[2013] JMCC Comm. 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2011CD00088

BETWEEN MARILYN HAMILTON CLAIMANT

AND UNITED GENERAL INSURANCE COMPANY LTD. DEFENDANT

Mr. Paul Beswick, Mr. Kayode Smith and Miss Carissa Bryan instructed by Ballantyne and Beswick for the claimant

Lord Anthony Gifford QC, Conrad George and Adam Jones instructed by Hart Muirhead Fatta for the defendant

Employment Law - Whether claimant introduced pirated software into defendant's environment - Whether the claimant was wrongfully dismissed - Whether Addis v Gramophone precludes award for breach of trust and confidence - Loss of advantage on labour market-stigmatization - Claim for anxiety and depression - Whether failure to mitigate reasonable - What constitutes reasonable notice to terminate - Entitlement under pension scheme - Whether employee entitled to employer's contribution upon termination of contract - Defamation

Heard: 1, 2, 14 and 15 May 2012, 21, 22 and 26 June 2012, 18 July 2012, 14 August 2012, 3 December 2012, 18 and 19 February 2013, 8 May 2013, 19 June 2013, 18 July 2013, 4, 23, 24, 25 and 30 September 2013, 1, 29 and 30 October 2013, 4 November 2013 and 13 December 2013

SINCLAIR-HAYNES J

[1] The trial of this matter has spanned one year and eight months as a consequence of the unfortunate illness of counsel for both sides. I am however grateful to counsel for their thorough submissions.

[2] The services of Marilyn Hamilton (claimant) as the Information and Technology Systems Manager for Advantage General Insurance Limited (defendant) were unceremoniously terminated on the 28 July, 2006. She was accused of introducing pirated software into its environment, which endangered the organization's reputation. Ms. Hamilton has sued the defendant for breach of contract. She claims that the manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in her agreement for employment. She is also seeking damages for financial loss she suffered as result of the defendant's breach which:

(a) caused her to suffer depression and anxiety;

(b) affected her future employment prospects; and

(c) defamed her character.

She further seeks payment of the defendant's pension contributions and loss suffered as result of the wrongful termination of her employment.

.

[3] This claim is met with trenchant resistance from the defendant. The defendant denies that the termination of the claimant's employment was wrongful and asserts that she committed repudiatory breaches by introducing unauthorized software into its computer system, which caused its system to cease functioning and exposed it to liability to the owners of the intellectual property rights in the software. It was therefore entitled to accept her repudiatory breach of contract and discharge her. It further asserts that although it was entitled to dismiss her summarily, she was paid a sum which was equivalent to her net emoluments in lieu of notice.

Was her dismissal wrongful?

[4] The basis for the claimant's dismissal was that she introduced pirated software into the defendant's environment. At paragraph 5 of her Further Amended Particulars: she claims:

"On or about 28th July, 2006, the Defendant through its managing director, Andrea Gordon-Martin wrote to the Claimant, wrongfully and without reasonable cause or legal footing, terminating the employment of the Claimant. The said letter stated inter alia

> *'It has been brought to our attention that you have knowingly put the organization at risk by introducing pirated software into the environment. These actions are out of keeping with your responsibilities as the Information Technology Manager to protect the company against reputational and fiscal risk. As a consequence, we will be terminating your services with immediate effect.'*

The claimant will at the trial hereof refer to the said letter of termination for its full terms and effects."

[5] At pagragraph 6 she further claims that :

"*At no time has she ever been a party to or directed or authorised the introduction of pirated software into the defendant's organization. The claimant, during her tenure at the defendant's company, repeatedly reported instances discovered by her of operation by the claimant of inadequately licensed software and consistently requested the necessary licence upgrades for the software operated by the defendant. The defendant's letter of termination has provided no information as to which software the claimant has knowingly introduced to the defendant's organization, and the claimant will say that the defendant's failure to stipulate and specify the software allegedly introduced is because there was in fact no incident where the Claimant knowingly introduced pirated software into the Defendat's organization."*

[6] Paragraph 6 of the defendant's amended defence reads:

> *"**As to paragraph 6,** the defendant will say that the claimant committed repudiatory breaches of her contract of employment by introducing into the defendant's computer system unauthorized software, thereby causing the defendant's computer system to cease functioning, giving rise to potential liability on the part of the defendant to those having intellectual property rights in such software. By so doing, the claimant acted in breach of her implied duties of good faith, fidelity and competence to the defendant; entitling the defendant to accept her repudiatory breach of contract, and so treat her contract of employment as being discharged."*

[7] What is the evidence supporting these allegations? The defendant must satisy the court on a balance of probabilities that:

a) pirated software was introduced; and

b) Ms. Hamilton was responsible for its introduction

[8] Can the defendant satisfy the court to the required standard that the claimant introduced the two pirated software it alleges she has? That is the critical issue. Mr. Andre Latty testified on behalf of the defendant. Under cross-examination, he admitted that he had no personal knowledge of pirated software being introduced into the defendant's environment by Ms. Hamilton. Any information he had was from a perusal of the file which was compiled prior to his employment with the company and correspondence from Ms. Bolt. On what then are they relying?

[9] The day before the claimant's dismissal, a management meeting was held. Certain shortcomings in the defendant's system were highlighted. It is necessary to quote the relevant portions of the minutes of that meeting. Item 8 of the minutes contains the pertinent portions. It states as follows:

REPORTS

Information Systems-Miss Kristine Bolt and Mr. Roland Crawford

> *"Mr. Crawford began by indicating that the achievements of department to date were*
>
> *(a)…*
>
> *(b) the resources of exchange server that was being shared with U.G.I. group has been split and we now have a new domain for ourselves U.G.I.C Ja."*
>
> *Mr. Crawford continued that the licence for the exchange server we were using ran out, as same was a "test licence; and with the creation of the new domain proper licensing arrangements are now in place. All branches have been converted to the new U.G.I.CJa domain, a task that was accomplished in 6 days. With the conversion, all branches can now send and receive e-mail; however, the restoration of e-mail from the old server*

has not yet been done. Miss Bolt added that the licences we will now use would come under AIC portfolio, as they have a contract directly with Microsoft."

Mr. Crawford indicated that during the conversion process some challenges were met regarding 'permission' for some of the softwares we have been using. Mrs. Gordon-Martin asked about documentation for such software and Mr. Crawford responded that documentation was scarce and that we are now in the process of creating a recovery path for the system. He also mentioned that with all the branches now 'migrated' to the new domain, we will have to 'tie up' the issue of 'permissions and security'.

Mrs. Gordon-Martin asked if with the domain change e-mail addresses have also been changed and Miss Bolt informed yes they have been changed and that she will be sending an e-mail tomorrow Friday 28/7) informing of this. She further indicated that Users will still be able to receive mail sent to them at the old address and Senders will get a reply message informing of the change in the e-mail address. This procedure will remain in place for one year.

Mr. Crawford informed that it was found that there were no 'governance standards' as to the User names on the system. He indicated that clear standards have now been established where middle initial of users will be used to allow for better identification and a 'clean up' of the names that are already on the system has also been done; an e-mail on this issue is to be sent tomorrow (Friday 28/7). Mrs. Hamilton objected and voiced that we have always had established 'governance standards' regarding User names, where it was agreed that the second letter of a user's first name will be used (rather than middle initial) as most persons would easier know the spelling of a person's first name rather than their middle name. Miss Bolt indicated that some of the responsibilities of updating user profiles have been passed to the Human Resources and Administration Department, and that as part of the standards being established a form will be created to be used to provide information for updating User profile(s).

The new U.G.I.CJa intra-net will be launched in the coming week; and Miss Bolt asked Manager to send her copies of frequently used forms that need to be placed on the site. Miss Bolt also advised that a disaster recovery plan for the organization is also to be worked on."

The claimant's case

[10] The claimant asserts that her dismissal was wrongful and without reasonable cause. It is her evidence that she neither directed nor authorized the introduction of

pirated software nor was she party to its introduction. She was vigilant in reporting instances of inadequately licensed software and regularly requested the licence upgrades necessary for software which the defendant operated. Prior to her dismissal, there was never any accusation made against her of introducing, permitting or encouraging the use of unlicensed software.

[11] Ms. Hamilton's unchallenged evidence is that at the time she was fired, she was no longer effectively in control of the department The defendant was acquired by National Commercial Bank Ltd. some weeks before her dismissal. A Mr. Crawford was the consultant sent to oversee the Information Technology department. She was instructed to report to him. He was responsible for approving all expenditure.

[12] At the time, they were using the trial version of Microsoft Exchange 2000 which was about to expire. Mr. Crawford arrived close to the expiry date. She advised him more than once that the expiry date for the trial version was imminent but he failed either to have the software reinstalled or to obtain a new licence before its expiration. It is also her evidence that although she pestered him about its imminent expiry, he failed to act. Consequently, upon its expiry, it stopped operating. As a result, the defendant's email system was shut down and its business disrupted. She testified that the situation was stressful as they were running out of space. The staff was instructed to load Microsoft Exchange software on the crashed server.

[13] The defendant blamed her for the shutdown of its email system and alleged that she introduced pirated software. She is, however, adamant that the compact disc which was loaded, was bought from Microsoft and licensed to United General Insurance Company (U.G.I). She further asserts that no evidence of pirated software has been produced nor is there any evidence that the logs showed that pirated software was installed. Further, she received no response refuting her claim that the compact disk which was installed was not the demonstration version (demo).

[14] It is her evidence that the log showed that it was the compact disc that came with the software that was used and not the demonstration version. She explained that

a log is a note or record in the system of an action which is written to servers. Event logs record that demos are loaded and the length of time the demonstration period lasts. The user is alerted days before the demonstration period expires that action must be taken, or else, it might cease to function.

[15] Regarding the concerns which were highlighted in the minutes, Ms. Hamilton disagreed with the allegation that there was a scarcity of documentation. She pointed out that the minutes of the meeting supports her claim that she had registered her objection to the claim that documentation was inadequate. In response to Lord Gifford's examination about the challenges which Mr. Crawford encountered, she explained that such challenges were normal considering the magnitude of the changes that were being undertaken.

[16] She explained that shortly before the "crash," U.G.I. Group of companies was acquired by NCB. The U.G.I. group comprised all the companies which were owned by Neville Blythe. She enumerated his group of companies as including U.G.I Insurance, Guardian Brokers but was unable to recall the others. The process of migration to the U.G.I. domain was in train. All the branches had converted to the new U.G.I.C Ja. domain. A Mr. Lawar Thomas was the consultant who was engaged to assist with the process. She explained that the new domain, U.G.I.C Ja. did not serve the whole group. It was specifically for U.G.I.

[17] She asserts that the permission to which Mr. Crawford referred was internal to the Information Technology environment and not permission from Microsoft to use the system. It was permission within the system, for example:

(a) the server must grant permission to specific users to do specific actions;

(b) accounts clerks need permission to use the accounts system, and;

(c) the general staff would not have the permission to access the human resource data base.

She further explained that in the process of changing out a domain server, it is normal for existing permission to be erased.

[18] As a result of the enormity of the changes which were being undertaken, one of the last acts to be performed would have been to "tie up" the granting of permission and security for certain users, access to the parts of the system necessary for them to do their jobs in tandem with others. The reason that the system ceased to function was insufficient space. The space which was allocated ran out and the system did not know where to turn hence it shut down.

[19] Mr. Donaldson testified on behalf of the claimant. Ms. Queenie Ko, Microsoft's Account manger in Jamaica who was subpoenaed by the court at Mr. Beswick's request, also gave evidence. It is Mr. Donaldson's evidence that he was employed to Computer Boutique/Solution Integrators(Computer Boutique) between 1999 and 2002 as an account representative. Computer Boutique was the supplier of over the counter soft and hardware, dealing mainly with large companies. He was engaged primarily on the network solution end and was responsible for servicing several large companies.

[20] In the year 2000, Ms. Hamilton, then the Information Technology Manager of U.G.I., engaged Computer Boutique's services as U.G.I.'s soft and hardware provider. Mr. Donaldson's testimony is that Ms. Hamilton appeared to him to be a competent and well trained specialist. Notwithstanding, it is however, his further testimony that at that time, even well trained Information Technology personnel had difficulty keeping up with the pace of expansion of the industry.

[21] Companies larger than the defendant's relied on the expertise of particular software/hardware account representatives. These representatives supplied their soft and hardware requirements and provisioning. It was his task to ensure that U.G.I. was compliant with the software licence for the software his company sold to U.G.I. Ms. Hamilton requested systems audits to ensure that the licences were up to date. Most of the audits he conducted involved the checking of workstations because of the likelihood of the server licences exceeding the actual user count.

[22] Under cross-examination by Lord Gifford, Mr. Donaldson testified that during the time he worked with U.G.I, the company's strict compliance with licence requirements was of utmost importance to them. He sold several software server product licences to U.G.I through the claimant. At no point was U.G.I. non-compliant with licences for software and other products which it used during the period he acted as its account representative for Microsoft.

[23] The server product licences were for the Back Office and the Exchange Server email software. He ensured that the licence count which U.G.I. bought, were appropriate. During the period he was the account representative for U.G.I. at Computer Boutique and while the claimant was Information Technology manager, he sold U.G.I. servers and work station software worth several million dollars. He was unable to recall the exact number. It is however, Ms. Ko's evidence that U.G.I. had purchased ninety of the more expensive licences for Microsoft Office 2000.

[24] The server software he sold was mainly Microsoft server software and workstation licences for Windows desktop software and Microsoft word processing software. He also sold miscellaneous software licences such as software to provide back-ups for the server data and several hardware devices. He was aware of U.G.I.'s licensing and ensured that they were up to date.

[25] Ms. Ko's testimony corroborates Mr. Donaldson's evidence . She testified that U.G.I. was compliant with the licence requirement for the software. She confirmed that in 2002 U.G.I. had purchased the necessary licence for the software which could be used with either the Back Office or Windows 2000. She elucidated the licencing requirements and process. She also explained Microsoft's method of recording purchases.

[26] It is her testimony that once a licence is obtained, the ownership of that licence is permanent. The licence which U.G.I. obtained in 2002 is still valid. Possession of the Back Office Client's Licence entitled the owner to access the exchange servers.

Once the server suite is installed, the access licence allows the licence holder to access the complete suite of server components.

[27] She also told the court that the Microsoft Back Office product was discontinued but the customer is allowed to continue using the product without obtaining new licences if they desired. Although its sale is discontinued, Microsoft supports the product to facilitate the customers who are still using it.

Assessment of the evidence

[28] Lord Gifford submits that there is no evidence that Ms. Hamilton purchased licences subsequent to Mr. Donaldson's departure from Computer Boutique. It is true that subsequent to 2002 he was no longer engaged by U.G.I. and there is no evidence of anyone assuming his responsibility. There is, however, no evidence of inadequate lincensing. On Ms. Queenie Ko's evidence, U.G.I. was in possession of all the necessary licences. Her evidence is that U.G.I. had acquired licences for Back Office and Windows 2002 Importantly, her evidence is that the acquisition of those licences is permanent. It is therefore beyond dispute that the software on which the alleged impugned compact discs were used were all in good standing.

Was pirated software introduced by Ms. Hamilton?

[29] The issue at this juncture is whether the defendant's use of either the Microsoft Exchange 2000 Enterprise Server which she describes as a Release Candidate or the compact disc which was borrowed from the Ministry of Health was unauthorized. The allegation that pirated software was introduced into the defendant's domain by Ms. Hamilton was made by Ms. Kristine Bolt in the following email which was sent to Ms. Hamilton on July 20, 2006 at 5:20 PM:

> *"If you had the original CD in its original case you would have been very aware that you are in fact installing a demo version. In addition, the key that you get with the demo CD is what determines that the software is for demo purposes and the length of the demo period.*
>
> *If the Ministry of Health had an original copy of this CD, they would know that they are using a demo version. If we obtained a burned copy from*

them, along with their key, we would not necessarily know what we were getting unless they told us specifically. Yes, the same software is installed on the new server but at the time of installation we were unaware that the software was not legally obtained, as it was installed from files stored on a server.

This brings me back to ask: ***why were we using software obtained from another company in the first place?*** *You contend that because it was a demo it was not illegal, however, as the software and key were acquired by the Ministry of Health, and not by us, it was not legal for us. This type of practice is rampant for personal use computers (home use, etc.) but is clearly unacceptable for business use. Please explain to me how we came to have this software in our environment.*

With respect to the size of the OS, your admission of forgetfulness with respect addressing this problem is noted.

Finally, with respect to the migration of the domain, I am aware that this is a complex exercise. Your comment regarding the fixing of the Exchange Server in a weekend is also noted. In fact, Roland and Troy worked through the weekend to right the situation and were unable to satisfactorily resolve it. As the new server for the domain change was already properly built with the required amount of storage space, the decision was made to begin migration immediately, since our plans were already in place for that exercise to begin this week.

*Awaiting your response (*emphasis hers)

The following is Ms. Hamilton's response.

It is my understanding that the following statements are true:

1. *The Microsoft Exchange Server software that we are running is a copy that was acquired from the Ministry of Health.*

This is what I remembered, however the fact that the event log shows that it was a demo version installed refutes this statement. Further I found that the version running on the 'crashed' Exchange server is the Enterprise edition – the copy I had obtained was the Standard Edition.

2. *The accompanying Microsoft Exchange Server license was beta, 120-day demo version that was installed during migration to the U.G.I.GROUP domain earlier this year.*

The event log indicates that a demo version was installed. I have called Lavar Thomas as well and he does not recall getting any message when installing the software that it was a demo version. This however now a moot point as the event log is irrefutable.

3. *The OS partition of the Exchange server was configured for 4GB of storage.*

This is true. The size of the C partition would have been discussed when the consultant raised the issue. A decision was made based on his explanation of the risks and the mitigating factors.

Further, I understand that Lavar Thomas, who set up the Exchange Server for the U.G.I.GROUP domain apprised you of the following while performing that exercise:

- *The software was a pirated copy, although he was unaware that it was from the Ministry of Health.*

- *The configuration of the OS partition storage was incorrect because 4GB of storage was insufficient for an Exchange Server*

The time factor would have been the main reason why we would have taken the decision to continue with the 4GB C partition:

1. *Time factor – in the early stages of the migration a Dell PC was being used as a temporary Exchange server, until the proper Exchange server could be reconfigured and reinstalled. A few days after we migrated to the Dell PC, it experienced a hard drive crash. Time was of the essence as we had to get the business' email back in action. We decided to 'borrow' a development ITP server, the server had a 4GB C partition and the time* ***needed*** *to rebuild the server was a negative. To say that a 4GB partition is 'incorrect' for Exchange is not true, it may not be optimal but as it is the event logs that occupy and fill this space, the risk can be mitigated by monitoring the size of the logs, saving (as necessary) and deleting them periodically. The server has been running since March with this configuration, Mr. Thomas was doing the monitoring in the early days, and then Satesh continued the procedure. I assumed that when Roland took over the management of our servers that he would have reviewed their configuration and acted accordingly. I offered to set up a meeting with Mr. Thomas to hand over the environment to him as I was not confident that I would be as effective in such a discussion. The offer was not taken up,*

however Roland has spoken to Mr. Thomas a few times on the phone but I do not know what they spoke about.

He seems to have been aware that the license was for 120 days.

Conversations with Mr. Thomas indicate that he was unaware of this. Contact with Microsoft indicates that at installation there would be an entry written to the event log saving that this was a demo version, installed mm/dd/yy that would expire on mm/dd/yy. With Microsoft products, when the demo period is nearing the end, messages are written to the logs to this effect.

He further reports that you advised him to proceed with installing the pirated software and to continue with the configuration of the OS partition for 4GB of storage.

The installation of pirated software is now moot as it has been established that a demo version was installed-demos are legal. The 4GB partition has been discussed above.

Last Friday, July 14, 2006, the Exchange Sever failed, which has led to business interruption that will last for at least 1 week. Review of the event logs reveals that this failure was due to the expiry of the Beta license, as well as to critically low storage levels, as 23KB of storage was all that was available.

Discussions with Microsoft also indicate that if the demo period ran out, a simple backup of the server, a reinstall of the same Demo software and a restore of the data would remedy the problem (in fact it is the very same demo version that is now installed on the new server). It is the critically low storage levels that caused the server to fail. As stated before, this modus operandi has been that for the last few months we have managed this situation effectively by monitoring and cleaning logs periodically. The problem is that as a result of the logs ***not*** *being monitored, the space got critically low – this will cause Exchange to fail.*

This business disruption being experienced is more related to the change in domain name than the failure of the Exchange Server. As you know, IS undertook a similar exercise in March, due to growing instability of our Active Directory infrastructure – this was not an easy exercise and it took long hours to come up with a workable plan of action. The problems with the Exchange Server could have been fixed in a weekend. The launching of the Domain name change is a lengthier project; it is this change that is the cause of the disruptions now being experienced.

Please explain the following:

1. *Why were we using pirated Microsoft Exchange Server software? How did we come to acquire this software from the Ministry of Health?*

2. *Were you aware that the software was a 120-day demo version? If yes, please give details on the plan that was devised to provide Exchange service to U.G.I.C users once the 120 days were over.*

3. *Why did you decide that 4GB of storage was sufficient for the OS partition?*

   Explanations have been given in the text above.

I remember after thinking and thinking that Mr. Thomas had concerns about using the Standard edition because of the 16GB limitation of the Information Store size, and we must have decided to use the demo Enterprise Edition with the intention of acquiring the licences within the period. I must then admit and regret that I had forgotten this fact in the furor of the situation and it also seems, that Mr. Thomas had also forgotten. As recently as yesterday I stated to Roland that I was sure we did not use a demo version, but I cannot contest the logs.

To further discuss this issue I suggest a meeting with yourself, Roland, Lavar Thomas and myself. Prior to the meeting I would like to review the server logs – printed or otherwise.

I am also attaching an email submitted by Mr. Thomas documenting the project he undertook. This is not formal documentation as this was scheduled as the final stage of the project which was ended prematurely. This email was also sent to Roland.

Please respond as early as possible on Wednesday, July 19, 2006."

The evidence

[30] It is Mr. Donaldson's evidence that in the year 2000 Microsoft Corporation sought to expand its domain in the area of large scale server and network provision. Computer Boutique was Microsoft's authorized agents in Jamaica. Microsoft developed the Microsoft Exchange server which was an email server product to handle large-scale email requirements for large companies. It also developed the Microsoft Back Office which provided database and accounting support for these large companies. As the product evolved, Microsoft released new versions annually or biannually with a slight change in the names.

[31] The unchallenged evidence of Ms. Hamilton is that the relationship between U.G.I. and Microsoft was excellent. Microsoft's chief representative in Jamaica constantly reviewed U.G.I.'s licensing requirements and suggested upgrades. He requested their evaluation of trial versions of new software. The trial periods were usually thirty (30) days. It is her further evidence that in in order to ensure continued smooth running of the software beyond the trial period, the software must be reinstalled or the necessary licence purchased before the last day of trial.

[32] The defendant's email server was in need of upgrading to Exchange 2002, the then newest version of software produced by Microsoft Corporation. She was in possession of a trial version of the Exchange 2000 which was installed and ran for less than a month during the period of the consultant's arrival. She had also obtained a CD-ROM from the Ministry of Health while they were deciding whether to restore the email server, (which was limited and could fail again), or install the demonstration version while they tried to obtain the appropriate one. That CD-ROM media was however, not used.

[33] She explained that in order to load the CD ROM from the Ministry a licence key was necessary. It would have been unlawful to use the Ministry's key. U.G.I. was,however in possession of the requisite licence and they would have applied their code. The use of the compact disk is unimportant if the user has the required licence. Possession of a licence key is what is important.

[34] She was supported by Ms.Ko regarding the legaltity of the use of the borrowed compact disc and the necessity to possess a licence key. Ms Ko explained that the server's software was supplied with keys which were strings of possible digits which the programme has to recognize in order to permit its installation. It is her evidence that the server on which the compact disc was used were properly licensed to use that compact disk.

[35] She said that Veritas was the backup software they tested when they were developing their backup system. It was owned by Guardian Insurance Brokers, a sister

company (member of the group). The Barita software was to be used in a test environment to determine whether it suited their needs. It was tested in a development environment and they decided not to use it. Instead, the backup software that was bundled with the server software was used.

[36] She testified that because of the stressful situation which existed at the time, she may have told Ms. Bolt that they had loaded the standard edition from a compact disc (media). The logs, however confirmed that it was software that was bundled with the software that was actually used.

[37] Both **Ms. Ko's** and Mr. Donaldson's evidence is that trial versions are free. They both support Ms. Hamilton that Microsoft handed out trial versions of its software and there was no restriction on the use of trial versions. Mr. Donaldson's evidence is that the trial period lasted between sixty to ninety days. In a few instances the software stopped working after the trial period and required reloading or reinstalling to begin a new trial period. Most versions however, continue to run.

[38] The reloading of the trial software, if done correctly, did not threaten the data which was already generated by the programme. Microsoft approved of the practice because it provided the purchaser with sufficient time before making the decision to buy and to access technical support and upgrades. Indeed according to Mr. Donaldson, it is a ploy of the producers "to hook" consumers on the product.

[39] It is Ms. Ko's evidence that Microsoft Exchange 2000 Enterprise Server was a Release Candidate. A Release Candidate, she explained, is not a trial version but it is also not the final product. It was a preview of Microsoft Exchange 2000 which is not to be used in a production environment. It was to be used as a test. It is also her evidence that the Release Candidate can be given to a customer who does not have the equivalent software.

[40] She further testified that Microsoft provides trial software through downloads as well as the actual compact discs. Compact disc are different from the trial compact disc. These compact discs can be used within the limits of the licence. In some cases,

the trial versions are not the full software. Some have functionality limit. Upon the expiry of the licence period of the trial version it cannot be reloaded. The full licence must be purchased and the full copy installed. At the time of purchasing the licence, the compact disc to install the software can be ordered.

[41] Should the hardware of a machine on which a trial version is installed fails, the trial version can be reloaded if there is some mechanism which recognizes the date of the first installation. The mechanism is designed to prevent reinstallation upon expiry. It is unlikely that the mechanism would function after a catastrophic crash which removes all the previous records and data from a computer. She was unable to say whether in the event of such a crash, restoration of the server and a reload of the trial software before the expiry period would be permissible. She explained that the terms and conditions are shown on the screen, hence permission is dependent on the them.

Ruling

[42] It is the view of this court that the defendant's claim that Ms. Hamilton introduced unauthorized software into the defendant's computer system "*thereby giving rise to potential liability on the part of the defendant to those having intellectual property rights in such software"* is untenable in light of Ms Ko's and Mr. Donaldson's evidence. Although Ms. Hamilton agreed that she was in possession of a compact disc which was owned by the Ministry of Health, Ms. Ko and Mr. Donaldson testified that the compact discs are free and may be given whether or not the customer has the equivalent software.

[43] Further, the claimant's evidence was corroborated by Ms. Ko that she had purchased the necessary licence for the software which enabled her to use the borrowed software . In any event, the unchallenged evidence which I accept is that the compact disc which was borrowed from the Ministry of Health was not used. Also, the uncontroverted evidence is that the logs revealed that it was the trial version which was built in to the software that was used.

[44] Regarding the defendant's assertion that Ms. Hamilton's introduction of unauthorized software resulted in its system ceasing to function, the unchallenged evidence which I accept, is that she was not in charge of the department at that time. With the acquision of U.G.I. by NCB her authority was supplanted by Mr. Crawford who was the consultant. He was in charge of purchasing the neccessary software. It was the responsibility of the new owners to convert the demonstration versions . Moreover, her evidence, which has not been assailed, is that she repeatedly reminded him that the demonstration period for the trial version they had been using was about to expire. She further explained to him the urgency of the situation. There is therefore no merit to that assertion. This court finds that the claimant was wrongfully dismissed on the bases put forward by the defendant.. In the circumstances, what are her entitlements?

Her entitlements

[45] Except for her claim for slander/defamation and the defendant's contribution to her pension, the other claims are all premised on the defendant's breach of implied trust and confidence. Ms. Hamilton claims that "the manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in the agreement for employment between the parties. At paragraph 17 of her Further Amended Particulars of Claim, she states:

> *"…the manner and cirumstances of her dismissal were in breach of the implied term of trust and confidence in the agreement for employment between the parties. At all material times, the Claimant reposed in the Defendant, the confidence and trust which was expected and implied in the relationship of master and servant and relied upon the Defendant not without reasonable and proper cause to conduct itself in such a way as to cause distress, anxiety and concern to the claimant, and/or humiliate the Claimant before her peers or other employees and/or injury to the Claimant's reputation as a manager and as a person who could be trusted with the management of corporate matters of importance, and/or cause damage to the Claimant."*

Examination of the relevant law

[46] The ruling in the English case of **Addis v Gramophone Company Limited** [1909] AC (HL) Privy Council 488 is the genesis of this controversial area of employment law. It was held by the majority in that case that the manner in which an

employee was dismissed should not be included in compensation for wrongful dismissal. Difficulty in obtaining employment as a result of the manner of dismissal or injured feelings was not compensatable. According to Lord Loreburn LC "*Such considerations have never been allowed to influence damages".*

Is Addis binding?

[47] Mr. Beswick contends that **Addis** is not binding on a judge of the Supreme Court because our Court of Appeal has not adopted the decision in **Addis** .Contrary to the submission of Mr. Beswick, the decision in **Addis** binds this court. The Court of Appeal, has, in **Kaiser Bauxite Company v Vincent Cadien** (1983) 20 JLR 168 lauded the principle espoused by the Law Lords in **Addis** that an employee is not entitled to recover damages for injured feelings consequent on the unjustified manner of the dismissal. Campbell JA regarded Lord Loreburn's LC statement on the matter as correct.

[48] Ten years later, Wolfe JA, as he then was, in **Cocoa Industry Board and Cocoa Farmers Development Company Limited and FD Shaw v Burchell Melbourne**(1993) 30 JLR 242, 247,said:

> " *Finally,he contended that aggravated damages could have been properly awarded. That argument is misconceived. In* ***Addis v Gramophone Co Ltd*** *(1909) AC 488, it was held by the House of Lords that damages for wrongful dismissal cannot include compensation for the manner of dismissal, for injured feelings or for the loss which may be sustained from the fact that the dismissal of itself makes it difficult for a person to obtain fresh employment"*

[49] Lord Gifford submits that **Addis** is the law that is applicable to this case. He also relies in support of his submission, on the unreported case of **Brown v Flour Mills** (2006) CL which was delivered on the December 15, 2006 in which I held that the claimant was not entitled to damages for the manner in whch he was dismissed. That case is however distinguishable from the instant, as that was a claim for wrongful dismissal. The implied term of trust and confidence was not invoked. This claim, however, is not merely one for damages for anxiety and depression as a result of the manner of her dismissal, which **Addis** declares is not compensatable and our Court of

Appeal has adopted. It is a claim for breach of the implied term of trust and confidence which resulted in her suffering financial loss.

Does Addis preclude an award for breach of trust and confidence?

[50] The question is whether **Addis** is a barrier to a claim for the implied term of trust and confidence? The court in **Malik v Bank of Credit and Commerce International SA/ Mahmud v Bank of Credit and Commerce International SA** [1997] AllER 1, took an enlightened step by recognizing the existence of the implied term of trust and confidence in a contract of employment. That court held that a breach of that implied term which resulted in financial loss was compensatable. The loss complained of in **Malik** was the appellants' diminished attractiveness to future employers.

[51] In **Malik,** the appellants were employees of the persons in control of the defendant bank. The defendant bank operated in a dishonest manner, which eventually led to its depositors losing their money. The claimants were senior employees of the bank and were unaware of the fraud which was perpetrated by the bank. The bank went into liquidation. Their association with the bank prevented them from getting jobs in the banking sector. They claimed that they were at a disadvantage in the employment market because they were stigmatized.

[52] The House of Lords held that there was an implied obligation on the employer not (without reasonable and probable cause) to operate in a manner that would likely damage " the relationship of trust and confidence between employer and employee." A claimant who suffered financial loss as a result of the breach(trust-destroying conduct) which was reasonably forseeable would be entiltled to damages.

[53] Lord Nicholls made it plain that unlike **Addis**, **Malik** was concerned only with financial loss. He commented that the facts reported in **Addis** do not state whether the claimant sought to recover damages for financial loss consequent on the manner of his dismissal. He expressed surprise at the fact that the issue whether the manner of Mr.

Addis's dismissal caused him financial loss which exceeded his premature termination loss was not addressed. He observed that in **Addis** reference was made to:

> "*injured feelings, the fact of the dismissal itself, aggravated damages, exemplary damages amounting to damages for defamation, damages being compensatory and not punitive, and the irrelevance of motive. The dissenting speech of Lord Collins was based on competence to award exemplary or vindictive damages."(* see page9*)*

[54] He noted that the observations of Lord Loreburn LC, Lord James of Hereford, Lord Atkinson, Lord Gorell and Lord Shaw of Dunfermline were in general terms. Lord Nichols opined that those observations as expressed by the Law Lords mainly concerned Lord Coleridge's CJ suggestion in **Maw v Jones**,[1890] 25 QB 107,108, with which they disagreed, that:

> *"an assessment of damages might take into account the greater difficulty which an apprentice dismissed with a slur on his character might have in obtaining other employment*."

At page 9 Lord Nicholls concluded:

> *"In my view these observations cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss**.*** ***Addis v Gramophone Co Ltd*** *was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles. This is as much true if the breach occurs before or in connection with dismissal as at any other time…"*

In Malik however,the claimant's claim for breach of the implied obligation of trust and confidence was however struck out as having no realistic prospect of surmounting the *insuperable hurdle of causation**.***

[55] The overarching claim in the instant matter is that "*the circumstances of her dismissal were in breach of the implied term trust and confidence in the agreement for employment between the parties."* It is therefore a claim for breach of contract which takes it outside the reach of **Addis**.

At page 15 of **Malik**, Lord Steyn defined the term. He said:

> "*For convenience I will set out the term again. It is expressed to impose an obligation that the employer shall not-*
>
> '*without reasonable and probable cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

[56] Lord Steyn further explained the development of the law in this area,at the same page 15 (para.a-l) where he said:

> *"The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties:* ***Hepple Employment Law*** *(4th edn, 1981) paras 291-292, pp 134-135. The reason for this development is part of the history of the development of employment law in this century. The notion of a 'master and servant' relationship became obsolete. Lord Slynn of Hadley recently noted in* ***Spring v Guardian Assurance*** *plc [1994] 3 ALL ER 129 at 161, [1995] 2 AC 296 at 335 -"*
>
> > *'the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statue or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.'*
>
> *"A striking illustration of this change is* ***Scally v Southern Health and Social Services Board*** *to which I have already referred where the House of Lords implied a term that all employees in a certain category had to be notified by an employer of their entitlement to certain benefits. It was the change in legal culture which made possible the evolution of the implied term of trust and confidence."* :(see paragraph e-h)

[57] Lord Nicholls defined conduct which constitutes a breach of the implied term of trust and confidence. At pages 5 and 6 he enuciated:

> *"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances*…"
> *A breach occurs when the proscribed conduct takes place:"*

The effect of Johnson v Unisys Ltd. [2001] UKHL 13

[58] One hundred plus years after the ruling in **Addis** and five years after **Malik,** the issue of whether a complainant could recover damages for breach of the implied term of trust and confidence, which resulted in financial loss was considered by the English House of Lords in **Johnson v Unisys Ltd.** [2001] UKHL 13. Mr. Johnson, the claimant was unfairly dismissed. He was not afforded an opportunity to defend himself.

[59] He was psychologically fragile. He claimed that the manner of his dismissal caused him to suffer a nervous breakdown which made it impossible to obtain employment. He further claimed, among other things, that the employers were in breach of the implied term of mutual trust and confidence between employer and employee by failing to give him a fair hearing and by ignoring its disciplinary procedure. In the alternative, he claimed that the employer owed him a duty of care in tort, as it was reasonably foreseeable, because of his psychological vulnerability, that the manner of his dismissal was likely to cause the injury he suffered.

[60] The majority of the House of Lords (Lord Steyn dissented) was of the view that an employee was not able, at common law "*to recover financial losses arising from the unfair manner of his dismissal."* That finding was, however, predicated on two main factors. First, England had enacted the **Employment Rights Act 1996.** Consequent on the promulgation of that Act, unfair dismissal cases fell within the ambit of the Act. The Act expressed in great detail the manner in which such claims were to be dealt with. Such matters were dealt with exclusively by Industrial Tribunals, which operated under an entirely different regime.

[61] **Johnson v Unisys** was decided subsequent to the enactment of the**Employment Rights Act.** All of Mr. Johnson's complaints fell within the ambit of the legislation and the jurisdiction of the industrial tribunal. Further, the awards made by the tribunal were capped and Mr. Johnson sued for a much higher sum. The majority held the view that in light of the legislators' manifest intention that those claims were to be heard by specialist tribunals, which were outside of the court's system, the development of the common law embracing the manner in which an employee was

dismissed, could not properly co-exist with the statutory right not to be unfairly dismissed

[62] Lord Nicholls held the following view:

> "*Having heard full arguments on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed. A newly developed common law 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." (* Page 803)

[63] Lord Hoffmann, at page 820, cited with approval the statement of judge Annsell:

> *'…there is not one hint in the authorites that the …tens thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way …it would mean that effectively the statutory limit on the compensation for unfair dismissal would disappear.'*

At page 821, he continued:

> *"I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy, but that it should be limited in application and extent."*

[64] The second consideration was that an implied term cannot be at variance with the expressed terms of the contract. The issue fell for the court's determination in **Johnson v Unisys.** As aforesaid, the statute and claimant's letter of engagement

stood in the way of implying such a term. Lord Hoffmann, considered Lord Reid's statement in **Malloch v Aberdeen Corp** [1971] 2 All ER 1278 at 1282 that a "servant" was not entitled to be heard before dismissal. The "master" could, if he wished, act "unreasonably or capriciously". Damages for breach of contract was his only remedy.

[65] He concluded that in light of the terms and condition which were contained in the company's handbook., the only remedy in the circumstances for an action for wrongful dismissal, would have been no more than the salary to which he was entitled to be paid during the contractual period of notice.

[66] At paragraph 37 of the decision, Lord Hoffmann, in grappling with issues of Mr. Johnson's letter of engagement and the statute, expressed, that the term implied must be consistent with the express terms of the contract and in harmony with Parliament. (paragraph 37). He however recognized that in **Mahmud's** case, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied term of trust and confidence. He also acknowledged that judges play a subsidiary role in the development of the common law. Concerning the function of judges, he said, "*Their traditional function is to adapt and modernize the common law. But such development must be consistent with legislative policy as expressed in statutue. The courts may proceed in harmony with Parliament but there shoud be no discord.".*

[67] Lord Hoffmann acknowledged that at common law, an employee's only entitlement was his salary for the contractual period of notice. He noted that the parties had contracted, by virtue of his letter of engagement, that the defendant would pay the claimant four week's pay in lieu of notice. He recognized the difficulty of implying a term that he should not be dismissed without good cause and an opportunity to show absence of cause in light of Mr. Johnson's letter of engagement which entitled Unisys to terminate his contract without reason.`

[68] At paragraph 43 he opined:

> "*My Lords, in the face of this express provision that Unisys was entitled to terminate Mr. Johnson's employment on four weeks' notice without any reason, I think it is very difficult to imply a term that the company should not do so except for some good cause and after giving him a reasonable opportunity to demonstrate that no such cause existed.*
>
> *On the other hand, I do not say that there is nothing which, consistently with such an express term, judicial creativity could not do to provide a remedy in a case like this."(28)*

[69] In considering what judicial creativity could do to imply a term in circumstance where such a term would not conflict with the expressed terms, he examined McLachlin's J dissenting view in the Supreme Court of Canada case of **Wallace v United Grain Growers Ltd** (1997) 152 DLR (4th)1. McLachlin J would have awarded damages for mental distress and loss of reputation and prestige which resulted from the brutal circumstances of the dismissal of an employee. He recognized the obligation on the employer to dismiss in good faith. He held the view that although an employer was entitled to dismiss without cause, in excercising that right, he should" *refrain from untruthful, unfair or insensitive conduct*." (see paragraphs 44-48).

[70] Having examined the position taken by McLachlin J, Lord Hoffmann concluded as follows:

> *"[44] My Lords, such an approach would in this country have to circumvent or overcome the obstacle of* ***Addis v Gramophone Co Ltd*** *[1909] AC 488, [1908-10] ALL ER Rep 1, in which it was decided that an employee cannot recover damages for injured feelings, mental distress or damage to his reputation, arising out of the manner of his dismissal. Speaking for myself, I think that, if this task was one which I felt called upon to perform, I would be able to do so. In* ***Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)*** *[1997] 3 ALL ER 1 at 19-20, [1998] AC 20 at 51 Lord Steyn said that the true ratio of Addis's case was that damages were recoverable only for loss caused by a breach of contract, not for loss caused by the manner of its breach. As McLachlin J said in the passage I have quoted, the only loss caused by a wrongful dismissal flows from a failure to give proper notice or make payment in lieu. Therefore, if wrongful dismissal is the only cause of action, nothing can be recovered for mental distress or damage to reputation. On the other hand, if such damage is loss flowing from a breach of another implied term of the contract,* ***Addis's*** *case does not stand in the way. That is why in* ***Malik's***

> *case itself, damages were recoverable for financial loss flowing from damage to reputation caused by a breach of the implied term of trust and confidence.*
>
> *[45] In this case, Mr. Johnson says likewise that his psychiatric injury is a consequence of a breach of the implied term of trust and confidence, which required Unisys to treat him fairly in the procedures for dismissal. He says that implied term now fills the gap which Lord Shaw of Dunfermline perceived and regretted in **Addis's** case ([1909] AC 488-505, [1908-10] ALL ER Rep 1 at 11) by creating a breach of contract additional to the dismissal itself."*

[71] Lord Hoffmann questioned whether the tribunal was able to include in an award, compensation for the type of injury Mr.Johnson suffered, that is, for 'distress, damage to family life and similar matters. His answer was in the affirmative. He was of the view that in an appropriate case, damages could be awarded for humiliation, distress, and damage to reputation in the community or to family life. He regarded such loss as 'financial loss'. He concluded however, that the presence of legislation in England prevented him from developing the common law which would 'give a parallel remedy' and which remedy would not be subject to the statutory limit.

[72] He, however, expressed feelings of disquiet with the use of the words 'trust and confidence' as the formulation of those words, he opined, concerns the preservation of a subsisting relationship between employer and employee. He felt it was inappropriate to extend it to the manner in which the dismissal ocurred. He preferred McLachin's implied duty to 'exercise the power of dismissal in good faith' although the result, he accepted, would be the same. For him, it was a matter 'of the choice of words'. He expressed the view that in the absence of legislation inhibiting the development of the common law in that area, implying "*a suitable term into the contract of employment is finely balanced".*

[73] Lord Millett at page 825, para. 78 (**Johnson)** too was not in favour of the use of the words 'trust and confidence' as that term, he felt:

> *" I agree with Lord Hoffmanthat it would not have been appropriate to found the right on the implied term of trust and confidence which is now generally imported into the contract of employment. This is usually*

> *expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them. But this is an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship. The implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration."*

[74] He also felt that the enactment of statute rendered the development of the law "*unnecessary and undesireable*." He, however, was of the view that in the absence of the right provided by the statute, the courts might have developed the law differently and imposed an obligation on an employer to generally treat his employee fairly. This obligation would extend to to the manner of his dismissal.(see para 79)

[75] In **Johnson v Unisys,** Lord Hoffmann noted that the common law had evolved from the stance of not implying terms in a contract of employment unless it was strictly necessary, as applied to commercial contracts. He observed that the common law had transformed to accommodate "new attitudes". Lord Steyn, in his dissenting speech, opined that there was a movement away from legal culture of master and the subordinate servant to a recognition that empoyers have an obligation to care for the employees' welfare.

[76] He cited with approval the comments of Lord Slynn of Hadley in **Spring v Guardian Assurance plc** [1995] 2 AC 296, 355, that*:*

> *"the changes which have taken place in the employer-employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee."*

He observed that:

> *"One of the most important of those developments is the evolution since the mid-seventies of the obligation of trust and confidence in contracts of employment and its unanimous and unequivocal endorsement in Mahmud's case."*

The Johnson Exclusion Zone

[77] Subsequent to **Johnson v Unisys,** cases pertaining to the manner of dismissal were considered as falling within the boundary of the J**ohnson** exclusion area. This boundary line is considered to be at the point of dismissal. The House of Lords in **Eastwood and another (appellant) v Magnox Electric plc; Mc Cabe (respondents) v Cornwall County Council and others (appellant)** [2004] UKHL 35 held that the *"implied term trust and confidence cannot be applied to dismissal itself. A common-law right embracing the manner in which an employee is dismissed cannot co-exist with statutory right not to be unfairly dismissed*."(see headnotes). (See also **Edwards v Chesterfield**).

[78] The rationale for this boundary line is explained by Lord Nicholls at paragraph 37 of the cases of **Eastwood and Mc Cabe**. He said:

> "*The ground upon which Johnson was decided is summarized in the headnotes of the appeal cases report. It reads as follows:*
>
> > *'… under part X of the Employment Rights Act 1996, Parliament had provided the employee with a limited remedy for the conduct for which he complained; that although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the manner of dismissal, it would be an improper exercise of the judicial function for the House to take such a step in the light of the evident intention of parliament that such claims should be heard by specialist tribunals and the remedy restricted in application and extent.'*
>
> *In other words, the majority held that the statutory regime of unfair dismissal precludes a common law development in respect of wrongful dismissal despite the different meanings of those concepts."*

[79] In the cases of **Eastwood** and **Mc Cabe,** both claimants sought damages for psychiatric injury consequent on the manner of their dismissal. **McCabe's** claim was for a period which led up to his dismissal, while **Eastwood's** was at the point of his dismissal. **McCabe** was able to recover compensation because his claim was regarded as falling outside of the **Johnson** exclusion zone. **Eastwood's** claim, however, failed, as it was at the point of dismissal and was therefore regarded as falling within the purview of the Act

[80] Lord Gifford submits that the circumstances of the instant case are distinguishable as the breach occurred at the time of dismissal, while in **Malik**, the breach occurred before the claimants were dismissed. It is, however, the view of this court that at the time **Malik** was decided, the court was not constrained by statute. The principle enunciated was of general application. It was the passage of the **Employment Rights Act** of 1996, which created the line of demarcation between the time leading up to dismissal and the point of dismissal.

Is there any statutory impediment preventing the inclusion of the an implied term?

[81] Lord Gifford postulates that Jamaica operates under a similar statutory regime. He cites the **Labour Relations and Industrial Disputes Act (LRIDA)** as the governing legislation. With that proposition, I disagree. At the time of the filing of this claim, we had not enacted legislation and still have no comparable legislation to the English **Employment Rights Act** which would inhibit the development of our common law. Ms. Hamilton's claim preceded the 2010 amendments to the **LRIDA. The LRIDA** which is applicable to this case, was limited in its scope.

[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 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 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, arguably, 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 bejond 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 contract of employment is, to borrow from Lord Hofman 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 retincence 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.

The claim for anxiety and depression

[86] Paragraph 18 of Ms. Hamilton's Further Amended Particulars, reads:

> "*The Claimant has suffered from anxiety and depression as a result of the wrongful dismissal and further has lost confidence in her ability to function*

effectively and efficiently as a Manager in a highly technical and techonologically mobile area of commerce."

[87] Ms. Hamilton's evidence is that:

"The event of dismissal, and the manner in which it was carried out summarily, caused me great personal difficulty and emotional distress. I became very depressed and suffered from what I would characterise as an incapacitating malaise."

"*I did not have the will to endure the embarrassment which would be sure to arise in any job interview when I disclose the details of my being fired. My personal and family lives were affected by my depression and I was unable to function normally for a considerable period of time because of the depression."*

The law

[88] Lord Steyn's statement in **Johnson** v **Unisys** reflects the modern approach:

"*Since 1909 our knowledge of the incidence of stress-related psychiatric and psychological problems of employees, albeit still imperfect, has greatly increased. What could in the early part of the last century dismissively be treated as mere "injured feelings" is now sometimes accepted as a recognizable psychiatric illness. The outlines of the gradual development of the law in this area are well known: see, for example,* ***McLoughlin v O'Brian*** *[1983] I AC 410;* ***Frost v Chief Constable of South Yorkshire Police*** *[1992] 2 AC 455. Nowadays courts generally accept that they must act on the best medical insight of the day. Specifically, this realism has taken root in the field of employment law:* ***Walker v Northumberland County Council*** *[1995] AllER 737;* ***Gogay v Hertfordshire County Council*** *[2000] IRLR 703. These considerations are testimony to the need for implied terms in contracts of employment protecting employees from harsh and unacceptable employment practices. This is particularly important in the light of the greater pressures on employees due to the progressive deregulation of the labour market, the privatisation of the public services, and the globalization of product and financial market: see Brendan J* ***Burchell and others****, "****Job Insecurity and Work Intensification"*** *(1999), a report published for the Joseph Rowntree Foundation, at pp 60-61. This report documents a phenomenon during the last two decades "of an extraordinary intensification of work pressures". The report states as a major cause the fact that the "quantity of work required of individuals has increased because of under-staffing so that hours of work have lengthened, and, more importantly, the pace of work has intensified. Inevitably, the incidence of psychiatric injury due to excessive stress has increased. The*

> *need for protection of employees through their contractual rights, express and implied by law, is markedly greater than in the past.*
>
> *It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract. If (contrary to my view) the headnote of **Addis's** case correctly states the ratio decidendi of **Addis's** case,I would now be willing to depart from it. That is not a particularly bold step. Indeed, in **Malik's** case [the House took that step*."(See pages 809-810; para.19-20*)*

[89] In spite of the view enunciated by Lord Steyn, that the development of the common law to include such an implied term at the point of dismissal is capable of coexisting with the statute, he nevertheless held that the claimant in **Malik** was faced with the difficulty of causation, that is, proving that his psychiatric condition was caused '*by the manner of his dismissal rather than the fact of his dismissal.* He concluded that he had no realistic prospect of overcoming that difficuty.

Is the claimant confronting an insuperable hurdle?

[90] The question is whether Ms. Hamilton has been able to surmount the hurdle of causation? Is the fact of her anxiety and depression a consequence of the manner of dismissal or as a result of the fact of the dismissal?

[91] Ms. Hamilton's dismissal was contumelious and infradig. She was handed the letter and in her words:

> *"I was escorted back to my office from the board room by a member of the Personnel Dept, asked to pack up my office and escorted to my car. This experience was extremely humiliating to me and members of staff present could not fail to observe and recognize that I was being summarily dismissed from my employment and removed from the building like a common thief."*

[92] It is also her evidence that she was humiliated before her peers and others. Her integrity as a manager was impugned. Her reputation as a manager and a person who could be trusted with the important matters of management was undermined. Her dismissal was undoubtedly embarrassing and extremely hurtful. This court cannot and

will not underestimate the nature and extent of the misery it no doubt has caused her. But he who asserts must prove.

[93] The requirement enunciated by Lord Steyn and referred to by Lord Hoffmann in **Malik** to prove that her anxiety and depression was not merely a result of the fact of her dismissal rather than the manner, cannot be ignored. At page 818 paragraph 48, of **Johnson,** Lord Hoffmann highlighted the difficulty in a situation such as this which a claimant may be confronted with in proving causation.

> "*This form of damage notoriously gives rise at best of times to dffiicult questions of causation. But the difficulties are made greater when the expert witnesses are required to perform the task of disinguishing between the psychiatric consequences of the fact of dismissal (for which no damage is recoverable) and the unfair circumstances in which the dismissal took place, which constituted a breach of the implied term."*

[94] Mr. Beswick referred the court to the Privy Council decision of **Gleaner Company Ltd. And Dudley Stokes v Eric Anthony Abrahams** delivered 14 July 2003 in which the Judicial Committee of the Privy Council upheld the Court of Appeal's award of thirty-five million dollars in an effort to persuade me to make a similiar award. That award however, included a claim for financial loss suffered as a consequence of defamatory statements.

[95] The claimant in that case was a public figure. There were repeated publications of the defamatory statement and the defendant persisted in a defence of justification up to trial. As a result of the publications, Mr. Abrahams was ostracized and publicly taunted. Supporting evidence was provided of the manner in which the defendant was treated by former clients and strangers. Evidence was adduced which supported the fact that persons felt that he was guilty inspite the half hearted apology which was made a number of years later.

[96] Medical evidence of damage to his self esteem, mental damage and physiological suffering was provided. The psychiatrist attributed aggravation of asthma and diabetes to the said publication. Mr Abrahams became obese as a result of his disinclination to move as a result of the psychological effect of the publication.

[97] The facts of the instant case bear very little resemblance to that case. Although this court accepts as true, Ms. Hamilton's unchallenged evidence regarding the circumstances of her dismissal, she has not provided any professional evidence, medical or otherwise to assist in determining the cause of the malaise or the extent of her incapacity. Cooke JA in **Air Jamaica v Neil Colman** delivered November 9, 2007. concerning the use of the word depression, said:

> "*It is my view that the word depression when used in ordinary and common parlance is readily understood in our society.This is not the case where the respondent is asserting that he became psychotic. He is describing the effect of the detention on his being. It was for the learned judge to determine his credibility in this regard."*

[98] In light of the paucity of evidence, this court finds that her use of the word depression, was used in the ordinary and common parlance. She was in the words of Cooke JA,' *describing the effect of the"* dismissal "*on her being"* and not an assertion that she became psychotic. In the absence of the required professional evidence proving the cause of her malaise, the hurdle of remoteness remains unsurmounted. The court is therefore unable to make any award under this head.

Claim regarding her inabililty to obtain employment

Handicap on labour market-loss of reputation-stigmatization

[99] Ms. Hamilton claims that her ability to obtain employment is reduced because she is disadvantaged on the labour market and stigmatized. At paragraph16, of her Further Amended Particulars she states:

> "16. *Furthermore, the claimant's position was one of significant responsibility and accountability. The action of the defendant in wrongfully dismissing the defendant has irreparably tainted the claimant's personal and job related credibility and therefore created a significant disadvantage for the defendant in obtaining alternative employment particularly in an employment market for senior Computer Information Technology professionals and managers, which is of limited scope in the island. The loss of credibility is exacerbated by the fact that the claimant is of advanced working age, and also had spent in excess of five years with the defendant at the time of her termination, giving rise to an immediate assumption by both prospective employers and other persons in the*

industry, that the claimant had been fired for dishonest behaviour of some kind.

19. Further and/or in the alternative the claimant will say that her wrongful dismissal from the post of Information Systems Manager was effectively an imputation of dishonesty in the exercise of her job related functions as Information System Manager, which had the effect of an importation of obloquy within the commercial community of the island, and as a result permanent loss and damage. The claimant in any future attempt to further her employment prospects or to gain employment elsewhere is required and bound to disclose the dismissal by the defendant and the published and stated reasons for such dismissal, and accordingly, the effect of this dismissal is to publish an imputation of the claimant's dishonesty and untrustworthiness to all future and potential employers of the claimant. The action of the defendant has therefore effectively slandered the reputation and character of the claimant, causing her permanent loss and damage."

In her Further Amended Particulars of Claim. she included a claim for stigmatization.

Further and/or alternatively, the claimant claims that the actions of the Defendant have stigmatized her in what was a very small employment market for senior information technology managers. As a result, of the Claimant's stigmatization, all employers of senior information technology managers would have been aware of her purported gross misconduct and the fact that she was removed from the premises of her employer under the watch of security personel.

The claimant has been unable to secure alternative employment since her termination from the defendant despite continuing attempts. The claimant will give credit to the defendant for any alternative employment obtained during the period of 5 years from the date of her termination.

The action of the Defendant in wrongfully terminating her employment without cause has caused the claimant loss and damage."

The claim for stigma compensation

[100] Mr.Beswick's application to amend the claimant's particulars of claims to include a claim for stigma compensation was made almost at the close of the trial. Lord Gifford objected to the amendment on the basis that it amounts to a new cause of action.

Ruling

[101] The claimant's Particulars of Claim and Amended Particulars of claim included a claim for loss of advantage and handicap on the labour market. Her witness statement spoke of her inability to obtain employment because of the reasons proferred for her dismissal. The defendant was therefore at all material times aware of this allegation, indeed she was cross-examined on those assertions.

[102] **The Judicature (Supreme Court) Act** allows for amendments which will obviate of the need for the institution of separate proceedings.Section 48(g) reads:

> (g)*"The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."*

[103] The issue, however, is whether the inclusion of this claim is otiose. Lord Gifford submits that it is. This court is of the view that loss of reputation, injury to previously existing reputation, loss of advantage on the labour market, handicap on the labour market and stigmatization fall under a broad head, that is, her inablility to obtain employment as a result of reputational damage. The following statement of Lord Steyn in Malik seems to support this view. He said at page 22:

> "*The Law Commision has pointed out that loss of reputation is inherently difficult to prove:* ***Aggravated,Exemplary and Restitutionary Damages(Law Commission Consultation Paper No*** *132) p 22,para 2.15. It is therefore, improbable that many employees would be able to prove 'stigma compensation."*

Given the facts of this case, even if Ms. Hamilton succeeds in establishing that she was not only stigmatized but suffered loss of reputation and loss of advantage on the labour market, she will, in this court's opinion, not be entitled to be compensated for each loss.

The evidence

[104] Ms. Hamilton's unchallenged evidence is that:

> "*After being handed the dismissal letter, I was escorted back to my office from the board room by a member of the Personnel Department, asked to pack up my office and escorted to my car. This experience was extremely humiliating to me and members of staff present could not fail to observe and recognize that I was being summarily dismissed from my employment and removed from the building like a common thief."*
>
> "*When I was wrongfully dismissed from the post of Information Systems Manager at the defendant's company, the dismissal was based on a statement that I had dishonestly and improperly exposed the company to reputational and fiscal risk by introducing pirated software into the organization. This statement and the fact of my dismissal based on the statement was effectively an imputation of dishonesty on my part in relation to the exercise of my job related functions as Information Systems Manager. The further result of this dismissal was an imputation of obloquy or disgrace of my professional standing among the commercial community of the Island, and as a result permanent loss and damage."*

The law

[105] The House of Lords in **Malik** held that damages for loss of reputation was recoverable and not inconsistent with **Addis**. Lord Steyn at p. 20 of that decision categorically stated:

> "*It is however, far from clear how the ratio of Addis's case extends. It certainly enunciated the principle that an employee cannot recover exemplary or aggravated damages for wrongful dismissal. That is still sound law. The actual decision is only concerned with wrongful dismissal. It is therefore arguable that as a matter of precedent, the ratio is restricted, but it seems to me unrealistic not to acknowledge that* ***Addis's*** *case is authority for a wider principle. There is a common proposition in the speeches of the majority. That proposition is that damages for breach of contract may only be awarded for breach of contract and not for loss cause for the manner of breach. No Law Lord said that an employee may not recover financial loss for damage to his employment prospects caused by a breach of contract. And no Law Lord said that in breach of contract cases,compensation for loss of reputation can never be awarded, or that it can only be awarded in cases falling in certain defined categories.* ***Addis's*** *case simply decided that the loss of reputation in that particular case could not be compensated because it was not a breach of contract."*

[106] The House accepted the views expressed in **Marb v George Edwards (Daly's Theatre) Ltd [1992**] 1KB 269, that damages for breach of contract, may include damages for loss of reputation as the correct statement of the law and rejected as unsound,the view of the court in **Withers v General Theatre Corp Ltd** [1933] 2 KB 536 that damages for loss of reputation, was , as a matter of law, not recoverable. Lord Steyn commented thus:

> "*But the Court of Appeal held that the plaintiff was not entitled as a matter of law to damages to his existing reputation. Nothing in* ***Addis's*** *case supported this distinction. It is difficult as a matter of principle to justify it. A rule that damages can never be recovered in respect of loss of reputation caused by a breach of contract is also out of line with ordinary principles of contract law."(*See page20)

[108] Lord Nicholls distinguished the case of **O'Laoire v Jackel International Ltd (No2** [1991]ICR 718 which was a claim for loss based on the manner of a wrongful dismissal which he regarded *"as separate from the independent termination of the contract of employment*" and not a breach of contract.

[109] At page 9 of of the decision, Lord Nicholls, having determined that the decision in **Addis** did not affect a claim for breach of the implied term trust and confidence, said:

> *"Writing on a clean slate, the courts have interpreted this as enabling awards to include compensation in respect of the manner and circumstances of dismissal if these would give rise to risk of financial loss by, for instance, making the employee less acceptable to potential employers…*
>
> *I do not believe this approach gives rise to artificiality. On the contrary, the trust and confidence term is a useful tool, well established now in employment law. At common law damages are awarded to compensate for wrongful dismissal. Thus, loss which an employee would have suffered even if the dismissal had been after due notice is irrecoverable, because such loss does not derive from the wrongful element in the dismissal. Further , it is difficult to see how the mere fact of wrongful dismissal, rather than dismissal after due notice, could of itself handicap an employee in the labour market. All this is in line with* ***Addis's*** *case. But the manner and circumstances of the dismissal, as measured by the standards of conduct now identified in the implied trust and confidence*

> *term, may give rise to such handicap. The law would be blemished if this were not recognized today. There now exists the separate cause of action which absence Lord Shaw of Dunfermline noted with "a certain regret"…The trust and confidence term has removed the cause for his regret."*

[110] Lord Hoffmann at page 816 para 37 of **Johnson v Unisys Ltd,** said:

> *"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 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."*

[111] No term in Ms. Hamilton's letter of engagement or any Act of Parliament provides any impediment in the way of such a term being implied. Jamaica, as noted, has no comparable legislation which would inhibit the development of the common law to reflect the changes in the legal culture. We are therefore able to advance, unimpeded "*across open country*" (to adopt Lord Hoffmann's words).

Can Ms. Hamilton recover damages?

[112] In light of the foregoing comments, is she able to recover damages for loss which has resulted in the reduction in her ability to obtain employment?

There was no "*reasonable and proper cause*" for the the defendant's conduct. The treatment of Ms. Hamilton was "*calculated to destroy or seriously damage the relationship of trust and confidence*". That however is not the end of the matter. There is yet another hurdle which she is required to surmount. As Lord Steyn pointed out in **Malik,** "…*loss of reputation* is *inherently difficult to prove…It is therefore, improbable that many employees would be able to prove 'stigma compensation' The limiting principles of causation, remoteness and mitigation present formidable practical*

obstacles to such claims succeeding." He nevertheless expressed the view that "…*difficulties of proof cannot alter the legal principles which permit, in appropriate cases, such claims for financial loss caused by breach of contract being put forward for conderation*".(page 22 paragraph d)

Is this an appropriate case?

[113] In **Malk,** Lord Steyn at page 17 paras.g-h, said:

> "*Subject to proof of causation and satisfying the principles of remoteness and mitigation, the employee ought on ordinary principles of contract law to be able to sue in contract for damages for financial loss caused by any damage to his employment prospects."*

Her evidence

[114] Ms Hamilton's evidence is that as a result she:

> "*… did not have the will to endure the embarrassment which would be sure to arise in any job interview when I disclose the details of my being fired. My personal and family lives were affected by my depression and I was unable to function normally for a considerable period of time because of the depression."*

[115] It is her evidence that between 2006 and 2007 she repeatedly cut advertsiments from newspapers for jobs in the Information Technology field but was too ashamed to follow through with applications. She did not wish to face the ridicule and embarrassment on being asked who was her last employer. It is also her evidence that in the Information Technology industry, failure to work in the area for a protracted period, results in the loss of ones expertise. She however attempted to become involved in networking and advertising. She obtained employment in the field of advertising between the years two thousand and seven and two thousand and nine. The hours of work were not standard.

[116] Ms. Hamilton has provided the court with no evidence of rejection as result of her dismissal. As stated above, the letter of termination stated that her services were terminated because of dishonesty. She was accused of introducing pirated software into the defendant's environment which exposed the company, which she was expected to protect, '*to reputational and fiscal risks'*

Mitigation

The Law

[117] Lord Haldane LC in **British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rys Co of London Ltd [1912] Ac 673** at page 673 adumbrated:

> "*The fundamental basis is that compensation for pecuniary loss naturally flowing from the breach;but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."*

Was her refusal to seek employment unreasonable in the circumstances

[118] James LJ, in **Dunkirk Colliery Co v Lever** [1919] 2 KB 588 said:

> "*It is plain that the question of what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case. There may be cases where as a matter of fact it would be unreasonable to expect a plaintiff, in view of the treatment he has received from the defendant, to consider any offer made, if he had been rendering personal services and had been dismissed afer being accused in the presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case."*

[119] It cannot, however, be ignored that on a preponderance of possiblities the claimant would have been asked the reason she left her job and a recommendation from her last employer might have been requested. In response to such a question she would have been obliged to disclose the fact that she was dismissed for dishonest behaviour and thus constructively publish the defamatory statement. It is also highly probable that she might have been viewed askance by prospective employers as a result.

[120] She was therefore forced into an invidious situation: apply for jobs and face the likely embrassment of having to disclose the reason for the separation

from her previous job or, forbear, and be accused of failing to mitigate. This is a classic case of 'be damned if you do and damned if you don't." This court holds the view that the failure of the claimant to expose herself to obloquy, cannot be unreasonable.

What is the measure of damages?

[121] Mr. Beswick submits that Ms. Hamiliton is entiltled to damages representing the income she lost by not being permitted to work until her retirement on her sixty-fifth birthday. Lord Gifford, however, submits that the claimant is entiled to the emoluments she would have earned during the notice period. It is his submission that the claimant's contract provides for one month's notice, therefore, if she is entitled to damages, it is limited to one month's salary which she has already received.

What constitutes reasonable Notice?

[122] At Paragraphs 14-15 of the Further Amended Particulars of claim, the Claimant claims

> *"14… that her contract of employment does not provide any specified period of notice and in lieu thereof, a reasonable period of notice for an employee of her standing is 36 months.*
>
> *15. At the time of her termination, the Claimant was 57 years of age and in excellent health. The Claimant had reasonable expectations of working with the Defendant until her retirement at age 65 and would therefore have been able to earn income at increasing rates for atl east another eight (8) years estimated at $30 million after taxes and statutory deductions."*

[123] The defendant contends that although it was entitled to dismiss her summarily, She was paid what she was entitled to pursuant to her letter of engagement, that is, one month's salary in lieu of notice. According to Mr. Latty, Ms. Hamilton was dismissed summarily "*and as a gesture of good faith, she was paid a sum equivalent to her net emoluments of employment for her notice period, specified in her contract as being one month*."

The evidence

[124] Ms. Hamilton, however, asserts that although her letter of engagement states that upon her appointment, a minimum period of one month is required to terminate her services, it does not entitle the defendant to dismiss her on one month's notice. It is her evidence that persons in her station of employment expect a minimum of 12 months' notice which is the period required to obtain employment at her level of experience and qualification. The period, she avers, can be longer if the job market is depressed.

[125] Her evidence is that she faced an additional difficulty because of her advanced age. She was fifty-seven years of age at the time of her dismissal. According to her, employers prefer to hire younger persons because the investment in training new employees who are older, means a shorter period of recoupment for them.

[124] It is her further evidence that at the time of her dismissal she was in excellent health and expected to retire at age sixty-five. Her evidence is that she received an annual increase in her salary. She estimated that for the years two thousand and two to two thousand and thirteen, her salary would have increased by 8.25% perannum. The figure of 8.25% represents the average percentage increases for the years from two thousand and seven to two thousand and ten. She estimates the total net income she would have earned over the said period as in excess of $40,000,000.00.

[126] It is necessary to examine the contract. Her letter of engagement reads:

> *"You will be required to serve a probationary period of three (3) months at the end of which, your performance will be assessed, and if found satisfactory, you will be appointed a permanent member of staff subject to the rules and regulations of the Company's Employment Policy.*
>
> *During the three (3) months probationary, neither party will be required to give notice of termination. However, should your probation be extended beyond three (3) months the required notice period is two weeks as stipulated by Law. Once appointed, a minimum period of one month will be required."*

The law

[127] The Author of **Trolley's Employment Handbook** Twenty FIrst Edtion at paragraph 48.6, in dealing with the issue of the termination of employment vis- a -vis the contractual notice period wrote:

> *"The contract of employment will usually specify the period of notice to be given to terminate the contract; indeed, the written particulars given to the employee must include the length of notice which the employee is obliged to give or entitled to receive (see 8.5* ***Contract of Employment).***
>
> *If the contract is not for a fixed term and the notice period has not been expressly agreed, there is an implied term that it may be terminated upon reasonable notice (see* ***Reda v Flag Ltd*** *[2002[UKPC 28, [2002] IRLR 747). The court will determine what amounts to reasonable notice. Factors taken into account include the seniority and remuneration of the employee, his age, his length of service and what is usual in the particular trade. As a very rough guide, a period of two weeks or one month might be appropriate in the case of manual worker, three months in the case of senior skilled workers or middle management, and between three months and one year in the case of more senior managers. However, the period of notice must be determined on the particular facts of each case. (For a discussion of the factors, see* ***Clarke v Fahrenheit*** *451 (Communications) Ltd (EAT 591/99) (1999) IDS Brief 666, p 11.)"*

[128] The Privy Council, in the Bermudian case of **Reda & Anor v Flag Ltd (Bermuda)** [2002] UKPC 38 at page18, enunciated:

> *"The appellants observe that dismissal without cause is not the same as dismissal without notice, and submit that the implication of a requirement of reasonable notice would accordingly not be inconsistent with the express terms of the contract. So far their Lordships agree with them. But they part company from them at the next stage of their argument viz. that all contracts of employment are, as a matter of law, subject to an implied term that they are terminable on reasonable notice, and that such a term can be displaced only by clear words: see* ***Lefebvre v HOJ Industries Ltd*** *[1992] 1SCR 831.*
>
> *In their Lordships' view there is no such rule. The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice: see* ***Chitty on Contracts*** *(28th Ed.) at*

> *para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contracts which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision of the contrary.* ***Lefebvre v HOJ Industries Ltd*** *was such a contract. But there is no need for the law to imply such a requirement in a case where the contract is for a fixed term."*

[129] Ms. Hamilton's letter of employment speaks to a minimum of one month's notice upon appointment. It is manifest that Ms. Hamilton's contract does not bind her to one month's notice as the defendant contends. The operative word is, 'minimum'. In the circumstances,this court holds the view that there is, an implied term that reasonable notice should be given. It is therefore now an issue of what is reasonable in these circumstances.

[130] In the case of **Ms. A Clark v Fahrenheit** Employment Tribunal Appeal No. EAT/591/99, the Appeal Tribunal found that one month's pay was not reasonable for a senior employee who had been employed by the defendant for three months. Three months were considered reasonable although the Tribunal expressed the view that her seniority was overstated. Judge Altman who delivered the judgment stated that seniority and status must be considered. He remarked that there was no "reason why "*a reasonable period of notice should not in certain cases depend upon length of service."* In the case of Ms. Clark, three months was considered reasonable in light of the recency of her employment and the modesty of the business.

Ruling

[131] Ms. Hamilton was employed to U.G.I. for five plus years in a managerial capacity. U.G.I is a large corporation. This court is of the view ,one year's salary in lieu of notice is reasonable. A consideration is also her age at the time of her dismissal.

Aggravating factor

[132] The invidiousness of the claimant's position as aforesaid was a result of the reasons given by the defendant for terminating her services. The actions of the defendant, therefore, created circumstances which prevented her from seeking employment as she would be forced to disclose the reason and suffer further

humiliation. She is therefore entitled to be paid up to the time she would have retired. She was age fifty-seven at the time of her dismissal. The issue for determination is, at what age would she retire.

At what age would she retire?

[133] The unchallenged evidence of Mr. Latty is that the working life of a female in the industry is sixty years of age. Mr. Beswick, however contends that she would have worked to age sixty-five years of age. That assertion, in the court's view, is speculative and therefore unsustainable for the following reasons:

(a) The defendant, would not have been obliged to extend her employment to age sixty-five.

(b) Her ablity to obtain other employment would have been uncertain in light of her evidence that there is a preference for younger employees.

[134] Futher, considering the vicissitudes of life, it is uncertain whether her health would have permitted. In the circumstances, this court considers that the usual age of sixty-years applies. She is therefore entitled to be paid for the two remaining years of working life that she was deprived of because of the defendant's breach. She is, in the circumstances entitled to be compensated for three years salary which is inclusive of one year's salary in lieu of notice. Deduction, however, must made for the period she was employed between the years two thousand and seven and two thousand and nine.

Claimant's entitlement under the pension scheme

[135] Paragraph 9 of her statement of claim reads:

> *"9. Pursuant to the contract of employment between the parties, the Defendant made certain contributions to the pension scheme operated by the Defendant for its employees and which contributions were made during the tenure of the claimant's employment and for and on behalf of the claimant's pension account.*
>
> *10. The aforesaid contributions were made for the benefit of the claimant and for her pension account only and the Defendant was obliged on termination of the claimant's employment to pay over the total of the said contributions to the claimant together with any interest and investment proceeds accumulated there- from.*

11. Further and/or, in the alternative, the claimant will say that the Defendant has breached an express condition in the agreement of services evidenced by the letter of employment dated the 16th December, 1999."

The evidence

[136] Ms. Hamilton contends that pursuant to her contract of employment, she was required to make contributions to the pension scheme which the defendant operated for the benefit of its employees. Her contributions were deducted from her salary and were placed in a pool which constituted a Pension Trust Fund. A pension account was automatically created for her upon her becoming a permanent member of staff. Membership in the fund was a condition of her contract of employment. The defendant promised to pay 5% of her salary to match her pension contribution.

[137] It was her understanding that the defendant's contributions were for the benefit of her pension account, therefore upon termination of her employment she would be entitled to the total of both contributions, that is, hers and the defendant's including interest and/ or investment proceeds accumulated. Mrs. Hamilton's evidence is that upon termination of her employment she recieved a cheque for the sum of $1487676.07 which supposedly represents her contributions. It is her evidence that the defendant's refusal to repay her pension contributions constitutes a breach of the employment contract as her letter of employment regarded the pension scheme as a "fringe benefit."

[138] At no time during her tenure of employment with the defendant was she informed that the defendant's pension contribution would not be paid to her upon the termination of her employment. She complains that the defendant has unjustly enriched itself at her expense by:

(a) its refusal to pay over or account for its pension contributions which were intended for her; and

(b) its refusal to account for the interest which accrued on her contributions.

[139] It is her evidence that a portion of her earnings was used to invest for the benefit of the pension scheme. Had she not been forced to contribute to the pension scheme, she could have placed the equivalent of her contributions in a commercial bank or financial institution and would have earned interest on the said sums. She further aserts that her contract of employment does not state that she would lose the value of her pension investment or that she would suffer any loss upon the termination of her employment.

Mr. Latty's evidence

[140] Mr. Latty, Vice President of the defendant's Human Resources and Training department testified on behalf of the defendant. It was his evidence that Ms. Hamilton was a member of an occupational pension scheme that permanent employees were mandated to join. He agreed that the scheme benefitted from the defendant's 5% percent contributions. The contributions were paid to the pension trust fund. The benefits became payable upon retirement which was age sixty years for women. Upon early retirement, it is payable with the consent of the trustees. An employee who withdraws from the Scheme before retirement is entitled to exercise one of two options, namely:

(a) A return of his or her own contributions to the Scheme with interest; or

(b) A deferred life annuity payable from normal retirement date the amount secured by the return in (a) above.

Ms. Hamilton selected option one. Her total contributions were $1,375,229.69 with interest on the sum of $256,608.13.

[141] Ms. Hamilton however refutes the claim that she is governed by the agreement between the Trustees of the Pension Plan and U.G.I. Group Ltd. She contends that she was neither a party to the pension agreement nor a signatory to the Trust Deed. She contends that her letter of employment specifically stated that she would be entitled to as fringe benefit, under the group pension Scheme to which she was obligated to contribute. The fact that her contributions were mandatory, she expected that the

defendant was also bound to provide its contributions pursuant to the letter of employment. The company's five (5%) was a consideration of her accepting the job.

[142] It is her further contention that she earned the employer's portion by participating in the scheme. It is also her evidence that her selection of an option of payment on a form cannot be construed that she, at the time was waiving her right to the employer's portion as only those options were presented to her.

Submissions

[143] Mr. Beswick submits that a trust is a contract and she was not signatory to the Pension Trust Scheme. A third party cannot be bound without express term. The Pension Scheme is an external, independent contract operated by trustees who are not answerable to the company. In order to bind the employee, that employee's signature is required. It is the employer's duty to ensure that the employee is bound by a contract. The Trust Deed should have been incorporated in the employment contract. The contributions are therefore held on trust for Ms. Hamilton. Further there is no evidence that her contributions were paid to the trustees.

[144] It is his further submission that the employer's five percent was one of the considerations for the claimant 's acceptance of the job. It was the price the defendant was prepared to pay for her services. According to him, the amount that was paid to Ms. Hamilton cannot be regarded as correct because she was not privy to the manner in which the calculations were done or the details of the payment. She was also ignorant as to the interest rate that was applied. Ms. Hamilton's contributions benefitted the fund, which was used to lure employees. It also increased the interest rate. There is no evidence that there was a bar to her obtaining the company's 5% however she demitted office.

[145] Lord Gifford however submits that the establishment of a Trust fund with its own trustees, employs the machinery of a trust and not a contract. The employees' rights are accordingly derived from the trust instrument which is the constitutive document. The trustees are therefore the proper defendants. He submits that the claimant was a

part of a pension scheme which was established on the 1 December 1997 by a Trust Deed with named trustees. There is no contractual right to a pension. He relies on the following opinion of Millett LJ in **Air Jamaica v Charlton** 1999] 1 WLR 1399, 1407:

> *" the employee members of an occupational pension scheme are not voluntary settlors. As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often (not inappropriately) described as deferred payment.*
>
> *This does not mean however, that they have contractual rights to their pensions. It means that, in constructing the trust instrument, regard must be had to the nature of an occupational pension and the employment relationship that forms its genesis."*

Ruling

[146] Clause 8.01 of the schedule to the **PensionTrust Deed** states:

> *"An Employee who has become a member of this scheme …who withdraws from the serice of employment before the Normal Retirement Date may select one of the following options in respect of his contributions to the scheme:-*
>
> (1) A return of his own contributions to the Scheme with interest;
>
> (2) A deferred life annuity payable from Normal Retirement Date the amount secured by the return in (1) above."

Her letter of engagement concerning the Pension Scheme reads:

> "As fringe benefits, the company provides:
>
> *(3) Group Pension Scheme with obligatory contribution of 5% of salary with the option to contribute an additional 5%. The company makes a contribution of 5%."*

[147] In light of the unexpected and swift summary dismissal of the claimant with one month's pay, it is not difficult to understand why she selected option one . Option two would have meant a wait of a number of years until her retirement. She testified, of the

well-nigh insurmountable obstacles which faced her in any attempt to obtain employment. There was no other option open to her which included taking her contribution with employers contribution. She was suddenly forced into a state of unemployment and was forced to make a selection.

[148] By virtue of her letter of engagement she was contractually entitled to the defendant's contribution as a fringe benefit. The English case of **Parry v Cleaver** (1970) AC 1 534 provides guidance as to an employee's entitlement under a pension scheme. It was held that the employer's contributions represent what he was willing to pay to obtain the employee's services. Lord Pearce stated at page 37:

> *"These [pensions], whether contributory or non-contributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums."*

[149] At page 37, Lord Pearce examined the character of the pension fund and concluded as follows:

> "*It is generally recognized that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment, money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. His earnings are greater than his weekly wage. His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pension funds are regarded as earned income.*
>
> *But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance what he gets back depends on how things turn out. He may never be off duty and may die before retiring age leaving no dependants. Then he gets nothing back. Or he may, by getting a retirement or disablement pension, get much more back than has been paid in on his behalf. I can see no relevant difference between this and any other form of insurance. So, if insurance benefits are not deductible in assessing damages and remoteness is out of the way, why should his pension be*

> *deductible?...A pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work."*

[150] In any event, short shrift can be made of this issue. Clause 8.01 of the deed specifically speaks to the employee who withdraws from the scheme before retirement. Ms. Hamilton did not of her volition, withdraw from the scheme. Her services were wrongfully terminated. She is therefore entitled to what she has lost as a result of the defendant's breach. Had the defendant not terminated her employment wrongfully, she would have been entiled to her contributions plus that of her employer's.

[151] I find support for this view in Salmon's J statement. in the case of **Acklam v Sentinel Insurance Co Ltd** [1959] 2 QB 683,697, a similar case. He enunciated:

> "*It does not say that if he does exercise one of the options he then forfeits any rights which he might otherwise have had by reason of wrongful dismissal and I refuse to read any such words into the contract. If that is what was intended and I am sure it was not-it could and should have plainly stated."*

[152] The claimant is therefore entitled to the defendant's contributions from the time she became a permanent member of the defendant's company. She is also to be compensated for the pension benefits to which she became entitled had she retired at age sixty years. Indeed she is entitled to be compensated for all that she would have been entitled to, had the defendant not wrongfully terminate her employment. Blaine J in **Yetton v Eastwoods Froy Ltd** [1967] WLR 104 puts it thus:

> "*The basic principle of damage is "restitution integrum: the plaintiff should have what he lost through the defendant's fault."*

The claim for slander

[153] The letter of dismissal imputed dishonesty to Ms. Hamilton. The allegation that she introduced pirated software thereby exposing the company to "reputational and fiscal risk is patently libelous. Mr. Beswick stridently argues that the claim for defamation has been established. According to him she has been constructively defamed because she would have been forced to disclose to her prospective employers

the reason for her dismissal. The defendant, in the circumstances must be treated as having in fact published the libelous statement.

Has the claimant established her claim for slander?

[154] An important question in determining whether she has established this claim is whether there has been publication of the offensive statements. Publication is an essential ingredient of defamation. The burden is on the claimant to prove publication. Apart from her receipt of the letter, there is no evidence as to whether anyone else saw the letter. Her clear evidence is that she did not attend job interviews because she did not wish "to repeat the defamatory allegations made by the defendant" and "republish the libel." In order to constitute constructive defamation, Ms. Hamilton must have been forced to publish the libelous statement and she did not. This claim is therefore unsustainable.

Her other Claims

[155] At paragraph 7 of her further amended particulars of claim, the Claimant avers that:

> "*7. At the time of the wrongful termination of her employment, the claimant's annual emoluments were as follows:*
>
> | | | |
> |---|---|---|
> | *Basic salary* | *:* | *$ 3, 501, 000.00* |
> | *Motor Vehicle Allowance* | *:* | *$ 492, 000.00* |
> | *Gas Allowance* | *:* | *$ 67, 320.00* |
> | *Lunch Subsidy* | *:* | *$ 81, 840.00* |
> | *Total Annual Emoluments:* | | *$ 4, 142, 160.00* |
>
> *Furthermore, the claimant was entitled to the following benefits:*
>
> *i. Blue Cross medical scheme up to a maximum value per annum;*
>
> *ii. Defendant's contribution to the Claimant's Pension enrollment up to a maximum of 5% of basic pay.*

iii. Paid life insurance up to a maximum value per annum. The claimant will before the trial hereof request discovery from the Defendant to determine the value of this benefit.

iv. Entitlement to 4 weeks paid vacation per annum by virtue of the claimant's length of service with the Defendant."

[156] At paragraph 8, the Claimant of her particulars, the claimant avers that:

" The Defendant has failed to pay the non-taxable portions of the motor vehicle allowance due to the Claimant

Particulars

2 Month's Motor Vehicle upkeep (non-taxable portions) $ 40,000.00"

[157] **Conclusion**

The following words of **Parke B in Robinson v Herman** [1848] 1 Ex 85, 884 are apt:

"*The rule of the Common Law is, that where a party sustains a loss by reason of the breach of contract, he is ,so far as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed."*

In light of the foregoing, damages awarded as follows:

(1) For wrongful termination of her employment and loss as a result of handicap/loss of advantage on the labour market in the sum equivalent to three (3) years net earnings including payment for breach from 29th July 2006 with an increase of 8.25% annually. Deduction to be made for the period she was employed

(2) Non- taxable motor vehicle allowance for two (2) months in the amount of Forty Thousand Dollars ($40,000).

(3) An account of:

(a) all employees' benefits including the defendant's penison contributions for a period of three (3) years at the rates at which the same would have been obtained by the claimant were it not for the defendant's breach;

(b) the contributions the defendant should have made between 10th January 2000 to the 29th July 2006 and payment of the amount due to the defendant.

(4) Interest due to the claimant at the commercial rate from the 29th July 2006 to defendant. (Regarding the claimant's pension entitlement from the point of her retirement had The defendant not breached the contract).

(5) Cost to the claimant to be agreed or taxed.

(6) Liberty to apply.