[2020] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 95/2010

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**EDWARD GABBIDON**	**APPELLANT**
AND	**SAGICOR BANK JAMAICA LIMITED (Formerly RBTT Jamaica Limited)**	**RESPONDENT**

Mrs Denise Kitson QC, Christopher Dunkley and Mrs Trudy-Ann Dixon-Frith instructed by Grant Stewart Phillips & Co for the appellant

William Panton and Kristopher Brown instructed by DunnCox for the respondent

11, 13 November 2015 and 3 April 2020

BROOKS JA

Layout of judgment

Introduction – paragraphs [1] – [5]

Background to the appeal – paragraphs [6] – [17]

The law in respect of wrongful dismissal:

a. The development of the relevant law in the UK – paragraphs [18] – [42]

b. The approach taken in some other jurisdictions - paragraphs [43] – [55]

c. The binding nature of the authorities - paragraphs [56] – [60]

d. The relevant law in Jamaica - paragraphs [61] – [91]

Mr Gabbidon's grounds of appeal - paragraphs [92] – [93]

The fault for the system error (ground 4) - paragraphs [94] – [103]

Mr Gabbidon and the ESP (grounds 1, 2, 3 and 5) - paragraphs [104] – [132]

The implied term of trust and confidence (grounds 6, 7 and 8) - paragraphs [133] – [139]

The options for relief open to Mr Gabbidon at the time (ground 9) – paragraphs [140] – [141]

Conclusion - paragraphs [142] – [147]

Introduction

[1] This is an appeal from the judgment of P Williams J, as she then was, given on 24 June 2010. The learned judge found that the appellant, Mr Edward Gabbidon, who was an employee of the respondent bank, Sagicor Bank Jamaica Limited ("the bank"), was not wrongfully dismissed from his employment, as the bank, in dismissing him, had relied on the terms of his employment contract.

[2] A common law principle regarding wrongful dismissal has remained virtually unchanged for over 100 years. In 1908, the House of Lords, in **Addis v Gramophone Company Limited** 1909 AC 488; [1908-1910] All ER Rep 1, HL (**Addis**), stated that, although an employee was entitled to damages for the loss suffered as a result of the employer's failure to give proper notice of termination, damages will not be awarded to the employee for the manner of the dismissal, the actual loss of the job, or pain and

distress that may have been suffered, as a consequence of the contract of employment having been terminated.

[3] Since 1908, the social and political attitude towards employment has changed. Legislatures in various countries, including the United Kingdom (UK) and Jamaica, have provided varying alternative statutory measures protecting employees from oppressive dismissals. In the interim too, the **Addis** principle has been criticised, but it has not been overturned in either the UK or Jamaica.

[4] In the UK, the courts have refrained from radically altering the common law, in this regard, because they do not wish to establish a system that competes with the statutory regime which the Parliament of that country has developed.

[5] The main issue in this appeal is whether this court should follow the example of the UK courts, or reconsider the common law approach to the termination of employment.

Background to the appeal

[6] At the time that Mr Gabbidon was employed to the bank, it was named RBTT Jamaica Limited. That name was changed to Sagicor Bank Jamaica Limited sometime after the learned judge had handed down her decision.

[7] On 3 June 2004, the bank dismissed Mr Gabbidon from his employment with it as its Assistant General Manager, Information Technology Operations and Technology Solutions. At the time of taking that action, it paid him one month's salary in lieu of notice. The payment was in accordance with the termination clause in his contract of

employment. The clause is contained in a letter dated 25 October 2001. The relevant portion of the clause states:

> "Termination of your services may be on the basis of one (1) month's written notice on either side, without reason being given thereof. The Bank has the option of making payment in lieu of notice."

[8] The dismissal came in the wake of Mr Gabbidon's writing a letter to the bank's chairman requesting that the chairman intervene in, among other things, disciplinary proceedings, which had been instituted by other bank executives, against Mr Gabbidon. He was dissatisfied with the disciplinary process as he viewed it as being unfair. The appeal for intervention was by way of the bank's Employee Suggestion Programme (the ESP), which allowed employees to confidentially comment on bank policy and procedure, and ask for intervention, without fear of adverse repercussions.

[9] The disciplinary action resulted from a major financial loss that the bank suffered in its operation, in December 2003. Between 23 and 26 December of that year, there was a technical operations error in the bank's computerised debit card system (the December incident). By the time the problem had been corrected, some of the bank's customers had improperly withdrawn monies to which they were not entitled. The sum initially involved was approximately $20,100,000.00. The bank eventually recovered about $9,000,000.00 of that amount, resulting in a loss of $11,000,000.00.

[10] The bank commissioned two separate investigations into the incident. Both were done by bank employees from its head office in Trinidad and Tobago. The findings of

those investigations are contained in two reports entitled: (i) 'Analysis of RBTT Jamaica Electronic Banking incident December 2003' dated 16 January 2004 (the technical report) and (ii) 'Report on System Error & Unauthorised Debit Card Transactions RBTT Bank Jamaica Limited during the period December 23 to 26, 2003' dated 3 February 2004 (the security report).

[11] After those reports had been completed, there was a shake-up in Mr Gabbidon's department. The general manager of his department was re-assigned and, shortly thereafter, dismissed by way of redundancy. In late April 2004, Mr Gabbidon was summoned to a meeting with the General Manager of Corporate Operations, Mr Howard Gordon, and the General Manager of Human Resources, Mrs Larraine Harrison. Mr Gabbidon was alarmed when Mr Gordon refused to give him any details, in advance, as to the purpose of the meeting. He referred the matter to his attorney-at-law. His attorney-at-law met with one of the bank's attorneys-at-law. Thereafter, Mr Gabbidon met with Mr Gordon and Mrs Harrison. The meeting was held on 3 May 2004. At that meeting, he was questioned, at length, about the December incident. He responded to the questions but asked that they be put in writing.

[12] Mrs Harrison wrote to him, by letter dated 6 May 2004, asking several questions relating to the December incident. He responded, in writing, on 10 May 2004. On the day that he responded, he was called to another meeting and, at that meeting, he was given a letter, which stated that he was suspended for 15 days without pay. He asserts that prior to being given the suspension letter, there were no discussions concerning his

answers to the questions. Mrs Harrison contends that there were further discussions and there were no differences between his initial oral answers on 3 May 2004, and his written answers. At no time was Mr Gabbidon informed that disciplinary proceedings were being instituted against him, nor was he informed of any charges of any sort being laid against him. He served his period of suspension.

[13] After returning to work, Mr Gabbidon wrote, by letter dated 28 May 2004, to the chairman of the bank, Mr Peter July. The chairman was then located in Trinidad and Tobago. In that letter, Mr Gabbidon complained about various developments in the bank's organisation in Jamaica and about his own treatment and suspension. He asked the chairman to give his attention to the various issues. Importantly, he copied the letter to Mrs Harrison and Mr Gordon.

[14] By letter dated 3 June 2004, the bank's Director, Group Human Resources, Mrs Helen Drayton, responded to Mr Gabbidon's letter to the chairman. Mrs Drayton did not state from whom she got Mr Gabbidon's letter. In her letter she:

a. supported the disciplinary process used by the bank's management;
b. refuted Mr Gabbidon's assertion that he has been suspended without being given an opportunity to defend his responses to the questions, which had been posed;
c. chided Mr Gabbidon for having bypassed the "appropriate channels" for review of the management's actions;

d. accused him of challenging the authority of Mrs Harrison and Mr Gordon;

e. communicated to him that his course of action was viewed as reflecting a lack of trust and confidence in the bank's management; and

f. informed him that the bank could not condone his actions and that it had referred the matter to the bank's managing director.

[15] On that same day, the bank's managing director (hereafter called the country manager) wrote to Mr Gabbidon terminating his services with immediate effect. No reason was given for the termination. The letter, however, referred to the clause in Mr Gabbidon's letter of employment, which stated that either party could terminate the employment by one month's written notice and that the bank had the option of making a payment in lieu of giving notice. Mr Gabbidon was asked to return his laptop and other bank property to the Human Resources Department "immediately".

[16] Mr Gabbidon sued the bank for damages for wrongful dismissal. He claimed that it had breached the confidentiality aspect of the ESP policy. Further, he claimed that the bank had breached the mutual duty of trust and confidence implied in the contract of employment, in not properly observing the terms of the ESP and for having terminated his employment as a result of his reliance on the ESP to seek Mr July's intervention in the matter of his suspension.

[17] On 24 June 2010, P Williams J gave judgment for the bank. Mr Gabbidon's wide-ranging grounds of appeal concern some of the established common law principles relating to the termination of employment. The grounds will be examined after a regrettably extensive, but unavoidable, outline of the law relating to wrongful dismissal. This will be done by considering:

a. the relevant case law in the UK;

b. the relevant case law in some other Commonwealth countries;

c. the binding nature of some of those authorities; and,

d. the relevant law in this country.

The law in respect of wrongful dismissal

a. The development of the relevant law in the UK

[18] It is important, at the outset, to draw the distinction between wrongful dismissal and unfair dismissal. Wrongful dismissals are, essentially, breaches of the contract of employment, and are the subject of litigation through the courts, while unfair dismissals are unreasonable dismissals in substance and/or procedure. A dismissal may be wrongful yet not be unfair and *vice versa*.

[19] Wooding CJ defined wrongful dismissal in **Fernandes (Distillers) Limited v Transport and Industrial Workers' Union** (1968) 13 WIR 336. He said, in part, at page 340:

> "…A wrongful dismissal is a determination of employment in breach of contract that cannot be justified at law…."

McLachlin J, in a case from the Supreme Court of Canada, **Wallace v United Grain Growers Limited** [1997] 3 SCR 701; 152 DLR (4th) 1, although dissenting, in part, was uncontroversial in saying, in part, at paragraph 115 of the judgment:

> "A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, **the law entitles both employer and employee to terminate the employment relationship without cause**. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given...." (Emphasis supplied)

[20] The attitude of the common law is that the court will not order specific performance of a contract of employment. This principle was accurately stated by Lord Reid in the important case of **Ridge v Baldwin** [1963] 2 All ER 66 at page 71 F – G:

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract."

On that basis, the employment may be terminated by either party; there is no restriction on an employer bringing the employment to an end by dismissing the employee, summarily for cause, or upon notice. Lord Reid in **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278 explained the attitude of the common law toward dismissal by the employer. He said, in part, at page 1282:

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

[21] It will have been noticed that the more recent cases change the terminology from "master and servant" to "employer and employee". That change is one of the consequences of the change in the attitude of the law and society toward the importance of a person's employment. Lord Hoffmann, at paragraphs [35] – [36] of **Johnson v Unisys Ltd** [2001] UKHL 13; [2001] 2 All ER 801, explained the change in attitude:

> "…At common law the contract of employment was regarded by the courts as a contract like any other. The parties were free to negotiate whatever terms they liked and no terms would be implied unless they satisfied the strict test of necessity applied to a commercial contract. Freedom of contract meant that the stronger party, usually the employer, was free to impose his terms upon the weaker. But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament.… And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.
>
> [36] The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far-reaching is the implied term of trust and confidence. But there have been others.…"

His judgment was set in the context of the UK but, as will be seen below, the transformation to which he referred is not restricted to that country.

[22] The shift in attitude also brought about the concept of viewing dismissals as being unfair. Lord Dyson SCJ in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58; [2012] 2 All ER 278 has provided a concise exposition of examples of unfair dismissals. He said, in part, at paragraph [40] of his judgment:

> "…A dismissal may be unfair because it is substantively unfair to dismiss the employee in the circumstances of the case and/or because the manner in which the dismissal was effected was unfair. The manner may be unfair because it was done in a humiliating manner or because the procedure adopted was unfair inter alia because the agreed disciplinary procedure which led to the dismissal was not followed. It may be unfair because defamatory findings were made which damage the employee's reputation and which, following a dismissal, make it difficult for the employee to find further employment. Any such complaint was intended by [the UK] Parliament to be adjudicated on by the specialist employment tribunal…"

Complaints of unfair dismissals are dealt with, in the UK, by the statutorily established tribunals dealing with industrial relations. Such complaints are not adjudicated upon in the courts.

[23] Lord Hoffmann continued, at paragraph [35] of his judgment in **Johnson v Unisys**, to explain that the Parliament of that country intervened in response to society's changing attitude toward employment. He said:

> "…Most of the changes have been made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights upon employees. European law has made a substantial contribution. And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights."

[24] The intervention by the legislature, which has statutorily recognised the concept of unfair dismissal, has proved to be a major basis for the resistance, by the courts in the UK, to calls to ameliorate the essence of the **Addis** principle. That essence is that, upon dismissal, except for cause, an employee is only entitled to damages for wrongful dismissal, which are equivalent to the amount (wages and other contractual benefits) he would have earned during the agreed notice period. There, however, is a statutory minimum notice period. If there is no agreed notice period, the employee is entitled to damages, which are equivalent to a period of notice that would be reasonable in the circumstances, taking into account such things as the employee's position, the length of the employment and the industry involved (see **Reda and another v Flag Ltd** [2002] UKPC 38; [2002] IRLR 747).

[25] At common law, there is no entitlement to damages for the manner of dismissal. The headnote for **Addis** states:

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

Despite being criticised by some judges and academics, the headnote has been accepted in the House of Lords as accurately setting out the rationale for the decision in that case (see paragraph [43] of Lord Dyson SCJ's judgment in **Edwards v Chesterfield Royal Hospital**).

[26] There, however, have been attempts to adjust the **Addis** principle by stretching its reach. The learned editors of Harvey on Industrial Relations and Employment Law explain an extension to the **Addis** principle. They state that where the contract of employment stipulated that a particular process be followed before there could be dismissal, an employee, in addition to the notice period salary and benefits, was also entitled to damages equivalent to the salary and benefits that that employee would have earned during the time that process would have taken. The learned editors cited **Gunton v London Borough of Richmond upon Thames** [1980] 3 All ER 577 as authority for that principle. They said at paragraph [477] of their text:

> "...If the contract incorporates a disciplinary procedure or some other administrative process which must be followed before notice of termination may be given validly, the time such a process may have taken, had it been followed, may also be added to the notice period itself when determining the period in respect of which damages are to be assessed; this possibility first arose from the case of *Gunton v Richmond-on-Thames Borough Council [1980] IRLR 321, CA* and can also be seen in *Focsa Services (UK) Ltd v Birkett [1996] IRLR 325, EAT*.... In the jargon, it tends to be known as the '*Gunton* extension'."

[27] In **Edwards v Chesterfield Royal Hospital**, Lord Dyson SCJ explained that the decision in **Gunton** was based on the fact that the failure to properly undertake the disciplinary process properly meant that the dismissal notice was invalid. There was no award, he said, for damages for breach of a disciplinary process leading to dismissal. Instead, the award is for a wrongful dismissal claim where the termination notice was invalid (see paragraph [48] of **Edwards v Chesterfield Royal Hospital**). The rationale

for that statement, of course, is that an award for damages for breach of a disciplinary process leading to dismissal, would contradict the **Addis** principle.

[28] Another attempt to mitigate the **Addis** principle has been the source of much judicial disagreement. Although it had been raised in previous cases, the concept of an implied term of mutual trust and confidence, in contracts of employment, was cemented by the decision of the House of Lords 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 (**Malik**).

[29] **Malik** confirmed that an employee could recover damages for a breach of an implied term of mutual trust and confidence which each party, the employer and the employee, could expect of the other. The breach must necessarily have occurred during the subsistence of the employment contract. The appellants in **Malik**, who were former employees of a bank, had had their employment terminated, by way of redundancy, by the provisional liquidators of the bank. The House of Lords held that they were entitled to claim damages for their subsequent inability, because of a tarnish to their respective reputations, to obtain employment in the banking industry. That tarnish was not as a result of anything that they had done, but was due to the manner in which their employer had, unbeknownst to them, conducted its business. The House held that the employer had breached the term of mutual trust and confidence that should be implied as a term of the appellants' contract of employment.

[30] Although **Malik** is not a 'manner of dismissal' case, the decision formed the basis for claims in which the manner of the dismissal was said to be a breach of the implied term of mutual trust and confidence. The House of Lords was later called upon to decide that issue.

[31] It did so in **Johnson v Unisys**, in which Mr Johnson sued his employer for breach of contract and negligence. He sought damages for loss of earnings as a result of the manner of his dismissal and the circumstances leading to the dismissal, which caused him to suffer a nervous breakdown. He said that the employer had breached the implied term of mutual trust and confidence by failing to inform him of the complaints against him, and by breaching its disciplinary procedure. In that case, their Lordships outlined the development of the common law and the statutory framework relating to dismissals from employment (see, for example, the opinion of Lord Hoffmann at paragraphs [35] to [45] and [51] to [56]).

[32] Their Lordships decided that damages were available for any breach of the contract of employment, including the term of mutual trust and confidence, which occurred before the dismissal. They further held that that cause of action, although only available from pre-dismissal circumstances, continued to be open to the employee, even after the dismissal. Their Lordships, however, conforming to the principle in **Addis**, held that an employee "had no right of action at common law to recover financial losses arising from the unfair manner of his dismissal" (see the headnote at page 801). The majority

of their Lordships decided that relief of that nature was the domain of the statutory framework and that the courts should not trespass on that domain.

[33] It is important to note that their Lordships in **Johnson v Unisys** took the view that the statutory framework did not impinge upon or adjust the common law in respect of the contract of employment. It created, they stressed, a new statutory right for the employee. Lord Millett said, in part at paragraph [73]:

> "The recommendations of the Royal Commission were given effect by the Industrial Relations Act 1971. This left the common law and the contract of employment itself unaffected. It did not import implied terms into the contract. Instead it created a new statutory right not to be unfairly dismissed, enforceable in the newly established National Industrial Relations Court. The 1971 Act was replaced by the Employment Protection Act 1975 and its provisions as amended are now contained in the Employment Rights Act 1996…."

[34] Lord Nicholls of Birkenhead, who made some strong statements in **Malik**, which indicated an inclination to extend the bounds established by **Addis**, was also a member of the panel of the House that decided **Johnson v Unisys**. His Lordship, in a short concurring judgment in **Johnson v Unisys**, stated that, as **Malik** was not a manner of dismissal case, his comments in **Malik**, concerning the right to recover damages for the manner of dismissal, should be considered only as observations. He accepted, however, that his stance taken in **Malik**, and adopted by Mr Johnson, faced an insuperable obstacle, namely the intervention of Parliament in the unfair dismissal legislation. Lord Nicholls said, in part, at paragraph [2] of the judgment:

> "…Having heard full argument 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…."

[35] Lord Millett, in **Johnson v Unisys**, also contemplated adjustments to the common law regarding employment. These, he suggested, could be achieved by the court implying terms into the contract of employment and imposing obligations on employers. He recognised that these measures could only be imposed in the absence of express contractual provisions. He was, however, satisfied that the statutory framework had made such an approach, by the court, "both unnecessary and undesirable" (see paragraph [80]).

[36] **Johnson v Unisys** has been the subject of criticism, but, like **Addis**, it has remained, not only undisturbed, but reinforced by the House of Lords, and later, the UK Supreme Court. In addressing the decision in **Johnson v Unisys**, Lord Dyson SCJ, pithily stated at paragraph [24] of his judgment in **Edwards v Chesterfield Royal Hospital**:

> "…The ratio of *Johnson*'s case is that the implied term of trust and confidence cannot be extended to allow an employee to recover damages for loss arising from the manner of his dismissal…."

Lord Kerr SCJ, who dissented in part, in **Edwards v Chesterfield Royal Hospital**, agreed with the majority, as to the effect of the decision in **Johnson v Unisys**. He said, at paragraph [145] of his judgment that there were two aspects to the decision in **Johnson v Unisys**:

> "I would prefer to express the ratio [in **Johnson v Unisys**] in terms that more clearly recognise the two separate aspects of

> the decision. In the first place, **the House of Lords rejected the notion that the implied term of mutual trust and confidence had any role in determining the nature of the employer's obligations at the time of the dismissal of the employee**. Secondly, it concluded that **compensation for loss flowing from the manner in which an employee is dismissed must be sought within the statutory scheme devised by Parliament** in the 1971 Act and continued in successor enactments. It seems to me that it is the latter of these two which is the more relevant to the issues that arise on this appeal." (Emphasis supplied)

[37] **Johnson v Unisys** has created what has been called, the "**Johnson** exclusion area". The cases excluded from the right to claim damages, are those in which the alleged breach of contract is what has led to the dismissal. The demarcation boundary of the exclusion area was considered by the House of Lords in **Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others** [2004] 3 All ER 991; [2005] 1 AC 503 ("Eastwood v Magnox"). Their Lordships held that improper conduct of the employer (such as unreasonable suspensions) prior to dismissal (and accordingly outside the **Johnson** exclusion area), was actionable at common law.

[38] In **Eastwood v Magnox**, despite criticism by Lord Steyn of both **Addis** and **Johnson v Unisys** (in which he dissented), their Lordships, at paragraphs [27] to [29], set out the boundary line of the **Johnson** exclusion area. A member of the panel deciding **Eastwood v Magnox**, Lord Nicholls of Birkenhead, said, in part:

> "[27] Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is

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

[39] Attempts have been made to push the boundaries of the **Johnson** exclusion area. These attempts include cases where the employee asserts that the employer had breached an express term of the contract of employment by failing to observe prescribed disciplinary procedures.

[40] This issue was considered by the UK Supreme Court, in **Edwards v Chesterfield Royal Hospital**. In that case, their Lordships held, in part, that "if provisions about

disciplinary procedure were incorporated as express terms into an employment contract, they were not ordinary contractual terms", and not actionable at common law (see the headnote, at page 279, and Lord Dyson SCJ's judgment at paragraph [38]). That curious finding resulted from the statutory framework. His Lordship went on to explain, at paragraph [40], that:

> "The unfair dismissal legislation precludes a claim for damages for breach of contract in relation to the manner of a dismissal, whether the claim is formulated as a claim for breach of an implied term or as a claim for breach of an express term which regulates disciplinary procedures leading to a dismissal…**Parliament did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations carefully crafted by Parliament for the exercise of this statutory jurisdiction**." (Emphasis supplied)

Lord Dyson SCJ went on to hold, at paragraph [49] of his judgment, that **Johnson v Unisys** "is a bar to a claim for damages for breach of an express term of an employment contract as to the manner of a dismissal".

[41] There have been no later cases in the UK Supreme Court, which address **Johnson v Unisys** or **Edwards v Chesterfield Royal Hospital**. Before the decision in **Edwards v Chesterfield Royal Hospital**, the Privy Council, in the case of **Reda v Flag Ltd**, an appeal emanating from Bermuda, did consider **Johnson v Unisys** and **Malik**. Their Lordships found, in that context, that:

a. an express provision relating to the termination of a contract of employment cannot be qualified by the implied term of mutual trust and confidence;

b. the implied term must yield to the express provisions of the contract;

c. where the contract allows for dismissal without cause, the exercise of that power does not have to be justified;

d. it is only where the contract does not contain an express provision for its determination, that it is generally, though not invariably, subject to an implied term that it is determinable by reasonable notice.

[42] It may fairly be said that it is that development in the common law of the UK which has generally influenced the attitude of the courts in Jamaica toward the termination of employment contracts.

(b) The approach taken in some other jurisdictions

[43] The approach taken in the UK toward termination of employment contracts, especially the issue of unfair dismissal, has not been followed in some other common law jurisdictions.

[44] For example, in New Zealand the legislature of that country has allowed a dismissed employee to choose the forum in which to pursue his or her remedy for an alleged unfair dismissal. Such an employee may choose a statutorily established Employment Tribunal or the Employment Court. Section 3 of the Employment Contracts Act, 1991, of New Zealand, stipulates that the Employment Tribunal and the Employment

Court, both constituted under that Act, shall "have exclusive jurisdiction to hear and determine any proceedings founded on an employment contract". Section 4 of that Act stipulates that the relevant proceedings shall "be heard and determined before the [Employment] Tribunal or the [Employment] Court or both". Cases decided in that context are, therefore, not of real assistance to the present analysis.

[45] The learned authors of Commonwealth Caribbean Employment and Labour Law, in discussing the issue of wrongful dismissal, cited, at page 152, the decision of **Cash and Another v Bahamas National Baptist Missionary & Education Convention and Others**, (unreported), Supreme Court of Bahamas, Suit No 771 of 2003, Common Law and Equity Division (SC), judgment delivered 5 June 2007, as an example of a decision based on a breach of the mutual trust and confidence implied term. The learned judge in that case, Lyons J, awarded damages for loss of reputation and inability to obtain alternative employment as a result of the manner of the employee's dismissal. He held that there was no wrongful dismissal, in its classic meaning, there having been a payment in lieu of notice. He, however, drew a distinction between "unfair dismissal in its natural meaning" and the statutory action of unfair dismissal under the Employment Act of that country. The learned authors assert that the learned judge's approach seems to have been restricted to the particular facts of that case and does not seem to represent the majority standpoint of the judiciary in that jurisdiction. Although an appeal was filed against the decision in **Cash and Another v Bahamas National**, the appeal was dismissed on procedural grounds.

[46] The stance taken in Bermuda is somewhat clearer. It, however, seems to follow the **Johnson v Unisys** approach. **Allison Thomas v Fort Knox Bermuda Ltd and Another** [2010] CA (Bda) 5 Civ demonstrates that, in that jurisdiction, the statutory framework is considered as creating the benefit and the procedure to acquire that benefit. The Court of Appeal of Bermuda stated that the "issue raised for decision is whether the Plaintiff is entitled to claim damages for breach of the statutory right given by section 18(1) [of that country's Employment Act 2000] that his contract was not to be terminated except for a valid reason, even where the required statutory and/or contractual notice was given, or wages paid in lieu of notice". That Act provided that employment disputes may be referred to an Inspector, who should attempt conciliation, and if unsuccessful, refer the dispute to the Employment Tribunal. The Employment Tribunal would hear both sides and adjudicate on the matter. It would, in the event that it found that the employee was unfairly dismissed, award compensation.

[47] The court found that a remedy for unfair dismissal is not for enforcement in the court. Sir Anthony Evans, with whom Zacca P and Stuart-Smith JA agreed, stated, in part, in his judgment in that case:

> "36. Sections 18 to 33 constitute Part IV of the Act under the heading Termination of Employment and are expressed in general terms, with no indication that they are intended merely to provide a code for proceedings before the Employment Tribunal, but not to affect the contractual rights which employers and employees can enforce in the Courts. There is nothing which suggests that the Courts' jurisdiction is excluded…nor is it easy to infer that the Act was intended to create two separate codes, one for the Employment Tribunal and another for the Courts.

37. However, it is not necessary to decide in the present case whether that is the effect of the Act. We can assume in the Plaintiff's favour that the sections 18 and 28 do create rights which are incorporated in the contract of employment. **But it does not follow that the employee is entitled to recover compensation for unfair dismissal, as the Plaintiff contends. In our judgment, he is not**.

38. **The reason in essence is that the statutory rights come with strings attached; they come with their procedural baggage**. There is no common law concept of unfair dismissal, and no common law remedies that flow from it. The statutory creation consists not merely of the right but also the remedy for its breach, and it is that package which the Courts can recognise. But the common law remedy of damages is not included in it.

39. The matter can be tested in this way. The employee gains the right to obtain statutory compensation for unfair dismissal, together with a contractual or common law right to have his complaint considered by the Inspector and the Tribunal as the Act prescribes. That right could be enforced by the Courts, if the need to do so were to arise, and the employee is protected from the risk, emphasised by [counsel for the appellant], that he would be left without remedy in a case where the Inspector refused his complaint on inadequate grounds.

40. The Judge included in his reasons that the claim for unfair dismissal "is a creature of statute and can only be pursued following the procedures provided for in the Act". Essentially for that reason, in our judgment he was correct in striking out the claim." (Emphasis supplied)

Stuart-Smith JA, although agreeing with Evans JA's conclusion, was not hesitant about excluding statutory rights from the jurisdiction of the court. He said, in part at paragraph 2 of his judgment:

> "While the language of the Bermudian statute is not precisely the same as the U.K. Statute, it seems to me inconceivable

> that the Bermudian Parliament intended to enact a system which was so much at variance with the U.K. model that the provisions of the statute could be relied upon as express or implied terms of the contract, and therefore enforceable through the courts....in my opinion an action for breach of contract must be based on common law principles and is not affected by [the statutory provisions]."

[48] Bell J, the judge who decided **Allison Thomas v Fort Knox Bermuda Ltd and Another** at first instance, considered the applicable law in the Cayman Islands and found that the statutory framework in that jurisdiction was considered to create a separate remedy from the common law (see [2009] SC 56 Civ at paragraphs [29] – [30]). Bell J's decision was upheld on appeal in the case cited above.

[49] Barbados also has a statutory framework for employment issues. It enacted the Employment Rights Act in 2012. The legislation declares that an employee has a right not to be unfairly dismissed by the employer. The statute also creates an Employment Rights Tribunal, which has an exclusive right to deal with complaints of breaches of the rights conferred by the Act. The Tribunal's decision is said to be final and not subject to appeal except on a point of law. It is important to note, however, that, in order to claim the protection granted by the Act, an employee must be continuously in that employment for "not less than one year ending with the effective date of termination" (section 27(3)). In the circumstances, it cannot be said that unfair dismissal may be the subject of litigation through the court in that jurisdiction. No decided case on that point was brought to the attention of this court.

[50] The Canadian stance in respect of the common law differs somewhat from the position in the UK. In **Wallace v United Grain Growers Limited**, the Supreme Court of Canada considered a complaint by Mr Wallace that he had been wrongfully dismissed. He further complained that the manner of his dismissal was so egregious that it caused him psychiatric illness. The court did not follow the **Addis** principle. It held that Mr Wallace, although not entitled to damages for the fact of the dismissal, was entitled to compensation for the manner of the dismissal. It awarded that compensation by applying the period that it considered a reasonable period for notice, and thereby increased the damages representing salary in lieu of notice.

[51] The reasoning of the majority in not following the **Addis** principle is that that principle, in their view, failed to consider the unique aspects of the contract of employment. Iacobucci J, writing for the majority, said at paragraph 90:

> "Although [**Addis** and like] decisions are grounded in general principles of contract law, I believe, with respect, that they have all failed to take into account the unique characteristics of the particular type of contract with which they were concerned, namely, a contract of employment. Similarly, there was not an appropriate recognition of the special relationship which these contracts govern. In my view, both are relevant considerations."

Iacobucci J's language differs somewhat from that of Lord Hoffmann, at paragraphs [35] – [36] of **Johnson v Unisys**, which was quoted above, in which Lord Hoffmann recognised the transformation of the employment contract, but did not highlight the uniqueness of the "special relationships which these contracts govern".

[52] The reasoning of the majority in **Wallace v United Grain Growers Limited**, on this point, is not entirely easy to follow. They held, at paragraph 76, that "[a] requirement of 'good faith' for dismissal would, in effect, contravene [either party's right to terminate the contract of employment] and deprive employers of the ability to determine the composition of their workforce". They held that such a requirement would be "inconsistent with established principles of employment law, and more appropriately, should be left to legislative enactment rather than judicial pronouncement". They accordingly, rejected the argument that a dismissed employee could sue in either tort or contract for "bad faith discharge".

[53] Despite that finding, the learned judges, in the majority, held that employers "ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period" (see paragraph 95). Iacobucci J asserted, at paragraph 98, his belief that "in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". Such behaviour, he held, based on previous decisions in Canadian courts, "ought to merit compensation by way of an addition to the notice period" (see paragraph 101). He also drew support, for his position, from the fact that compensation for injured feelings was available in other areas of the law, such as defamation (see paragraph 105).

[54] It is important to note:

a. that there was no express term in Mr Wallace's contract that stipulated the notice period to which he would have been entitled, upon termination of his employment;

b. the court, in deciding the notice period, placed great emphasis on the fact that the employer had induced Mr Wallace to leave his previous employer on assurances of job security; and

c. the court did not have to contend with any legislation affecting the dismissal, and therefore the issue that faced the court in **Johnson v Unisys**, as to whether the common law or the statute applied, did not arise for discussion.

[55] The result of the exercise of examining the comparative positions in those other common law jurisdictions, which have been considered, is that, the courts, apart from the court in New Zealand, which is permitted by legislation to address unfair dismissal cases, and the Supreme Court of Canada, follow the common law principle that is set out in **Addis**. Apart from the court in New Zealand and the Supreme Court of Canada, the court in the jurisdictions, which have been considered, have accepted that it is the statutory framework which governs compensation for unfair dismissal, whilst wrongful dismissal remains the province of the court. Those jurisdictions, therefore, adopt the distinction set out in **Johnson v Unisys**.

(c) The binding nature of the authorities

[56] Before addressing the relevant law in this country, it would be helpful to consider another, centuries old, principle, which is relevant in this context, namely, *stare decisis.* That principle supplements the requirement that the law must be certain, and requires courts to consider the previous decisions, especially of superior courts, as authoritative and binding. The principle applies to this court in relation to the decisions of the highest court of this country, the Judicial Committee of the Privy Council. The decisions of the Privy Council, in appeals from this jurisdiction, bind the approach that this court may take in respect of any principle of law. The Privy Council's decisions, on appeals from other jurisdictions, on common law matters, and those involving legislation similar to those in this country, are, although not binding, highly persuasive. It is unnecessary, for these purposes to elaborate on that point.

[57] The Privy Council has declared that, where the applicable law is English (such as is the common law principle set out in **Addis**), it considers itself constrained to follow the judicial decisions of the House of Lords, which address the point in issue (see **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others** [1986] AC 80). The principle necessarily extends to the decisions of the UK Supreme Court, which has replaced the judicial arm of the House of Lords. It is perhaps axiomatic that the Privy Council will not consider itself bound by UK Supreme Court decisions, if the issue before the Privy Council turns on, or is substantially affected by, custom, statutory provisions or some other

peculiarity of the jurisdiction, from which the appeal before it, emanates. The Privy Council, although not bound by its previous decisions, does not readily depart from them.

[58] The Privy Council, accordingly, adopts and applies the doctrine of *stare decisis*.

[59] This court has, in a number of cases, also considered the doctrine of *stare decisis* in respect of its own decisions. Prominent among the recent ones is **Gordon v Russell** [2012] JMCA App 5. In that case, Phillips JA, at paragraphs [58] and [59], accepted that this court reserved the power to review its previous decisions and correct them, where they are clearly wrong. Rule 1.7(7) of the Court of Appeal Rules (CAR) also allows this court to revoke its previous orders. Those principles only apply, however, if this court is not bound by the decisions of the Privy Council (see page 148 of Commonwealth Caribbean Law and Legal Systems – second edition – by Rose-Marie Belle Antoine).

[60] The reasons for that interpolation in the discourse are:

a. to set the stage for asserting that this court is bound to follow the decision in **Addis**; and

b. to assist in determining if the statutory provisions, which affect the issue of dismissals in this country, allow this court to take a different approach from that adopted in **Johnson v Unisys**.

(d) The relevant law in Jamaica

[61] In this jurisdiction, **Addis** has been accepted as the law and has been applied in a number of cases. This was acknowledged by Morrison JA, as he then was, at paragraph 21 of **United General Insurance Company Limited v Marilyn Hamilton** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 88/2008, judgment delivered 15 May 2009. There he said, in part:

> "**Addis** has been routinely followed and applied by this court (see, for example, **Kaiser Bauxite Company v Cadien** (1983) 20 JLR 168, **Chang v National Housing Trust** (1991) [28] JLR [495] and **Cocoa Industry Board et al v Melbourne** (1993) 30 JLR 242…."

[62] Although not citing **Addis** by name, the decision of the Privy Council in **British Guiana Credit Corporation v Clement Hugh DaSilva** (1965) 7 WIR 530; [1965] 1 WLR 248, confirmed the **Addis** principle. After holding that the wronged employee, who was the plaintiff in that case, was not entitled to punitive damages, their Lordships said, in part, at page 538 of the WIR:

> "The plaintiff was from the beginning of the contract always at the risk that the corporation could have given him reasonable notice to terminate or pay him salary for that period in lieu. Indeed, had…the corporation taken this course **the plaintiff could have recovered no more than the salary plus other benefits under the contract for the period of the notice, or a payment down in lieu**. This therefore represents the measure of his loss (subject as to what is said hereafter as to leave pay). *Prima facie* a reasonable period of notice would have been six months….." (Emphasis supplied)

[63] Similarly, to the application of **Addis**, it must also be accepted that the implied term of mutual trust and confidence constitutes a part of the law of this country, relating

to the contract of employment. The introduction of that term into contracts did not turn on any statutory provisions in the UK, and it was confirmed by the House of Lords. On that basis, and as has been explained above, the Privy Council will, undoubtedly, in the absence of any statutory provisions to the contrary, uphold the principles decided in **Malik**. That case, therefore, must also be treated as binding on this court.

[64] Whether **Johnson v Unisys** represents the law in Jamaica depends on the view taken of the efforts of the Jamaican Parliament. The Jamaican legislature has also been active in providing relief from unfair dismissals. Those efforts commenced in 1974, with the passing of the Employment (Termination and Redundancy Payments) Act (the ETRPA). That Act established a minimum notice period depending on the length of the employment. A more significant effort, for these purposes, was made in 1975, with the passage of the Labour Relations and Industrial Disputes Act (the LRIDA), regulations promulgated under the LRIDA and a Labour Relations Code (the code). Amendments have been made to those statutory instruments over the years. A major one will be discussed later in this judgment.

[65] Rattray P, in **Village Resorts Limited v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292, explained the background to the legislative intervention and the effect of the LRIDA, as is relevant for these purposes. In a judgment that has been commended by the Privy Council (see **Jamaica Flour Mills Limited v Industrial Disputes Tribunal and another** [2005] UKPC 16), Rattray P said, at pages 299 - 300 of the report on **Village Resorts Limited v IDT**:

> "The relationship between employer and employee confers a status on both the person employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant to employer and employee there is clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in the productive process and the creation of wealth in the society.
>
> …The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, - first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. **To achieve this Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes**.
> …
>
> **The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law**." (Emphasis supplied)

[66] Some three years later, Lord Hoffmann, in **Johnson v Unisys**, used similar language to that contained in the latter part of that extract from Rattray P's judgment. Lord Hoffmann, at paragraph [54] of his judgment, addressed the reasoning adopted by

the UK Parliament in creating the legislation leading to the Employment Rights Act 1996 of that country. Lord Hoffmann said:

> "My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of *Malloch v Aberdeen Corp* [1971] 2 All ER 1278, [1971] 1 WLR 1578. **The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies**. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount." (Emphasis supplied)

[67] In his judgment in **Village Resorts Limited v IDT**, Rattray P held that the term "unjustifiable", as used in the LRIDA, equates to the word "unfair" as used in the UK legislation. That finding also found favour with Forte P, in this court's decision in **Jamaica Flour Mills v The Industrial Disputes Tribunal and another**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2002, judgment delivered 11 June 2003.

[68] The LRIDA was originally designed to create an environment for the resolution of disputes between collective bargaining units (trade unions) and employers. It allowed the responsible Minister to call such parties in dispute, to conciliation, and failing success at that level, to refer their dispute to the Industrial Disputes Tribunal (IDT). The Minister may also refer the dispute to a Board of Inquiry. The LRIDA was originally restricted to addressing and resolving disputes between trade unions (including unionised employees) and employers or entities representing employers in an industry.

[69] In 2010, Parliament amended the LRIDA (by the Labour Relations and Industrial Disputes (Amendment) Act, 2010) to expand the ambit of the LRIDA as well as the powers of the IDT. The LRIDA, consequently, now also regulates disputes involving individual employees and allows the IDT to consider the cases of individual employees who have disputes with their employer. Accordingly, the IDT may now address complaints by an individual employee, that he or she has been unjustifiably dismissed. Section 12(5)(c) of the LRIDA provides that the IDT may, in cases where it finds unjustifiable dismissal, order that the employee be:

i. re-instated with a payment of lost wages;

ii. paid compensation for the manner of dismissal; or

iii. given such other relief as the IDT may determine.

[70] It is important to note that disputes, which relate to disciplinary action taken against a worker, are subject to a limitation period. They may not be referred to the IDT unless a complaint is lodged with the Minister "within twelve months of the date on which

the disciplinary action became effective" (see section 11B of the LRIDA). The restriction seems to apply to both unionised and non-unionised employees.

[71] The IDT, in discharging its functions, may summon witnesses, administer oaths to the witnesses who appear before it, and otherwise regulate its procedure as it thinks fit. Its decisions may only be challenged on issues of law. Such challenges are usually by way of applications to the Supreme Court for judicial review.

[72] The code was established under the auspices of the LRIDA. Part I, section 3 of the code stipulates that it applies to all employers, workers and organizations representing workers. It further stipulates that a breach of it "does not of itself render anyone liable to legal proceedings, however, its provisions may be relevant in deciding any question before a tribunal or board". The Privy Council, in **Jamaica Flour Mills Limited v Industrial Disputes Tribunal**, accepted as accurate, an assertion by the IDT that the code "is as near to law as you can get" (see paragraphs 6 to 7 of the judgment).

[73] Part III, section 11 of the code gives recognition to employees being secure in their employment, and requires employers, among other things, to provide continuity of employment. Other sections concern various areas, including dispute procedure, individual grievance procedure and disciplinary procedure.

[74] The legislative structure created by the LRIDA, the code and the regulations, was considered by the Privy Council in **University of Technology Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22. Lady Hale JSC, as she then was, in

delivering the decision of the Board, summed up their Lordships' view of the framework of the LRIDA. She said at paragraph 18:

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

[75] Although her Ladyship, at paragraph 19, described that framework as being "in stark contrast to the provisions of" the UK's statute relating to unfair dismissal, she found that both statutes had in common that they provided "remedies quite different from, and additional to, the common law of wrongful dismissal" (paragraph 23).

[76] That latter statement is important in the context of whether this court follows the reasoning that led to the decision in **Johnson v Unisys**.

[77] The case law in respect of the effect of **Johnson v Unisys** on the common law has been very limited in this jurisdiction. There have only been observations about it in decisions in this court. In **United General Insurance Company Limited v Marilyn Hamilton**, Morrison JA pointed out, at paragraph 20, that Lord Steyn, in **Johnson v Unisys**, recognised the impact of **Addis**. He also stated that **Johnson v Unisys** recognised the "change in the law's attitude to the contract of employment" (paragraph

29). Morrison JA also opined that the evidence was that the **Addis** principle was wearing thin. He said at paragraph 32:

> "It will be seen from [the analysis of the cases] that, although **Addis** has yet to be formally overruled in England, the concept of the employment contract as an ordinary commercial contract which it enshrines is plainly wearing thin. McGregor on Damages [17th ed] notes that the influence of **Addis**, certainly in relation to claims for damages for injured feelings or reputation 'is now, and at the highest level, showing signs of weakening' (paragraph 28.016). A similar movement in the cases is to be found in the Commonwealth (see the authorities referred to by Lord Cooke in **Johnson v Gore Wood & Co** [**(a firm)** [2001] 1 All ER 481] at page 517)."

The learned judge of appeal took the view, supported by the other members of the panel, that it was open to Mrs Hamilton to challenge the **Addis** principle, at a trial, insofar as she was claiming that the manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in the agreement between the parties.

[78] This court, therefore, held that the judge at first instance was not in error in refusing to strike out the relevant paragraphs of Mrs Hamilton's claim, which challenged **Addis**, or to grant summary judgment in favour of her employer on that issue. Morrison JA apparently viewed the relevant law as being uncertain. He said at paragraph 34:

> "However, these difficulties [**Addis** and the lack of judicial support for Lord Steyn's position] notwithstanding, I do not think it can be said that, applying the language of Rule 15.2 [of the Civil Procedure Rules], [Mrs Hamilton] 'has no real prospect of succeeding on the claim or issue'. Nor can I say, adopting Lord Woolf MR's formulation in **Swain v Hillman** [[2001] 1 All ER 91]…that her prospects of success are no more than 'fanciful'. 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)(c)(i) and (ii)), there is no comprehensive unfair dismissal legislation in Jamaica, such as that which posed what Lord Nicholls characterised 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 legislature in Jamaica must be taken to have considered and rejected extending it beyond that category.** This is itself an indication, in my view, that the question of whether it is open to our courts to develop the law in this area by implying a suitable term in the contact of employment is, to borrow from Lord Hoffmann this time, 'finely balanced' (**Johnson v Unisys**, page 819)." (Emphasis supplied)

[79] In **Karen Thames v National Irrigation Commission Limited** [2015] JMCA Civ 43, Phillips JA also made reference to the shifting attitude toward the **Addis** principle.

She said at paragraph [69] of her judgment:

"Evan Brown J may have well thought that by virtue of **Addis v Gramophone Co Ltd** [1909] AC 488 damages ought to be restricted to definable pecuniary losses, that is, payment in lieu of notice and nothing more and not for injury to feelings and the harshness of the dismissal. However, **Addis v Gramophone Co Ltd** is a century old case and since then, the law has been in a developing mode. The House of Lords has acknowledged the existence of an implied term of trust and confidence into an employment contract which if breached may entitle a claimant to additional damages in a number of cases, namely **Malik and Mahmud v Bank of Credit and Commerce International** [1999] AC 20, **Eastwood v Magnox Electric plc**, **McCabe v Cornwall County Council** [2004] 3 All ER 991, **Blackburn v Aldi Stores Ltd** [2013] IRLR 846 and **Yapp v Foreign and Commonwealth Office** [2014] EWCA Civ 1512. Indeed in **Blackburn v Aldi Stores Ltd**, the House of Lords held that serious breaches of the employers [sic] internal disciplinary and grievance procedures, at both original and appellate

> stages, was a breach of the implied term of trust and confidence. I acknowledged this new development in the law in **Lafette Edgehill, Dwight Reid and Donnette Spence v Greg Christie (Contractor General of Jamaica**) [2012] JMCA Civ 16, at paragraph [75]. However, this doctrine was not argued in the court below or in this appeal and has not yet been judicially examined by this court."

[80] It may be said, from that review, that no previous decision of this court presently binds it on the questions of whether the **Johnson v Unisys** approach must be followed and whether the **Addis** principle remains unchanged in this jurisdiction. Apart from the decision in the court below in this case, these issues were tackled head-on in other cases in the Supreme Court. Some are:

a. **Reid v C & W Jamaica** (unreported), Supreme Court, Jamaica, Claim No CL R-037/2000, judgment delivered 30 September 2011;

b. **Marilyn Hamilton v United General Insurance Company Limited** [2013] JMCC Comm 18;

c. **Brendan Bain v University of the West Indies** [2017] JMFC FULL 3; and

d. **David Gayle v Sol Petroleum Jamaica Limited** [2018] JMCC Comm 30.

[81] Whereas the decision in **Marilyn Hamilton v United General** did not follow the **Johnson v Unisys** approach, the others did. **Marilyn Hamilton v United General** and **Reid v C & W Jamaica** are the subject of appeals to this court and are awaiting the

judgment of the court. Nothing further can be said about them at this time, except that they, and all those other judgments, reflect careful consideration of the issue. The fact that there are differences in opinion is a testimony to the intricacy of the subject matter. Those differences reflect the differences in opinion in the House of Lords and now the UK Supreme Court.

[82] Three factors support following the **Johnson v Unisys** approach. The first is the principle that where parties have agreed the terms of their engagement, it is not for the courts, barring illegality or breach of public policy, to impose other contrary terms upon them. Where, therefore, the parties to an employment contract agree that the contract may be terminated by a period of notice, or payment in lieu of notice, a court should not, where the terms of that contract are followed, interfere with that termination by imposing contradictory "implied" terms. Lord Hoffmann so stated at paragraph [37] in **Johnson v Unisys**, where he said, in part:

> "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…."

[83] As Lord Hoffmann has indicated, it is for the legislature to cure the ills caused by the imbalance between the strength of the employer versus the employee, and to reflect the modern approach of society to the status of the employee, and the interest that the employee has in his employment. The Jamaican Parliament has addressed the issue with

the ETRPA, the LRIDA, the regulations and the code. The existence of those statutory instruments is the second reason that this court should follow the **Johnson v Unisys** approach.

[84] It has been recognised by this court, and by the Privy Council, that this country's Parliament intended to intervene into the contracts of employments made in this country, particularly providing relief for employees whose employment has been terminated in a manner contrary to modern societal norms. Rattray P first said so in **Village Resorts Limited v IDT**, when he said, as has been quoted at paragraph [65] above, that the LRIDA created a new regime for employment relationships and established the IDT to provide remedies for unfair dismissal.

[85] In the Privy Council, Lady Hale JSC, as has been quoted at paragraph [74] above, in **UTech v IDT**, again recognised the intention of Parliament as expressed by the LRIDA. Her statement at paragraph 23 of her judgment explains Parliament's intention to provide "remedies quite different from and additional to, the common law of wrongful dismissal, which had long been acknowledged to be insufficient to remedy unfair or unjustified dismissals and redress the imbalance of bargaining power between employers and employees".

[86] It is true that the scope of the remedy in the LRIDA is not as broad as the legislation in the UK, but it does not have to be. As long as it is clear that Parliament intended a separate structure for the resolution of disputes arising from dismissals that

are said to be unfair, there is no room to accommodate a competing court process. As Lord Hoffmann said, in part, at paragraph [37] of **Johnson v Unisys**:

> "…The second reason [that dismissal presents special problems] is that judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. **The courts may proceed in harmony with Parliament but there should be no discord**." (Emphasis supplied)

[87] There are similarities and there are differences between the UK legislation and the legislative framework in Jamaica (LRIDA and the code). Similarities include:

a. Protection from unfair dismissal (Part X, chapter I, section 94 of the Employment Rights Act (ERA) expressly provides employees with the right against unfair dismissal by their employer; Part I second paragraph of section 2 of the code.;

b. the referral to disputes to a specialist tribunal (Part X, chapter II, sections 111 and part XIII, chapter II, section 205 of the ERA; Sections 11, 11A(1)(a)(i) and 16A of the LRIDA), which need not be manned by legally trained individuals (See dicta from Lord Millet in

Johnson v Unisys at paragraph [80]; Second Schedule of LRIDA);

c. the types of relief that the tribunal may award which includes reinstatement and compensation (Part X, chapter II, sections 122-123 of the ERA; Section 12(5)(c) of the LRIDA;

d. the establishment of time limits within which complaints may be brought (Part X, chapter II, section 111(2)(a) of the ERA; Section 11B of the LRIDA); and

e. the provision outlining the disciplinary procedure to be followed (Part I, section 3 of the ERA; Part IV of the code).

[88] The differences between the two legislative regimes include the following:

a. whereas the UK regime limits the value of the award that the tribunal may grant, there is no such limit imposed by the LRIDA;

b. prior to 2010 only unionised employees' grievances were allowed to be considered by the IDT in Jamaica, while there is no such restriction in the UK;

c. since 2010, any employee may approach the Minister to complain about unfair dismissal, while in the UK only

employees who have been in the employment for over one year may apply to the tribunal;

d. whereas the UK statute gives clear definitions for what constitutes unfair dismissal, the Jamaican legislative provisions do not;

e. contrary to the UK legislation, the Jamaican legislative provisions do not specifically state that the tribunal may reduce the quantum of an award as a result of the conduct of the employee, but given the breadth of the powers available to the IDT, such a power could not be said to be excluded; and

f. unlike the statutory requirement for employers in the UK to give employees a written statement of the particulars of their employment, there is no such requirement in the Jamaican legislative regime.

[89] Prior to 2010, the legislature did not provide for the non-unionised employee. As a result, prior to that year, persons who were not members of a trade union did not have access to relief from dismissals which are alleged to be unfair. That, however, must be held to be a deliberate policy of the Parliament of the day. The amendment in 2010 confirms that Parliament intends to rule that area of the law. The possibility considered by Morrison JA in **United General Insurance Company Limited v Marilyn**

Hamilton, in the extract cited at paragraph [78] above, is accepted as being the position that this court should adopt, even for claims that were filed prior to the 2010 amendment:

> "…by providing a remedy for unjustifiable dismissal to a limited category of workers, the legislature in Jamaica must be taken to have considered and rejected extending it beyond that category".

[90] Based on the above analysis, it must be held that, in this country, there is a comprehensive alternative statutory scheme for providing a remedy where an employee is unfairly dismissed. The **Addis** principle and the **Johnson v Unisys** approach should be followed, namely, that there is no right of action for damages for an alleged breach of trust and confidence, where that breach is what led to the dismissal, or for loss, which flows from the manner of dismissal. It is for the IDT, in an appropriate case, to determine if such a dismissal, is unfair, and worthy of compensation.

[91] It is now possible to examine the grounds of appeal in the present case.

Mr Gabbidon's grounds of appeal

[92] The amended grounds of appeal are:

> "1. The learned Judge erred in finding that the Appellant could not expect confidentiality to be maintained and that he could not benefit from the ESP because he chose not to remain anonymous by copying the letter he sent to Mr. July to Mr. Gordon and Mrs. Harrison.
>
> 2. The learned Judge erred in not finding that the ESP programme gave employees the option of remaining anonymous or disclosing their identity. The fact that the Appellant chose to disclose his identity should not have resulted in him being subjected to acts inimical to his interest, contrary to the very purpose and intendment of the ESP.

3. The learned Judge erred in finding that the ESP was possibly being used to usurp the role of managers or supervisors.

4. The learned judge erred in finding that the 'buck stopped' with the Appellant as the same is against the weight of the evidence. The unchallenged evidence before the court clearly indicated that Ms. Natalie Timberlake, Assistant Manager Credit Card Center [sic] the subordinate of Mr. Gordon who suspended the Appellant, had detected a discrepancy of $1.5 million when balancing the Defendant's account but failed to notify the Defendant of the same and had she done so the loss suffered by the bank would have been only $ 1. 5 million.

5. The learned Judge erred in law and/or misdirected herself in treating the dismissal of the Appellant as properly governed by his contract of employment without giving recognition to the policy of the ESP which was incorporated into the contract and which had been implemented by the Respondent as a method of resolving employment issues without fear of reprimand or recourse.

6. The learned Judge erred in law and/or misdirected herself in limiting the standard to be met by the Appellant to establish a breach of the implied term of trust and confidence to cases where the Defendant conducts its business in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence.

7. The learned Judge thereby failed to conduct the essential task of assessing all the relevant facts and considering the circumstances as a whole and marshalling the facts properly in order to make a proper determination as to whether there was a breach of the implied term of trust and confidence. The following evidence was given and not addressed properly or at all in the decision of the learned judge:

(i) The Appellant was called to a meeting without being informed as to the purpose of the meeting;

(ii) The Appellant was asked to respond to questions posed, the said questions were framed based on certain findings in a report he did not know about and therefore had not been given any opportunity to review;

(iii) The Appellant requested that those questions be put in writing, this was done, but the Appellant was presented with a suspension letter at the very meeting he returned his answers, without any discussion taking place;

(iv) The decision to suspend the Appellant was taken outside of these 2 meetings; despite the fact that the reports prepared by both the external investigation unit and the internal investigation unit did not name the Appellant as a person who should face disciplinary proceedings.

(v) The Appellant was, in breach of the implied term of trust and confidence, punished for relying on and implementing the terms of the ESP by his letter to Mr. Peter July.

8. The learned trial judge erred in not finding that the second meeting was in essence a sham as the decision to suspend the Appellant was taken prior to the second meeting and the suspension letter prepared prior to the meeting. Therefore no significant weight should have been given to Ms. Laraine Harrison's response that had the Appellant's written responses been different from the oral ones the suspension letter would have been withdraw[n].

9. The learned trial judge erred in considering issues not raised by the evidence when she purported to consider

> whether the Appellant failed to have recourse to avenues that would have been afforded to him if he were a member of a union; as the Appellant was not a member of any union because of his position with the Respondent."

[93] Learned counsel for Mr Gabbidon have grouped the various grounds of appeal according to the issues raised by those grounds. Grounds 1, 2, 3 and 5 deal with the issue of the relationship between the ESP policy and the contract of employment. Ground 4 deals with the issues of fault for the system error. Grounds 6, 7 and 8 deal with the implied term of trust and confidence, while ground 9 deals with the options for relief that were open to Mr Gabbidon at the time. The grounds will be assessed according to those issues, as grouped.

The fault for the system error (ground 4)

[94] It is convenient, however, to deal first with ground 4 since it affects the issue, which relates to the events that occurred first in the chronology of this case. Much time was spent on this issue at the trial. Less time was spent on it during the appeal. Although Mr Gabbidon's counsel pursued it with vigour, it is not a substantive issue in the case.

[95] The learned judge found that the bank took the decision to suspend Mr Gabbidon because it was not satisfied with his answers to the questions about the system error. She took the view that the bank's decision to suspend was based on "the premise that the buck had to stop somewhere and as usually is the case it stopped with the persons at the helm of the department where the problem arose". She accepted that "the buck" stopped with him as the assistant general manager and the general manager (who had,

in the wake of the system error, been transferred from the department and later made to part company with the bank).

[96] Mrs Kitson QC, appearing for Mr Gabbidon, in arguing this ground, sought to explain why the fault for the computer error ought not to have been placed at Mr Gabbidon's feet. Learned Queen's Counsel examined the two reports that the bank had commissioned and submitted that the reports did not show that Mr Gabbidon did anything wrong, yet he received the harshest sanction compared to the other persons involved in the debacle. The submission was that the suspension and eventual dismissal were unfair to Mr Gabbidon. These actions against Mr Gabbidon, it was submitted, "in and of themselves undermined the implied term of trust and confidence between the parties" (paragraph 59 of the written submissions on behalf of Mr Gabbidon).

[97] Learned Queen's Counsel submitted that the learned judge's finding for blame to be affixed to Mr Gabbidon was entirely unreasonable. The finding, she submitted, ought, therefore, to be set aside.

[98] Mr Panton, on behalf of the bank, argued that the evidence showed that Mr Gabbidon was in charge of four departmental units, one of which was responsible for the action, and omission, which resulted in the system malfunction. Learned counsel contended that the learned judge was correct in finding that "the buck" stopped with Mr Gabbidon. Learned counsel also pointed to the fact that the suspension and the dismissal are separate and distinct issues.

[99] This ground, and the submissions on behalf of Mr Gabbidon in respect of it, contain several flaws. The first is that the dismissal was not in connection with Mr Gabbidon's fault, or lack thereof, in relation to the system error. Although the letter of dismissal does not give a reason for his dismissal, it may be reasonably inferred that the bank's management was upset about the method that he had chosen to complain about his suspension. Even if there had been an express statement in the letter of dismissal, linking the reprimand to the dismissal, it would have been of no moment. The principle that applies, is that the ostensible "reason" for the dismissal is to be ignored if the previously agreed option, of a payment in lieu of notice, is adopted. In **Cocoa Industry Board and others v Melbourne** (1993) 30 JLR 242 Wolfe JA, as he then was, said (at page 246 C-E):

> "The letter of dismissal…did purport to set out reasons for the dismissal. However the letter clearly stated that the [employee] was being paid one month's wages in lieu of notice….
>
> The manual clearly states that dismissal for cause attracts summary dismissal, that is, dismissal without the necessity to give notice or wages in lieu of notice. Having stated that there were reasons for the dismissal, the [employers] were entitled to dismiss the [employee] without notice or wages in lieu of notice. **The tendering of one month's wages in lieu of notice is cogent evidence that the dismissal was not for cause**. The [employers], in terminating the contract, employed one of the methods permitted by the manual…to terminate a contract. More particularly, the contract was terminated by the method stipulated in the letter of appointment." (Emphasis supplied).

[100] The second flaw in the submissions is that the claim is not based on a complaint that Mr Gabbidon was suspended; it is based on a complaint that he was dismissed. Loss

of salary due to the period of suspension does not form a part of his claim. This aspect of the complaint is addressed in part by paragraph [28] of the judgment of Lord Nicholls of Birkenhead in **Eastwood v Magnox**, where the learned Law Lord said:

> "In the ordinary course, **suspension apart**, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area." (Emphasis supplied)

[101] Because this case is not concerned with the loss resulting from Mr Gabbidon's suspension, and contrary to the submissions made on his behalf, his case is to be distinguished from **Eastwood v Magnox**. In that case, the treatment and suspension, to which Mr Eastwood and his co-claimant, Mr Williams, were subjected, caused them to suffer illness and incur loss, during the time that they were still employed to Magnox.

[102] The third flaw in this ground of appeal, and the related submissions, is that the learned judge's finding, with regard to the issue of fault, was not germane to her decision in the case. She found that Mr Gabbidon's complaint before her, "did not address any matter that arose during this employment" (paragraph 113 of her judgment). She went on to say that the issue before her concerned the bank's treatment of Mr Gabbidon leading up to the dismissal. She said, in part, at paragraph 114:

> "…The question ultimately to be resolved is whether those actions [of the bank leading up to the dismissal] are of that standard where they can be regarded as breaching the implied term of trust and confidence, i.e [sic] did the [bank] conduct [its] business in a manner calculated and likely to destroy or seriously damage that relationship of confidence and [trust] between them.

> To my mind the proof of such a breach requires something more [than] what [Mr Gabbidon] has here complained of."

[103] There is no merit in this ground.

Mr Gabbidon and the ESP (grounds 1, 2, 3 and 5)

[104] The ESP, which is at the centre of the complaints in these grounds, was implemented by the bank after Mr Gabbidon became a member of staff. The ESP extolled the principle of staff being free to "express their views, ideas and concerns". It urged staff to provide feedback on behaviour and actions that:

> a. negatively impacted the bank's image and performance;
>
> b. detracted from the bank's ability to provide exceptional service to both internal and external customers; and
>
> c. were contrary to the bank's core values, code of ethics, policies and procedures.

Importantly, the rationale for the ESP stated that the bank was committed to the methods involved in the programme "of providing a confidential and easily accessible channel for staff to express their views/concerns **without fear of reprimand**" (emphasis supplied).

[105] The document named the persons, termed "advisers", to whom staff could make reports on any issue of concern. Mr July and Mrs Harrison were among those named as being advisers. The ESP indicated that reports would be "handled as sensitively as possible and unless, otherwise indicated, the employee's anonymity and confidentiality will be maintained". It also indicated that if the adviser decided not to take any action in

respect of the report, "the decision will be fully explained to the member of staff". The explanation was to have been through, what the ESP dubbed, "the Independent Party". It did not explain or define that term.

[106] The ESP warned that the role of advisers was not to usurp the role of managers, supervisors or any other authority. It also indicated that certain issues would be dealt with in accordance with either the bank's human resources policy or its grievance procedure.

[107] Mr Panton submitted that the ESP cannot be described as being part of the contract of any employee of the bank, as it is not sufficiently clear and it does not normally form part of a contract of employment.

[108] Mr Panton's submissions cannot be upheld. There can be no dispute that the ESP:

a. was implemented as a policy programme of the bank;

and

b. formed part of the terms and conditions of Mr Gabbidon's terms and conditions of employment.

[109] Firstly, in his letter introducing the ESP to staff, the country manager spoke to it as an initiative of the bank to "strengthen employee relations and further develop ownership and pride in the" bank's group of companies. He encouraged branch managers, and heads of departments of the bank, to share the contents of the ESP with the members of their respective units. There is nothing in the country manager's letter

or the ESP, which precluded management or supervisory staff from utilising the ESP. The ESP was, undoubtedly, bank policy.

[110] Secondly, Clause 7 of Mr Gabbidon's letter of employment stated that he would be bound by any additional policies that the bank created during the time of his employment. It said:

> "You are required to observe and uphold the Bank's policies. The existing policies, **in addition to any variations, additions and exemptions associated with the Bank's policies**, **are deemed part of your terms and conditions of employment with the bank**." (Emphasis supplied)

[111] Contrary to Mr Panton's submissions, apart from the issue of the "Independent Party", mentioned above, there is nothing unclear about the bank's policy, as set out in the ESP policy document. It clearly stated the bank's commitment to facilitate the communication "channel for staff to express their views/concerns without fear or reprimand".

[112] Mr Gabbidon made use of the ESP. He explained in the 28 May 2004 letter that he was writing to make Mr July aware of the unease that existed at the time within the bank. He said that he was doing so "in the interest of good management/employee relations, since all actions taken against us as officers/staff members should stand any test of scrutiny or justification". He addressed, not only his own situation, but the treatment of Mrs Hamilton, his immediate supervisor, and the general situation in the Jamaican operation. In his testimony at the trial, he said that he copied the letter to Mr Gordon and Mrs Harrison because they were persons, with whom, ordinarily, he had good relations.

[113] In her witness statement, Mrs Harrison explained the bank's objection to the procedure that Mr Gabbidon adopted. She said that Mr Gabbidon's letter was inappropriate. She completely recanted that stance in cross-examination. She confirmed that any employee, including Mr Gabbidon, could have chosen to address any of the bank's ESP advisers. She stated, however, that the adviser, in the circumstances of this case, being a disciplinary matter, would have had to handle the matter in accordance with the HR Policy of Discipline and Grievance. That policy, however, was not put into evidence. It does not appear, in cross-examination, that Mrs Harrison had any objection to Mr Gabbidon having copied his letter to her. She said that she enjoyed a fairly good working relationship with him and it was reasonable that he had informed her and Mr Gordon that he was writing to Mr July (see pages 458-459 of the record of appeal).

[114] The learned judge found that Mr Gabbidon was entitled to make use of the ESP in communicating his grievance about the disciplinary process that had been used in his case. She found however, that his use was not fully consistent with the terms of the ESP. Having copied the letter to other people, she found, disentitled Mr Gabbidon to the benefits of the confidentiality that the ESP promised.

[115] In their collaborative written submissions, learned counsel for Mr Gabbidon complain about the learned judge's approach in this regard. Learned counsel contend that the fact that Mr Gabbidon copied the letter to other people did not relieve the adviser, Mr July, of handling the matter sensitively as the ESP required and to give Mr Gabbidon a response. Even if the response was to be a refusal of Mr Gabbidon's request, the

adviser, the submission continues, was obliged to respond. Learned counsel submit that it is obvious that it was Mr July who sent the communication to Mrs Drayton, since Mr July did not respond to Mr Gabbidon.

[116] Learned counsel also contend that the fact that Mr Gabbidon surrendered his right to anonymity in his letter did not mean that he relinquished his right to confidentiality. They submit that the fact that he did not copy the letter to other managers or members of staff meant that he was still entitled to the confidentiality that the ESP promised.

[117] Learned counsel are correct in the submission that there was nothing objectionable about the writing of the letter to Mr July. Mrs Harrison confirmed that in her evidence. To that extent, the learned judge erred in stating that the letter was not fully consistent with the ESP policy.

[118] Learned counsel's submission about the surrender of confidentiality, however, has some difficulty, but is not unreasonable. The difficulty is that the letter was copied to Mrs Harrison and Mr Gordon. Nonetheless, the ESP, and the fact that the letter was headed "Private and Confidential", should have bound Mr July to confidentiality. Learned counsel are correct that it was likely that it was Mr July who turned over the letter to Mrs Drayton. Even if this is not an inescapable inference, it is inconceivable that the letter of reprimand or the dismissal could have occurred without, at least, Mr July's blessing. To that extent, Mr July breached the confidentiality requirement of the ESP.

[119] To that extent, the learned judge erred in finding that Mr Gabbidon had surrendered his right to confidentiality. Mr Gabbidon accepted that he had waived his right to confidentiality, but stated that he still expected Mr July to have acted in accordance with the ESP (see page 432 of the record of appeal). Mr Gabbidon's expectation cannot be said to be unreasonable.

[120] Those issues, however, are not central to the controversy. The crux of the matter is the bank's response to Mr Gabbidon's letter. The response was to:

a. write to him, accusing him of, and reprimanding him for, having ignored protocol; and on the same day,

b. dismiss him.

[121] It must be said that the bank, not only acted contrary to the spirit of the ESP, but unfairly, in the circumstances. It led Mr Gabbidon to believe that he could rely on the ESP without any risk of adverse response. It specifically stated in the ESP that staff members who utilised the ESP should not fear reprimand. Apart from the breach of confidentiality, the bank breached the ESP by reprimanding him and then dismissing him. The breach must be said to be also a breach of the implied term of mutual trust and confidence.

[122] Two critical points flow from that fact situation. The first is that it is incontrovertible that the breach is what led to the dismissal. The letter of reprimand and the letter of dismissal are too closely connected to be held to be separate actions. Mr Gabbidon did not, and could not, seek to say that the breach of confidentiality, or the letter of reprimand, caused him loss. It is the dismissal that has caused him to incur loss. The

dismissal, therefore, falls within the **Johnson** exclusion area. Mr Gabbidon cannot rely on the breach of the implied term of trust and confidence to recover damages from the bank.

[123] The second point that is raised is whether the ESP prevented the bank from relying on the termination clause in Mr Gabbidon's contract of employment. The authorities, including **Reda v Flag Ltd**, make it clear that an express provision, relating to the termination of a contract of employment, cannot be qualified by the implied term of mutual trust and confidence. Although, not in relation to a contract of employment, the principle that a court cannot imply terms that are contrary to the express terms of a contract, was upheld, by this court, in **Airports Authority of Jamaica v F.R.E.M. Ltd** (1996) 33 JLR 145, cited by learned counsel on behalf of the bank.

[124] Learned counsel for Mr Gabbidon do not refute that principle. Mrs Kitson, in oral submissions, contended that the ESP is not relied upon as an implied term in the contract of employment, but rather as an express term. That position can readily be accepted. As has already been explained, Mr Gabbidon's employment letter required him to "observe and uphold the Bank's policies", both then existing and thereafter implemented.

[125] The question, therefore, is whether the ESP document, being part of the bank's policy, contains any provision which restricts the operation of the express term that allows for the termination of the contract. The closest provision is that, already quoted, which implicitly promises that there would be no reprimand of any member of staff who uses

the ESP. Dismissal must be considered the ultimate reprimand in the contract of employment.

[126] On the one hand, it may be said that the ESP policy document does not state that it modifies or supersedes the established policy regarding the termination of contracts of employment. Following the principle that general provisions may not supersede specific ones, it would mean that the ESP policy could not affect the bank's right to terminate the employment, according to the relevant clause in the contract of employment. The bank would therefore not be in breach of the contract if it dismisses, and makes the payment, in accordance with the agreed termination clause. The result on this scenario is that no damages flow from the termination.

[127] The above scenario is described as category 2 in the judgment of Lord Browne-Wilkinson in **Delaney v Staples** [1992] 1 All ER 944. In the course of that judgment, his Lordship explained the difference between the concepts of a payment in lieu of notice, and that of damages for breach of contract arising from a termination of employment, without notice. He said, in part, at page 947:

> "The phrase payment in lieu of notice is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories. (1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly call 'garden leave') there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages. **(2) The contract of employment provides expressly that**

> **the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.** (3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice, Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment. (4) **Without the agreement of the employee, the employer summarily dismisses the employee and tenders payment in lieu. This is by far the most common type of payment in lieu…The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended, no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense, since it is not a payment for work done under the contract of employment.**" (Emphasis supplied)

[128] The other interpretation of the effect of the ESP may not be unreasonable. It would be to interpret the provision, banning reprimands in ESP circumstances, coming as it did, after the letter of engagement, as creating an exception to the bank's right to terminate the employment, according to the termination clause. In this latter scenario, the dismissal would have amounted to a breach of contract. The bank, however, cannot be estopped, by its promise contained in the ESP, from terminating the employment. As has been explained above, the attitude of the common law is that the court will not order specific

performance of a contract of employment. The result, on this interpretation, is that the bank is liable for damages for breach of contract (category 4 of Lord Browne-Wilkinson's examples in **Delaney v Staples**, cited above). The bank, however, is not liable to Mr Gabbidon in this claim, as it has paid all damages that properly flow from the breach.

[129] As explained by McLachlin J in **Wallace v United Grain Growers Limited**, the remedy for a breach of the contract of employment is an award of damages based on the period of notice, which should have been given. That principle was applied in **Cocoa Industry Board v Melbourne**, where Wolfe JA said at page 246 G-H:

> "It is settled law that where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is usage to that effect, **the measure of damages for breach is the amount of such wages, which is to be regarded as liquidated damages**. See *Kaiser Bauxite Co. v. Vincent Cadien*..." (Emphasis supplied)

[130] The principle concerning the measure of damages is also addressed by Lord Browne-Wilkinson at page 948 of his judgment in **Delaney v Staples**:

> "The nature of a payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In *Gothard v Mirror Group Newspapers Ltd* [1988] ICR 729 at 733 Lord Donaldson MR stated the position to be as he had stated it in *Dixon v Stenor Ltd* [1973] ICR 157 at 158:
>
> > **'If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, i.e. wrongful dismissal. During the**

> **period to which the money in lieu relates he is not employed by his employer**.'
>
> In my view that statement is the only possible legal analysis of a payment in lieu of the fourth category. But it is not, and was not meant to be an analysis of a payment in lieu of the first three categories, in none of which is the dismissal a breach of contract by the employer. In the first three categories, the employee is entitled to the payment in lieu not as damages for breach of contract but under a contractual obligation on the employer to make the payment." (Emphasis supplied)

[131] The result, therefore, is that, on either interpretation of the effect of the ESP on the contract of employment, the bank is not liable on this claim.

[132] On those bases, these grounds cannot succeed.

The implied term of trust and confidence (grounds 6, 7 and 8)

[133] The weaknesses in the complaints in grounds 7 and 8 have already been foreshadowed in this judgment. They will be addressed, more specifically, below. Ground 6 has a different difficulty. It seeks to ascribe to the learned judge, what she did not say. For convenience, the ground is again set out below:

> "The learned Judge erred in law and/or misdirected herself in limiting the standard to be met by the Appellant to establish a breach of the implied term of trust and confidence to cases where the Defendant conducts its business in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence."

The complaint suggests that the learned judge expected proof along wider proportions, namely, the general practices of the bank, such as on the scale that took place in **Malik**.

The complaint is not justified when the learned judge's comments on this point, are looked at as a whole.

[134] The learned judge's comments, in relation to the bank and the implied term of mutual trust and confidence, were brought to a head in the closing paragraphs of her judgment. She said, in part, at paragraph 114 of her judgment, that the question to be decided was whether the bank had conducted its business "in a manner calculated and likely to destroy or seriously damage that relationship of confidence and [trust] between [Mr Gabbidon and itself]". She found that Mr Gabbidon had not proved such a breach, as has been quoted above.

[135] Earlier in her judgment, however, the learned judge expressed her embrace of the principle of an implied term of trust and confidence. The context spoke to a more limited context than those in the **Malik**-type situation. She said at paragraph 104 of her judgment:

> "There [can] be no doubt that the recognition of the implied term of trust and confidence in an employment is a welcomed development.
>
> **It is clear that in any relationship these two principles can be regarded as pillars on which to build a successful symbiotic union**.
>
> I am however not satisfied that a recognition of any other implied term can be afforded to the employment contract given the developments of the law[.]" (Emphasis supplied)

[136] The learned judge then went on to juxtapose the implications of the ESP, for the implied term of trust and confidence, against the express term for terminating the

contract. She found that Mr Gabbidon was in his rights to use the ESP, but it did not prevent the bank from using the express term to terminate his contract.

[137] It is in that context that the learned judge said that Mr Gabbidon needed to have done more. For those reasons ground 6 cannot succeed.

[138] Grounds 7 and 8 seek to criticise the learned judge for not having dealt more closely with the events leading to Mr Gabbidon's suspension. As has been said before, those issues are separate and distinct from the issues relating to the dismissal. No loss flowed from the treatment leading to the suspension. The complaints are immaterial to Mr Gabbidon's claim for damages.

[139] These grounds must also fail.

The options for relief open to Mr Gabbidon (ground 9)

[140] The complaint in this ground arises from the comments by the learned judge at paragraph 109 of her judgment. After querying whether Mr Gabbidon's complaint to Mr July was "a wish to usurp the role of…Mr. Gordon and Mrs. Harrison", the learned judge said, in part:

> "It is also significant to note that [Mr Gabbidon] found it necessary to point out [in his letter to Mr July] he had been the person to whom other employees had brought their concerns and that the concerns had been brought to the attention of the newly formed union. This raises the question as to whether [Mr Gabbidon] did not have the avenues afforded him upon dismissal by the relevant legislation if he was a member of a union."

[141] Mr Gabbidon's membership, or not, of a union was not an issue in the case. The learned judge, although stating that the matter was "significant", did not decide the case on that point. This ground cannot succeed.

Conclusion

[142] An examination of the law in relation to the termination of the contract of employment has demonstrated that, despite its antiquity, the **Addis** principle that damages are awarded for breach of contract and not for the manner of the breach, remains the law in this country. It has been happily supplemented by the introduction of the implied principle of mutual trust and confidence into the contract of employment.

[143] That implied term, however, has its limitations. Firstly, it cannot trump an express term of the contract that allows either party to terminate the contract upon notice or that allows the employer to make a payment in lieu of notice. Secondly, in the absence of an express term, stipulating the means by which the contract may be terminated, the implied term does not apply if the breach of it is what leads to the dismissal.

[144] The latter principle describes the so-called **Johnson** exclusion area. It is based on the existence of the alternative statutory regime which deals with unfair dismissals. The alternative statutory regime in Jamaica lies in the LRIDA, the code and the regulations. Unfortunately, Mr Gabbidon could not have benefitted from that alternative regime, because, at the time of his dismissal, individuals were not able to access that regime. The regime, however, is what the legislature had established at the time and it is not for this court, or any other court in this jurisdiction to act in conflict with it.

[145] Mr Gabbidon's situation in this case fell squarely within the **Johnson** exclusion area. His loss flowed from the manner in which the bank dismissed him. His treatment prior to the dismissal, including his suspension, did cause him loss of salary, but was not a part of his claim for damages.

[146] The learned judge was, therefore, not wrong in finding in favour of the bank and Mr Gabbidon's appeal must be dismissed, with costs to the respondent.

[147] This judgment cannot be concluded without sincere thanks to counsel for each of the parties for their very helpful submissions, which assisted the decision-making process. A no less sincere apology is also made for the long delay in delivering the judgment.

MCDONALD-BISHOP JA

[148] I have read, in draft, the comprehensive and illuminating judgment of Brooks JA. He has dealt adequately and accurately, in my view, with all relevant aspects of the law applicable to the germane issues in this appeal. His reasoning and conclusion, which led to his decision that this appeal should be dismissed, accord with my own views. There is nothing more that I could usefully add to his analysis.

F WILLIAMS JA

[149] I too have read, in draft, the well-reasoned and learned judgment of Brooks JA. I agree with his judgment in all respects; and there is nothing that I could usefully add to it.

BROOKS JA

ORDER

1. The appeal is dismissed.
2. Costs to the respondent to be agreed or taxed.