

IN THE HIGH COURT OF SIERRA LEONE
(INDUSTRIAL & SOCIAL SECURITY DIVISION)

BETWEEN:

RALPH HARDING - PLAINTIFF

AND

UNION TRUST BANK LIMITED - DEFENDANT

Counsel:

M. Lisk (Ms). for the Plaintiff

M. Conteh (Ms) & A. Turay (Ms). for the Defendant

**JUDGMENT DELIVERED THIS 16TH DAY OF NOVEMBER 2022 BY HONOURABLE
MRS. JUSTICE JAMESINA E. L. KING J. A.**

1. The Plaintiff herein, Ralph Harding instituted an action against the Defendant Union Trust Bank by a Writ of Summons on 17th February 2021 for the following:

1. An order that the Plaintiff is entitled to his end of service benefits and all other entitlements.
2. Payment of the Plaintiff's end of service benefit under the period of his employment from 2012 to 2020 as well as other entitlements.
3. Payment of all the Plaintiff's N.A.S.S.I.T. (National Association Social Security Insurance Trust) contribution before he attained the age of sixty (60).
4. Any further relief(s) that this Honourable Court may deem fit and just in the circumstances.
5. Cost(s) of the action.

THE PLEADINGS

The Plaintiff's Particulars of Claim

2. In his particulars of claim, the Plaintiff averred he was an employee of the Defendant, a Banking Institution and was employed as Head Internal Control responsible for the Department of Internal Control and subsequently as Auditor and Compliance Officer for a period totaling 8 (eight) years. He further stated that his employment letter dated 17th January 2012 was on a contractual basis for three years effective 23rd January 2012 which stipulated that his appointment will not be governed by the Terms and Conditions of Service applicable to the Defendant's staff and that he will not enjoy any terminal or other benefits generally applicable to staff of the bank.
3. The Plaintiff further averred that he considered this stipulation to be contrary to the Employers and Employed Act Cap 212 of the Laws of Sierra Leone which states that workers exceeding nine (9) months service to their employers must not be considered contract workers but as general staff. He referred to a letter received by the Defendant on 22nd November 2018 from the Ministry of Labour and Social Security notifying them that retaining contract workers for a period exceeding nine months was contrary to the Labour Laws of Sierra Leone and requiring it to regularize the status of all contract staff who have worked for more than nine months, to pay their contributions to N.A.S.S.I.T. and to stop evading P.A.Y.E. (Pay as You Earn) tax.
4. The Plaintiff also averred that upon expiration of his employment contract which was in itself already expired because he had been working for eight (8) years instead of 3 years stated in the contract, he did not receive any end of service benefits or other entitlements owed to him as a trustworthy and loyal staff for the past eight (8) years. He further averred that on 18th August 2020 he wrote a complaint to the Commissioner of Labour enlisting their help in obtaining his end of service benefits and other entitlements.
5. On 24th September 2020 the Ministry of Labour and Social Security wrote a letter to the Defendant requiring payment of the Plaintiff's end of service benefit and other entitlement. It also reiterated that all employe[es] serving the same employers for a period exceeding nine (9) months could no longer be

considered casual or contract employees but general employees and also that the Plaintiff's contract of employment should have been vetted by the Ministry and recommended that gaps in the Plaintiff N.A.S.S.I.T. contribution before he attained the age of sixty (60) be filled.

6. The Plaintiff referred to the response of the Defendant through their Solicitors to the Commissioner of Labour on 24th September 2020 in connection with his end of service benefits, they claimed that the Plaintiff was neither a servant nor an employee and is not entitled to any end of service benefit or other entitlements, and regarding the NASSIT contributions they stated that they were not required to make any such contribution because the Plaintiff was already a pensioner.
7. The Plaintiff in conclusion averred that he was an employee of the Defendant under a contract of employment or contract of service serving faithfully for eight (8) years and entitled to end of service benefits and other entitlements and NASSIT contribution before he attained 60, regardless whether he was already a pensioner or not. The Plaintiff averred that he considered the action of the Defendant to be unfair and unjust given his years of loyal and faithful service.

Defence of the Defendant

8. The Defendant entered an appearance and filed a Defence to the Claim. Their defence consisted of denials and admissions. In summary, it denied the Plaintiff's particulars of claim regarding his employment status and averred that he was an independent contractor who directly reported to the Board of Directors of the Defendant whose appointment was not governed by the terms and conditions of service for staff of the bank as evidenced by letter dated 17th January 2012.
9. Save for its admissions that the Plaintiff occupied the positions of head Internal Control Department, and Auditor and Compliance Officer for eight years as stated in his claim, the Defendant denied that he was an employee of the Defendant and averred that he was an independent contractor whose services were engaged on a contractual basis, for a senior management position that is above supervisory level. It further stated that the "contract of service" does not fall under the legal definition of a "contract of service" contained in the provisions of section 2 of the Employers and Employed Act Cap 212.

10. Regarding the non-payment of end of service benefits and other entitlements, the Defendant averred that the contract between the Defendant and Plaintiff expressly stated all the terms and conditions which the parties intended to be bound by. It also stated that upon expiration of the three years' initial contract dated 17th January 2012 there were subsequently yearly renewals evidenced in 5 letters listed therein with dates spanning from 28th January 2015 – 18th March 2019.
11. The Defendant also referred to a Memorandum from the Plaintiff dated 22nd January 2020 addressed to Mrs. Kultumi Massally its Director Human Resource Department giving the Defendant two (2) days' notice of his intention not to renew his contract of service, and in which he referred to a letter of 18th March 2019, his last letter of renewal.
12. The Defendant admitted the exchange of letters between the Ministry and itself. The Defendant averred that the Plaintiff contract of employment dated 17th January 2012 clearly outlines his terms and conditions which included, inter alia that he was not entitled to any terminal or other benefits applicable to the Defendant's other members of staff.

Reply to Defence

13. The Plaintiff filed a Reply to the Defence. It further stated that by letter dated 17th January 2012 he was a contractual staff for three years whose contract had expired on 23rd January 2015, Defendant kept him on the job giving him more responsibilities proving he was a staff at the Bank. The Plaintiff averred that by sections 4 and 8 of the Employers and Employed Act Cap 212 a contract written or unwritten shall not be binding for over a period of six months since it was entered into thereof.
14. Plaintiff also avers that he was a general staff as his contract had expired but was kept in the Bank and given responsibilities for the past eight (8) years and so share same privileges as other general staff. It further averred that the Employers and Employed Act Cap. 212 and NASSIT Act of 2001 must be adhered to by the Bank.

The Trial

15. Directions for trial were granted by this Court on 2nd July 2021 and both sides complied and trial commenced.

Case for the Plaintiff - Evidence

16. The only witness was the Plaintiff, Mr. Ralph Edmond Donald Harding, who told the Court that he was a retired banker and identified his witness statement which was tendered pursuant to an application under Order 30 Rule 9 (a) of the High Court Rules 2007 which was granted. His statement was in similar terms with his particulars of claim and portions of his statement will be referred to later in this decision.
17. In addition to his witness statement, he further told the Court that his immediate predecessor the Compliance Officer is a person he knew and whom the terms and conditions applied to and he had a fixed term. His predecessor had the same job description as him and he was subject to the same terms and conditions of service.
18. The Plaintiff was cross examined. During cross-examination, he confirmed he worked for 8 years holding the position as Head Internal Audit Manager in charge of Kono or Relief Manager and in 2013 he was appointed as Head of Credit, 2014, 2nd Manager, Small Medium Enterprises, later sent to Audit and later elevated to Compliance Officer until he severed the relationship.
19. In answer to questions, he told the court that as Compliance Officer he was charged with checking benefits for employees. He used the handbook which is the Bank's conditions of service to make sure that the calculations are as per the handbook and the leave issues and loans are deducted. He answered that he was fully involved in all of the process. Asked whether he liaised with the Ministry of Labour during this period, the witness responded that he did not have cause to liaise with them and that the Human Resource Officer did so. The information he checked was purely what was in the Bank's handbook.
20. He was shown the letter of 17th January 2012 and confirmed his signature on it at page 13. He was asked to and did read what is stated on page 13. What he read related to his acceptance of the terms of employment dated 20/01/2012. He was asked to read the 3rd paragraph at page 12 and said it was correct that he had expressly agreed not to be bound by the terms and conditions of service

for staff. He answered that he was not familiar with the Collective Bargaining Agreement negotiated by the trade group in the Ministry of Labour. He responded that to a fair extent he was familiar with the term below supervisory level.

21. He explained that when there is an issue he will always refer to the terms of the Collective Bargaining Agreement (CBA). Asked whether he is aware to which class of employees the CBA is applicable to, he responded that it applied across the board. He agreed that he mentioned in his statement that he left his former employers before going to the Defendant at the age of 55. Asked whether he is aware of the term voluntary or early retirement, he responded that you can go for voluntary retirement after you have achieved a particular age. He did not have the right figure (age). Asked whether he applied to NASSIT for early or voluntary retirement, he responded that was not to his knowledge. He was asked other questions about NASSIT, and confirmed he had received his benefits. He also confirmed that during his time with the Defendant no deductions were made as contributions to NASSIT because he had already received voluntary retirement benefits from NASSIT.

22. He was not re-examined. That was the case for the Plaintiff

Case for the Defendant - Evidence

23. Two witnesses testified on behalf of the Defendant. The first witness was Kultumi Umu Massally (Mrs.), Director of Human Resources at the Defendant Bank. She told the Court she was aware of a matter between the parties and deposed to a witness statement. She was shown page 36 & 37 of the Court Bundle and identified her signature on the statement signed on 2nd November 2021. Application for her witness statement to form part of her evidence was granted.

24. In addition to her witness statement, she told the court that she worked for the Defendant for 27 years and worked closely with the Plaintiff during that time. Some of the functions they worked closely on was that as the Internal Auditor and Compliance Officer he had to verify the calculations of end of service benefits for staff, monthly salary payment for staff and other benefits they were entitled to. She stated that the Plaintiff was supervised by the Board of Directors (BOD). He reported directly to the Board. The CEO also worked with the Plaintiff as he worked with Internal Audit.

25. As part of management, the witness said she worked with the CEO and the BOD. Other staff regarded as part of management included the Executive Director, other Directors in the bank, the Internal Auditor who was head of Internal Audit, the Compliance Office and other heads of department who are management. The management team supervised all other employees. The NASSIT contributions of the Plaintiff were not paid and she was aware that he was a voluntary pensioner. As a voluntary pensioner before he came to UTB, the Defendant, the Plaintiff was already a pensioner therefore they did not deduct any payment from his salary to NASSIT, neither did they contribute as a Bank to NASSIT on his behalf.
26. The witness was cross-examined. Responding to Counsel on what basis the Bank determined whether or not a member of staff is subject to the terms and conditions of service, she responded that they had 2 categories of employees, the permanent employees and contract employees. There are certain senior positions that are given a contract with different terms of their engagement and this is a contract agreed with the employee.
27. Whether the Plaintiff's predecessor who was head of Internal Audit Mr. Thomas Legg was on a fixed term contract and subject to the terms and conditions of staff the witness said she will have to check. Whether contract staff generally are excluded from the terms and conditions for staff she responded that they were. She confirmed that the Plaintiff provided services as a contractor. She also told the court that the Plaintiff's contract renewal did not make him to be classified as an employee and not as a contractor because he was initially given a contract for 3 years and it was stated that he would not be subject to the terms and conditions of staff and he had his terms and conditions attached to that appointment.
28. She was shown the letter from the Ministry of Labour at page 27 -28 of the Bundle, specifically page 27 point 3, page 29 & 30 letter signed by the witness at point 3 at page 30. The witness stated that they looked at Mr. Harding's position at the Bank as a Senior Manager at the Bank and this answer in point 3 related to other staff other than Mr. Harding.
29. She confirmed that other Senior Management Staff are covered by the terms and conditions of staff. These are the Executive Director, some Directors, Managers and Heads of Departments. Asked whether all senior management staff are covered by the staff terms and conditions of service, her answer was

no. Further asked whether those not covered by the Bank's terms and conditions are on fixed term contract, she said yes they were on fixed term contract.

30. During re-examination, the witness stated that the terms and conditions of service are those stated in the Staff manual of the Bank.

31. On 21st February 2022, after the testimony of the first witness of the Defendant, the Plaintiff's Counsel informed the Court that the Plaintiff had withdrawn his case for NASSIT contributions as claimed in the statement of claim. As a result, Counsel for the Defendant informed the Court that it will not proceed with its third witness from NASSIT.

32. The next witness for the Defendant was Salimatu Gbanyawai who worked at the Defendant Bank as an Assistant Manager at the Human Resources Department. She had worked for the institution for 25 years. She was shown her witness statement at page 39 of the Bundle and identified her signature. Her witness statement was admitted to form part of her evidence pursuant to an application under the High Court Rules already mentioned above.

33. In addition to her witness statement, she told the Court that she knew the Plaintiff as they all worked together at the Defendant Bank. Upon leaving the institution he (the Plaintiff) was a Compliance Officer at the Bank. Initially he was Head of Controls Department. The Plaintiff signed and executed a contract with the Bank and she identified the contract at page 12 of the Court Bundle. It is a contract between the Plaintiff and the Bank. She was asked and did read paragraph 3 and explained that (the clause that the terms and conditions of service/terminal benefits is not applicable to the Plaintiff), is only limited to contract staff of the Bank and does not apply to all employees. She concluded that the Plaintiff was a contract staff and that during his tenure as contract staff, he reported to the BOD.

34. During cross-examination, the witness was asked to explain the Bank's Policy. She told the Court that contract staff are not governed by the terms and conditions of service. Asked whether it was a written policy or practice, she responded that it is normally stated in the offer letter which the employees accept. Whether the Bank had a written policy on end of service benefits, she stated that upon recruitment, a staff is issued with the terms and conditions of service apart from the contract staff and the computation of end of service benefits is on the terms and conditions of service.

35. When asked about the Plaintiff's predecessor Compliance Officer, she responded that he was governed by the terms and conditions of service. Asked why the terms and conditions applied to him even though he was carrying the same duties as the Plaintiff, she responded that (the Plaintiff), Mr. Harding was recruited as a contract staff as head of internal audit. Asked why he continued as a contract staff when he was appointed a Compliance Officer and not as an employee governed by the terms and conditions, she responded that (was the case) because his initial employment was on a contractual basis.
36. Counsel put to the witness that the Plaintiff was now been offered a different job, and the witness responded that he was enjoying additional facilities when his position was changed from Head of Internal Control to Compliance Officer. Asked what were those additional facilities she responded that she could not recollect. Asked whether those facilities were enough for him not to be made an employee, she responded that she did not say that.
37. She was shown page 27 – 28 of the Court Bundle which was a letter to the bank from the Ministry of Labour dated 4th October 2020, 2nd page and was asked what changes has the Bank introduced as a result of this letter. She responded that it is something that is being worked on. She agreed that nothing had changed as it is still a work in progress. She admitted that she still considered contract employees who worked for 9 months or more as contract staff.
38. She was not re-examined and that was the case for the Defendant.

Summary of submissions by Counsel for the parties

39. Both Counsel submitted written addresses on the facts and the law. They also provided the Court with the authorities they relied on which is commendable.

Submissions for the Plaintiff

40. Counsel for the Plaintiff referred to the letters from the Defendant to the Plaintiff and from the Ministry of Labour and Social Security to the Defendant. Counsel emphasized the statement of the Ministry inter alia that all employees who have served the same employer for a period of over 9 months are not considered a casual employer. She referred to the Plaintiff's evidence during cross-examination that it was his understanding that the Commercial Insurance and Accounting Trade Group Agreement 2016 applied across board, to those above and below supervisory level. Counsel pointed out that despite

the fact that the Defendant relied and referred to both its terms and conditions of service for staff and the Commercial Insurance and Accounting Trade Group Agreement 2016, it has not tendered these as documentary evidence and therefore the Court is unable to consider the detail of these documents.

41. On the law Counsel submitted that the two main issues are whether or not the Plaintiff was an employee or an independent contractor and secondly if he was indeed an employee whether or not the express term of the Plaintiff's letter of appointment which states "*your appointment will not be governed by the terms and conditions of service for staff of the bank, nor will you enjoy any terminal or other benefits generally applicable to staff*" should be excluded as an unfair contract term.
42. Counsel submitted that an independent contractor is a self-employed person who is engaged for his specialist knowledge or skills and hallmarks included that: he must submit invoices for work carried out; be responsible for his own tax and NASSIT contributions, is free to work for others at the same time and can ask someone of his choice to do the work he is contracted to do; determine from where and how the work is done so long as it is submitted /completed within the time frame specified and he uses his own equipment/tools, etc etc to do the work.
43. She relied on the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* 1968 2 QB 467 which sets out factors to determine whether or not a person is an employee as opposed to an independent contractor. These are mutuality of obligations, worker's obligations to work and the employer's obligation to pay for the work; i.e. the work must be carried out exclusively by the worker who has no right to substitute any other individual at a location and for a time period determined by the employer; sufficient degree of control by the party for whom the work is being carried out over the individual doing the work and consistency of the other provisions of the contract with it being a contract of employment.
44. Counsel submitted that on the control test, relevant considerations include the extent to which the individual is subordinate to the employer, for example is he subject to appraisals and disciplinary procedures; is the individual integrated into the business; does he have his own desk, business cards and email address?; Does he provide his/her own tools and equipment?; what training and supervision is provided?; is the individual permitted to take on

other work; and how senior is the individual? As the more senior, the less control the employer would be expected to have over him.

45. She further submitted that control is not enough to determine employment status as consistency of the other provisions of the contract with it being a contract of employment is also important. Other relevant factors besides control include: the extent of the financial risk assumed by the individual, such as the risk of making a loss on the contract; whether the individual supplies his own insurance cover; how much the individual invests in and manages the business; and whether the individual is entitled to typical employee benefits such as a salary and entitlement to holiday and/ or sick pay.

46. She concluded that based on the evidence adduced on the detailed description of the duties of the Plaintiff during his eight years' association with the Defendant, none of which are disputed, the relationship satisfies the "employee test".

47. Relying on the statutory provisions in other jurisdictions namely, section 9 of the Protection of Employees (Fixed Term Work) Act 2003 applicable in the Republic of Ireland, section 8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 applicable in England and article 18 of Japan's Labour Contract Law 2012 as well as the position taken by the Ministry of Labour and Social Security, Counsel submitted that there was a need to give fixed-term employees' rights comparable to those of permanent employees after a sufficient period of time elapsed and not to subject them to employment on terms that are less favourable than those that apply to permanent employees.

48. Counsel referred to the case excluding the Plaintiff from the status of permanent employee to his detriment which automatically excludes him from entitlement to end of service benefits, despite the fact that he had an exemplary unbroken eight-year employment relationship and submitted that the Court should apply statutory principles in Ireland, England and Japan in Sierra Leone as a matter of fairness even though Sierra Leone's legislation contains no provision similar to those in the above mentioned countries.

49. Counsel also referred to article 18 of Japan's Labour Contract Law 2012 which gives employees the right to apply for the status of permanent employee after five years of continuously-renewed contracts.

terminal or other benefits usually offered to permanent staff." Counsel also highlighted the Plaintiff's testimony that at the time of executing his referred contract of employment he "was satisfied with the remuneration package that I was offered", and that he appended his signature on the letter dated 17th January and expressly agreed not to be bound by the terms and conditions of service for staff of the Defendant.

56. Counsel referred to the evidence of the two witnesses of the Defendant about the terms and conditions of the Plaintiff's employment as well as paragraph 3 of the Plaintiff's witness statement which clearly outlined all that the Plaintiff was entitled to without any added benefits. Counsel further submitted that the provisions of the Employers and Employed Act Cap 212 of the Laws of Sierra Leone 1960 and amendments do not apply to the Plaintiff since he was a member of staff above supervisory level. Both witnesses of the Defendant gave evidence to the effect and further stated that the Plaintiff enjoyed additional facilities when his position was changed from Head of Internal Control to Compliance Officer.

57. Counsel referred to the rule in *L'Estrange v F. Graucob Ltd* [1934] 2 KB 394: which stipulates that when a party signs a contract knowing it to be a contract which governs the relations between them, such party is deemed to be bound by the terms of the contract. Counsel submitted that upon appending his signature to exhibits D1 and D2 (Offer letter of employment), the Plaintiff became bound by the terms and conditions of service stipulated therein. Counsel referred to the words of Lord Denning J (as he then was) in *Curtis v Chemical Cleaning Dyeing Co. Ltd* 1951 1 All ER 631 and submitted that the Plaintiff's signature "is irrefutable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

58. Counsel submitted that exhibits D1 and D2 cannot be binding if the Plaintiff establishes one of three defences to the rule in *L'Estrange v F. Graucob Ltd* supra which are fraud, misrepresentation or non est factum. Counsel referred to the evidence to the effect that the Plaintiff expressly agreed not to be bound by the terms and conditions of service for staff of the Defendant.

59. Counsel submitted that the Collective Bargaining Agreement cannot bind the Plaintiff as it only bind workers below supervisory level within a sector and the Plaintiff was not a worker below supervisory level. Counsel submitted that

based on the evidence the Plaintiff directly reported to the Board of Directors of the Defendant. Counsel submitted that the Plaintiff was neither a servant nor an employee as defined in the Employers and Employees Act, Cap 212 as the definition clearly depicts workers below supervisory level.

60. Counsel finally submitted that the interpretation section of the Regulation of Wages and Industrial Relations Act, No 18 of 1971, a “worker” is defined as “any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise expressed or implied, oral or in writing and whether it be a contract of service or a contract concerning learning or a contract personally to execute any work or labour and include an outworker, and an employee of the Government other than a public officer, but does not include any person comprised in or responsible for the management of any undertaking or a supervisor”.

61. It is the Defendant’s case that the Plaintiff is not entitled to payment of end of service benefits and other entitlements since his contract of service was not governed by the terms and conditions of service for staff of the Defendant and he is legally bound by the terms and conditions expressly stated in his letter of appointment.

Analysis & Decision

62. The Plaintiff withdrew his claim for NASSIT payment contributions by letter to the Defendant’s Solicitors dated 9th February 2022 copied to the court and at the Court hearing on 21st February 2022. The Plaintiff’s claim that was only outstanding was his claim for end of service benefits for the period 23rd January 2012 to 30th January 2020.

63. The issues for the determination of this Court are as follows:

- i. Whether the Plaintiff is an employee or independent contractor?
- ii. If the Plaintiff is an employee whether he is entitled to end of service benefits as claimed?

Whether the Plaintiff is an employee or independent contractor?

64. The Plaintiff maintained he was an employee of the Defendant. The Defendant in its defence denies that the Plaintiff was an employee and states that he was an independent contractor (see paragraph 8 & 9 above) confirmed by the

evidence of Mrs. Massally. The Defendant also stated that the Plaintiff had a contract of service but made a distinction that he was a fixed term contract employee and not a permanent employee.

65. At this stage it is important to set out in full the initial offer of employment which created the relationship between the parties. The Plaintiff offer of employment dated 17th January 2013 reads as follows:

17th January 2012

Mr. Ralph Harding

7 Dadley Street

Regent Village

Freetown

Dear Mr. Harding

RE: OFFER OF EMPLOYMENT

We are pleased to offer you appointment as head, Internal Control in the bank on a contractual basis for 3 (three) years effective 23rd January 2012 or any date you wish to report for duty, but not later than one calendar month from the date of this letter.

As Head, Internal Control, you will be directly responsible for the Department of Internal Control whose functions include the strategic direction and management of the bank's audit functions as spelt out in the bank's organogram. You will report directly to the Board of Directors through the Chief Executive Officer but you are also expected to work closely with the rest of Management and Staff of the bank.

The annual remuneration for your services will be a composite gross package of Le80,000,00 (Eighty Million Leones). Your appointment will not be governed by the Terms and Conditions of Service for staff of the bank, nor will you enjoy any terminal or other benefits generally applicable to staff. You will however be entitled to facilities and allowances applicable to Senior Management while on official mission

of the bank and 25 (twenty - five) working days leave for every complete year of employment.

Before the contractual terminal date, this appointment can be terminated by either party by a written notice of 3 (three) months or payment of 3 (three) months basic salary in lieu of notice.

You are required to sign a copy of this letter which confirms the basis of your contract and as your explicit agreement to the terms and conditions of your appointment.

On behalf of the Management Staff we wish to congratulate you on this appointment and wish you a very successful tenure with the banks.

Yours sincerely

For Union Trust Bank Ltd

J Sampha Koroma

Chief Executive Officer.

I HEREBY ACCEPT THE OFFER OF EMPLOYMENT ON THE TERMS AND CONDITIONS STATED ON THIS LETTER.

I WISH TO REPORT FOR DUTY ON 23/01/2012.

Signature [signed by the Plaintiff]

Date 20/01/2012"

66. By his signature on the above letter dated, the Plaintiff, Mr. Harding accepted the offer of employment on the terms and conditions stated on the letter. The said appointment was renewed for one year effective 23rd January 2015 "on the same terms and conditions of the original appointment" save for notice of termination which was one month or salary in lieu of notice. The acceptance of extension of appointment was duly signed by the Plaintiff. It was also renewed or extended on the same terms in 2016. By a memorandum dated September 22, 2016 from the Bank, with the added responsibilities given to the Plaintiff, his contract compensation was adjusted to a gross of Le120,000,000 per annum with effect from 1st October 2016. In 2017, 2018,

2019, the Plaintiff accepted in writing the extension of appointment on the same basis.

67. I have considered the entire evidence adduced, the positions held by the Plaintiff in the Defendant bank, his duties, postings, his remuneration packages as highlighted by the Plaintiff during his evidence, annual appraisals, increment and bonuses given to him by the Defendant, memos given to him regarding his work, and based on the hallmarks of an independent contractor as well as the four-stage test expounded in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* supra, and highlighted earlier, I am fully convinced that the Plaintiff was not an independent contractor.

68. Furthermore, the position of the Plaintiff and his duties were very much integrated and integral to the Defendant, and as Head Internal Control his functions included the strategic directions and management of the Defendant's audit, reporting directly to the Board of Directors through the Chief Executive officer and working closely with the rest of Management and staff of the Bank. This was confirmed by the witnesses of the Defendant.

69. It is also not challenged or controverted that the Plaintiff served the Defendant faithfully at management level for 8 years and received positive annual appraisals, increments and bonuses.

70. Therefore, having regard to the evidence before this court this Court concludes and finds that the Plaintiff was an employee of the Defendant based on the initial written offer of employment accepted in writing and the subsequent offer of renewals or extensions also accepted by the Plaintiff.

If the Plaintiff is an employee is he entitled to end of service benefits as claimed?

71. It is important to recall the main crux of the Plaintiff's case which is for end of service benefits for 8 years served. There is no indication from the pleadings or evidence on the quantum or amount or a calculation to determine what the Plaintiff is entitled to if at all his claim for end of service benefits succeeds. This is possibly because the Plaintiff is faced with the express term of the contract he agreed to that he is not entitled to such benefits.

72. On 22nd January 2020, the Plaintiff informed the Defendant, (Exhibit M) that he did not wish to renew the contract on its expiry on 24th January 2020. At first, Management of the Bank did not accept his notice of disengagement (Exhibit N) but it later did. (Exhibit P). On 18th August 2020 the Plaintiff made a

written complaint to the Commissioner of Labour soliciting his assistance to have end of service benefit and other entitlement from the Defendant for 8 years of service as auditor and compliance officer. (Exhibit Q).

73. The Commissioner of Labour wrote a letter to the Defendant dated 24th September 2020 (Exhibit R1-2) on the issue of payment of end of service benefits, NASSIT contributions and regularizing all employment status of employees including those referred to as contract and casual workers.

74. The Defendant by letter dated 14th October 2020 (exhibit S1-2) replied to the Commissioner of Labour to the effect that the Collective Agreement for the Banking sector was inapplicable to the Plaintiff as he was not a worker below supervisory level as his position as Head of Internal Audit was above supervisory level. It also stated among others that Cap. 212 of the Employers and Employed Act as amended by the amended Act of 1962 was not applicable to the Plaintiff.

75. According to the evidence this was the first time the Plaintiff raised the issue of end of service benefits with the Defendant albeit not directly but through the Commissioner of Labour. In his witness statement dated 23rd August 2021, the Plaintiff at paragraph 3 stated as follows:

"My letter of appointment expressly stated that my employment was not governed by the terms and conditions that apply to the Defendant's permanent staff, and that I was not entitled to the terminal or other benefits usually offered to permanent staff. At the time, I did not dwell on this, as I was satisfied with the remuneration package that I was offered. I noted, however, that most of the Defendant's employees were classed as permanent staff to whom the terms and conditions of service applied, and that the terms and conditions of service applied to certain other senior management staff who were on fixed-term contracts." (emphasis added).

76. The 2nd paragraph of the Plaintiff's witness statement reads as follows:

"I left the employment of the Defendant with an exemplary staff record: during the eight years for which I worked for the Defendant, I received several excellent annual appraisals that resulted in me being awarded bonuses and increments. I therefore felt that I left the employment of the Defendant on a good footing, and so I expected that the Defendant would pay me end of

service benefits, and any other entitlements that may have accrued to me, as a matter of course. My assumption was based on my experience of auditing payment of end of service benefits to other employees who had left the service of the Defendant- they did not have to request such payment, it was part of the normal process upon the departure of employees, and payment was usually made direct to their bank account.” (emphasis added)

77. In paragraph 2 of page 4 the Plaintiff concluded thus:

“Given that the Defendant was adamant that I am not entitled to end of service benefits, I consulted solicitors to commence this action against them so that I am properly remunerated for all the years of dedicated service that I gave to the Defendant.”

78. The Plaintiff told the Court that his immediate predecessor in the post of Compliance Officer, Mr. Thomas Legg was employed as permanent staff and he received end of service benefits on termination of his employment. The Plaintiff could not provide evidence that other employees who were “contract staff” as himself received end of service benefits. The Defendant’s witnesses stated that all contract staff did not receive end of service benefits.

79. During cross examination, the Plaintiff told the Court that it was his understanding that the Commercial Insurance and Accounting Trade Group Agreement 2016 applied “across the board” that is to those above supervisory level as well as those below supervisory level. This was challenged and controverted by the Defendant’s witnesses.

80. The Defendant led two witnesses in evidence in support of their defence. According to the witness statements of Kultumi U. Massally Director of Human Resources of the Defendant (Exhibit V1-2) and that of Salamatu Gbanyawai Assistant Manager of Human Resources (Exhibit SG DW1-2) both dated 23rd November 2021 respectively confirmed that the Defendant was above supervisory level and as per his terms of his initial contract dated 17th January 2012 was not governed by the terms and conditions of service applicable to staff members of the Defendant. The Defendant’s evidence adduced was also to the effect that the Plaintiff’s terms and conditions of service was not in accordance with the Collective Bargaining Agreement in the Banking Sector as the Plaintiff was above supervisory level. Mrs. Massally was unable to deny or

confirm whether the Plaintiff's predecessor and she stated that the Plaintiff should not be classified as a permanent member of staff despite the fact that his annual contract was renewed on several occasions.

81. During cross examination Mrs. Gbanyawai told the Court that the Plaintiff's predecessor in the role as Compliance Officer was a permanent staff and subject to the terms and conditions of service for staff which entitled him to end of service benefits. When asked to explain the difference in treatment she stated that the Plaintiff was recruited as a contract staff and that classification continued when he was appointed as Head of Internal Control and Compliance Officer. She also stated that the Plaintiff enjoyed "additional facilities " but could not recall what these consisted of.
82. Can this Court hold that the express term of the Plaintiff's letter of appointment which states "*your appointment will not be governed by the terms and conditions of service for staff of the bank, nor will you enjoy any terminal or other benefits generally applicable to staff*" should be excluded as an unfair contract term as urged by Counsel?
83. The Plaintiff relied on the letters from the Ministry of Labour to the effect that all employees who have served the same employer for a period of over 9 months are not considered casual employees.
84. Counsel questioned the Defendant's policy to distinguish between permanent employees and fixed contract staff with the latter having less entitlements than the former and referred to what obtains in other countries. These are section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 of the Republic of Ireland which provides thus:
- (1) ***...Where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.[emphasis added]***
- (2) ***...Where after the passing of this Act a fixed term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is***

passed, the aggregate duration of such contracts shall not exceed 4 years.

*(3) Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned **shall be deemed to be a contract of indefinite duration.** [emphasis added]*

85. In England, section 8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002 provides: -

“(1) This regulation applies where-

(a) An employee is employed under a contract purporting to be a fixed-term contract, and (b) the contract mentioned in subparagraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in subparagraph (a).

(2) Where this regulation applies, **the provision of the contract mentioned in paragraph (1) (a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if – (a) the employee has been continuously employed under the contract mentioned in paragraph 1 (a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and (b) the employment of the employee under a fixed-term contract was not justified on objective grounds...**[emphasis added].

86. Clearly as conceded by Counsel, there are no similar provisions in the laws of Sierra Leone consistent with the above statutory provisions that will justify this Court to set aside or exclude the exclusion clause expressly agreed to by the Plaintiff as an unfair contract term. I do hope that the Parliament in this country will be inspired by the above provisions and enact much needed legislation to protect not only employees below supervisory level but also employees above supervisory level.

87. Cap. 212 of the Employers and Employed Act, Laws of Sierra Leone 1960 is inapplicable in the instant case as in the said Act, the employed according to

section 2, means a "servant" not under the age of 12 who has entered into a contract of employment with the employer. "Servant" in accordance with the same section, means and includes "any artificer, journeyman, handicraftsman or other skilled workman and any canoeman, hammockman, carrier, watchman, caretaker, messenger, labourer, domestic servant or apprentice" and does not cover senior positions as that of the Plaintiff such as Head of Internal Control and Compliance Officer.

88. Similarly, the Regulation of Wages and Industrial Relations Act, 1971 Act no. 18 of 1971, offers protection to workers who according to section 2 thereof does not include any person comprised in or responsible for the management of any undertaking or a supervisor.

89. Furthermore, a contract of employment is governed by the fundamental principles of the law of contract. It is trite law that where parties have entered into a contract or an agreement which is in writing, it is from that document that the court must ascertain the intention of the parties and to construe the contract in terms of that document.

90. Based on the evidence, particularly the evidence of the Plaintiff cited in paragraphs 75 – 76 above, payment of end of service benefits was not part of the terms of the contract of service between the parties and this was expressly stated and agreed on. There is no evidence that such an agreement which had an exclusion clause was obtained by fraud, mistake, misrepresentation and the Plaintiff consistently confirmed that he signed it. In his witness statement he stated he did not dwell on it i.e. the exclusion clause at the time.

91. In *L'Estrange v Graucob* supra, at page 403 of 2 K.B. a statement of Scrutton, L.J., reads as follows:

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

This principle was endorsed in *Curtis v. Chemical Cleaning & Dyeing Co.* supra, at page 633 and Denning, L.J made the following statement:

"If the party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation."


92. In Halsbury's Laws of England, Fifth Edition Volume 39 on Employment, the author at paragraph 90 stated as follows:

"A term may be implied from custom and practice, provided that it is certain, general and reasonable; this will particularly be the case where either the employee took the employment subject to the custom or practice, or that custom or practice grew up during the employment and the employee impliedly accepted it, as for example, by taking benefits under it. An implied term even one based on custom and practice, cannot however, negate or alter a clear express term although there may be scope for the use of implication in order to interpret an express term." (emphasis added)

93. Having regard to the above, I see no legal basis for the Court to exclude an express term and include payment of end of service benefits as an implied term or even an imposed term. This is because end of service benefits are usually not implied or imposed for employees such as the Plaintiff who are above supervisory level.

94. For employees below supervisory level, in the absence of any agreement and even where the employee agrees not to be entitled to end of service benefits, based on the provisions of the Collective Agreement applicable to that sector it is likely that such an employee's claim for end of service benefit may succeed.

95. The case of *Alusine Conteh v Sierra Leone Roads Authority* supra relied on by Counsel for the Plaintiff is distinguishable from the Plaintiff's case. The claim in that case was in respect of wrongful or unlawful dismissal. The Learned Trial Judge, Justice Sengu Koroma found the employers liable for wrongful dismissal. In determining damages for wrongful dismissal, Justice Sengu Koroma relied on the principles enunciated in *Bangura v Sierra Leone Electricity Corporations* (S.C. Civ. App) 10/81 (1983) to the effect that consideration shall be given inter alia to "legitimate entitlements due the plaintiff at the time the employment was terminated e.g. terminal benefits." [emphasis added]. The Court in *Alusine Conteh v Sierra Leone Roads Authority* did not award what was not legitimate entitlements due the Plaintiff.


96. Furthermore, there was no reference to an express agreement in that case that terminal benefits shall not apply to the plaintiff, there was no challenge by Sierra Leone Roads Authority that terminal benefits were not applicable in its terms and conditions of service ~~of service~~ which was in evidence. In the case before this Court, the question therefore is, are end of service benefits claimed 

legitimate entitlements due the Plaintiff, Mr. Harding? The answer is No. This is because of the express term agreed on by both the Plaintiff and Defendant that these would not be part of his contract of service.

Conclusion

97. For the reasons above, I am constrained by the law and facts to conclude that in spite of his dedicated service to the Defendant for eight years, the Plaintiff is not entitled to end of service benefits. The Plaintiff has therefore failed to prove his case on a balance of probabilities that he is entitled to end of service benefits and other entitlements.

98. The Plaintiff's claim is dismissed and costs to the Defendant to be taxed if not agreed on.

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HON. MRS. JUSTICE JAMESINA E. L. KING J.A.