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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 17 of 2006

BETWEEN:	**ALEXA THOMAS**	**PLAINTIFF**
AND:	**CAYMAN ISLANDS NATIONAL INSURANCE COMPANY**	**DEFENDANT**

Wrongful dismissal

Appearances:
Mr. Scott Wilson of Diamond Law Associates for the Plaintiff
Mr. Alan Turner and Ms. Rowena Lawrence of Turner & Roulstone for the Defendant

Before: Mr. Justice Sanderson

Hearing Date: 16th & 17th January 2007

REASONS FOR JUDGMENT

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1. The Plaintiff seeks damages for wrongful dismissal. Her employment contract provided that she would be employed until December 31, 2006. It also provided that the Defendant could terminate the contract by giving her not less than one month's notice. By letter dated November 11, 2005 the Defendant advised the Plaintiff that it was required by the Immigration Law to offer her position to a qualified Caymanian who had applied for it. The Defendant gave the Plaintiff notice advising that her employment would be terminated effective December 31, 2005.

2. The Defendant defends the claim primarily on the basis that:

   (i) It was required by law, to offer her position to a qualified Caymanian who had applied for it; and

   (ii) The terms of the contract permitted the Defendant to dismiss the Plaintiff upon giving one month's notice.

3. At issue are the determination of the rights and obligation of the parties to the agreement and the statutory rights and obligations of the Defendant employer when a qualified Caymanian applied for the position.

FACTS:

4. The Plaintiff is a Canadian citizen who had worked for the Canadian Government in the Health Care field. In early 2004 she took a leave of absence from her job in Canada and commenced employment for the Cayman Islands Government with the Health Insurance Commission. Later in 2004 she applied for a position which the Defendant had advertised. She accepted the Defendant's offer as Public Relations Manager/Insurance Administrator.

5. On July 6th 2004 the Plaintiff signed a letter contract of employment. It provided in part;

   1. **Employment and Job Title**

   "The Employer will employ you from the date of receipt of a valid work permit or 2nd day of August 2004 (whichever is later) until the 31st December 2006. Three months prior to the date of expiration, the Employee may be given notice by CINICO of CINICO's intent to renew this contract. If mutually acceptable terms are not reached between Employee and CINICO within one month of the expiration date, then this contract shall expire."

   3. **Notice and Termination**

   "This offer of employment is conditional upon and subject to the Employer obtaining a work permit for you. In the event that the

Immigration Board does not grant a work permit for you the Employer will not be able to employ you and this contract of employment will lapse.

Your employment is subject to a probationary period of six months, which can be extended upon the Employers discretion. Your employment may be terminated at any time during the probationary period by the Employer on giving 7 days notice.

The Employer may terminate this contract of employment by giving to you not less than the following notice:

Your length of service	**Period of notice**
Probation period	7 days
Less than four years service	1 month
Four years service but less than 10 years service	2 months
10 years service and over	3 months

In the event of your serious or persistent misconduct or breach of your employment contract, or for cause, the Employer may terminate your employment without notice or payment in lieu of notice.

In the event that the Immigration Board refuses to renew your work permit, the Employer may, forthwith upon notification of such refusal, terminate your employment without notice or payment in lieu of notice.

You are required to give the Employer two month's notice, submitted in writing to the Chief Executive Officer to terminate your contract of employment or on paying the Employer two months salary.

During the notice period, the Employer may require you:

1. not to come into your place of work and/or not to carry out your duties (you must be available if required); and/or

2. to use up all or part of any vacation entitlement by taking vacation; and/or

On termination of your employment, you must immediately hand over all Employer property, including keys, other property, in your possession or control."

6. On July 19th 2004 the Defendant applied to the Immigration Board for a two year work permit. That application described the Plaintiff as having had eight years of Health Insurance experience, prior experience at the Cayman Islands Government Health

Insurance Commission, a working knowledge of health claims, entitlement and auditing functions, and a holder of Business Administration Diploma. The application also indicated that the Defendant had received applications from five Caymanians but in the opinion of the Defendant, those applicants were not suitable candidates for the reasons stated in the application.

7. By letter dated November 2nd 2004 the Work Permit Board of the Department of Immigration advised that a working permit had been approved for the 12 month period effective October 24th 2004 and expiring on October 25th 2005. The letter from the Work Permit Board to the Defendant stated:

> "You are hereby informed that, under the existing laws and regulations, the granting of this permit in no way confers any entitlement to, or preference in connection with the granting of any application for the renewal hereof of any application for rights to be Caymanian. Application for the renewal of the work permit, application for the grant of permanent residency and application for the right to be Caymanian are all considered on their own merits and in light of the circumstance existing of the relevant time."

8. During the course of her employment the Plaintiff was an excellent employee in every respect. She was commended for her good work by the Defendant as well as its clients. The Defendant described her as a pleasure to work with.

9. The Plaintiff's work permit was due to expire on October 25, 2005. The Defendant advertised the Plaintiff's position in the Cayman Net News on August 17 and August 24, 2005. The ad provided the deadline for receipt of applications was August 26, 2005. The Plaintiff took holidays from August 26, 2005 to approximately September 9, 2005. No application had been received from a qualified Caymanian prior to August 26, 2005.

10. The Defendant again advertised the Plaintiff's position in the Cayman Compass on September 6 and September 9. The closing date for receipt of applications was stated to

be September 16, 2005. No applications from suitably qualified Caymanians were received by September 16, 2005.

11. After September 16, 2005 the Defendant received an application from Mark Frye, a person the Defendant believed was suitably qualified for the position.

12. He was interviewed by Ronald Sulisz on September 29, 2005 and was considered to be qualified. Mr. Frye had been married to a Caymanian for some time but had only applied for Caymanian status on September 22, 2005. He had not yet been granted status by September 29, 2005. Sometime after October 20, 2005 Mr. Sulisz said he became aware that Caymanian status had been granted to Mr. Frye.

13. On October 24 the Defendant, through its agent Baraud International, applied to the Immigration Board to renew the Plaintiff's work permit for one year. The application described the Plaintiff as a hard working, reliable and honest employee. It further stated that after the position was advertised, applications were received from 13 Caymanians and Caymanian status holders and that;

> "Mr. Mark Frye, a Caymanian, is being considered by the management to fill this position. However, as Mrs. Thomas work permit expires tomorrow (25th October 2005) and our client is not in a position to make a final decision on the within named new applicant, Mrs. Thomas application is being submitted for your favourable consideration. We were further advised that the final decision on this post will be communicated to the Board as soon as possible."

14. Mr. Sulisz said the application to renew the Plaintiff's work permit was made to ensure the Plaintiff was not working without a permit. Thereafter Mr. Sulisz considered the matter further and consulted others within the senior management of the Defendant. He concluded that he was legally required to offer the position to Mr. Frye.

15. On November 11, 2005 Mr. Sulisz wrote to the Plaintiff. He said:

> "I regret to advice (sic) you that we will be terminating your employment effective 31 December 2005. During the renewal of your work permit we interviewed many Caymanian applicants and there was one that had extensive qualifications for the position. The immigration law requires that we provide the position to any qualified Caymanian.
>
> In accordance with your employment agreement, your termination notice is only one month; however we felt that an extended notice period was warranted. We thank you for your employment and wish you the best in your future endeavours."

16. On February 27, 2006 the Work Permit Board considered the Defendant's application for the Plaintiff's work permit renewal. It granted a renewal until February 2, 2006 only, as it was known at that time that the Plaintiff's contract had been terminated because a suitable Caymanian had been found for the position. The Work Permit Board granted the permit until February 2, 2006 as it had been anticipated that the Plaintiff would assist in January 2006 with providing training to Mr. Frye in January 2006. In fact, the Plaintiff ceased employment effective December 31, 2005.

ORAL EVIDENCE:

17. Both parties gave evidence of the discussions that occurred at the time the contract was negotiated and agreed to. The rule of contractual interpretation is that unless there is an ambiguity in the contract, oral evidence is not admissible to explain the intention of the parties or the meaning of the contract. The intention, so far as possible is to be derived from the words of the document.

18. First, there is no ambiguity on the face of the contract such as to warrant the use of the oral discussions to assist the Court with the interpretation of the contract. I will return to this later in these reasons.

19. Second, even if there is an ambiguity on the face of the contract there was no significant contradiction between the evidence of the Plaintiff and the Defendant of what was orally

discussed between the parties. There are no significant issues of fact that are in dispute. The determination of this case is a matter of law and contractual interpretation.

20. Third the oral evidence of what was discussed is not necessarily inconsistent with the written contract. During the interview and subsequent discussions with Mr. Ronald Sulisz, the Plaintiff was told she would be part of the Defendant's long term plans, that she was a key employee and that she would continue to be employed by the Defendant and continue a blossoming career. Mr. Sulisz testified that he had told her he was keen to keep her employed even after December 31, 2006.

21. When the contract was signed the Plaintiff testified she knew or understood that;

> (i) if her work permit was not granted or if granted but subsequently not renewed, then her employment could be terminated;
>
> (ii) her continued employment was subject to the work permit being renewed and there was a risk of her permit not being renewed, if a suitably qualified Caymanian applied for her position.

22. She testified she understood the Defendant would, at the expiry of the first work permit, advertise the position and consider qualified applicants. If there were qualified Caymanian applicants for her position she understood she could receive notice of termination. She believed the chance of that was unlikely. She also testified that having entered into a two year contract she understood that the Defendant had a duty and would in fact support any applications for a renewal of her work permit, even if there was a qualified Caymanian for the position at the time of renewal and that the ultimate decision regarding the work permit would be left to the Work Permit Board.

ISSUES:

23. (1) Was the Defendant required by statute to offer the Plaintiff's position to Mr. Frye?

(2) Was the performance of the contract frustrated because the Defendant could not obtain a work permit for the Plaintiff?

(3) If the Defendant was not required to offer the Plaintiff's position to Mr. Frye, was it nevertheless entitled to dismiss the Plaintiff on giving one month's notice?

(4) Was there an implied term in the contract that the one month notice clause applied only to a dismissal for cause?

(5) Is the Defendant entitled to rely on the one month notice provision in clause 3 if its decision to terminate was based on the erroneous conclusion that it was legally required to hire Mr. Frye?

(6) Is the Plaintiff entitled to compensation for unfair dismissal and retirement allowance pursuant to the *Labour Law* (2001 Revision)

ISSUE I:

WAS THE DEFENDANT REQUIRED BY STATUTE TO OFFER THE PLAINTIFF'S POSITION TO MR. FRYE?

24. The Defendant argues that the Immigration Law and Regulations required it to offer the Plaintiff's position to the qualified Caymanian that applied.

25. The relevant provisions of the *Immigration Law 2003*, which were in force at the times material to this case provided:

> "39. No person shall carry on gainful occupation in the Islands unless-
>
> (a) he is Caymanian;
> (b) he has acquired permanent residence with a right to work under this or any earlier Law;
> (c) he has acquired the right to reside and to work in the Islands as a result of the issue of a Residency and Employment Rights Certificate or a Residential Certificate for Entrepreneurs and Investors; or
> (d) he is authorised to do so by a work permit granted under this or any earlier Law.
>
> 40.(1) A person or his prospective employer may apply for a work permit-

(a) to the Work Permit Board or the Business Staffing Plan Board, as the case may be, where he seeks to engage a gainful occupation in Grand Cayman; or
(b) to the Cayman Brac and Little Cayman Immigration Board, where he seeks to engage in gainful occupation in Cayman Brac or Little Cayman.

(2) An application for a work permit shall be in the prescribed form, accompanied by the prescribed fee and such documentary evidence as may be prescribed.

42. (1) The Work Permit Board or the Business Staffing Plan Board, as the case may be, in considering an application under section 40, shall, subject to any general directions which the Governor may, from time to time give in respect of the consideration of such application, take particularly into account the matters listed in subsections (2) to (4).

(2) In relation to the prospective employer, that-

(a) he has demonstrated his genuine need to engage the services of the prospective worker;
(b) he has, unless he has been exempted by the Governor or by the Board, sought, by advertising in at least two issues for two consecutive weeks in a local newspaper, to ascertain the availability of-
    (i) a Caymanian;
    (ii) a member of his staff; or
    (iii) a person legally and ordinarily residing in the Islands, who is qualified and willing to fill the position; and
(c) in the case of an application in respect of a professional, managerial or skilled occupation, he has established an adequate training or scholarship programme that would ensure that a Caymanian is being trained to fill the position.

(3) In relation to the worker-

(a) his character, reputation and health, and where relevant, the character reputation and health of his dependants;
(b) his professional and technical qualifications and his experience and competence to undertake the position applied for;
(c) the economic and social benefit which he may bring to the Islands;
(d) the sufficiency of the resources or the proposed salary of the worker and his ability to adequately maintain his dependants;

(e) his facility in the use of the English language;
(f) the location, type and suitability of the residential accommodation available for the worker and his dependants, if any, throughout the term of the work permit; and
(g) the hardship that may be caused to the spouse and dependants of the worker;

(4) Generally-

(a) the protection of local interests and in particular of Caymanians;
(b) the availability of the services of a suitable person already legally and ordinarily resident in the Islands; and
(c) the requirements of the community as a whole, and such other matters that may arise from the application.

(5) For the purpose of being satisfied of the matters specified in subsection (1)(b) the Board shall consider all responses to the advertisement from Caymanians and persons legally and ordinarily resident in the Islands unless the applicant has been exempted in respect of that application, form the requirement to advertise."

26. If a non-Caymanian wanted to work in these islands, he or she is required to apply for and obtain a work permit pursuant to Sections 39 and 40 unless exempted by Section 39 (b) or (c). Once he or she applies, the Work Permit Board is required to take into account the matters listed in Sections 42(2) to (4).

27. The Work Permit Board is only required to consider those matters and then base its decision acting on the ordinary principals of administrative law.

28. The Work Permit Board was required to consider, pursuant to Section 42 2(a) and 2(b) that the employer has properly advertised to ascertain the availability of:

(i) a Caymanian;

(ii) a member of his staff; or

(iii) a person legally and ordinarily residing in the Islands, who is qualified and willing to fill the position.

29. That section did not specify that a Caymanian must be hired. It specified that the availability of a Caymanian was one of the factors the Board must consider. It also specified that the Board must consider if there was available another member of the employer's staff or another qualified person legally entitled to reside in these Islands. A person who falls under subsection 42 (2) (b) (ii) and (iii) might not be a Caymanian but, for example, a non-Caymanian member of staff working under an existing work permit, or a person legally and ordinarily residing in the Islands.

30. The intention of the section seems to be set out in Section 42 (4) which requires the Work Permit Board to consider several factors. They are:

(i) the protection of local interests and, in particular, of Caymanians;

(ii) the availability of qualified persons in the Cayman Islands; and

(iii) the requirements of the community as a whole.

31. It is clear that the legislation intended that the interests of individual Caymanians be considered of particular importance. But that was not the only consideration and the legislation specifically required the Work Permit Board to consider the interests of those who were also qualified and legally in the Islands, whether or not they are Caymanian, and as well, the interests of the community as a whole. Those interests could also include the success and welfare of the Caymanian company seeking to employ a non-Caymanian individual.

32. Section 42 (5) further demonstrates that the Work Permit Board must consider the applications from both Caymanians and qualified non-Caymanians with legal residence.

33. The Immigration Regulations, 2001, which were in effect at the material times also dealt with this issue. They provided in part:

"4. (1) Subject to subregulation (2), an employer or prospective employer shall use his best endeavours to ascertain whether or not there

is a Caymanian, or a person legally and ordinarily resident in the Islands, ready, willing and able to undertake the job in question before making an application for the grant or renewal of a work permit in respect of a worker or prospective worker whose gainful occupation in the job is sought to be authorised by the work permit.

(2) The Board may, by prior arrangement, waive the requirement of subregulation (1) if, having regard to the nature of a particular application, it considers such waiver to be in the interests of the community.

(3) For the purpose of fulfilling the requirement of subregulation (1) the employer or prospective employer shall cause advertisements to be published inviting Caymanians or persons legally and ordinarily resident in the Islands to apply for the position.

(4) Subject to subregulation (2), an application for the grant or renewal of a work permit shall be accompanied by -

(a) a copy of each advertisement published in accordance with subregulation (3) with details of the newspaper in which it was published and the date on which it was published;
(b) a full and accurate description of the job to be filled;
(c) a full and accurate description of the qualifications the employer or prospective employer considers necessary for carrying out the job and the reasons for requiring those qualifications;
(d) details of any responses received in respect of the advertisements including the qualifications of those who responded; and
(e) details of the employer's or prospective employer's reasons for not employing any Caymanian, or person legally resident in the Islands, who responded to the advertisement.

(5) Where a Caymanian has applied for a position, the Work Permit Board shall, for the purpose of being satisfied of the matters specified in subregulation (1), take into account the following information supplied by the applicant for the grant of the work permit:

(a) the names of all applicants for the post;
(b) the qualifications, working experience and background of all the applicants;
(c) the reasons given for the choice of the successful applicant and for the refusal to employ the other applicants;
(d) a copy of the refusal letter and interview report for each unsuccessful Caymanian applicant; and

(e) a copy of the job description and resumes of the non-Caymanian applicants.

34. Section 4(1) provides that an employer must use his best endeavours to ascertain whether or not there is a Caymanian or a person legally and ordinarily resident in the Islands suitable for the position before a work permit can be granted or renewed. Again, a person may be legally resident here without being Caymanian.

35. Further, 4(2) provides that the Board may even waive the requirement of subsection (1) if it is in the interests of the community to do so.

36. Section 4(3) continues to illustrate that the Board shall consider not only the availability of Caymanians but also non-Caymanian legal residents. This view is also supported by Section 4(4)(e) requiring an employer to advise the Work Permit Board of its reasons for not employing any Caymanian or person legally resident in these Islands.

37. Section 4(5) appears to draw a distinction between Caymanians and other applicants. It provides that where a Caymanian has applied for a position the Work Permit Board must take into account any reasons for not employing a Caymanian.

38. None of the legislative provisions require the Work Permit Board to refuse to issue a work permit where there is a qualified Caymanian who has applied for the position. If a qualified Caymanian has applied, the Work Permit Board is entitled, after considering all of the factors required by the legislation, to refuse a work permit to a non-Caymanian in favour of a Caymanian but it is not required to do so. Indeed, the legislation mandates that the Work Permit Board consider factors other than an application by qualified Caymanians.

39. Further, there is no requirement that an employer must employ a Caymanian over a non-Caymanian. It must use its best endeavours to ascertain the availability of a Caymanian or a person legally and ordinarily resident here. The decision whether to grant a work

permit to a non-Caymanian when a Caymanian has applied for the position is to be made by the Work Permit Board.

40. What is clear from the legislation is that the interest of individual Caymanians in obtaining employment is a significant factor that the Work Permit Board must take into consideration when granting or renewing work permits. Further, pursuant to regulations 4(5), an employer was required to provide written reasons why a Caymanian should not be hired. However, the Work Permit Board is also required to consider the availability of non-Caymanians who are legally resident here as well requirements of the community as a whole. So long as the Board considers all of the factors it is required to, and acts in accordance with the established principles of administrative law, it is open to the Board to refuse a work permit to a non-Caymanian, in favour of a Caymanian applicant.

41. Mr. Manderson gave evidence at trial. He accepted that it is possible for an employee to apply to the Work Permit board for a work permit, even if a qualified Caymanian had applied for the position. Indeed, that is consistent with the legislation. He also testified that it would be very unlikely for the Work Permit Board to grant a permit to a non-Caymanian when a qualified Caymanian had applied. He said he was unaware of that ever occurring before. Mr. Manderson testified that it was the policy of the Immigration Board to give preference to qualified Caymanians over non-Caymanians. Assuming that the Work Permit Board has considered all of the required factors, that is within its remit. That is, the Work Permit Board was entitled to refuse work permits to non-Caymanians in favour of Caymanians who have applied so long as its consideration and decision is based on the correct legal factors.

42. In this case the Defendant could have applied to the Work Permit Board for an extension of the Plaintiff's permit notwithstanding the application of Mr. Frye. Mr. Manderson accepted that. The Defendant could have said that it wanted the permit renewed because the Plaintiff was an excellent employee in every respect, that the Defendant wanted

continuity of service to its clients, and that it had agreed to employ her for a two year period.

43. Mr. Manderson testified that it is important for the Cayman Islands to be able to attract qualified foreigners to augment the work force that is required here because of its successful tourism and financial industries. There are not enough Caymanians to perform all the jobs that the Cayman Islands economy has created. Mr. Manderson agreed that one of the important features necessary in attracting qualified professionals from other countries and retaining them, is the offer of a longer term contract. Foreign professionals may be less likely to come and stay unless employers agreed to make longer terms available. Many contracts of employment offered here are one or two year terms, which provide some measure of security to both employer and employee.

44. Since it is required to consider the requirements of the community as a whole, the Work Permit Board can consider the desirability of longer term contracts in granting or renewing work permit applications. It does not mean that qualified Caymanians will loose out to non-Caymanian employees simply because the non-Caymanian had entered with a two year employment contract. It only means that the Work Permit Board may consider the length of the contract as one of the factors relating to the requirements of the community, including both Caymanian individuals and corporations.

45. In the present case there is no legal requirement that the Work Permit Board refuse the Plaintiff's work permit renewal. They could have rejected it and done so primarily on the basis that a qualified Caymanian had applied, so long as all required factors were considered.

46. Similarly there was no legal requirement that the Defendant dismiss the Plaintiff because a qualified Caymanian had applied. The Defendant had both contractual and common law rights and obligations in respect of the Plaintiff. The Defendant was not, however,

required pursuant to the legislation to dismiss the Plaintiff and offer her position to Mr. Frye.

47. I note parenthetically that the legislature and regulations have been amended subsequent to this dismissal. One of the amendments in Section 42 of the Immigration Law requires the Work Permit Board to consider the factors in the order in which they are listed, with being Caymanian listed first in priority. Secondly, the amended section 42 no longer requires the employer to determine if an existing member of staff is available. The decision in this case is, however, based on the legislation as it existed at the time of dismissal.

ISSUE II:

WAS THE PERFORMANCE OF THE CONTRACT FRUSTRATED BECAUSE THE DEFENDANT COULD NOT OBTAIN A WORK PERMIT FOR THE PLAINTIFF?

48. The Defendant submits that the performance of the contract was frustrated because it was incapable of being performed once a qualified Caymanian applied.

49. The contract might have become incapable of being performed had the Work Permit Board refused to renew the Plaintiff's permit. If it had refused then the Defendant would have had the right, under clause 3 of the contract, to terminate the Plaintiff, immediately without any notice.

50. The Work Permit Board had not refused the work permit renewal by the date of dismissal. At that point, even though it may have been likely that the Work Permit Board would refuse the renewal, the contract was not frustrated. If and when it was refused the Defendant would have the right to terminate without notice or salary in lieu. The defence of frustration, therefore, fails.

ISSUE III:

IF THE DEFENDANT WAS NOT REQUIRED TO OFFER THE PLAINTIFF'S POSITION TO MR. FRYE, WAS IT NEVERTHELESS ENTITLED TO DISMISS THE PLAINTIFF ON GIVING ONE MONTH'S NOTICE?

51. Since the Defendant was not legally required to offer the Plaintiff's position to Mr. Frye was it nevertheless entitled to dismiss the Plaintiff and replace her with Mr. Frye. There is little doubt the Defendant in this case, was entitled to dismiss the Plaintiff. At common law the employer, absent a contrary provision in the employment contract or collective agreement, is generally entitled to terminate an employee. The question is, whether the Defendant's dismissal was wrongful and whether it is liable to the Plaintiff for damages.

52. The Plaintiff argues that the contract is for a fixed term of two years and if dismissed wrongfully, the Plaintiff is entitled to damages equal to the income and benefits she would have earned up to the end of the two year term, minus income and benefits she actually earned during that period.

53. Mr. Wilson submitted that there was a conflict between clause 1, which provided for a two year term and clause 3, which provided that the contract could be determined on one month's notice. He submitted that it was clear on the evidence, that the overriding intention of the parties was to enter into a two year contract and likely an even longer term employer-employee relationship. He said that since the overriding intention was to enter into at least a two year term, the Court in order to give efficacy to the contract, should delete or ignore clause 3. Alternatively he submits that the Court can conclude there was an implied term in the contract that the one month notice provision of clause 3 could only be invoked if there was dismissal for cause.

54. Mr. Wilson referred me to a passage from Chitty on Contracts, 28th edition, p. 617 para 12-076:

> "**Inconsistent or repugnant clauses.** Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected.[12] The old rule was, in such a case, that the earlier clause was to be received and the later rejected[13], but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given in both clauses.[14] A term may also be rejected if it is repugnant to the intention of the parties as it appears from the document.[15] However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement.[16] Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void.[17] But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the intention of the parties as disclosed by the instrument as a whole.[18]"

55. The Plaintiff relies upon the decisions of the English Court of appeal in *Dixon and Another v. British Broadcasting Corporation* [1979] QB 546 and The Employment Appeal Tribunal in *Allen v. National Australian Group Europe Limited* [2004] 1RLR 847, EAT in support of the proposition that an employment contract can still be a fixed term contract even if it contains a clause for termination prior to the expiration of the term.

56. These cases deal with the interpretation of the labour legislation in the United Kingdom. In both cases it was held that an employment contract would fall within the statutory definition of a fixed term contract even though they contained a clause providing for dismissal on notice, prior to the expiry of the term.

57. Denning M.R. said in Dixon (supra):

> "We should have held that a "fixed term" is sufficiently satisfied if the contract is for a specific stated period, even though it is determinable by notice within that period. ... Looking at the general purpose and intention of the statute, each contract must have been employment for a "fixed term" within the meaning of the statute."

58. The English Court of Appeal in *British Broadcasting Corporation v. Linda Kelly Phillips* [1998] E.W.J. No. 475 EATRF 97/1051 CMS3 reviewed several authorities dealing with the interpretation of a fixed term contract under the *Employment Rights Act* 1996. Gibson L.J. held at paragraph 33:

> "…. "the fact that a term is determinable by notice does not preclude the term being a fixed term."

59. These cases all deal with the right of an employee to claim unfair dismissal pursuant to certain statutory provisions if a fixed term contract is not renewed. They dealt with situations where fixed term contracts had been extended. The legislation was intended to protect employees from an unfair dismissal as defined by the legislation and regulations. They are all decisions of Labour Tribunals which had been appealed to the court. The decisions were based on the court's interpretation of the legislative intention in place, dealing with unfair dismissal.

60. The Plaintiff in this case did not bring a claim to the Labour Board under Part VI or Part VII of the *Labour Law* (2001 Revision) which deal with unfair dismissal.

61. Further, the three decisions referred to above do not go so far as to say that an employment contract for a definite or fixed term cannot also have a clause providing for early termination upon agreed notice. In *Allen v National Australia* (supra) Judge McMullen stated:

> "In our judgement, the provision for such earlier notice will not destroy the original intention in such a contract, if it be in the form of one in front of us, that the parties would see through the fixed-term unless and until some event which was not in the normal course occurred, causing them to separate."

62. In the present case something occurred which was not in the normal course or, put another way, something "unexpected by the parties" occurred. Namely a qualified Caymanian was available for this position at the time the work permit was due to be

renewed. Even though the parties had both believed that the contract would last 2 years or perhaps longer, when a qualified Caymanian became available the Plaintiff was entitled to rely on the one month notice provision contained in clause 3.

63. In claims brought in the Courts for wrongful dismissal it is recognized that even a contract with a defined term can be determined by notice if the parties have expressly agreed. Smellie C.J. in *Wayne Long v OBM Limited* 2000 CILR note 12, considered the question of a fixed term contract with a provision for termination by notice. The contract had an initial term of one year. The standard terms and conditions provided in part:

> "Employees who have been with the company in excess of 3 years are required to give 3 months' notice of leaving in writing of their intention to terminate their employment. All other employees will be required to give 1 month's notice. Should it become necessary for this firm to terminate your employment, the same notice will be given or payment in lieu made. The exception to this is instant dismissal for any misconduct or violation relating to any OBM policies."

64. The employee in *Wayne Long* (supra) argued that the notice provision conflicted with and was inconsistent with the 1 year term provision and it should prevail.

65. The Chief Justice said in part:

> "The short answer to his argument is that that would be an impermissible construction of the agreement between the parties; as the court is not allowed to recast the bargain struck at arm's length between the parties. ... There is nothing conflicting or inconsistent between the covering letter of 26th March 1999 and the standard provisions.
>
> They compliment each other; there is no ambiguity. As a matter of construction, I find that this contract of employment was not one for a fixed term but one for 1 year renewable determinable for cause or by notice or payment in lieu of notice."

66. Other courts have also recognized that an employer and employee can agree to a contract for a specific term with the right to terminate the contract earlier on notice.

67. The English Court of Appeal in *Manchester City Football Club plc v Joe Royle* [2005] EWC 14 CIV 195 concluded that an employee that had a 4 year term contract could be dismissed and paid the 6 months notice which was provided for in a separate termination clause.

68. The Supreme Court of Canada in *June Hamilton v. Open Window Bakery* [2004] 1 S.C.R. 303 concluded that where the parties had entered into a 36 month employment contract, the employer was nevertheless entitled to dismiss the employee by giving him 3 months' notice as provided in the contract. The contract however, provided that the 3 month notice could not be given until after 18 months and therefore the employer would be liable to pay the employee a minimum of 21 months' salary in lieu of notice.

69. In all three wrongful dismissal cases referred to, the courts recognized that an employment contract with a fixed or definite term could also provide for termination of the contract by mutually agreed notice. The clauses are not necessarily inconsistent. It reflects the parties' intention to have a contract for a definite as opposed to indefinite period. It contemplates that the contract will come to an end at that point at which time it may or may not be renewed. It does not necessarily mean that the parties cannot agree to determine the contract at an earlier date upon notice. I was not referred to any authority where the court held that a contract of employment for a fixed or definite term could not have a separate clause giving the parties the right to terminate upon giving the agreed notice or salary in lieu of notice.

70. Finally the *Labour Law* (2001 Revision) of these Islands stated at section 9:

> "9. Where the contract of employment is for a fixed term it shall terminate automatically and without further notice on the expiration of that term unless previously extended by prior agreement, or unless the terms of contract specify otherwise." (emphasis added)

without any reason and that if she had been told at the outset, that she could be dismissed on one month's notice, she would not have signed the contract.

76. This evidence does not show that the parties mutually intended that the one month notice clause could only be used if there was dismissal for cause. The Defendant said or did nothing which could have led the Plaintiff to come to that conclusion. No objective bystander hearing what was discussed could reasonably conclude that such a term would be implied into the contract.

77. The contract says the opposite. Namely that no notice is required if there is a dismissal for cause and that one month's notice is otherwise agreeable for employees up to 4 years.

ISSUE V:

IS THE DEFENDANT ENTITLED TO RELY ON THE ONE MONTH NOTICE PROVISION IN CLAUSE 3 IF ITS DECISION TO TERMINATE WAS BASED ON THE ERRONEOUS CONCLUSION THAT IT WAS LEGALLY REQUIRED TO HIRE MR. FRYE?

78. There is no doubt that the Defendant concluded it was legally required to offer the Plaintiff's position to Mr. Frye. It also concluded that the Work Permit Board was required to refuse the Plaintiff's application for renewal, because Mr. Frye had applied. It was for these reasons it decided to terminate the Plaintiff's employment.

79. As previously stated, the Defendant was not required by virtue of the provisions of the *Immigration Law* to offer the Plaintiff's position to Mr. Frye. Nor was the Work Permit Board required to refuse it.

80. The Defendant was therefore mistaken in its belief that it had to dismiss the Plaintiff for the reasons stated.

81. The Plaintiff argues that the Defendant has "pinned its colours to the mast" and cannot now rely on the one month notice provision allowing it to terminate the contract. She

It seems, that the relevant labour legislation here accepts the concept that a fixed or defined term contract can nevertheless provide for termination prior to the end of the term, if so agreed by the parties.

71. As Smellie C.J. did in Wayne Long. (supra), I conclude that clause one and clause three of this contract are not irreconcilable and that the employer had the right under clause 3 to terminate the contract upon giving one month's notice.

ISSUE IV:

WAS THERE AN IMPLIED TERM IN THE CONTRACT THAT THE ONE MONTH NOTICE CLAUSE APPLIED ONLY TO A DISMISSAL FOR CAUSE?

72. The Plaintiff's submission that it was an implied term of the contract, that the one month notice clause could only be relied upon when there was dismissal for just cause, cannot succeed.

73. The contract specifically provides in clause 3:

> "In the event of your serious or persistent misconduct or breach of your employment contract, or for cause, the Employer may terminate your employment without notice or payment in lieu of notice."

74. The parties have expressly agreed that the employer may dismiss the employee for cause without giving any notice or salary in lieu thereof. It would not make any sense to imply a term in the contract that the one month notice provision would be invoked only for cause when the parties have expressly agreed that the employee could be dismissed for cause without any notice.

75. Further, even if there was any contractual ambiguity on this issue, there was no evidence of anything that was said or done by the parties to lead me to the conclusion that they intended the one month notice clause, to be applied only if there was dismissal for cause. The Plaintiff testified that she did not contemplate that the Defendant could terminate

says that the Defendant, having based its decision to terminate her on a misunderstanding of the law, cannot now ignore that reason and instead rely on the one month notice provision contained in clause 3.

82. There are two problems with this argument. First, even though the Defendant said the reason it was terminating the Plaintiff's employment was because it believed that it was legally required to offer the position to a qualified Caymanian, it nevertheless relied on the general contractual right to terminate on one month's notice. The Defendant did not dismiss the Plaintiff in specific reliance on the provision in clause 3 which allowed it to dismiss the Plaintiff without notice if her work permit renewal was refused.

83. The letter of dismissal stated the reason for deciding to terminate, but then stated:

> "In accordance with your employment agreement, your termination notice is only one month, however we felt that an extended period was warranted."

84. The Defendant did not purport to rely on the portions of clause 3 dealing with the work permit which provided in part:

> "This offer of employment is conditional upon and subject to the Employer obtaining a work permit for you. In the event that the Immigration Board does not grant a work permit for you the Employer will not be able to employ you and this contract of employment will lapse ...
>
> In the event that the Immigration Board refuses to renew your work permit, the Employer may, forthwith upon notification of such refusal, terminate your contract of employment without notice or payment in lieu of notice."

85. The Work Permit Board, at the time of dismissal, had not refused the renewal application. Therefore the Defendant would not have been able to rely on the above clause to justify the dismissal. The Defendant, however, expressly did not rely on that clause but rather

chose to rely on the general one month notice. In fact, it actually gave the Plaintiff one month and 18 days notice, which was more than required.

86. I conclude that the Defendant has not "pinned its colours to the mast" or put another way, it did not rely on the work permit renewal clause as the basis for dismissal. Rather, it based the dismissal on the general one month notice provision.

87. If I am incorrect in that conclusion I believe the Plaintiff faces a second difficulty. Mr. Wilson conceded the general principle that when an employer dismisses an employee for cause for a particular reason (for example incompetence) and it is later discovered after the dismissal that that incompetence cannot be proved but there were other reasons to dismiss for cause (for example, dishonesty), the employer is entitled to rely on the newly discovered grounds to justify the dismissal. That is, an employer may defend a claim for wrongful dismissal on the basis of cause, even if that particular basis was not stated or known at the time of dismissal.

88. Similarly even though the reason for dismissal may have been mistaken, the Defendant is nevertheless entitled under the terms of the contract to terminate upon giving one month's notice. That is, what the parties agreed to.

89. In *Cerberus Software Ltd. v. Rowley* [2001] E.W.J. No. 200 [2001] EWCA CIV 78 the English Court of Appeal considered this issue. The contract of employment gave either party the right to terminate the contract on not less than six months' notice of termination. It provided in part; "it is agreed that the employer may make a payment in lieu of notice". The employer summarily dismissed the employee on grounds of misconduct later held to be unfounded.

90. The Court of Appeal accepted that even though the dismissal was unlawful the employer was still entitled to rely on the six month notice clause. Lord Justice Ward said at paragraph 11:

> "I have considerable sympathy for the respondent. On the findings of the Tribunal, the company engaged in a deplorable charade in a shameful effort to avoid the truth and reality of their actions which were wrongfully to dismiss their employee. I wish to help him if I can."

91. In that case the employee was dismissed on July 4, 1996 and obtained employment on August 1, 1996. He claimed damages for wrongful dismissal of the six months' salary he should have received in lieu of notice. He argued that he was not required to deduct from that, the amount of income he actually earned during the notice period.

92. The Court of Appeal concluded that even though the employer had wrongfully dismissed for cause, it was still entitled to rely on the six months' notice clause. It awarded damages equivalent to six months' salary but deducted the income actually earned by the Defendant during that 6 month period.

93. Lord Justice Ward stated at paragraph 15:

> "... The claim was for damages for breach of contract, i.e. damages for wrongful dismissal. The measure of damages is the amount that the employee would have earned had the employment continued according to contract but then the ordinary rule that applies that the employee must minimize his loss by using due diligence to find other employment."

94. The Supreme Court of Canada in *June Hamilton v. Open Window Bakery Limited* (supra) reached a similar conclusion. In that case the employer dismissed the employee alleging cause. The employer did not prove cause and the trial judge held that the employer had wrongfully repudiated the contract and awarded damages. The contract was for a period of 36 months but also stated the employer could terminate the contract:

> "with notice to the Agent effective after the commencement of the 19th month of the term herein, on three months notice".

95. In determining the quantum of damages, Arbour J, speaking for the Court followed the general principles explained by Scrutton L.J. in *Withers v. General Theatre Corp.*, [1933] 2 KB 536 (C.A.) at pp 548-49 where he said:

> "Now where a Defendant has alternative ways of performing a contract at his option, there is a well settled rule as to how the damages for breach of such contract are to be assessed ... The damages are assessed ... on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff."

96. Arbour J., concluded that the proper award of damages was a determination of the minimum performance the Plaintiff was entitled to under the contract. In that case it was provided by the agreement that the Plaintiff was only entitled to 3 months' notice given after the expiration of the 18th month.

97. In the present case, even if the Defendant wrongfully dismissed the Plaintiff on the basis that it was legally required to offer her position to Mr. Frye, the maximum damage she would be entitled to under clause 3 of the contract is one month's notice or salary in lieu of notice. Since the Plaintiff was given more than one month's notice she has not suffered any damage.

ISSUE VI:

IS THE PLAINTIFF ENTITLED TO COMPENSATION FOR UNFAIR DISMISSAL AND RETIREMENT ALLOWANCE PURSUANT TO THE *LABOUR LAW* (2001 REVISION)?

98. In her amended Writ of Summons, the Plaintiff alleges she has also been unfairly dismissed. In her witness statement she advances a claim for unfair dismissal and severance pay in the amount of $1,250 or one week's salary, in respect of each claim, for a total of $2,500 C.I.

99. Sections 47(1) and 48(1) of the *Labour Law* (2001 Revision) provide:

"47. (1) An employee other than a person specified in paragraph (b) of section 25(2) of the National Pensions Law (2000 Revision) and who-

(a) has worked with his employer for a period of one year or more;
(b) voluntarily retires or resigns from such employment; and
(c) is not entitled to a pension under the National Pensions Law (2000 Revision),

shall be paid by the employer in addition to any other allowance or monies to which he is otherwise entitled a retirement/resignation allowance equal to one week's wages, at the employee's latest basic wage, for each completed twelve month period of his employment with his employer subject to a maximum of twelve weeks' pay.

48. (1) Should any question arise as to the date of hiring or as to whether or in what amount the retirement/resignation allowance is due to an employee, then the employee, the employer, or their respective representatives, may seek a resolution of the question by filing a complaint as to retirement/resignation allowance in writing with the Director."

The Plaintiff claims one week's salary or $1,250 pursuant to Section 47(1).

100. Part VII of the *Labour Law* (2001 Revision) deals with unfair dismissal. Sections 54(1), 55(1) and (3) provides:

"54. (1) Should any questions arise as to whether an employee has been unfairly dismissed, the employee may seek a resolution of the question by filing a complaint of unfair dismissal with the Director.

55. (1) Where, upon a complaint of unfair dismissal, a Labour Tribunal has determined that the dismissal was unfair it may order the payment by the employer to the person dismissed of a sum of money by way of compensation for unfair dismissal.

(3) The amount of an award of compensation under subsection (1) shall not exceed one week's wages for each completed year of service and shall not exceed twelve weeks' wages in aggregate."

The Plaintiff again claims one week's wages or $1,250 pursuant to these sections.

101. The Defendant submits that any claim for unfair dismissal or retirement allowance must be brought before the Labour Tribunal. Both Sections 48(1) and 54(1) state that any employee may file a complaint with the director regarding failure to pay either the retirement allowance or an award for unfair dismissal. The Defendant argues that these are statutory remedies that can only be made to the Labour Tribunal as specified in the legislation and that the Court does not have jurisdiction to make these types of awards. Schofield J. came to that conclusion in *Roulstone and Coffee v. Cayman Airways Limited* [1992-98] CILR 259. At pages 260-261 he said:

> "... This court does not recognize unfair dismissal as a cause of action. An employee who is wrongfully dismissed has his remedies before this court at common law. But the common law does not provide a remedy for unfair dismissal. Unfair dismissal is recognized by the Labour Law and the remedy open to an employee under that Law is a complaint to the Director of Labour, and thereafter, by a party aggrieved by the Director's decision to an Appeals Tribunal. A final appeal lies to this court from the Tribunal's decision (see ss. 48, 69 and 71 of the Law). No cause of action in the first instance lies with the court. Accordingly, I strike out the prayer in the statement of claim for damages for unfair dismissal."

102. Both Sections 48(1) an 54(1) say that an employee may file a complaint with the Director. The Plaintiff submits that language is permissive and does not require her to make a claim to the Labour Tribunal.

103. I disagree. I accept that Schofield's J. analysis was correct. These claims are not ones that are part of a common law claim for damages for wrongful dismissal. They are created by statute which expressly provides that if an employee decides to make such a claim, they have the right to apply to the Labour Tribunal. Accordingly, this claim must fail.

CONCLUSION:

104. For the above reasons the Plaintiff's claims for damages for wrongful dismissal, unfair dismissal and retirement allowance are dismissed.

COSTS:

105. The determination of costs is slightly more difficult in this case. Ordinarily the successful party would be awarded costs. There was divided success on the issues in this case.

106. The Plaintiff was successful on the main issue, namely, was the Defendant required by law to hire Mr. Frye because he had Caymanian status. The Defendant was successful on the remaining issues.

107. Both parties were candid, forthright and fair in their evidence. Both parties felt they had a legitimate case on a potentially important point of law.

108. In these circumstances I think it appropriate to award the Defendant one half of its costs. Such costs to be taxed if not agreed.

D Sanderson

Dale Sanderson
Judge of the Grand Court

GRAND COURT - CAYMAN