In the Supreme Court of St. Helena

Citation: SHSC 18/2023

Civil

Revision by the Chief Justice pursuant to s73 of the Civil Procedure Ordinance 1968

Solomon and Company

Plaintiff

-V-

Patrick Crowie

Respondent

Ruling dated 23rd February 2024

The Chief Justice Rupert Jones

1. This is my judgment on revision pursuant to section 73 of the Civil Procedure Ordinance of a Ruling made by the Magistrates' Court in this case on 21 August 2023.

2. I held the hearing of the review in person in the Supreme Court on 26 January 2024. Ms Kylie Hercules, Trainee CILEx, Public Solicitors Office, appeared for the Plaintiff (Solomon and Co) and Mr Andy Burnett, of the Public Solicitors' office, appeared for the Respondent (Mr Crowie). I am grateful to each of them for the quality of their written and oral submissions.

   Jurisdiction of the Supreme Court on review under section 73 of the Civil Procedure Ordinance ('the Ordinance')

3. Section 73(1) of the Ordinance provides:

   Revision by Supreme Court
   73. (1) The Supreme Court may call for the record of any cause or matter which has been determined under this Ordinance by the Magistrates' Court, and if it appears that the Magistrates' Court has—
   (a) exercised a jurisdiction not vested in it by law;

(b) failed to exercise a jurisdiction so vested; or
(c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice, the Supreme Court may revise the judgment or order pronounced or made in the cause or matter and may make any order in it as the Supreme Court thinks fit

4. The first question on which I invited submissions was whether the jurisdiction of the Supreme Court under section 73(1) was confined to determining whether there were errors of law in the Magistrates' Court Ruling (a supervisory jurisdiction on review) or included reconsidering evidence and making or re-making findings of fact (a full merits jurisdiction).

5. The Supreme Court's jurisdiction to revise the Magistrates' Court's ruling under section 73(1)(c) is on the basis it has 'acted in the exercise of its jurisdiction illegally or with material irregularity or injustice'. The first phrase – 'acted in the exercise of its jurisdiction illegally', equates to a material error of law (as do the terms of subsections 73(1)(a) and (b)). The inclusion of the later phrase - acting 'with material irregularity or injustice' - provides the Supreme Court with a wide jurisdiction to revise decisions of the Magistrates' Court.

6. This is supported by the Supreme Court's power to 'make any order in it as the Supreme Court thinks fit'. This remedy on review supports the jurisdiction on revision being broader than in those categories of appeal which are confined to a point of law.

7. I agree, with Mr Burnett that section 73(1)(c) therefore empowers the Supreme Court to revise the Magistrates' Court's ruling or judgment not simply on the basis that it involved a material error of law. I am satisfied I have a full merits jurisdiction to consider matters of fact and law afresh (de novo) if I consider that the Magistrates' Court has erred in law in any material manner or erred in fact so as to give rise to 'material irregularity or injustice'.

8. The Supreme Court therefore has a broad jurisdiction to consider all facts and evidence and re-make the decision on any basis of fact or law. On this review I therefore consider the evidence and facts afresh and make such fresh findings as may be required in addition to considering what I view to be the proper interpretation and application of the law.

<u>The Magistrates' Court ruling</u>

9. The Chief Magistrate set out the background facts in this case as follows at paragraphs 1-8 of his ruling:

    1. 'These proceedings arise out of a claim brought by Solomon and Company against their ex-employee Patrick Crowie. Mr Crowie has issued a counter claim against the Plaintiff in relation to unpaid wages.

2. The agreed facts are that Mr Crowie was employed in the bakery by Solomon and Company. His salary was £912.77 a month. On 11th March 2022 [for which read 2021] he left his employment by letter but without giving notice. At the time of leaving his employment wages due to him were £357.17 along with holiday pay of £72.61 and a tax refund of £277.42. Mr Crowie owed to Solomon and Company £350 from a Christmas loan taken out on 29th October 2020. Since the 11th March 2022 [2021] he has paid £140 to his ex-employers.

3. The issue in this case surrounds a claim by the Plaintiff that to avoid breaching his contract of employment Mr Crowie had to pay his ex-employers a sum equivalent to one month's salary. It is asserted that as he has not paid this money he is in breach of the contract.

4. The relevant parts of the contract of employment are in paragraphs 29 and 6.2. Paragraph 29 provides that, *"Appointment may be terminated or resigned by the giving or receiving of one months* (sic) *notice in writing by either side, or by payment of one month's salary in-lieu-of notice for monthly paid staff……."* Paragraph 6.2 provides that, *"If the employee is for any reason indebted to the Company for any amount (including any overpayment made by the Company to the employee) the company shall be entitled to make a deduction in or towards the discharge of that liability from the employee's remuneration or any other money payable by the Company to the employee."* This contract was signed by Mr Crowie before he took up his employment and he was paid monthly.

5. The position of Solomon and Company is that the impact of paragraph 29 is that by not giving notice Mr Crowie owes them an equivalent of one month's salary and that this can be deducted from his salary, holiday pay and tax refund by virtue of paragraph 6.2. This then leaves him owing them a balance of what cannot be recovered by this deduction, in this case £555.57 if the Christmas loan is taken into account. Given that £140 has already been paid by Mr Crowie since he left his employment the amount owing is now £415.57.

6. Mr Crowie's position is that the company were not entitled to deduct the unpaid salary, holiday pay or tax refund due at the time of resignation. They could only deduct the staff loan and were required to pay him for the time worked up until his resignation. This leaves the company owing him £497.20 after taking into account all matters owing and owed. There is then a further claim by Mr Crowie for £95.46 in interest at 8%.

7. Solomon and Company do not assert any financial loss to themselves by the employee leaving early, for example having to replace him with more expensive temporary labour. The Plaintiff simply goes by the letter of the contract and nothing more.

8. The Plaintiff's position is that should Mr Crowie not wish to work for them then he must give one month's notice and work that notice, or he must pay the equivalent of a month's salary in lieu of notice.'

10. The Chief Magistrate then considered the English common law relating to payments in lieu of notice by an employer to an employee at paragraph 9 before continuing at paragraphs 10-11 as follows:

    10. 'The payment in this case falls within number (2) above but the ruling in *Delaney v Staples [1992] 1 AC 687* is predicated upon employers summarily dismissing employees without notice, not employees leaving without notice. To assist me on whether it is permissible for employers to receive payments in lieu of notice from employees I also have regard to *s.86(3)* of the *Employment Rights Act 1986* which provides that, *"Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice."* (emphasis added). This section, when read with *Delaney v Staples [1992] 1 AC 687,* does not prevent terms in a contract of employment for either the employer or employee to make a payment in lieu of giving or receiving notice to end the contract. It is not argued that the *Employment Rights Act 1996* applies to St Helena and it is generally accepted that it does not, but *s.86(3)* assists in assessing whether it is permissible in a contract of employment to provide for an employee to pay to an employer a payment in lieu of giving notice. The *Employment Rights Ordinance 2010* is silent on the point.

    11. Contracts of employment impose a number of duties within the contract and in common law upon an employee, which include an obligation to work for the employer and not to disrupt the employer's business. In response to the employee providing his labour the employer agrees to pay the employee for the work done and to act towards the employee in certain ways in compliance with common law, the contract and statute. If the employer's business is disrupted by the employee in such a way that incurs costs then the employer may look to their employee to indemnify them.'

11. The Chief Magistrate then applied his interpretation of the law to the facts found as follows at paragraphs 12-16 of the ruling:

    12. 'Here no financial loss is identified, if anything there appears to be a financial benefit to the employer in not having to pay Mr Crowie's wages. However employers are entitled to a degree of certainty with their employees and business can be disrupted by employees leaving without notice. The period of one month's

notice is not unreasonable in the circumstances of an employee with Mr Crowie's job. He was a baker responsible for baking bread for the main supplier on the island. If that supply chain is interrupted by employees not working then it impacts upon business and causes reputational damage.

13. I can find no reason why in St Helena law a contract should not include the terms found in paragraph 29 and consequently Mr Crowie's argument of illegality must fail for the reasons in paragraphs 9 – 12.

14. It is also argued that the terms are unreasonable or, in the alternative, that enforcing the contract is unreasonable. I cannot agree with this. As already referred to, employers are entitled to a degree of certainty with their employees and it is not unreasonable that there is an insistence on providing proper notice, especially with someone in Mr Crowie's position within the company.

15. Although not asked to I have also considered the construction of the contract of employment. The relevant part reads as follows, *"Appointment may be terminated or resigned by the giving or receiving of one months notice in writing by either side, or by payment of one month's salary in-lieu-of notice for monthly paid staff……."* It is normal for contracts to require the employer or employee to provide an adequate notice period as is the case here. It could be argued that by placing the words, *'by either side'* before the comma does not make it clear that *'or by payment of one month's salary in-lieu-of notice for monthly staff'* refers to both employees and employers. However I consider that the contract is clear as the reference is to *'either side'* in the same sentence and it is standard practice for contracts of employment on St Helena to contain clauses that require employees to make payments if they leave without notice.

16. I find that the terms of the contract are clear, lawful and not unreasonable and to avoid breach of the contract there is a requirement to make a payment equivalent to one month's salary if the employee resigns by not giving notice. The court finds in favour of the Plaintiff in the sum of £415.57 plus costs in the sum of £10.95 making a total of £426.52. Judgment is entered in that sum.'

12. The Chief Magistrate concluded his ruling by inviting the Supreme Court to review his judgment. This I have done following the receipt of written and oral submissions on evidence and case law.

13. On 12 October 2023 I identified to the parties a number of issues and questions regarding the law on unenforceable penalty clauses in employment contracts that I saw as being relevant to this case. The parties have provided their answers to the questions I posed in their written and oral submissions.

The law

14. As the Chief Magistrate correctly identified in his ruling, the Employment Rights Ordinance 2010 ('the 2010 Ordinance) which applies in St Helena is silent on the lawfulness or otherwise of contractual terms relating to payment in lieu of notice by an employee. There are no other relevant provisions within the 2010 Ordinance which may assist in this case.

15. Likewise, the Chief Magistrate was right to observe that the Employment Rights Act 1996 of England does not apply where there is local and inconsistent provision within the St Helenian primary legislation, the 2010 Ordinance. This is the consequence of section 4(c) of the English Law (Application) Ordinance 2005: *'The Adopted English Law applies to St Helena only insofar as it is not inconsistent with— ... (c) any provision made by or under any law enacted by a legislature in St Helena.'*

16. The question remains as to the extent to which the common law of England applies in St Helena to assist in determining this case.

17. Sections 1-3 of the English Law (Application) Ordinance 2005 ('the 2005 Ordinance') provide as follows:

Short title and commencement

1. This Ordinance may be cited as the English Law (Application) Ordinance, 2005 and comes into force on 1 January 2006.

Adopted English law

2. In this Ordinance, "Adopted English Law" means:

(a) the common law of England, including the rules of equity; and

(b) the Acts of Parliament which are in force in England at the time of commencement of this Ordinance.

Application of Adopted English Law to St Helena

3. (1) Subject to subsection (2) and other provisions of this Ordinance, the Adopted English Law applies in St Helena.

(2) The Adopted English Law applies to St Helena only in so far as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.

18. I invited the parties to assist on me on the proper interpretation of section 2(a) of the 2005 Ordinance. Mr Burnett submitted that this limits the application to St Helena of English common law only as of 1 January 2006 (which is the position for English Acts by virtue of section 2(b)). In effect he submits that the later phrase in section 2(b) 'which

are in force in England at the time of commencement of this Ordinance' applies to or governs both subsections 2(a) and 2(b).

19. Miss Hercules submitted that whatever the position, English common law post 1 January 2006 is of persuasive weight in its application to St Helena law by virtue of the 2005 Ordinance.

20. The task of statutory interpretation in this case was not straightforward. I bear in mind Lord Bingham's words in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, [8]:

> "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

21. Lord Hodge, giving the leading judgment for the Supreme Court in the case of *R (on the application of O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 WLR 343 said at [29]-[31]:

> "29.The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
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> > *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd *[2001] AC 349, 396).*
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> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397: *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*
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> 30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law

Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below…

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."'

22. In construing the relevant statutory provisions within the English Law (Application) Ordinance 2005 I must therefore ascertain the meaning of the words in the light of their context and the purpose of the provision. There is a presumption that the legislature intends to act reasonably and so should not be taken to "*intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless"*: R *(Edison First Power) v Central Valuation Officer* [2003] UKHL 20, at [116].The more unreasonable the result produced, the less likely it is that Parliament intended it: *Edison* at [117].

23. The starting point is the plain and ordinary of the language of section 2 of the 2005 Ordinance. There is a distinction between subsections 2(a) and 2(b) of the 2005 Ordinance. I noted during the hearing that the natural wording of subsection 2(a) does not provide for a temporal limitation for common law in contrast to section 2(b) which provides for the cut off date of 1 January 2006 for Acts of Parliament. In my view the

temporal limitation at the end of subsection 2(b) cannot be read sensibly as governing both subsections: 'the Common Law of England….and Acts of Parliament which are in force at the time of commencement…'. The words 'which are in force in England' naturally applies to Acts of Parliament in subsection 2(b) – common law is not normally described as being 'in force' on any particular date, unlike legislation which is.

24. If the draftsperson had wanted to apply the cut off date to both common law and legislation, then they would have redrafted these subsections of the Ordinance so that it was clear that the temporal limitation date applied to both and not simply including it as an end phrase to subsection 2(b). For example this might have been done by placing the final phrase of section 2(b), 'which are in force…' in a further and separate line of the text so it was clear that it applied to both (a) and (b) and replacing the phrase with 'which apply…').

25. In my view, section 2(a) is properly read as not limiting the date of the application of English common law in contrast to Acts of Parliament which are time limited by virtue of section 2(b).

26. Against that, it might be argued that it is inconsistent to apply English statute law only as of 1 January 2006 but English common law as it currently stands. It might be said that the legislature in St Helena did not intend such a result because it is inconsistent and hence unreasonable or absurd.

27. However, I am satisfied that this is the meaning of the words in their context and it does represent the legislative intent. There are sound public policy reasons why the legislature of St Helena sought to time limit the application of English legislation but not common law to the law of St Helena.

28. The 2005 Ordinance is one of sequence of Ordinances that has been passed by the legislature from time to time in order to fix the point at which English statute law might apply. It enables the St Helena legislature to know with certainty which English statute law applies and which does not. The Ordinance can be reviewed over time and updated (as it is). However, the intention may be that the legislature of St Helena has control over what Acts of Parliament that it would like to adopt as law in St Helena.

29. In contrast, the English common law is slower in evolution and development and less liable to the radical change or innovation that an Act of Parliament may introduce. It may also be artificial and lead to uncertainty if the common law was cut-off or stagnated at a certain point and ignored the subsequent learning of the English courts (include reversal by the appellate courts). It may therefore be harder to pinpoint what exactly is the common law of England on any specific date (even if it were done by applying only those judgments of the courts which are handed down by that date, there is an argument that subsequent developments, such as court judgments later reversed on appeal, are treated as having always been the law at the earlier time).

30. I am satisfied that section 2(a) must be interpreted so as to give effect to the intent of the St Helenian legislature. The natural reading of section 2 distinguishes between the dates as of which English common law and Acts of Parliament apply. There is nothing

unreasonable or absurd in there being a different timeframe for the application of English common law and statute law to St Helena.

31. I consider that the legislative intent was to provide for English common law and primary legislation to apply to St Helena, with suitable modifications pursuant to section 3(2) where there were gaps in St Helenian legislation or case law and so long is not inconsistent with the local and other legislation stipulated in section 4.

32. In addition, in order to avoid absurdity, that part of the English common law which interprets and applies to Acts which post-date 1 January 2006 must also not apply to St Helena. Areas of English law which depend only on common law or on legislation pre-dating 1 January 2006 (as opposed to case law which interprets legislation post dating January 2006) can be applied in St Helena so long as it is not inconsistent with sections 3(2) and 4 of the Ordinance.

33. I consider the proper interpretation of section 2(a) of the 2005 Ordinance is that the current common law of England applies contemporaneously and without temporal limitation to St Helena. However it applies with the modifications to local circumstances provided by section 3(2) and limitations provided by section 4 – that it applies only where not inconsistent with the specified legislation.

34. In conclusion, I am satisfied that the proper interpretation of section 2(a) of the 2005 Ordinance is that the current English common law applies to St Helena with suitable modifications under section 3(2) and so long as it is not inconsistent with local legislation (Ordinances and Regulations) or the other legislation defined in section 4 of the Ordinance.

35. Further and in any event, as Ms Hercules points out, the common law of England that post dates 1 January 2006, so long as it did not directly contradict St Helena legislation, would be persuasive in interpreting St Helenian law even if it is not directly applicable.

36. The relevance of this interpretation to this case means that I may consider English case law in judgments or authorities from 2014 and 2015 as being not simply relevant but directly applicable in this case.

The English common law on Penalty clauses

37. As I identified above, I invited the parties to assist me on whether the relevant clause within the Respondent's employment contract regarding payment in lieu of notice was an unenforceable penalty clause. The alternative is that it was an enforceable clause that provides a genuine pre-estimate of financial loss or damage which the employer would suffer.

38. The traditional approach to establishing whether a contractual clause represents an unenforceable penalty clause that is that set out by the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 ("**Dunlop Pneumatic**")]. This is that a clause will be an unenforceable penalty if:

(i) It is triggered upon breach by the paying party (which is the situation we have here).
(ii) The penalty is extravagant or unconscionable, with the predominant function of deterring a party from breaching the contract, instead of compensating the party by way of genuine pre-estimate of loss.

Later case law replaced the terms 'extravagant or unconscionable' with the word 'excessive'.

39. It became accepted over time that a clause was probably penal if it was not a genuine pre-estimate of loss, unless there was a commercial justification for the clause.

40. In the employment law context, in the case of *Giraud UK Ltd v Smith* [2000] UKEAT/1105/99 Giraud UK Ltd v. Smith [2000] UKEAT 1105_99_2606 (26 June 2000) (bailii.org) the Employment Appeals Tribunal ('EAT' - Maurice Kay J, as he then was) held that a clause which required an employee to reimburse the employer for any shortfall in the number of days' notice required was an unenforceable penalty clause.

41. The Employment Tribunal whose decision was upheld on appeal had noted that the clause in *Giraud* did not place any limitation on the right of the employer to recover damages for the employer's actual loss in the event of that being greater than the damages specified in the clause, and the EAT agreed with the Tribunal that this seemed to be a case of 'heads I win, tails you lose', per paragraphs 10-12 of the EAT judgment:

'10. It is of significance that the clause in this case did not seek to place any limitation on the right of the employer to recover damages for his actual loss in the event of its being greater than that specified in the clause and the calculation which it laid down. Thus, in the present case, the employee is in a position where if the actual loss turned out to be nil the employee is liable for the calculable sum, but if the actual loss is greater than the calculable sum he may face an unlimited claim for the balance. This is a matter which weighed heavily on the Employment Tribunal. It also weighs heavily on us.

11. In our judgment, it is difficult to see how in these circumstances the clause can represent a genuine pre-estimate of loss. Moreover, we agree with the implicit finding of the Employment Tribunal that the clause, by reason of this aspect of its application, is an oppressive clause because it takes a form which can be described colloquially as "heads I win, tails you lose."

12. In all the circumstances, we have come to the conclusion that the finding of the Employment Tribunal about this clause was correct. It did not represent a genuine pre-estimate of loss. It was a penalty clause and, as such, unenforceable.'

42. A different constitution of the EAT (Langstaff J) came to a different conclusion on the facts of *Li v First Marine Solutions* UKEATS/0045/13/B1 Li v First Marine Solutions Ltd & Anor (Contract of Employment : Implied Term or Variation or Construction of Term) [2014] UKEAT 0045_13_0403 (4 March 2014) (bailii.org).

43. It found a similar clause in an employment context to be allowed as an enforceable genuine pre-estimate of financial case. In that case the employee was the principal project engineer on a large project for the energy sector. The Employment Tribunal distinguished *Giraud* on the basis that it accepted that the penalty was a genuine estimate of the substantial costs that would be incurred in hiring a replacement senior professional at short notice (whereas in Giraud the employee was a driver who could presumably be replaced more easily).

44. The EAT upheld the decision of the Employment Tribunal ('ET') noting that it was hampered by the acceptance of the parties that the clause would operate in a particular way (whereas the EAT was not itself satisfied that the parties' approach was correct). The EAT considered the decision of the ET and stated at [33]-[36] and [42]-[47]:

[33] What was not argued before me were the legal points which might suggest that the clause was neither a penalty clause nor a genuine pre-estimate of loss, or that showed that the tribunal might have made an error of law in its approach.

[34] I confess to a very real concern about the way in which this particular clause was approached, as I shall express at the end of this judgment. But I have to deal with the arguments as they have been presented by the parties, and with the judgment of the tribunal on the basis of the arguments which were presented to it. In respect of those arguments, there was no dispute as to the effect of the clause. The question was simply whether or not it was enforceable so as to produce that effect.

[35] The tribunal distinguished *Giraud*. The tribunal did not deal with the reasoning which appealed to Maurice Kay J and the members. That reasoning is powerful. Mr Hughes meets it by arguing that, upon a proper construction, in context here, there was no right to receive any sum greater than one calculated by reference to the period provided for by 12(1) in the event that an employee broke her contract by leaving service early and where the employee had incurred significant expense. Instead, he distinguished *Giraud* on the facts. I note that Nelson J, in *Tullett Prebon,* also thought that *Giraud* turned upon its own particular facts. The distinction was a real one.

Whereas in *Giraud* the post was that of a driver, whom without more one would think to be fairly easily replaceable, at no particular expense, this contract, on the face of the contract itself, was for a very different type of employee. This was not just an engineer but a project engineer. She was engaged at a high salary compared to that which would apply to a driver. Engineers are not as common as are drivers, and to obtain one at short notice is always likely to be of particular difficulty. Significant expense might be incurred. When the contract as a whole is examined in the context within which it was made, to which reference must be had to decide what the parties intended at the time that they made the contract, it is plain that the fact that she was headhunted meant that the employer placed a particular value upon her services.

[36] One passage which gave me concern was the last sentence in para 132. To place a high value on retaining services and loyalty, and to that end include a "generous reassurance against" the employment coming to an end, looks to me logically very much as if the employer is contending that there should be a marked disincentive within the contract for the employee to go. If so, this is something which seeks to penalise the employee for leaving and thereby dissuade the employee. It is not aimed at compensating the employer for the loss which will actually be incurred if the employee does go. I had, therefore, at one stage in the argument been inclined to think that the reasoning of this tribunal could not be supported. But the language appeared redolent of an extract from case-law, and Mr Hughes pointed me to the judgment of Sir Richard Buxton in the Court of Appeal, in *Murray*, from which the words come. I note that they were repeated with no disapproval in the course of her earlier judgment in the same case by Arden LJ Clarke LJ agreed with the judgment that Sir Richard Buxton gave in any event.

…

[42] What was not argued before me was whether the clause should have been construed as having the effect it was said to have. It was that effect which led to the discussion as to whether it was a penalty clause or a genuine pre-estimate of loss. With hesitation, since a similar clause was analysed in the same way in *Giraud* as being either a penalty, or genuine pre-estimate I would venture these views, which may be of importance in future cases.

[43] First, an employment contract should be construed with the reality of employment circumstances in mind. If a tribunal has a contract such as this to construe in future, it should ask itself whether the parties, in enacting a clause such as this, really intended that, if an employee left not having worked the full amount of notice – irrespective of whether the notice was given by the company or the employee – there should be paid by the employee to the employer a sum equal to the amount of time which was not spent working during that notice period, but should have been.

[44] A different construction may better represent the realities of the workplace. Where salary is paid a month in arrears and the notice period is one month, it would normally

be understood as fair between the parties that, if an employee were to leave early during that notice period, she would not be paid for the balance of the period. No work, no pay. Yet she would already be entitled to some payment at the end of the month. It is entirely conceivable in these days, when it is recognised that an employer may not make a deduction from sums otherwise due to an employee without there being express provision in the contract to that effect, that a contract should recognise the lack of entitlement to payment for that period by providing for a deduction from the salary cheque otherwise due at the end of the month, equivalent to the shortfall in the period of notice. Thus work two weeks, get paid for two weeks – but not the four weeks covered by the monthly salary cheque if the period of notice is four weeks.

[45] This construction would avoid some of the problems which can occur under the clause as this one stands. The clause permits the company only to deduct. It does not entitle the company to receive or demand a payment, nor oblige the Claimant to make one. When Mr Hughes was asked during the course of argument how it would work if, at the end of one salary period a Claimant simply upped sticks and left, he acknowledged that, in the event there was no holiday or other payment due to the employee, there would be nothing to deduct the one month's shortfall from. That, he acknowledged, would put the employer in some difficulty. Similarly, if the employee were summarily dismissed by the employer for proper reason, then there would be no recompense for the employer, although the employee by definition would be at fault in the employer's eyes. This makes it unlikely that there would be a clause in the contract providing that, if she exercised contractual rights, the employee would have to pay, but if the employee simply did not give notice but instead simply failed to turn up to work, and was dismissed for that reason, the employee would have nothing to pay under this clause.

[46] Next, I note there is nothing in the language of this clause which suggests, on the face of it, that the company had in mind the additional expenses of recruitment and replacement such as might result from early termination. It is not drafted as if to indicate that the parties had in mind "penalty" or "genuine pre-estimate of loss" at all.

[47] Accordingly, I recommend to tribunals who consider such a clause in future that they may wish to think carefully, in the light of the evidence before them in the particular case, whether the parties actually intended a clause such as this to operate as a penalty clause, liquidated damages clause, or simply as a provision that entitled the employer to withhold pay for the period of time not worked during notice. <u>All will, of course, depend upon the particular conclusions and the particular facts, contracts of employment being individual.</u>

<u>[Emphasis Added]</u>'

45. The important point to note is that the EAT recognised that the consideration of whether any specific clause in an employment contract is a penalty clause is very much a fact specific judgment.

English common law on penalty clauses generally – outside the Employment context

46. In the UK the law on penalty clauses underwent some evolution with the decision of the Supreme Court in the conjoined appeals of *Cavendish Square Holding BV v Talal El Makdessi and Parking Eye Limited v Beavis* [2015] UKSC 67 Cavendish Square Holding BV / Beabis (Appellants) v Talal El Makdessi / ParkingEye Limited (Respondents) (supremecourt.uk).

47. In its judgment, a majority of the UK Supreme Court (Neuberger and Sumption SCJs) at [32] suggested a modern approach, in which the Court moved away from focussing mainly upon whether the penalty was a genuine pre-estimate of loss or not:

"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any of the legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or some appropriate alternative to performance."

48. I agree with Mr Burnett that under *Cavendish*, the test may be considered to be:

(i) The penalty is triggered on breach of contract, and

(ii) There is no justification for the clause (to be valid, the clause must seek to protect a legitimate interest of the innocent party, where compensation for the breach may not be the only legitimate interest. The fact that such a clause is not a genuine pre-estimate of loss is still relevant, but it is not the only concern).

(iii) Nonetheless, even if the clause seeks to protect a legitimate interest of the innocent party in the performance of the contract, it may still be an unenforceable penalty if it is extravagant or unconscionable (excessive), in that it provides for a remedy which is disproportionate to the interests of the innocent party.

Submissions on behalf of the Plaintiff Employer - Solomons and Co

49. Ms Hercules made the following submissions in writing on behalf of the Plaintiff employer in support of the Magistrates' Court's ruling being upheld:

1. 'Was there any consequential loss or damage suffered by the Plaintiff?

2. It is not accepted that there was no loss or little loss as asserted in the submissions of the Respondent paragraph 18.3.5. The loss suffered by the Plaintiff, whilst only an estimate is set out in paragraph 29 of the Second Case Summary of the Plaintiff, which is an estimate of over two months, dividing this by two results in £955.65, which is £43.12 more than that of the Respondents monthly salary.

3. In order for there to be minimal effect on the services provided, as the main supplier of a daily local dietary requirement and in support of food security, the Chief Executive Officer, CEO, promptly arranged for managers to assist in the continuation of this

crucial and key service on a small island. In the absence of this, the impact would have been not only reputational but a significant impact on those on island who rely upon this service, with no replacement or alternative available. Whilst there is a small volume of imported product from time to time, there are no other source of bread production supplying the service to the number of customers that the Plaintiff does supply.

4. The Plaintiff operates on a commercial scale on island and in a typical week the Bakery will produce, on a daily basis, a maximum of 1760 loaves of bread,1965 rolls, 255 baguettes and a range of other bread products (Baps, bloomers, focaccia etc) on specific days in addition to the breads, rolls and baguettes above.

5. Was there any other non-pecuniary damage demonstrated by the Plaintiff?

6. The Plaintiff has suffered loss, although it is not directly quantifiable in monetary terms. The lack of notice period put pressure on the business to continue to operate and produce the service to a small island which has a number of customers dependent on the bread supply. When the Respondent resigned, the Bakery Manager (middle management) had to take on the full operational role on the bread production shift (as opposed to their duties of their management role). The General Manager -Production (senior management) then stepped into the Bakery Manager role and would undertake day to day management duties which the Bakery Manager would otherwise have been carrying out. This took the General Manager away from his role, which encompassed the Bakery, Lands, Livestock, Coffee and other Production Administration.

7. The above position was not ideal and stress suffered by the managers in order to accommodate an unplanned situation when the Respondent resigned on the spot, however the company has not sought to quantify or rely upon this.

8. It is not accepted that the time of the Bakery Manager and General Manager -Production as detailed above, is in any way linked to the disciplinary process, as set out in 7.1 of the Respondents submissions.

9. It is accepted that the recruitment process would have been necessary either way. However the notice period would have provided certainty, as paragraph 12 of ruling of the Chief Magistrate. Further the Plaintiff, if provided the one month notice, would have had a period of time for the prompt handing down of knowledge and skills to other employees, demonstrating the potential to be able to take on these responsibilities in the interim period whilst recruitment was being processed .

10. It is not accepted that there can simply be reorganisation of staff as asserted by the Respondent in paragraph 7.3. The diverse operations of the Plaintiff company are reflected by the size of its workforce. However the same diversity means that the business areas are often not transferrable. This is the case for the Bakery. Bread production cannot be performed by employees who lack experience, knowledge and training.

11. The Bakery is not automated. Consequently, each workstation in the bread production process needs to be physically resourced (i.e. transferring flour from flour room to production, operating the mixer, operating the divider, operating the moulder (including hand moulding), panning of bread, manning of ovens (noting the number of batches to be baked), slicing of bread). The Bakery complement of workers is in fact at the minimum required to operate and there is no slack to be taken up as submitted by the Respondent in paragraph 18.3.2.

12. Is the clause a penalty clause?

13. The clause has been in operation for a number of years, not only it is a usual clause in contracts for the Plaintiff company but a usual clause for the giving of a months notice to terminate by either party. This again goes back to ensuring certainty and minimising disruptions, which has been recognised by, and forms part of the Chief Magistrates ruling at paragraph 15, final sentence.

14. The matter as to whether or not the clause is a penalty clause must be considered in light of other factors not within the ambit of the UK; that is that this is an isolated remote island in the South Atlantic with limited skilled and general labour, a decreasing population, with the highest percentage of the population being over 65. There are no labour markets or recruitment agencies to easily procure employees of skilled labour or indeed general labour.

15. To recruit abroad, the local immigration requirements for migrant workers currently require medical insurance of £175,000.00 per person to cover medical evacuation due to the inability of the island's health service in dealing with complex medical cases. In addition there would need to be work permits to enable the person to take up employment. The associated costs of travel to and from the island, availability and cost of accommodation, are all factors to be considered.

16. The case of **Giraud UK Ltd v Simth [2000] UKEAT/1105/99** Giraud UK Ltd v. Smith [2000] UKEAT 1105_99_2606 (26 June 2000) (bailii.org) is firstly a matter bought before the Employment Appeals Tribunal (EAT) and not to the Court. The employee was a driver who was required under the notice clause in his contract to pay the employer for insufficient notice, in this case 4 weeks notice, unless the notice was worked. The EAT concluded that as the clause was a penalty clause and therefore unenforceable.

17. Further cases have changed the way in which these matters are assessed. The law has evolved from the case of Giraud UK Ltd v Smith [2000]. Whilst not automatically applicable, cases post-dating the English Law (Application) Ordinance 2005, should be persuasive and the Plaintiff should not be barred from relying on such.

18. The Respondent has set out at paragraph 11 the case of **Li v First Marine Solutions Ltd (2014) UKEATS/0045/13, [2014] All ER (D) 03 (Sep)** The EAT distinguished this case from Giraud. It is relevant in the context that the Respondent role would fall

within that of one of a professional and not one which could easily be replaced, in the context of replacement on island or even abroad.

19. The Shortage occupation list and guidance effective 1 April 2021, Shortage-Occupation-List-and-Guidance-2021.pdf issued by the Saint Helena Government demonstrates that the Respondent's role is one which is skilled and that there is a shortage on island.

20. In **Cavendish Square Holding BV v Talal El Makdessi and Parking Eye Limited v Beavis [2015] UKSC 67** the Supreme Court set out the following:

'The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.'

Of further relevance is the following:

'The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe that: 'The court should not be astute to descry a "penalty clause" ' (Robophone Facilities Ltd v Blank [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1447). As Lord Woolf said, speaking for the Privy Council in Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41 at 59, 'the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld', not least because '[a]ny other approach will lead to undesirable uncertainty especially in commercial contracts'.

21. It appears that the test in Cavendish does not rely solely on 'pre-estimate of loss'. It examines whether there was a legitimate interest of the innocent party, which the Plaintiff says that there is, with the reasons why provided in submissions and may provide further details orally.

22. If the above is right, is the clause extravagant or unconscionable? The Plaintiff submits that it is not. Although not barred from doing so, the Plaintiff would say that a claim for the full cost of damages would be extravagant or unconscionable.

23. Other factors for consideration

24. Island statistics and political focus in recent months has been on the declining local workforce and the resourcing challenges faced by the St Helena Government and the private sector. It is submitted that to suggest that a skilled role could be easily filled, despite the small pool of resources available; is to strongly demonstrate a disconnect from the reality of the resourcing challenges in St Helena.

25. Against the reality of these operational challenges, the inclusion of a notice period in an employment contract is not extravagant nor unconscionable – it is a necessity for the delivery of services and for the effective functioning of the island.

26. The Court is reminded that this is not an unfair dismissal claim. The Respondent at para states that the origin of the resignation was as a result of a breakdown in trust between employee (Respondent) and employer (Plaintiff). It is entirely convenient for the Respondent to rely upon a breakdown in trust when it suits and only when proceedings are initiated by the Plaintiff.

27. Whilst the Plaintiff does not accept the assertion of one which appears to align with an unfair dismissal on the grounds of constructive dismissal and the Plaintiff submits that the resignation with immediate effect should not be considered in the context that the respondent has submitted.

28. It is accepted that the Respondent was employed by the Plaintiff. The Respondent's role was to provide leadership for the bread production. The disciplinary was as a result of an allegation of unacceptable behaviour towards a junior employee, who was under his leadership. The allegation was investigated and decided in accordance with the disciplinary process. As a result of this, the Respondent received a written warning. Further, the Plaintiff recognised that the Respondent had some learning to do around staff management. It is not accepted and there is no evidence of the Plaintiff having accused the Respondent of doing a 'bad job' , in fact to the contrary, save for the isolated staff management incident. A decision was taken by the Plaintiff to assist the Respondent in achieving acceptable behaviour in the workplace, given that the written warning was as a result of threatening and inflammatory behaviour. The Respondent's response to this was to resign with immediate effect.

29. The resignation letter of the Respondent makes no suggestion to a breakdown in the relationship. In fact, it thanks the Plaintiff for the time employed. There were no grievances lodged nor did the Respondent speak to Management or HR about the breakdown in trust and as is conveniently upon commencement of proceedings, relied upon.

30. At no point did the Respondent engage in negotiation with the Plaintiff in regards to his notice and it is not for the Plaintiff to initiate this; the decision to resign with immediate effect was made by the Respondent and was not in the control of the Plaintiff.

31. <u>It is just and reasonable clause?</u>

32. The Plaintiff submits that the clause is fair and reasonable in all the circumstances. It is submitted that the payment to the equivalent of one month's salary required by the notice period, is not extravagant or unconscionable, being appropriate and lawful. The value is no more and no less than the value to the Company of one month of the employment contract. A genuine pre-estimate of loss, would be extravagant in the Plaintiff's assessment and this is not being sought. The employment contract is relied

upon for the value assessed which, as such, could not be deemed unconscionable, it being the value for the job role performed under the Job Profile signed up to at the time of appointment.

33. The Company's interests are submitted to be legitimate in that it seeks a degree of certainty from its employees and promises the same, through honouring exactly the same term of one month's notice and for exactly the same value being equivalent to one month's salary. It is submitted this is proportionate as it is based entirely on the individual contract of employment between the employer and the employee. Every job role in the Plaintiff Company is valued appropriately in that the value paid for one month, is proportionate to the specific job role of that employee. It is the value to be used as the basis of any breach of the employment contract by either the employer or the employee and is a balance of equal bargaining power between the parties. Whilst the term is similar, the differentiation between roles occurs in relation to the salary paid, as reflective of the job role.

34. It is reiterated that whilst the Respondent argues that the clause is a standard clause, which is not disputed; the actual value of the clause is personal and tailored to the individual employee and is based on the value of that employees job role to the employer, therefore being differentiated by the job role and consequently the salary in each case, as opposed to being a 'blanket term' as purported to at paragraph 21.3 of the Respondents submissions.

35. Further it is submitted that it would be disproportionate to the Plaintiffs interests to have no notice period at all, and there would be an inequality of bargaining power. It would also be detrimental to employees, if the Plaintiff were to terminate the contract without notice or a payment in lieu of the notice. The notice period simply cannot work one way, in that the employers must give notice or payment and the employee does not. This would be unequal bargaining power between the parties and not just and reasonable to do so.'

Discussion and Analysis

50. Despite the skilful written and oral submissions of Ms Hercules, I am satisfied that the relevant contractual term requiring payment of one month's salary in lieu of notice by the employee (the Respondent) to the employer (the Plaintiff) was an unenforceable penalty clause on the specific facts of this case. This is largely for the reasons that Mr Burnett submitted.

51. I emphasise that this is very much a fact specific decision based upon the specific facts of this case - the terms of the contract, the position of the employee, the size of the employer and its operation of the bakery. It is not a judgment that all similar clauses would always be unenforceable in St Helena. Each case will turn on its own facts.

52. I have considered the questions that I posed to the parties in determining whether the contractual clause requiring payment in lieu of notice was a penalty clause in this case.

Was Any Loss Shown by the Plaintiff Employer?

53. No evidence was presented to the Magistrates' Court of any consequential loss or damage suffered by the Plaintiff Employer as a result of the Respondent not working out his notice that was stipulated in the contract. I am satisfied that the Chief Magistrate was right to rule as he did at paragraph 12 of his judgment that no financial loss was proved to have resulted from the Respondent's breach of contract.

54. The Ruling of the Magistrates' Court, at paragraph 7, rightly noted that the Plaintiff Employer did not assert any financial loss to themselves by the employer leaving early, for example with having to replace him with more expensive temporary labour.

55. The Ruling at paragraph 12 states that no financial loss was identified, and that if anything there appeared to be a financial benefit to the employer in not having to pay Mr Crowie's wages for the notice period.

56. No evidence was provided, nor even any claim asserted, that the Plaintiff Employer lost turnover or profit as a result of the Respondent Employee not serving his notice.

57. No evidence was provided, nor even any claim asserted, that the Plaintiff had to hire a replacement employee at a greater (or even equal) salary than the Respondent was being paid. Indeed, no evidence or assertion was produced to the Chief Magistrate to say that the Plaintiff Employer had to employ, or had since employed, a replacement employee at all.

58. As was clarified at the hearing before me, the Plaintiff Employer rearranged its personnel from across the company into the bakery and did not employ any replacement member of staff until November 2022 (some 20 months after the Respondent's resignation in March 2021). It neither proved any loss of turnover or profit arising from the Respondent's resignation nor that it had to hire additional or replacement staff at an increased rate of pay.

59. I accept Ms Hercules's submission that middle managers from elsewhere in the company were re-deployed to cover the Respondent's role. However, despite her persuasive written and oral submissions, I am not satisfied that any financial loss has been proved.

60. In the Plaintiff's Employer's Second Case Summary Response dated 16th August 2023, at paragraph 20, the Plaintiff 'estimated' that the minimum costs associated with the Respondent Employee resigning without serving notice were:
    - 25% of senior management time for 2 months at a cost of £1026.24, and
    - 30% of middle management time for two months at a cost of £885.06,

61. This totals £1,911.30, which is more than the Respondent Employee's monthly wage of £912.77. However, this was admitted to be an estimate, and no evidence was provided in support to the Magistrates' Court (no witness statement from the managers concerned, no details of the time spent or on what tasks, no detail of the managers' pay, no accounts, etc).

62. The figures provided regarding management time do not stand up to scrutiny.

63. Firstly, as Mr Burnett submits, as a result of the Respondent Employee not serving *one* month's notice, how did it take two managers' time over *two* months? Either the Plaintiff Employer included management time spent dealing with the disciplinary process regarding the Respondent Employee over the month preceding his resignation, or that the Plaintiff Employer included time trying to recruit a replacement employee generally. Both of these tasks would have been required whether the Respondent Employee served his notice period or not, and neither of these tasks were caused by the Respondent Employee failing to work during such notice period.

64. Secondly, even if it is accepted (which the Respondent does not) that the managers had to spend the time estimated on tasks as a result of the Respondent failing to serve notice, reorganising managers' time from one task to another does not automatically equate to pecuniary loss. There was no claim that the managers had to be paid more for the time spent on such tasks, and so presumably they were not. If the managers were paid the same, then there was no cost to the Plaintiff. In the absence of showing a loss of profit arising from the managers' reallocation of duties and time, there was no financial loss at all.

65. I find on balance that, with approximately 250 employees (as per Plaintiff's Second Case Summary Response paragraph 22) and approximately 6 bakers (according to the Plaintiff's recollection), the Plaintiff simply reorganised its existing employees and suffered no financial loss, nor even any non-pecuniary loss, as a result of the Respondent not serving notice.

66. I accept and am sensitive to the Plaintiff Employer's claims as to it being difficult to recruit staff in St Helena (as per Plaintiff's Second Case Summary Response paragraph 23). Likewise, the Magistrate was right to recognise the difficulties of recruiting staff in a small island labour market as being highly relevant to the contractual terms entered into by employers and employees.

67. However, in light of these restrictions and obstacles it may be expected for the Plaintiff, particularly as the largest employer on island, to have to routinely engage and train new staff and to put contingencies in place for a level of fluctuation in staffing and for the sudden absence which may be expected (whether through resignation, suspension,

dismissal, illness or other reasons). Not having such contingencies in place may put the operation of the Plaintiff Employer at risk.

68. I am satisfied, both on the evidence before the Magistrates' Court and that before me, that the Plaintiff has not proved that it suffered any financial loss or damage resulting from the Respondent's resignation and failure to work out the one month's notice required by the clause in his employment contract.

69. The question is then whether he should be required to pay one month's salary to his employer in lieu of notice because it was not a penalty clause but a genuine pre-estimate of loss to which he had freely agreed in his contract of employment.

Genuine pre-estimate of loss or penalty clause?

70. Mr Burnett seeks to distinguish the UK Supreme Court judgment in *Cavendish* because it was a case which post dates the adoption of English Law as at 1 January 2006 as per the English Law (Application) Ordinance 2005 (English-Law-Application-Ord-Updated-061219.pdf (sainthelena.gov.sh), and so is not part of the Adopted English Law of St Helena. He also noted that neither appeal in *Cavendish* concerned a dispute in the context of employment law.

71. Nonetheless, for the reasons given above, I am satisfied that *Cavendish* does apply to my consideration of whether the Respondent's contract clause was a penalty clause or a genuine pre-estimate of financial loss.

72. I consider all aspects of the traditional and the modern tests to the instant case in considering whether the clause requiring payment in lieu of notice by employee was a penalty clause.

73. For either test, it is required that the damages sought were triggered on breach of contract. That was so here, as according to clause 29 and the claim as advanced, the payment was required as a result of the Respondent Employee's breach of contract in failing to serve the required 1 month's notice.

74. First, I am satisfied that the clause in the standard terms of the Plaintiff Employer is not a genuine pre-estimate of loss.

    (i) It makes no pretence that it is intended to be so. The Respondent Employee was employed as a 'Foreman Designate (Bread Production)' as explained in his job description. It was a middle management role in the Bakery. The key purpose was described as 'To be responsible for leading the Bakery's Bread Production team, to ensure agreed production is met and quality standards are achieved. To deputise in the absence of the Operations Supervisor'. There is no suggestion that it required a unique or highly specialised skill set – although

it was clearly a job that required a level of skill and experience both in management and in the bakery. There is no explanation in the contract that any vacancy in this role would cause any particular financial loss to the Employer or that there would be particular difficulties in retraining or recruiting staff to fill it. There were six employees in the bakery in total.

(ii) Paragraph 10 of the Second Case Summary Response of the Plaintiff Employer dated 16th August 2023 states that the relevant clause 29 has formed part of the Plaintiff Employer's standard terms and conditions of employment since 1st April 2008.

The fact that it is a standard clause, applied to the vast majority of the 250 employees at varying levels of operation across 24 business operating units (see paragraph 22 of the same document). I do accept that there was some distinction made by the Plaintiff Employer in the length of notice periods in its employment contracts as Ms Hercules explained during the hearing. The most senior employees and managers were required to give three months' notice and the CEO to give six months' notice in their employment contracts. However, that the fact that there was otherwise a standard notice period for one month for almost all employees reveals that there was not a significant attempt made to consider a pre-estimate of loss with regards the failure of any individual Respondent Employee to serve their notice.

(iii) Even if the Plaintiff had attempted to pre-estimate loss, what would that estimate be?

The Respondent Employee was paid £912.77 per month. The Plaintiff Employer set the notice period at 1 month. This indicates either that the Plaintiff Employer could replace a bakery foreman such as the Respondent Employee (by recruiting an experienced bakery foreman or manager from St Helena or overseas, which is unlikely to have been the option considered, or by re-training an existing baker or manager in the company) within 1 month. These two points do not suggest the Respondent Employee had a skill set sufficiently unique or specialised that major problems for the Plaintiff Employer would be caused were he to be absent.

The parties have accepted that there were approximately 6 people in the bakery, and so presumably there was some slack to be taken up.

(iv) It is noted that the Plaintiff Employer had suspended the Respondent Employer from around 23rd February 2021 to 11th March 2021 (see Plaintiff Employer's case summary dated 15th May 2023). Presumably the Plaintiff Employer's business managed without the Respondent Employee during that period as it did for a further 20 months until November 2022.

A. The Plaintiff Employer has been unable to credibly point to any actual loss suffered as a result of his actual absence as set out above.
B. Accordingly, whilst the Respondent Employee's refusal to serve his notice period may well have been inconvenient and caused extra work for his managers, it is likely that a genuine pre-estimate of the loss from the same is likely to have been nil, or at best something minimal.

(v) Under the traditional test of *Dunlop*, the above would likely suffice. Triggered on breach, and failing to be a genuine pre-estimate of loss (and thus extravagant and/or unconscionable or excessive), would be sufficient to establish that clause 29 was an unenforceable penalty clause.

(vi) In an employment setting, the instant case would be similar to that of *Giraud* (there was no unique skill set of the employee or small company for the employer as in *Li*). Further, the additional point in *Giraud*, namely that the EAT were concerned that the relevant clause allowed the employer to seek a month's wages, but did not preclude them from seeking more than that, arguably also applies in the instant case.

The contract appears to be silent as to whether, if the Plaintiff Employer's loss from an employee's breach of contract is higher than a month's wages, the employer can seek the higher amount from its employees. From the silence, one might infer that clause 29 is the sole remedy for failure to serve notice, and that no other sum can be claimed. However, at paragraph 21 of the Plaintiff Employer's Second Case Summary Response dated 16th August 2023 the Plaintiff Employer seeks to 'reserve the right' to seek what it says are its actual losses (being the management time referred to at paragraph 20 of the same document). As such the contract in the instant case would be similar to that in *Giraud*). Even though Miss Hercules helpfully clarified during the hearing that the Plaintiff employer would not be seeking to bring any other claim based upon any financial loss claimed for breach of contract, this does not mean that the contract might not permit it.

75. However, the *Cavendish* approach requires me to consider further matters when determining if the clause requiring payment in lieu of notice by the Respondent Employee was a penalty clause:

(i) The penalty was triggered on breach of contract by the Respondent Employee not serving his notice period.

(ii) The fact that the clause does not involve a genuine pre-estimate of loss (as found above) is still relevant, though not decisive on its own.

(iii) The Plaintiff Employer argues, that it has a legitimate interest to protect with clause 29 because it is the island's largest bakery and because the remoteness

of St Helena means that it does not have ready access to temporary or permanent replacement staff. On the face of it such arguments seem attractive, as they did to the Chief Magistrate, but I am not persuaded that this legitimate interest means that the notice clause is not a penalty clause.

(iv) I accept and am sensitive to the difficulties of recruiting and retaining staff in St Helena and the differences from a large labour market such as in the UK. However, that is not determinative. As set out above, the clause is included as standard for most of its 250 employees across many different operations of the Plaintiff Employer, regardless of role, seniority, skills, etc. The only exceptions are for very senior employees as identified above. That supports the argument that clause 29 is not genuinely targeted at each employee to the protect legitimate financial interests of the business but is a largely blanket term designed in part to reduce the inconvenience of short term departures by deterring breach of required notice periods. The clause was primarily deterrent or penal in nature rather than compensatory.

(v) The Respondent Employee was not a critical senior staff member with unique skills or a key employee in a small company, and whom could not be replaced relatively quickly and at no great cost. The failure of the Respondent Employee to serve 1 months' notice may well have been inconvenient for the Plaintiff Employee and its managers, but did not cause any loss, nor the failure of bread supplies on the island. Even if it had, the £912.77 would be an insignificant sum for the Plaintiff Employer, and yet is a significant sum for the Respondent Employee.

76. Further, even if the claims of legitimate interest had been justified, clause 29 would still be unconscionable, excessive and disproportionate to the interests of the Employee because:

(i) While there was inconvenience, no financial loss was suffered by the Plaintiff Employer, and so £912.77 is a sum much in excess of the loss suffered.

(ii) The sum of £912.77 is insignificant to the Plaintiff Employer, but significant for the Respondent Employee.

(iii) Clause 29 has been included as standard for most employees, regardless of their role, seniority, skills etc. Such a clause may be justified for critical or difficult to replace staff, but not across the board and not for the Respondent Employee. Again, it is noted that: the Plaintiff Employee coped when they suspended him and for 20 months thereafter; the notice period of a month shows that the Plaintiff Employer did not think it would be difficult to replace him; and the lack of financial loss supports the fact that he was not replaced for a long time, and then replaced without further trouble.

(iv) Paragraphs 4 to 7 of the Plaintiff Employer's case summary dated 15th May 2023 explain that: the Respondent Employee had been accused of

doing a bad job; evidence from colleagues had been produced in support of those accusations; the Respondent Employee did not trust some of those appointed to work under him (and whose incompetence he thought was getting him into trouble); he had been suspended from work; and he had been given a written warning for gross misconduct immediately before he resigned.

In such circumstances, to require him to return to work for a month on pain of financial loss is disproportionate, and against the interests of the Respondent Employee, but also for his colleagues, for the Plaintiff Employer and potentially for the island whose bakery he would have been expected to help supervise.

(v) Clause 29 is imposed by the Plaintiff Employer in the context of unequal bargaining power between job applicant and the island's largest employer. A job applicant in this context is less likely to have a realistic prospect of negotiating anything other than Clause 29. Although I accept the suggestion from the Plaintiff's CEO at the hearing that the company would be open to negotiation on contract terms with employees, it is unclear that it would be likely to result in a different term. Indeed, it might be that the Plaintiff Employer's practice is to send letters of appointment which simply refer to the Company Terms and Conditions. It may be envisaged that some prospective employees will not have read nor understood them, whatever declarations to that effect are signed.

Is it a just and reasonable clause? Is it proportionate?

77. For the reasons given, the Employer's justification for the payment in lieu of notice clause - the understandable difficulties for an employer in having to source alternative labour at short or no notice in a small labour market - is not sufficient to avoid the characterisation as a penalty clause on the facts of this case. Even though the clause seeks to protect a legitimate interest of the innocent party (the Employer) in the performance of the contract, it is still an unenforceable penalty because it is extravagant or unconscionable (excessive), in that it provides for a remedy which is disproportionate to the interests of the innocent party (of the Employer).

78. I have taken into account, the size and operations of the Employer, the nature of the role filled by the Employee and when such payment in lieu of notice clauses may be imposed in the employment context, particularly bearing in mind the inequalities in bargaining power of the parties when entering into the original employment relationship.

79. The Respondent was a bakery foreman (Foreman Designate (Bread Production)) first and foremost. The role was replaceable and there is no evidence to suggest a replacement was not and / or could not be sourced or was not undertaken and/ or the quota was not met. His role was such that it could be filled despite the small pool of

resources available. The role was not so specialised or so senior to render the performance of the contract null and void.

80. The Plaintiff employer suffered no financial loss as they did not have to pay any wages for the notice period and have proved no other loss of profit or the like. The Respondent's termination of his contract of employment was effected and his employment ended when he tendered his resignation with immediate effect. The activation by the Plaintiff Employer of the payment in lieu of notice clause within this context acted as deterrent and a punishment.

81. Given the facts surrounding the reasons for the Respondent Employee's departure and resignation - that he felt he could not work his notice period because there was a breakdown in trust with the employer who had said he had committed 'gross misconduct', then the operation of the clause was neither just or reasonable nor proportionate as regards the (business) interest of the Employer or interests of the Employee. To operate the penalty clause was therefore unlawful as it was disproportionate and excessive – its primary purpose was to act as a deterrent or punishment rather than to compensate. It was unfair and unconscionable taking into account all the factors set out above including the circumstances where the Employer has not proven any loss and /or that they were unable to fulfil the performance of the contract.

82. In conclusion, I am satisfied that the sum required to be paid by the Employee for not working a month's notice is excessive and disproportionate - it constitutes an unenforceable penalty clause.

Conclusion

83. I find there to be an error of law and material irregularity and injustice in the ruling of the Magistrates' Court because the clause in his employment contract requiring the Respondent to pay one month's salary in lieu of notice was an unenforceable penalty clause.

84. I therefore revise the Magistrates' Court judgment pursuant to section 73(1)(c) and order that the judgment be entered in favour of the Respondent. None of the £912.77 sum in respect of a month's salary is payable by him to the Plaintiff.

85. In light of further written consequential submissions from the parties as to the outcome, this results in the Respondent not owing the £415.57 previously ordered by the Magistrates' Court. Rather my order is that the Plaintiff is to pay the Respondent £497.20 by way of principal sum, after taking into account all matters owing and owed, plus interest at 8% being at 15 February 2024, £116.82. Interest will continue to rise at £0.11 per day thereafter until payment is made. Payment should be made directly by the Employer to the Employee.

86. I repeat my observation in this case that this is a fact specific judgment relating to the specific employee and employer, the particular contract and facts of this case. It is not to be read as meaning that a contract term requiring payment in lieu of notice by employee to employer would never be enforceable in St Helena.

87. Further, this judgment does not affect the enforceability of payment in lieu of notice clauses in favour of the employee – they are not penalty clauses but to compensate an employee for financial loss - the loss of earnings when they would otherwise be entitled to work out a notice period (of whatever length) and receive a salary during that period. If any employer chooses not to require the employee to work out the notice period and simply agree to pay in lieu of notice, then this is a matter for it.

Rupert Jones, The Chief Justice

Dated 23 February 2024