[2018] JMCC Comm. 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 CD 00408

COMMERCIAL DIVISION

BETWEEN	**DAVID GAYLE**	**CLAIMANT**
AND	**SOL PETROLEUM JAMAICA LIMITED**	**DEFENDANT**

Dr Mario Anderson, Attorney-at-Law for the Claimant

Mr Christopher Dunkley and Ms Carissa Bryan instructed by Phillipson Partners, Attorneys-at-Law for the Defendant

Heard: 18th, 19th September and 22nd October 2018

Contract – Contract of employment – Whether period of probation was extended – Whether sufficient notice of termination – Whether there is an implied term of trust and confidence in an employment agreement – Whether breach of such a term can override an express contractual term specifying the appropriate period of notice

LAING J

The Claim

[1] By Claim Form and Particulars of Claim filed on 21st December 2016, the Claimant claims damages for wrongful dismissal and damages for breach of trust and confidence which he asserted was an implied term of the contract between the parties.

The Background

[2] The Claimant is a Sales Executive and the Defendant is a company duly incorporated under the laws of Jamaica, which is engaged in the petroleum industry. On 11th September 2013, the Claimant accepted the Defendant's offer of employment. It is common ground between the parties that the terms and conditions of the Claimant's employment are contained in a letter of that date together with the Defendant's form of employment agreement. A copy of the "SOL Employment Agreement" dated 12th September 2013 was admitted into evidence as an exhibit (the "Employment Agreement").

[3] Paragraph 2.1 of the Employment Agreement provides that:

> *"Your employment with the Company begins on September 12, 2013 subject to satisfactory references, a full medical examination inclusive of a test for drug use and alcohol dependency being undertaken and verification of your qualifications. The first three months of your employment will be a probationary period. During this period your performance and conduct will be monitored. At the end of the probationary period your performance will be reviewed and, if found satisfactory, your appointment will be confirmed."*

[4] The Claimant in his witness statement indicated that at the end of his probationary period he received a letter from the Defendant confirming that he had passed his probationary period. As evidence of this, he indicated that, he was given a company credit card and placed on the company's health scheme. In cross examination he said he did not have a letter of confirmation from the Defendant but clarified in re-examination that he did not in actually receive one. The evidence of Ms Colinnette Wilson, the Human Resources/Administrative Officer, was that a Sales Representative of the company is usually issued a company credit card within one week of completing orientation. She also said that she could not locate any evidence of the Claimant having been a participant in the company's health scheme. The Clamant admitted during cross examination that he had never used the company's health card and Counsel for the Defence highlighted the fact that at the end of his employment a health card was not among the items he returned to the Company. I have concluded on a

balance of probabilities that the Claimant was not actually enrolled in the Defendant's health scheme as he asserted.

[5] I state at the outset that on the evidence before the Court, I do not accept that the Claimant received any confirmation whether in writing or orally that he had successfully completed his period of probation and/or that his appointment was confirmed. If the appointment of the Claimant was indeed confirmed, the Defendant's letter dated 4th February 2014, by which the Claimant was informed that the Defendant would be extending his probationary period to 11th March 2014, would be very odd. I would also expect that it would have, quite reasonably, generated more attention than it evidently did since, there is no evidence that the production of this letter and the terms contained therein elicited even the slightest objection or any form of protest from the Claimant. As will become apparent, this finding does not have any real significance as it relates to the process by which the Court arrived at its ultimate conclusions.

[6] On 11th March 2014, the Claimant attended a meeting with the General Manager (who participated by teleconference), as well as Ms Colinnette Wilson and the Financial Controller of the Defendant. Subsequent to the meeting, but on the same day, the Claimant was advised that his employment was being terminated with immediate effect for not having met the sales targets.

Was there a valid extension of the probationary period?

[7] Paragraph 2.1 of the Employment Agreement (to which reference has previously been made) provides that the first three months of the Claimant's employment will be a probationary period. However, nowhere in the Agreement is there provision for the extension of this probationary period.

[8] It appears that the issue of the extension of the probationary period was not one which was central to the Claimant's case because in his witness statement he simply mentions receiving the 4th February 2014 letter indicating that his probationary period was being extended and that a further review of his

performance would be done on 11th March 2014. In closing arguments, Counsel for the Claimant submitted that the extension of the probationary period amounted to a breach of the Employment Agreement. He conceded that this had not been pleaded but submitted that the Court could nevertheless make such a finding. Even if it did amount to a breach (which I have not considered for purposes of this judgment), it not having been raised as an issue, to find that it did would not be fair to the Defence and I do not accept this submission of Counsel.

[9] During his closing submissions, the Court raised with Counsel for the Defendant the issue of the Claimant's position during the period between the end of his probation on or about 11th December 2013 and 4th February 2014 when the Claimant was advised that his probationary period was being extended until 11th March 2014 (this period for purposes of convenience only is referred to herein as the "Transitional Period"). Counsel submitted that the position of the Claimant was that he was a person "under review".

[10] With all due respect to learned Counsel for the Defendant, I have a difficulty accepting his submission that during the Transitional Period the Claimant was merely a "person under review". Such a characterisation is unsupported by the Employment Agreement and purports to place the Claimant during this period in what could be described as "contractual limbo". In my view, during the Transitional Period the Claimant could only have been (a) an employee whose probationary period was continuing or (b) an employee whose probationary period had ended and whose employment could have been deemed to be continuing on the basis of his appointment having been confirmed, (even if he was not so notified).

[11] It is noted that the Employment Agreement at paragraph 2.1 provides that at the end of the probationary period the Claimant's performance will be reviewed and if found satisfactory his employment will be confirmed. However, in my view, this did not provide a licence for the Defendant to have a protracted period of review

while the Claimant's position with the Defendant remained in a state of suspended animation. The phrase "*...at the end of the probationary period*" as used in paragraph 2.1, can only be reasonably interpreted to mean "*[immediately] at the end of the probationary period"*, that is to say, on the day the period ends or perhaps a day or two afterwards, (depending on any special circumstances of each case).

[12] It is not without significance and it must be appreciated that the end of the probationary period is certain. An employer in the position of the Defendant in this case is aware of that date and ought to take the necessary preliminary steps, which may include the gathering of sales and other performance data, in order to ensure that that review can be conducted timeously. It is the employer that has the duty to conduct the review and in my view, that imposes a concomitant responsibility to ensure that it is done immediately. It seems to me that it would be grossly unjust and impermissible, for an employer to delay its review and then, a month later for example, advise the employee that his performance during the probationary period was unsatisfactory and that he was being terminated in reliance on the contractual provisions which governed termination of an employee on probation.

[13] It is this Court's finding of fact, based on the evidence, that there was no review of the Claimant's performance by the Defendant in a timely manner which satisfies section 2.1 of the Employment Agreement. The Court noted the evidence of Ms Wilson that the letter to the Claimant advising him of the extension of his probationary period being dated 4th February 2014 instead of sometime in December 2013, might be explained by the fact that the end of the probationary period coincided with the lead up to the Christmas holidays and having regard to the fact that the Defendant's Corporate office is located in Barbados with business operations in 23 countries, the travelling of relevant officers during this festive period may have prevented the letter being signed in December 2013. Whereas these factors provide an explanation for the delay, in

my view, they would not be sufficient to absolve the defendant of its responsibility to timeously conduct a review.

[14] It is significant, that although the General Manager Mr Robert Jackson was outside the jurisdiction on 11th March 2014, which was the final day of the purported extended probationary period, steps were taken to convene a meeting in which he participated by teleconference and a review was conducted which resulted in the Claimant being advised that his appointment will not be confirmed. The evidence suggests that the meeting was convened at the last minute, because as Ms Wilson indicated, she did not know of the intention to have the meeting until she was advised of it on the 11th March 2014. The General Manager said that he called the meeting on the 11th March 2014 because that was the date of the review indicated in the letter dated 4th February 2014.

[15] Whether the meeting was convened at the eleventh hour or not, what the fixing of the review date on the 11th March 2014 by the 4th February 2014 letter clearly demonstrates is that the Company fully appreciated, (and on my analysis, quite correctly so,) the need for the review to be done, "*immediately*", at the end of the probationary period. If this was required on or about the 11th March 2014 at the end of the purportedly extended probation, then it ought to have been patently obvious that such a review was required on or immediately after the 11th December 2013, since that date was the end of the probationary period as defined in clause 2.1 of the Employment Agreement.

[16] It is the Court's conclusion that the consequence of the failure of the Defendant to immediately conduct a review of the Defendant's performance at the end of the probationary period, and/or failure to terminate his employment at the end of that period, was that the Claimant was deemed to have continued his employment in the Transitional Period as an employee who had successfully completed his period of probation.

Was the probationary period extended by agreement between the parties?

[17] Counsel for the Defendant also submitted that it was well within the rights of the parties during the Transitional Period to vary the terms of the Employment Agreement retroactively, so as to provide for the extension of the probationary period. This extension would have been for an additional three months, to begin from the date of expiry on or about 11th December 2013, and to end on 11th March 2014.

[18] Counsel conceded that there was no documentary evidence to support an assertion that there was a variation of the Employment Agreement by mutual agreement. However, he submitted that this can be inferred, or that, at the very least, the evidence is more supportive of that position than of the position advanced by Counsel for the Claimant that the extension of the probationary period had been unilaterally "*imposed*" on the Claimant. Counsel for the Defendant submitted that the extension of the probationary period was for the benefit of the Claimant. Counsel posited that if the period was not extended in order to give the Claimant the opportunity to improve his performance, then the likely outcome was that his employment would have been terminated. In such circumstances, he argued, there was every incentive for the Claimant to agree to an extension of the probationary period.

[19] It is a general principle of contract law that parties have freedom to agree whatever terms they wish and can do so in a written document, by word of mouth or by conduct. Accepting for the sake of analysis (without so deciding) that such a retroactive variation as submitted by Counsel was possible as a matter of contract law, the Court faces a difficulty because of the dearth of evidence on this issue. Neither party addressed in any detail the circumstances leading to the purported extension. It was certainly not pleaded that it was by consent, nor was the issue of consent ventilated during the trial. All the evidence before the Court simply asserts that the period was extended by the 4th February 2014 letter.

[20] Furthermore, on the Court's analysis, on the 4th March 2014 the date of the extension letter, the Claimant would have already been under a contractual duty to the defendant as an employee. This is a fact which it appears was not lost on the Claimant. When asked if he believed he was fully employed to the Defendant during the probation period his response was that he believed that "*once you commence, you are employed to carry out the duties you are employed to do*." It is the Court's opinion, that if the Claimant simply performed or promised to perform the duties and obligations that were already imposed on him by the Employment Agreement, then, this in and of itself, would not provide good consideration for any new offer or promise by the Defendant to extend the probationary period (see **Stilk v Myrick (1809) 170 ER 1168**). Therefore, in the absence of a clause in the Employment Agreement which provided for an extension, and in the absence of evidence which supports a mutual agreement for such an extension, as a matter of contract law, the Court concludes, that the purported extension of the probationary period until 11th March 2014 was invalid.

The relevant law relating to wrongful dismissal

[21] **Halsbury's laws of England** 4th edition at paragraph 451 defines wrongful dismissal as follows:

> *"... A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:*
>
> *1. The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be: and;*
>
> *2. His dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily."*

[22] It is the settled position at common law (see for example **W. Dennis & Sons v Tunnard Bros and Moore** (1911) 56 SJ 162), that where, as in this case, the Employment Agreement permits the employer to terminate the employment with a specified period of notice, or on the payment of a sum of money in lieu of

notice, if the employer summarily dismisses the employee with payment of the appropriate sum in lieu of notice, then such termination is not wrongful because the employer would be acting in compliance with the strict provisions of the agreement.

[23] In reliance on this general principle, the Defendant's case as pleaded in its Defence, is that it did not breach any term of its contract with the Claimant whether expressed or implied, in that the Claimant never successfully passed the probationary period which was a requirement of his contract of employment with the Defendant. It was further submitted at trial, that the employment contract of the Claimant was never breached as he was never confirmed as an employee. I find that this latter submission is without any merit in light of the Court's finding that the Claimant was an employee at the time his employment was terminated.

Payment in lieu of notice

[24] It was also submitted by the Defendant, that the Claimant was given adequate payment in lieu of notice as per his employment contract because he was given and accepted, (acceptance being a necessary condition), one month's pay in lieu of that notice. It should be observed that at the time of the termination of the Claimant's employment, the Defendant did not assert that it accepted that one month was the appropriate notice period pursuant to section 18.2 of the Employment Agreement which provides as follows:

> *"18.2 During your probationary period your employment is terminable on one week's written notice given by either party. After completion of the probationary period your contract of employment is terminable by you or by the Company on giving the greater of:*
>
> *18.2.1 one month's written notice; or*
>
> *18.2.2 one week's written notice for each complete year of service up to a maximum of 12 weeks' written notice; or*
>
> *18.2.3 any notice required under any relevant employment legislation."*

[25] The evidence of Ms Colinnette Wilson the Human Resources/Administrative Officer of the Defendant was that:

> *"...per the terms of employment contract, the claimant was only entitled to one (1) week's notice during the probationary period but instead, he received payment of one (1) month's notice, which was more than reasonable in the circumstances."*

It is therefore clear from the evidence and the Defence that the Defendant was not consciously purporting to avail itself of the termination provisions which would have entitled it to terminate the Claimant in any event on giving one month's notice or payment in lieu thereof.

[26] Counsel for the Defendant submitted that even if the probationary period was not extended, the Defendant would still not be liable for wrongful dismissal because although the Defendant's officers were of the view that the Claimant was only entitled to one week's notice of termination, the Defendant would have protectively covered itself by having given the Claimant one month's pay in lieu of notice. This is because this was the maximum to which he would have been entitled in any event, if he were not treated as an employee who was still on probation as a result of the purported extension. In other words, since the applicable notice period was one month, the notice requirement was satisfied by the payment of one month's salary notwithstanding the fact that it was not expressly stated to be payment in lieu of one month's notice. As Counsel succinctly expressed the point, the adequacy of the payment for one month was not subverted by the erroneous statement that the Claimant was only entitled to one week's notice.

[27] Counsel for the Claimant agreed in principle that if the appropriate period of notice was found by the Court to be one month, then the payment by the Defendant of one month's notice would have amounted to a payment in lieu of notice for that period and would have satisfied the requirement. However Counsel submitted that this period of notice was not adequate in the circumstances and his position was based on his submission that there was an implied term of mutual trust and confidence in the Employment Agreement.

The statutory development of employee protection laws

[28] Historically, at common law, an employer was entitled to dismiss an employee for any reason he saw fit or for no reason whatsoever, save for a limited category of cases. The common law was primarily concerned with the issue of whether the employee was entitled to and received the appropriate period of notice or payment in lieu of notice in those cases where the conduct of the employee did not justify him being summarily dismissed without more.

[29] The early legal position is captured in the oft-quoted words of Lord Reid in **Malloch v Aberdeen Corp** [1971] 2 All ER 1278 at page 1282:

> *" ... 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 chose but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract"*

[30] There were obvious weaknesses in the existing common law and in 1971 in England, the **Industrial Relations Act** was passed which introduced a new regime in which many employees were afforded the right not to be unfairly dismissed. After revisions, the statutory provisions relating to unfair dismissal in England are now contained in the **Employment Rights Act 1996**.

[31] Jamaica followed suit and the **Labour Relations and Industrial Disputes Act** (the "LRIDA") was passed in 1975 which introduced the concept of "*unjustifiable dismissal*". It created an Industrial Disputes Tribunal ("IDT") to hear complaints, (then limited to unionised workers) and also provided for the **Labour Relations Code** which was enacted in 1976 which has been amended most recently by **Act No 8 of 2010**, which, *inter alia,* amended the definition of "Industrial Dispute" and specifically included disputes involving workers who are not members of any trade union having bargaining rights where such disputes related to the physical conditions of work, and the termination or suspension of employment of such worker.

[32] In **Village Resorts Limited v Industrial Disputes Tribunal** (1998) 35 JLR 292, Rattray P equated unjustifiable dismissal with unfair dismissal and described unjustifiable dismissal as a dismissal which is not in accordance with justice and fairness. It was noted that the learned President of the Court of Appeal that the **LRIDA** had altered the common law principles governing employment contracts.

[33] The learned President made the following observations in the judgment at pages 299 H - 300:

> *" need for justice in the development of law has tested the ingenuity of those who administer law to humanize the harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, - first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though rigidities of its enforcement have been ameliorated. To achieve this Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes...*
>
> *...The Labour Relations and Industrial Disputed Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law"*

[34] The effect of the creation of a statutory unjustifiable/unfair dismissal remedy, (both terms are used interchangeably in the discussion relating to Jamaica within this judgment), is that there are now two parallel regimes in existence. The person who wishes to sue for wrongful dismissal at common law may bring his claim in the Courts, whereas the person who is of the view that he has been unjustifiably/unfairly dismissed may obtain relief from the IDT.

[35] In **University of Technology, Jamaica (Appellant) v Industrial Disputes Tribunal and others (Respondents) (Jamaica)** [2017] UKPC 22, at paragraph 19, Lady Hale delivering the judgment of the Court made the following observations in respect of the Jamaican statutory regime:

> *"18. Three points about this statutory framework are noteworthy. First, the emphasis throughout is on the settlement of disputes, whether by negotiation or conciliation or a decision of the IDT, rather than upon the determination of claims. Second, where the dispute relates to the dismissal of a worker, the IDT has a range of remedies, where "it finds that the dismissal was unjustifiable". Third, its award is "final and conclusive" and no proceedings can be brought to impeach it in a court of law "except on a point of law". This is the sum total of the LRIDA in relation to the dismissal of workers."*

[36] The existence of these two streams as recognised in **Village Resorts** has been consistently followed in this jurisdiction as evident in the decision of my learned brother K Anderson J in **Cameron, Calvin v Security Administrators Limited** [2013] JMSC Civ. 95, in which he refused a claim for unfair dismissal.

Unfair dismissal and the implied term of mutual trust and confidence

(a)The Manner of Dismissal

[37] Counsel for the Claimant has sought to have the Claimant benefit from an implied term of trust and confidence in the Employment Agreement in two ways. In his first approach he sought to use it to challenge the manner of dismissal. He submitted that if the Court implied a term of trust and confidence in the Employment Agreement, this would inexorably lead to a finding that the dismissal was wrongful. He argued that an implied term of trust and confidence carried with it a requirement that the power of dismissal would be exercised fairly and in good faith. If this is so, then the Court would have to assess the reason the Defendant gave for his dismissal which was the poor performance of the Claimant in not reaching his sales targets. Counsel submitted that the Defendant would not have fairly exercised that power of dismissal because, *inter alia*, the Claimant had in fact met his assigned targets.

[38] With this strategy in mind Counsel had devoted a fair portion of his cross examination of Mr Robert Jackson, the Managing Director, to exploring the issue of the Claimant's performance. In this regard, Counsel was not very successful. The Claimant in paragraph 6 of his witness statement asserted that at the end of his initial probationary period he had met and exceeded the agreed targets for

sales in assigned zones. However, this was a bald assertion unsupported by any details such as what were those targets. In a similar vein, it was suggested to the Managing Director that the Claimant was assigned only three customers in his area. This was denied. It was also suggested that the Claimant had signed up a significant number of new clients. This was also denied by the Managing Director. Of course, these suggestions were unsupported by any evidence coming from the Claimant's case and were of no assistance to the Court.

Procedural fairness

[39] The case of **National Commercial Bank Jamaica Ltd. v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24 was an appeal from a decision of Sykes J, to refuse the National Commercial Bank permission to apply for judicial review. The Court of Appeal upheld the decision. Both the decision of Sykes J and that of the Court of Appeal recognised the emphasis placed by the IDT on procedural fairness in reaching its decision. In **Jennings** one of the bases on which the IDT made an award against the Bank was the IDT's finding that the disciplinary process was procedurally flawed. The Claimant in the instant case also attempts to import the concept of procedural fairness and Counsel submitted that having regard to the implied term of trust and confidence, the Claimant's dismissal was wrongful on the grounds of procedural fairness. As stated in paragraph 7 of the Particulars of Claim;

> *"In breach of the agreement, and the implied term of trust and confidence, the Claimant was summoned from a meeting with customers of the Defendant to the office on march 11 2014 and summarily dismissed by telephone conference, without a formal review or a chance to discuss the performance as agreed earlier, causing him great embarrassment."*

[40] It was admitted by the witnesses for the Defendant that the Claimant was not advised of the meeting on the 11th March 2014 until that same day. Both witnesses were cross examined as to whether sales figures were discussed and they both stated that the issue of sales figures and specific targets were discussed. As it relates to the point at which the Claimant was dismissed, I accept the evidence of Ms Wilson who by her evidence appeared to me to have

had a clear recollection of events before, during and after the meeting. I accept her evidence that it was after the meeting and further discussions with her corporate office that she became aware that the Claimant would be dismissed and that she is the person who delivered that letter to the Claimant advising him of that decision.

[41] Counsel also submitted that having regard to the disadvantageous position in which the Claimant had been placed by virtue of the post termination six-month no compete restrictions of the Employment Agreement, the period of one month's notice or payment in lieu thereof was unfair and wholly unreasonable.

(b) Damages for breach of an implied term of trust and confidence

[42] The second way, (which is closely related to the first), in which Counsel sought to utilize an implied term of trust and confidence in the Employment Agreement was by submitting that the Claimant should be awarded damages under a specific and distinct head arising from the breach of the implied term of trust and confidence.

The development of the implied term of trust and confidence

[43] An appropriate starting point on this subject is the House of Lords decision in **Addis v Gramophone Co Ltd** [1909] AC 488 which is generally used to support the ratio as contained in its headnote, that where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of his 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. This decision has been the subject of much analysis with varying viewpoints as to its effect in the world following the development of the statutory concept of unfair dismissal.

[44] The case of **Malik v Bank of Credit and Commerce International SA; Mahmud v Same** [1997] 3 WLR 95 (referred to in subsequent cases as **Malik'**s

case or alternatively as **Mahmud's** case), is often cited as having made a major assault on the principle of the **Addis** case. In **Malik's** case**,** two employees of a bank had their employment terminated on the ground of redundancy by the provisional liquidators who had been appointed. They alleged that they were unable to obtain employment in the financial service industry because of the stigma attached to them as former employees of the bank, which was widely reputed to have carried out fraudulent business, although they themselves were innocent of any wrongdoing. They each submitted a proof of debt in the liquidation claiming substantial sums as compensation for the alleged stigma but their proofs were rejected on this "stigma" head of loss and they also failed on their appeal to the Court of Appeal and appealed to the House of Lords. They faced success before the House of Lords with the Court's decision being reported in the headnote as follows:

> *"...Held , allowing the appeals, (1) that there was an implied obligation on an employer that he would not carry on a dishonest or corrupt business, and if it could be shown that it was reasonably foreseeable that in consequence of his corruption there was a serious possibility that an employee's future employment prospects were handicapped, damages were recoverable for any such continuing financial losses sustained; and that it made no difference if the employee only heard of the employer's conduct after leaving the employment."*

[45] However the euphoria brought on in some circles by **Malik** evaporated somewhat after the subsequent decision of the House of Lords in the case of **Johnson v Unisys Limited**, [2001] UKHL 13. In that case, Mr Johnson sought damages for loss he claims he suffered as a result of the manner in which he was dismissed. His employers had made allegations against him regarding his conduct and he was asked to attend a meeting but no specific allegations were put to him. Later that day he was summarily dismissed. The facts of **Johnson** are clearly not on all fours with the instant case before this Court, but they do share similarities to the extent that the Claimant in the instant case is complaining about the sequence of events leading up to the meeting of 11th March 2014, and about deficiencies in the conduct of that meeting.

[46] Mr Johnson was successful in his complaint of wrongful dismissal before the industrial tribunal and was awarded the statutory maximum sum of £11,691.88. He subsequently commenced a claim in the County Court for breach of contract and negligence on the ground of the manner of his dismissal. He alleged that his employers never advised him of the complaints made against him and relied on an implied term of his contract that his employers would not without reasonable and proper cause conduct themselves in such a way that is calculated and likely to destroy or seriously damage the relationship of trust and confidence between themselves as employers and himself as employee. It was generally accepted that at the heart of his claim as it related to breach of the various implied terms was the assertion that he was dismissed without a fair hearing and in breach of the company's disciplinary procedure. In other words, Mr Johnson sought to rely on the breach of the implied terms as a claim at common law of what was effectively unfair dismissal.

[47] At first instance the Judge struck out the claim on the basis that the case was in substance one for unfair dismissal and Mr Johnson was seeking to circumvent the unfair dismissal legislation. Relying on **Addis** he held that an unfair dismissal could not by itself ground any action to recover financial loss caused by the manner of the employee's dismissal. On appeal to the Court of Appeal the appeal was dismissed by way of a majority judgment, and there was a further appeal to the House of Lords.

[48] In reviewing **Johnson** one must keep in mind the fact that Mr Johnson was claiming financial loss from his psychiatric injury which he says was a consequence of his dismissal. The Claimant in the instant case before the Court does not have any such issues and is primarily concerned with what might be termed his "premature termination losses". In looking at the concept of premature termination losses, Lord Nicholls of Birkenhead in **Malik** at pages 100-101 stated as follows:

> *"This proposition calls for elaboration. The starting point is to note that the purpose of the trust and confidence implied term is to facilitate the proper*

> *functioning of the contract. If the employer commits a breach of the term, and in consequence the contract comes to an end prematurely, the employee loses the benefits he should have received had the contract run its course until it expired or was duly terminated. In addition to financial benefits such as salary and commission and pension rights, the losses caused by the premature termination of the contract ("the premature termination losses") may include other promised benefits, for instance, a course of training, or publicity for an actor or pop star. Prima facie, and subject always to established principles of mitigation and so forth, the dismissed employee can recover damages to compensate him for these promised benefits lost to him in consequence of the premature termination of the contract."*

[49] Putting the factual difference between **Johnson** and this case to the side for the moment, the case of **Johnson** highlights a number of key issues and concerns which are at the heart of the debate as it relates to the development of the common law in this area. One viewpoint was clearly and concisely stated by Lord Nicholls of Birkenhead in paragraph 2 of the Judgment where he said:

> *"I am persuaded that a common law embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to b unfairly dismissed. A newly developed common law right of right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law."*

[50] In the subsequent decision of **Eastwood and another v Magnox Electric plc. McCabe v Cornwall County Council and others** [2004] UKHL 35 The House of Lords for the most part accepted the reasoning of the Judges in **Johnson** but took the opportunity to refine a number of points. Lord Nicholls of Birkenhead reviewed **Johnson** and the permissible limits which **Johnson** placed on a claim. Lord Nicholls suggested that the identification of what has been described as the "***Johnson*** *exclusion area*" is comparatively straightforward. He expressed the procedure as follows:

> *"27. ...The statutory code provides remedies for infringement of the statutory right not to be **dismissed** unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.*

> *28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the* ***Johnson*** *exclusion area.*
>
> *29. Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."*

[51] In support of his submissions on the expanded operation of the implied term of trust and confidence, Counsel for the Claimant relied on dicta in the Jamaican Court of Appeal decision of **United General Insurance Company Limited v Marilyn Hamilton Supreme** SCCA 88/08 (delivered 15 May 2009). In this case the Court of Appeal had to consider whether the learned Judge at first instance was correct in refusing to strike out certain paragraphs of the claim or to grant summary judgment in favour of the Defendant. The Claimant alleged that she had been wrongfully dismissed and included in her claim was an averment that the "*manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in the agreement between the parties*". It was argued on behalf of the Defendant company, relying on **Addis,** that the remedy for wrongful dismissal is an award of damages and that Ms Hamilton had received the requisite notice and compensation. Accordingly, no further scope remained for damages for injured feelings, loss of reputation or difficulty in finding fresh employment.

[52] The Court of Appeal formed the view that having regard to the nature of the application, it being an application pursuant to rule 15.2 of the Civil Procedure Rules, and having regard to the development of the law in this area, it could not be said that Ms Hamilton had "*no real prospect of succeeding on the claim or issue*". The portion of the judgment which arguably supports the Claimant's position, for the sake of completeness is set out *in extenso* as follows:

> *"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 readily been followed and applied in this jurisdiction.*
>
> *34. However, there difficulties notwithstanding, I do not think it can be said that, applying the language of Rule 15.2, the respondent, "has no real prospect of succeeding on the claim or issue". Nor can I say, adopting Lord Woolf MR's formulation in* ***Swain v Hillman*** *(at page 92) that her prospects of success are no more that "fanciful"....[the remainder of the paragraph is reproduced by Madam Justice Sinclair-Haynes in paragraph 83 of her judgment which is quoted in the following paragraph]"*

[53] Counsel for the Claimant also relied on the decision of Madam Justice Sinclair-Haynes J (as she then was), which was delivered following the trial of the Claim in **Marilyn Hamilton** v **United General Insurance Company Limited** [2013] JMMC Comm. 18. The relevant portion of that judgment is reproduced as follows:

> *"[82] In any event, it is the view of this court that the 2010 amendments to the LRIDA are not as elaborate and all embracing as the English legislation to capture all cases of wrongful dismissal. Unlike the English Act, it does not stipulate an exclusive forum before which such matters are to be heard, nor is there any ceiling on the awards. There is no provision in our legislation which would render the development of the common law 'unnecessary and undesirable'. Jamaica is therefore free of the statutory impediment which blocks the development of the English common law in relation to dismissal cases which are in breach of contract and not captured by* ***Addis.***
>
> *[83] In light of the absence of statutory impediment, the court, is at liberty to develop the common law to reflect a modern, post master/servant relationship.... The Court of Appeal upheld an order of Thompson-James J in which she refused the defendant's application for summary judgment and to strike out portions of Ms. Hamilton's statement of case. Morrison JA said:*
>
> > *"For instance, while the Industrial Disputes Tribunal may, in cases of industrial disputes within its jurisdiction, order reinstatement or compensation if it finds that the dismissal of a worker is "unjustifiable"* ***(Labour Relations and Industrial***

> ***Disputes Act*** *section 12(5) (i), there is no comprehensive unfair dismissal legislation in Jamaica, such as that which posed what Lord Nicholls characterized as "an insuperable obstacle" to a successful claim for damages arising out of the manner of dismissal in* ***Johnson v Unisys****. This point may, arguable, also admit of the opposite proposition, which is that by providing a remedy for unjustifiable dismissal to a limited category of workers, the legislation in Jamaica must be taken to have considered and rejected extending it beyond that category. This is itself, an indication, in my view that the question of whether it is open to our courts to develop the law in this area by implying a suitable term in the contact of employment is, to borrow from Lord Hoffman this time, 'finely balanced'."*
>
> *[84] The comments of the eminent Morrison JA, in my opinion, is an indication that we are at the cusp of jurisprudential development in this area. The gate is open for the development of our jurisprudence. More than a century has elapsed since the decision in* ***Addis****. Societal norms are dynamic. The common law therefore cannot stagnate. Judges do have a role, within the legal parameters, in its development.*
>
> *[85] In the absence of Statutory impediment, it is unthinkable, in light of modern developments, such as:*
>
> *(a) the erasure of the words 'master servant' from the legal vocabulary of employment law and;*
>
> *(b) recognition of the employee's contribution to the work force*
>
> *that there should be reticence about implying a term which compensates an employee who has suffered financially as a result of the manner in which he was dismissed and which results in pecuniary loss."*

Should there be a paradigm shift in the law?

[54] I was advised by Counsel that the decision of Madam Justice Sinclair-Haynes in the **Marilyn Hamilton** case is being appealed and that the appeal has been heard. The Court has reserved its judgment. I anxiously await the decision of the Court of Appeal and the usual invaluable guidance which will emanate from the judgement. However as at this point, I have not been presented with, nor have I by my independent research, been able to identify any local case which is binding on this Court in respect of the issue of whether the breach of an implied term of trust and confidence can amount to what is essentially a claim of unfair dismissal at common law. I must confess that I have not been able to derive sufficient comfort from either the decision of the Court of Appeal in **Marylyn Hamilton** (supra) or Madam Justice Sinclair-Haynes' judgment in that claim

(supra), in order to confidently conclude and be able to express a robust opinion, that an implied term of trust and confidence provides a basis for the Claimant's claim to succeed.

[55] It is axiomatic that it is necessary for the law to evolve to meet changing social and economic realities. This is especially so in the area of labour/employment law. In **Johnson** Lord Hoffman recognised the contribution of the common law to the employment revolution by the evolution of implied terms in contracts of employment the most far reaching of which is the implied term of trust and confidence, but recognised limits to this. I am attracted to and his views expressed at paragraph 37 of the judgment in this manner:

> *"The problem lies in extending or adapting any of these implied terms to dismissal. There are two reasons why dismissal presents special problems. The first is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them. Only Parliament may actually override what the parties have agreed. The second reason is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The Courts may proceed in harmony with Parliament but there should be no discord."*

[56] It is plainly demonstrated in the cases mentioned herein, that much will turn on the specific facts of each case as it relates to the time at which and the manner in which an employee asserts that he suffered a wrong. This will usually influence the amount and nature of the damages claimed. It is therefore my opinion that there is considerable scope for the evolution of the law in terms of what is considered to be the limits of the "**Johnson** exclusion area". It is necessary for this Court to explore the limits of this zone, but in so doing, the Court ought to consider the House of Lords decisions to which reference has been made. It may of course be necessary to distinguish them, especially having regard to the differences between the English **Employment Rights Act** and the **LRIDA.** In the

University of Technology case (supra) the Privy Council recognised the differences between these statutes and arising from these differences, the difference in the approach of the respective tribunals. At paragraph 23 of the Judgment, Lady Hale having reviewed the approach of the employment tribunal in the United Kingdom in assessing an employer's dismissal of an employee stated as follows:

> *"23. However, there is absolutely no reason why the IDT or the courts in Jamaica should be obliged to follow the United Kingdom's approach. The two statutes have in common only that they were providing remedies quite different from and additional to, the common law of wrongful dismissal, which had long been acknowledged to be insufficient to remedy unfair or unjustified dismissals and redress the imbalance of bargaining power between employers and employees...."*

[57] However, it is my opinion, there is no evidence which is capable of supporting a conclusion that the fundamental legislative intent which resulted in the creation of a regime for the adjudication of claims of unjustifiable dismissals, no longer exists. Although the **LRIDA** (unlike the **Employment Rights Act**) does not expressly provide that unjustifiable dismissal claims must be determined exclusively by the tribunal, the **Village Resorts** decision has confirmed that the IDT is the proper forum for such disputes and that decision remains binding on this Court.

[58] The common law right of an employee to sue for breach of the terms of his contract of employment remains alive and well. Having considered the cases herein to which reference has been made, I accept that there is an implied term of trust and confidence in contracts of employment, the breach of which can give rise to a cause of action in appropriate cases. This position was also accepted by the Full Court in the case of **Bain, Courtney Brendan, v The University of the West Indies** 2017 JMKC Full 3, although on the facts of that case the Court held that such a claim did not arise . However, although such a term can be implied, there are, and must be limits to its operation. These limits should not be unnaturally stretched, so as to create at common law, unforeseen obligations on

an employer who has sought to fix and make certain the terms relating to the termination of a contract of employment.

[59] Such an implied term should not operate to place limits on the manner of an employee's dismissal, so as to override the express provisions in a contract of employment governing the appropriate periods of notice of termination (assuming of course that these contractual terms do not otherwise offend any law). If the operation of this implied term in such a manner suggested by the Claimant were permitted, it would essentially create a cause of action which is akin to an unjustifiable/unfair dismissal claim. Permitting a common law right of this nature, which covers the same ground as the statutory right provided by the **LRIDA**, would, to quote Lord Nicholls of Birkenhead in **Johnson** (supra), "...*also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law*."

[60] I do not believe that in support of my conclusions I need to have recourse to the argument that the expansion sought by the Claimant would open the floodgates for thousands of similar claims, but this possibility is relevant when one is considering the issue of parliamentary intent. In **Johnson** Counsel for the employers submitted that there could be a proliferation of claims in the County Courts because in virtually every case there could be a claim based on the manner of dismissal. At paragraph 26 of the judgment, Lord Steyn considered these predictions to be "*too alarmist*" and rejected the floodgates argument.

[61] The extent of the increase in claims in the Supreme Court would of course vary depending on what the Jamaican Courts find to be the scope of any extended application of the implied term of trust and confidence. However, I doubt that it can be reasonably challenged that if the common law claim for dismissal is radically extended, in the manner advanced by the Claimant in this case, so as to, effectively, create at common law a parallel unjustifiable dismissal claim in the nature of the statutory right provided by the **LRIDA**, there is likely to be a very significant increase in the number of claims in the Supreme Court. I am of the

view, that, because we have an already overburdened justice system, creaking at the seams with a substantial backlog of cases, careful consideration must be given to the role and function of the IDT *vis a vis* the Courts in the currently existing legal framework and to the possibility of opening the floodgates unnecessarily.

CONCLUSION

[62] The Court finds that the period of notice of termination to which the Claimant was entitled pursuant to the Employment Agreement was one month. He received one month's pay which the Court finds to have operated as a payment in lieu of notice notwithstanding the fact that it was not expressly stated to be paid as such. In these circumstances the decision to terminate the Claimant's contract of employment is unassailable.

[63] For the reasons expressed herein the Court finds that the Claim fails on a balance of probabilities. It is worth stating for the avoidance of any doubt, that even if I were of a different view as to the effect of the implied terms, it would not affect the outcome of the case, because of my findings of fact and my conclusion that there was no breach of an implied term of trust and confidence by the Defendant in its treatment of the Claimant and termination of his employment.

[64] I have concluded that the Claimant was treated fairly in that he was advised of his performance at various points and although he was given an opportunity to improve his performance, he still did not meet the prescribed targets. The 4th February 2014 letter had fixed the 11th March 2014 as the date for the review. On 11th March 2014, although the Claimant was given short notice of the time at which the review meeting was scheduled, he did not then complain nor was it seriously advanced at trial that this, in and of itself, affected his ability to respond to the allegations by the Defendant concerning his performance.

[65] The Court accepts the evidence on behalf of the Defendant that at the meeting on 11th March 2014 the Claimant was advised by the Managing Director, of his

targets and his failure to meet them, with the details being demonstrated to him with specific figures, to which he responded with excuses. I reject the submission of Counsel for the Claimant that because of the specialised nature of the job and/or the no compete clause, the period of one month's notice as provided for in the Employment Agreement was inadequate. In my view there is no legal basis for such a conclusion which would trample on the revered concept of freedom to contract. On these findings of fact, the Claimant could not have succeeded on a claim for breach of contract on a balance of probabilities in any event.

[66] For the reasons stated herein, the Court makes the following orders:

1. Judgment in favour of the Defendant on the Claim.

2. Costs of the claim are awarded to the Defendant to be taxed if not agreed.