

Freetown
June 17,
1960

[SUPREME COURT]

Marke J.

MUKTARR A. KALLAY Plaintiff

v.

UNITED AFRICA COMPANY LTD. Defendant

[C. C. 403/57]

Contract of employment—Yearly hiring—Notice of termination—Damages for dismissal—Right to receive commission.

Plaintiff was a storekeeper for defendant at Makeni under a written agreement of service which provided, inter alia, that plaintiff should receive a salary of £6 per month and a commission on cash sales and produce bought (if any) and that the contract was terminable at any time by one month's notice on either side. When, in December 1955, there was a shortage of defendant's stock in the hands of plaintiff, he was instructed to hand over the shop and proceed to Freetown. In Freetown, he continued to receive his salary of £6 until October 1956, when, without prior notice, his services were terminated. He then brought this action for damages for wrongful dismissal.

Held, for the plaintiff, (1) since the contract was a yearly hiring, plaintiff was entitled to six months' notice of termination.

(2) Plaintiff was entitled to £786 damages in lieu of notice, based on £6 salary and £125 commission per month.

(3) Plaintiff was entitled to £1,250 damages to compensate him for loss of commission during the ten months prior to his dismissal.

(4) By way of general damages, plaintiff was entitled to three months' remuneration, which, on the basis of £6 salary and £125 commission per month, amounted to £393.

Case referred to: *Orman v. Saville Sportswear Ltd.* [1960] 3 All E.R. 105.

Mrs. Elizabeth A. Wilson for the plaintiff.

E. Livesey Luke for the defendant.

Note: This decision was reversed by the Sierra Leone and Gambia Court of Appeal on November 2, 1960 (Civil Appeal 37/60).

MARKE J. In my interlocutory judgment dated March 18, 1960, I held that the plaintiff was engaged by the defendant company on a yearly hiring and that the contract was only determinable at the end of a complete year of service.

As there was no evidence of the specific date on which the plaintiff was transferred to Makeni in the company's service, I directed that the Master and Registrar should hold an inquiry to find what that date was. The inquiry has been held and from the transfer certificate the date was March 1, 1954. It follows from that that the plaintiff's year of service so far as his service at Makeni was concerned was from March 1 to February 28.

The defendant company has admitted that it gave the plaintiff no notice before terminating the plaintiff's service in November 1956. The proper notice to which the plaintiff is entitled is six months' notice terminating on February 28, 1957.

On the question of damages, the plaintiff has given evidence that while at Makeni his earnings by way of commission was on an average of £115 in addition to his salary of £6 a month. Mr. Solomon, district manager of the company, said that the plaintiff used to earn £125 a month commission at Makeni. I accept Mr. Solomon's figure. So that while at Makeni the plaintiff's remuneration was £6 salary plus £125 commission, making in all £131 a month.

As the plaintiff was entitled to six months' notice, and no notice was in fact given him I award him damages in lieu of notice—£786.

Further the plaintiff was brought down to Freetown in 1955 and through no fault of his own was deprived from earning any commission from January 1956 to October 31, 1956. The question arises whether the plaintiff should be entitled to any commission during those ten months.

In *Orman v. Saville Sportswear Ltd.* which was reported in "The Times" newspaper for March 3, 1960, but which I have as yet been unable to find in any of the law reports, this question came for decision before Pilcher J.

As this case has not yet appeared in the Law Reports I shall set out the relevant portions of the report of that case as it appears in the copy of "The Times" for March 3, 1960

"His Lordship giving judgment said that the plaintiff was employed by the defendants as a production manager at the defendants' skirt factory at a salary of £30 a week plus a bonus of 2d. for each skirt which was manufactured, which usually amounted to about £20 a week. The contract of service was contained in two letters, both of which were silent as to whether the plaintiff should be paid a salary or a salary and bonus during his absence due to illness. The defendants had paid the plaintiff the whole of his basic salary of £30 a week for the period during which he was ill and this, they said, was not because they were legally obliged to do so but as an act of grace.

"The point which His Lordship had to determine was whether, having regard to the contract of services in the circumstances of the case, the plaintiff was entitled to recover the £250 6s. 2d. bonus which he would have earned if he had continued to work until his contract was terminated.

"Having considered the careful arguments of counsel and the authorities His Lordship concluded that where the written terms of a contract of service were silent as to the employee's right to be paid while absent from the employment, the employers remained liable to pay the employee's salary until the contract was terminated except where an intention not to pay could be inferred from the facts of the case.

"His Lordship concluded that the question to be asked was: What was the plaintiff's remuneration? It amounted to £50 a week. Accordingly the plaintiff should be paid the full remuneration which he would have received so long as the contract subsisted."

There is nothing in Exhibit "A" to deprive the plaintiff of commission he would have earned if he were absent through illness or otherwise from his

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station. On the contrary the plaintiff in answer to the court and in course of his cross-examination said,

"The general manager would give me a chit for the commission I would have earned calculated from the average of my commission if I had not been on leave. When I am on leave I receive not only salary but commission I would have earned."

Then in answer to Mr. Luke in cross-examination he said,

"I received commission when on leave."

The plaintiff was ordered by the company to proceed to Freetown in December 1955, and from January 1956 to October 1956 he was kept away from Makeni where according to Mr. Solomon his commission was £125 a month. In view of the authority cited above and the facts of this case it would in my opinion be grossly unfair to deprive the plaintiff of the commission he would have earned but for the fact that the company kept him idle in Freetown. I award the plaintiff commission he would have earned for the first ten months in 1956 at £125 a month, that is, £1,250. If during that period or any part of it the plaintiff was not paid his salary of £6 a month, that should be added to the sum of £1,250 I have awarded. But as the evidence on that is not clear I make no order for such arrears.

On the question of general damages I am satisfied that the plaintiff made genuine efforts to seek employment; but that when he submitted his papers from his last employer his application for employment was refused.

In the certificate of employment, Exhibit "D," the defendant company after stating that the plaintiff had been in their employment for fourteen years and that his conduct was satisfactory went on to state that his ability was not up to the standard required by U.A.C. Ltd. Learned counsel for the plaintiff has described the certificate as malicious and spiteful. From the evidence before me the plaintiff has been promoted by stages to different stores of the company, each one doing better business than the former till he was placed in charge of a store, the largest in the Northern Province, with a turnover of £15,000 per month.

Mr. Solomon in his evidence said,

"I have not found in the record of plaintiff's 18 years' service any notice to him about dissatisfaction by the company of his efficiency."

In view of all this the lowest award I can make is on the basis of three months' remuneration which is £393 by way of general damages.

The order of the court is

1. There will be judgment for the plaintiff for £786 in lieu of notice.
2. £1,250 being commission he would have earned if he had not been removed from Makeni and kept idle in Freetown.
3. £393 by way of general damages.
4. The defendant company to pay the costs of this action.
5. Costs to be taxed.