Harding v. Teperoi Timbers Pty. Ltd.

National Court
Kidu C.J.
22 July 1988

Employment law—wrongful dismissal—whether damages for breach of employment contract can include an award for distress, loss of reputation, and embarrassment.
Damages—breach of employment contract—whether damages can be awarded for distress, loss of reputation, and embarrassment
Damages—breach of employment contract—whether it is within the contemplation of the contracting parties that a foreseeable result of a breach of contract will be to cause vexation, frustration, and distress.

Facts:
The plaintiff was wrongfully dismissed, in breach of contract, from his position as the defendant's general manager. Judgment had been entered against the defendant and the only matter before the Court was the assessment of damages. The elements of lost wages, accrued holiday pay, and air fares were not in dispute, and the Court discussed only the plaintiff's claim under the head, general damages, for distress, loss of reputation, and embarrassment.

HELD:
(1) Where at the time of making a contract it is within the contemplation of the contracting parties that a foreseeable result of a breach of contract will be to cause vexation, frustration, or distress then if a breach occurs which does bring about that result, damages are recoverable under that heading. *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488 not followed; *Cox* v. *Philips Industries Ltd.* [1976] 1 W.L.R. 638; [1976] 3 All E.R. 161 applied.
(2) As a "good commonsense conclusion", "in employment contracts there cannot be any doubt that it is the contemplation of the parties that if the employee is dismissed in breach of the contract it is foreseeable that the effect would be to cause him/her to suffer some degree of mental distress, frustration or upset": page 292, line 364.
(3) In light of the meagre evidence of distress, K1,000 (a nominal amount) only would be awarded.

Other cases referred to in judgment:
Addis v. *Gramophone Co. Ltd.* [1909] A.C. 488
Archer v. *Brown* [1984] 3 W.L.R. 350
Athens-Macdonald Travel Service Pty. Ltd. v. *Kazis* [1970] S.A.S.R. 264
Bailey v. *Bullock* [1950] 2 All E.R. 1167
Beswick v. *Beswick* [1967] 2 All E.R. 1197
Cheong Supermarket Pty. Ltd. v. *Percy Muro t/a Gigidu Trade Store* [1987] P.N.G.L.R. 24

Cox v. *Philips Industries Ltd.* [1976] 1 W.L.R. 638; [1976] 3 All E.R. 161
Davis & Co. (Wines) Ltd. v. *Afa-Minerva (EMI) Ltd.* [1974] 2 Lloyds Rep. 27
Ex parte Fewings: In re Sneyd (1883) 25 Ch.D. 338
Falko v. *James McEwan & Co. Pty. Ltd.* [1977] V.R. 447
Hamlin v. *Great Northern Railway Co.* (1856) 1 H. & N. 408; 156 E.R. 1261
Herbert Clayton and Jack Walker Ltd. v. *Oliver* [1930] A.C. 209
Heywood v. *Wellers* [1976] Q.B. 446; [1976] 2 W.L.R. 101; [1976] 1 All E.R. 300
Hobbs v. *London & South Western Railway Co.* (1875) L.R. 10 Q.B. 111; [1874–80] All E.R. Rep. 458
Hodson v. *Independent State of Papua New Guinea* [1985] P.N.G.L.R. 303
Independent State of Papua New Guinea v. *Hodson* [1987] S.P.L.R. 232; [1987] P.N.G.L.R. 241
Jackson v. *Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468; [1975] 3 All E.R. 92
Jarvis v. *Swans Tours Ltd.* [1973] Q.B. 233; [1973] 1 All E.R. 71
Lloyd's v. *Harper* (1880) 16 Ch. D. 290
Marbe v. *George Edwardes (Daly's Theatre) Ltd.* [1928] 1 K.B. 269
Stedman v. *Swan Tours* [1951] 95 Sol. Jo. 727

Legislation referred to in judgment:
Constitution, schedule 2.2
Judicial Proceedings (Interest on Debts and Damages) Act (Ch. No. 52)

Counsel:
L.D. Dacre for the plaintiff
M.J.S. Sevua for the defendant

KIDU C.J.:

Judgment:

In this case I am concerned only with assessment of damages. The question of liability was determined when judgment by default was entered against the defendant on 10 April 1987. This means that, as alleged in the writ of summons, the plaintiff's employment was wrongfully, and in breach of agreement, terminated on 22 January 1985 by the defendant as its general manager.

The plaintiff makes the following claims:

And the Plaintiff therefore claims against the Defendant:

(a) Salary for the month of January, 1985	K1,815.00
(b) Payment for one month's salary in lieu of notice	K1,815.00
(c) Long service leave calculated from the 1st July, 1977 to the 31st January, 1985 at the rate of 6 months' salary for 15 years' service —91 months' service	K5,505.00
(d) Repayment of the shareholders' loan account	
Principal	K2,924.00
Accrued interest	K3,627.00
(e) Reimbursement of repatriation air fares for the Plaintiff and his dependants on cessation of employment	K1,308.00
(f) Accrued holiday pay for the months of November, December and January	K453.00

(g) Leave fares accrued by the Plaintiff but not taken during his employment K7,258.00

(h) Loss of salary calculated from the 1st day of February, 1985 to the 1st day of January, 1986 at the rate of K21,780.00 per annum 11 months at K1815 per month K19,965.00

K44,670.00

Together with interest assessed pursuant to the provisions of the Judicial Proceedings (Interest on Debts and Damages) Act, damages and costs.

[His Honour's review of special damages, claims (a)–(h), which were not in dispute, is omitted.]

I. General Damages

Under this head of damages the plaintiff seeks compensation for distress, *loss of reputation,* and *embarrassment* he suffered as a result of the breach of contract. And the amount he seeks is within the range of K6000 to K10000. He bases his claim on *Hodson* v. *Independent State of Papua New Guinea* [1985] P.N.G.L.R. 303. In that case Los J. awarded the plaintiff the sum of K6000 for "disappointment, distress, the upset and frustration suffered by the breach . . ." of contract. On appeal to the Supreme Court the matter was remitted to his Honour for reassessment of damages: *Independent State of Papua New Guinea* v. *Hodson* [1987] P.N.G.L.R. 241; [1987] S.P.L.R. 232. In respect of the damages for disappointment, distress, upset, and frustration caused by Hodson the reconsideration was ordered because the matter had not been argued by the parties. I was a member of the Supreme Court which entertained the appeal by the State and I said (at 244–245):

> Damages for *distress, frustration, etc* are part of general damages. But the matter was not raised by the plaintiff at the trial. So the appellant was not afforded an opportunity to make submissions on the matter. Section 59 of the Constitution requires that at least fairness be observed. It might be that the K6,000 awarded was the proper amount but the appellant ought to have been given an opportunity to make submissions. There are no actual figures in Papua New Guinea. But in the United Kingdom the amount usually awarded under this head of damages is about £500.00: see *Archer* v. *Brown* [1984] 3 W.L.R. 350; *Cox* v. *Philips Industries Ltd.* [1976] 1 W.L.R. 638 and *Jarvis* v. *Swans Tours Ltd.* [1973] Q.B. 233.
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> It is for the foregoing reasons that I have decided that the assessment of damages ought to be remitted to the learned trial judge for proper assessment.

Barnett J. agreed with me (at 248). The third member of the Court, Kapi Dep. C.J., agreed to have this aspect referred back to the trial judge as it had not been pleaded by the plaintiff and argued at the trial (at 248).

What is the law in respect of damages for injured feelings, distress, frustration, etc. arising from a breach of contract? I have been unable to find any principle of customary law which may assist in the resolution of this aspect of the case. In the absence of such principle I turn to the common law existing on 16 September 1975.

The major case in England on the matter, before the 1970s, was *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488. In this case the House of Lords said, in the

words of the Lord Chancellor (Lord Loreburn L.C., at 491):

> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the *injured feelings* of the servant, *or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.* (My emphasis)

The gist of this judgment is that contract law did not recognize damages for injured feelings, frustration, and the like.

But in 1930 the House of Lords approved an exception in the case of *Herbert Clayton and Jack Waller Ltd.* v. *Oliver* [1930] A.C. 209. Mr. Oliver, an actor, entered into a contract with the appellants to appear at the London Hippodrome and play a leading part in a musical. Mr. Oliver found out the part he was to play was not one of the three leading parts. The appellants refused to recast him and Mr. Oliver declined to appear in the play. He sued for breach of contract. At the trial the jury found for him and awarded him £1000 damages for loss of publicity and for loss of three weeks' salary.

The question which eventually went before the House of Lords was whether an actor who was engaged to act in a theatre and was not allowed so to act, or justifiably refuses so to act, is entitled to damages for loss of enhancement of his reputation or for loss of publicity.

Their Lordships' judgment was delivered by Lord Buckmaster who said (at 220):

> The next question is what was the measure of damage? It is true that as a general rule the measure of damage for breach of contract is unaffected by the motives or manner of its breach. What are known as vindictive or exemplary damages in tort find no place in contract nor accordingly can injury to feelings or vanity be regarded. The action of breach of promise of marriage is an exception to the general rule, for, strictly assessed, the loss to a woman as a husband of a man who declines with insult to marry her might be assumed to be nil, but that is not the way such damages are determined.
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> In the present case the old and well established rule applies without qualification, the damages are those that may reasonably be supposed to have been in the contemplation of the parties at the time when the contract was made, as the probable result of its breach, and if any special circumstances were unknown to one of the parties, the damages associated with and flowing from such breach cannot be included. Here both parties knew that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right.
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> In assessing the damages, therefore, it was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and in assessing those damages they may consider the loss he suffered (1) because the Hippodrome is an important place of public entertainment and (2) that in the ordinary course he would have been "billed" and otherwise advertised as appearing at the Hippodrome. The learned judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarises what I have stated as my view of the true situation. As to the amount, that was for the jury; the damages appear to me extravagant

just as they were in *Marbe's* case [1928] 1 K.B. 269, but they are not so extravagant as to vitiate the verdict.

So the exception to the principle in *Addis* was confined strictly to actors or artistes and the damages apart from loss of salary etc., include damages for *loss of reputation which the actor or artiste would acquire if allowed to appear in the play etc.* The damages excluded *injury to reputation.*

Then a breakthrough came in 1973 in *Jarvis* v. *Swans Tours Ltd.* [1973] 1 All E.R. 71, where the Court of Appeal (Lord Denning M.R., Edmund Davies and Stephenson L.J.J.) held that in a proper case damages for *mental distress* could be recovered in an action for breach of contract. Lord Denning said (at 74–75):

> What is the right way of assessing damages? It has often been said that on a breach of contract damages cannot be given for mental distress. Thus in *Hamlin* v. *Great Northern Railway Co.* (1856) 1 H & N 408 at 411; 156 E.R. 1261 at 1262, Pollock CB said that damages cannot be given 'for the disappointment of mind occasioned by the breach of contract'. And in *Hobbs* v. *London & South Western Railway Co.* (1875) L.R. 10 Q.B. 111 at 122; [1874–80] All E.R. Rep. 458 at 463, Mellor J said that
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> > . . . for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages.
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> The courts in those days only allowed the plaintiff to recover damages if he suffered physical inconvenience, such as having to walk five miles home, as in *Hobb's* case, or to live in an overcrowded house: see *Bailey* v. *Bullock* [1950] 2 All E.R. 1167.
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> I think that *those limitations are out of date. In a proper case, damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort.* One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset, and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities. Take the present case. Mr Jarvis has only a fortnight's holiday in the year. He books it far ahead, and looks forward to it all that time. He ought to be compensated for the loss of it. A good illustration was given by Edmund Davis LJ in the course of the argument. He put the case of a man who has taken a ticket for Glyndbourne. It is the only night on which he can get there. He hires a car to take him. The car does not turn up. His damages are not limited to the mere cost of the ticket. He is entitled to general damages for the disappointment he has suffered and the loss of the entertainment which he should have had. Here, Mr Jarvis's fortnight's winter holiday has been a grave disappointment. It is true that he was *conveyed* to Switzerland and back and had meals and bed in the hotel. But that is not what he went for. He went to enjoy himself with all the facilities which the defendant said he would have. He is entitled to damages for the lack of those facilities, and for his loss of enjoyment.

A similar case occurred in 1951. It was *Stedman* v. *Swan Tours* (1951) 95 Sol. Jo.

727. A holiday-maker was awarded damages because he did not get the bedroom and the accommodation which he was promised. The county court judge awarded him £13.15s. This court increased it to £50.

I think the judge was in error in taking the sum paid for the holiday, £63.45s and halving it. The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get. Looking at the matter quite broadly, I think the damages in this case should be the sum of £125. I would allow the appeal accordingly. [My emphasis]

The other two members of the Court delivered similar judgments.

Jarvis' s case was followed by *Jackson* v. *Horizon Holidays Ltd.* [1975] 3 All E.R. 92 (judgment was delivered in February 1974). In this case it was held once again that a person may recover damages for discomfort, vexation, and disappointment suffered by reason of breach of contract, and further that such damages could be recovered by him for his wife and children suffering the same. Lord Denning M.R. (with him Orr and James L.J.J. agreed) said (at 94–96):

In *Jarvis* v. *Swan Tours Ltd.* [1973] 1 All E.R. 71 it was held by this Court that damages for the loss of a holiday may include not only the difference in value between what was promised and what was obtained, but also damages for mental distress, inconvenience, upset, disappointment and frustration caused by the loss of the holiday. The judge directed himself in accordance with the judgments in that case. He eventually awarded a sum of £1,100. Horizon Holidays Ltd appealed. They say it was far too much. The judge did not divide up the £1,100. Counsel has made suggestions about it. Counsel for Horizon Holidays suggests that the judge gave £100 for diminution in value and £1,000 for the mental distress. But counsel for Mr Jackson suggested that the judge gave £600 for the diminution in value and £500 for the mental distress. If I were inclined myself to speculate, I think the suggestion of counsel for Mr Jackson may well be right. The judge took the cost of the holidays at £1,200. The family only had about half the value of it. Divide it by two and you get £600. Then add £500 for the mental distress.

On this question a point of law arises. The judge said that he could only consider the mental distress to Mr Jackson himself, and that he could not consider the distress to his wife and children. He said:

> ... the damages are the Plaintiff's; that I can consider the effect upon his mind of his wife's discomfort, vexation and the like, although I cannot award a sum which represents her vexation.

Counsel for Mr Jackson disputes that proposition. He submits that damages can be given not only for the leader of the party, in this case, Mr Jackson's own distress, discomfort and vexation, but also for that of the rest of the party.

We had an interesting discussion as to the legal position when one person makes a contract for the benefit of a party. In this case it was a husband making a contract for the benefit of himself, his wife and children. Other cases readily come to mind. A host makes a contract with a restaurant for a dinner for himself and his friends. The vicar makes a contract for a coach trip for the choir. In all these cases there is only one person who makes the contract. It is the husband, the host or the vicar, as the case may be. Sometimes he pays the whole price himself. Occasionally he may get a contribution from the others. But in any case it is he

who makes the contract. It would be a fiction to say that the contract was made by all the family, or all the guests, or all the choir, and that he was only an agent for them. Take this very case. It would be absurd to say that the twins of three years' old were parties to the contract or that the father was making the contract on their behalf as if they were principals. It would equally be a mistake to say that in any of these instances there was a trust. The transaction bears no resemblance to a trust. There was no trust fund and no trust property. No, the real truth is that in each instance, the father, the host or the vicar, was making a contract himself for the benefit of the whole party. In short, a contract by one for the benefit of third persons.

What is the position when such a contract is broken? At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, *what damages can he recover? Is he limited to his own loss? Or can he recover for the others?* Suppose the holiday firm puts the family into a hotel which is only half built and the visitors have to sleep on the floor? Or suppose the restaurant is fully booked and the guests have to go away, hungry and angry, having spent so much on fares to get there? Or suppose the coach leaves the choir stranded half-way and they have to hire cars to get home? None of them individually can sue. Only the father, the host or the vicar can sue. He can, of course, recover his own damages. But can he not recover for the others? *I think he can. The case comes within the principle stated by Lush LJ in Lloyd's* v. *Harper.* (1880) 16 Ch. D. 290 at 321:

> *... I consider it to be an established rule of law where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.*

It has been suggested that Lush LJ was thinking of a contract in which A was trustee for B. But I do not think so. He was a common lawyer speaking of the common law. His words were quoted with considerable approval by Lord Pearce in *Beswick* v. *Beswick* [1967] 2 All E.R. 1197 at 1212. I have myself often quoted them. I think they should be accepted as correct, at any rate so long as the law forbids the third persons themselves to sue for damages. It is the only way in which a just result can be achieved. Take the instance I have put. The guests ought to recover from the restaurant their wasted fares. The choir boys ought to recover the cost of hiring the taxis home. There is no one to recover for them except the one who made the contract for their benefit. He should be able to recover the expense to which they have been put, and pay it over to them. Once recovered, it will be money had and received to their use. (They might even, if desired, be joined as plaintiffs.) If he can recover for the expense, he should also be able to recover for the discomfort, vexation and upset which the whole party have suffered by reason of the breach of contract, recompensing them accordingly out of what he recovers.

Applying the principles to this case, I think that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr Jackson himself. But when extended to his wife and children, I do not think it is excessive. People look forward to a holiday. They expect the promises to be fulfilled. When it fails, they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can. I see no reason to interfere with the total award of £1,100.

I would therefore dismiss this appeal. [My emphasis]

As is obvious from the judgment, *Jackson*'s case extended the damages to third parties covered under the agreement.

The cases referred to thus far are pre-Independence ones. Since Papua New Guinea gained its independence there have been other cases which have followed *Jarvis* and *Jackson*. These cases are *Cox* v. *Philips Industries Ltd.* [1976] 1 W.L.R. 638; *Heywood* v. *Wellers* [1976] 2 W.L.R. 101. (There are some Australian cases—*Athens-Macdonald Travel Service Pty. Ltd.* v. *Kazis* [1970] S.A.S.R. 264; *Falko* v. *James McEwan & Co. Pty. Ltd.* [1977] V.R. 447.)

The post-Independence cases from England are, of course, not binding on us: see schedule 2.2 of the Constitution. But the fact of the matter is that these authorities are merely reiteration or extension of the *Jarvis* and *Jackson* principles and I see no reason why they should be rejected. *Cox* v. *Philips Industries Ltd.* (decided in October 1975) is a case of an employee being relegated to a position of lower responsibility. This breach of contract by his employee exposed him to "a good deal of depression, vexation and frustration and indeed led to ill-health".

> The question is: can I give him damages in respect of those matters for that breach of contract? I have considered *Jarvis* v. *Swan Tours Ltd* [1973] Q.B. 233, which is referred to but, I think not particularly helpfully in the later case of *Davis & Co (Wines) Ltd* v. *Afa-Minerva (EMI) Ltd* [1974] 2 Lloyds Rep. 27.
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> In my judgment this is a case where it was in the contemplation of the parties in all the circumstances that, if that promise of a position of better responsibility without reasonable notice was breached, then the effect of that breach would be to expose the plaintiff to the degree of vexation, frustration and distress which he in fact underwent.
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> I have had very helpful submissions from Mr Eady on this matter suggesting that damages for this kind of loss are really only appropriate when you lose a relative and the funeral procession does not turn up at the right time, or you acquire a wife and a photographer does not turn up at the right time, or you do not have the holiday you are promised. But I can see no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach. Doing the best I can, because money can never really make up for the mental distress and vexation—this is a common problem of course in personal injury cases—I think the right sum to award the plaintiff under that head is the sum of £500. (Lawson J. at 644)

These cases set down the general principles that "where at the time of making a contract it is within the contemplation of the contracting parties that a foreseeable result of a breach of contract will be to cause vexation, frustration, or distress then if a breach occurs which does bring about that result, damages are recoverable under that heading . . .": see *Heywood* v. *Wellers* (*supra*).

Does this case come within the ambit of this principle? The question is posed because it is not for every breach of contract that damages can be recovered for mental distress, frustration, upset, etc.

I consider that in employment contracts there cannot be any doubt that it is the contemplation of the parties that if the employee is dismissed in breach of the contract it is foreseeable that the effect would be to cause him/her to suffer some degree of mental distress, frustration, or upset. This is only a good commonsense conclusion. I think in this case general damages are recoverable.

What should the appropriate compensation be? As Mr. Sevua points out in his submission, the only real evidence of the degree of distress caused to the plaintiff appears in the following, taken from his evidence-in-chief:

Question: What do these letters tell you?
Answer: I've lost all my shares and I became upset.

So in view of this meagre evidence of distress etc., I consider that the plaintiff should be entitled only to a nominal sum and this I calculate as K1000, a sum similar to the £500 so far awarded in the English jurisdiction. I think it should be stated that the more serious and intense the degree of mental distress and frustration is, the higher the amount of damages that will be awarded.

II. Interest

There was a fixed 10% interest on the money in the loan account and this has persisted to date. After the date of this judgment the interest should remain the same.

In *Cheong Supermarket Pty. Ltd.* v. *Percy Muro trading as Gigidu Trade Store* [1987] P.N.G.L.R. 24, Bredmeyer J. said (at 29):

> If a debtor has contractually agreed under say a bank loan to pay interest at 15 per cent that rate terminates on entry of judgment, *Ex parte Fewings; In Re Sneyd* (1883) 25 Ch. D. 338. Thereafter interest runs at the prescribed rate of 8 per cent under s 3 [of the *Judicial Proceedings (Interest on Debts and Damages) Act* (Ch. No. 52)] "unless the court otherwise orders". That is because the entry of judgment terminates the bank debt and transforms it into a judgment debt. In the example given the bank would have good grounds for applying to the court under s 2 for an order to fix 15 per cent as the post-judgment interest rate.

In this case there is every justification not to alter the post-judgment interest rate on the loan account. The money clearly belonged to him. It was clearly wrong for the plaintiff to have deprived him of it for so long—a period now of over three years. There was, in my view, no legal basis for the deprivation. So I see no reason to reduce the post-judgment interest on the loan account to 8% per annum.

As to the rest of the damages I consider that as the date of the breach of contract is clear, 22 January 1985, the interest should run from that date at the prescribed rate of 8% per annum to the date of judgment and thereafter.

Judgment is entered for the plaintiff as follows:

1.	Long service leave pay	K5,505.00
2.	Salary for 22 days (1.1.85–22.1.85)	K1,425.00
3.	One month's pay in lieu of notice	K1,815.00
4.	Repatriation fares	K1,308.00
5.	Loss of salary	K9,075.00

6.	Accrued holiday pay (November and December 1984 and January 1985)	K453.00
7.	Reimbursement for share monies paid	K7,500.00
8.	Damages for distress, frustration, and general disappointment	K1,000.00
	Subtotal	K28,081.00
	Interest at 8% from 22 January 1985–22 July 1988	K6,739.44
	Total	K34,820.44
9.	Reimbursement of capital and interest on loan account as at date of judgment	K8,181.00
	Grand Total	K43,001.44

Costs are awarded but will have to be taxed.

Judgment for K43,001.44.