**[2017] JMFC FULL 3**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE FULL COURT**

**CLAIM NO. 2014 HCV 02857**

***COR*: THE HONOURABLE MR. JUSTICE L. CAMPBELL**
**THE HONOURABLE MISS JUSTICE P. WILLIAMS**
**THE HONOURABLE MR. JUSTICE F. WILLIAMS**

**IN THE MATTER OF the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (the Charter)**

**AND**

**IN THE MATTER of Professor Brendan Courtney Bain for Constitutional Redress pursuant to section 19(1) of the Charter.**

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| **BETWEEN** | **BRENDAN COURTNEY BAIN** | **CLAIMANT** |
| **AND** | **THE UNIVERSITY OF THE WEST INDIES** | **DEFENDANT** |

**Mrs. Georgia Gibson-Henlin; Mrs. Tanisha Rowe-Coke and Miss. Kristen Fletcher, instructed by Henlin Gibson Henlin for the claimant.**

**Mr. Hugh Small, Q.C.; Mr. Christopher Kelman and Mr. Krisna Desai, instructed by Myers Fletcher and Gordon for the defendant.**

**Miss Carlene Larmond; Miss Simone Pearson and Mr. Andre Moulton, instructed by the Director of State Proceedings for the Attorney General as amici curiae.**

**Heard: 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27 and 28 January 2015 and 31 July 2017.**

**Constitutional Law – Claim for breach of Fundamental Rights and Freedoms – Freedom of Expression – Freedom of Thought and Conscience – Expert Witness – Expert Report – Whether breach of Fundamental Rights and Freedoms is demonstrably Justified in a Free and Democratic Society – Breach of Employment Contract – Payment in Lieu of Notice – Stigma and Reputational Harm – Loss of Advantage on the Labour Market – Breach of Implied Term of Trust and Confidence – Defamation – Damages – Aggravated Damages – Constitutional and Vindicatory Damages.**

**Lennox Campbell, J.**

**[1]** I have read in draft the judgments of my sister, P. Williams, J and brother, F. Williams, J. I agree with their reasoning and conclusion and I have nothing to add.

**Paulette Williams, J.**

**Background**

**[2]** Brendan Courtney Bain, the claimant, is a medical doctor and professor who served as Director of the Regional Co-ordinating Unit of the Caribbean HIV/AIDS Regional Training "CHART" Initiative at the University of the West Indies, Mona, the defendant. By way of letter dated the 20 May, 2014, the Vice-Chancellor of the defendant purported to terminate the claimant's contract as Director of CHART on behalf of the defendant.

**[3]** The claimant contends that this termination was a direct consequence of his having complied with an order of the Supreme Court of Belize in the matter of **Caleb Orozco v The Attorney General of Belize,** "the Orozco case". By an order of the Court, he had been appointed one of the experts on behalf of the church, an interested party in the matter, and as such, he had prepared and submitted his expert report.

**[4]** The claimant is alleging that the defendant infringed rights guaranteed to him under section 13(3) (b) and (c) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**, 2011. Further, he asserts that the actions of the defendant caused injury to his reputation, loss and damages and that some of the things done were and continue to be defamatory of him.

**[5]** The defendant counters that the claimant's termination was done in accordance with the termination provision in Clause 2 of his employment contract. It denied that the act of termination is in breach of the claimant's right to express himself, as evidenced by the matters in the report, or his freedom of thought and conscience or of the implied terms of trust and confidence in the claimant's contract of employment. Further, it denies that a statement issued by it, relative to the termination, was defamatory o f him.

**[6]** The remedies sought by the claimant in his Further Amended Fixed Date Claim Form dated the 11 June, 2014 listed several declarations, orders and relief being sought. At the conclusion of the trial, it was then indicated that some of those matters were not being pursued. The claimant therefore seeks the following:

> *"1. A declaration that the Defendant's action as evidenced by letter of termination dated 20th May 2014 is a breach of the Claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*
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> *2. A Declaration that the Defendant's action as evidenced by statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May 2014 and continuing is in breach of the Claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and freedoms (Constitutional Amendment) Act 2011 (the Charter).*
>
> *3. A Declaration that the Defendant's action as evidenced by letter of termination dated the 20th May 2014 is a breach of the claimant's right to freedom of thought as guaranteed by section 13 (3) (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*

4. *A Declaration that the Defendant's action as evidenced by statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May 2014 and continuing is in breach of the claimant's right to freedom of thought as guaranteed by section 13 (3) (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*

5. *A Declaration that the Defendant's statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May 2014 and continuing is defamatory of the claimant.*

6. *An order that the letter of the 20th May 2014 is null and void and of no effect and is to be quashed or is not otherwise enforceable or to be treated as effective against the Claimant in that the purported termination is in breach of the implied term of trust and confidence contained in the contract of employment dated 19th December, 2012.*

7. *Damages*

8. *Aggravated Damages*

9. *Damages for Breach of contract including:*

    *(a) Stigma Damages and/or Damages for loss of reputation.*

    *(b) Damages for loss of advantage on the labour market.*

10. *Constitutional and vindicatory Damages*

11. *Costs to the Claimant to be taxed if not agreed; and*

12. *Such further and other relief as this Honourable Court may deem just."*

**[7]** The evidence given in this matter lasted some ten (10) days but ultimately there was not much dispute about certain underlying facts deemed relevant. Thus, there is not much challenge to the circumstances leading to the existence of an employment contract between the parties. There is also no dispute as to the sequence of events leading up to the termination of it.

**[8]** There was acceptance and acknowledgement of the fact that the claimant is a well-respected and seasoned professional with a distinguished career in

academia and medicine. He is re-known for being one of the pioneers in the clinical infectious disease practice in the Caribbean and is regarded as a leading medical authority on the HIV epidemic in the Caribbean. It is further admitted that he is known to have provided care for persons living with HIV and AIDS and had a specialist medical practice at the University Hospital of the West Indies as well as in small private clinics in Kingston, Jamaica.

**[9]** It is not disputed that in the year 2000 the claimant was appointed by the then Vice-Chancellor of the defendant as the Focal Point for HIV/AIDS in a regional project aimed at strengthening the institutional response to HIV/AIDS and sexually transmitted diseases in the Caribbean.

**[10]** The claimant's explanation as to the beginnings of his involvement with CHART was not challenged. He was invited by a United States Government team to lead the Regional Co-ordinating Unit of the CHART initiative which became part of the outreach to the CARICOM countries by the International Training and Education Centre on HIV (now called the International Training and Education Centre for Health) directed from the University of Washington at Seattle and funded by grants from the United States Agency for International Development (USAID), the US based Health Resources and Services Administration (HRSA) and the US Centres for Disease Control and Prevention (CDC).

**[11]** The Regional Co-ordinating Unit of CHART was in 2003 established in the Department of Community Health and Psychiatry on the Mona Campus of the defendant under the direction of the claimant, who then held the position of Professor of Community Health in that department. It is accepted that upon the return of Professor Eon Nigel Harris to the defendant, in the position of Vice Chancellor, the claimant approached him with the request that the newly formed CHART programme be re-located to the Vice-Chancellery from the jurisdiction of the Mona Campus. This request was acceded to and although the claimant was

reluctant when giving his evidence to limit the programme to being defined as a "UWI programme," it was a programme that was managed within the defendant, run on behalf of the defendant and with the blessing of the defendant. Significantly, also, funds received from donors for the programme was disbursed through the defendant. Indeed, the programme was also referred to as "UWI-CHART".

**[12]** The claimant also was Director of the Caribbean Health Leadership Institute ("CHLI") which was managed from offices on the Mona Campus of the defendant. In performance of this as well as his duties as Director of CHART, the claimant communicated with the defendant through the office of the Vice-Chancellor; either to the Vice- Chancellor himself or through his assistants.

**[13]** The accepted mission of UWI-CHART was outlined in its new strategic plan 2013 – 2017, which was however never formally ratified or officially released.

> *"UWI-CHART is committed to strengthening public and private health systems through effective and efficient HIV and AIDS and Human Resources for Health (HRH) planning and excellent and relevant capacity building for equitable health care."*

**[14]** This statement represented an expansion in the focus of CHART from its original purpose which was that of capacity development among institutional and community based health care workers involved in the prevention of HIV/AIDS and in the care, treatment and support of persons living with HIV and AIDS. The scope of training overseen by CHART was therefore changed to include other sexually transmitted infections and tuberculosis.

**[15]** In September 2013, the claimant retired from his academic appointment as Professor of Community Health in the faculty of Medical Sciences at the Mona Campus. To continue his work with CHART post-retirement, he approached the Vice-Chancellor and it was agreed that the claimant would enter a two (2) year contract to manage CHART.

**[16]** A copy letter dated December 19, 2012 from the University Registrar consisting of the contract offer between the parties and signed by the claimant evidencing acceptance on December 20, 2012 was exhibited. It had among its terms the following clauses: -

> *1) I am directed by the Council to offer you a post-retirement appointment as Director, Caribbean HIV/AIDS Regional Training (CHART) Initiative, the University of the West, Mona following your retirement from the University on September 30, 2013, subject to a medical report of physical fitness for the appointment.*
>
> *2) The appointment is with effect from October 1, 2013 to September 30, 2015. The appointment is nevertheless terminable by three (3) months notice in writing on either side.*
>
> *3) The appointment is full-time and no outside employment may be undertaken without the written consent of the University. Your duties will be arranged by the Dean, Faculty of Medical Sciences or any other designated person.*
>
> *4) Your basic salary will be at the rate of $6,436,449.00 per annum. You will also be paid a housing allowance at the rate of 40% of your basic salary.*

**[17]** As Director of CHART, the claimant served as the representative of the defendant on the Pan Caribbean Partnership against HIV and AIDS (PANCAP). This partnership is a composition of Caribbean regional civil society organisations, regional institutions and organisations, bilateral and multilateral agencies and contributing donor partners. The defendant, as a CARICOM institution is a member of PANCAP. Further, the claimant represented the CHART network on the Priority Areas Co-ordinating Committee (PACC) of

PANCAP. This was one of the organs of PANCAP, which was a technical advisory committee and had the responsibility of advising the board.

**[18]** The claimant indicates that sometime before June 2012, he was approached by a group of persons representing churches in Belize who were appearing as interested parties in the **Orozco** case. It was their mission to find out if he would be prepared to appear as an expert witness in the matter. He agreed to do so and on the 4 June 2012, he was so appointed by order of the Supreme Court of Belize.

**[19]** The **Orozco** case had been filed in that court from 2010 and it concerned "the matter of the Constitution of Belize, in the matter of the alleged unconstitutionality of section 53 of the Criminal Code, in the matter of application made pursuant to section 20 (1) of the said Constitution". Section 53 of the Criminal Code states:

> *"Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten (10) years."*

**[20]** From before the order was made, the claimant became aware that there was some concern about his being involved in the case. He received a letter dated 8 February 2012 from the Caribbean Vulnerable Communities Coalition ("CVC\CVCC") over the signatures of Ms. Dona DaCosta Martinez and Dr. John Waters, co-chairs of CVC. This group describes itself as the Caribbean's network of civil society doing human rights, HIV prevention, and care work with those considered most vulnerable to HIV infection in the Caribbean. In the letter the claimant received, it was indicated that the group had been made aware that he was being proposed as an expert witness in the constitutional challenge to the buggery law in Belize on behalf of one of the interested parties namely, the church. The group expressed its deep concern that; "if this is in fact the case, it would harm the work of many organisations around the region who have supported your work and who believed that the church's position is a moral one, not in alignment with policies agreed and promoted by PANCAP and UNAIDS."

**[21]** The claimant was further asked to confirm whether he was a witness or was actively considering becoming a witness in support of the church's position. He was also asked what evidence he would be proffering in support of that position. While recognizing his right to present himself as a witness, he was questioned as to whether he had "given full consideration to the impact that this may have on the HIV movement in the region which we have all built collectively over the years".

**[22]** Professor J. Peter Figueroa was made aware of the claimant testifying in the **Orozco** case at a meeting of Regional Co-ordinating Mechanism of PANCAP in April 2012. Professor Figueroa was chair at the meeting and was there designated to speak with the claimant who was not at the meeting. Professor Figueroa was given the task of asking the claimant to "clarify his position." This Professor Figueroa did upon his return to Jamaica. When the claimant acknowledged that he was going to be an expert witness in the **Orozco** case, Professor Figueroa pointed out to the claimant that giving evidence would be interpreted as being in support of the anti-buggery law. Further, Professor Figueroa explained to the claimant that PANCAP viewed the anti-buggery law as a barrier to providing HIV services to men who have sex with men ("MSM") and as promoting stigma and discrimination against them.

**[23]** Eventually other persons approached the claimant concerning the possibility of his providing expert evidence in the **Orozco** case. Mr. Ian Garfield McKnight is one such person. He is a co-founder of Jamaica Aids Support for Life ("JASL"). He is also a co-founder of the CVC. He is also a co-founder and was chair of the Civil Society Forum of Jamaica on HIV and AIDS to which over sixty (60) organizations; combined of non-governmental organizations, community based organizations and faith-based organizations that work directly or indirectly with persons with HIV belong. He was aware of the **Orozco** case and knew Caleb

Orozco, the claimant in the matter, who was then Executive Director of United Belize Advocacy Movement, ("UniBam") – a CVC member organisation in Belize.

**[24]** In early 2012, Caleb Orozco had advised Mr. McKnight and Dr. Waters that a church was planning to approach the claimant to ask that he give testimony on its behalf in the case. Eventually, after discussions at the CVC board, Mr. McKnight was asked to speak to the claimant to ascertain if such testimony was to be given. It was at a meeting of PANCAP in late May that Mr. McKnight and Dr. Waters had private discussions with the claimant on the matter

**[25]** During the discussion, Dr. Waters asked the claimant if he had really thought the matter through because it was likely to have some serious consequences. The view was expressed to the claimant that his presence in the case might be inconsistent with his work over the years. Further, the views were expressed that his testifying would undermine the public health response in the region and topple gains already made. The claimant was alerted to the possibility that he would "alienate" himself if he testified and mention was made of a consensus at PANCAP at regional and inter-national levels that he would be speaking against their position. The claimant was reminded of the sentiment that the continued criminalization of buggery militates against good public health practices.

**[26]** Mr. McKnight, in his evidence to this court, maintained that he begged the claimant to think about possible consequences and offered to meet with him in Jamaica to continue discussions particularly about the issues facing vulnerable populations. Two other meetings took place between Mr. McKnight and the claimant at the latter's offices in Jamaica.

**[27]** Upon receiving the order appointing him expert, the claimant prepared his report and submitted it to the Court in Belize. This report is dated August 7, 2012.

**[28]** On September 24, 2013, Vice-Chancellor Harris received an e-mail from Mr. McKnight in his capacity as Executive Director of CVC. The subject of the email was "The voice of Caribbean Civil Society Organisations on Belize Constitutional Challenge on section 53 of the Criminal Code". Attached to the email were two (2) documents namely:

1. *"A letter from over thirty (30) civil society organisations in the Caribbean highlighting an unacceptable situation which includes Prof. Brendan Bain*

2. *The expert report submitted by Prof. Bain in the Belize constitutional challenge."*

**[29]** It was stated in the letter; inter alia:–

> *"The current movement in Belize to change the laws that discriminate against persons because of their sexual orientation has made great stride and a landmark case currently before the Supreme Court of Belize is challenging the constitutionality of section 53 of the Criminal Code which criminalizes "anal sex between consenting adult males in private". The removal of this law, a relic of the 1861 British Sexual Offences Act, will be in line with the United Nations Secretary General's stand on ensuring the human rights of all citizens and the removal of laws that stigmatize based on sexual orientation and behaviour and impede access to health and other services.*
>
> *Over the last decade, the Pan Caribbean Partnership Against Aids housed in CARICOM, reporting to Ministers of Health and Heads of Government has taken a clear stand against discrimination based on sexual orientation and advocated for the removal of punitive laws. PANCAP has been a recipient of significant funding from PEPFAR and the Global Fund for AIDS to develop programmes aimed at reducing stigma.*
>
> *One of the recipients of this funding is the Caribbean HIV/AIDS Regional Training Network or CHART. This programme is based at the University of the West Indies and is headed by Prof. Brendan Bain. Professor Bain had submitted written testimony (see attachment) as an expert witness in the Belize case.*

> *Professor Bain is fully entitled to his right to free speech. His testimony is clearly stating that these are his personal views and that they do not represent the University of the West Indies. However, we wish to point out the conflicts between his personal views and those of the organisation which he leads. Professor Bain continues to receive funding to support a regional effort to end discrimination.*
>
> *Caribbean civil society must ask for a response when individuals funded by international donors, advocate positions that contradict a human rights approach to HIV and the region's decade old HIV effort: Does UWI intend to continue supporting Professor Bain's work and his participation in CARICOM and PANCAP HIV meetings and decision making bodies?*
>
> *Will UWI/CHART continue to use PEPFAR and or Global Fund resources to support Professor Bain's work?"*

**[30]** The Vice-Chancellor replied to Mr. McKnight by letter dated October 14, 2013. In the letter, he set out the University's policy of opposing any form of discrimination for reasons of gender, religion or sexual orientation. He went on to indicate: -

> *".....we support as an institution the United Nations Secretary General's stand on ensuring the human rights for all citizens. In addition, for both human right and public health reasons, we support all efforts, including legal one, to remove stigmatization of any group including legal ones, to remove stigmatization of any group including any based on sexual orientation and behaviour.*
>
> *In reviewing Professor Brendan Bain's report and your letter, I wish to assert that the University's Statement of Principles/Codes of Ethics for Academics and Senior Administrative Staff enables academics to give expert opinion based on their professional and technical expertise. Professor Bain expressly indicated that his views did not reflect those of UWI.*
>
> *We believe that any judgment of Professor Bain's leadership with respect to our common struggle against HIV/AIDS must acknowledge that he has provided dedicated service to affect patients over many years. I believe it is important to note his credentials in this area."*

**[31]** The Vice-Chancellor went on to detail the claimant's service and leadership and listed the various awards that the claimant had received. He concluded thus: –

> *"We wish our university to link with relevant groups in our society to remove obstacles such as stigmatization based on sexual orientation and behaviour, to assert the human rights of all citizens and to change laws that may hinder those efforts. I urge that we do not weaken the leadership on our common struggle against HIV/Aids and Sexually Transmitted Diseases."*

**[32]** The Vice-Chancellor shared the letter received from Mr. McKnight with the claimant. He also had discussions with the claimant about the matter. On the same day, he wrote a letter to the claimant in which he stated, inter alia:

> *"The concept of freedom coupled with responsibility is embodied in the notion that a member of academic staff enjoys the freedom to study, teach, publish and debate, independent of current opinion subject to commonly accepted scholarly standards of freedom from institutional censorship. This has always been the University's position. In the testimony, you gave to the court we note that you expressly indicated that your views do not reflect those of the U.W.I.*
>
> *We recognise the considerable work you have done to treat patients with HIV/AIDS to educate the public with respect to safe sexual practises and your effort to combat stigmatization of communities with his disease for reasons both of public health and human rights. We hope that these broad contributions will be recognised by those who have criticized your testimony."*

**[33]** The claimant subsequently received a letter from Mr. William Conn, the Co-ordinator for the President Emergency Plan for AIDS Relief (PEPFAR), Caribbean region. PEPFAR was one of the donor agencies, which assisted the work of CHART and other organisations in the Caribbean with funds to carry on their activities in the struggle against the HIV/AIDS epidemic. This letter from Mr. Conn was dated 18 October 2013 and commenced with Mr. Conn expressing a desire to have discussions with the claimant about the expert testimony he had given in the **Orozco** case. Mr. Conn indicated further that in September 2013 a letter had been sent from the CVC to Ambassador Eric Goosby, Global AIDS co-ordinator and Director of PEPFAR, with concerns about the expert testimony that the claimant had presented.

**[34]** Mr. Conn then stated: -

> *"The written testimony you provided to the government of Belize is inconsistent with both the PEPFAR Caribbean Region Partnership Framework strategy and the PANCAP Caribbean Region Strategic Framework – documents that frame the HIV strategy for the region and assert the need to address stigma and discrimination as a critical driver of the epidemic. Consistent with US government policy and international human rights standards, PEPFAR supports an enabling environment that respects the rights of all persons who participate in PEPFAR – supported programs, including key populations and lesbian, gay, bisexual and transgender (LGBT) persons."*

**[35]** He concluded by recommending steps that could be taken by both CHART and CHLI 'to address the concerns raised by CVC and to improve the engagement of key populations in HIV programming. However, the discussions, which he sought never, materialized.

**[36]** The Vice-Chancellor received a letter in response to the one that he had written to Mr. McKnight. This letter dated 30 October 2013, and was from the same group of organizations that had first written to the Vice-Chancellor in September 2013. They expressed deep disappointment that the response to the concerns raised about "Prof. Bain's action fails to engage with the harm his opposition to human rights and equality does to the regional fight against HIV and to the University's capacity to lead that fight and to preserve critical funding for it". It was maintained that the claimant's testimony in the **Orozco** case "dichotomizes sexual behaviour between gay and heterosexual in a biased manner, many references are decades old and the interpretation of the 2012 Lancet studies cited are misunderstood and misused".

**[37]** The continued leadership of the claimant of CHART was questioned and challenged in the following terms:-

> *".....we the undersigned organizations hold that Professor Bain's testimony as expert witness in the Belize case brings into serious question his expertise and credibility for heading a program which is*

> *designed "to enhance the skills and effectiveness of Caribbean leaders in the health sector including persons leading HIV/AIDS Programs."*

*It was further stated:*

> *"We are fearful that institutional silence in the fitness of someone whose actions seek to uphold criminal codes that contribute to "stigma and discrimination inimical to public health efforts" and are a disjuncture with "principles of respect for human dignity and essential freedoms that are enshrined and engraved in the Caribbean constitutions" as Sir George Alleyne noted in his graduation address this week places, UWI's important work in jeopardy and our shared ability to sustain gains and support for our common struggle."*

**[38]** It was clear that it was felt that the Vice-Chancellor had not responded to the issues specifically raised and the question were again put to him about supporting the claimant's work and participation in certain bodies and the usage of certain resources to support the claimant's work. It was stated: -

> *"Your response also seems to ignore the point that Prof. Bain cannot, in a private capacity be saying something at odds with the public position of the University and the position of the funders of the programmes that he is implementing and expect to continue to enjoy the trust of those who he is purporting to serve."*

**[39]** The letter was concluded with an indication that the Vice-Chancellor's letter and their response would be sent to various other bodies. It was in fact seen to have been copied to the following persons:

- *Ambassador Irwin LaRoque, Secretary General of CARICOM*
- *Ambassador Eric Goosby, United States Global AIDS co-ordinator*
- *Ambassador Pamela Bridgewater, United States Embassy of Jamaica*
- *Dr. Peter Figueroa, Public Health, Epidemiology and HIV, University of the West Indies*
- *Prof. Edward Greene, United Nations Special Envoy on HIV for the Caribbean*
- *Dr. Ernest Massiah, Director, UNAIDS Regional Support*

- *Mr. Silvio Martinelli, Global Fund Regional Manager for LAC*
- *Mr. Derek Springer, Director of PANCAP.*

**[40]** On 3 November 2013, the claimant sent an e-mail to the Vice-Chancellor with, what he described as, a note to the Vice-Chancellor and to the Chancellor, Sir George Alleyne. He thanked them for their efforts to mediate the situation that had arisen over the previous weeks. He summarized aspects of his involvement in the response to the HIV epidemic in the Caribbean and authorised them to share the information as they thought fit. In the email, the claimant acknowledged awareness of the fact that an emergency meeting was called to discuss the most recent letter from CVC and indicated that the Chancellor had written to him since the meeting.

**[41]** The Vice-Chancellor responded to this correspondence indicating that he had hoped to hear from the claimant a response to a specific suggestion that had been raised by Sir George namely:

> *"that you consider writing a letter or making a statement couched in a way that does not offend your own moral principles but which will make clear that you do not support discriminatory practices, are supportive of human rights for all and perhaps go as far as expressing regrets if it has offended any group."*

**[42]** The Vice-Chancellor indicated to the claimant that he would not yield to the threats as expressed in the last letter he had received from Mr. McKnight. He however expressed a fear that the whole CHART enterprise would be at risk without some clear action along the lines suggested by Sir George. He was concerned about the future of the CHART personnel and activities without the then existing HRSA Grant on which the programme was dependent since the defendant could not undertake sustaining the effort and ending the e-mail by noting, "with the furore, other funding agencies may not be sympathetic to future funding request."

**[43]** A response from the Vice-Chancellor to the CVC was in a letter dated 20 November 2013, and was addressed to Mr. McKnight. He restated the position of the defendant as being unequivocally opposed to any form of discrimination for reasons of gender, religion or sexual orientation. He further noted that the defendant could not derogate from its basic freedom as provided in its Statement of Principle/Codes and Ethics for Academics and Senior Administrative Staff. He stated:

> *"This freedom includes freedom in carrying out activities, in pursuing research and scholarship and in publishing or making public the results thereof and freedom from institutional censorship. In referring to the Statement of Principles, we note the Professor Bain in providing the testimony he did, expressly indicated that his views did not reflect those of UWI."*

**[44]** The Vice-Chancellor went on to note the relevance of the fact that it was a University of the West Indies Faculty Group of Public Law Teachers (U-RAP) which had initiated litigation in the **Orozco** case as well as other cases which was indicative of the fact that the defendant provided the freedom to undertake litigation where believed to be appropriate.

**[45]** He acknowledged that there might be differences in opinion relative to the suitability of the claimant's leadership of CHART. He, however, indicated that given the claimant's dedicated service to the HIV/AIDS community and the role played in leadership of CHART, he wanted to undertake a process of consultation with both the internal community as well as with representatives of PEPFAR and the Global Fund to "balance the various principles at issue here – academic freedom and leaders of sensitive programmes representing in practice and symbolically the position of the UWI and their having the confidence of the full community they serve".

**[46]** He addressed their specific questions in relation to the issue of the claimant's work and participation in CARICOM and PANCAP HIV meetings. He indicated

that that any decisions about these matters would have to be made by the bodies. In relation to the usage of certain resources to support the claimant's work, he noted the improvement of the UWI/CHART project and the impact on the lives of many. He concluded that he was aware that the funding agencies knew about the developments and would await their determination about the suitability of the leadership and the status of funding for the programme.

**[47]** A response from the group of organisations came to the Vice-Chancellor in a letter dated 24 January 2014 and was now specifically calling for the removal of the claimant from any leadership position in the CHART programme and all positions of representation of the UWI on issues of HIV/AIDS. This, they argued, was "a necessary first step to ensure that UWI's programme leadership demonstrates unequivocal commitment to prompting human rights for populations made vulnerable to HIV through structural factors".

**[48]** It was stated, as a fact, that the claimant no longer held the confidence of civil society in the integrity of his word and work and thus there was no way it could be seen that his remaining in a leadership position in the programme would demonstrate the defendant's commitment to ensuring that it implemented a strong project. Further, there was concern expressed that considering the defendant's position on non-discrimination and the work being done by various parts of the Institution, the Vice-Chancellor could form the view that the claimant's suitability for leadership of CHART is a "simple matter of differences of opinion". It stated further:

> *"The University's continued support of Professor Bain's leadership of the CHART program undermines the trust not only of civil society, but the university's internal community. Indeed, some staff, such as Professor Rose Marie Antoine, have publically distanced themselves from the statements of Professor Bain and expressed serious concern about the inherent conflict of interest generated by his express opposition to human rights in public spaces."*

**[49]** On 21 February 2014, the claimant met the Vice-Chancellor and discussed this last letter from the CVC requesting the claimant's removal as Director of the CHART project. The claimant subsequently wrote a memo to the Vice-Chancellor in which he sought to record his understanding of "the essence of the discussion that took place". Among the matters they had discussed was the claimant considering stepping aside from the leadership of UWI CHART.

**[50]** In early March 2014, the Vice-Chancellor invited a group of persons from within the defendant's community to sit on a small advisory panel to provide guidance about the suitability of the claimant's continued leadership of the CHART network. By way of letter to the selected individuals dated 7 March 2014, the Vice-Chancellor outlined the pertinent matters surrounding the issue. He also shared relevant documents including the claimant's expert witness report in the **Orozco** case, a brief that had been filed by an expert witness on behalf of the claimant in the case, and the letters he had received from CVC and his responses to those letters. He indicated that the meeting was not proposed to be a hearing but an effort to reach some form of consensus in moving forward.

**[51]** On 14 March 2014, the claimant retired from the Priority Areas Co-ordinating Committee of PANCAP. He wrote to Mr. Dereck Springer, the Director of PANCAP Co-ordinating Unit, indicating his "surprise and discomfort" at learning that the matter of his providing expert witness in the case in Belize was being included in the agenda of meetings of PACC. He felt the group had operated outside of the terms of reference in bringing this matter to its agenda. He also noted that the notes of the previous meeting had led him to believe that "several persons on the committee" were opposed to his continued membership. He concluded:-

> *"In view of this, I believe that my presence at future meetings would generate discomfort and hinder the easy operation of the group. For this reason, I am choosing to retire from the committee."*

**[52]** On 24 April 2014, Dr. Carolyn Gomes, in her capacity as Executive Director of the CVC, sent an e-mail to Vice-Chancellor Harris with an attachment she described as a follow-up to the groups' "concerns re Professor Bain remaining in a position of leadership of the UWI HIV response despite his position as expert witness for the retention of Buggery Law". She acknowledged in the letter that there was an awareness of the fact that the claimant had resigned from the PACC of the PANCAP, but equally, she expressed an awareness that he continued to lead the CHART programme and to represent the defendant's HIV response programme in many different forums.

**[53]** She went on to express disappointment with the lack of response to the concerns raised which, coupled with the claimant's continued leadership position in the UWI response to HIV, was found to be "completely unacceptable, disrespectful of the populations the University is purporting to serve, and an affront to the proud tradition of principled regional leadership that the UWI had previously displayed". It was concluded that: -

> *'We have not pressured for the University of the West Indies to lose funding for its CHART programme. On the contrary, we have tried to ensure that you would respond to the concerns in ways that would see UWI providing strong leadership of the issue. However, your lack of leadership in the exercise of your discretion regarding who heads and implements the CHART programme, and who represents UWI in decision-making spaces, leaves us with few options but to make our concerns known to the widest possible audience including Regional and International supports, funders and leaders.'*

**[54]** The Vice-Chancellor shared this letter in an e-mail to the claimant and stated: -

> *'I believe it important to share the attached letter with you. I am hopeful that you can see the gravity of the situation in which the University finds itself and you can find it in yourself to act accordingly. I shall move as swiftly as I can to conclude this matter.'*

**[55]** By 6 May 2014, the Vice-Chancellor again wrote to the claimant confirming that the advisory committee had been set up to give advice on the suitability of the

claimant's leadership of CHART and would be meeting on 12 May, 2014. The Vice-Chancellor stated: -

> *'I must make it clear that this committee will not be asked to consider your freedom as an academic to hold views and to conduct scientific enquiry in an individual capacity, but to consider your leadership of an institutional body that has a responsibility for the conduct of a regional endeavour affecting diverse members of our communities and funded by funds allocated by a USA based agency committed to combating HIV/AIDS. Those same stakeholders have expressed the view that they have been adversely affected by statements made by you in support of the retention of a law in Belize whose existence continues to discriminate against persons who practice same sex.'*

**[56]** Before the convening of this advisory committee, a meeting was held with the claimant and his then Attorney-at-Law, the Vice-Chancellor and the University's counsel, Mrs. Lolita Davis-Mattis. This meeting was viewed as a mediation to address the issues and ended on a cordial note. The Vice-Chancellor left the meeting with the view that there was no longer any need for the advisory committee to determine the way forward. This meeting was held on 10 May 2014.

**[57]** The advisory committee was still to meet, however, the claimant was advised that he no longer needed to attend but was to feel free to send a statement. This he did on 11 May 2014. In that communication, the claimant included material he wished put on his record. He set out his achievements, contributions and experiences. He noted that he had devoted the bulk of his professional life within and outside the walls of UWI (1983-present) to the national, regional and international response to the HIV epidemic.

**[58]** He also recognised the controversy that had been brewing and stated: -

> *"The events of the past few months appear to be conspiring to sweep my service to the CHART programme out of existence and to simultaneously threaten my professional credibility."*

**[59]** He indicated a willingness to have dialogue with persons whose views differed from his and to listen to them on the matters concerning his statement to the court in Belize. He expressed what he viewed as the substance of what he said in the report as follows: -

> *'My position is that human rights for all, not just for some should be the goal of a just society. This has been reflected in my work over the past thirty-one (31) years including my leadership of the CHART project. My personal view from a Public Health perspective is that rights and personal responsibility and safety must go hand in hand.'*

**[60]** The claimant concluded this letter by seemingly acknowledging that he would be separating from his position with CHART. He stated: -

> *'I am near the end of what has been a satisfying and fruitful career at UWI. I am proposing a managed handover of my institutional responsibilities in the course of time. A strategic plan for the CHART Regional Co-ordinating Unit was completed in late 2013 and has begun to be implemented. Internal discussions are being held with regard to a transition of leadership. The start of this transition is earmarked for September 2014 with the selection of a new Deputy Director while a search for a new Director is planned. A managed handover to ensure stability during the transitional period would seem to be more prudent than implementing a "scorched earth" policy.'*

**[61]** The advisory committee met on 12 May 2014 and a general discussion took place. The statement from the claimant was shared with the committee and a consensus was arrived at. It was felt that although everyone respects the work of the claimant, "he had lost the confidence of a significant sector of the community that CHART intended to reach and his resignation should be accepted".

**[62]** On 13 May 2014, the claimant sent an e-mail to the Vice-Chancellor indicating that having thought about his position; he had decided not to resign at that time. The Vice-Chancellor had discussions with various individuals upon receipt of the email and came to a decision to terminate the contract between the defendant and the claimant in accordance with the terms of the contract. On Sunday, 18

May 2014, there was in the media an article about the "proposed firing" of the claimant. The matter was in the public domain and given the publicity, the Vice-Chancellor decided to move swiftly to finalise a letter of termination.

**[63]** On 20 May 2014, the termination letter was completed and delivered to the claimant. In it, the Vice-Chancellor acknowledged and thanked the claimant for the work he had done. He stated: -

> *"The past several months have been quite tumultuous as the University has struggled to balance the interest of the Academy, your personal interests and the views of varying civil society groups who have registered their concerns regarding your seeming support for the maintenance of laws advocating the criminalisation of men who have sex with men (MSM). These concerns were triggered by your submission of a statement that was deemed by persons familiar with the field to have been framed in a manner that could contribute to further stigmatisation of the MSM community. The conclusion of many, including members of the vulnerable communities, is that your testimony runs contrary to the objectives of programmes such as CHART which champions the human rights of all persons irrespective of sexual orientation and opposes stigma and discrimination. Your statement has the potential to threaten the credibility of the CHART project and undermine the University's representation in vitally important groups (for example, PANCAP and Justice for All) as we work together to benefit those vulnerable communities.*
>
> *After consulting, widely, I have concluded that it would be in the best interest of the University to terminate your contract as Director of the Regional Co-ordinating Unit of CHART as of June 15, 2014, and to pay you 3 months' salary in lieu of notice. Additionally: -*
>
> - *You shall not represent the University in any fora related to CHART*
> - *You shall before the 15th of June, 2014 provide a status report detailing the accomplishments of the project, planned meetings, unscheduled deliverables and any other matter which in your professional opinion is necessary for your successor to seamlessly continue the implementation of the programme.*
> - *We recognise that the CHART carried with it concomitant projects including CH.....and you are hereby advised that*

*until further notice you shall not render services within the context of any project concomitant with CHART.*

- *In addition to your three months' pay in lieu of notice, you shall be paid any other entitlements that may become due and owing to you.*

*I regret that this has become necessary, but we are satisfied that the controversy has compromised your ability to lead the programme on behalf of the University, which leaves me with no other recourse than the one I have taken."*

**[64]** The Vice-Chancellor also caused a statement to be framed and posted on the website of the defendant, which he felt properly explained, the circumstances surrounding the claimant's contract being terminated. It was entitled "Statement regarding Termination of Contractual Arrangement with Professor Brendan Bain as Director of CHART" and said the following: -

*"The University of the West Indies sees its role as providing higher education and increasing capacity of the human resources of the region it serves, conducting and publishing research and helping to guide public policy on issues relevant to social and economic development. The academic community plays a pivotal role in carrying out the University's mandate and is encouraged to engage in public dialogue on matters of national and regional import. The UWI therefore affirms the right of academics to communicate their views based on their work and expertise and in so doing to render public service.*

*For the last year, there has been considerable controversy surrounding the appropriateness of Professor Brendan Bain serving as Director of CHART. Professor Bain is a retired member of staff of the University of the West Indies who has had a distinguished career primarily in the field of HIV/AIDS in the Caribbean. In June 2001, the CARICOM Secretariat proposed the creation of a Caribbean HIV/AIDS Regional Training (CHART) Centre and two years later the CHART Network was established "for the purpose of contributing to systematic capacity development among institutional and community-based healthcare workers involved in prevention of HIV/AIDS and in care, treatment and support of persons living with HIV and AIDS.*

*Professor Brendan Bain had been the Director of CHART since its inception and after his retirement from the UWI in 2013 he was given a two-year post retirement contract to continue in his role as Director. CHART is not a department of the UWI but a regional project managed by the University under a contract funded by the President's Emergency*

*Plan for Aids Relief (PEPFAR) the Global Fund and a group of US agencies, to train health workers dealing with patients and communities affected by HIV/AIDS.*

*The issue in question arose about two years ago in a high profile case in Belize in which Caleb Orozco, a gay man in Belize, challenged the constitutionality of an 1861 law that criminalises men having sex with men (MSM). Professor Brendan Bain provided a Statement on behalf of a group of churches seeking to retain the 1861 law. Many authorities familiar with the Brief presented believe that Professor Bain's testimony supported arguments for retention of the Law, thereby contributing to the continued criminalisation and stigmatisation of MSM. The opinion is shared by the lesbian gay and other groups who are served by CHART.*

*The majority of HIV and public health experts believe that criminalising men having sex with men and discriminating against them violates their human rights, puts them at even higher risk, reduces their access to services, forces the HIV epidemic underground thereby increasing the HIV risk. These are the positions advocated by the UN, UNAIDS, WHO, PAHO the international human rights communities and PANCAP (The Pan Caribbean Partnership against AIDS) which is the organization leading the regional response to the HIV epidemic.*

*While the University recognises the right of Professor Bain to provide expert testimony in the manner he did, it has become increasingly evident that Professor Bain has lost the confidence and support of a significant sector of the community which the CHART programme is expected to reach, including the loss of his leadership status in PANCAP, thereby undermining the ability of this programme to effectively deliver on its mandate. It is for this reason that the University of the West Indies has decided to terminate the contract of Professor Bain as Director of the Regional Co-ordinating Unit (RCU) of Caribbean HIV/Training (CHART) Network."*

**[65]** The statement concluded with the following excerpt from an address given by Chancellor, Sir George Alleyne to the 2013 UWI Graduating Class at the Cave Hill Campus:-

*"I have heard activists complain that scholarship and practice need to come together more closely, that the teaching and the discourse around moral, philosophical and constitutional niceties do not relate to the daily infringements suffered by minorities in our societies.*

*It is in this context that I wish to refer to the negation of human rights of a specific minority in our Caribbean societies. Professor Rose-Marie Antoine and I have published a book "HIV and Human Rights" which*

*resulted from a symposium held at Cave Hill (3) years ago. This brought out clearly the degree of stigma and discrimination against persons living with HIV/AIDS and minorities such as homosexuals and many were appalled to know that eleven of our CARICOM countries are the only ones in the Western Hemisphere which still have laws on their books that criminalise consensual homosexual sex in private. Their presence is clear indication of the disjuncture between the criminal codes and the principles of respect for human dignity and essential freedom enshrined in the Caribbean constitutions.*

*They are a reflection of the savings law clause which, as written and understood, insulates laws which were in existence at the time of independence from constitutional challenge. We should note that they are relics of British laws of 1876, and Britain has long repealed such law. Of course, Parliaments if so inclined could amend or repeal these laws by an ordinary majority. However, given the difficulty of parliamentary action, the only recourse for change is through litigation.*

*It is sometimes suggested that these laws are not enforced and therefore pose no problem but the evidence is clear that they contribute to the stigma and discrimination suffered by lesbians, gay, bisexual and transgender persons. Not only is such stigma and discrimination inimical to the public health efforts to prevent and control HIV, but they affront the basic rights which are enshrined in the constitutions of our countries.*

*Given Sir Phillip's injunction that as an institution we should be concerned with the elimination of prejudice, I ask what our University does in this field. I am aware of the programs in human rights which are well supported. But is the culture of our institution such that there is intolerance and the infringement of the rights of minorities? Should our institution simply be a reflection of the prejudices of the rest of the community or should it by precept and word speak to the injustice that attends the negation of human rights of a minority? Should it be a leaven of change in the bodies politic?*

*I am pleased that the Faculty of Law has been proactive in this regard, mixing scholarship with practice and had formed a Rights Advocacy Project whose main objective is "to promote human rights and social justice in the Caribbean through pivotal public interest litigation and related activities of legal and social science research on the situation relating to human rights in the Caribbean and public education." As I understand it, two of their major efforts are now in relation to the denial of human rights to a specific minority, the lesbian, gay, bi-sexual and transgender community. I wish them well and trust their work gets widely known throughout the University. I think that if Sir Phillip were here now fifty (50) years later, he would be proud of this work."*

**[66]** Following this purported termination, there were several articles in the media referring to what was described as the "sacking" of the claimant. The articles were carried over the internet to several other websites, thus facilitating it being reported all over the globe. There was much public discussion on the issue and the Vice-Chancellor himself appeared on a public affairs news show on television discussing the matter.

***The issues in the case***

**[67]** Flowing from the defendant's act of terminating the claimant's employment contract, the issues which this court now has to resolve can succinctly, to my mind, be identified as falling within the following broad areas:-

*a) constitutional issues*

*b) breach of contract*

*c) defamation*

*d) damages*

**[68]** Before seeking to determine the issues, I wish to acknowledge and thank counsel in this matter for their industry and research reflected in the evidence presented and then evidenced by the high quality of the submissions that were made. I wish to assure them that I have duly considered all submissions. I intend no disservice in failing to rehearse in any detail these submissions but will refer only to those aspects of them, which needs be mentioned in the ultimate resolution of the issues identified. Similarly, I do not intend to review all the testimony of the 17 witnesses who gave evidence but will only mention those bits of evidence considered truly relevant to the issues.

***The constitutional issues***

**[69]** The fundamental assertion by the claimant is that the reason for his dismissal was his giving expert testimony in the matter in the court in Belize and in so doing the defendant breached his fundamental rights and freedom as guaranteed by the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act**, 2011. ("The Charter").

**[70]** The defendant counters with the argument that there is no reasonable basis in law or fact for this court to hold that the claim can be elevated to the standard that justifies the attention of the jurisdiction of a constitutional court. The defendant, however, posited that it has constitutional rights that ought to be considered, in the event that the court holds that the claim is properly brought in this court.

**[71]** It is perhaps useful to note the provisions of the Charter, which are relevant to the claim. Section 13 provides as follows:-

> *'(1) Whereas –*
>
> *a) the state has obligation to promote universal respect for, and observance of, human rights and freedom;*
>
> *b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and*
>
> *c) all persons are under a responsibility to respect and uphold the rights of others recognised in this Chapter.*
>
> *the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.*

*(2) Subject to sections 18 and 19 and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –*

*a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16, and 17; and*

*b) Parliament shall pass no law and no organ of state shall take any action, which abrogates, abridges or infringes those rights.*

*(3) The rights and freedom referred to in subsection (2) are as follows-.....*

*b) the right to freedom of thought, conscience belief and observance of political doctrines;*

*c) the right to freedom of expression.*

*(4) This Chapter applies to all law and binds the legislature, the Executive and all public authorities.*

*(5) A provision of this Chapter binds natural or juristic persons of and to the extent that it is applicable taking account of the nature of the right and the nature of any duty imposed by the right.'*

**[72]** The Attorney General was invited to assist the court in addressing the constitutional issues and we benefitted greatly from the submissions by Miss Larmond in her usual clear and concise manner. She firstly encouraged the court to consider whether the defendant was bound to uphold the claimant's rights, with a preliminary consideration being the question of how the defendant is bound.

**[73]** I note that the defendant seemingly conceded that it is a juristic person. In its skeleton argument it states:

*'It also accepts that, as a juristic person, it is under a constitutional obligation under section 13 (1) (c ) and 13 (5) to respect the rights of Professor Bain to freedom of expression, thought and conscience.'*

**[74]** Having had the privilege of reading in draft the decision of my brother F. Williams J, I am in agreement with his reasons and conclusions in regards to this issue. I am satisfied that the defendant would be a "hybrid person" and so is properly to be regarded as a juristic person within the meaning of section 13 (5) of the Charter.

**[75]** In one of the earliest decisions from these courts considering the new Charter, there was extensive discussion on the extent to which the protection afforded to all individuals under the constitution has developed and expanded. In that decision of **Maurice Tomlinson v CVM Ltd, TVJ Ltd. and PBCJ** [2013] JMFC Full 5, Pusey J at paragraph 327 said:-

> *"When the Jamaica parliament enacted the New Charter of Rights in 2011, it attempted to modernize Jamaicans access to constitutional protection. In section 13 of the Jamaican Charter of Rights opened new grounds. It not only bound the state in section 13 (1) but 13 (1) (c) placed a duty on all persons to respect and uphold the rights of others recognised in the Charter. Section 13 (5) then explicitly indicates that the Charter binds natural and juristic person."*

In a further comment on section 13 (5) of the Charter, Sykes J said at paragraph 203:

> *"The wording suggests that a Charter right may not apply to a private citizen at all or if it does, then it may not apply to the same extent as it would to the State."*

**[76]** It is accepted that the defendant can be bound by the provisions of the Charter, as a juristic person. The next consideration recommended by the Attorney General and which becomes appropriate is whether the provisions for the rights to freedom of expression, thought and conscience are applicable to juristic persons taking into account the nature of these rights and the nature of any duty imposed by these rights.

**[77]** The first right that I will consider is the right to freedom of expression. The statement of Sykes J in the **Maurice Tomlinson v TVJ, CVM and PBCJ** concerning this right is, to my mind, sufficient. At paragraph 253 he said:-

> *"Looking now at section 13 (3) (c) of the Charter which provides that all persons enjoy the freedom of expression, it is important to note that the legislature chose the word 'expression' and not 'speech'. This is so because it was clearly appreciated that not all expression can be called speech, as in the spoken or written word. Without being exhaustive, speech includes different forms of expression such as speech, sign language, dance, drama, cartoons, poetry and depending on context, silence. It seems to cover just about any form of expression by which meaning can be conveyed from the mind of the communicator to the person intended to be communicated with. The word used permits of a wider meaning – expression is not limited to speech or word and there is nothing in the context which excludes gestures, miming and such like. The word expression can legitimately bear the meaning indicated."*

**[78]** In both of the submissions made by Miss Larmond on behalf of the Attorney General and Mrs. Gibson-Henlin on behalf of the claimant, the guidance to be gleaned from the Canadian case of **Irwin Toy Ltd. v Quebec (Attorney General)** [1989] 1 SCR 927 was noted. Dickson CJ at page 9689 (g) stated:

> *"'Expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. The meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs indeed all expressions of the heart and mind, however unpopular, distasteful and contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, 'fundamental' because in a free pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."*

**[79]** In the instant case, the claimant is contending that the expert report he was ordered to give by a court was a form of expression. Mrs. Gibson-Henlin submitted that the testimony conveys meaning and that "the claimant as an academic" and as "part of the UWI's academic community was participating in

community and human flourishing by assisting the court with information on an area that is undoubtedly riddled with emotion, controversy and debate."

**[80]** In the expert report, the claimant stated:-

> *"...[the report] represents his own opinions based on his professional experience together with information from research literature....The opinions expressed in the report are mine should not be attributed to any institutions with which I am associated."*

**[81]** There was no challenge mounted to the claimant's assertion that the report and subsequent testimony was a form of expression in the submissions made on behalf of the defendant.

**[82]** In **The Attorney General v Irwin Toy**, the Canadian Supreme Court adopted a two-fold test to determine whether the plaintiff's right to freedom of expression had been infringed. In her submissions, Miss Larmond usefully identified the questions of being:-

1. *Whether the plaintiff activity falls within the sphere of conduct protected by the guarantee.*
2. *If so, whether the purpose or effect of the government's action in question was to restrict the freedom of expression.*

**[83]** The claimant's activity in the instant case to my mind fall squarely within the sphere of conduct protected by the guarantee. At the request of a court, he researched and presented material intended to be used by that court in assisting it to resolve the matter before it. I will now consider the matter of freedom of thought, conscience, belief and observance of political doctrines. These two rights have generally been regarded as closely intertwined as the freedom of expression is recognised as usually involving the manifestation of the freedom of thought and conscience.

**[84]** In her submissions, Miss Larmond noted that the research undertaken revealed that in most constitutional arrangements and international agreements the right to

freedom of thought and conscience is closely linked or combined with the freedom of religion. Indeed that was the position that previously existed in the Jamaican Constitution which had provided at section 21(1) as follows:-

> *"Except with his own consent, no person shall be hindered in the employment of his freedom of conscience and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance."*

**[85]** In his text "The Constitutional Law of Jamaica", Dr. Lloyd Barnett commented on this provision at page 405:-

> *"This guarantee applies not only to religious belief but also to all types of philosophies and doctrines. Thus it protects the atheist as well as the communist. The enjoyment of the right of freedom of conscience involves the right to carry out the external practices of one's creed, to endeavour to persuade others to adopt one's belief as well as the right to organize and manage its activities and ceremonies."*

**[86]** In **Re Eric Darien (a Juror)** Home Circuit Court Judgment (delivered July 29, 1974), Smith CJ held that the freedom protected by section 21(1) covers thought, religion or a sincerely held belief.

**[87]** The new provisions of the Charter deals with the issue of freedom of religion under a separate and distinct section (see section 17). It is significant that the right to freedom of thought, conscience and belief is now linked with the observance of political doctrines. The previous linking of these freedoms with the freedom of religion would seem to be limiting the freedom to one's personal private relationship with their faith. However, under the new provisions, there is much more than one's faith that now defines the freedom.

**[88]** In the submissions made on behalf of the claimant, the case of **R v Morgentaler [1988] 1 SLR 80** is relied on for the manner in which the nature and scope of this freedom is explained. In that case, Dickson C.J., in one of the majority decision,

identified the principle issue raised by the appeal as being whether the abortion provisions of the Canadian Criminal Code infringed on the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

**[89]** The issue of freedom of thought and conscience did not form a major part of the court's decision and the comments made by one Justice on the issue may well be considered obiter but does prove useful to the present discussion. Wilson J at pages 176 and 177 had this to say:

> *"What unites enunciated freedom in the American First Amendment, in S.2 (a) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation....*
>
> *It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasised the primary or "firstness" of the First Amendment. It is this centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental". They are the sine qua non of the political tradition underlying the Charter. Viewed in this context, the freedom of conscience and religion becomes clear. The values that undertake our political and philosophic tradition demands that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."*

**[90]** The freedoms protected by Section 13 (3) (b) of the Charter guarantees each Jamaican citizen the right to think and believe what they choose, the freedom to consider and hold a particular viewpoint independent of another's viewpoint and the freedom to hold opinions without interference.

**[91]** Miss Larmond referred to the Council of Europe Human Rights handbook entitled "Protecting the Right to freedom of conscience, thought and religion under the European Convention on Human Rights" edited by Jim Murdock. It is, as she rightly submitted, a useful tool in understanding how the right has been interpreted as embodied in Article 9 of the European Convention on Human Rights which protects the freedom of thought, conscience and religion.

**[92]** At page 16 of the handbook, the author in addressing the question of what is meant by thought, conscience and religion, engages in a discussion, which I find to be sufficient for an understanding of the right. He states:-

> *"Use of the terms "thought, conscience and religion" (and religion or beliefs in paragraph 2) suggests a potentially wide scope for Article 9, but the case-law indicates a somewhat narrower approach is adopted in practice.... Nor is "belief" the same as "opinion", for to fall within the scope of Article 9, personal beliefs must satisfy two tests: first the belief must attain a certain level of cogency, seriousness, cohesion and importance and secondly, the belief itself must be one which may be considered as compatible with respect for human dignity. In other words, the belief must relate to a weighty and substantial aspect of human life and behaviour and also be such to be deemed worthy of protection in European democratic society.... However, it is important to note that interferences with the voicing of thoughts or the expression of conscience will often be treated as giving rise to issues arising within the scope of Article 10's guarantee of freedom of expression or the right of association under Article 11."*

**[93]** Having come to some appreciation of what is embodied in the two provisions of the Charter through which the claimant is alleging that his rights have been infringed, the next question I will consider is whether the defendant is bound to uphold these rights vis-a-vis the claimant, in any event. This concerns the issue of whether these rights are of horizontal application.

**[94]** In **Maurice Tomlinson v TVJ, CVM and PBCJ** Sykes J addressed the issue and in so doing, he usefully conducted an analysis of the development of a similar provision to the provision in the Charter, which is to be found in the South African

Constitution, in his usual thorough and comprehensive manner. He concluded at paragraphs 202 and 203:-

> *202. "From all this I can now say definitively...that horizontal application is now part of Jamaican Constitutional law. The position was arrived at by the legislature after full and careful consideration. There is no doubt that this Charter, in time, will prove to be the most fundamental change to our legal system since 1655. The horizontal approach with all its implications will change private law in ways not yet appreciated and will have to be worked out as the circumstances require.*
>
> *203. It is vital to notice what section 13 (5) says. It states that a provision of the Charter is binding on natural and juristic persons if and to the extent that it is applicable having regard to the nature of the right and the extent if the duty imposed by the right. The wording suggests that a Charter right may not apply to a private citizen at all or if it does then it may not apply to the same extent as it would do the state."*

**[95]** The decision of the court in **Maurice Tomlinson v TVJ, CVM and PBCJ** acknowledged that the right to freedom of expression has horizontal application. The South African Constitution Court decision of **Khumalo and others v Holomisa** 2003 ZACC 12 provided much guidance in that decision.

**[96]** In **Khumalo and Others v Holomisa**, the defendant was a South African politician and businessman who had sued the publishers of a South African newspaper for publishing articles he alleged was defamatory of him. The newspaper publishers asserted that the contents of the statement were matters in the public interest and given that the defendant had failed to allege that the statement was false, this rendered the claim excipiable in that it failed to disclose a cause of action. The publishers brought this action and the court had to interpret sections of the South African Constitution identical to provisions of the Jamaican Charter.

**[97]** O'Regan J at paragraphs 31 and 33 had this to say:-

> *"(31) It is clear from sections 8 (1) and (2) of the Constitution that the Constitution distinguishes between two categories of persons and institutions bound by the Bill of Rights. Section 8 (1) binds the legislature, Executive, judiciary and all organs of state without qualification to the terms of the Bills of Rights. Section 8 (2) however provides that natural and juristic persons shall be bound by provisions of the Bill of Rights to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right....*
>
> *(33) In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question coupled with the potential invasion of the right that could be occasioned by persons other than the state or organs of the state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8 (2) of this constitution."*

**[98]** In assisting this court as to how to approach this issue, Miss Larmond submitted that a consideration of whether a potential invasion of a right could be occasioned by the persons other than the state or organs of the state is a useful test which could be applied in determining the applicability of constitutional rights to natural and juristic persons generally. This is an attractive submission and I agree that this consideration is indeed useful.

**[99]** The potential for one person to invade and interfere with the freedom of expression of another is readily recognised. The potential to infringe on the freedom of conscience, thought, belief and observance of political doctrines is not so immediately discernible. This stems from the simple premise that it is hard to know for certain what a person is thinking and thus to seek to stifle unspoken thoughts may more readily be viewed as being possible by the organs of a state through censorship or some form of indoctrination. Further, the fact is that these freedoms are usually manifested by some act which may also be protected by other provisions e.g. the freedom of thought, conscience and belief may be manifested in some form of expression and would be protected by the right to

freedom of expression - section 13 (3) (c). The freedom of observance of political doctrine may be manifested in the joining of certain political associations, which is protected by the right to freedom of peaceful assembly, and association - section 13 (3) (e). This freedom is also related to the right to freedom from discrimination on the ground of political opinions – section 13 (3) (i) (ii).

**[100]** However, it is not beyond imagination that a situation may arise where a natural or juristic person can seek to influence the thoughts and beliefs of another. The invasion may take the form of deliberately seeking to restrict how one is encouraged to think about a matter and penalising one from practising one's belief in certain circumstance. I am prepared to hold that the rights under this provision can also be of horizontal application.

**Whether the defendant's decision to terminate the claimant was in connection with his expert report?**

**[101]** This question is the first of the issues identified by the claimant as being material to the resolution of this matter. It is of primary significance because the claimant is asserting that what flowed from his giving the expert report led to his contract being terminated and this was directly because of the defendant interfering with his constitutional rights.

**[102]** At this stage, I do not think I will review the contents of the report, since it has been sufficiently outlined by my brother F. Williams J at paragraphs 326 - 328. The fact that the claimant was giving evidence on behalf of churches opposing the move to have the buggery law declared unconstitutional seemed to be as equally significant as the actual contents of the report. As the Vice-Chancellor stated in his evidence, the concern was more about the negative impact the claimant's testimony would have on the stakeholders that were served by CHART.

**[103]** The Vice-Chancellor insisted that the claimant was not dismissed because of his expert report but he could not deny that what triggered the series of event that led to the dismissal was that report. It also asserted that the issue became a leadership question and not a testimony question. The fact however is that the leadership question arose because of the testimony question.

**[104]** In the written submissions made on behalf of the defendant it was asserted:

> *"The University was of the opinion that while it recognises the right of Professor Bain to provide expert evidence in the manner he did, it has become increasingly evident that Professor Bain has lost the confidence and support of a significant sector of the community which the CHART programme is expected to reach, including loss of his leadership status in PANCAP. This undermined the ability of CHART to effectively deliver on its mandate."*

**[105]** Mrs. Gibson-Henlin noted that the termination letter contained many references to the claimant's testimony, which suggest that he was in fact terminated for cause with the disclosed cause being directly linked and associated with his expert testimony. Further, she noted that the call for the removal of the claimant from CHART and all positions of leadership was directly related to his giving the testimony, which was seen as expressly contradicting to the positions of the CVC – the main group calling for his removal.

**[106]** Mrs. Gibson-Henlin urged that one factor of pivotal importance is the fact that the advisory committee which was convened to consider the claimant's suitability for continuing as Director of CHART was asked to consider the testimony along with that of the expert called on behalf of Orozco in the Belize case to give an opinion "alternative" to the claimant's. Although the committee admittedly met at a time when their advice as to how to proceed was no longer seen as necessary, they did ultimately agree that the claimant had lost the confidence of a significant sector of the community that CHART was intended to reach, as was contended by CVC.

**[107]** There was no evidence of how this loss of confidence was manifested. In the months after the giving of the testimony up to the time the controversy started because of the letter from Mr. McKnight on behalf of CVC to the Vice-Chancellor, there was no evidence of anything happening in the CHART programme that would have led to the conclusion that the claimant's leadership was being called into question.

**[108]** It is noted that the Vice-Chancellor gave evidence that it was not until 18 October 2013 that he became aware that the agency that funded the CHART programme was concerned about this matter. This was when Mr. William Conn, PEPFAR, co-ordinator for the Caribbean Region, had requested a telephone conference to take place between him and inter-agency senior management to discuss the claimant's testimony in "the Belize homosexuality" case. The significance of the testimony to the claimant's continued leadership of CHART was made apparent from this request.

**[109]** Mr. Small Q.C., in responding, contended that there was no causal link in the sense that the giving of the evidence caused the termination. He acknowledged that there was no evidence that anyone either reported or complained to the defendant about the claimant before he gave the expert report. Learned Queen's Counsel, however, considered it significant that the role initially taken by the defendant in this matter was not just to mediate but also to encourage the claimant to make a gesture indicating to the CVC that there had been no intention to hurt or harm them.

**[110]** Mr. Small Q.C. concluded the submissions made in this area in terms that are best repeated:

> *"So the fact that he gave evidence in Belize, he had been spoken to before, the fact that the University took no position against him even after he had given his evidence, nobody from the University reported him, that the University continues to say he has the right to say what he said in*

> *Belize cannot fit any logical understanding of a proposition that there was a causal link. It has to be in sequence, but one was not the cause of the other."*

**[111]** I find that the sequence of events that led to the termination of the claimant's contract demonstrates quite simply that, had he not given the expert report, he would have continued to serve as Director of CHART. He was warned of possible consequences before giving the report. However, once he had been summoned to give the report, the claimant had no other choice but to comply with the court order.

**[112]** Ultimately, I cannot see how it can be denied that the root cause of the termination of the claimant's contract was the testimony he had given and the "firestorm" (as the Vice-Chancellor had described it) that followed due to the insistence by CVC that the claimant be removed from his leadership position.

**[113]** It is the clear evidence that pressure was brought on the Vice-Chancellor to do what eventually was done. There were initially efforts to avoid that result but it is apparent that the termination of the claimant's contract was the only thing that could appease the parties who claimed to have been speaking on behalf of vulnerable groups intended to benefit from CHART and who it was alleged had lost confidence in the claimant's leadership.

**[114]** Although Mrs. Gibson-Henlin argued that the expert evidence of Professor Rosemarie Antoine called on behalf of the defendant ought not to be relied upon, it is, to my mind, a useful bit of evidence, which reveals the attitude of the defendant to the claimant being an expert witness in the **Orozco** case. In the defendant's skeleton arguments, her evidence is summarized as follows, inter alia:

> *"a) Professor Bain's evidence in the Orozco case is in conflict with the policy of UWI's HIV policy of non-discrimination on grounds of sexual orientation.*

> *i) Professor Bain's testimony in Orozco caused widespread shock, dismay and hurt to stakeholders in HIV Programming and the retention of him by the University threatened to destroy much of the hard-fought gains and thrust[sic] that the University had won against the scourge of HIV and discrimination in general and seriously undermined its institutional interest ....*
>
> *j) Persons working in the University's HIV programming are placed in special positions of trust to work towards the social good as promoting a humane, pragmatic and socially sensitive approach to HIV. HIV is the most devastating disease of our time. Accepting universal human rights values dictates that all human beings, including persons of the LGBTI community, are created equal and are persons deserving of tolerance and rights. Bain in giving testimony in Orozco violated the principle of non-discrimination, intrinsic to the initiatives of the University."*

To my mind, these statements serve to buttress the finding of the direct and undeniable link between the testimony of the claimant and the termination of his contract by the defendant.

**[115]** The reasons set out in the termination letter are also of significance, although it may well be properly argued that no reasons were necessary. The letter spoke of the difficulty in balancing the interest of the Academy, the claimant's personal interests and the views of varying civil society groups who registered concerns regarding the claimant's seeming support for the maintenance of laws advocating the criminalization of man who have sex with men. These concerns were said to be triggered by his statement and his testimony. It was expressly stated in the letter that:

> *"Your statement has the potential to threaten the credibility of the CHART project and undermine the University's representation in vitally important groups (for example PANCAP and Justice for All) as we work together to benefit those vulnerable communities."*

It seems clear from the context of the termination letter that the report and testimony was at the root of the termination of the claimant's contract and can quite properly be viewed as the precursor of his eventual dismissal.

**Whether the defendant's action as evidenced by the letter of termination dated 20 May 2014 is a breach of the claimant's right to freedom of expression?**

**[116]** The claimant had witnesses testify on his behalf who supported his contention that the expert report he presented to the Belizean court conveyed meaning and fell within the definition of expression, which is protected under the Charter. Professor Robert Landis described the claimant's testimony as "cryptic". He opined that the claimant did not come to any conclusion other than asking that a comprehensive approach be utilized in dealing with HIV/AID care. Further, he stated that he did not see, in the claimant's testimony, an argument for the retention of "the buggery law" in Belize. Dr. William Aiken testified that he understood that the claimant had given testimony in Belize that was scientifically rigorous, and did not have any ideological spin to it but that it was based purely on facts that would allow whoever hearing it to arrive at their own conclusion because the facts spoke for themselves.

**[117]** Witnesses called by the defendant were invited to comment on the expert report. Professor John Peter Figueroa testified that upon seeing the contents of the claimant's testimony, he formed the impression that the effect of the testimony was that it would be used to support the retention of the Belizean law that makes it a criminal offence for men to have sex with men. He expressed his being shocked at this because the retention of this law was in opposition to the explicit goals of PANCAP. He further explained that the nature of the claimant's testimony caused considerable concern among experts and internationally in circles within the field of HIV experts. He felt the testimony was deficient because it did not adequately address the negative impact of stigma and discrimination and criminalization with respect to MSM.

**[118]** Professor Antoine took issue with the expert report finding because, in her opinion, there were important omissions from it and the main thrust of the report

suggested that the public health issue is only about the act of anal sex, which was incorrect. Professor Antoine maintained, however, that whether or not the contents of the report were true was a "side track" in the debate. She opined that the testimony's purpose was to demonstrate that it is in retaining discriminatory laws that the public health risk of HIV to MSM would be addressed and this view was wrong, faulty and inaccurate.

**[119]** Regardless of the view taken of the testimony, there can be no dispute that it was a form of expression. I note that the claimant certified that the report represented "his own opinions based on his professional experience together with information from research literature related to the matter under consideration". He attached to that report articles from journals that help to guide the opinions expressed in the report.

**[120]** The defendant, through its witnesses, was consistent in the view that the claimant was never prevented from freely expressing his view on this or any matter. Indeed in one of the earliest letters written by the Vice-Chancellor in response to the complaint by CVC, the Vice-Chancellor asserted that the "University's Statement of Principles/Codes and Ethics for Academics and Senor Academics and Senior Administrative Staff enables academics to give expert opinion based on their professional and technical expertise".

**[121]** Further, in a letter from the Vice-Chancellor to the claimant he stated:-

> *"The concept of freedom coupled with responsibility is embodied in the notion that a member of academic staff enjoys the freedom to study, teach, publish and debate, independent of current opinions subject to commonly accepted scholarly standards of freedom from institutional censorship. This has always been the University's position."*

**[122]** Mrs. Gibson-Henlin submitted that the purpose and effect of the defendant's action was to punish the claimant for his expression. She contended that this was a case of the claimant being warned but failing to take the warnings even

though the warnings had come from persons with an admitted interest in the Orozco case and its outcome. She argued that the evidence from witnesses for the defendant suggested that the mere act of testifying in the manner that the claimant had, presented a barrier to the removal of the laws in question which amounted to an unwarranted restriction on speech in a free and democratic society.

**[123]** Mr. Small Q.C. countered by submitting that there is nothing in this case to suggest that there was any act of reprisal, any act of vindictiveness or any act of ill will on the part of the defendant. He noted that the evidence revealed that there was no calling into question the claimant's professional ability but rather what was being questioned was the impact of his testimony on the persons who the defendant's outreach programme was established to assist. Further, he maintained that the case for the defendant is that the programme operated by it, with international funding, was being exposed to questions. He said it was not that there had been a fall out in the programme in the sense that persons stopped going to the clinic. Thus, the defendant did not have to wait until the programme crashed, but the evidence was that it was crashing. In terminating the contract of the claimant, the defendant was doing what was necessary to save the programme.

**[124]** Miss Larmond in assisting the court in this area submitted that the question might well be asked whether there could be an infringement of the claimant's right in light of the fact that he had actually exercised his right to freedom of expression by giving the testimony before the court in Belize without any interference from the defendant. She went on to posit that if, however, the claimant can satisfy this court that the termination of his contract was actually an act of reprisal or punishment for the exercise of his freedom of expression this then could be considered a violation of the right. In support of this position, Miss Larmond referred to two cases from the European Court of Human Rights namely **Baka v**

**Hungary** ECHR App. No.20261/12-15/12/2014 and **Harabin v Solbakia** ECHR No. 62584/00, June 29, 2004.

**[125]** In **Baka v Hungary**, the applicant contended that was dismissed from his position as President of the Supreme Court for expressing his views, in his professional capacity, on issues of fundamental importance for the judiciary. He contended that it was his right and one of his duties as President of the National Council of Justice to deal with those issues. He maintained that there was a causal relationship between the expression of his views and his premature dismissal from his position, three and a half (3½) years before the normal date of the expiry of his appointment. The Government contended that there had been no interference with the applicant's freedom of expression, since the termination of his mandate was not related to the opinions he expressed. The Government argued that dismissal had become necessary in the scheme of constitutional reform that had to be undertaken with the passage of "The Fundamental Law". The Government further stated that the fact that the public expression of his opinions pre-dated the termination of his mandate was not sufficient to prove that there was a causal link between them.

**[126]** The court held:-

> *"However, in order to determine whether this provision was infringed, it must first be ascertained whether the disputed measure amounted to an interference with the exercise of the applicant's freedom of expression in the form of a formality condition, restriction or penalty or whether it lay within the sphere of the right of access to or employment in the civil service, a right not secured in the convention. In order to answer this question, the scope of the measure must be determined by putting it in context of the facts of the case and the relevant legislation."*

The court concluded that the early termination of the applicant's mandate as President of the Supreme Court was a reaction against his criticism and publicly expressed views on judicial reforms and therefore constituted an interference

with the exercise of his right to freedom of expression as guaranteed by Article 10 of the Convention.

**[127]** The case of **Harabin v Slovakia** involved an applicant who had been elected President of the Supreme Court in Slovakia. He had expressed views on certain matters. The Government adopted a resolution under which it initiated the revocation of the appointment. The applicant had been accused of taking steps, which cast doubt on the trustworthiness of the Supreme Court and of the judiciary as a whole. The allegations had been compiled in a report submitted by the Ministry of Justice which the applicant maintained were unsubstantiated and aimed at discrediting his person. The court adopted the same principle expressed in **Baka v Hungary**, but came to a different conclusion.

**[128]** The court here found that in examining whether there was an interference with the applicant's right to freedom of expression, the report submitted by the Minister of Justice should be at the centre of the court's attention as it expressed the reasons for the applicant's proposed dismissal. It was based on this report that the Government adopted its resolution to propose that the applicant's appointment be revoked. The court went on to observe that according to that report, the applicant's actions and behaviour showed that he did not meet the professional and moral requirements for holding the post.

**[129]** After a consideration of the allegations of improper conduct, the court determined that the disputed measure essentially related to the applicant's ability to execute properly the post of President of the Supreme Court. The measure also related to the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to state administration of the Supreme Court. The court went on to find that the measure complained of therefore lay within the sphere of holding a public post related to state administration of justice, a right not secured in the Convention and the court was

therefore not required to determine whether the arguments put forward in the Minister's report were well-founded.

**[130]** Of significance to the issue of freedom of expression, the court found that the documents before it did not indicate that the proposal to remove the applicant from office was prompted exclusively or preponderantly by his views. The court concluded:

> *"Considering the scope of the measure in issue in the context of the facts of the case and the relevant law, the court concludes, that there was no interference with the exercise of the applicant's right to this freedom of expression."*

**[131]** Miss Larmond submitted that what is to be concluded from these authorities is that it is imperative to consider the scope of the claimant's dismissal in the context of the facts of the case and the relevant law in order to make a determination as to whether the dismissal amounted to a violation of the claimant's right to freedom of expression.

**[132]** The significant difference that must of course be borne in mind between the authorities relied on by Miss Larmond and the instant matter is that this case involves a juristic person with the consideration then being whether the horizontal application is permissible. The cases referred to involved individuals seeking redress against state action. Further, as Mr. Small Q.C. quite properly noted, there is no relevant law that is applicable in the instant matter.

**[133]** The factors that remain significant would be the circumstances surrounding the termination of the claimant's contract and the reasons given for it in light of the defendant's assertion that the termination had no causal link to the testimony he had given. The defendant say it was exercising its right under the contract between the parties that allowed termination by three (3) months notice in writing on either side. The letter of termination dated 20 May 2014 indicated that the contract was to be terminated as of 15 June 2014 and with the payment of three

(3) months' salary in lieu of notice. It is undisputable that this was not expressly one of the terms of the contract.

**[134]** It seems to me that there needs be no evidence of ill will or malice for the eventual dismissal being viewed as punishment. Once the dismissal can be viewed as being because of the giving of the testimony, then there has been a violation of the claimant's right to express himself freely, in the manner he did when giving the report he was called upon by a court of law to give. Having already found that the termination of the claimant's contract was due to his giving the expert report, I am satisfied that in terminating his contract for that reason the defendant breached the claimant's right to freedom of expression.

**[135]** It is convenient to note here that the claimant is also asserting that the publishing of the statement on the defendant's website outlining the reason for the claimant's contract being terminated was also in breach of the claimant's right to freedom of expression. However, whereas the act of dismissal of the claimant amounts to a measure, which can be viewed as violating his right to enjoy that freedom, I cannot see how the publishing of that statement can be viewed in the same way.

**Whether the defendant's action as evidenced by the letter of termination is a breach of the claimant's right to freedom of thought?**

**[136]** The contention made on behalf of the claimant is that his expert report is a manifestation of his conscientiously held beliefs, thought and conscience. Mrs. Gibson-Henlin submitted that the expert report is in relation to specialized knowledge, skill and experience with the essential feature being that it is the opinion of an expert supported by such material, art, science or experience, which has influenced that opinion. It was submitted that an expert is expected to be impartial and thus the expert should be free to express his opinions in his

report unhindered by the dictates of anyone and in accordance with his own thoughts, conscience and beliefs.

**[137]** It was also contended that throughout the defendant's pleading there is an effort to assign the claimant to a particular role in organizations such as PANCAP and to widen the scope of the work at CHART. Further, it was opined that from its pleadings, the defendant was arguing that the claimant was bound to adopt a human rights approach in his role as Director of CHART, so as prevent the creation of an enabling environment for stigma and discrimination. Therefore, in giving the expert report and expressing the opinions that he did, the claimant was deemed to be running counter to this human rights approach.

**[138]** The submission was also made that the argument had been advanced that in remaining silent or failing to object to the consensus arrived at in relation to this approach, the claimant could be viewed as having agreed with it. It was argued that in advancing this approach in the manner it did, the defendant however failed to take into account the claimant's personal views or philosophy (in the form of his expert report) or his personal rights as protected by the Charter which amounts to an unjustifiable incursion into the claimant's freedom of thought and conscience.

**[139]** The submissions made continued by acknowledging that the defendant's witnesses conceded that the claimant was recruited for his technical expertise. It was opined that, to the extent that the claimant had a human rights mandate, it was in relation to influencing by training, the attitudes and behaviour of those persons and institutions who care for persons who live with HIV and AIDS and eventually who may become affected by HIV and AIDS. This did not require him to impose his own thoughts and views to prevent others from having different views from his.

**[140]** The claimant is alleging that the defendant interfered with his opinions, thought, conscience and belief in other ways. Firstly, there is the evidence that the claimant had been warned not to give testimony. Secondly, one witness for the defendant testified that the claimant had admitted being a Christian and had explained that as being the reason for positions taken. Thirdly, the defendant made much of its requests of the claimant to make a gesture to the gay community.

**[141]** Mr. Small Q.C. submitted that the defendant is bound by the principles of academic freedom, which seeks to prevent the indoctrinating of any individual; seeks to permit the holding and the development and refinement and even the change of personal thought, conscience and religion. He concluded his submissions in this area by stating the following:

> *"In an institution such as the University academic freedom more than anything else says we are a community that honours respects and upholds diversity opinion."*

**[142]** Miss Larmond urged the court to decide firstly whether the claimant's expert testimony would fall within the ambit of his right to freedom of thought and conscience. She noted that from the claimant's submission, the position maintained was that his expert report was based solely on scientific data and was not influenced by the party who requested the report. Further, she noted that the claimant has generally maintained that the report was not done in order to advocate a particular cause. Relying on the authority of **Re Eric Daren (a juror)**, Miss Larmond submitted that the court must be first convinced that the giving of expert testimony, which does not advocate for a particular cause and consists primarily of scientific data, can be considered the expression of a sincerely held belief or a matter which relates to a weighty and substantial aspect of human life. She concluded that it is only if the claimant's testimony falls within the ambit of this right, the court may then decide whether the action in dismissing him was a means of punishing the claimant for exercising this right.

**[143]** From earlier discussion, I have already alluded to the difficulty, which arises in seeking to prove that a person interfered with the thoughts and beliefs of another. In the instant case, I find that the expert report should not have been about one's personal thoughts and beliefs without more. It has been accepted that the report had to be grounded on scientific data and facts. However, it is also accepted that it can be so structured to coincide with the views of the expert.

**[144]** There is no doubt that the claimant was asked by the churches involved in the **Orozco** case to participate in the proceedings as an expert because of his Christian belief; there is evidence to suggest that his belief was well known and indeed that he was much respected for them. There is no evidence to suggest that these beliefs interfered with his leadership of CHART or indeed was an issue within the community dedicated to fighting the HIV and AIDS crises. He was again clearly respected and commended for his work in the field.

**[145]** The efforts made to prevent the claimant from giving expert testimony in the case in Belize did not come from the defendant or any one directly connected to it. The warnings of possible consequences similarly did not come from the defendant or anyone acting on its behalf. Hence, whatever his thoughts and beliefs were relative to the matter, there is no evidence that anyone acting on behalf of the defendant sought to influence the claimant prior to his giving the expert report and testimony. There is no evidence that the defendant sought to interfere with any sincerely held belief of the claimant or infringe on his right to hold them.

**[146]** I therefore find that the report may have been the manifestation of his thoughts, which were freely expressed, without any interference from the defendant. Ultimately, whereas the termination of the contract of employment of the claimant can be viewed as punishment for exercising his freedom of expression, I cannot say it can be equally viewed as punishment for exercising his right to freedom of

thought conscience, belief and observance of political doctrines as provided in section 13(3) (b) of the Charter.

**Whether the infringement of the claimant's right to freedom of expression could be considered demonstrably justified in a free and democratic society?**

**[147]** A consideration of this question becomes necessary given the general derogation set out in section 13 (2) of the Charter which states inter alia:

> *"Subject to Sections 18 and 49 to subsections (9) and (12) of this section and save only as may be demonstrably justified in a free and democratic society-*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and sections 14, 15,16 and 17;*

**[148]** The Canadian authority of **R v Oakes** [1986] 1 SCR 103 was referred to in the submissions on behalf of the Attorney General. It is noted that that case sets out the test to be applied in determining whether a measure can be considered demonstrably justified in a free and democratic society.

**[149]** Dickson C.J. commencing at paragraph 69 gave the following explanation:-

> *"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure objectives which are trivial or discordant with the principles of a free and democratic society do not gain s.1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is recognized, the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of 'proportionality test'. There are, in my view, three (3) important components of a proportionality test. First the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational*

> *considerations….Second, the means even if rationally connected to the objective in this first sense, should impair as 'little as possible', the right or freedom in question…Third there must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance' – the more severe the deleterious effects of a measure, the more important the objective must be."*

It is readily recognised that the test propounded by the court in **R v Oakes** may be more easily applied in situations involving actions of the State against individuals where there is a vertical application than where there is a horizontal application as in the instant case.

**[150]** In his submissions, Mr. Small Q.C. noted that the concept of proportionality has played a significant role in human rights law before the European Court of Human Rights. He also alluded to the fact that there are several decisions from the Privy Council where human rights law, as applied in the European Commission has been referred. Further, he indicated that even in judgments from the Caribbean Court of Justice in which human rights law have been dealt with, they are in terms of the European Commission human rights jurisprudence. He observed that there is no precedence in our administrative law that binds us to say one has to look at proportionality.

**[151]** Mr. Small Q.C. submitted that the provisions of section13 (5), by the language used requires that there has to be a balancing and the provision is "classic language" to say proportionality and proportionality is about balancing.

**[152]** Miss Larmond shared with the court an article, which proved very useful in this area. The article, which is written by Hugh Collins, is entitled "On the (In) compatibility of Human Rights Discourse and Private Law".

**[153]** At page 29 the author had this to say:-

> *"In public law many fundamental rights can be qualified or modified on grounds of public policy according to some versions of a test of proportionality. The test of proportionality can be formulated in slightly*

> *different ways, but its focus is on the issue of whether the policy reason for an interference with a protected right is of sufficient strength to justify the interference."*

**[154]** He went on to give as an example of the case of a ban on public protest; the legitimate aim of protecting law and order on the streets must be measured against the individual's rights to freedom of assembly and freedom of expression. He notes that to balance these interests against each other is far from straightforward. At page 30 he states:-

> *"In truth, the test of proportionality provides a useful structure for a legal analysis of the justifiability of interferences with fundamental rights, but ultimately it requires a court to engage in a difficult balancing exercise between incommensurable values. The balancing exercise in private law often assumes a rather different character. This change results from the problem that in many cases both parties can claim that their fundamental rights are at stake. It is not a matter of assessing whether the government's case for the need to override a right in the pursuit of a compelling public interest is established, but rather how to measure competing rights against each other.....*
>
> *Again, direct horizontal effect presents a risk in this respect. This technique may induce courts to conceive of the necessary reasoning process as one of determining whether policy considerations justify the limitation on the claimant's constitutional right, whereas the correct question to ask must involve the balancing if interest on both sides, taking into account both rights and policies.....*
>
> *If the test of proportionality developed in public law is appropriate in those cases where both parties to a private law dispute are protesting about an interference with their rights, what is the correct formulation of the test? The simple is that the rights need to be balanced against each other."*

This approach, formulated by the author, seems to be most proper and appropriate.

**[155]** Mr. Small Q.C. submitted that the defendant in its defence, not only accepted that the claimant was entitled to enjoy the rights of freedom of expression and the rights of freedom of conscience, but it went a little further and said, in accepting that it was a juristic person bound under the provisions of section 13 (5) of the

Charter, it had rights too. While acknowledging that it did not expressly plead any specific rights being relied on, Mr. Small Q.C. contended that it was not necessary to do so. He went on to submit that a juristic person certainly had the right to freedom of expression and the right to seek, receive and disseminate information, opinions and ideas through media.

**[156]** In its Amended Defence, the defendant asserts:-

> *"32 (iii) Furthermore as it relates to the horizontal application of constitutional rights amongst private persons, the defendant in its capacity as manager of the privately-funded CHART initiate, is entitled to balance the claimant's rights to freedom of expression thought and conscience with that of the defendant's own rights and particularly its obligation as manager of CHART to ensure the effective administration of CHART in line with CHART's objectives and that of its funders."*

**[157]** This assertion is the only one that refers specifically to any rights of the defendant. If the court is to determine how the constitutional rights of the claimant is to be balanced with those of the defendant, it is not enough to ask the court to infer which of the rights delineated in the Charter the defendant is relying on. In the instant case the termination of the claimant's employment contract can hardly be viewed other than as being a serious measure. Having found that this was a measure in breach of the claimant's guaranteed right to freedom of expression, there is nothing presented that can be viewed as justifying the necessity of this action in achieving the objective of effective administration of CHART.

**[158]** The assertion that the programme was crashing came only from the say so of one group of individuals and was not proven with sufficient cogency to make the dismissal of the claimant justified in the circumstances. The fact that the claimant had resigned his position with PANCAP and had not been invited to participate in a conference, does not in and of itself mean that the termination of his contract was justifiable in the context of any rights the defendant sought to assert and have respected.

**[159]** In the circumstances, I find that the defendant's action as evidenced by the letter of termination is a breach of the claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter, which is not demonstrably justified.

**Whether the termination is in breach of the implied term of trust and confidence contained in the contract of employment dated 19th December 2012?**

**[160]** The contract of employment clearly provided that it was determinable by three (3) months notice in writing on either side. The facts demonstrate that claimant did not get the three (3) months' notice but there was an offer of salary in lieu of notice. This payment had not been made at the time the letter was issued and had not been made up to the time of trial.

**[161]** The claimant therefore contended that the termination was unlawful. Further, it is contended that the defendant cannot rely on the terms of the post-retirement contract entered into with the claimant as a basis for his termination especially in the context of the reasons it had given for the termination and the manner in which it had handled the claimant during the contract. Relying on the authority of **Imperial Group Pension Trust v Imperial Tobacco Limited** [1991] 2 All ER 597, it was submitted that the post-retirement contract does not enable the defendant to exercise its powers arbitrarily and capriciously. Vice-Chancellor Browne-Wilkinson said at paragraph 35:-

> *"In every contract of employment there is an implied term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

**[162]** It was also submitted that the existence of this implied term of trust and confidence in a contract of employment was recognised in the case of **Malik v**

**Bank of Credit and Commerce International SA** [1998] AC 20 and in the decision from our court of **Marilyn Hamilton v UGI** [2013] JMCC COM 18.

**[163]** The defendant maintained that the termination was in keeping with established principles of employment law as have been held in several decisions and that it is well settled law that where a contract of employment, by its express terms, provides for termination by way of notice or payment in lieu of notice, the employer may terminate the contract by notice. Further, even where the contract provided only for a period of notice as a matter of practice, payment in lieu is an adequate alternative. The cases referred to were **Coconut Industry Board and Cocoa Farmers Development Company Limited and F.D. Shaw v Burchell Melbourne** [1993] 30 JLR 242; **Egerton Chang v National Housing Trust** [1991] 28 JLR 495**; Lisamae Gordon v Fair Trading Commission** Claim No. 205 HV 2699**; Janice Elliot v Euro Star Motors Limited** Claim No. C.L. 2000/E024; **Edward Gabbidon v RBTT Bank of Jamaica** Claim No. 2005 HCV 2775; **Rosmond Johnson v Restaurant of Jamaica Limited T/A Kentucky Fried Chicken** Resident Magistrate's Civil Appeal No. 17/2011; **Calvin Cameron v Security Administrations Ltd.** Claim No. 2007 HCV 02271.

**[164]** Mr. Small Q.C. submitted that from these authorities, the following principles were relevant to the issues in the instant matter:

> *(i) Payment in lieu of notice in such cases is cogent evidence, that dismissal is not for cause;*
>
> *(ii) Where dismissal is not for cause no issue can arise regarding an employer's right to be heard similarly where a disciplinary process is established under the employment contract dismissal can occur without utilizing the said process.*

Thus, Mr. Small Q.C. concluded the defendant had complied with the provisions of the contract by paying the claimant three (3) months' salary in lieu of notice and as his dismissal was not for cause, he was not entitled to be heard prior to being dismissed.

**[165]** The submission, made in relation to a breach of the implied term of trust and confidence was succinct. It was noted that the defendant was not shown to have done any trust destroying act. Further, even if the defendant in acting as it did in firstly terminating the claimant's employment and subsequently publishing the statement, there were no trust-destroying acts as the conduct of the claimant in testifying as he did threatened the credibility of the CHART project and undermined the defendant's position of representing groups that were vitally important to the programme.

**Discussion and Analysis**

**[166]** In **Rosmond Johnson v Restaurant of Jamaica Limited T/A Kentucky Fried Chicken**, Brooks JA at paragraph 15 and 16 provides the following useful guidance:

> *"15. It is necessary to point out at this juncture three (3) basic relevant principles. The first is that " unless there are statutory requirements or there is an express or implied agreement to the contrary, an employer may dismiss an employee with or without notice and with or without cause" (per Rowe JA (Ag.), as he then was, in **R v Alexander Dixon** (1977) 16 JLR 39 at page 41B). This principle was accurately stated by Lord Reid in the important case of **Ridge v Baldwin** [1963] 2 All ER 66 at page 71 F - G:*
>
> > *'The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.'*
>
> *16. That quote also refers to the second principle. It is that, as with any other material aspect thereof, the terms of the contract with respect to its termination, must be followed (See **Gunton v London Borough of Richmond upon Thames** [1980] 3 All ER 577). The third principle is that where the contract of employment does not specify a period of notice of termination of the contract, the minimum period of notice is that established by section 3 of ETRPA. Common law rules require a*

> *reasonable period of notice. That required period may well be no longer the minimum (See **Godfrey v Allied Stores Ltd.** (1990) 27 JLR 421 at page 425 H - I)."*

**[167]** In the instant case, the first issue that needs to be addressed is the fact that the defendant was purporting to terminate the contract in keeping with the terms of the contract in circumstances where the contract did not provide for payment in lieu of notice. Added to this is the fact that the notice given was not in accordance with the terms of the contract.

**[168]** In **Janice Elliot v Euro Star Motors Ltd**, Anderson J had this to say on the issue at paragraph 19:

> *"It is trite law that where the contract provides for a period of notice, payment in lieu thereof is an adequate alternative. In fact, as a matter of practice, it is accepted for an employer to give the employee wages in lieu of notice even if the contract does not provide for this. The case of **Konski v. Peet** [1915] 1 Ch 530, a decision of the House of Lords, is authority for this proportion."*

**[169]** Mrs. Gibson-Henlin referred this court to the judgment of Lord Browne-Wilkinson in **Delany v Staples** [1992] 1 All ER 944. She acknowledged that the issue of payment in lieu of notice was only considered when the court was determining if it fell within the statutory definition of wages within the Wages Act but submitted that it was useful for its explanation of the general effect of such a payment. It is of course to be noted that Mr. Kelman, in making his response to the authorities relied on by Mrs. Gibson-Henlin, submitted that this authority was very unhelpful to the issues this court had to decide. He opined that it was limited only to cases involving summary dismissal and a payment in lieu of notice in those circumstances.

**[170]** The words of Lord Browne Wilkinson however, to my mind, do offer some useful guidance in the circumstances of the instant case. He stated at page 947:-

> *"The phrase 'payment in lieu of notice' is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the*

> *principle categories..... (4) Without the agreement of the employee the employer summarily dismisses the employee and tenders payment in lieu of proper notice. This is by far the most common types of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended, no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment. The nature of a payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In* ***Gothard v Mirror Group Newspaper Ltd*** *[1988] ICR 729 AT 733 Lord Donaldson MR stated the position to be as he had stated it in* ***Dixon v Stenor Ltd.*** *[1973] ICR 157 at 158:*
>
> > *'If a man is dismissed without notice, but with money in lieu, what he receives, is as a matter of law, payment which falls to be set against and usually be designed by the employer to extinguish any claim for damages for breach of contract i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer.'"*

This is an appropriate statement of the relevant law, which is applicable to the instant case. The claimant's contract was determined without the proper period of notice being given. The payment in lieu of the proper notice was permissible to address damages, which would arise from this breach of the contract.

**[171]** In the circumstances, the claimant could have been correct in saying that he was wrongfully dismissed, given the terms of the contract. In that event, the comments of Lord Reid in **Matlock v Aberdeen Corp** [1971] 2 All ER 1278 at page 1282 would be well borne in mind –

> *"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so choose but the dismissal is valid. The servant had no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."*

**[172]** It is well settled that the approach to be taken in cases of wrongful dismissal was long established in **Addis v Gramophone Ltd.** [1909] AC 488 where it was held that a servant who is wrongfully dismissed from his employment cannot include compensation for the manner of his dismissal, for his injured feelings or the loss he may sustain from the fact that the dismissal of itself makes it more difficult to obtain fresh employment. It is against that background, that the developing recognition of a need to protect the employee from the unreasonable and capricious acts of his employer in the manner utilised in terminating an employment contract, is understandable. Hence, there has arisen the development of the implied term of trust and confidence in employment contracts.

**[173]** In **Malik v BCCA SA** Lord Steyn at page 45 discussed the concept as follows:-

> *"It is expressed to impose an obligation that the employer shall not:*
>
> *a) without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employers and employee.....*
>
> *A useful anthology of the cases applying this term or something like it, is given in Sweet and Maxwell's Encyclopaedia of Employment Law (looseleaf ed.) Vol.1 para. 1. 5107 pp. 1467–1470. The evolution of the term is a comparatively recent development. The obligation probably has its origin on the general duty of co-operation between contracting parties: Hepple and O'Higgins, Employment Law 4th ed 1981 pp 134-135, paras. 291-292. The reason for this development is part of the history of the development of employment law in this country. The notion of a "master and servant" relationship became obsolete.....*
>
> *It is true that the implied terms adds little to the employee's implied obligations to serve his employer loyally and not to act contrary to his employer's interests. The major importance of the implied duty of trust and confidence lies in the impact on the obligations of the employer .....the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*

**[174]** In the instant case, there is no assertion that the claimant failed to serve the defendant with distinction. Equally, there is no allegation that, over the several years that he was employed directly to the defendant, there was any unfair or improper exploitation of the claimant by his employer. The claimant's contention is that the defendant's approach in its termination of his contract is a breach of the implied term of trust and confidence contained in that post-retirement employment contract. Mrs. Gibson-Henlin further submitted that the circumstances surrounding the claimant's termination are such that it is clear that the defendant conducted itself in a manner that was calculated and likely to destroy or seriously damage the relationship of trust and confidence between itself and the claimant. The House of Lords in **Johnson v Unisys Ltd** [2003] 1 AC 518 explored the possibility of an implied term of trust and confidence developing at common law to allow an employee to recover damages for loss arising from the manner of his dismissal. Lord Hoffman at page 541 expressed the following opinion:

> *"It may be a matter of words, but I rather doubt whether the term of trust and confidence should be pressed so far. In the way it has been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated. If one is looking for an implied term, I think a more elegant solution is McLachlin J's implication of a separate term that the power of dismissal will be exercised fairly and in good faith."*

**[175]** Ultimately, however, the Law Lords recognised the possibility of conceiving of an implied term in the circumstances of a dismissal, but felt it would have been an improper exercise of the judicial function of the House to take such a step in light of the evident intention of their parliament that such claims should be treated by specialist tribunals and the remedy restricted in application and extent. It is also significant that although Lord Steyn found that the employee had a reasonable cause of action based on a breach of the implied obligation of trust and

confidence, he had no realistic prospect of overcoming the obstacle of remoteness of damage.

**[176]** In our Court of Appeal decision of **United General Insurance Co. Ltd. v Marilyn Hamilton** SCCA 88/08 (delivered 15th May 2009), Morrison JA (as he then was) recognised the development of this implied term in contracts of employment. At page 18 he said:-

> *"Less than five (5) years after the decision in **Malik and Mahmud**, **Addis** would only escape direct assault in the subsequent decisions of the House of Lords in **Johnson v Unisys** (supra) as a result of the conclusion of the majority, that because Parliament in the United Kingdom had (Under Part X of the Employment Rights Act 1996) provided the dismissed employee with a limited remedy for the wrongful manner of his dismissal, it would be improper exercise of the judicial function for the House to craft a judicial remedy in light of the evident intention of Parliament that such claims should be heard by specialist tribunals empowered to provide a remedy restricted in application and extent. Were it not for this limitation, it is clear that the house might have been disposed to conceive of an implied term in the contract of employment that would allow an employee to recover damages for loss arising from the manner of dismissal."*

Further, at page 21, Morrison J.A. made the following instructive observations:

> *"In the first place apart from the obiter comments of Lord Nicholls in **Malik and Mahmud** (at page 10) and Johnson v. **Unisys** (at page 803) and the sustained assault by Lord Steyn on **Addis** in his judgments in both these cases and in **Eastwood v Magnox Electric**, there has not been uniform support for extension of the implied term of trust and confidence to a manner of dismissal case which this plainly is. Secondly any development of a new implied term that the power of dismissal will be exercised fairly and in good faith (the possible solution favoured by Lord Hoffman and Milett) will still have to overcome the obstacle of Addis itself, as a decision of the House of Lords that has withstood the test of a hundred years, and the fact that it has readily been followed and applied in this jurisdiction."*

**[177]** The imposition of an implied term into an employment contact while it subsists is eminently sound. In the best interest of good industrial relationship, an employer is expected to treat his employees fairly and reasonably, if his intention is to have them remain in his employ. Unreasonable conduct likely to damage the working

relationship at any level is not to be condoned especially where deliberately pursued. It is arguable therefore that if that relationship of employer and employee were at an end in any event, there would be a breakdown where the maintenance of trust and confidence at that time would not be easily achievable or practicable.

**[178]** In her submissions, Mrs. Gibson-Henlin opined that the implied term of trust and confidence applies in the instant circumstances where an employer is carrying out investigations, which may lead to the dismissal of the employee. She referred to the case of **King (Pursuer) v University Court of the University of St. Andrews** 2002 IRLR 252 in support of this submission.

**[179]** In that case, the employee was dismissed after a panel set up for the purpose of investigating disciplinary charges laid against him concluded that he should be dismissed. His appeal against the decision was dismissed and he then sought damages against his former employer. One ground on which he sought to recover the damages was that his employers had breached the implied duty of trust and confidence in various respects in the course of their investigation and evaluation of the allegations against him. In particular, he claimed that he had not been given a proper opportunity to reply to the charges against him and was prevented from cross-examining witnesses.

**[180]** The court was asked to decide whether or not the implied term of trust and confidence subsisted during the period of investigation and evaluation of the disciplinary charges. The court ruled that the implied duty of trust and confidence did so subsist. The case however was clearly not concerned with the existence of the term at the time of dismissal. Lady Smith at paragraph 20 stated:-

> *"In the present case, however, the pursuer founds on alleged breaches of the implied duty of trust and confidence which occurred before any decision to dismiss had been taken. These breaches occurred, according to the pursuer, at the stage when the employer was considering but had*

> *not determined the question of whether it was entitled to dismiss in terms of clause 4 of the contract. Specifically, they occurred prior to the determination of whether 'good cause' had been 'shown' for termination of the pursuer's contract of employment.....For an employer to act in breach of that duty during an assessment which has the potential either to reinforce or to terminate the contract of employment would clearly be highly destructive of and damaging to the relationship between them."*

**[181]** In the instant case, Mrs. Gibson-Henlin highlighted the fact that after the defendant received the first letter from Mr. McKnight, it had iterated in its response its confidence in the claimant as an employee and a leader of all duties entrusted to him. Further, she noted that the claimant had enjoyed a good working relationship with the defendant and with the CHART programme and other programmes and groups with which he was involved. She also noted that the Vice-Chancellor in his testimony still holds the claimant in high esteem and could not point to any misconduct on the claimant's part in giving the testimony and there was no denial that the claimant had a right to do so. It was her contention that in spite of all this, the defendant dismissed the claimant at the behest of this small LBGT sub-group on the basis that it no longer holds confidence in the integrity of the word or work of the claimant.

**[182]** There is nothing from these circumstances as outlined by the claimant, which, to my mind, demonstrates any breach of the implied obligation of trust and confidence during the existence of the employment relationship. When the controversy unfolded, the defendant, through continued communication between the Vice-Chancellor and the claimant, shared all the communications received, invited and welcomed the claimant's response and initially put up what some could view as a stout defence of the claimant. The Chancellor was also called upon to assist in defusing the situation and attempts were made at some form of mediation; all with a view to preserve the programme with the claimant remaining as Director. Ultimately, the evidence makes it clear that efforts were made by the defendant to preserve the relationship between itself and the claimant.

**[183]** Mrs. Gibson-Henlin complained that the claimant was not party to consultations the Vice-Chancellor held with various experts for eight (8) months while trying to determine how best to deal with the situation. In these circumstances, I do not think there was any requirement for the claimant to be a party to these discussions. Through the entire process, it is apparent that efforts were made to treat the claimant with the respect due to him. Although Mrs. Gibson-Henlin submitted that the letters, which the claimant wrote, which were respectful of his mentor and friends were ultimately used against him, I do not find this to be so.

**[184]** The claimant's complaint also concerned the convening of the advisory panel without him being present. It is not disputed that the claimant had had discussions with the Vice-Chancellor with an Attorney-at-Law present and because of those discussions, the Vice-Chancellor had taken from them the distinct impression that there would be no need for the panel to consider the matter. As Mrs. Gibson-Henlin conceded, the statement that the claimant eventually sent to the committee was sufficient in any event.

**[185]** There may however be some merit in the submission that the meeting of the advisory committee was convened at a time when the outcome was pre-determined. It might well have been a sham and not bona fide or carried out in good faith as Mrs. Gibson-Henlin contended. In all fairness, this however must be considered against the background that the Vice-Chancellor had formed the view that no meeting was necessary, following the discussions with the claimant and his Attorney-at-Law. To my mind however, this complaint does not equate with the breaching of any implied obligation of trust and confidence.

**[186]** Another way in which the defendant is said to have breached the implied duty is in the way in which it sought to terminate the contract based on the right it continues to maintain that it had to terminate it on giving three (3) months notice. The failure to terminate in accordance with the contract is accepted to amount to

a wrongful dismissal. The principles enunciated in **Addis v Gramophone Ltd.** remains the appropriate ones for consideration in these circumstances and the claimant has failed to establish that the defendant has breached any implied terms in this regard.

**[187]** In conclusion, I find that the defendant's action was not in breach of the implied term of trust and confidence contained in the contract of employment.

**Whether the defendant's statement of the 20 May 2014 posted on its website and subsequent publications were defamatory of the claimant?**

**[188]** The claimant contends that the statement which was issued entitled "Statement regarding termination of contractual arrangement with Professor Brendan Bain as Director of CHART", when read in its entirety is defamatory of him. This statement is set out in its entirety in paragraph [64] above.

**[189]** In its Amended Defence, the defendant asserts that a claim for defamation is not appropriate for trial of a claim for constitutional redress that is normally tried by a court comprised of three (3) Justices of the Supreme Court. It further contended that the practice and law regarding the trial of defamation actions provides for the trial by a single judge alone or by judge with a jury.

**[190]** The Civil Procedure Rules provides that such a joiner is permissible. CPR 56.10 (1) provides:-

> *"(1) The general rule is that, where not prohibited by substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –*
>
> *a) arises out of; or*
>
> *b) is related or connected to,*
>
> *the subject matter of an application for an administrative order."*

The claim for defamation is therefore appropriately made in these circumstances, as it is related and connected to the subject matter of the application for an administrative order.

**[191]** In his Further Amended Fixed Date Claim Form the claimant alleges that:

> *"20. On that same date as the termination letter was issued, a statement entitled "Statement regarding Termination of Contractual Arrangement with Professor Brendan Bain as Director of CHART" was posted on the defendant's website at* http://myspot.mona.uwi.edu/marcom/newsroom/enrty/5708 *and continues to be displayed there to date.*
>
> *21. The statement dated May 20, 2014, when read in its entirety is defamatory of the claimant. A copy of the statement is attached.*
>
> *22. In their natural and ordinary meaning, the said word meant and were understood to mean:*
>
> *i. That the Claimant in providing expert testimony was personally prejudiced or biased against men who have sex with men. That the Claimant encourages and promotes continuation of stigmatization and discrimination against this group.*
>
> *ii. That the Claimant, as a fact, had lost the respect of his counterparts.*
>
> *iii. That the Claimant had acted wrongfully in testifying as he did.*
>
> *iv. That the Claimant, after testifying as he did, could not effectively meet the leadership objectives of CHART.*
>
> *v. That the Claimant held at all or had lost leadership status in PANCAP."*

**[192]** In its Amended Defence, the defendant maintains the words used in the statement were not capable, in their natural and ordinary meaning, of the inferences enumerated in the claimant's Particulars of Claim. It gave the following reasons for the assertion:

*'The statement recognises and highlights the Claimant's distinguished career, particularly in the field of HIV/AIDS in the Caribbean.*

*The statement refers to the perception of the Claimant's testimony in the Orozco case and the impact thereof, not to his personal beliefs, prejudices or actions outside of said testimony as the Claimant alleges.*

*i. The statement affirms the right of the Claimant to provide expert testimony in the manner in which he did, and in no way stated or implied that his decision to testify as he did was wrongful as the Claimant alleges.*

*ii. The statement specifically refers to the Claimant losing the confidence of a significant sector of the community of a significant sector of the community which the CHART is mandated to reach, not that he has, as a fact, lost the respect of his counterparts in general as the claimant alleges.*

*iii. The statement does not say or in any way imply that the Claimant's testimony itself, or his decision to so testify, is the reason why he cannot effectively meet the leadership objectives of CHART as the Claimant alleges, but rather that his ability to lead CHART has been undermined by the consequential loss of confidence and support of a significant sector of the community which CHART is expected to reach.'*

**[193]** The defendant further asserts:

*"25. In further answer to the paragraphs re-numbered 21 and 22 of the Particulars of Claim, the defendant says the statement is not reasonably capable of lowering the Claimant in the estimation of right-thinking members of society generally. Further the Defendant has, at all material times, including in the statement itself, acknowledged the Claimant's contributions to the CHART programme and the fight against HIV/AIDS locally and regionally.*

*26. In further response to the paragraphs re-numbered 21 and 22 of the Particulars of Claim, the Defendant will say that if, which is denied, any of the words complained of by the Claimant are capable of being considered defamatory as alleged, these words, in so far as they consist of statements of fact, are true in substance and in fact or they are not materially different from the truth, and, in so far as they consist of expressions of opinion, are fair comment in a matter of public interest as the Claimant's termination had garnered immense public attention prior to the issuance of the statement. In particular, the following material*

*facts contained in the Defendant's statement are true in fact and in substance:*

*I. Many of the organisations and persons who are familiar with the Claimant's expert report, in addition to the LGBTI communities served by CHART, believe that his testimony supported arguments for retention of the Belizean law that criminalises men having sex with men ("MSM").*

*II. The majority of HIV/AIDS and public health experts and many members of society generally believe that criminalising anal sex by consenting male adults (a) is discriminatory against MSM (b) violates their human rights (c) reduces their access to health services (d) puts them at even higher risk by driving them away from health services, (e) forces the HIV/AIDS epidemic underground and (f) increases the HIV/AIDS risk to the general population. These beliefs are shared by the United Nations Organisation ("UN") World Health Organisation ("WHO"), Pan American Health Organization ("PAHO") the Joint United Nations Programme on HIV/AIDS ("UNAIDS"), the international human rights communities, and the Pan Caribbean Partnership against Aids ("PANCAP").*

*III. The claimant lost the confidence and support of significant constituents of the communities that CHART and PANCAP have served during the years of their existence.*

*IV. Prior to the publication of the statement the Claimant, and arising from concerns related to his giving evidence in the Orozco case, had resigned from his membership of the PACC and PANCAP."*

**[194]** The tort of defamation in Jamaica is now governed by the Defamation Act, which became operative on 28th November 2013. This Act in its preamble states that it repeals the Defamation Act as also the Libel and Slander Act and makes new provisions relating to the tort of defamation and for connected purposes.

**[195]** The standard required by a claimant to succeed in a defamation matter remains the same. There are three (3) things a claimant must establish namely:-

*(a) That the words were defamatory.*

*(b) That they referred to him.*

> *(c) That they were published to at least one other person than the claimant himself.*

**[196]** There is no issue taken with the fact that the words in the statement referred to the claimant. Further, there is no challenge as to the publishing of the statement on the defendant's website that meant that at least one other person became aware of it. The claimant called a witness to speak to the dissemination of the words in the statement. Mr. Shawn Wenzel, an information technology management consultant, gave evidence as to his being able to identify "the geographic spread of the alleged defamation."

**[197]** Mr. Wenzel concluded his expert report as follows:

> *"In reviewing the information presented to me, and identified through my research, it is clear that:*
>
> - *With certainty, the UWI press release was published on the websites that are owned and controlled by the University of the West Indies.*
>
> - *The information in the UWI press release was published in whole or in part on several Internet sites. Likewise, the information in the UWI press release was cited, and specific language was quoted, in several news articles that were published worldwide. These articles, in turn were quoted, translated and published by other news media in a sort of "snowball effect". Thus the fact the UWI press release is no longer available on UWI's website does not make the information that was contained in it unavailable to the public."*

**[198]** The important question of whether the words so published of the claimant were defamatory of him requires of course an appreciation of what is meant by defamatory. The authors of the text **Gatley on Libel and Slander** have expressly recognised the difficulty of producing a comprehensive definition of the meaning of defamatory but at paragraph 3.1 of the 10th edition provides what is referred to as a "workable test" as follow:

> *"Possibly the closest to a comprehensive definition is that adopted by the American Law Institute in the Second Restatement of Tort : a statement*

> *is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third parties from associating or dealing with him or her. Although this has never been adopted by an English Court and one must bear in mind that in many respects there are major differences between American and English defamation law, nevertheless it would seem to provide a workable test consistent with case law."*

**[199]** In deciding whether the words are defamatory, the court must determine their meaning. In **Bonnick v Morris and the Gleaner** [2003] 1 AC 300, the Privy Council defined this task in a manner most relevant to the Jamaican context. Lord Nicholls of Birkenhead at page 306, paragraph 9 had this to say:

> *".... As to meaning, the approach to be adopted by the court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham MR in **Skuse v Granada Television Ltd** [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reader of the "Sunday Gleaner" reading the article once. The ordinary reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole and eschew over-elaborate analysis and also, too literal an approach. The intention of the publisher is not relevant."*

**[200]** In considering whether the statement is defamatory of the claimant, it is useful to bear in mind the context in which it was said to have been published. It is not disputed that in the days leading up to the eventual termination of the claimant's employment contract, the matter of his giving the expert testimony as well as the position of CVC had been receiving significant attention in the public domain. Indeed, it was reported in one daily newspaper that the defendant was considering "firing" the claimant.

**[201]** The Vice-Chancellor testified that he decided to frame a statement that would correct some of the misconceptions being spread in the media reports. Further he expressed:

> *"Given the public firestorm generated by the matter over the succeeding days and the considerable distortion and misunderstanding of the facts,*

> *the University issued for its community a document that sought to explain simply what were the issues and why the University took the decision it did."*

**[202]** The claimant presented some witnesses who gave evidence that I will review in order to determine if it can assist the court in determining whether the words of the statement were defamatory of the claimant.

**[203]** Dr. Wycliffe Wright, a physician who resides in the United States of America, trained initially at the University of the West Indies. His knowledge of the claimant commenced in 1982 when he received instructions from the claimant in one of his course of studies at the University. He said that he was alerted to the impending termination of the claimant's contract while reading the online version of one of the Jamaican newspapers; an article entitled "Gay advocates want UWI Professor sacked" and bore a picture of the claimant. He spoke of writing a letter to the editor of this newspaper. This was on 18 May 2014.

**[204]** Dr. Wright subsequently learned that the defendant had terminated the claimant's employment contract in an online article of yet another of the Jamaican newspapers. This article was dated 20 May 2014 and entitled. "UWI fires professor amidst gay lobby outrage." This article referred to the statement issued by the defendant. It was Mr. Wright's evidence that he had read the following:

> *"In a statement issued this afternoon, the UWI said it had become increasingly evident that Bain has lost the confidence and support of a significant sector of the community, which the CHART programme is expected to reach. Bain's termination came after he provided a statement in a high profile case in Belize, in which Caleb Orozco, a gay man challenged the constitutionality of an 1861 law that criminalises men having sex with men (MSM)."*

**[205]** Dr. Wright testified that he interpreted the words to mean that the defendant dismissed the claimant "because he was not capable of providing professional and unbiased care to the community of patients his organization was created to serve. In other words he was practising discriminatory behaviour which is

negative conduct." He became concerned at the decision taken by the defendant because of the impact the termination would have on the claimant's reputation and stature generally in the community of science and medical men, where based on his experience the claimant commanded a lot of respect. Ultimately, Dr. Wright did not testify to having read the actual statement. He therefore does not speak to the statement itself and in what way it could have been defamatory. His view formed by reading a report of the statement is therefore not of much assistance.

**[206]** Miss Mavis Fuller, a retired Senior Education Officer had occasions to interact professionally with the claimant over several years. She became aware of the claimant's termination when someone called her and advised her of it. She spoke of being stunned and in disbelief when she heard. She located and read an article on the internet in her effort to get information. The article she found made reference to another article in a Jamaica newspaper that she said gave the defendant's reason for terminating its contract with the claimant. She explained that what she read conveyed to her that because the claimant had given testimony in Belize, he had been guilty of prejudice and discriminatory conduct against the gay community, which she felt, was an unfair characterisation of him.

**[207]** Miss Fuller however had not read the statement in its entirety prior to the trial. She explained that she had offered herself as a witness if it would help to repair his character but she did not actually say she had formed the view it had in fact needed repairing. When shown the statement while being cross-examined, she maintained that it could convey the impression that he was guilty of prejudice and discrimination. She formed that impression from the following words in the statement:-

> *"Many authorities familiar with the Brief presented believe that Professor Bain's testimony supported arguments for retention of the law thereby contributing to the continued criminalisation and stigmatisation of MSM ....*

*Professor Bain has lost the confidence and support of a significant sector of the community which the CHART programme is expected to reach."*

**[208]** Dr. William Aiken is a Consultant Urologist who had been a student of the claimant during undergraduate studies. His interaction with the claimant was enhanced by his need to consult the claimant in a professional manner for personal reasons. He admitted to having great professional affection and admiration for the claimant.

**[209]** He came to learn of what he termed as "Professor Bain's termination" while overseas and browsing Facebook and seeing a link to a Gleaner article entitled "UWI fires Professor amidst gay lobby outrage" dated 20 May 2014. Dr. Aiken said it was from the article that he formed the impression that something had gone wrong and that the claimant had gotten into some trouble. Further, he thought that given the tone of the article, the claimant must have done something unethical or immoral that had resulted in his termination and thus Dr. Aiken explained he felt disappointed in the claimant. It is apparent that Dr. Aiken arrived at a conclusion before he had even read the statement, which the claimant alleges, is defamatory of him.

**[210]** Dr. Aiken, on reading the article, got the understanding that the contract of the claimant was terminated because the claimant had given testimony on behalf of a church at a trial in Belize some years ago in which an individual was challenging the buggery law. He however thought that the content of this testimony was in conflict with the claimant's position as head of CHART. Dr. Aiken felt it necessary after reading the article to read the expert report. Upon doing so, he felt even more disappointed and dismayed because the contents of the report appeared to him to be "true and balanced". He then felt extremely saddened that the defendant had not renewed the claimant's contract and more so because of the reason that was given. He found the reason given was

misleading and felt it would cause the public to think that the claimant, by giving the testimony, had committed a grave wrong.

**[211]** Dr. Aiken explained how his immediate reaction after reading the expert report was that “a great injustice had been done to [the claimant] by the very institution he has served with such distinction”. He saw the termination in those circumstances as “a wake-up call” in terms of his own status with the defendant, that if the claimant could be treated in that manner by the defendant, others could similarly be treated.

**[212]** While being cross-examined, Dr. Aiken was shown the defendant’s statement of 20 May 2014. He admitted that was not the statement he had read prior to forming the opinion that he did. He acknowledged the importance of carefully analysing what he had read in the newspaper article to see what had been newspaper commentary and what part had been the actual statement of the defendant. Upon being asked to look again at the article and make that determination, Dr. Aiken conceded that it was not necessarily clear which parts of the article were in fact taken from the statement.

**[213]** Dr. Aiken confessed that it was the suddenness of the termination of the claimant’s contract that was the main reason for his thinking something was wrong. His understanding was that the claimant had a position which was in conflict with certain groups and this was what ultimately caused the termination of the contract. He however thought that there must have been more to it than what had been presented by the defendant. He concluded that the abrupt dismissal appeared to be unjustifiable to him while admitting that he was unaware of the terms of the contract the claimant had with the defendant.

**[214]** Mr. Dwight Anthony Williamson testified to having known the claimant for forty-seven (47) years and having come to know him very well over the years. He said they have had multiple professional relationships and could speak about the

claimant from his "close personal and professional knowledge of him in several areas – as a professional in the health care delivery system, financial services and as a long time friend". Mr. Williamson described the claimant as a man of uncompromising standards, a rigorous scientist and a person of unimpeachable integrity.

**[215]** Mr. Williamson first heard of the termination on 20 May 2014 on one of the local radio stations. He immediately became concerned as a result of what he heard. He subsequently watched a programme on TVJ entitled "All Angles" where the Vice-Chancellor was interviewed by the show's host. On 22 May, he read the defendant's statement regarding the termination of the claimant's contract.

**[216]** Mr. Williamson believed that the defendant's handling of the matter in the media concerning the claimant's termination was done in a manner that defamed him. He felt that the claimant was slandered and stated "by which I mean much damage was done to his outstanding reputation". Significantly, it was not the statement itself that led Mr Williamson to come to this conclusion.

**[217]** Mr. Williamson was cross-examined mainly on the views he had expressed concerning the interview the Vice-Chancellor had given on All Angles and the interpretation he had arrived at from what the Vice-Chancellor had said. He was shown a copy of the transcript of the programme and was confronted with the fact that much of what he expressed was not supported by what was actually said in the interview. He agreed with the suggestion that there were several variations between his recollection of the interview and the transcript of what had actually taken place. His assertion that the defendant's handling of the matter in the media was done in a manner that did much damage to the claimant's outstanding reputation remained unexplored.

**[218]** One final witness called by the claimant who spoke directly to the impact of the defendant's statement was Professor Robert Landis who is the Director of

Chronic Disease Research Centre at the Cave Hill campus of the defendant. He actually worked with the claimant in organising training workshops aimed at sensitizing professional HIV caregivers on the issues of stigma discrimination and vulnerability. He acknowledged that he is on public record for supporting the lifetime achievements of the claimant in the HIV field when he nominated the claimant for the 2012 Pan Caribbean Partnership against HIV and AIDS (PANCAP) Award.

**[219]** Professor Landis first heard of the termination of the claimant's contract through an e-mail from the claimant himself on the morning of 21 May 2014. Later that day he received an official e-mail, issued from the Office of Public Information of the defendant, with the statement regarding the termination attached. He described his first reaction when he read the statement as being that of dismay at how the statement belittled the claimant and his immense contributions in the HIV field. He interpreted the statement to mean that the claimant had done something wrong and felt that it must inevitably undermine the claimant's reputation in the eyes of the public and cast a shadow over the claimant's life work in the HIV field. He also felt that the defendant's decision to dismiss the claimant because he had "lost the confidence and support of a significant sector of the community which the CHART programme is expected to reach", seemed to run against all the evidence of the enormous contribution the claimant had made to the cause of fighting the HIV epidemic in the Caribbean.

**[220]** Under cross-examination, when asked how exactly the statement served to belittle the claimant, Professor Landis was directed to a paragraph in the statement which he acknowledged gave some consideration to the claimant's contribution and work. Professor Landis agreed that that paragraph could serve to elevate the claimant in the view of persons reading it.

**[221]** Professor Landis ultimately admitted that much of his concern was with the need to publish a statement regarding the termination at all. He felt that when one sees such a message disseminated as it was, one would automatically form the impression that the claimant had done something wrong. Professor Landis explained that for eleven (11) years he had sat on a committee that dealt with promotions and termination of staff members and he had never seen the publication of the termination of a persons' contract dealt with in a similar manner.

**[222]** Professor Landis, under cross-examination, conceded that he was unaware of the publicity that had surrounded the issue concerning the claimant and his giving the expert testimony. He was also unaware that there had been much speculation in the media regarding the termination of the claimant's employment with CHART. He was however aware of the controversy within the defendant and had himself given a statement at one of the meetings held about the issue. He was unable to recall any termination of any member of staff attracting any intense media coverage in all the eleven (11) years he had served on the committee he had mentioned.

**[223]** Professor Landis maintained that the lifetime achievement of the claimant was lost in the entire message conveyed in the entire article. He felt that there was a mere token of appreciation of the achievements and accomplishments of the claimant. He thought the claimant was not accorded the level of respect due to him but rather the message conveyed in the article was of a retired technocrat who is out of step with progressive thought. Whether this amounted to a lowering of the estimation of the claimant, in his eyes, was not addressed.

**The submissions**

**[224]** Mrs. Gibson-Henlin found it necessary to remind the court that ultimately the meaning of the words used is a matter for the judge and that this should involve a

consideration of the entire article. She urged that the reasoning of the court in the **Bonnick v Morris** case should be applied in the instant case. She noted that in that case it was held as follows:

> *"In its context "termination" of Mr. Bonnick's services is to be read as meaning that Mr. Bonnick was dismissed by JCTC (which he was). But this statement would not be read as merely a neutral statement of historical fact. Mr. Bonnick is said to have been dismissed "shortly after the second contract was agreed". This links the timing of his dismissal to the matters discussed earlier, and later, in the article. It suggests to the reader that there was a connection between his dismissal and those events. It would be understood by the ordinary reader to mean that Mr. Bonnick had been dismissed because JCTC was dissatisfied with Mr. Bonnick's handling of the Prolacto contracts in one or more of the respects identified by the anonymous source."*

**[225]** Applying what she described as the reasoning in **Bonnick**, Mrs. Gibson-Henlin submitted that the defendant's statement more than suggested to the reader that there is a connection between the complaints of discrimination of MSM and the promotion and encouragement of stigmatization and discrimination against this group, the claimant's expert report, and the basis on which the defendant terminated the claimant's employment. She urged that the defendant should not reasonably be allowed to seek to separate parts of the statement in reliance on defences of truth and fair comment when the article taken as a whole carried defamatory imputations against the claimant. She contended that these statements clearly imputed discriminatory acts and/or conducts to the claimant and "engulfed and cloaked him in the flames of stigma and discriminatory conduct in an enlightened age".

**[226]** Mrs. Gibson-Henlin relied on the authorities of **Chong v The Jamaica Observer** Claim No. CLC578 of 1995 **(**delivered February 26, 2008) and **Easton Douglas et al v The Jamaica Observer et al** Claim No. HCV 03612 of 2006 (delivered May 18, 2012). She urged that it was the imputations of the word as opposed to the literal truth and the qualitative effect of the statement that should be viewed by this court as relevant. She submitted the following:-

> *"As has been outlined above as contained in the witnesses' evidence, the imputations of the words and the qualitative effect of the statement regarding termination including as extracted and republished in the newspaper article, the statements of the Vice-Chancellor in the All Angles programme of the 21st May 2014 and the Internal Communique of the 26th May, 2014 are of paramount importance and must be taken into consideration by this Court in determining whether the Statements made were defamatory of the claimant."*

**[227]** She contended that the veracity of the assertion, that the claimant had lost the confidence and support of a significant sector of the community that CHART is expected to reach, was contradicted by the evidence coming from witnesses. She noted that the sole group claiming to have lost confidence was the CVC, purporting to represent "civil society" but more specifically men who have sex with men. It would not be true or substantially true to say the claimant had lost the confidence of a "significant" sector of that community especially given that the remit of CHART was not limited to the training of healthcare workers in relation to HIV/AIDS only but that its reach had been broadened to human resources for health in general.

**[228]** Mrs. Gibson-Henlin addressed the issue of a loss of leadership in PANCAP by noting that the claimant had in fact resigned from the PACC of PANCAP which was not the same as a loss of leadership. She submitted that the misinformation and negativity conveyed by this statement is defamatory of the claimant and is untrue.

**[229]** In responding on behalf of the defendant, learned Queen's Counsel submitted that the core of the defence is that when read in its entirety, the publication is not defamatory of the claimant. Further, he submitted the ordinary reasonable, fair minded reader would form an impression that the claimant is a distinguished person in his field, locally and regionally. He contended that the defendant, by the words chosen, invited the reasonable reader to draw favourable impression of the claimant from the outset rather than a negative one.

**[230]** Mr. Small Q.C. went on to further submit that a reasonable reader would select a non-defamatory meaning and interpret the statement as addressing only the claimant's expert testimony and not as alleged, his personal belief, prejudices and action outside of his testimony. Further to this, he opined that no reasonable, fair minded person would view the claimant with hatred, ridicule or contempt or have a low estimation of the claimant especially since there are no words which could be interpreted as a personal attack or heaping obloquy on him, or imputing basic motive, or any act of wrong doing or misconduct by him.

**[231]** In considering the evidence of the witnesses, Mr. Small QC noted that Dr. Wright did not even attempt to say he regarded the statement as defamatory but just wanted people to know the kind of person he found the claimant to be. He noted that Miss. Fuller never read the statement in its entirety. He opined that Dr. Aiken's real complaint was that if the defendant can do this to the claimant what would they do to him. Mr. Small Q.C. also invited the court to say that Dr. Aiken was not representative of the average reader. In considering the evidence of Professor Landis, Mr. Small Q.C. noted that the concern for this witness was that he had never seen anything like this happen in the University community before.

**[232]** The submission made on behalf of the defendant was concluded with the assertion that if the court finds that the words complained of are capable of bearing defamatory meaning, the truth of the words insofar as they are statements of fact and insofar as they are expressions of opinions, was relied on. Further it was contended that the words are fair comment on a matter of public interest.

**Discussion and Analysis**

**[233]** Mrs. Gibson-Henlin's reminder that ultimately it is the judge's function to decide whether the words are capable of being defamatory is certainly appropriate in the circumstances. This is especially so since the evidence of the witness called by

the claimant in this regard did little to assist. Indeed one was left with a sense that the witnesses were largely outraged at the treatment meted out to the claimant, a man of distinction. Further, nothing in what they said left the impression that the words tended to lower the claimant in their estimation, but rather it was apparent that it was the defendant who was seen to have wronged the claimant in dismissing him.

**[234]** In determining whether the words are capable of a defamatory meaning, I think it is useful to bear in mind the comments of Lord Reid in **Rubber Improvement Ltd and another v Daily Telegraph and Associated Newspaper Ltd**. [1964] AC 234 at page 258:

> *"What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning."*

**[235]** The first matter I consider necessary to bear in mind is the context of the publication of the statement. The Vice-Chancellor explained that there was a "fire storm" surrounding the issue and it was shown that several articles had been published about it. The media had indeed drawn much public attention to the issue and thus it was appropriate to explain why it had been found necessary to terminate the claimant's contract. Although the defendant maintain that it was doing nothing more than what was permissible under the terms of the contract, the circumstances were such that the effort at an explanation was justifiable.

**[236]** In considering the statement itself, in some detail, it is noted that the first paragraph sets out the defendant's role in a manner that cannot be regarded as defamatory of the claimant. The gist of the paragraph is to affirm the defendant's support of freedom of expression of academics.

**[237]** The next two paragraphs recognize the existence of the controversy as it relates to the claimant. They set out the role and function of CHART and acknowledge the role of the claimant in terms that have not been described as inaccurate. Nothing in these paragraphs can be viewed as defamatory of the claimant.

**[238]** The next paragraph addresses the fact that the claimant had given expert testimony in the case in Belize. It expressly state that this testimony was on behalf of a group of churches seeking to retain the law which criminalises men having sex with men. The comment that "many authorities familiar with the Brief presented believe that Professor Bain's testimony supported arguments for the retention of the law thereby contributing to the continued criminalization and stigmatisation of MSM" may well raise concern as to what it suggests of the claimant to those who know him, but I do not find that the ordinary, fair-minded and unbiased person reading them would necessarily understand them as being disparaging of the claimant. The words are not defamatory.

**[239]** The next paragraph makes no mention of the claimant but reflects the view of certain groups on the effect of criminalising men having sex with men. The views are expressed in terms that could hardly be viewed as affecting anyone's estimation of the claimant.

**[240]** The concluding paragraph acknowledging the reason for terminating the contract of the claimant adopts the terminology used in the letters written to the Vice-Chancellor by CVC that the claimant had lost the confidence and support of a significant sector of the community which the CHART programme is expected to reach. There is no dispute that this formed the basis for the decision to terminate the contract. Although there was some argument before this court as to exactly how significant this sector truly was, in the circumstances, the words in themselves do not convey a meaning which suggests anything defamatory of the claimant.

**[241]** The necessity of attaching the excerpt of the address of the Chancellor to the statement may well be considered unnecessary. However there is nothing in it that speaks about the claimant. It is however true that juxtaposing it with the statement on the termination of the claimant's contract raises an inescapable inference that in doing what he did, the claimant had deviated from some of the defendant's objectives. However, that in and of itself does not give rise to an imputation that is capable of being defamatory of the claimant.

**[242]** In conclusion therefore on this issue of defamation, I find that the words and the context of the statement as a whole are not capable of being defamatory of the claimant. Any meaning adverse to the claimant could only be possible if one was trying to look behind the message and be avid for some scandal.

**Final disposition of the declarations sought**

**[243]** In the circumstances, there is only the following declaration to which the claimant is entitled, namely:

1. *The defendant's action as evidenced by letter of termination dated 20th May, 2014 is a breach of the claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.*

**Damages**

**[244]** The claimant is seeking the following:-

*10. Damages*

*11. Aggravated Damages*

*12. Damages for Breach of contract including*

*(a) Stigma Damages and/or damages for loss of reputation.*

*(b) Damages for loss of advantage on the labour market.*

*13. Constitutional and Vindicatory Damages.*

The particulars of constitutional/vindicatory damages, and aggravated damages were listed as being:-

*I. The purported termination of the Claimant was a direct consequence of his academic and professional expression as contained in his expert report given in the Orozco case in the Supreme Court of Belize pursuant to an Order of that Court.*

*II. The Defendant failed to conduct an appropriate hearing or any hearing at all into the matter prior to his termination. In the circumstances, the Claimant was not afforded a fair hearing before an impartial tribunal as guaranteed by the Charter of Rights.*

*III. In the absence of a fair hearing or any hearing at all, the Defendant was not allowed due process.*

*IV. The fact of termination was published in all media including the internet on the same date as the letter of termination.*

*V. The Defendant failed and/or refused to apologise.*

*VI. The Defendant failed to take steps to minimize the risk of damage to the Claimant's reputation. It maintained its position by the continuing publication and defence of the statement regarding the purported termination.*

*VII. The publication of the termination was intended to punish the Claimant and/or cause the Claimant embarrassment and distress.*

*VIII. The publication increased the scrutiny and public interest in the Claimant's purported termination, thereby causing the Claimant to be subject to adverse commentary and held in odium and contempt by a significant number of local and international public to which it was made available.*

*IX. The Defendant also caused subsequent publications to be made in the media regarding the termination and the reasons there for including reasons not previously communicated to the claimant by the Defendant.*

*X. The Claimant's ability to work as an expert has been or is likely to be impaired.*

The claimant in his claim finally asserts that he has suffered injury, loss and damage for which the ordinary measure of damages, remedies and redress are inadequate.

**[245]** Given the conclusion that I have arrived at as to the declaration which is appropriate, the issues of vindicatory/constitutional damages and aggravated damages will first be considered. It must be noted that during her submissions, Mrs. Gibson-Henlin indicated that the claimant was not pursuing the matters relating to a hearing and due process.

**[246]** In the submissions made for both the claimant and the defendant, the usefulness of the Privy Council decisions of **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UK PC 15 and **Tamara Merson v Drexel Cartwright and the Attorney General** Privy Council Appeal No. 61 of 2003 was urged.

**[247]** In **Attorney General v Ramanoop**, Lord Nicholls in delivering the judgment of the Court said at paragraphs 18 and 19:

> *"18 When exercising this constitutional jurisdiction the court is concerned to uphold or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in some cases more will be required than words. If the person wronged has suffered damages, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law.*
>
> *19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense*

> *of public outrage, emphasise the importance of constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."*

**[248]** The section 14 to which the Privy Council made reference is similar to section 19(4) of the Jamaican **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act** which provides:

> *"Where an application is made for redress under this Chapter, the Supreme Court may decline to exercise its power and may remit the matter to the appropriate court, tribunal or authority if satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law."*

**[249]** At paragraph 17 of the decision, Lord Nicholls had this to say about the section:

> *"Section 14 recognises and affirms the court's power to award remedies for contravention of Chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection Chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court."*

**[250]** Having recognised that the provisions of the Charter recently introduced in the Jamaican Constitution now allows for the horizontal as well as the vertical application of the rights, it is also acknowledged that not all the rights are enforceable horizontally. To my mind, it would seem that the award of constitutional damages horizontally ought to be approached carefully. Whereas

the rights of a citizen which are violated by the state may easily attract this kind of award, I am not so satisfied the same applies for the horizontal application.

**[251]** In the submissions she made on behalf of the claimant, Mrs. Gibson-Henlin understandably relied on cases which all involve violations committed by the state or agencies of the state namely; **Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago (No. 2)** [1979] AC 385; **Gairy and Another v Attorney General of Grenada** [2002] 1 AC 167**; Angela Innis v. The Attorney General of Saint Christopher and Nevis** [2008] UKPC 42. In submitting on the approach to the assessment of damages under this heading, Mrs. Gibson-Henlin noted the decisions from our Supreme Court in **Sharon Greenwood-Henry v The Attorney General of Jamaica** Claim No. CLG 116 of 119 (delivered October 26, 2005) and **Nicole-Ann Fullerton v The Attorney General** 2010 HCV 01556 (delivered March 25, 2011).

**[252]** In her submissions, Mrs. Gibson-Henlin also noted that this "redress clause" was the subject of judicial interpretation by Lord Diplock in the Privy Council decision of **Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago (No.2)** and it was held that the protection afforded in the redress clause was against contravention of those rights and freedoms by the state or by some public authority endowed by law with coercive powers such as police officers.

**[253]** Thus, it can readily be appreciated that the assistance to be gained from authorities that speak to the vertical application of constitutional redress would be limited. It is perhaps in recognition of this that, in the submissions made on behalf of the defendant, a case from the South African courts was referred to, namely; **The Minister of Police v Vongani Sharon MBoweni and Rudzani Lolla Makatu** (657/2013) [2014] ZASCA 107. This case concerned the death of a man after being in police custody and the mothers of his two daughters pursuing claims against the Minister of Police for substantial damages based on

an allegation that their daughters' "right to parental care as provided for in section 28 (1) (b) of the Constitution was impaired upon when their father died as a result of unconstitutional conduct of members of the force". The lower court had held that the plaintiff's right to claim for constitutional damages lodged on behalf of the minor children of the deceased succeeded and that the defendant was liable to compensate the children for proven constitutional damages arising out of the unlawful depravation of their father's parental care. The Court of Appeal however upheld the appeal from this decision.

**[254]** The defendant relied on this case from the South African courts to support its contention that a claimant can claim common law damages for proved loss to vindicate a constitutional right and that there is no reason why common law damages that vindicates constitutionally infringed rights should not provide appropriate relief. The defendant urged that the court look carefully at whether there is an existing appropriate remedy of damages for breach of the constitutional rights complained of, since constitutional damages are not there for the asking.

**[255]** In responding to this authority in the submissions made on behalf of the claimant, it was contended that the case was of more assistance to the claimant's case. It was opined that in the case, the Court of Appeal had declined from upholding an award of vindicatory damages in circumstances where facts had not been presented to the court to establish that a right under the constitution has been breached. It was therefore contended that where such facts have been presented, constitutional damages ought to be awarded where it is just and equitable for the court to do so. It was ultimately submitted that the instant case was distinguishable from the **MBoweni** case in that there is sufficient evidence before this court in this matter that support the claimant's claim of breaches of his constitutional rights of freedom of expression and thought and conscience.

**[256]** It must be firstly recognised that the case, whilst from South Africa where admittedly the horizontal application of constitutional rights is now accepted, is still ultimately involving a claim against organs of the state – the vertical application. The court did, as noted in the submissions for the claimant, find that the paucity of the facts on which the claim was based would prevent a determination of whether the breaches of constitutional rights warranted an award of constitutional damages. The court identified previous cases in which damages had been awarded for the breach of constitutional rights namely: **Fose v Minister of Safety and Security** [1997] (3) SA 786; **Modderfontein Squatters**; **Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd. et al** [2004] (6) SA 40, and **MEC, Department of Welfare, Eastern Cape v Kate** [2006] (4) SA 478.

**[257]** At paragraph 6 of the judgment, Wallis JA, writing on behalf of the court had this to say:-

> *"Those three cases demonstrate that the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. To start with the appropriateness of remedy is to invert the enquiry. But that is what occurred in the present case."*

**[258]** In further submissions made in reply on behalf of the defendant in the instant case, it was acknowledged that the paucity of facts was noted but that Wallis JA at paragraph 20 stated:-

> *"Even if those issues could be and had been determined in favour of the respondents there remained the further issue of whether constitutional damages were the appropriate constitutional remedy for that breach."*

**[259]** It is also useful to note that the court acknowledged the section of their constitution, section 8 (2), which equates with section 13(5) of the Charter in the Jamaican Constitution which has been found to introduce the horizontal application of the bill of rights. At paragraph 18 Wallis JA commented:-

> *"A further issue was whether the actions, or more accurately inaction, of the police in failing to safeguard and care for Mr. Mahlati while in police custody, constituted a wrongful act in relation to the children. It was clearly wrongful in relation to Mr. Mahlati himself but whether it constitutes a wrongful breach of the children's constitutional right is a different matter. The court needed first to decide whether the right operates horizontally in terms of section 8 (2) of the Constitution so as to extend to the policemen in the present situation or whether, if it does not, the position of employees is different, by virtue of section 8 (1) of the Constitution. It also required the court to decide whether the police owed a legal duty to the children to avoid or prevent them from suffering a loss of parental care. Not every breach of constitutional duty is equivalent to unlawfulness in the delicutal sense and therefore not every breach of a constitutional obligation constitutes unlawful conduct in relation to everyone affected by it."*

**[260]** In the Jamaican context, it is significant to note that the discussion as to whether there can be constitutional damages in claims against private citizens was mentioned by Sykes J in **Greenwood Henry v The Attorney General**. In considering and finally determining that a claim for vindicatory damages must be explicitly pleaded, he said at paragraph 19:-

> *"That constitutional redress is a special remedy was reinforced by the Privy Council in the Ramanoop case (see paragraphs 24 and 25) Consistent with this philosophy it seems to be that if that kind of remedy is to retain its status as being special and unique, then the claimant would need to plead it specifically and set out the facts which he says entitles him to such an award. This would enable the offending party to know that this claim is being made and how to respond to it. I say offending party and not the State because Carberry JA raised the possibility, that is yet to be explored in* ***Grant v Director of Public Prosecutions*** *(1989) 30 WIR 246, 274g – 275d, that the infringer of the Constitution need not be a State organization."*

**[261]** Although, with the advent of section 13 (5) of the Charter, there is no longer the need to explore the possibility of what now is a reality; the infringer of the Constitution need not be a state organization, I think it is contextually useful to note what Carberry JA had said:-

> *"While it is true that the State (being either legislature, Executive or judiciary) may provide the persons most likely to infringe the several provisions, for example by arresting or detaining persons, hindering their freedom of movement, compulsorily acquiring their property, charging*

> *them with criminal offences etc, it by no means follows that private persons may not be guilty of these contraventions; and there are some that are more likely to be committed by such persons than by the State. For example, depriving a person of his life (s14);or entry on to private property(s19);or hindering the freedom of conscience (s21); or hindering the freedom of expression (s22); or hindering the freedom of assembly or the right to form or belong to trade unions (s23); and see also S. 15 (4). While, therefore, it is clear that the Constitution contains provisions aimed at imposing restrictions on the legislature, and the Executive, it does not (with respect) follow that Lord Diplock's remarks in* ***Maharaj's*** *case limiting constitutional redress to contraventions by the state apply to the Constitution of Jamaica. Certainly, redress is obtainable against the category of person or State organization that he mentions, but that it does not apply to contraventions by private persons does not necessarily follow, and in any event was not before their Lordships.*
>
> *As regards such actions against private persons, it may well be that on most occasions the existing remedies in tort will be such that the Constitutional Court, mindful of the proviso to s25 (2) will decline to exercise its powers because it is satisfied that adequate means of redress for the contravention are available."*

**[262]** Now that the Charter allows for actions against private persons in the terms that it does, it is even more evident that constitutional redress will apply to contraventions by private persons, where it is appropriate. The question then becomes: What kind of behaviour would call for the imposition of such an award? The cases which have addressed the nature of this award all tend to speak to the purpose of the award being to vindicate the right of the claimant as distinct from seeking to punish the defendant. It was perhaps more easily seen as appropriate where the claim was against agents of the state, where the claimant was to be vindicated for some unjustified interference, mistreatment or oppression.

**[263]** It remains true that the fact of the breach of a constitutional right in and of itself is not sufficient for damages to flow. There must be some objectionable behaviour which is meted out to the claimant to a standard which demands some compensation. In the case of **Maharaj v the Attorney General of Trinidad and Tobago** the claim for damages was for the "quite appalling misbehaviour by a police officer". In the case of **Merson v Cartwright and the Attorney General**,

the behaviour was described as “the wholesale contempt shown by the authorities, in their treatment of Ms. Merson to the rule of law and its requirements of the police and prosecution authorities, make this, in our opinion, a very proper case for award vindicatory damages”. It is also to be noted that in that case, it was expressly stated that in some cases a suitable declaration may suffice to vindicate the right.

**[264]** In **Angela Innis v Attorney General of Saint Christopher and Nevis**, the Privy Council decided that an appropriate award for contravention of a breach of the Constitution ought to be made. In that case the appellant was a barrister and solicitor of the High Court of the Federation of St. Christopher and Nevis. She entered the public service as Registrar of the High Court and was also appointed to the office of Additional Magistrate. She entered into a contract to serve in that capacity for a period of two (2) years commencing on 1 June 1998. On 20 February 1998, the Permanent Secretary of the Establishment Division wrote to the appellant purporting to terminate her contract.

**[265]** The appellant wrote to the respondent, drawing his attention to section 83 (3) of the Constitution which set out the method by which she could be removed from office. The section provided that the power to exercise disciplinary control over persons in her position vested in the Governor General, acting in accordance with the recommendation of the Judicial and Legal Services Commission. There had been no such recommendation.

**[266]** The Privy Council noted that there were two elements to be considered in computation of the total sum to be awarded as damages. The first was the appellant’s claim under contract, she being entitled to damages for its premature termination. That award was to be measured by the sum which she would have received if she had continued in her employment to the date when the contract was due to expire and all those sums due to her under it had been paid. The

second element was her claim for contravention of the constitutional right. In this regard, the court noted at paragraph 20:-

> *"The trial judge held that the contravention of section 83 (3) was calculated to and did affect the appellant's interests. He could hardly have done otherwise, as the effect of the contravention was to deprive her of protection against interference with her contract by the Executive. She was deprived of the opportunity to satisfy the Judicial and Legal Services Commission that there were no grounds for the premature termination of her contract. In these circumstances it was open to the High Court to grant her such remedy by way of damages as it thought appropriate in addition to the remedy in damages for breach of the contract."*

**[267]** At paragraph 21, their Lordships went on to make observations which I find to be of some assistance in considering whether an award of damages would be appropriate in the instant case:-

> *"The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief. But in this case the contravention was, as the judge said, calculated to affect the appellant's interests and it did so. On the judge's findings it was a deliberate act in violation of the Constitution to achieve what the time consuming procedures of the Commission could not achieve. He rejected the submission that it was an innocuous administrative act. The desire was to get rid of the appellant quickly and the contract proved to be the expedient vehicle for achieving this."*

Their Lordships went on at paragraph 23 to observe –

> *"But the only effective way of ensuring that such a flagrant breach of the constitution is vindicated is by making an order for the payment of damages for the breach."*

**[268]** In the instant case, the desire was to get rid of the claimant quickly and the contract proved to be an expedient vehicle for achieving this, so the contract was terminated. The notice period given was not adhered to but the payment of sums due would be an adequate remedy for that. The breach of the constitutional right to freedom of expression, which I have found did occur, does not to my mind; require an order for payment of damages.

**[269]** I am satisfied that in this instance the declaration sought is sufficient to vindicate the right. The infringement that occurred was serious in so far as it resulted in the termination of the claimant's employment contract but not of the nature that call for vindication by way of damages. He remains entitled to the sums, which became due under the contract.

**[270]** The claimant submits that he is entitled to damages in the following amounts:-

1) *A sum equivalent to salaries for the remaining period of the contract, that is between January 1, 2015 to September 30, 2015. This sum in on the basis that the Defendant by its action jeopardised the claimant's position, took a decision and communicated it to the donors resulting in the termination of the project;*

2) *To additional salaries for the period of October 2014 to January 2015, which were still due and owing at the time of trial;*

3) *Payment of three (3) months' salary in lieu of notice;*

4) *Unused vacation pay;*

5) *Housing allowance.*

**[271]** The case of **Lisamae Gordon v Fair Trading Commission** was referred to in submissions made in support of the claim for the sum equivalent to salaries for the remaining period of the contract. It was noted that Brooks J (as he then was) ruled that "the damages payable for the wrongful termination of a fixed term contract is the equivalent of the salary which would have been due for the unexpired portion of the contract." In arriving at this decision, he relied on the following words of Wallace JA in the case of **Carr v Fama Holdings Ltd.** [1989] 63 DLR (4th) 25:

> *"A fixed-term contract serves a number of purposes. It sets forth the duration of the employment and thereby defines the extent of the damages to which a party is exposed for wrongful termination of the contract."*

**[272]** On the evidence presented, it is clear that the CHART Programme was brought to an end for reasons outside of the direct control of the defendant. Indeed, there

was no suggestion that the defendant influenced the ending of the support of the programme. It could well be regarded as ironic that the defendant, in terminating the claimant's contract, was doing what it thought necessary to ensure continuation of the programme for the funding agency to declare a lack of funds so to do in any event. In the circumstances, it is not appropriate to award any sums which may have been payable if the programme had continued.

**[273]** The claimant gave clear and concise evidence as to the arrangement, which had been in place for his remuneration. This arrangement had included a supplementing of the basic salary from the defendant with amounts approved by the donor. This had been in place since the inception of the programme and had continued uninterrupted until November 2014 as was evidenced by letters submitted by a staff member at the defendant's office of finance.

**[274]** The defendant, through its bursar, is now seeking to assert that mistakes had been made in calculations of the claimant's salary and fringe benefits and he had in fact been overpaid. In the submissions made on behalf of the claimant it is urged that the claimant is entitled to damages based on his course of dealings with the donor and the defendant.

**[275]** Any evidence that the claimant was being overpaid must be viewed with some amount of cynicism especially since this assertion only seem to have arisen when the relationship between the claimant and the defendant was being brought to the end, in the manner it was. The sums due to the claimant would have to be calculated in keeping with the evidence presented, all of which support no evidence of an overpayment.

**[276]** There is included in the submissions made on behalf of the claimant, a detailed calculation or formula for the determination of the salary payments allegedly due to him. It was offered as a guide to the court in assessing damages consequent on the breach of contract. The final figure given represents the sums due in lieu

of three (3) months notice of dismissal as being $4,272,957.00 Jamaican dollars. I am satisfied that this amount is in fact due to the claimant.

**Damages for breach of contract including stigma and reputational damage**

**[277]** The House of Lords in **Malik v BCCI** recognised the principle of stigma damages as being where the employer's breach of contractual duty of trust and confidence creates a stigma which results in a handicap in the market place with damages being recoverable if the employee can prove a financial loss. In the circumstances, there has not been proven any basis for the award of stigma damages.

**[278]** There has also not been any evidence presented that justifies the awarding of damages for any loss of reputation or loss of advantage on the labour market.

**Aggravated damages**

**[279]** In **Thompson v Commission of Police of the Metropolis** [1997] 2 All ER 762, Lord Woolf provided useful guidance as to when aggravated damages ought to be awarded. At page 775 (e) he stated:

> *"Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the awards were restricted to a basic award."*

**[280]** In the submissions made in relation to these damages, the aggravating circumstances were in relation to the defamation claim. Having found that the claimant was not defamed, any further discussion and consideration under this heading is unnecessary.

**Frank Williams, J.**

**[281]** Although widely separated on several issues in this matter, there is one respect in which the parties are not in dispute and it is this: that Professor Brendan Courtney Bain, the claimant in this matter, is a man of unquestionable distinction.

**[282]** He is a medical doctor and retired professor of community health in the Department of Community Health & Psychiatry of the Faculty of Medical Sciences at the Mona Campus of the University of the West Indies (UWI). As a medical doctor, he has had specialist training in general internal medicine, clinical infectious diseases, medical education and public health. Up to the time of his termination which has led to the filing of this claim, he held some four positions with the UWI, namely:

*i. Director of the Regional Co-ordinating Unit (the RCU) of the Caribbean HIV/AIDS Regional Training (CHART) Initiative.*

*ii. Director of the Caribbean Health Leadership Institute (CHLI), (both of which are managed from offices at the UWI, Mona).*

*iii. Programme Co-ordinator of a two-year post-doctoral fellowship in infectious diseases offered by the Department of Medicine at UWI, Mona.*

*iv. Director of a UWI sub-grant team in the CARICOM Regional Global Fund Grant (Grant # MAC – 910 – G02 H).*

**[283]** He has played a leading role in the Caribbean in the fight against the scourge of HIV/AIDS.

**[284]** As is indicated in paragraph 9 of the Further Amended Fixed Date Claim Form, the claimant obtained undergraduate degrees and post-graduate training in internal medicine from the defendant. He studied and conducted research in infectious diseases at St. George's Hospital Medical School funded by a

research fellowship. He also holds a diploma in medical education from the University of Dundee, Scotland. Additionally, he has a master's degree in public health summa cum laude from Boston University in the United States of America. He is a Fellow of the Royal College of Physicians of Edingborough, (FRCPE); and is a published author.

**[285]** The breadth and depth of his work are best described in his own unchallenged words contained in paragraphs 6 to 12 of his witness statement dated 24th November 2014. They are set out as follows:

> *"6. I am one of the pioneers in Clinical Infectious Disease practice in the Caribbean and am regarded as a leading medical authority on the HIV epidemic in the Caribbean. My work in this field began in 1983. Since that time I have provided clinical care to men and women living with HIV and AIDS. I have accepted patients of all sexual persuasions, regardless of their reported sexual practices.*
>
> *7. In addition to my work as an HIV clinician, I have been an active member of the national HIV response team organized by the Ministry of Health of Jamaica. I have served in several capacities, including educator, researcher and counselor, policy advisor, administrator and member of the Jamaica Country Coordinating Mechanism – the latter is a multi-agency group mandated by the Global Fund to fight AIDS, tuberculosis and malaria as the body within the country responsible for preparing and submitting grant applications to the Fund.*
>
> *8. Between 1989 and 1992, I led the first HIV/AIDS training workshops for health care workers at the invitation of the Governments of the Cayman Islands, Jamaica and Belize.*
>
> *9. In 1999, as an advocate for improvement of services to persons living with HIV (PLHIV) and recognizing the need for provision of reliable medical care to these individuals, I persuaded the UHWI authorities to allow me to start an out-patient clinic dedicated to the care and treatment of PLHIV and to the training of younger physicians and nurses in HIV care – the first service of this kind in Jamaica at the time, apart from the sexually transmitted infection service at the Comprehensive Health Centre in Kingston. This initiative at UHWI led to the commencement of a similar clinic at the Kingston Public Hospital in Jamaica, increasing access to HIV care for a larger number of patients.*

> *10. In the year 2000, the Vice-Chancellor of the University of the West Indies (UWI) appointed me as the Focal Point for HIV/AIDS in a regional project aimed at strengthening the institutional response to HIV/AIDS and sexually transmitted diseases in the Caribbean. I was thereafter endorsed by two successive Vice-Chancellors to lead Caribbean training programmes on behalf of the University. Between 2005 and 2010, I served as a member of the inaugural Technical Working Group on HIV/AIDS and Sexually Transmitted Infections of the Pan-American Health Organization.*
>
> *11. In 2003, I was invited by a United States Government team to lead the Regional Coordinating Unit of the Caribbean HIV/AIDS Regional Training (CHART) Initiative, which became part of the outreach to the CARICOM Caribbean (sic) by the International Training and Education Centre on HIV (now called the International Training and Education Centre for Health) directed from the United States Agency for International Development (USAID), the US-based Health Resources and Services Administration (HRSA) and the US Centres for Disease Control and Prevention (CDC).*
>
> *12. Over the past eleven years, the CHART programme has, under my leadership, trained more than 20,000 health care workers and lay counselors in the English and Dutch-speaking countries of the Caribbean as well as in parts of Haiti."*

**[286]** I have taken the step of setting out these paragraphs *in extenso* and verbatim for a number of reasons. For one, there is no challenge mounted in the affidavit evidence filed on behalf of the defendant to this information about Professor Bain's history of involvement and leadership in the fight against HIV/AIDS. Second, this background will assume considerable importance when we come to analyze the circumstances of his termination. Third, it also gives us an orientation, if you will, of some of the acronyms (such as CHART and CHLI), that feature prominently in the evidence (both documentary and oral), in this matter. I will mention three other acronyms that also play a significant role in this matter. They are (i) PANCAP – the Pan-Caribbean Partnership against HIV/AIDS - formed in 2001 by the Caribbean Community (CARICOM) Heads of State. PANCAP has a co-ordinating committee – the Priority Areas Co-ordinating Committee - referred to by the acronym PACC. PEPFAR is another – referring to the United States President's Emergency Plan for AIDS Relief.

**[287]** It will be necessary as well to set out verbatim the contents of two documents: (i) the post-retirement contract between the defendant and Professor Bain, dated 19th December 2012; and (ii) the defendant's letter terminating the claimant's said contract. They too will be of considerable importance when the issues are being analyzed. It may be convenient to set out the contents of these two documents now.

**[288]** I will just note, before doing so, that the claimant retired from the UWI with effect from 30th September 2013.

**The Post-Retirement Contract**

**[289]** These are the terms of the post-retirement contract:

*"December 19, 2012*

*Professor Brendan Bain*
*Director*
*UWI CHART*
*The University of the West Indies*
*MONA.*

*Dear Professor Bain,*

*I am directed by the Council to offer you a post-retirement appointment as Director, Caribbean HIV/AIDS Regional Training (CHART) Initiative, the University of the West Indies, Mona, following your retirement from the University on September 30, 2013, subject to a medical report of physical fitness for the appointment.*

*2. The appointment is with effect from October 1, 2013 to September 30, 2015. The appointment is nevertheless terminable by three (3) months' notice in writing on either side.*

*3. The appointment is full-time and no outside employment may be undertaken without the written consent of the University. Your duties will be as arranged by the Dean, Faculty of Medical Sciences, or any other.*

*4. Your basic salary will be at the rate of J$6,436,449.00 per annum. You will also be paid a housing allowance at the rate of 40% of your basic salary.*

*5. The provision at Clause 84 in the Rules for Academic and Senior Administrative staff for insurance of staff travelling on University business will be applicable to you. In addition, the Employer's Liability Insurance at Clause 104 and the Health Insurance Scheme of the Mona Campus will be deemed to apply to you.*

*6. You will be entitled to ten (10) days annual leave per year.*

*7. A medical certificate is required for absence of more than two (2) consecutive days of sick leave.*

*8. As evidence of your acceptance of this offer, I should be grateful if you would sign and return the endorsed copy of this letter.*

*Yours sincerely,*

*C. William Iton*

*University Registrar*

*I accept post-retirement appointment on the terms set out above*

*(Signature) Brendan Bain*

*(Date) 20th December, 2012*

*Encl."*

This document was received into evidence as exhibit B 1.

The letter of termination was received into evidence as exhibit B 28. It is a letter written on the letterhead of the UWI, from the Office of the Vice-Chancellor (Professor E Nigel Harris). These are its terms:

*'May 20, 2014*

*Professor Brendan C. Bain DM, MPH, FRCPE*
*Director, CHART Regional Coordinating Unit*
*and Caribbean Health Leadership Institute*
*The University of the West Indies*

*Mona Campus*
*Kingston 7*

*Dear Professor Bain,*

*I take this opportunity to once again acknowledge and thank you for all you have done over many years in the advocacy for the prevention of HIV/AIDS and the care of patients suffering with the disease. Your remarkable contribution to the establishment and growth of the Caribbean HIV/AIDS Training (Chart) Network is highly appreciated as indeed is your contribution to the academic enrichment of the University.*

*The past several months have been quite tumultuous as the University has struggled to balance the interests of the Academy, your personal interests and the views of varying civil society groups who have registered their concerns regarding your seeming support for the maintenance of laws advocating the criminalization of men who have sex with men (MSMs). These concerns were triggered by your submission of a statement that was deemed by persons familiar with the field to have been framed in a manner that could contribute to further stigmatization of the MSM community. The conclusion of many, including members of the vulnerable communities, is that your testimony runs contrary to the objectives of programmes such as CHART which champions the human rights of all persons irrespective of sexual orientation and opposes stigma and discrimination. Your statement has the potential to threaten the credibility of the CHART project and undermine the University's representation in vitally important groups (for example, PANCAP and Justice for All) as we work together to benefit those vulnerable communities.*

*After consulting widely, I have concluded that it would be in the best interest of the University to terminate your contract as Director of the Regional Coordinating Unit of CHART as of June 15, 2014 and to pay you 3 months' salary in lieu of notice. Additionally:*

- *You shall not represent the University in any fora related to CHART.*

- *You shall before the 15th day of June 2014 provide a status report detailing the accomplishments of the project, planned meetings, unscheduled deliverables and any other matter which in your professional opinion is necessary for your successor to seamlessly continue the implementation of the programme.*

- *We recognize that the CHART carried with it concomitant projects including CHLI and you are hereby advised that until further notice you shall not render services within the context of any project concomitant with CHART.*

> ► *In addition to your three months' pay in lieu of notice, you shall be paid any other entitlements that may have become due and owing to you.*
>
> *I regret that this has become necessary, but we are satisfied that the controversy has compromised your ability to lead the programme on behalf of the University, which leaves me with no other recourse than the one I have taken.*
>
> *Yours sincerely,*
>
> *E. Nigel Harris (Prof)*
>
> *Vice-Chancellor"*

**[290]** So by what means did a separation come about between one so esteemed and an institution that held (or holds) him in such high regard? The answer to this question lies in the brief background to the matter that I will shortly give.

**The Background to the Termination**

**[291]** It all started with Professor Bain's expert testimony in the matter of **Caleb Orozco & another v The Attorney-General of Belize** – claim number 668 of 2010. In that case, the claimants sought to challenge and have declared unconstitutional, section 53 of the Belize Penal Code which outlaws homosexual activity – even in private. (Orozco is head of UniBam: the United Belize Advocacy Movement). The relevant section of that law reads as follows:

> *"Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for 10 years."*

**[292]** The challenge to the law was brought pursuant to section 20 (1) of the Belize Constitution. The wording of that section is as follows:

> *"**20.**-(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with*

> *respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.'*

**[293]** The suit was brought with the support and on the initiative of a group originating in the defendant named U-RAP: the Faculty of Law, University of the West Indies Rights Advocacy Project. That organization on its website www.u-rap.org, describes its aims and activities in the following way:

> *"The main objective of the Faculty of Law UWI Rights Advocacy Project (U-RAP) is to promote human rights, equality and social justice in the Caribbean by undertaking and participating in human rights litigation in collaboration with human rights lawyers and civil society organizations. U-RAP is currently engaged in constitutional litigation in the English speaking Caribbean, challenging laws that undermine the human dignity and human rights of sexual minorities."*

**[294]** It operates in a manner somewhat reminiscent of the method of the National Association for the Advancement of Coloured People (NAACP) in the United States of America which mounted state-to-state challenges to "Jim Crow" racial segregation laws. The end result of that effort was the dismantling of the "Jim Crow" system. Similarly, that group (U-RAP) has mounted an assault on anti-homosexuality and anti-discrimination laws in the Caribbean region.

**[295]** A group of churches in Belize joined the fray to oppose the claimant, Orozco's, application; and, in doing so, sought an expert report from the claimant, Professor Bain. He eventually provided a report; and his expert report in the matter is dated 7th August 2012. It is exhibit B 17 in this matter.

**[296]** Even before he submitted his expert report, however, he was approached by several persons who sought to dissuade him from giving his report. Their concern was that his giving such a report on behalf of a group that was opposing the application being made in the Orozco matter, might have had the effect of having persons in the lesbian, gay, bi-sexual, transsexual and intersex (LGBTI) community view him as being opposed to the removal of the anti-buggery law.

One such person who approached him with this view in mind was Professor Peter Figueroa of the defendant university. Others who approached him together in May of 2012 were: (i) Mr. Ian McKnight, who was, at that time, head of the CVCC; and (ii) Dr. John Waters, also at that time a representative of CVCC and a member of the Regional Coordinating Mechanism (RCM) of PANCAP.

**[297]** Apparently incensed at Professor Bain's providing the report, the CVCC penned a letter of complaint to the Pro-Vice Chancellor of the defendant dated 24th September 2013. That letter is exhibit B 18. On a fair interpretation of it, it indirectly calls for the claimant's termination. Among its more important paragraphs are the following:

> *"…we wish to point out the conflicts between his personal views and those of the organization which he leads. Professor Bain continues to receive funding to support a regional effort to end discrimination.*
>
> *Caribbean civil society must ask for a response when individuals, funded by international donors, advocate positions that contradict a human rights approach to HIV and the region's decades old HIV effort.*
>
> *Does UWI intend to continue supporting Professor Bain's work and his participation in CARICOM and PANCAP HIV meetings and decision making bodies?*
>
> *Will UWI/CHART continue to use PEPFAR and or Global Fund resources to support Professor Bain's work?"*

**[298]** The CVCC letter lists as being its members some thirty-three (33) disparate organisations across the Caribbean, such as UniBam; Jamaicans for Justice (JFJ); Guyana Trans United (GTU); Suriname Men United; and the CVCC itself. It was sent as an attachment to an e-mail sent by Mr. McKnight and copied to Professor Peter Figueroa. It described the giving of the expert report by Professor Bain as "an unacceptable situation…"

**[299]** In its initial response, the defendant in its letter dated 14th October 2013 (exhibit 21), encouraged the CVCC to consider the defendant's view that:

> "…any judgment of Professor Bain's leadership with respect to our common struggle against HIV/AIDS must acknowledge that he has provided dedicated service to affected patients over many years…"

**[300]** A letter of the same date was sent to the claimant by the defendant under the signature of Mr. E. Nigel Harris, the defendant's Vice-Chancellor, expressing in effect substantially the same sentiments. In the last sentence of the first paragraph of that letter, it is stated that: "In the testimony you gave to the court, we note that you expressly indicated that your views do not reflect those of the UWI."

**[301]** Thereafter, there was a meeting on 12th May 2014 between the claimant and his legal representative on the one hand, and the Vice-Chancellor and the legal representative of the defendant on the other. The impression with which the Vice-Chancellor left that meeting was that the claimant was going to resign as head of CHART; however, even if that were so, the claimant reconsidered and did not do so.

The letter of termination was what followed.

**The Issues in the Case**

**[302]** The order of the closing addresses in this matter saw counsel for the Attorney-General addressing the court first, and dealing with the issues in a particular order. The other parties followed suit. Therefore, although there are several ways in which the issues might be stated and analyzed, it seems to me that no useful purpose would be served by stating the issues in a way different from that in which they were dealt with by the parties. These therefore are the issues in the order that they were dealt with so far as the constitutional law aspect of the case is concerned:

> *"i. Is the defendant bound as a public authority under section 13(4) of the Charter or as a juristic person under section 13(5) to uphold the Claimant's rights?*
>
> *ii. If the Defendant is bound as a juristic person in respect of the horizontal application of the rights set out in the Charter, are the three rights in question applicable to the Defendant, taking into account the nature of the rights and the nature of any duty imposed by the rights?*
>
> *iii. If the Defendant is bound to uphold the rights in question, has there been an infringement of the rights to freedom of expression, thought and conscience and due process?*
>
> *iv. If the Defendant has infringed the Claimant's rights, can such infringement be considered 'demonstrably justified in a free and democratic society' under section 13(2) of the Charter?'*

**First Issue: Whether the defendant is bound as a public authority under section 13(4) of the Charter or as a juristic person under section 13(5) to uphold the claimant's rights?**

**[303]** Some time will be saved by first looking at the defendant's position in relation to this issue.

**The Defendant's Submissions**

**[304]** The defendant accepts that it would fall to be considered a juristic person (if the court disagrees with its submissions that the matter is more in the nature of an employment dispute between private parties). This is what the defendant states in its written submissions filed 8th December 2014:

> *"57. It also accepts that, as a juristic person, it is under a constitutional obligation under section 13(1) (c) and 13(5) to respect the rights of Professor Bain to freedom of expression, thought and conscience."*

This acceptance is not to be taken as a capitulation, however, as the defendant makes clear in paragraph 59 of the said submissions:

> *"59. The University, as a juristic person is entitled under section 13 (5) to the protection of its right to protect its business and institutional reputation and to have that right taken into account in any adjudication of its conduct where that conduct, as is the case in Professor Bain's claim, is alleged to have infringed his rights."*

**The Attorney-General's Position**

**[305]** The position of the Attorney-General on this point is to the effect that it is more likely that the defendant owes a duty to the claimant as a juristic person than as a public authority. The distinction is made apparent in the wording of section 13 (4) and (5) of the Charter, which read as follows:

> *"13 (4) This Chapter applies to all law and binds the legislature, the Executive and all public authorities.*
>
> *(5) A provision of this Chapter binds natural and juristic persons,* ***if and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right****." (Emphasis added)."*

**[306]** In very helpful submissions, counsel for the Attorney-General went on to explore this distinction and its implications, citing several authorities in support.

**The Claimant's Position**

**[307]** For the claimant, the main argument advanced was to the effect that there has in fact been a breach of the claimant's constitutional rights – whether the defendant is to be viewed as a public authority or as a juristic person. In fact, not much time was spent by the claimant on this point, there seeming to be the assumption that, from whatever aspect the matter is considered, there was a breach.

**Discussion**

**[308]** As previously mentioned, the approach taken by the Attorney-General commends itself to me. While we can (with the defendant's acceptance that it is a

juristic person), obviate that aspect of the discussion as to whether it is a juristic person or public authority, we might nevertheless briefly explore whether it might also be regarded as a public authority and what difference, if any, the two categories carry.

**[309]** It is useful to recall at this time, the distinction between subsections (4) and (5). The main distinction between them is that subsection (4) appears to bind the legislature, Executive and public authorities absolutely, without exception. In relation to juristic persons and natural persons, on the other hand, whether they will be bound, and, if so, to what extent, depends on the nature of the right and the nature of the corresponding duty imposed by that right (see subsection (5)). Of the authorities cited by counsel for the Attorney-General, the ones that I find most persuasive and that impel me to the conclusion that the court was invited (by the said counsel) to draw are: (i) **Clark v University of Melbourne (No. 2)** [1979] VR 66; and (ii) **Judicial Review in Public Law and in Contract Law: The Example of Student Rules**, by Simon Whittaker, in Oxford Journal of Legal Studies (2001) (21) (2): 193.

**[310]** In **Clark v University of Melbourne (No. 2)**, (at page 73), the court held that:

> *"[T]he essence of the University's powers is that they are powers of self-government affecting only those who choose to become members by enrolment or the acceptance of employment or office within the University. ... The regulation now under consideration does not levy money to the use of the Crown, because the University is neither the Crown nor a body substituted for the Crown to perform a Crown or Executive function."*

In his article, Whittaker directly considered the question of whether a university might be regarded as a public authority. This was what he had to say on the matter:

> *"But are universities 'public authorities' so as to attract the application of section 6? While government ministers are clearly included and private individuals generally not included, there is*

*considerable difficulty as to the application of section 6 to 'hybrid persons', a category in which universities may be thought to fall."*

**[311]** On the basis of these authorities and the submissions of counsel for the Attorney-General, I conclude that the university would not be a public authority; but a "hybrid person", and so is properly to be regarded as a juristic person within the meaning of section 13(5) of the Charter.

**[312]** This conclusion will, of course, now require some consideration of the nature of the rights being put forward by the claimant to see whether the defendant would be bound by them. Issues (ii) and (iii) may conveniently be dealt with together. Let us start with the right of freedom of thought and conscience.

*Issue: (ii) If the Defendant is bound as a juristic person in respect of the horizontal application of the rights set out in the Charter, are the three rights in question applicable to the Defendant, taking into account the nature of the rights and the nature of any duty imposed by the rights?*

*Issue: (iii) If the Defendant is bound to uphold the rights in question, has there been an infringement of the rights to freedom of expression, thought and conscience and due process?*

**Freedom of Thought and Conscience**

**[313]** This right is enshrined in section 13 (3) (b) of the Charter. It may be best at this juncture in addition to setting out the specific provision governing this particular freedom, to also set out the provisions in the wider context of which this freedom is stated. This is how the relevant parts of section 13 of the Charter read:

*"(1) Whereas-*

*(a) The state has an obligation to promote universal respect for, and observance of, human rights and freedoms;*

*(b) all persons in Jamaica are entitled to preserve for themselves and future*

*generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and*

*(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter… the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.*

*(2) Subject to sections 18 and 49 and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society-*

*(a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*

*(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.*

*(3) The rights and freedoms referred to in subsection (2) are as follows-*

*… (b) the right to freedom of thought, conscience, belief and observance of political doctrines;*

*(c) the right to freedom of expression…'*

**[314]** What are the essential features of the freedom of thought, conscience, belief and observance of political doctrines? They have been discussed and described in a number of authorities. Among them, more significantly, are (i) the Council of Europe Human Rights Handbook, specifically that part by Jim Murdoch entitled: **Protecting the Right to Freedom of Conscience, Thought and Religion**

**under the European Convention of Human Rights**, which discusses Article 9 of the **European Convention on Human Rights** (the Convention), dealing with "freedom of thought, conscience and religion". This is the relevant quotation, to be found at page 18:

> *"At its most basic, Article 9 seeks to prevent state indoctrination of individuals by permitting the holding, development, and refinement and ultimately change of personal thought, conscience and religion. All of this involves what is often referred to as the forum internum. For example, an intention to vote for a specific party is essentially a thought confined to the forum internum of a voter and its existence cannot be proved or disproved until and unless it has manifested itself through the act of voting."*

**[315]** The above quotations were relied on by the Attorney-General as a basis for the submission that private individuals are, like the state, in a position to limit the enjoyment of a person's right to freedom of thought and conscience. It was further submitted that this freedom is closely linked with freedom of expression, through which is usually manifested the freedom of thought and conscience. I accept the submission that it is through freedom of expression that the other freedom of thought and conscience is usually manifested.

**[316]** It is best, it seems to me, to explore at this stage the hallmarks of the freedom of expression.

**Freedom of expression**

**[317]** As previously indicated, this freedom is provided for in section 13 (3) (c) of the Charter which guarantees: "the right to freedom of expression".

**The Attorney-General's Submissions**

**[318]** In making submissions on this freedom for the court's consideration, Ms. Larmond on behalf of the Attorney-General, sought to place reliance on mainly three cases. The cases were: (i) **Benjamin and others v Minister of**

**Information and Broadcasting and Another** (2000) 58 WIR 171; (ii) **Irwin Toy Ltd v Quebec (Attorney General)** [1989] 1 SCR 927; and (iii) **Khumalo and Others v Holomisa** (2002) ZACC 12.

**[319]** The Privy Council case of **Benjamin**, which concerned the provision for freedom of expression in the Constitution of Anguilla, was cited with a view to demonstrate the importance of this particular freedom to the existence of a democratic society. In that judgment, Lord Slynn of Hadley was quoted at paragraph 38 as observing that freedom of expression:

> *"... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no 'democratic society'."*

**[320]** It was submitted as well that the following quotation from the **Irwin Toy** case might also be of assistance:

> *"Expression has both content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey a meaning. The meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as* ***to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.***
>
> *Such protection is, in the words of both the Canadian and Quebec Charters, 'fundamenta' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. '(Emphasis added by the Attorney-General).' "*

**[321]** It was observed by Ms. Larmond that in the first-instance decision of **Maurice Tomlinson v CVM, TVJ and PBCJ**, claim no. HCV 05676 of 2012, P Williams, J

(as she then was), acknowledged that freedom of expression had horizontal application.

**[322]** The **Khumalo** case was cited as an example of a decision in which it was held that the right to freedom of expression had "direct horizontal application"; and that a potential invasion of the right could be occasioned by persons other than the state or organs of the state.

**The Defendant's Submissions**

**[323]** In a nutshell, the defendant's contention might be seen in paragraph 59 of its written submissions, which reads as follows:

> *"59. The University, as a juristic person is entitled under section 13(5) to the protection of its right to protect its business and institutional reputation and to have that right taken into account in any adjudication of its conduct where that conduct, as is the case in Professor Bain's claim, is alleged to have infringed his rights. To be more specific, while the University strongly resists the claim that it has infringed any of Professor Bain's constitutional rights, it relies on the principle espoused by the Charter, that its actions were motivated by and limited in the interest of protecting its responsibilities to the persons with whom it is and was associated in the quest to curtail and eliminate the epidemic of HIV/AIDS in the Caribbean."*

**The Claimant's Submissions**

**[324]** Interestingly, the claimant relies on the same just-cited quotation from the **Irwin Toy** case. Counsel for the claimant also relied on a further quotation from **Toy** in which Chief Justice Dickson is quoted as saying at page 970:

> *"…freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure."*

The following quotation of Dickson CJ (at pages 978e to 979a) was also relied on:

> *"To make this claim the Plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in community or individual selffulfilment and human flourishing."*

With this quotation having been set out as a support for her arguments, counsel for the claimant made the following submission (at paragraph 67 of the written submissions), which is the pith and substance of the claimant's case in relation to this freedom:

> *"67. The facts before the Court confirm that the testimony conveys meaning. Further, the Claimant as an academic and part of UWIs academic community was participating in community and human flourishing by assisting the Court with information on an area that is undoubtedly riddled with emotion, controversy and debate. The fact that the Claimant was an expert elevates the status of the information and the pursuit of truth. The Claimant was not simply pursuing the truth; he was bound to do so as part of the contribution to the administration of justice. He was at the fount of academia, the citadel of intellect and education [in] the region and he was the acknowledged leading expert in the region. The administration of justice is inextricably linked to a common objective to search for the truth of any community. The Claimant had a duty to be true to himself; his report could be clarified and tested under cross-examination…"*

**Discussion**

**[325]** Since it is the report and its presentation in the **Orozco** case that initiated the controversy that eventually led to the claimant's separation from the defendant, it is, of course, required that some time be spent considering the contents of the report. It is, in my view, best to do so at this stage, in trying to arrive at a conclusion as to whether the claimant's freedom of expression was contravened.

**The Expert Report**

**[326]** The expert report (exhibit B17) starts by giving the claimant's professional qualifications and experience. It next gives a summary of the key points of the

report. Included among these is his statement of the focus of his report and the context in which the report was requested and presented. For example, he states, at page 3 of the report:

> *"The focus of the present inquiry is how the law treats men who have sex with men who have anal sex in private. The specific request is for modification of the law to exclude the classification of 'anal sex between two consenting adult males in private' as a criminal offence.*
>
> *In this context, a major argument that has been posited by some experts is that the current law impedes access to HIV prevention, care and treatment services by men who have sex with other men (MSM), thus jeopardizing their health and threatening premature demise. Although it is not mentioned specifically by the claimant, I believe that the matter of access to HIV services is one of the considerations relevant to the current case."*

**[327]** It would appear that the following excerpt to be found on page 4 of the report might be that which led to the disquiet and to the claimant's eventual termination:

> *"This report shows that the relative risk of contracting HIV is significantly higher among men who have sex with other men (MSM) in Belize than in the general population. This is also true in several other countries for which data are available, including countries that have repealed the law that criminalizes anal sex and countries where the law still applies.*
>
> *Some Public Health practitioners and agencies have hypothesized that decriminalizing the practice of anal intercourse among consenting adults would lead to a reduction in the incidence rate of HIV infections among MSM. To date, published data have not substantiated this hypothesis."*

**[328]** The report at page 5 also makes reference to "all sexually active persons" and their need to take responsibility for behaviour change. It mentions on the same page, the need for programmes aimed at stemming the tide of HIV infections and other STIs to be comprehensive, rather than piecemeal. It considers as well on page 6 "Male-female and male-male behaviours". It looks at data from other countries; at a recent series of articles and the economic cost of STIs to the community and governments.

**[329]** It appears to me that the report draws no direct conclusions. It simply or primarily presents data and reviews other associated considerations from a wide spectrum of viewpoints. It does not appear to me directly to state or advocate a particular position. And it considers not just MSMs; but also heterosexuals as well. The impression that one gets from reading it (and I so find) is that it is a balanced, fair and impartial report. In fact, it would be strange if it were otherwise, having regard to the fact that the claimant made it in his capacity as a court-appointed expert in ongoing litigation. As a court-appointed expert, his mandate would have been to assist the court in arriving at its decision with impartial evidence; not to advance or advocate a particular policy position or to suppress the truth as he saw it or facts as he knew them so that a particular policy could be advanced.

**[330]** This finding in respect of the report is one of my primary findings (if not the primary finding) in this matter – in particular as it relates to the right to freedom of expression and the decision to terminate the claimant.

**[331]** In considering the evidence as to the reason for the claimant's termination, I found the evidence of Dr. William Aiken to be of considerable assistance in this matter and on this issue. In answer to the court's question seeking clarification from him as to his response: "it has to be", when asked in cross-examination whether he felt that the claimant in effect was terminated for giving his report, Dr. Aiken explained that: "…the testimony is at the epicenter – the basis of it…that has caused the loss of confidence. Also, for the University to terminate his contract, they must have lost confidence in him as well."

**[332]** I am in complete agreement with this assessment and viewpoint. Had the claimant not given the report, there is no evidence pointing to any other possible reason for him to have been terminated. As Dr. Aiken characterizes it, the report was "the epicenter…" of the termination and the subsequent controversy.

**[333]** This makes the defence advanced ring hollow and its position of seemingly celebrating the claimant's right to freedom of expression while, at the same time, terminating him, appear (with respect) somewhat hypocritical or conflicted. In these circumstances, the defendant must be regarded in practical terms of saying in effect: you can express yourself freely or as you want, so long as you say what we (or others – even the mainstream) want you to say. Or, put another way: you are free to express yourself as you see fit, but, if you say anything that does not accord with our policy or affects our finances, then you have to go.

**[334]** Professor Rosemarie Antoine, who gave evidence in the matter, sought to draw an analogy between the claimant's testimony vis-à-vis his employment; and a hypothetical employee of Grace Kennedy who advocated a position against the policy of that company. In relation to Professor Antoine's analogy with the Grace Kennedy employee, I must, with respect, disagree with the applicability of this analogy to the facts and circumstances of this case. The main basis for the view that the analogy is inapplicable is the fact that in that analogy the employee is assumed to be articulating a position that is inimical to Grace Kennedy's interests; whereas, in this case, on my finding, that is not what the claimant has done: his report is balanced and impartial and does not advocate a position.

**[335]** To my mind, his termination strikes at the heart of the right to freedom of expression, and runs counter to the principle stated in the **Irwin Toy** case, that the freedom was meant:

> *"...to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream..."*

**[336]** In relation to the right of freedom of thought and conscience, however, I hold to the view that the preparation and submission of the expert report would not properly fall within the notion of the expression of "sincerely held beliefs" which

would be protected by the relevant section of the Charter. I would, therefore, dismiss the claimant's application in respect of this aspect of the claim.

> *Issue: (iv) If the Defendant has infringed the Claimant's rights, can such infringement be considered 'demonstrably justified in a free and democratic society' under section 13(2) of the Charter?*

**The Oakes Test**

**[337]** I accept that a finding of a breach of the claimant's right to freedom of expression is not the end of the matter. A finding of breach must be followed by the defendant availing itself of the opportunity of establishing whether its actions which resulted in the breach of the claimant's right might be regarded as "demonstrably justified in a free and fair society" (as per section 13(3)(2) of the Charter).

**[338]** I further accept (as submitted on behalf of the Attorney-General) that the test to be applied to this consideration is that outlined in the Canadian case of **R v Oakes**, [1986] 1 SCR 103. Central to that decision was a consideration of section 11(d) of the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court considered in that case whether the provisions of section 8 of the Narcotic Control Act constituted a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. That section contained what is referred to as a "reverse onus", depriving a defendant found in possession of narcotics of the presumption of innocence; and, instead, presuming him to be guilty of possession for the purpose of trafficking; and requiring him to prove his innocence (that is, that he was not in possession for the purpose of trafficking) on a balance of probabilities. The Ontario Court of Appeal (on the case being appealed from the Ontario Provincial Court) found that that provision of the Act was unconstitutional, it being in violation of the presumption of innocence in s. 11(d) of the Charter. On appeal to the Supreme Court of Canada, the appeal was dismissed.

**[339]** Dickson CJ made several observations and gave important guidance as to how an analysis of the issues in the case was to have been approached. These dicta and that guidance might be found primarily in paragraphs 65 to 71 of the judgment. The more-important parts of them are as follows:

> *"65. The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. …*
>
> *66. The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation….*
>
> *67. The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability.The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. …*
>
> *68. Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". …*
>
> *69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd. supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.*
>
> *70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance*

> *the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*
>
> *71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.'*

**Summary of principles in Oakes**

**[340]** If I may attempt to summarize the relevant considerations, then they would be as follows: Whilst Charter rights are not absolute, a party who wishes to assert that such rights should be limited, bears the onus of establishing to a very high degree of probability that such a limit is reasonable and demonstrably justified in a free and democratic society. In attempting to do so, two central criteria must be satisfied: (i) The objective which the limit is designed to achieve must be pressing and substantial; (ii) If a sufficiently significant objective is recognized, it must be

shown that the means meant to achieve the objective are reasonable and justified. This calls for the application of a three-part proportionality test. The parts of that test are reflected in the questions that follow: (i) Were the means adopted carefully designed to achieve the objective; or, are they arbitrary, unfair and based on irrational considerations? (ii) Do the means impair "as little as possible" the freedom in question? (iii) Is there proportionality between the effects of the measure limiting the right and the objective? The more deleterious the effects of the measure, the more important the objective should be determined to be.

**Discussion**

**[341]** In this case the defendant has sought to discharge the onus by advancing what it says is the claimant's failure to adhere to what might be described, simply put, as the human-rights agenda. That is, the acceptance of the position (and taking steps to advance it) that laws viewed as discriminatory (such as the buggery law being challenged in the **Orozco** case), are a deterrent to the seeking of treatment by men who have sex with men (MSM) and so militate against the reduction of the spread of HIV/AIDS and conduce to an increase in its incidence. The giving of evidence by the claimant, it is contended, ran counter to this well-established and widely-accepted position, known to be the defendant's position as well.

Evidence in this regard for the defendant came in particular from Professor Antoine and Mr. Derek Springer. They spoke, in their testimony, to the various meetings in which the human-rights approach was discussed, developed and agreed; and the considerations that informed that approach.

**[342]** We should consider as well, however, the evidence of persons such as Professor Landis and Dr. Aiken, who appear to take the view that the claimant's expert report was unobjectionable, and scientifically rigorous.

**[343]** But, even taking by itself the evidence presented by the defendant, the question arises as to how to relate it to the criteria or guidelines set out in **Oakes**. The claimant contends that his termination came about as a direct result of his giving testimony in the **Orozco** case. This seems to be the position as well on one interpretation of the evidence of Professor Antoine. Additionally, there are several references in the letter of termination to the "statement" (meaning expert report) of the claimant and in the final paragraph of the said letter it is stated that: "the controversy has compromised your ability to lead the programme on behalf of the University…"

**[344]** Starting with the first of the two central criteria in **Oakes** (that of the objective that the limit is designed to achieve), while it might be accepted that the ultimate aim of the defendant (the reduction in the incidence of HIV/AIDS) is a pressing and substantial objective, one wonders whether it can accurately be said that the termination of the claimant by the defendant was designed to achieve this. In the first place, rather than being a designed strategy, it could be argued to instead have been a reaction to the pressure brought to bear by the CVCC. However, even if we accept that the defendant has met this first criterion, there remains the second; that is, whether the termination has been shown to be reasonable and justified. Here is where the three-part proportionality test comes into play.

**The Proportionality Test**

**(i) Whether the measures adopted were carefully designed to achieve the objective; or were they arbitrary, unfair and based on irrelevant considerations?**

**[345]** Here I must start (as I ended the previous paragraph) by saying that I am unable to conclude that the termination was "carefully designed" to achieve the objective. To the extent that I accept the submissions of counsel for the claimant that CHART primarily had a training and sensitization mandate and given the view that I have come to in respect of the contents of the expert report, I would

more be minded to conclude that the termination was unfair and based on irrelevant considerations.

**(ii) Do the means impair as little as possible the freedom in question?**

**[346]** In the circumstances of this case I do not know what consequence could have been more severe than the very public termination of the claimant and of his being relieved of all responsibilities connected with the CHART programme with immediate effect. Perhaps a reprimand, suspension from duties or some other similar measure less than the ultimate could qualify for the designation of impairing the freedom as little as possible; but in these circumstances termination would not.

**(iii) Proportionality between the effects of the measure and the objective.**

**[347]** It could not be convincingly argued that the objective of effecting a reduction in the incidence of HIV/AIDS is not an important one. However, when one considers the possible deleterious effects of the claimant's termination and tries to strike some balance between the two, it is difficult to take the view that the objective trumps the effects.

**[348]** Having regard to the very high degree of probability that is the standard to which the defendant is required to persuade this court that the termination would fall within the definition or description of being demonstrably justified in a free and democratic society, I am of the view that the defendant has failed to meet this threshold requirement. I conclude, therefore, that the claimant has succeeded in establishing a breach by the defendant of his right to freedom of expression by terminating him in the circumstances of this case. Although I recognize that, as the defendant, contends, it had some right to seek to protect its reputation, termination of the claimant was not the means by which it should have set about:

> *"…protecting its responsibilities to the persons with whom it is and was associated in the quest to curtail and eliminate the epidemic of HIV/AIDS in the Caribbean." (See paragraph 59 of the defendant's written submissions.)*

**Due Process**

Claimant's submissions

**[349]** The claimant's claim pursuant to this freedom appears to be that he ought to have been given a fair hearing before the decision to terminate him was made.

The defendant's submissions

**[350]** On the other hand, the defendant denies that the right to due process or to a fair hearing is applicable to termination of the claimant's contract.

The Attorney-General's submissions

**[351]** Like the defendant, the Attorney-General's position is that the right to a fair hearing before a court or authority established by law, taking account of the nature of that right and the nature of any duty imposed by that right, would not have horizontal application. Accordingly, the defendant would not be bound to uphold the claimant's right to a fair hearing.

**Discussion**

**[352]** The best starting point for a discussion of this right is the relevant provision itself that is, section 16 (2) of the Charter, which reads as follows (so far as is relevant):

> "*16 (2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial* ***court or authority established by law****."*
> *(Emphasis supplied).*

**[353]** Having regard to the wording of this section; and in particular to the underlined words, it is difficult (if not impossible) to see how the defendant could properly be held responsible for any breach of this particular right. The section clearly makes reference only to courts and authorities established "by law"; and the advisory committee referred to in the evidence, that was established by the University could never be said to have been established "by law". It seems to me (accepting the submissions of the Attorney-General) that the section must be construed to mean that the framers of the Charter must have intended for this right to be given and guaranteed by the state; and not by an entity such as the defendant. To my mind, there can be no other interpretation. The aspect of the claimant's case that is based on this constitutional provision must therefore be rejected.

**The alleged breach of the implied term of trust and confidence.**

**[354]** The contest here was joined between the claimant and defendant, the Attorney-General's role in this matter having been limited to constitutional matters only. This is a summary of the submissions from the two sides:

The claimant's submissions

**[355]** It was contended on behalf of the claimant that the defendant's approach in its termination of the claimant amounts to a breach of the implied term of trust and confidence that is contained in the claimant's post-retirement contract. The termination (it was further submitted) also amounts to a breach of the claimant's right to due process and natural justice. On the claimant's submission, the defendant exercised its powers to terminate arbitrarily and capriciously.

On behalf of the claimant, the case of **Imperial Group Pension Trust v Imperial Tobacco Limited** [1991] IRLR 66 was cited, in which, at paragraph 35, it was stated as follows by Brown-Wilkinson VC:

> *"[in] every contract of employment there is an implied term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously destroy the relationship of confidence and trust between employee…..I will call this implied term the implied obligation of good faith."*

**[356]** Counsel for the claimant also sought to place reliance on the later House of Lords case of **Malik v Bank of Credit and Commerce International SA** [1997] UKHL 23 in which the existence of the said implied term was confirmed to exist. Particular reliance was placed on the judgment of Lord Steyn. The law, it was submitted, is not concerned so much with the motive of the employer, as motive is not determinative or relevant. The question is whether the employer's conduct, objectively considered, was likely to cause serious damage to the employer-employee relationship.

**[357]** It was further submitted that another manifestation of the breach of the implied term of trust and confidence is to be seen in the way in which the defendant sought to terminate the claimant by giving him three months' notice. The submission continued that the claimant was not terminated in accordance with the contract.

The defendant's submissions

**[358]** It was the submission by counsel for the defendant that the contract of employment between the claimant and itself was lawfully terminated pursuant to the provision contained therein permitting termination upon the giving of three months' notice on either side. Further, that as the claimant was not charged with the commission of a disciplinary breach, no hearing was required.

**[359]** Counsel for the defendant cited several cases including the following, as the basis for making a number of submissions. The cases include: (i) **Coconut Industry Board and Cocoa Farmers Development Company Limited and F. D. Shaw v Burchell Melbourne** (1993) 30 JLR 242; (ii) **Egerton Chang v**

**National Housing Trust** (1991) 28 JLR 495; (iii) **Lisamae Gordon v Fair Trading Commission** – Claim No. HCV 2699 of 2005; (iii) **Janice Elliott v Eurostar Motors Limited** – Claim No. CL E 024 of 2000; and (iv) **Rosamond Johnson v Restaurants of Jamaica Limited T/A Kentucky Fried Chicken** – RMCA No 17/2011.

**[360]** These cases, among others, were the bases for this summary of propositions:

> *(i) Where a contract of employment expressly provides for termination by way of notice or payment in lieu thereof, the contract may be terminated by notice.*
>
> *(ii) Payment in lieu of notice in such cases is cogent evidence that dismissal is not for cause.*
>
> *(iii) Where the appropriate notice (or payment in lieu) has been given, there is no obligation to justify or give reasons for the dismissal.*
>
> *(iv) In such cases, even if a reason is given, that does not detract from the lawfulness of the termination pursuant to the contractual terms.*

**[361]** Additionally, it was submitted that the claim that the defendant acted in breach of an implied term of trust and confidence is without merit, as the defendant cannot be shown to have done any trust-destroying act. Neither is there any evidence that, in acting as it did, the defendant was motivated by ill will. Further, on the authority of **R v Binger, Vaughan and Scientific Research Council, Ex parte Bobo Squire** (1984) 21 JLR 118, it was submitted that the claimant is not a public officer and as such, the remedy of certiorari was not available to him. The matter ought properly to be heard by the Industrial Disputes Tribunal (IDT) established pursuant to the **Labour Relations and Industrial Disputes Act** (LRIDA).

**Discussion and Analysis**

**[362]** In relation to the citation of the case of **Ex parte Bobo Squire**, it seems to me that the defendant's submission in relation to the remedy of certiorari is unassailable and must be accepted. However, where the submission that the

matter ought to be referred to the IDT is concerned, I am unable to agree with the submission. The main reason for my disagreement concerns the multifaceted nature of the claims in this matter. As the foregoing discussion discloses, there are claims for alleged breaches of the freedom of expression, the freedom of thought and conscience, defamation and others. Were this a claim solely concerning termination of employment on narrow issues, then I might have been more inclined to accept the submission on this issue. That not being the case, it appears to me that this contention is without merit and that the present proceedings are appropriate to deal with the multiplicity of issues as they are here framed and presented.

**[363]** In relation to the termination being allegedly done pursuant to the contractual terms as to notice, the defendant is, again, undoubtedly on good ground as the cases cited all support the contentions advanced. Further, in relation to the contention as to the implied term of trust and confidence, the most-recent local authority on the subject seems to confirm the defendant's contention. That is the case of **United General Insurance Co. Ltd. v Marilyn Hamilton** – SCCA # 88/2008; delivered 15th May 2009. In that case, in a most elucidating judgment, Morrison JA (as he then was) traced the development of the law in relation to this matter from the case of **Addis v Gramophone Co. Ltd.** [1909] AC 488 to the time of the delivery of that judgment in 2009. **Addis v Gramophone** has often been cited for a particular position on damages for wrongful dismissal, which is reflected in the head note to the judgment as follows:

> *"Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment*."

**[364]** At paragraph 21 of the **UGI v Hamilton** judgment, Morrison JA observed that: "**Addis** has been routinely followed and applied by this court...." Cases such as **Malik**, he observed, represented a challenge to the **Addis** approach to damages

for wrongful dismissal. Its departure from **Addis** was a "path breaking decision" (see paragraph 23 of the judgment). The House of Lords in that case confirming that there is an implied term of trust and confidence in employment contracts, binding employers not to, without reasonable and probable cause, conduct their businesses in a manner that would destroy or seriously damage the employer-employee relationship. It awarded the claimants in that case "stigma compensation" arising from their difficulty in gaining employment.

**[365]** The observations made in paragraph 33 of the **Marilyn Hamilton** judgment are also sufficiently important to this matter for it to be set out here in full:

> *"33. In the instant case, the respondent specifically pleads a breach of an implied term of trust and confidence. Despite **Malik & Mahmud** and the subsequent cases, she may yet face some formidable hurdles in establishing this at trial. In the first place, apart from the obiter comments of Lord Nicholls in **Malik & Mahmud** (at page 10) and **Johnson v Unisys** (at page 803) and the sustained assault by Lord Steyn on **Addis** in his judgments in both those cases and in **Eastwood v Magnox Electric**, there has not been uniform support for the extension of the implied term of trust and confidence to a manner of dismissal case, which this case plainly is. Secondly, any development of a new implied term that the power of dismissal will be exercised fairly and in good faith (the possible solution favoured by Lords Hoffman and Millett) will still have to overcome the obstacle of **Addis** itself, as a decision of the House of Lords that has withstood the test of a hundred years, and the fact that it has already been followed and applied in this jurisdiction."*

**[366]** Having regard to the dicta in the immediately-preceding paragraph and to the other dicta referred to in the discussion of this issue, as well as to the particular facts and circumstances of this case, it is my view that this case does not justify making a departure from the principle enunciated in the case of **Addis v Gramophone**. To my mind, the manner of the termination of the claimant does not call for a term of trust and confidence to be implied into this contract of employment and for damages to be awarded for the manner of his dismissal. Although each case has to be decided on its own facts, the facts of this particular case may in no way be regarded as approximating the egregiousness of those in,

say, the case of **Malik**. I am not persuaded that it would be appropriate to imply such a term into the instant contract; and, on this issue I would accept the defendant's submissions.

**The Other Issues**

**[367]** Three issues remain for resolution in this matter: (i) whether the claimant was defamed by the defendant; and (ii) whether the claimant was deprived of "due process" pursuant to section 16 of the Charter; and (iii) the question of the award of damages, if any.

**[368]** Having had the opportunity of reading the draft judgment of my learned sister, P Williams, J, I concur entirely with the way in which she had addressed these issues. As the law at present stands, this court cannot find that the claimant was defamed. The right to due process, to my mind, is inapplicable to the facts and circumstances of this case, given how the right is defined in section 16. It is not a right that is amenable to horizontal application. Additionally, if my notes are correct, this aspect of the claim was not pursued. The authorities, therefore, simply do not support the claimant in respect of these three issues. Those aspects of his claim that are based on them must therefore be dismissed.

**[369]** In his Further Amended Fixed Date Claim Form in this matter, it will be remembered that the claimant had applied for the following relief:

> *"1. A declaration that the Defendant's action as evidenced by letter of termination dated 20th May 2014 is a breach of the Claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*
>
> *2. A Declaration that the Defendant's action as evidenced by statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May 2014 and continuing is in breach of the Claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and freedoms (Constitutional Amendment) Act 2011 (the Charter).*

3. *A Declaration that the Defendant's action as evidenced by letter of termination dated the 20th May 2014 is a breach of the claimant's right to freedom of thought as guaranteed by section 13 (3) (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*

4. *A Declaration that the Defendant's action as evidenced by statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May 2014 and continuing is in breach of the claimant's right to freedom of thought as guaranteed by section 13 (3) (b) of the Charter of Fundamental Rights and Freedoms (Constitutional Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).*

5. *A Declaration that the Defendant's statement of the 20th May 2014 posted on its website http://myspot.mona.uwi.edu/marcom/newsroom/entry/5708 on the 20th May and continuing is defamatory of the claimant.*

6. *An order that the letter of the 20th May 2014 is null and void and of no effect and is to be quashed or is not otherwise enforceable or to be treated as effective against the Claimant in that the purported termination is in breach of the implied term of trust and confidence contained in the contract of employment dated 19th December, 2012.*

7. *Damages*

8. *Aggravated Damages*

9. *Damages for Breach of contract including:*

(a) *Stigma Damages and/or Damages for loss of reputation.*

(b) *Damages for loss of advantage on the labour market.*

10. *Constitutional and vindicatory Damages*

11. *Costs to the Claimant to be taxed if not agreed and*

12. *Such further and other relief as this Honourable Court may deem just."*

**[370]** As a result of how I have approached the matter, however, it seems to me that the only remedy that it would be appropriate to grant is a declaration as prayed in paragraph 1 of the said Further Amended Fixed Date Claim Form, to wit:

> *"1. A declaration that the Defendant's action as evidenced by letter of termination dated 20th May 2014 is a breach of the Claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter)."*

**[371]** Finally, I also note, in passing, that a decision in the **Orozco** case was handed down and a written judgment dated 10th August 2016 was delivered. In that judgment the claimant was granted the substance of what he sought. What the court did at the end of the day was to "read down" section 53 (see paragraph 99 of the written judgment) and to order that the section be amended by addition to it the following words:

> *"This section shall not apply to consensual sexual acts between adults in private."*

**[372]** A reading of the judgment reveals that, apart from a summary of the claimant's expert report in paragraph 71, no other reference is made of it in the judgment (although we might be certain that all aspects of all evidence would have been considered in arriving at the judgment). However, despite the "firestorm" that the giving of the report left in its wake, it appears not to have assumed in the trial the significance that it did at the time that it was given.

**Campbell J.**

**[373]** In light of the foregoing reasons, the Court makes the following orders:

1. It is hereby declared that the defendant's action as evidenced by letter of termination dated 20th May 2014 is a breach of the claimant's right to freedom of expression as guaranteed by section 13 (3) (c) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (the Charter).

2. The defendant is to pay the sum of $4,272,957.00 to the claimant, being sums due in lieu of three (3) months notice of dismissal.

3. The claimant is to be paid any sums that may have been withheld due to the assertion that there had been an overpayment.

4. The claimant is to have 20% of his cost, to be agreed or taxed.