JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 80/1999

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH J.A.

BETWEEN:	**SAMUEL WRAY**	**PLAINTIFF/APPELLANT**
AND:	**THE UNIVERSITY OF THE WEST INDIES**	**DEFENDANT/RESPONDENT**

Raphael Codlin for the Appellant

Dennis Goffe Q.C., and Dave Garcia instructed by Myers Fletcher and Gordon for the Respondent

July 11, 12, 13 19, November 12, 2001; and July 30, 2004

DOWNER, J.A.

Dr. Samuel Wray who holds the degree of Doctor of Philosophy in Psychology from the University of Hull has been a long outstanding member of the medical faculty at the University of the West Indies, Mona. He was Dean of that Faculty for many years. There is no dispute that he was appointed as a Lecturer in Psychology in the Department of Psychiatry on 6th September 1973, and promoted to Senior Lecturer from 12th October 1979 to 30th September 1982 on indefinite tenure. What is disputed is his tenure as Professor and whether the University was empowered to "revert" him to the post of Senior Lecturer

pursuant to his contract without his consent. Donald McIntosh, J. dismissed Dr. Wray's claims as to the duration of his professorship and as he was aggrieved by that decision, he has appealed to this Court. The best way to understand the nature of this dispute is to examine the correspondence between Dr. Wray and the University. The effect of those letters must then be determined against the background of the University's status and the general law of contract. As for the status of the respondent, it is a chartered corporation and it is financed by contributions on a continuing basis from a number of West Indian countries.

There are some matters which ought to be pointed out at the outset. The record of proceedings is contained in three volumes. Volume I contains the pleadings, the judgment of Donald McIntosh J. together with the written submissions of Counsel. Volume II contains the exhibits and the third Volume, which is not numbered, contains the notes of evidence. It is a complicated case and the issues were not properly explored in the Court below. The contract of employment was examined by the plaintiff's counsel against the Revised Statutes and Ordinances of the University and by no one else. Equally, there was exhibited Rules for Senior Academic Staff to which scant reference was made in the judgment below, although it was relied on in this Court. It is necessary to make these points because this is a Court of rehearing. We perform our duties against the background of the assessment of the evidence in the Court below, and the construction of the relevant documents and statutes. When we are obliged to do this for the first time to dispose of an appeal, we have to combine

the duties of a judge of first instance and the duty of a Court of rehearing. Such a situation is undesirable especially in so important a case. Be it noted that the University gave no evidence at the trial.

History of appointment to the Chair of Mental Health

There are terms in the letter of appointment as Senior Lecturer dated April 30, 1979, which are of importance and should be stated. Paragraph 2 at page 3 of Volume II of the Record reads:

> "2. The appointment will take effect from 1st October, 1979, to 30th September, 1982, on indefinite tenure. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year. The retiring age is 60 years, but may be extended to 65 years on the invitation of Council, subject to the same conditions of notice.
>
> 3. The appointment is subject to the Charter of the University and to its Statutes, Ordinances, Rules and Regulations for the time in force."

This letter is significant as the issue of redundancy is raised in this case and the period of continuous employment runs from1st October 1979 to the date of his dismissal 31st December, 1996.

To demonstrate the esteem in which Dr. Wray was held, here is an unchallenged extract from his evidence at page 4 of the Notes of Evidence:

> "I held both the position of Dean of Faculty of Medical Science also University Dean of the Faculty of Medicine. U.W.I. has three faculties; Mona- Jamaica, Cave-Hill Barbados, St. Augustine-Trinidad and Tobago. There are Campus Administrations. There are University Administrations. In 1976 when I became Dean of Faculty of Medical Science on 20th

> February 1976, there was one Faculty of Medicine that administered operations in Barbados and in Trinidad and Tobago. In fact there was one faculty in those days. In 1984 the University Council created three Campus Faculties of Medical Sciences each with a Campus Dean. But there was an overall University Faculty of Medical Science and one of the three Deans was appointed by the Senate to be the University Faculty Dean. I was appointed in 1984 for four years and again in 1990 – 1991. From Senior Lecturer on 10th March, 1987, I was appointed when the title of Professor of Neuropsychology was conferred on me by the University Council of the West Indies."

It is against this background that the issue of his Professorship must be considered. Here is the relevant extract from the letter of appointment from the Acting University Registrar at page 5 of Vol. II of the Record:

> "May 1, 1987
>
> Professor S. R. Wray
> Faculty of Medical Science
> UWI
> Mona
>
> Dear Professor Wray,
>
> I am directed by the Council to offer you the post of Professor in Neuropsychology in the Department of Child Health, University of the West Indies, Mona.
>
> 2. The appointment will take effect from March 11, 1987 to September 30, 1989 in the first instance. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year. The retiring age is 65 years.

> 3. The appointment is subject to the Charter of the University and to its Statutes, Ordinances, Rules and Regulations for the time being in force.
>
> 4. The appointment is full-time and no outside employment may be undertaken without the consent of the University. Your duties will be as arranged by the Head of the Department of Child Health."

There are four points to note. The first is that it was for upwards of two years in the first instance. Secondly, the post was subject to the Charter, Statutes, Ordinances, Rules and Regulations of the University. Thirdly, as the Professorship was for upwards of two years in the first instance there was a reasonable expectation on both sides that it would be continued, although it could be terminated with six month's notice on either side. Fourthly, he was appointed in the Department of Child Health.

It is clear that in terms of appointments this was a Personal Professorship within intendment of Rule 29(v) of the New and Amended Ordinances at page 68 of Volume II of the Record. Be it noted that once the title Professor is conferred, Rule 53(e) of the Ordinances obliges the Estimates Committee to be responsible for financial provision. As for the status of the Ordinances Rule 23 of the Charter at p. 18 of Volume II of the Record reads:

> "23. In the case of conflict the provisions of this Our Charter shall prevail over those of the Statutes, Ordinances and Regulations; the provisions of the Statutes shall prevail over those of the Ordinances and Regulations; and the provisions of the Ordinances shall prevail over those of the Regulations."

The initial document, an invitation to treat, was an advertisement in the **Gleaner** which reads as follows at page 7 of the Record:

> "CHAIR IN MENTAL HEALTH, DEPARTMENT OF CHILD HEALTH
>
> Applications are invited from suitably qualified Psychologists and Psychiatrists with extensive experience in research, training and postgraduates in medical sciences, undergraduate teaching of medical students and of working with Caribbean Governments in establishing health care projects. This is a new post established within the Faculty of Medical Sciences and will be for a duration of two years. Continuation of the appointment beyond the stipulated period will be subject to funding. Applicants should have expertise in the field of neuropsychological aspects of mental health in children and adolescents in a family context, and research experience in the neuropharmacological basis of brain function and behavioural mechanics underlying mental disorders particularly in the area of psychoactive drugs and other abuses."

The New and Amended Ordinances at page 74 of Volume II of the Record require vacant posts to be advertised unless the relevant Appointment Committee decides otherwise.

Although some of the fundamental advances in medicine are made by scientists who are not qualified in medicine, medical doctors are a sensitive breed. Dr. Wray handled this issue with tact. Here is how the conflict emerged in the first instance at page 5 of the Notes of Evidence:

> "The style of the chair was objected to by some members of the faculty especially my colleagues – psychiatrists. They felt neuropsychology would more be descriptive of a Psychologist than mental health. As a consequence this went back to council and chair was called: Professor Neuropsychology."

The scope and funding of the Professorship was well understood by Dr. Wray. Here is how he stated it at page 5 of the Notes of Evidence:

> "I was involved in discussions leading up to establishment of the chair. I led the discussions as Dean of the faculty of medical sciences for the establishment of a post in Neuropsychology that would focus on the Drug Abuse problems and the problems thereof in the Caribbean. The University faculty adopted the resolution and then it passed to the Finance and General Purposes Committee action on behalf of council. The resolution was passed about 1983. Discussions occurred about four years. There were discussions about funding of chair. The University Administration was supportive but said the faculty would have to find the funding to prime the pump. This was found through US $80,000 as seed money from the W. K. Kellogg Foundation which was part of the programme. They gave the U.W.I. the money to fund the chair in Neuropsychology."

Dr. Wray continued thus:

> "At the University there are requests to do programme for the West Indies. The committee would say to the faculty if you find the money we can put on programmes. Resolution would say programme would start pending availability of funding. In situation where money is tight the University in starting programmes always has a clause to say – subject to funding and these are subject to funding. Because we are never sure either from the government or private sources whether there will be enough money to run the University. Everything is subject to funding.
>
> Reads
>
> Exhibit 4 paragraph 1
>
> 'Chair in Mental Health Department of Child Health.' In text there is no mention of Professor. What is referred to here, is chair. Chair is

> synonymous with Professorship. I applied for position."

The significant sentence to note in this aspect of the evidence is that Dr. Wray recognized that it was the Estimates Committee although he styled it, the Finance and General Purposes Committee which was responsible for the financial obligations of the Professorship. Dr. Wray signed the contract indicating agreement with its terms. It is important to set out his acceptance as this completed the formation of the contract. It reads at page 6 of Volume II of the Record:

> "I accept appointment on the terms set out above."

The acceptance was dated 9th November, 1987.

There was a rider dated November 10th 1987 which is set out in full at page 8 of the Record:

> "CONFIDENTIAL
>
> TO: Acting University Registrar (Attention Mrs. B. Christie)
>
> FROM: Professor S. R. Wray
>
> I hereby return contract duly signed. Please note as from the date of my appointment, I have been working in my new Department along with my duties as Dean. The Head of Department and myself have delineated a set of research projects including issues in Maternal and Child Health, Substance Abuse among children and teenagers and behavioural and neuropsychological problems in children.
>
> The two-year appointment is in accordance with the original funding for two years. May I suggest that as I am being paid at the professorial level as Dean until July 1988, the appointment be extended until July 1990 in the first instance.
>
> S. R. Wray."

The necessary inference from this memorandum is that the original funding for the Professorship would be deferred. The inference is that the University accepted this arrangement, having regard to their conduct. However, it seems that the University did not factor in the legal consequences of this course of dealing.

The next aspect of this correspondence is a memorandum of March 21, 1989, from Professor Wray to the Registrar at page 9 of Volume II of the Record:

> "TO: The Registrar
>
> Attention: Mrs. B. Christie
>
> From: Professor of Neuropsychology and Dean, FMS
>
> RE: Chair of Neuropsychology
>
> I received your note through Mrs. Wynter requesting a letter about this Chair. The appointment was made for two years subject to the availability of funding. First I would like to state that the funding earmarked for two years (1987-89) has not been used. As indicated to the Registrar, Mrs. Robertson, at the time of accepting the appointment, that my Deanship went until August 31, 1988 and as Dean I was paid a Professorial salary. I have since been appointed Dean from 1.8.88 to 30.7.91 and in this regard I shall not be drawing down on the Professorial salary earmarked for the Chair."

The memorandum continues thus:

> "In the meantime, along with my onerous duties of Dean of the Faculty I have been satisfying my academic commitment as Professor of Neuropsychology. In this context I have continued my research local and regional-wide into the

> neurodynamics of (1) substance abuse, (2) basic neuroresearch into the mechanisms mediating drug/neuropsychological behaviour. In addition I have been supervising a research student into brain/behaviour mechanisms as a function of nervous system disruption by drugs. I continue to publish the findings of my research."

The closing paragraph reads:

> "Coupled with the administrative consultations to the Department of Child Health, I have been attracting large sums of money to assist in the development of children and their health. I have just negotiated a W.K. Kellogg Foundation Grant for approximately $US700,000.00, Canadian funding of $25,000.00 in the middle of settling a Carnegie Corporation Grant of approximately $800,000.00. I have also been invited to apply for US$400,000.00 from PEW Charitable Trusts. These funds will go a long way in strengthening the development of Child Health services in the University.
>
> With regards the appointment my suggestion would be that it goes until 1993 and thereafter subject to funding. This time span is explained as follows, until 1991 as Dean of FMS, Mona (to 30.7.91) and the funding for two years to 30.7.93 and thereafter subject to funds available."

The inference to be drawn from this correspondence is that Dr. Wray by adroit use of his Deanship ensured that he was entitled to be styled Professor beyond the initial two and a half years in the first instance.

The emoluments received from being Dean was the equivalent to that which he would have obtained from being a Professor without the Deanship. It seems that this financial arrangement was feasible as part of Dr. Wray's emoluments came from the vacant post of Senior Lecturer in the Department

of Psychiatry. It was advantageous to him as the Kellogg funding would be intact as long as he was Dean. It is to be emphasized that he was a Professor who also held the office as Dean.

The other point to note is that the New Amended Ordinances at pages 66-68 of Volume II of the Record indicates provisions for promotion from Senior Lecturer to Professorship and rule 53 (e) at page 76 of Volume 11 of the Record is as follows:

> "53 (e) If the University Assessment and Promotions Committee accepts a recommendation of a Selection Board that the person be appointed to the Professorship, it shall forward the recommendation:
>
> (i) to the Estimates Committee, for financial provision; and
>
> (ii) to the Senate, with a request for a recommendation to the Council for the creation of a Professorship under Statute 17.1(b) and

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> (ii) to the University Appointments Committee."

There is a need to refer to Rule 17(1)(b) of the New and Amended Statutes at page 34 of Volume II of the Record which reads:

> "Statute 17 – Powers of the Council
>
> 1. Subject to the Charter and these Statutes and, in particular, without prejudice to the powers specifically assigned by these Statutes to the Campus Councils, the Council shall be a governing body of the University and shall exercise all the powers thereof. Without derogating from the generality of its powers

> it is specifically declared that the Council shall exercise the following powers:
>
> (a) To make the appointments authorized by the Charter and these Statutes.
>
> (b) With the consent of the Senate to institute, confirm, abolish or hold in abeyance any Professorship, Readership or other academic office and any senior administrative office in the University with the exception of an academic office or a senior administrative office of a campus."

The purpose for citing these provisions is to demonstrate that if a Professorship is abolished then the provisions pertaining to Redundancy in the New Ordinances at pages 99 and 104 of Volume II of the Record may be applicable. This aspect of the case seems to have escaped the attention of the learned judge below. Consequently no attention was paid to the Statutory provisions in the Court below namely, the Employment (Termination and Redundancy Payments) Act ("the Act.")

On two occasions the then Vice Chancellor wrote gracious letters to Dr. Wray increasing his salary and commending his work. The first was dated November 24, 1983 and reads as follows at page 114 of Volume II of the Record:

"November 24, 1983

CONFIDENTIAL

Ref. No. W. A. 133

Dear Sam,

In keeping with the decisions taken by the Finance and General Purposes Committee in June 1964 and November 1973, with regard to the review of salaries of Professors, I have carried out such a review and now write to let you know that I have decided that your salary should be increased by J$1000 per annum from February 21, 1982.

May I take this opportunity also to say how much the University appreciates the services that you render here at Mona.

Yours sincerely,

A. Z. Preston

Dr. Samuel Wray
Dean, Faculty of Medicine
U.W.I. Mona
c.c. Bursar, Mona."

The second was dated 6th February, 1984 at page 115 Volume II of the Record:

"6th February, 1984

PERSONAL & CONFIDENTIAL

Dr. Samuel Wray,
Dean,
Faculty of Medicine,
UWI.

Dear Sam,

In keeping with the decisions taken by the Finance & General Purposes Committee in June 1964 and November 1973, with regard to the review of salaries of Professors, I have again carried out such a review and now write to let you know that I have decided that your salary should be increased by $15000 per annum from 21st February, 1984.

With best wishes and much appreciation for the Services that you continue to render to the University.

Yours sincerely,

A. Z. Preston

c.c: Bursar"

Of significance is that copies of these letters were sent to the Bursar.

I mentioned that there were two other such letters dated 18th April, and 21st June, 1988 at pages 183 and 184 of the Record. What is significant is that the Finance & General Purposes Committee performed its function of securing Dr. Wray's emoluments while the title of Professor was conferred on him.

The application for sabbatical leave

The following extract from a memorandum at page 116 of Volume II of the Record by Professor Samuel Wray speaks for itself:

"TO : Professor Hon. G. Lalor

FROM: Professor Samuel R. Wray
Programme for Neuroscience, Adolescent Development and Drug Research Programme

SUBJECT: APPLICATION FOR SABBATICAL LEAVE 1995/96

DATE: April 27, 1994

I hereby apply for sabbatical leave for session 1995/96, in accordance with a memorandum from the Campus Registrar dated January 25, 1994, reference C157/5.

Your records will reveal that I have never had any of the following; sabbatical, no pay, fellowship or assisted leave.

I joined the staff in the Department of Psychiatry, University of the West Indies in 1973 and served in the following positions:

Lecturer	- September 6, 1973
Senior Lecturer	- 1978
Head, Department of Psychiatry	–June 1974- December 1975
Dean, Faculty of Medical Science	- February 1976 - July 1991
Professor of Neuropsychology	1987 – present

Since August 1991 I have been coordinating a Programme for Neuroscience, Adolescent Development in the population. In addition, I have examined drug usage in school children in Kingston, St. Andrew and St. Thomas in association with potential psychosocial correlates. I am now preparing reports for official presentations and subsequent publications."

In continuing his memorandum Professor Wray outlined his proposals as to how he intended to use his sabbatical. It is appropriate to advert to it. It reads at page 117 of Volume II of the Record:

> "I propose to use the sabbatical leave as follows:
>
> FACULTY OF MEDICAL SCIENCES – UNIVERSITY OF THE WEST INDIES BASED
>
> 1. The first six months will be used to co-ordinate data base in neuropsychology, substance abuse and adolescent development, in order to write a book on the relationships of these factors as they affect substance abuse and other deviant behaviours in the Caribbean. A book of this nature is highly required.
>
> I have extensive research material and laboratory data to develop such a book for use within the region, and especially for students and professionals.
>
> INTERNATIONAL INSTITUTIONS
>
> 2. Two months at the above institution examining the latest development in Biochemistry with respect to models of schizophrenia and other mental illnesses.
>
> 3. School of Medicine – Howard University
>
> Two months in the Department of Physiology and Biophysics at the above institution investigating brain amines and CNS activities, especially in the context of the latest computer modeling.
>
> 4. School of Medicine – University of Miami
>
> Two months in the Department of Epidemiology and Public Health, at the above

> institution updating research techniques dealing with substance abuse and HIV/AIDS.
>
> During this sabbatical year I will assiduously attempt to raise international funding to carry on my work. This fund raising effort will be greatly assisted by the data that have been collected.
>
> I trust that the Committee would find it possible to grant this leave."

What is to be noted is that during the period 1987-1996 Dr. Wray held a Professorship at the University of the West Indies. It seems that it was anticipated that there would be a problem of funding the Chair of Neuropsychology and the extract dated December 13, 1984 from the General Purposes Committee at page 118 of Volume II of the Record and a letter from Vice Chancellor Sir Allister McIntyre dated December 12, 1994, at page 121 of Volume II of the Record explains this position.

As for the extract it reads at page 118:

> "Proposal for the Establishment of a Chair in Mental Health (Neuropsychology) in the Faculty of Medicine (Ref. FGP.M.218,18/5/84
>
> 288. F.&.G.P.C. noted that the Mona Planning and Estimates Committee had agreed to the proposal for the establishment of a Chair in Mental Health (Neuropsychology) in the faculty of Medicine for two years in the first instance, to be funded by the Kellogg Foundation, and continuation beyond that time to be subject to the availability of funding.
>
> 289. F.&.G.P.C., after noting that the University Academic Committee, at its meeting earlier that day, had also given its approval, approved the establishment of this Chair under the conditions

> stated, subject to the Appointments Committee approving the title to be given to the Chair."

It was against this background that the creative financing suggested by Dr. Wray to the Registrar was accepted by the University, and was in keeping with the contract which envisaged that the Chair could continue beyond the initial two years in the first instance. It was of course understood that the University Council pursuant to Clause 17 of the Statutes was empowered to abolish the Chair it created. If the appellant, Professor Wray was constructively dismissed the Redundancy Clauses at page 104 of Volume II of the Record and the Act would come into play.

Then the letter dated December 12, 1994 at page 121 of Volume II of the Record reads:

> "December 12, 1994
>
> **PERSONAL & CONFIDENTIAL**
>
> Professor S. A. Wray
> Faculty of Medical Sciences
> Postgraduate Medical Education Building
> UWI
> Mona
>
> Dear Professor Wray,
>
> I write in response to your letter of November 24, 1994, following our meeting on November 21, 1994.
>
> You referred, *inter alia* to the Chair in Neuropsychology and attached the F&GPC 1984/85 Minutes which approved this. I remind you that the Chair was established "for two years in the first instance, to be funded by the Kellogg Foundation, and continuation beyond that time to be subject to the

> availability of funding". In light of the full utilization of the funds provided by the Kellogg Foundation, any continuation of the Chair is now contingent on a proposal to that end from the Mona campus supported by the Faculty of Medical Sciences and identifying the source of funding for the Chair.
>
> I have no personal objection to the advance of your sabbatical leave to start on March 1, 1995, as you have requested. I can, however, give no assurance at this stage that your salary can remain at the current professorial level during this period. I propose to consult further on the matter with the Principal and the University Appointments Committee.
>
> Yours sincerely
>
> Allister McIntyre
> Vice-Chancellor."

The letter of November 24, 1994 is set-out later.

The inference from the above letter is that the emoluments of the post of Senior Lecturer in the Psychiatry Department was available to Dr. Wray, but there were no funds available to meet the salary of the Chair which Dr. Wray occupied. It must be emphasized that the phrase "subject to the availability of funding" does not exclude the University's responsibilities for salary or the statutory obligations regarding redundancy.

The next stage in the narrative is the approval of sabbatical leave (in principle) and Professor Wray's acceptance of the offer. The relevant correspondence follows at page 170 of Volume II of the Record:

"June 28, 1995

Professor S.R. Wray
Postgraduate Medical Education Building
U.W.I. Mona

Dear Professor Wray,

I write to inform you that approval has been granted "in principle" for you to proceed on Sabbatical Leave for the academic year 1995/96, subject to satisfactory arrangements for a replacement being made.

2. You are asked specially to note the words "in principle". As a result of unfortunate experiences in the past, Appointments Committee, Mona has instructed me that formal permission for you to proceed on leave and for the Bursary to pay you salary for the academic year 1995/96, is not given until the Head of your Department (or in case of Heads of Departments, the Dean) has certified:

(a) that satisfactory arrangements have been made for replacement; and

(b) that you have satisfactorily completed all your teaching, examining and/or administrative duties

3. You are required also, not later than three months after your return, to send a report to the Principal of the work undertaken.

4. Members of staff who proceed on leave before fulfilling the conditions set out at (a) and (b) of paragraph 2 above **will not** be paid their salaries.

5. As evidence of your acceptance of this award, I should be grateful if you would sign and return the enclosed copy of this letter not later than six (6) weeks after the date of this letter.

Yours sincerely

B. Christie

For Campus Registrar

I accept this award by the terms set out above

(Signature) S. R. Wray

(Date) 5th July, 1995."

The actual approval for the sabbatical Leave was given in two letters dated September 20 1995, and October 12, 1995. They are to be found at pages 171 and 172 of Volume II of the Record. The period for the sabbatical leave was stated in the October 12 letter to run from October 1 to December 31, 1995. I think this was an error and should read December 31, 1996.

The genesis of the dispute

Financing or the lack of it is at the heart of most problems of Regional Institutions in the West Indies. What is appropriate to the needs of an institution is not always feasible in terms of resources. Part of the problem is the need to seek funding from each regional government. Shortfalls are met by seeking funds from charitable foundations abroad for essential programmes. This causes unease in academic and administrative circles and in this case prolonged litigation. The following memorandum from the Vice Chancellor at page 173 of Volume II of the Record indicates the core of the problem. It was written nearly four years before the Professor went on his sabbatical. It reads:

"CONFIDENTIAL July 23,1991

To: The Principal

Fr: The Vice-Chancellor

Discussion with PROF. S. Wray about his future

Prof. S. Wray came to see me recently to discuss his future when his term of office as Dean expires on July 31st. He told me that the Dean elect and some other members of the Faculty were pressing him to take over the Directorship of the Medical Learning Resources Unit.

I told Prof. Wray that there was some controversy in the Faculty over the matter, and I did not consider that it was in his interest to become director of the Medical Learning Research Unit in that environment. I proposed instead that Prof. Wray should revert to his substantive post as Prof. in Neuro-psychology.

I went on to tell him that were he to do so, ways and means would be found to provide him with some initial academic support; say the provision of some full-time or part-time research assistance. I pointed out also that since his field was an inter-disciplinary one, it would not be appropriate to remain attached to a particular department. I suggested that I would be willing to support a proposal to MPEC and UPEC for the establishment of a special programme in Neuro-psychology, of which he would be head. In that situation, he would report through the Dean to the Principal of the campus. His professorial post together with any support resources that we could provide could constitute a nucleus for seeking outside funding to establish an appropriate programme of teaching and research.

Prof. Wray liked my proposal which in his opinion, was a very satisfactory settlement of his

> situation. He undertook to provide me with some notes for consideration by the relevant Campus and University Committee.
>
> c.c. Deputy Principal
> University Registrar
> Campus Bursar."

There is a puzzling sentence which might have caused some unease. It seemed that while Dr. Wray was Professor he also held the Deanship and there was no problem with funding in those circumstances. The salary of the apparently vacant Senior Lecturership together with drawings from the Kellogg fund or the emoluments of Deanship enabled him to retain his Chair. His substantive post was Professor. The Deanship was held for a period of years. When that came to an end he was a Professor without a Deanship. This seems to be the clue to the puzzling sentence about reverting to his substantive post as Professor. If the Kellogg funding ceased then reversion to the post of Senior Lecturer seemed to be an administrative option provided Dr. Wray would accept such a demotion. Such a demotion without consent would have amounted to a constructive dismissal. There is no evidence that the University sought Dr. Wray's agreement to such a proposal. It is not surprising that the Vice Chancellor concluded his memorandum by saying that "Professor Wray liked my proposal."

The problem was also previously raised in the U.W.I. Minutes Appointments Committee, Registry U.W.I. of April 14, 1992, and it is essential

to set it out, so that the problem emerges with clarity. It reads at page 175 of Volume II of the Record:

"UNIVERSITY OF THE WEST INDIES

PROFESSOR S. .R. WRAY, PROFESSOR OF NEUROPSYCHOLOGY
RELATIONSHIP WITH THE DEPARTMENT OF CHILD HEALTH

University Appointments Committee at its meeting on March 11, 1987, (Ams 136-139) agreed that Dr. S. R. Wray then Dean, Faculty of Medical Sciences, Child Health should be appointed as Professor of Neuropsychology in the department of Child Health for two years in the first instance, with effect from March 11, 1987 to September 30, 1989.

2. The Dean, Faculty of Medical Sciences, has now written as follows:

"At a meeting of Heads of Departments the question of Professor Wray's status and location within the FMS was raised verbally by the Head, department of Psychiatry. The Head, Department of Child Health, to which the Chair in Neuropsychology is attached, indicated that he would be writing to me on this matter.

I am forwarding to you a letter which I have received... from the Head, Department of Child Health which speaks for itself. I would be grateful if the University could examine the questions raised by the Head, Department of Child Health."

3. The letter from the Head, Department of Child Health is attached.

4. Dr. Wray's record of service is as follows:-

1973-79 - Lecturer, Department of Psychiatry
1979-87 - Senior Lecturer, Department of Psychiatry

1987 - Appointed Professor in Neuropsychology
- Department of Child Health
1976-91 Dean, Faculty of Medical Sciences

5. Appointments Committee, Mona, was asked to consider Dr. Wray's status in the faculty.

THE REGISTRY
UWI, MONA
APRIL 14, 1992"

The letter referred to in paragraph 3 cannot be traced in the record. It may be that there was a problem concerning Professor Wray's relationship with the Department of Child Health. This minute by the Registrar also confirms the Vice Chancellor's intimation that there was a controversy in the Medical Faculty. Moreover, the fact that Professor Wray was being pressed by the Medical Faculty to be Director of Medical Learning Research Unit is an indication that the Department of Child Health thought if Dr. Wray's Chair were to be abolished there would be no post in that department to accommodate Dr. Wray. As the learned judge below decided that Senior Lecturer was Dr. Wray's substantive post, I will return to the issue when dealing with his judgment.

It is significant that the 1995-96 Calendar at page 189 in Volume II of the Record lists Dr. Wray in the Department of Psychiatry. There is a Senior Lecturership in the Department of Child Health but the holder is listed as being on leave.

When there was a new Dean of the Faculty of Medical Sciences then the Deanship was no longer available to Professor Wray. It seems the only funds

available was from the vacant post of Senior Lecturer in the Department of Psychiatry.

The following letter at page 176 of Volume II of the Record continues the story. Professor Wray was still on his sabbatical and due to resume on 31st December 1996. It reads:

> "OUR REFERENCE August 15, 1996
>
> Professor S. R. Wray
> Postgraduate Medical Education Building
> UWI, Mona
>
> Dear Professor Wray,
>
> I write to advise that the University Appointments Committee agreed that you should revert to your substantive post of Senior Lecturer.
>
> Please note that this decision was arrived at after careful consideration.
>
> The effective date should be September 1, 1996.
>
> Yours sincerely
> Barbara Christie
> Campus Registrar
>
> c.c. Dean, Faculty of Medical Science
> Head, Department of Child Health
> Head, Department of Community Health
> And Psychiatry."

The University wrote as if they had seconded Professor Wray to a Chair and that when the Chair came to a rest he would "revert" to his substantive position of Senior Lecturership. There was no such arrangement. The title

and emoluments of Professor were conferred on him for an indefinite period which lasted for upwards of nine years. The substance of the letter is that it was a constructive dismissal of Professor Wray which he accepted by not returning to work after December 31, 1996. The letter was in accordance with the Redundancy provisions in Ordinances. It does not seem that the Appointments Committee was aware that in substance they were abolishing the Chair of Neuropsychology presumably with the directive of the University Council. This issue will be adverted to later.

It is significant that a copy of this letter was not sent to the Bursar. The University averred in paragraph 9 of their Amended Defence that it was an administrative error why Professor Wray was paid a Professor's salary after September 1996. However, the above letter of August 15th 1996 would not have alerted the Bursar to discontinue payment to Dr. Wray as Professor.

This letter is at the heart of the dispute. It is appropriate to cite the Powers of the Council in the New and Amended Statutes at page 39 of Volume II of the Record.

It reads:

> "1. There shall be a University Appointments Committee of the Council comprising the following:
>
> (a) the Vice-Chancellor;
> (b) the Pro Vice-Chancellors
> (c) the Campus Principals;
> (d) the Deputy Campus Principals;
> (e) the University Deans of the Faculties;
> (f) the members of the Council appointed under Statute 16.1(d) by the

governments of the Contributing Countries.

2. (i) The University Appointments Committee shall exercise the powers of the Council under Statutes 26 and 17.1(a) to make appointments to academic and senior administrative offices on the recommendation of the University Selection Boards.

(ii) The University Registrar shall report to the Council and to the Campus Councils all decisions of the University Appointments Committee in exercise of its powers under sub-clause (i) above."

The University has stated that it was empowered to revert Dr. Wray to the post of Senior Lecturer. Through his counsel, firstly the late Dr. Manderson-Jones in the Court below and Mr. Raphael Codlin in this Court, the appellant has challenged this stance. The power of the Council pursuant to 17(1)(b) of the Statute to abolish a Professorship at page 34 of the Record has already been adverted to.

The Appointments Committee had the power to revert Professor Wray with his consent. He did not accept the reversion by not returning to work in January 1997. In substance the proffered reversion amounted to constructive dismissal. In this context the Registrar in answer to interrogatories stated that there was a Chair of Neuropsychology and that Chair had ceased to exist from July 31, 1993. However, the letter of August 15, 1996 suggests that Dr. Wray held the Chair until September 1st of that year. So Professor Wray was obliged to accept the letter of August 15 as an indication that the Chair of

Neuropsychology was to be abolished and rely on the legal effect of the abolition as at December 1996, since he was paid up to that time it seems as Professor. He returned the salary for January 1997. Since that was done, the issue must be what was Dr. Wray's entitlement. It is to this issue that we must now turn.

The issues on the pleadings

A curious feature of the pleadings is that there is insufficient reference to the Charter of the University or to its Statutes and Ordinances. Yet the plaintiff's written submissions in the Court below contain substantial reference to these documents. The learned judge below makes no mention of this in his judgment. He also ignored the pleadings. The issues were therefore never addressed in the learned judge's reasons for dismissing the plaintiff's claims in its entirety.

The basic claim of Dr. Wray is that his substantive post at the University from March 11, 1987 to December 31, 1996, was Professor of Neuropsychology. Further, he alleges that there was a breach of contract by the University when it purported to revert him to the post of Senior Lecturer. Here are the averments in the Further Amended Statement of Claim at page 10 of Volume I of the Record:

> "2.. The Plaintiff's employment with the Defendant has been for an unbroken period of 23 years during which he received appointments by the Defendant to the following positions in its employment:
>
> ...

4. By an agreement in writing made on May 1, 1987 whereby the Defendant appointed and employed the Plaintiff as, and the Plaintiff agreed to accept the position of, Professor of Neuropsychology, with effect from March 11, 1987, the Plaintiff was to be paid on the professorial scale and to have professorial status

5. Pursuant to the terms of the said Agreement the Plaintiff has been Professor of Neuropsychology for nine years and six months."

Then the pleadings continued thus:

"7. In breach of the contract of employment of the Plaintiff by the Defendant, the Defendant by letter dated August 15, 1996, notified the Plaintiff of the decision of the Defendant that the Plaintiff "should revert to (his) substantive post of Senior Lecturer", effective September 1, 1996."

The Registrar, Mrs. Gloria P. Barrett-Sobers gave the following answers which are crucial to the outcome of this case. They are to be found at page 23 of Volume I of the Record and read thus:

"9. *Is there now a Chair of Neuropsychology?*

Ans. *No*

...

11. If the answer to interrogatory No. 9 is in the negative, when and for what reason did the Chair of Neuropsychology cease to exist?

Ans: On July 31, 1993, when financing ceased to be available."

There are numerous letters to Professor Wray which indicated that he was addressed and paid as a Professor long after July 31, 1993. As stated previously he was paid as Professor up to December 31, 1996.

On the basis of these answers, together with the letter of August 15, 1996, there can be a claim for redundancy on the basis of the Ordinances and by Statute. The issue is dealt with in Rule 16 at page 104 of Volume II of the Record and reads thus:

"REDUNDANCY

16 (a) The University Appointments Committee, or the Campus Appointments Committee may terminate the employment of a member of the academic or senior administrative staff on grounds of redundancy, subject, however, to the payment of any superannuation benefits by means of a pension and/or gratuity or such other benefits to which the member of staff may be entitled under any applicable law governing termination of employment by reason of redundancy

(b) For the purposes of this clause, termination of employment on grounds of redundancy shall be so construed if it is attributable wholly or mainly to:

(i) the fact that the University has ceased, or intends to cease, to carry on the activity for the purposes for which the member of the academic or administrative staff was employed by the University or has ceased or intends to cease to carry on that

> activity in the place in which the member of the staff worked; or
>
> (ii) the fact that the requirements of that activity for members of the academic or administrative staff to carry out work of a particular kind in that place have ceased or diminished or are expected to cease or diminish."

This clause is crucial to Professor Wray's case. There is a similar clause in the Act. It is crucial because the letter of August 15, 1996 satisfies Rule 16(b).

> "(c) In cases of termination of employment on the grounds of redundancy under this clause the details of overall redundancy arrangements shall be negotiated at Campus level under the relevant staff industrial relations agreement and applicable local law, with the University making every effort, both before and after redundancy, to assist in the retraining and relocation of staff."

The letter of August 15, 1996 cited previously, terminated Professor Wray's appointment with the University. It was a constructive dismissal and Professor Wray accepted the dismissal. He accepted the dismissal by not returning to the post of Senior Lecturer at the end of his sabbatical. His decision not to return to work must be understood in the light of the letter of August 15, 1996. **Marriott v Oxford District Co-op Society No. 2** [1970] 1 Q.B. 186 illustrates the point. Lord Denning, M.R. put it thus at page 192:

> "I come back to this. Mr. Marriott was undoubtedly redundant. The letter of January 24, 1967, was a termination by the employer of the contract of employment. If he had left at the end of the week, he would certainly have been entitled to redundancy payment. He should not be deprived of it, seeing that he only stayed on for three or four weeks whilst he found another job. This seems to me to be in accord with the policy of the Act. Where a man is dismissed for redundancy, redundancy payment is not unemployment pay. It is compensation for long service as we said in **Lloyd v. Brassey** [1969] 2 Q.B. 98."

Winn L.J. was of the same mind. Cross L.J. states the position thus at page 194:

> "So, as I see it, the only question for us to determine is whether the letter of January 24, was a termination of the contract by the employer – a matter upon which there was some uncertainty and fluctuation of opinion in the various judgments below. The letter says, in effect, "You will have to leave our employment at the end of the month unless you accept the reduction of £1 a week." So it can be argued that it would only have operated as a termination by the employer if Mr. Marriott had not accepted the terms. But in all the circumstances of this case, including the fact that Mr. Marriott continued to protest about the reduction even after he received the letter, I think it would be wrong to treat the fact that he went on working and put up with the reduction for a few weeks as showing that agreement was reached without a previous termination of the contract by the employer. If one looks at the realities of the case, the contract was terminated by the employer by that letter. I agree that the appeal must be allowed."

It will be demonstrated that section 3(5) and 5(4)(c) the Employment (Termination and Redundancy PaymentsAct) ("The Act") recognizes the common law principle of constructive dismissal.

Then paragraphs 11, 12 and 13 of the Amended Statement of Claim at page 11 of Volume I of the Record completed this aspect:

> "11. The effect of the Defendant's decision set forth in its letter of August 15, 1996, is to repudiate the contract of appointment of the Plaintiff as a professor and, in flagrant breach of its express term that it was terminable by six months' notice in writing on either side given to terminate not earlier than March 31, in any academic year, to wrongfully dismiss the plaintiff without any or reasonable notice or pay in lieu of notice.
>
> 12. Furthermore, the said letter was also in flagrant breach of contract by disregarding the fact that the Plaintiff at all material times enjoyed the distinction of indefinite tenure in his employment with the Defendant, by virtue of which the Plaintiff was entitled to hold the appointment as Professor indefinitely, that is until the retiring age of 65 as specified in the said contract of appointment. Consequently, it was an express as well as an implied term that the period of notice referred to in the contract would be subject to the Plaintiff's indefinite tenure and could arise in cases of disciplinary action against the Plaintiff. The Plaintiff will at the trial refer to the relevant statues, (sic) ordinances, rules and regulations of the Defendant in support of this contention.
>
> 13. As a consequence of the said breach of contract and wrongful dismissal the Plaintiff who is 54 years old has suffered loss and damage."

It is important to state in part the Ordinance on tenure at this point at page 103 0f Volume II of the Record:

"TENURE

13. (a) Subject to the provisions of this clause, it shall be possible for members of staff of the University to be appointed with indefinite tenure. Consistent with the principles set out in the Charter, the promotion of academic freedom and the protection against arbitrary decisions or political or other bias guaranteed to all staff are further enhanced by the conferral of tenure. Tenure shall be a mark of distinction which signifies the University's desire and commitment to retain a person in indefinite employment.

(b) A member of staff on indefinite tenure shall be entitled to the continuation of his appointment unless that appointment is terminated by virtue of the procedures set out in paragraph 13(h) or pursuant to the provisions of 13(i) or by virtue of retirement under the Statutes.

(c) Save in the case of a Professor, indefinite tenure may not be conferred on any member of staff who has not served for a minimum period of six (6) years on the staff of the University or in some other institution of higher learning approved by the Appointments Committee for this purpose; provided that six (6) years of service shall not be construed as conferring entitlement to indefinite tenure.

(d) A person appointed with indefinite tenure shall be subject, in like manner as other members of staff, to continuous assessment of performance

(e) The University Appointments Committee or the relevant Campus Appointments Committee, as the case may be, may subject to 13(f) undertake a formal evaluation of a tenured member of staff at intervals of not less than four years from the latest of:-

(i) the date of enactment of this clause;

(ii) the last such evaluation of that member of staff;

(iii) the date of the appointment on tenure of the member of staff.

Then the provisions on tenure continue thus:

(f) If pursuant to a formal evaluation under 13(e) the performance of the member of staff is found to be unsatisfactory, a formal first supplemental evaluation of the performance of the member of staff may be undertaken not earlier than one year after the communication to the member of staff of the result of the formal evaluation. If the performance of the member of staff is found still to be unsatisfactory after the supplemental formal evaluation, a further second supplemental formal evaluation may be undertaken at an interval of not less than one year from the communication to the member of staff of the result of the first supplemental formal evaluation.

(g) In the exercise of its functions in relation to a member of staff on indefinite tenure under 13(d), the Appointments Committee shall take into account performance in the areas of activity specified in clause 12(b) having regard to the different standards of

achievement to be expected at different stages of the career of a member of staff.

(h) The appointment of a member of staff with indefinite tenure may be terminated if, after a second supplemental formal evaluation under 13(f), the Appointments Committee pursuant to such review under the preceding paragraph recommends such termination on grounds of the unsatisfactory performance by the member of staff.

(i) Nothing in this clause shall preclude the termination of the appointment of a member of staff of the University, including a member of staff on indefinite tenure, in the exercise of the University's rights arising from breach of contract by the member of staff or by virtue of any other provision of the Statutes or Ordinances of the University. The appropriate Appointments Committee shall give reasons for any decision adverse to a member of staff, and the relevant Registrar shall communicate those reasons in writing to the member of Staff."

Clause 15 shows that the University has its own domestic tribunal to deal with some of the issues raised in this suit. It is clear that Dr. Wray did not wish to pursue that course, although if he had there would still be recourse to the Courts by means of judicial review. **Page v Hull University Visitor** [1993] 1 All E.R. 97 illustrates this issue. While the ultimate domestic tribunal in **Page's** case is the **Visitor,** the ultimate domestic tribunal in the instant case

is the Appeals Committee. Here is how Clause 15 provides for the domestic tribunal in the instant case:

> "15. (a) Where an Appointments Committee recommends the dismissal of a member of staff under clause 13(h) or decides against renewal of the contract of a member of staff under clause 12, the member of staff concerned, by notifying the relevant Registrar within four weeks of receiving notification of the decision of the intention to appeal under this clause, may have the case reviewed by an Appeals Committee. This Appeals Committee shall comprise a Chairman chosen by the Vice Chancellor and one representative from each Academic Board, drawn by lot from a panel chosen by the Academic Board from those who indicate their willingness to serve and who do not fall within the disqualification category in clause 45(b) in addition to one other member of the academic or senior administrative staff nominated by the Vice Chancellor. In selecting his nominee the Vice Chancellor shall ensure that there is on the Appeals Committee at least one member who possesses expertise and competence in the discipline of the member of staff whose appeal is to be considered.
>
> (b) The member of staff appealing under 15(a) shall have the right to appear before the Appeals Committee.
>
> (c) The Appeals Committee in 15(a) shall remit a case to the Appointments Committee for its reconsideration if it considers that the procedure under this Ordinance were not compiled with or that information relevant to the case

> was not considered by the Appointments Committee. The Appeals Committee may allow the appeal if, in its view, the reasons given by the Appointments Committee for the dismissal or non-renewal were erroneous or inadequate. The decision of the Appeals Committee shall be final.
>
> (d) Where the Appeals Committee remits a case for its reconsideration, the Appointments Committee shall reconsider the case within three months from the date of the notification to the Registrar of the decision of the Appeals Committee."

It should be noted that the letter of August 15, 1996 gave no express reasons for the constructive dismissal of Professor Wray. It is clear from all the surrounding circumstances that the personal Professorship was abolished and the Registrar has given direct evidence of this. The cardinal point in **Page's** case which is relevant to this case is despite tenure, **Page** was dismissed for redundancy by invoking the three month notice period in his contract of employment. Similarly, the University could have revoked Professor Wray's appointment by invoking the six month clause in his contract. The University however chose to dismiss him by abolishing his Chair.

A point adverted to earlier should now be reiterated. It requires reference to the Act:

> "3.-(1) The notice required to be given by an employer to terminate the contract of employment of an employee who has been continuously employed for four weeks or more shall be-

> ...
> (e) not less than twelve weeks' notice if his period of continuous employment is twenty years or more,
>
> and shall be in writing unless it is given in the presence of a credible witness."

Then section 3(5) recognizing the common law of constructive dismissal reads:

> "(5) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the passing of this Act, or to treat a contract of employment for a fixed term as terminated at the expiration of the term."

Professor Wray's contract was terminated without notice.

Here is how the Amended Defence answers this issue at page 14 of Volume I of the Record:

> "2. As regards paragraph 2 of the Amended Statement of Claim the Defendant says that the Plaintiff's appointment as Professor of Neuropsychology was stated to take effect from March 11, 1987 to September 30, 1989 in the first instance, and that the creation of the Chair in Neuropsychology and hence the appointment of a Professor of Neuropsychology was, to the Plaintiff's knowledge, for a period of 2 years which was funded by the W.K. Kellogg Foundation, and its continuation thereafter was subject to the continued availability of funding. The Defendant also says that since the filing of this suit, i.e. on January 2, 1997, the Plaintiff terminated his employment with the Defendant by not returning to work after his sabbatical leave ended. Save as aforesaid, paragraph 2 of the Statement of Claim is admitted.

> 3. As regards paragraph 3 of the Amended Statement of Claim, the Defendant states that a Dean is paid on the professorial scale for the period of the deanship, and thereafter reverts to the scale appropriate to his or her substantive post, irrespective of how long he or she has been Dean. The duration of the Plaintiff's deanship had nothing to do with the fact that he was paid a Professor after ceasing to be Dean, which was solely the result of the fact that when the deanship ended the Plaintiff was a Professor and was paid as such. Save as aforesaid, paragraph 3 of the Amended Statement of Claim is admitted," (Emphasis supplied).

It should be noted that there is an important admission in this Amended Defence. The University admitted that when Dr. Wray ceased to be Dean the Plaintiff was a Professor and paid as such. The relevant dates are stated in the memorandum of Dr. Wray to Professor Lalor dated April 27, 1994 (supra) averment. He ceased to be Dean in July 1991 and the University continued to pay him as Professor up to December 1996.

The case as contested below was largely concerned with the construction of documents relating to Dr. Wray's employment. This is reflected in paragraph 8 of the Amended Defence at page 17 of Volume 1 of the Record:

> "8. It is clear from paragraphs 4A, 5, 6,7 and 7A above that the Plaintiff fully understood that:-
>
> i. his appointment as Professor of Neuropsychology depended on the availability of funds;
>
> ii. if funds were not obtained after July 1993 his appointment would not be renewed;

iii he was allowed to continue to style himself as Professor of Neuropsychology, and receive a professorial salary, as a courtesy;

iv. the Defendant had been making efforts to ascertain whether it was feasible to proceed with the permanent establishment of the Chair.

v. if that did not materialize the appointment would not be renewed.

vi. in that event, he would revert to his substantive post of Senior Lecturer (hence his interest in the "topping up" of the Senior Lecturer's salary)."

This averment misses the point which is at the heart of this case. We are here dealing with contract law where the issue is the construction of the contract of employment against the background of the Charter Statutes Ordinances, Rules and Regulations. Once the University appointed Dr. Wray to be a Professor it was responsible to fund the Chair or terminating it in accordance with the contract. Once it is terminated the issue of redundancy may arise and a prudent Bursar would make provisions for redundancy, just as how provisions are presumably made for maintenance of buildings.

A comment is necessary here on the averment about topping up the Senior Lecturer's salary. It seems that the post of Senior Lecturer in the Department of Psychiatry was never filled or became vacant and the salary was used to pay the salary of Professor Wray together with the emoluments of the Deanship. When Professor Wray ceased to be Dean, the University's Defence admitted that Professor Wray was still being paid a Professorial salary,

although they aver it was a courtesy. It was a courtesy from which certain legal consequences flowed. He was still a Professor with all the emoluments which were attendant to a Chair. The Amended Defence continued thus at page 17 of Volume I of the Record:

> "9. In May 1995 the Defendant concluded that there was no basis for the creation of a permanent Chair in Neuropsychology, and orally communicated that to the Plaintiff that same month. However the Defendant continued to pay the Plaintiff on the professorial scale, as a result of an administrative error."

The University gave no evidence to support this averment. Also this averment falls to take into consideration that the discontinuance of the Chair after nine years and upwards meant that, the University Rules and the relevant sections of the Act came into play.

The other significant averments on the issue of the status of Dr. Wray are in paragraphs 11 and 13 of the Amended Defence. They read thus:

> "11. Save that the Defendant denies that the letter dated August 15, 1996, breached the contract of employment, paragraph 7 of the Amended Statement of Claim is admitted. The said letter was entirely in accordance with the Plaintiff's proposal referred to in paragraph 5 hereof, the Plaintiff's letter of November 24, 1994 and the Vice Chancellor's letter of December 12, 1994 which the Plaintifif did not dispute, and the Plaintiff is estopped from denying that he understood and accepted that he would revert to his permanent post as Senior Lecturer with tenure, if funds ceased to be available to support the Chair.
>
> ...

> 13. Paragraph 11 of the Amended Statement of Claim is denied. The Defendant repeats that the Plaintiff's appointment as Professor of Neuropsychology came to an end on July 31, 1993, in accordance with the conditions which attached to it, and in particular, the condition that its continuance beyond that date was subject to the availability of funds. The Plaintiff's employment was not terminated as he reverted to his substantive post of a Senior Lecturer with tenure. It was the plaintiff who terminated his employment on January 2, 1997, as earlier pleaded."

These averments ignore the issue of redundancy and that, that issue flowed from the constructive dismissal of Professor Wray. To reiterate the letter of August 15, 1996 amounted to the dismissal of Professor Wray from his Chair.

The important issue of redundancy was the next claim averred by Dr. Wray. Here are the relevant parts of the Further Amended Statement of Claim at page 11 of Volume I of the Record:

> "14. Further and in the alternative, the Defendant has made the position of Professor Of Neuropsychology redundant.
>
> 15. In breach of its statutory duty under The Employment (Termination And Redundancy Payments) Act, 1974, the Defendant has failed to pay the Plaintiff the benefits to which he is entitled and which the Defendant is obliged to pay under the provisions of the said Act and regulations and Orders thereunder, as a consequence whereof the Plaintiff has suffered loss and damage.
>
> PARTICULARS
>
> As to particulars of emoluments please see paragraph 6 hereof.

Employment date 6.9.73
Number of weeks due per year
a) September, 1973 – August, 1980 @ 3 weeks per annum = 21 weeks
b) September, 1980-August, 1996 @ 4 weeks per annum = 64 weeks
Total weeks due = 85

Total redundancy is $2,055.751.20x 85 = **$3,360,362.40"**
52

This claim and final figure will have to be recalculated as the Act came into effect on 9th December 1974, and the initial contract for being a Lecturer commenced 6th September 1973. The period for redundancy payment is to be computed from 1st October 1979 to 31st December 1996. This is the result of section 8(1) of the Act which reads:

> "8.-(1) Section 5 shall not apply to an employee who immediately before the relevant date is employed under a contract of employment for a fixed term of two years or more, if that contract was made before the appointed day (whether before or after the passing of this Act)."

The University denied that Professor Wray was made redundant. There was no alternative averment stating that if he was made redundant, then the Further Amended Statement of Claim setting out the Particulars was incorrect.

Paragraph 6 of the Further Statement of Claim at page 10 of Volume I of the Record reads as follows:

> "6. As Professor of neuropsychology for 10 years the Plaintiff was being paid at the top of the scale in August, 1996, with the following annual emoluments:
>
> Salary (basic) = $1,347,384.00

Allowances –	=	
Entertainment	=	105,588.00
Transportation	=	48,228.00
ESSU(superannuation)	=	134,736.00
Book Grant	=	15,000.00
Optical & Dental	=	300.00
SUB-TOTAL	=	$1,651,536.00
In addition, the Plaintiff enjoyed or was entitled to the following benefits		
Option of rent allowance of 30% of basic salary in lieu of provided house	=	404,215.20
		$2,055,751.20"

My finding as regards redundancy was that Professor Wray was made redundant as at December 31, 1996, as he was paid it seems as Professor up to that date. The University purported to revert him and in fact dismissed him. I wish to set out the basis on which the redundancy claim ought to be computed and state that there was no challenge in the pleadings of the University to the method Dr. Wray used or any challenge as to the computation.

Section 5 of the Act reads:

> "5.-(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed.

> (2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to -
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or . . . ."

Then section 5(4) of the Act reads:

> "(4) The manner of determining whether an employee has been continuously employed for the period specified in subsection (1) shall be such manner as shall be prescribed."

Section 5 (5)(c) reads:

> "(c) if he is compelled, by reason of the employer's conduct, to terminate that contract without notice."

which is the statutory provision for constructive dismissal.

Section 5 (5)(c) is the kernel of Professor Wray's case. The letter of August 15, 1996 was the evidence of the employer's conduct which terminated the Professor's employment without the requisite notice.

As for the basis of the redundancy payment the paragraph 8 of the Employment (Termination and Redundancy Payments) Regulations 1974 reads:

> "8.-(1) Subject to paragraph (2) the amount of the redundancy payment to which an employee other than an employee engaged in seasonal employment is entitled in respect of any period, ending with the relevant date, during which the employee has been continuously employed shall be –

(a) in respect of a period not exceeding ten years of employment, the sum arrived at by multiplying two weeks' pay by the number of years;

(b) in respect of a period of more than ten years of employment –

(i) for the first ten years reckoned, the sum arrived at by multiplying two weeks' pay by that number of years; and

(ii) for the years remaining, the sum arrived at by multiplying three weeks' pay by the number of such remaining years."

Then paragraph 2 (c) reads:

"c) "three weeks' pay" means –

(i) three times the normal wages earned by the employee in respect of the last normal working week preceding the relevant date during which he has worked; or

(ii) 3/13 of the aggregate normal wages earned by him in respect of the last thirteen normal working weeks preceding the relevant date during which he has worked."

Then paragraph 3 is relevant. It reads:

"3. An employee's period of employment shall be computed in weeks and accordingly the periods of five, ten and fifteen years mentioned in section 3 of the Act shall be taken as 260, ,520 and 780 weeks respectively."

The Amended Defence gave this claim short shrift thus in paragraph 14 at page 18 of Volume I of the Record:

> "14. As regards paragraphs 12, 13, 14 and 15 of the Amended Statement of Claim, the Defendant repeats that the Plaintiff's employment was not terminated by the Defendant for reasons of redundancy or at all and denies that the Plaintiff is entitled to any damages whatsoever. The Defendant says further that the Plaintiff was paid his salary for January 1997. However, by letter of February 11, 1997 his Attorney-at-Law sent the Plaintiff's cheque to the Defendant's attorneys-at-law for the amount he had been paid."

The point to note is that the claim for redundancy was rightly averred. If the letter of August 15, 1996, purporting to revert Dr. Wray was in substance an abolition of his Personal Professorship the Act comes into play. The claim for redundancy was a live issue.

Then there is another aspect of redundancy which it is essential to note. Redundancy deals with continuous employment. During that period of continuous employment there may be separate contracts. In this case there were three contracts. The first was for the post of Lecturer. The second for the post of Senior Lecturer and the third for Professor. It was dismissal from the Chair which brought the provisions of the Act into play over the period of continuous employment.

It is to be noted that in section 2(2) of the Act, a contract of employment which purports to exclude the Act is void to that extent. To my mind Professor Wray's claim for "redundancy payment" is well founded. It is

appropriate to point out that there is a significant difference regarding redundancy in the United Kingdom and Jamaica. There is no Employment Protection Consolidation Act (1978) U.K. in this jurisdiction providing for consultation with Trade Unions on the issue of redundancy even when there is resort to the Industrial Disputes Tribunal. There is no redundancy fund to which the government makes a contribution. Here in Jamaica the payment must come from the employer who since the Act has presumably created a redundancy fund. Again it might also be useful to point out that we have no legislation on "unfair dismissal" as the aforementioned United Kingdom Act provides. The advanced legislation in the United Kingdom on these issues is a reflection of an economy operating at full employment. Here in Jamaica we are operating an economy with "unemployment with unlimited supplies of labour". I have adverted to these issues in **Institute of Jamaica v Coleen Beecher and the Industrial Disputes Tribunal** S.C.C.A 9/2002 delivered April 2, 2004 at page 18 and I reiterate them as they are issues of general public importance. On one issue both jurisdictions have a similar approach. In instances of flagrant dishonesty by an employee, the employer may resort to instant dismissal. See **West Midland Co-op Society v Tipton** (1986) 2 W.L.R. 306 at pages 313 and 316.

There are two other claims by Dr. Wray. There is a claim for libel or further in the alternative there is a claim for negligence. The averments pertaining to libel read thus at page 12 of Volume I of the Record:

"16. Further, the Defendant publishes an annual Calendar which has wide local and international circulation among universities and other academic institutions. In the Defendant's Calendar for the Academic Year 1995-1996 (Volume II) on page 139 the Defendant falsely and maliciously printed and published of and concerning the Plaintiff and of his office that he was a "Senior Lecturer."

17. The said words in their natural and ordinary meaning meant and were intended and understood to mean:

(1) The Plaintiff did not hold professorial status.
(2) The Plaintiff's academic position was below that of professor.
(3) The Plaintiff was not Professor Of Neuropsychology

18. The said words were intended by innuendo to mean:

(1) The Plaintiff was falsely representing himself to the public and to his professional colleagues in Jamaica and internationally as being a professor and Professor of Neuropsychology at the University of the West Indies

PARTICULARS

(1) The Plaintiff was appointed by the Defendant as Professor of Neuropsychology in or about 1986 and remained a professor since then.

(2) The Plaintiff, as he was entitled to do, referred to himself as Professor of Neuropsychology and represented himself to his professional colleagues in Jamaica and internationally, as well as to the public in general, as Professor of Neuropsychology at The University of the West Indies and

this was at all material times fully well known to the Defendant.

19. By reason of the premises referred to in paragraphs 16, 17 and 18 hereof the Plaintiff has been injured in his personal reputation and credit and brought into public scandal, ridicule, odium and contempt."

In the Amended Defence on the issue of libel the University answered thus in paragraph 15 at page 18 of Volume I of the Record. It reads thus:

"15. As regards paragraphs 16 and 17 of the Amended Statement of Claim, the Defendant admits that it was responsible for the publication referred to, and that the words meant that in the Academic Year 1995-6, the plaintiff was a Senior Lecturer and not Professor of Neuropsychology or a Professor at all. The Defendant says that the words were true in substance and in fact, and repeats paragraphs 6-9 above."

As for the alternative claim of the negligence it was stated thus in paragraph 20 of the Further Amended Statement of Claim at pages 12 and 13 of Volume I of the Record:

"20. Furthermore, and or in the alternative, the aforesaid publication by the Defendant (referred to in paragraph 16 hereof) whereby its Calendar for the Academic Year 1995-1996 (Volume II) on page 139 incorrectly described the Plaintiff as a "Senior Lecturer" was caused by the negligence of the Defendant, as a consequence whereof the Plaintiff has suffered personal injury and damage.

PARTICULARS OF INJURY

1) emotional stress
2) Anxiety
3) Annoyance

PARTICULARS OF SPECIAL DAMAGES

1) Embarrassment
2) Inconvenience

PARTICULARS OF NEGLIGENCE

1) Failing to record and publish the fact that the Plaintiff was Professor of Neuropsychology.

2) Failing to keep and maintain records or any proper records of academic staff appointments.

3) Failing to consult or check records of academic staff appointments

4) Failing to consult the Plaintiff regarding his academic staff appointment with a view to verifying his position prior to publication."

There is no need to address this alternative claim in view of my finding that the claim for libel must succeed.

How did Donald McIntosh, J. treat these issues in his reasons for judgment?

The hearing in the Court below took five days and the learned judge disposed of all the issues in favour of the University. With respect to Dr. Wray's tenure as Professor the learned judge wrote at page 41 of Volume I of the Record:

> "By letter dated the 15th August, 1996, {Exhibit 20} the Defendant purported to bring the Chair to an end effective the 1st September, 1996. This letter did not terminate the Plaintiff's employment with the University."

The substance of the letter certainly brought the contract of employment as a Professor to an end. It purported to "revert him" to his former post as Senior Lecturer but this could only be achieved if Professor Wray accepted such a proposal. He did not. Continuing on the same page the learned judge wrote:

> "The Plaintiff was appointed to the Chair in Neuropsychology. It was not a promotion. The procedure for appointment was different from that for promotion. The Plaintiff not having been promoted was not demoted.
>
> The Chair had always been for the duration of two years. Thereafter it was subject to funding and not one of indefinite tenure or duration. When funding was no longer available the chair came to an end."

Dr. Wray was certainly promoted in accordance with the University Ordinances to a Personal Professorship. The duration of the Chair was upwards of two years in the first instance and its duration turned out to be just under ten years. The New and Amended Ordinances which deal with Promotions will be dealt with later.

Then on page 42 of Volume I of the Record the learned judge wrote:

> "It is the Plaintiff's evidence that he was paid for the month of January 1997. This would effectively cover the salary of the Plaintiff for the six month's period of Notice –i.e. from July 1996 to January 1997 the Plaintiff would therefore not be entitled to any pay in lieu of notice."

This approach ignores the fact that Professor Wray had a contract of employment with the University and was paid as such up to December 1996

and he returned the January salary. The University averred at paragraph 9 that he was paid as Professor after he was no longer Dean as an error, and paragraph 8 iii of said Amended Defence averred that he was paid as a courtesy. The evidence of the Registrar of the University demonstrates that he was made redundant both by the University's Statutes and the Act.

With respect to the issue of libel the learned judge dismissed the matter thus at page 42 of Volume I of the Record:

> "The claim for libel is based on the publication of the Calendar listing the Plaintiff as a Senior Lecturer. There is no doubt that that was the Plaintiff's substantive post and his letter dated 24th November, 1994 {Exhibit 12} confirmed that."

As to whether Professor Wray's substantive post was that of Senior Lecturer or Professor, that did not depend on the opinion of Dr. Wray, but, on the construction of his contract and the University Statutes and Ordinances etc. Certainly if an opinion was to be required, the Vice Chancellor in his memorandum of July 23, 1991 to the Principal, speaks correctly of Dr. Wray's substantive post as Professor.

It is however necessary to cite the letter at page 112 of Volume II of the Record. It reads thus:

> "Programme Co-ordinator
> Professor S. R. Wray
>
> November 24, 1994
>
> The Hon. Sir Alister McIntyre
> Vice Chancellor

University of the West Indies
Mona, Kingston 7.

Dear Vice Chancellor,

1. I write to confirm our understanding of the main issues emanating from our meeting dated November 21, 1994. I indicated to you that I was appointed Dean, at Professorial level since February 20, 1976 (See letters 1 & 2) and Professor of Neuropsychology in October 1986. I, therefore, enjoyed professorial rank for over eighteen years and during this period I took no fellowship nor sabbatical leave.

2. I have been engaged, since September 1991, in full-time research, development of academic programmes and some teaching. These activities among others were discussed with you and confirmed by letter at that time. The highlight of these activities inter-alia was the publication of "Prevalence and Patterns of Substance Abusers: Neurobehavioural and Social Dimensions", this being a National Survey of Substance Abuse in Jamaica.

In addition, the organization of a very successful International Symposium dealing with drug-abuse, adolescent and women's health. I am also establishing a database Centre for Substance Abuse which is ongoing and proceeding very well. The above activities were funded by the United States Government.

In association with the University of Miami, School of Medicine I am conducting a survey on HIV prevalence and related issues in St. Thomas.

3. The convergence of these activities indicated a sabbatical especially since I have not had a sabbatical before. I am requesting your approval to bring forward my sabbatical leave, immediately following the University Appointments Committee Meeting, scheduled for February 1995. The starting date can be March 1, 1995 subject to your approval.

4. The sabbatical will provide for me with (i) preparing the proceedings of the symposium for International Publication and, (ii) writing a text-book on neuropsychological problems in the Region, utilizing my knowledge of over two decades of scientific epidemiological and clinical consulting experiences.

The research and writing will be carried out in conjunction with the other stated activities (see #3 sabbatical application).

5. The question of further funding for the ***Established Chair*** in ***Neuropsychoology*** (see #4 attachment) is on the agenda. I have indicated to you my deep reservations about the procedure of this matter being discussed by the Faculty of Medical Sciences, Mona, while I occupy the Chair and, in view of comments expressed by the Dean, FMS (Mona).

Regional Heads of Government have placed a high priority on the drug-abuse problem, including the effects on adolescent and women's health. The Academic Board (Mona) has also indicated Substance Abuse as one of its area for research and development.

In the context of the above, I feel confident that funds could be obtained to execute the agenda of the Professor of Neuropsychology.

In the event of this not being possible, I indicated to you, that I would "take my chances" on the outcome of UWI's effort, and the "chair can come to rest"
These and other matters, such as topping up the Senior Lecturer's salary, can be determined while I am on sabbatical leave.

Sincerely,
Samuel R. Wray

b.c. Professor the Hon. G.C.Lalor."

I do not find that Professor Wray was confirming that his substantive post was Senior Lecturer. It seems Professor Wray was suggesting that salary from his former post as Senior Lecturer which was apparently vacant since he was promoted to Professor could be "topped up" so that he could continue to enjoy the emoluments of his Chair. If that were to be done since he was already a Professor, it would be a creative way of funding the Chair during the Professor's tenure. As for the phrase "the Chair can come to rest", if the Chair came to a rest by the decision of the University then the new Ordinances and the statutory provisions pertaining to redundancy would come into operation. The learned judge also stated on page 42 of Volume I of the Record that the Defendant was not negligent for the same reasons, as those he gave dismissing libel claim. The claims were different. For the claim of negligence damages had to be proved. For the claim of libel damages are presumed.

On the claim for redundancy the learned judge was equally dismissive. Also at page 74 of Volume I of the Record he wrote:

> "There is no evidence of any breach of Statutory Duty on the part of the Defendant"

In so stating the learned judge paid no attention to the Registrar's evidence that the Chair came to rest when financing ceased to be available, or the legal effect of the letter of August 15, 1996. The responsibility for the financing was a matter for the University. To reiterate if the University decided to discontinue the Chair, then its rules on Redundancy or the Act might be

relevant. Under those rules redundancy would probably be computed from 1st October 1979 when Dr. Wray was appointed Senior Lecturer.

In concluding on the same page the learned judge said:

> "On the totality of the evidence it is patently clear that the Defendant did all in its powers to facilitate the Plaintiff and to keep him in their employ as a happy and satisfied academician.
>
> On the other hand the Defendant's interest was in money and not scholarship. He points to one joint publication, a chapter in "Central Brainstem Mechanisms" done in collaboration with other academicians.
>
> In conclusion the claims of the Plaintiff in this suit are ill founded. The Plaintiff's claims are dismissed with cost to the Defendant to be agreed or taxed."

It is against this background that proceedings were instituted in this Court. There were fourteen grounds of appeal. However, it is necessary to concentrate on grounds 11 and 13. They read as follows at page 5 of Volume I of the Record:

> "11) The learned trial judge failed to appreciate that termination of the Plaintiff's employment as Professor of Neuropsychology created a redundancy under and by virtue of Sections 3, 5(1), (2)(a)(b), and (5) of the Employment (Termination and Redundancy Payments) Act.
>
> . . .
>
> 13) The learned trial judge erred in holding that the publication of the Defendant's calendar listing the Plaintiff as Senior Lecturer was not libelous on the ground that that was the Plaintiff's substantive post; and that for the same reason the Defendant was not negligent in the publication."

Resolution of the issues in this Court

When Dr. Wray accepted the post of Professor in the Department of Child Health his previous post was that of Senior Lecturer and Dean of the Medical Faculty. It was a promotion both as fact and according to the Ordinances of the University.

The New and Amended Ordinances govern this promotion. Clause 26 refers to Promotion at page 66 of Volume II of the Record thus:

> "Promotion
>
> 26. Promotion may be to an existing vacancy or, under clauses 27, 28 and 29 below on grounds of seniority or for exceptional or distinguished service and may take one of the following forms:
>
> (i) promotion to the Lecturer grade for persons to whom clause 14 above applies;
>
> (ii) special increments in the Assistant Lecturer or Lecturer grade for persons to whom clause 14 above applies;
>
> (iii) special increments in the Senior Lecturer grade;
>
> (iv) promotion to the Senior Lecturer grade;
>
> (v) conferment of the title of Reader;
>
> (vi) conferment of the title of Professor"

It was by conferment of the title Professor which satisfied the test of promotion in the instant case.

Then clause 28, on the same page states, the requirements for promotion thus:

> "28. Applications for promotion to Senior Lecturerships and to Readerships, or Professorships, must always be supported by at least two external assessors by the Vice-Chancellor after consultation with the University Dean of the Faculty."

It is clear that Dr. Wray was promoted to a Personal Professorship and the relevant Clause 29(v) at page 68 of Volume II of the Record reads thus:

> "Personal Professorship
>
> 29 (v) (a) A member of staff may subject to (b) below and to clause 53 below be promoted to a personal Professorship provided that he has:-
>
> (i) previously held a readership in the University;
>
> (ii) in the opinion of the University Assessment and Promotions Committee enhanced the reputation of the University in his field of study through his own work and through his contribution to the development of postgraduate programmes in the Department of which he is a member.
>
> (b) In special circumstances a member of staff may be eligible for consideration for promotion to a Personal Professorship without passing through the grade of Reader, in which case the decision shall be governed by the criteria in sub-clause (iv) above and this sub-clause."

Sub-clause (iv) deals with the rank of Reader. To achieve this distinction, Dr. Wray had to perform as a Reader although such title was not conferred on him. The requirements stated in Rule 29 (iv) at page 67 of Volume II of the record reads thus:

> "Readership
>
> 29 (iv) (a) The title of reader shall be regarded as a mark of distinction and shall rarely be conferred.
>
> (b) The title of Reader may be conferred on a member of staff in the grade of Senior Lecturer either at the time of his appointment or promotion to the grade, or by a separate decision of the University Assessment and Promotions Committee at any other time
>
> (c) The criteria for conferment of the title shall be:-
>
> (i) a record of distinguished original work;
> (ii) outstanding success in and wide recognition of professional activities."

It is also necessary to refer to Rules which govern the Procedure of Appointing a Professor. Clause 53 shows that the financial implications are always taken into account. The rules at page 75 and 76 of Volume II of the Record bear this out:

> "Procedure for Appointing Professors under Clause 29 (v) (vi) and (vii)
>
> 53. The procedure for appointing Professors under clause 29 (v) (vi) and (vii) shall be as follows:

(a) where the person to be recommended holds an appointment at a Campus of which the Vice-Chancellor is not Campus Principal, a recommendation shall be made by the Campus Principal to the Vice-Chancellor;

(b) The Vice-Chancellor shall forward the recommendation to the University Assessment and Promotions Committee;

(c) the University Assessment and Promotions Committee shall consider whether to recommend the establishment of a Selection Board;

(d) if the establishment of a Selection Board is recommended it shall be convened and its recommendation submitted to University Assessment and Promotions Committee."

Then the important clause (e) reads as follows:

"(e) if the University Assessment and Promotions Committee accepts a recommendation of a Selection Board that the person be appointed to the Professorship, it shall forward the recommendation:

(i) to the Estimates Committee, for financial provision; and

(ii) to the Senate, with a request for a recommendation to the Council for the creation of a Professorship under Statute 17.1(b) and

(iii) to the University Appointments Committee."

Professor Wray's letter of appointment of May 1, 1987 makes it clear that his appointment was pursuant Clause 53(e)(ii). The presumption must be that there was full compliance with Clause 53.

Since clause 17(1)(b) is referred to it is pertinent to refer to page 34 of Volume II of the Record again:

> "Statute 17 – Powers of the Council
>
> 1. Subject to the Charter and these Statutes and, in particular, without prejudice to the powers specifically assigned by these Statutes to the Campus Councils, the Council shall be a governing body of the University and shall exercise all the powers thereof. Without derogating from the generality of its powers it is specifically declared that the Council shall exercise the following powers:
>
> (a) To make the appointments authorized by the Charter and these Statutes.
>
> (b) With the consent of the Senate to institute, confirm, abolish or hold in abeyance any Professorship, Readership or other academic office and any senior administrative office in the University with the exception of an academic office or a senior administrative office of a campus."

If the powers under clause (b) are exercised then the Redundancy provisions pursuant to the University Ordinances at page 104 of Volume II of the Record and the statutory provisions come into play. Part of the problem in this case is that there is no minute or resolution demonstrating that the consent of the Senate was obtained to abolish the Professor's Chair in accordance with Rule 17(1)(b) supra. Had his case been conducted on that

basis it might have emerged that Professor Wray's Chair was never abolished. The problem of administering a Federal University with three campuses does not seem to have been appreciated. It was the University Council which appointed Professor Wray. Yet it emerges that the University Appointments Committee through the Campus Registrar in the letter of August 15, 1996 constructively dismissed Professor Wray. This case has been conducted on the basis that Appointments Committee sought the sanction of the Council and the Senate for the letter of August 15, 1996.

I cannot help thinking that the University provisions on Redundancy would be more generous than the statutory provisions and perhaps even at this stage this aspect of the case might well lead to an improvement. The statutory provisions set the minimum. The late Dr. Manderson-Jones was a formidable advocate and in the interest of his client, he often took an uncompromising stance. It may be that if in his correspondence he had taken a more moderate stance and suggested a settlement a generous redundancy payment would have been offered.

Then 17.(1)(w) continues at page 36 of Volume II of the Record:

> "17.1(w) To exercise powers of removal from office and other disciplinary control over the academic staff, the senior administrative staff and all other staff in the University. Provided that in the case of the academic and senior administrative staff this power shall be exercised for the reasons, on the grounds, in the manner and pursuant to

the procedures set out in Ordinances which shall include the following rights:

(i) to appear and be heard by the Council or any person or body to whom the Council has delegated this function under Statute 31;

(ii) to be represented by a person of his choice from among members of the academic and senior administrative staff;

(iii) to call and examine witnesses;

(iv) to appeal to the Chancellor."

It is clear that none of these procedures were resorted to either by the University or Dr. Wray. The University had the option to give six months' notice "in writing" and to terminate the contract not earlier than March 31 in any academic year, the retirement age being sixty-five. The University did not exercise this option. It ought to be emphasized that even if the University had given the six-month notice in conformity with the contract it would still be required to comply with the redundancy provisions of the Act.

To my mind there was a breach of a fundamental term of the contract by the University when the Campus Registrar wrote on 15th August 1996 to say that "the University Appointments Committee agreed that you should revert to your substantive post of Senior Lecturer". To reiterate this was a constructive dismissal of Professor Wray.

Also at that point the University Ordinances and statutory provisions on redundancy came into play. The contractual and statutory provisions are of

great assistance to workers in all categories. In the upper echelons of business, this contractual clause is known as a golden handshake. Perhaps the University might well contemplate such a handshake. Its own rules on tenure indicates it is a mark of distinction and that it is the aim of the University to retain an academic with tenure until retirement.

The Claim for Libel

The claim for libel is set out in paragraphs 16 - 18 of the Further Amended Statement of Claim at page 12 of Volume I of the Record. They were adverted to earlier.

In **Hugh Bonnick v Margaret Morris, The Gleaner Co. Ltd. and Ken Allen**, Privy Council Appeal No. 30 of 2001 dated 17th June, 2002, Lord Nicholls states how to elicit defamatory words in the context of an article:

> "The defamatory meaning
>
> 9. Before their Lordships' Board the issues were reduced to two: meaning and qualified privilege. As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham MR in **Skuse v Granada Television Ltd** [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the **Sunday Gleaner,** reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where either, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb

> the trial judge's conclusion unless satisfied he was wrong."

His Lordship expanded on the above paragraph when he came to deal with the issue of qualified privilege:

> "20. This divergence of view is neither surprising nor unusual. Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration. Should the law take this account when applying the objective standard of responsible journalism? Or should the law simply apply objective standard of responsible journalism to the single meaning the law attributes to the offending words, regardless of how reasonable it would be for a journalist or editor to read the words in a different, non-defamatory sense?
>
> 21. At first sight there might seem to be some legal logic in applying the latter approach. The "single meaning" rule adopted in the law of defamation is one sense highly artificial, given the range of meanings the impugned words sometimes bear: see the familiar exposition by Diplock LJ in **Slim v Daily Telegraph Ltd** [1968] 2 QB 157, 171-172. The law attributes to the words only one meaning, although different readers are likely to read the words in different senses. In that respect the rule is artificial. Nevertheless, given the ambiguity of language, the rule does represent a fair and workable method for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptionable."

It must be recalled that the University gave no evidence at the trial. However, the pleadings on some aspects of the case are in agreement. To

reiterate, paragraph 11 of the Amended Defence corresponds to paragraph 7 of the Further Amended Statement of Claim which reads at page 11 of Volume I of the Record:

> "7. In breach of the contract of employment of the Plaintiff by the Defendant, the Defendant by letter dated August 15, 1996, notified the Plaintiff of the decision of the Defendant that the Plaintiff "should revert to his substantive post of Senior Lecturer", effective September 1, 1996."

The substance of the letter of August 15th 1996, was that Dr. Wray's Chair was abolished and he was made redundant. In the Calendar Year the academic year 1995-1996 at page 189 of Volume II of the Record under the Department of Psychiatry Dr. Wray is listed as a Senior Lecturer. The Calendar for 1994/1995 at page 195 of Volume II of the Record and a previous Calendar for 1993-1994 at page 219 of Volume II of the Record exhibited described Dr. S. R. Wray as Professor, Neuropsychology. The libel was in the 1995-96 Calendar.

There is no denial that the Calendar has a wide circulation both within the West Indies and internationally. The readers would be students, undergraduates, graduates, University administrators and academics and some members of the general public. The general public would include powerful administrators in foundations who disburse funds for the advancement of learning.

Gatley on Libel and Slander sixth edition points it out at paragraph 57:

> **"57. Reputation in business, trade or profession.** Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. Such an imputation, if spoken, would have been actionable *per se* even at common law: see § 68. To be actionable, words must impute to the plaintiff some quality which would be detrimental, or the absence of some quality which is essential, to the successful carrying on of his office, profession or trade. For examples see § § 58-67: see also §§ 167-1183 for imputations amounting to slander *per se* and which are defamatory however published. The mere fact that words tend to injure the plaintiff in the way of his office, profession or trade is insufficient. If they do not involve any reflection upon the personal character, or official, professional or trading reputation of the plaintiff, they are not defamatory. See § 68."

Dr. Wray held the post of Professor up to December 1996, and the defence of justification cannot avail the University.

It would seem that to describe Dr. Wray as a Senior Lecturer at page 189 of Volume II of the Record when by the terms of his contract he was a Professor could only have one meaning in the Calendar, which was that Dr. Wray was in fact a Senior Lecturer when previous Calendars had him as a Professor and a Dean. It gave the impression that he was demoted. It was a reflection on his academic reputation and therefore libellous. The 1994/95 Calendar at page 195 of the Record correctly lists Dr. Wray as a Professor.

Dr. Wray's basic claim is that to style him as Senior Lecturer when he was by the terms of his contract a Professor was to lower his reputation in the eyes of right thinking members of the academic community. It is a community

restricted in numbers but a very powerful and influential peer group. Referring to Dr. Wray as a Senior Lecturer suggests that he was demoted because he was not performing his Professorial duties with competence.

The University pleaded justification, but such a plea is of no avail having regard to the fact that no evidence was led and the fact that Dr. Wray has established in law that he was a Professor during the period covered by the Calendar.

Who terminated Dr. Wray's contract as Professor?

The University claims Dr. Wray did not return to his post as Senior Lecturer when he had completed his sabbatical. Dr. Wray claims that the University had breached fundamental terms of his contract while as Professor and as a result of that breach the University's Ordinances and the statutory provisions on Redundancy came into play. This is the central issue in this case. I think the submissions of Mr. Raphael Codlin are to be preferred to those of Mr. Dennis Goffe Q.C. Lord Denning stated the principle in **Western Excavating v Sharp** [1978] 1 All ER 713 at page 717 on dismissal thus:

> *"The contract test*
>
> On the one hand, it is said that the words of Sch 1, para 5(2)(c), to the 1974 Act express a legal concept which is already well settled in the books on contract under the rubric 'Discharge by breach'. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any

> further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if, he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

CONCLUSION

Once the University purported to revert Professor Wray to the post of Senior Lecturer then they were guilty of conduct which went to the root of the contract. So he was entitled either to resort to the internal remedies provided by the University or sue for redress in the Courts. He chose the latter and I have found that he has been successful on two principal issues, redundancy and libel.

On the issue of libel I have taken into account the nature of the libel and the plea of justification in determining the issues of damages. Dr Wray has been Dean of his Faculty for a considerable period and Professor for upward of nine years. If he sought an academic post as Professor he would be confronted with the libel that he was a Senior Lecturer. In those circumstances I consider the appropriate damages to be in the region of $J6-7M and I have awarded him J$6M at the lower end of the scale. Interest at the rate of 3% from the filing of the Writ to date of judgment in the Court below.

As for interest on the recomputed redundancy payment it should be the average Treasury Bill rate, from 1st October 1979 to 31st December, 1996, to be determined from the official publication of the Bank of Jamaica. Liberty to apply is being accorded for the purposes. So the Order of this Court ought to be:

1) Appeal allowed

2) Order below set aside.

3) $J6M awarded as damages for libel with interest at the rate of 3% from 2nd September, 1996 to July 12, 1999.

4) J$3.360,362.40 claimed as a redundancy payment with interest. This figure must be recomputed and the redundancy payment period dated from 1st October 1979 - 31st December, 1996. Interest at the average Treasury Bill rate over the period.

5) Liberty to apply.

PANTON, J.A.

1. This is an appeal from a judgment of Donald McIntosh, J. delivered in the Supreme Court on July 12, 1999, in which he dismissed the appellant's claims for damages for breach of contract and wrongful dismissal, breach of statutory duty, libel and negligence. The appellant now seeks to have that decision set aside, and a judgment entered in his favour for $7,388,238 .00 arrived at as follows:

(a) for breach of contract and wrongful dismissal
- $1,027,875.60

(b) for breach of statutory duty under the Employment (Termination and Redundancy Payments) Act
- $3,360,362.40

(c) for libel (alternatively for negligence)
- $3,000,000.00

These amounts that are now sought on appeal are a far cry from the sums claimed in the Supreme Court. In respect of the breach of contract only, the further amended statement of claim was for an amount in excess of $20,000,000.00.

The early history of the relationship between the parties

2. On June 26, 1973, the appellant accepted appointment with the respondent as a lecturer in psychology in the department of psychiatry, Mona. Between June 1974 and December 1975 he was head of that department. He then served as Dean of the Faculty of Medical Sciences between February 1976

and July, 1991. In 1979, he was appointed senior lecturer. Eight years later, he was appointed Professor of Neuropsychology. This professorship, or rather the discontinuance of the funding for it, has, in a way, given rise to this lawsuit. This is so because the appellant claims that the professorship having ended, he was still entitled to be remunerated as such whereas the respondent is contending that he reverted to his substantive position as senior lecturer. The description of the appellant as a senior lecturer in a publication by the respondent has resulted in the claim for libel and negligence. Simply put, the result of this appeal depends on what view we take of the circumstances surrounding the professorship. It is therefore important to look at the status of the appellant prior to his appointment as a professor, and then to see whether the professorship affected his earlier substantive position or not.

3. There is no doubt that on the 26th June, 1973, the appellant accepted the respondent's offer of an appointment in its Department of Psychiatry for "the period 6 Sept. 1973 to 30th September, 1976, in the first instance". He became "eligible for re-appointment by mutual agreement for a further specified period at the discretion of Council or to the retiring age which is 60 years, but which may be extended to 65 years on the invitation of Council". This appointment was extended for the period October 1, 1976 to September 30, 1979. A letter dated 22nd December, 1975, from the respondent to the appellant described the situation as an extension of the contract. There was a further extension of this contract from 1st October, 1979 "on indefinite tenure"(see page 1 of the volume

of exhibits) . This meant that there would no longer be the need to extend the appellant's contract as he would be guaranteed tenure until resignation or retirement and would be subject to "continuous assessment of performance" as required by Ordinance No.8 governing appointments, promotion and dismissal of persons employed by the respondent. The acceptance of the extension of this contract on indefinite tenure was signed by the appellant on March 30, 1979. By May 4, 1979, he was signing another acceptance; this time it was his acceptance of "the post of Senior Lecturer on promotion from...Lecturer in the Department of Psychiatry, University of the West Indies, Mona." The letter of appointment (dated April 30, 1979 and found at page 3 of the volume of exhibits) provided for, among other things, the following:

(a) indefinite tenure, full-time;

(b) retirement at age 60, or 65 on the invitation of Council;

(c) governance by the Charter of the University, its Statutes, Ordinances, Rules and Regulations;

(d) duties to be arranged by the Head of the Department of Psychiatry; and

(e) five full passages to Guyana for the appellant and his dependents on the termination of the appointment, provided that there has been no misconduct on the part of the appellant.

4. According to a memorandum [Exhibit 12(iii)] written by the appellant, between June, 1974 and December, 1975, he held the position of Head of the Department of Psychiatry, and between February, 1976, and July, 1991, he held

the position of Dean, Faculty of Medical Sciences. On the basis of this document, which was addressed to the Principal of the Mona Campus, it seems that the appellant was appointed Senior Lecturer in the Department of Psychiatry while he held the position of Dean of the Faculty of Medical Sciences.

The professorship

5. The next significant development of relevance to these proceedings was the establishment by the respondent of a Chair in Mental Health in the Department of Mental Health. At a meeting of the respondent's Finance and General Purposes Committee held on July 11, 1984, it was noted "that the Mona Planning and Estimates Committee had agreed to the proposal for the establishment of a Chair in Mental Health (Neuropsychology) in the Faculty of Medicine for two years in the first instance, to be funded by the Kellogg Foundation, and continuation beyond that time to be subject to the availability of funding". This matter was put before the University Academic Committee at its meeting on December 13, 1984. There followed an advertisement inviting applications for the post of "Chair in Mental Health, Department of Child Health". The applicants were to be suitably qualified psychologists and psychiatrists, and it was clearly stated that it was "a new post established in the Faculty of Medical Sciences and will be for a duration of two years". The advertisement further stated: "continuation of the appointment beyond the stipulated period will be subject to funding". The appellant applied and was successful. By letter dated May 1, 1987 (see page 5 of the volume of exhibits), he was offered the post of

Professor in Neuropsychology, effective March 11, 1987, to September 30, 1989, in the first instance. He accepted the offer on the 9th November, 1987. On the 10th November, 1987, he returned the contract, duly signed. In the covering memorandum to the respondent's Registrar, the appellant suggested that seeing that he was being paid at the professorial level as Dean until July, 1988, the appointment should be extended until July, 1990, in the first instance. It does not appear that this suggestion received the courtesy of a written response.

6. On January 27, 1989, the W.K. Kellogg Foundation wrote to the respondent's Vice Chancellor (see page 242 of the volume of exhibits) indicating the approval of assistance to the respondent for the development of "a primary care outreach program for Jamaican urban and rural population groups affected by Hurricane Gilbert, based on the proposal submitted" by the Vice Chancellor, with supporting letter from the appellant. The letter advised that a maximum of US$681,346 would be made available to the respondent for the stated purpose during two years beginning January 1, 1989 (or beginning on any other date preferred by the respondent). The letter also set out a detailed budget, and advised that the first payment would be made on receipt of a letter confirming agreement to the commitment on several conditions, fourteen of which were itemized. The letter from the W.K. Kellogg Foundation was copied to the appellant who, on March 21, 1989, wrote, in part, to the respondent's Registrar thus:

> "With regards the appointment my suggestion would be that it goes until 1993 and thereafter

> subject to funding. This time span is explained as follows, until 1991 as Dean of FMS, Mona (to 30.7.91) and the funding for two years to 30.7.93 and thereafter subject to funds available".

7. On June 15, 1990, the W.K. Kellogg Foundation's Program Director and Coordinator for Latin America and the Caribbean wrote to the appellant expressing concern regarding the slow implementation of the project's activities. The letter pointed out that the Foundation had in November 1988 -

> "responded very quickly to your University's request for a grant to help diminish the Jamaican people's suffering in the aftermath of Hurricane Gilbert.....However, it seems unfortunate that the project did not correspond to our expectations and to the emergency situation of the Jamaican people".

The letter then went on to set out in detail the failings of the programme. The report submitted by the appellant was in disharmony with the reality of the situation. The appellant responded with a catalogue of the difficulties being faced, and stated that in all these matters "there has always been some difficulty in the implementation process". By October 25, 1990, the W.K. Kellogg Foundation had clearly had enough. The Program Director and Coordinator wrote to the appellant thus:

> "Since the two-year support of the Foundation was approved on the basis of emergency assistance to alleviate the immediate situation of the needy communities after such a disaster, we do not believe that the project could be extended beyond December, 1990. We are sorry, and disappointed that the Faculty of Medical Sciences was not able to overcome the ddifficulties and use this project as a special opportunity".

8. After this letter from the W.K.Kellogg Foundation, the situation with the appellant became somewhat unsettled. He went to see the Vice-Chancellor of the respondent to discuss his future. On July 23, 1991, the Vice-Chancellor wrote to the Principal of the Mona Campus in the following terms:

> "Prof. S. Wray came to see me recently to discuss his future when his term of office as Dean expires on July 31st. He told me that the Dean elect and some other members of the Faculty were pressing him to take over the Directorship of the Medical Learning Resources Unit.
>
> I told Prof. Wray that there was some controversy in the Faculty over the matter, and I did not consider that it was in his interest to become director of the Medical Learning Research Unit in that environment. I proposed instead that Prof. Wray should revert to his substantive post as Prof. in Neuro-psychology. I went on to tell him that were he to do so, ways and means could be found to provide him with some initial academic support; say the provision of some full-time or part-time research assistance. I pointed out also that since his field was an inter-disciplinary one, it would not be appropriate to remain attached to a particular department. I suggested that I would be willing to support a proposal to MPEC and UPEC for the establishment of a special programme in Neuro-psychology, of which he would be head. In that situation, he would report through the Dean to the Principal of the campus. His professorial post together with any support resources that we could provide could constitute a nucleus for seeking outside funding to establish an appropriate programme of teaching and research. Prof. Wray liked my proposal which in his opinion, was a very satisfactory settlement of his situation. He undertook to provide me with some notes for consideration by the relevant Campus and University Committees".

9. The next important development was that on April 14, 1992, the Registrar of the Mona Campus of the respondent requested the Appointments Committee, Mona, to consider the appellant's status in the Faculty of Medicine. Two and a half years later, the appellant applied for sabbatical leave for session 1995/96. In that application, he described himself as being Professor of Neuropsychology since 1986. The appellant's application was dated November 24, 1994, and addressed to the respondent's Vice Chancellor. The letter reads, in part:

> "5. The question of further funding for the Established Chair in Neuropsychology...is on the agenda. I have indicated to you my deep reservations about the procedure of this matter being discussed by the Faculty of Medical Sciences, Mona, while I occupy the Chair and, in view of comments expressed by the Dean, FMS (Mona).....
>
> In the context of the above, I feel confident that funds could be obtained to execute the agenda of the Professor of Neuropsychology.
>
> In the event of this not being possible, I indicated to you, that I would "take my chances" on the outcome of UWI's effort, and the "chair can come to rest". These and other matters, such as topping up the Senior Lecturer's salary, can be determined while I am on sabbatical leave."

To this letter, the Vice Chancellor responded under confidential cover on December 12, 1994. He reminded the appellant that the Chair had been established "for two years in the first instance, to be funded by the Kellog Foundation, and continuation beyond that time to be subject to the availability of funding". The Vice Chancellor further stated:

> " . . . In light of the full utilisation of the funds provided by the Kellog Foundation, any continuation of the Chair is now contingent on a proposal to that end from the Mona Campus supported by the Faculty of Medical Sciences and identifying the source of funding for the Chair".

The Vice Chancellor concluded his letter by saying that he had no personal objection to the advance of the sabbatical leave as requested by the appellant; however, he could not give the appellant any assurance at that stage that his salary could remain at the professorial level during the leave. This was a matter that the Vice Chancellor intended to consult further on with the Principal and the University Appointments Committee. The appellant duly went on leave and on his resumption he was advised that the University Appointments Committee had agreed that he should revert to his substantive post of Senior Lecturer on September 1, 1996.

The oral evidence

10. The appellant was the only person who gave evidence at the trial. He introduced in evidence all the documents referred to above, as well as others. The oral evidence sought in some instances to clarify and explain the purport of the documentary evidence. Among the things said by the appellant were the following:

(i) he was emotionally upset when he saw himself described as senior lecturer in the university's calendar for 1995/96;

(ii) his curriculum vitae shows his year of birth as 1942 when he was in fact born in 1939;

(iii) he can get a full professorship in the United States or the United Kingdom, but he does not wish to relocate while the case is pending;

(iv) it was not true that he was offered the professorial post for two years in the first instance, continuation thereafter to be dependent on the availability of funding;

(v) when he suggested in writing that there should be a topping up of the senior lecturer's salary, he was not referring to any particular senior lecturer - he was suggesting the application of that sum of money to his Chair;

(vi) he had not submitted any report to the respondent although he was required to do so on his return from his extended study leave and sabbatical leave;

(vii) the University's Appointments Committee is the body responsible for making all academic appointments;

(viii) the appointment of a campus dean is for a definite period, at the end of which the person may or may not be appointed for another period;

(ix) the position of Dean of the Faculty of Medical Sciences carries a professorial salary;

(x) when a person ceases to be Dean of the Faculty of Medical Sciences, that person reverts to the salary scale relevant to his or her substantive post;

(xi) he does not recognise the distinction between an appointment and a promotion - to him, they are the same; and

(xii) he terminated his employment with the respondent by not returning to work after the sabbatical leave had ended on the 31st December, 1996.

The judgment

11. The learned trial judge was clearly not impressed by the appellant as a witness. In the written reasons for judgment, the appellant is described as someone who "contradicted himself", "was hesitant in giving answers to simple questions" and claimed that he did not "understand the import of letters written to him or even those he had himself written". The judge was also not impressed with the appellant as an academic. In his view the appellant was interested in money, not scholarship. Given the context, it appears that the learned judge ridiculed the fact that the appellant pointed "to one joint publication, a chapter in "Central Brainstem Mechanisms" done in collaboration with other academicians".

12. The judge regarded the appellant's claims as ill-founded. He concluded that the appellant had been aware of the terms and duration of the Chair from its inception, he having been instrumental in setting it up and finding funding for it. According to the learned judge, the fact that the Chair had remained in existence for such a long time was due entirely to the persuasive efforts of the appellant, "an expert psychologist". The judge interpreted the appellant's letter regarding the topping up of the senior lecturer's salary as a direct reference to himself and his salary. That, he felt, was an acceptance of the fact that the funding for the Chair was finished and that the Chair would come to rest. It was the judge's view that the appellant was concerned that his salary as a senior lecturer should be topped up to ensure that he continued to receive the salary that he had been receiving as a professor.

13. So far as the claim for libel is concerned, the learned judge found that there was no doubt that the appellant's substantive post was that of senior lecturer. Hence, there was no basis for the claim for libel or for negligence in the publication of the Calendar for the academic year 1995/1996. Donald McIntosh, J. also concluded that there was no evidence of any breach of statutory duty on the part of the respondent.

14. Although the learned judge concluded that the claims were ill-founded, he said on page 41 of the record of appeal :

> "What the University seemed to have failed to do, was to give the plaintiff the required six months notice termination as specified in the letter dated the 1st May, 1987 {Exhibit 3}.The defendant had a curious way of making appointments. The letter of the 1st May, 1987 purported to make an appointment effective the 11th April, 1987.{Exhibit 3}. The letter of 22nd December, 1975 {Exhibit 8} purported to make an appointment effective 1st October, 1975, so that there must have been communication in advance of these letters".

He then qualified this observation by making the following statement appearing on page 42 of the record of appeal:

> "It is the plaintiff's evidence that he was paid for the month of January 1997. This would effectively cover the salary of the plaintiff for the six month's period of notice - i.e. from July 1996 to January, 1997. The plaintiff would therefore not be entitled to any pay in lieu of notice".

Taken as a whole, these statements by the learned judge mean that he found that the respondent had failed to give six months notice, but had paid the appellant in lieu thereof.

The respondent's notice

15. The respondent was not happy with the findings of the judge as expressed on pages 41 and 42 of the record of appeal and referred to in paragraph 14 hereof. Consequently, it filed a notice which is at page 7 of the record of appeal. In this notice, the respondent seeks to have the finding as to the failure to give notice set aside. The grounds relied on are:

> "(i) The letter of 1st May 1987 did not create a new contract of employment. It made an appointment within the framework of the existing contract of employment between the appellant and the respondent i.e. it amended the existing contract to the extent that its terms did not duplicate it. It was common ground on the pleadings and at the trial that the appellant's employment by the respondent began on September 6, 1973. The appellant pleaded that it lasted for an unbroken period of 23 years, up to September 1, 1996, whereas the respondent pleaded that it lasted until January 2, 1997, but both agreed that it began on September 6, 1973 by virtue of a letter of appointment, dated June 21, 1973 and accepted by the appellant on June 26, 1973, (Ex.7) which, in common with all subsequent letters of the kind, stated that 6 months notice of termination by either side was required. The letter of 1st May 1987 merely repeated that provision as every previous letter to the appellant had done; it did not create any new rights or obligations so far as the manner of terminating the contract entered into on June 26, 1973, and which took effect on September 6, 1973, was concerned.

(ii) Even if the said letter created a new and separate contract, that contract was not terminated by the appellant; it came to an end in accordance with its own terms and with the proposal set out by the appellant in his memorandum of March 21, 1989, (Ex.6) as well as with the appellant's letter of November 24, 1994 (Ex. 12) and the respondent's reply dated December 12, 1994 (Ex. 13), hence no question of notice of termination arose at all."

The grounds of appeal

16. There are fourteen grounds of appeal. Given the factual situation, it is necessary to set them out for a proper understanding of the complaint of the appellant. These are the grounds:

(i) the learned judge having found that there had been a failure to give six months' notice of termination to the appellant, erred in failing to award judgment to him;

(ii) there was an error by the judge in holding that payments received by the appellant from July, 1996, to January, 1997, effectively covered the salary of the appellant for the six month notice period;

(iii) the learned judge erred in holding that the appellant was not entitled to any pay in lieu of notice;

(iv) the learned judge erred in not accepting the unchallenged evidence that the payments made to the appellant between July, 1996, and January, 1997, related to payments due to him in respect of the period of his award of sabbatical leave;

(v) the learned judge erred in failing to hold that the appellant held the Chair of Professor of Neuropsychology from 1989 to 1996;

(vi) the learned judge erred and was inconsistent in holding on the one hand that the letter dated 15 August 1996 (Exhibit 20) stating that the appellant should revert to the position of senior lecturer did not constitute termination of the employment of the appellant by the respondent while simultaneously holding that the respondent had failed to give notice of termination to the appellant as required by the letter dated 1st May 1987;

(vii) the learned judge erred in not finding that the letter of 1st May, 1987, appointing the appellant to the Chair of Neuropsychology constituted a contract of employment;

(viii) the learned judge failed to recognize that the appellant's appointment as Professor of Neuropsychology was not a temporary or acting appointment;

(ix) the learned judge failed to recognize that the appellant's substantive post was that of Professor of Neuropsychology;

(x) the learned judge erred in holding that the appellant's contract of employment was extended by the appellant's letters, and failed to appreciate that the contract could only be varied by the Appointments Committee and Council of the University;

(xi) the learned judge failed to appreciate that the termination of the appellant's employment as Professor of Neuropsychology created a redundancy under the Employment (Termination and Redundancy Payments) Act;

(xii) the learned judge erred in not holding that termination of the appellant's employment as Professor of Neuropsychology was in violation of his tenured status with the respondent;

(xiii) the learned judge erred in holding that the publication of the respondent's calendar listing the appellant as senior lecturer was not libellous as that was the appellant's substantive post; and

(xiv) the learned judge erred in holding that there was no evidence of a breach of any statutory duty on the part of the respondent.

The contract between the parties

17. This case may be described as a case of two contracts. The fact is that there was a contract between the parties so far as the position of senior lecturer was concerned. During the currency of that contract, a separate contract was entered into in relation to the professorship. The latter contract made no reference to the earlier one and there is nothing to suggest that the earlier one had been terminated, or that the arrangements under the former had been merged into the latter. This seems to be a position accepted by the respondent as Mr. Goffe submitted that when the professorial contract ended, the appellant reverted to the original contract. There was one caveat, he said, and that was that the appellant could not rely on the provision as to six months notice of termination.

18. In November, 1987, when the appellant accepted the offer of appointment to the Chair in Mental Health , that is, as professor in neuropsychology, he was already contracted to the respondent as senior lecturer in the Department of Psychiatry, on indefinite tenure. Some of the provisions of that contract have already been listed at paragraph 3 above. That contract

provided also that the appointment was "terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year". The contract in respect of the professorship was different in three main areas:

(i) it was to be effective for a stated period;

(ii) the salary was higher; and

(iii) there was provision for unfurnished accommodation.

In all other respects, the contracts were identical.

19. The stated period for the professorial contract was from March 11, 1987, to September 30, 1989. This period was extended as the professorial position was still very much alive in November 1994 when the appellant wrote to the Vice Chancellor of the respondent seeking to bring forward his sabbatical leave. In that letter (page 112 of the volume of exhibits), he expressed confidence that "funds could be obtained to execute the agenda of the professor of Neuropsychology". He concluded his letter by saying that "in the event of this not being possible...I would 'take my chances' on the outcome of the UWI's effort, and the 'chair can come to rest'. These and other matters, such as topping up the Senior Lecturer's salary can be determined while I am on sabbatical leave".

20. In paragraph 1 of the letter, the appellant asserted that he had enjoyed professorial rank for over eighteen years, from February 20, 1976, when he was appointed Dean. However, the suggestion of the topping up of the senior

lecturer's salary is a clear indication that he regarded that position as his substantive appointment, to which he would revert if the professorship did not last. For him to say that he enjoyed professorial rank for over eighteen years is somewhat of a distortion of the reality of the situation when it is considered that he was a lecturer in 1976, and he was promoted to senior lecturer in 1979. So, if one takes his statement to its logical conclusion, it would mean that while he was a professor, he was promoted to senior lecturer. The reality in law and in fact is that the appellant was substantively a senior lecturer in the Department of psychiatry, and he was on indefinite tenure. While in that position, he was offered a professorial position on the clear understanding that it would be temporary. In that situation, it is my view that a claim for libel does not arise from the reference to him as senior lecturer.

21. The advertisement seeking applications for the Chair in Mental Health made it clear that the post would be for two years, and that continuation of the appointment beyond the stipulated time would be subject to funding. The appellant's letter of appointment said that the appointment would take effect from March 11, 1987, to September 30, 1989, **"in the first instance"**. The letter went on to specify that "the appointment is **nevertheless** terminable by six months' notice in writing on either side given to terminate not earlier that March 31 in any academic year". These provisions, in my view, mean that the appellant was appointed for two years at the outset; the period of the

appointment may be extended, but, in any event, either side may terminate the contract by giving six months' notice in writing.

22. The appellant was on sabbatical leave for the academic year 1995/96. He would have resumed on September 1, 1996. The Campus Registrar wrote to him on August 15, 1996, advising that, after careful consideration, the University Appointments Committee had agreed that he should revert to his substantive post of senior lecturer as of September 1, 1996. He having refused to resume his substantive position of senior lecturer terminated his employment with the University. There is no merit in his complaint that the University was in breach of contract and had wrongfully dismissed him.

23. There was no evidence before the Court to substantiate the claim for redundancy payments, and as said earlier, there is no basis for the claim in libel. I would dismiss the appeal with costs to the respondent to be agreed or taxed.

SMITH, J.A.

I am in agreement with the judgment of my brother, Panton, J.A. However, since my brother Downer, J.A. is not of the same view I will make a contribution.

The appellant, a psychologist, was employed by the respondent in various positions from 1973 to 1996. One such position was that of Senior Lecturer to which he was promoted on the 30th April, 1979.

In 1986 the respondent by advertisement invited applications for the post of a Chair in Mental Health. Consequent on objections from some psychiatrists, the Chair was renamed "Professor of Neuropsychology."

It is not in dispute that this Chair was new and was established within the Faculty of Medical Sciences and that the appellant was involved in discussions leading up to its establishment. Indeed, the appellant testified that as Dean of the Faculty of Medical Sciences he led the discussions and that these discussions involved, among other things, the funding of the Chair.

The appellant applied for the position. By letter dated May 1, 1987 the respondent offered the post of Professor of Neuropsychology to the appellant. The appellant communicated his acceptance to the respondent on the 9th November, 1987.

The appellant was instrumental in securing funding for the Chair. In this regard, the benefactor was W.K. Kellog Foundation. Unfortunately, in June

1990, the benefactor's Program Director and Co-ordinator wrote the appellant stating "I must express my concern regarding the slow implementation of the project's activities" – page 247 of Volume 2 of Record. The Program Director further observed: "The financial report that you presented seems to be in disagreement with the statements made in your narrative report and with my colleagues' observations". He requested clarifications and comments in respect of several items of the appellant's financial report.

The appellant, in his response chronicled "a series of factors which impeded the smooth implementation of the project." Nonetheless his prognostication in reference to the implementation of the programme was hopeful.

The Programme Director after completing the review of the report together with the appellant's response indicated that he did not share his view. In a letter dated October 25, 1990 he advised the appellant "we do not believe that the project could be extended beyond December, 1990". The withdrawal of assistance by the Kellog Foundation signalled the beginning of the controversy in the Faculty of Medicine as to the appellant's status. By memorandum dated 14th April, 1992 the respondent's registry asked the Appointments Committee to consider the status of the appellant in the Faculty of Medical Sciences.

On the 27th April, 1994 the appellant applied for sabbatical leave for the session 1995/96.

In November, 1994 the appellant wrote to the Vice Chancellor of the respondent seeking his approval to bring forward his sabbatical leave. In this letter he expressed confidence "that funds could be obtained to execute the agenda of the Professor of Neuropsychology." He went on to state:

> "In the event this not being possible, I indicated to you, that I would 'take my chances' on the outcome of the UWI's effort and the Chair can come to rest.
>
> These and other matters, such as topping up the Senior Lecturer's salary can be determined while I am on sabbatical leave."

The implication of the letter is critical and will be considered later. In his response (letter dated December 12, 1994) the Vice Chancellor reminded the appellant that the Chair was established for two years in the first instance and that the continuation thereof was subject to the availability of funds. He pointed out that the funds provided by Kellog, had been fully utilised and the continuation of the Chair was now contingent on a proposal from the Mona Campus supported by the Faculty of Medical Sciences and the identification of a source of funding. He indicated that he had no objection to the advance of the appellant's sabbatical leave to start on March 1, 1995. He further informed the appellant that he could give no assurance that his salary would remain at the

professorial level but promised to consult with the Principal and the Appointments Committee.

A letter dated 7th June,1995 from the appellant's attorney-at-law to the respondent's Vice-Chancellor suggests that the appellant was later informed that the respondent intended to discontinue the Chair of Neuropsychology and to revert the appellant to the post of Senior Lecturer. In that letter his attorney-at-law wrote:

> "...it is most disturbing to learn that the University of the West Indies is presently contemplating discontinuing the Chair of Neuropsychology and also ending Professor Wray's appointment at professorial level by having him reverted to the significantly lower status of a Senior Lecturer".

The attorney-at-law concluded with a warning of legal action if the appellant was reverted to the post of Senior Lecturer.

The threat of legal action did not deter the respondent. On August 15, 1996 the respondent's campus registrar wrote the appellant advising him that the Appointments Committee had agreed that he should revert to his substantive post of Senior Lecturer as of September 1, 1996. This is the date the appellant was due to resume. The appellant's attorney-at-law by letter dated 19th August, 1996 described the respondent's letter of August 15, 1996 as "out of order and in breach of contract." He warned that proceedings would be commenced in the Supreme Court.

In the respondent's annual calendar for the academic year 1995 – 1996 page 189of Volume 11 of the Record the appellant was referred to as a "Senior Lecturer".

On the 2nd September, 1996 the appellant filed a Writ of Summons claiming damages for breach of contract, breach of statutory duty, libel and negligence.

On July 12, 1999, D. McIntosh J, dismissed the appellant's claims and gave judgment for the respondent.

This appeal is from that judgment. Some fourteen (14) grounds of appeal were filed.

I venture to think that it would be correct to say that all these grounds touch and concern the construction of the contract relating to the appointment of the appellant to the Chair of Neuropsychology. Before considering the appointment of the appellant to the abovementioned Chair, it is in my view necessary to refer to the appellant's employment by the respondent leading up to his appointment as Senior Lecturer.

From Lecturer to Senior Lecturer

The appellant was employed as a lecturer in psychology in the respondent's Psychiatry Department from 1973 to October, 1975 in the first instance. The contract of employment as lecturer was extended to September 30, 1979. In December , 1978 the appellant was offered an extension of his

contract as lecturer on indefinite tenure. This offer was accepted on March 30, 1979. By letter dated April 30, 1979, the respondent offered the appellant promotion to Senior Lecturer on indefinite tenure. The appellant accepted this promotion. It is important to note the opening paragraph of this letter which was signed by the Registrar . It reads:

> "I am directed by the Council to offer you the post of Senior Lecturer on promotion from your present post of Lecturer in the Department of Psychiatry University of the West Indies Mona." (Emphasis mine)

The Professorial post – its duration

The letter of May 1, 1987 reads:

> "I am directed by the Council to offer you the post of Professor in Neuropsychology in the Department of Child Health".

It is important to note that this appointment was not stated to be on promotion or on indefinite tenure. The duration of the appointment was clearly stipulated:

> "The appointment will take effect from March 11, 1987 to September 30, 1989 in the first instance. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31, in any academic year. The retiring age is 65 years."

Among other things the contract provided that "the appointment is subject to the Charter of the University and its Statutes Ordinances, Rules and Regulations for the time being in force."

At the time when the appellant was appointed Professor of Neuropsychology, he was a Senior Lecturer and Dean of the Faculty of Medical Sciences and as Dean his salary was the same as that of a professor. In the light of this, the appellant sought, through his letter of acceptance an extension of the duration of his appointment. On November 10, 1987 he wrote the following letter to the Registrar of the respondent:

> "I hereby return contract duly signed. Please note as from the date of my appointment, I have been working in my new Department along with my duties as Dean. The two-year appointment is in accordance with the original funding for two years. May I suggest that as I am being paid at the professorial level as Dean until July 1988, the appointment be extended until July, 1990 in the first instance".

It would appear that this suggestion was accepted. There is no dispute that the appointment was further extended to July 30, 1993, consequent on the appointment of the appellant as Dean from 1st August, 1988 to 30th July, 1991 (see letter dated March 21, 1989 to which reference will be made later).

Was the continuation of appointment subject to the availability of funding?

We have seen that the May 1, 1987 letter provided that the appellant's appointment as Professor of Neuropsychology would "take effect from March 1, 1987 to September 30, 1989 in the first instance." It must not be forgotten that the letter of May 1, 1987 was in response to the appellant's application for

the post which had been advertised by the respondent as a new post for a duration of two (2) years and thereafter the continuation of the appointment to the post would be subject to funding. The advertisement should be read with the letter of appointment – see ***R.v. Hull University Visitor ex parte Page*** (1991) 4 All ER 747 at page 758 (d) – (f).

It is in this context that the following letter of the appellant to the respondent must be viewed. This letter is dated March 21, 1989 and reads in part:

> "I received your note through Mrs. Wynter requesting a letter about this Chair. The appointment was made for two years subject to the availability of funding. First, I would like to state that the funding earmarked for two years [1987-1989] has not been used. As I indicated to the Registrar, Mr. Robertson, at the time of accepting the appointment that my Deanship went until August 31, 1988 and as Dean I was paid a Professorial salary. I have since been appointed Dean from 1st August, 1988 to 30th July, 1991 and in this regard I shall not be drawing down on the Professorial salary earmarked for the Chair.
>
> ...
>
> With regards to the appointment my suggestion would be that it goes until 1993 and thereafter subject to funding . This time span is explained as follows, until 1991 as Dean of FMS, Mona, (to 30th July, 1991) and the funding for two years to 30th July, 1993 and thereafter subject to funds available". (Emphasis supplied)

In a letter to the Vice Chancellor dated November 24, 1994, to which reference has already been made, the appellant expressed himself thus:

> "I feel confident that funds would be obtained to execute the agenda of the Professor of Neuropsychology. In the event of this not being possible, I indicated to you that I would 'take my chances' on the outcome of UWI's effort and the 'chair can come to rest'. These and other matters such as topping up the Senior Lecturer's salary, can be determined while I am on sabbatical leave".

This is a clear admission by the appellant that the continuation of the post was subject to funding. This means it was not an established post and the requisite financial provisions had not been made by the Estimates Committee as would have been done when the appointment of a professor is made under Clause 29 (v) (vi) and (vii) – see Ordinance 53. In his reply (letter dated December 12, 1994) the vice Chancellor confirmed that there was consensus **ad idem** on this aspect.

In the light of the above it is difficult, in my view, to contend otherwise than that the parties agreed that the continuation of the Chair in Neuropsychology was subject to funding. There is no doubt, in my judgment, that after the signing of the contract letter of May 1, 1987 the contract was varied by consensus to extend it firstly to 1990, then to 1993 and "thereafter subject to funds available."

Its effect

The contract letter of May 1, 1987, which appointed the appellant Professor of Neuropsychology provided a limited time for the duration of the appointment in the first instance, "from March 11, 1987 to September 30, 1989." I have already observed that the appellant's appointment as Professor was not stated to be "on promotion" as was his appointment as Senior Lecturer. His appointment as Professor was certainly not on promotion since it was pursuant to an advertisement and was not in accordance with the procedure set out in Ordinances 26, 27, 28 and 29 (v) (vi) (vii). Indeed, in his submissions Mr. Codlin conceded that the appellant's appointment to the Chair was not by way of promotion. However, counsel for the appellant contended that when the appellant was appointed Professor he ceased to be Senior Lecturer.

Mr. Goffe Q.C. for the respondent, on the other hand, submitted that the May 1, 1987 letter was clear: the employment of the appellant to the respondent as Senior Lecturer was not terminated. He was to remain on indefinite tenure as Senior Lecturer for the period March 11, 1987 to September 30, 1989, "in the first instance" he was to be Professor of Neuropsychology. I think Mr. Goffe is right. It is not denied that the post of Senior Lecturer, which the appellant occupied, remained vacant during his appointment to the Chair in Neuropsychology. In my view the effect of the contract of May 1, 1987 was that the appellant would be transferred for a limited period of time, in the first

instance, to another assignment without loss of position or security of tenure. Such appointment could nevertheless be terminated within this stated period by six months' notice given by either party.

As Mr. Goffe correctly submitted, if there is any ambiguity that these were the terms of the May 1 contract and any subsequent variations thereof reference may be made to the "surrounding circumstances". For this submission he relied on the following passage from **Chitty on Contracts** 27th Edn. 1994, para. 12-104:

> "...If an ambiguity emerges when it is sought to apply the language of the document to the circumstances under consideration, extrinsic evidence will be admissible to ascertain the true meaning of the words or phrases used. The court is entitled (and indeed, bound) to enquire beyond the language of the document and see what the circumstances were with reference to which words were used, and the object appearing from those circumstances which the person using them had in view. The Court must place itself in the same 'factual matrix' as that in which the parties were. In ***Reardon Smith Line Ltd. v Yngvar Hansen Tangen*** (1976) WLR 989 995-996 Lord Wilberforce said 'no contracts are made in vacuum; there is always a setting in which they have to be placed.' The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise, it can be illustrated but hardly defined...'."

The correspondence between the parties and the fact that the appellant was instrumental in the establishment of the new post clearly show that both parties were agreed that the appellant had been appointed Professor for two (2) years

which could be extended if funding were available. Thereafter, he would revert to the position of Senior Lecturer in which he would continue to enjoy indefinite tenure. The appellant's letters dated November 10, 1987; March 21,1989; November 24, 1994 and the respondent's letter dated December 12, 1994, all of which I have already referred to, clearly show that the parties were agreed that when funding was no longer available the Chair would "come to rest" and the appellant would revert to the position of Senior Lecturer. In this regard, it is, I think, necessary to repeat a quote from the appellant's letter of November 24, 1994 to the Vice Chancellor. Before I get to the relevant quote I should observe that the appellant began this letter in this way: "I write to confirm our understanding of the main issues emanating from our meeting of November 21, 1994". At the end he expressed confidence that funds could be obtained and concluded:

> "In the event of this not being possible, I indicated to you, that I would 'take my chances' on the outcome of UWI's effort and the 'Chair can come to rest'. These and other matters such as topping up the Senior Lecturer's salary, can be determined while I am on sabbatical leave".

When cross-examined, the appellant stated that when he said "the chair can come to rest", he meant that it "can come to an end". However, he testified that when he mentioned "topping up the Senior Lecturer's salary" he was not speaking of any particular Senior Lecturer. Of course, the learned trial judge rejected this part of his evidence and found that the appellant was in fact making

a "direct reference to himself and his salary". It is as clear as can be that the appellant's contract of employment with the respondent as a Senior Lecturer existed separately from his appointment as a Professor pursuant to the letter of May 1, 1987.

Claim for Redundancy Payment

In his Statement of Claim para. 15 the plaintiff/appellant made the following averment:

> "In breach of its statutory duty under the Employment (Termination and Redundancy Payments) Act, 1974, the Defendant has failed to pay the Plaintiff the benefits to which he is entitled and which the Defendant is obliged to pay under the provisions of the said Act and regulations and Orders thereunder, as a consequence whereof the Plaintiff has suffered loss and damage."

Section 5(1) and (2) of the Act provides:

> "**5.**-(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a 'redundancy payment')calculated in such manner as shall be prescribed.
>
> (2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or

(c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment."

Section 6 (1) states:

"**6** – (1) An employee shall not be entitled to a redundancy payment –

(a) if for any reason other than that specified in paragraph (c) of subsection (5) of section 5 he terminates the contract under which he is employed; or

(b) if the contract under which he is employed is terminated by reason of his retirement in circumstances in which he is entitled to pension, super-annuation, or other retiring benefits (other than benefits under the National Insurance Act) under any scheme, agreement or provision."

By virtue of section 5 (1), (2) the right to redundancy payment can only arise if the employee has been continuously employed for two (2) years and if he

has been dismissed by his employer by reason of redundancy. In the instant case it is not in dispute that the appellant had been continuously employed by the respondent for over two (2) years.

The issues to be determined are therefore:

(i) was the appellant dismissed by the respondent;

(ii) if so was the dismissal by reason of redundancy.

What constitutes dismissal is set out in subsection 5 of section 5 of the Act. This subsection reads:

> "(5) For the purposes of this section an employee shall be taken to be dismissed by his employer –
>
> (a) if the contract under which he is employed by the employer is terminated by the employer either by notice or without notice; or
>
> (b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or
>
> (c) if he is compelled by reason of the employer's conduct, to terminate that contract without notice.

I now turn to the question of his dismissal. There is no evidence that the appellant was told not to return to work after his sabbatical leave.

The respondent gave the following evidence by way of Interrogatories p. 23 vol. 1 of record):

> "7. was the Plaintiff's appointment as Professor of Neuropsychology terminated.

Ans. Yes, in accordance with the Plaintiff's memorandum dated March 21, 1989.

8. If the answer to Interrogatory No. 7 is in the affirmative state when, by whom and in what manner (whether orally or in writing) and by what amount of notice the Plaintiff's appointment as Professor of Neuropsychology was terminated?

Ans. On July 31, 1993 in accordance with the understanding between the Plaintiff and the Defendant as set out in the Plaintiff's memorandum dated March 21, 1989."

The appellant in evidence said "the University did not dismiss me" (page 29 of the Notes of Evidence). He agreed when cross-examined that it was he who terminated his employment with the respondent by not returning to work after his sabbatical ended on December 31, 1996: (page 35 of Notes of Evidence).

In the light of this admission by the appellant, he may only be treated as having been dismissed, if he was compelled by reason of the respondent's conduct to terminate the contract without notice – section 5 (5) (c) of the Act. In spite of the admission, it is the contention of the appellant's attorney-at-law that the respondent breached the contract. What is the nature of the breach which counsel complained of?

By letter dated August 15, 1996 (supra) the respondent advised the appellant that "the University Appointments Committee agreed that you should revert to your substantive post of Senior Lecturer." The effective date was

stated to be September 1, 1996. Mr. Codlin submitted that at the time when the respondent purported to give the appellant notice reverting him to Senior Lecturer, the defendant had no authority so to do. By refusing to allow the plaintiff to continue in his post as Professor, the defendant had committed a fundamental breach of the appellant's contract and that fundamental breach entitled the appellant to claim that he was constructively dismissed and to treat the contract as discharged.

I do not accept this view as correct. The letter of August 15, 1996, did not breach the terms of the contract or constitute a "dismissal" within the contemplation of section 5 (5) (c) of the Act, because in the circumstances the appellant was not compelled to terminate the contract without notice by reason of the respondent's conduct.

The words of section 5 (5) (c) express a settled legal concept which is referred to in the books on contract as 'Discharge by breach'. They do not introduce a new concept into contracts of employment to the effect that the employer must show that he acted reasonably.

This was in essence the decision of the English Court of Appeal in **Western Excavating (ECC) Ltd. v. Sharp** (1978) 1 All ER 713. In that case the Court was construing the words of Sch 1, paragraph 5(2) (c) of the Trade Union and Labour Relations Act 1974: viz "the employee terminates that contract, with or without notice, in circumstances such that he is entitled to

terminate it without notice by reason of the employer's conduct." Lord Denning MR at page 717 said that the appropriate test in determining whether an employee has been constructively dismissed was:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

The words of para. 5 (2) (c) of the English provision are close to the words in our section 5 (5) (c). Two important differences are noteworthy. They are:

(i) the use of the word "compelled" in the Jamaican provision instead of the word "entitled" which is in the English counterpart. In **Sharp** it was held that "entitled" in para. 5 (2)(c) meant entitled according to the law of contract. By parity of reasoning "compelled" should mean "compelled according to the law of contract." The books on contract show that a

party is compelled to terminate a contract if the other party has by his own conduct or default, made further performance of the contract impossible. No doubt a party who is compelled to terminate a contract is also entitled so to do. The converse, however is not necessarily true.

(ii) The Jamaican section 5 (5)(c) is only applicable where the employee terminates the contract <u>without notice.</u>

In England under para. 5(2) (c) he may terminate <u>with or without notice.</u>

In my view the "contract test" which was held applicable in **Sharp** is the test which should be applied in this jurisdiction with the necessary modification to give full force and effect to the word "compelled." As was said by Lord Denning MR:

> "...the new test of 'unreasonable conduct' of the employer is too indefinite by far. It has led to acute difference of opinion between the members of the tribunals. Often there are majority opinions. It has led to findings of "constructive dismissal" on the most whimsical grounds ... It is better to have the contract test of the common law. It is more certain ...."

It was also the view of the Master of the Rolls that the unreasonableness test gave no effect to the words "without notice".

Applying the "contract test" the question is has the respondent by his own conduct or default made further performance of the contract impossible?

I am clearly of the view that the respondent is not guilty of any such conduct. The continuation of the appellant's professorship was subject to the

availability of funding. It was the lack of funding which caused his appointment to the Chair to end. The letter of August 15 affirmed that the respondent intended to treat the appellant as continuing to be in its employ. The letter stating that he should "revert" was clearly within the terms of the contract as varied. Indeed, as already shown the appellant expected and accepted that he would revert to the post of Senior Lecturer. The appellant, in my view, was certainly not compelled by reason of the respondent's conduct to terminate the contract without notice.

Since the appellant was not dismissed by the respondent his claim for redundancy payment is misconceived and must fail.

In passing it is of interest to note that in his Particulars of Claim for redundancy payment (paragraph 15 of amended Statement of Claim) the appellant based his claim from September 1973 – the employment date.

However by virtue of section 8(1) of the Act, the fact that the contract was made before December 1974, renders such a claim baseless.

Claim for Payment in lieu of Notice

In paragraph 11 of his Statement of Claim the appellant averred that the effect of the respondent's letter of August 15, 1996, was to repudiate his contract of employment as a Professor. Further, in breach of the express term of the contract, that is, that it was terminable by six (6) months' notice in writing on either side, the respondent wrongfully dismissed the appellant.

Pursuant to the contract embodied in letter dated May 1, 1987, as varied, the appointment of the appellant as Professor of Neuropsychology was to come to an end in 1993 – see letter dated March 21, 1989 – pages 9-10 of Record of Exhibits.

Thereafter the appointment would cease when the funding ceased. After 1993, there was no entitlement to notice because the May 1 letter was varied and the continuation of the Chair was now subject to funding. In this letter of March 21, 1989, the appellant identified the source of funding up to 30th July, 1993. The letter stating that he should revert to his substantive post on September 1, 1996, was, in my respectful view, within the terms of the contract as varied in 1989. Indeed the appellant demonstrated that he understood that his appointment to the Chair would come to an end but not his employment to the respondent, when he stated in his letter of November 24 that he would "take his chances" and the chair can come to rest" and that the "topping up of the Senior Lecturer's salary, can be determined" while he was on leave. Having found that there was a variation of the appellant's contractual right to six months' notice upon the termination of his appointment to the Chair, and the continuation was now subject to funding, I would dismiss his claim for payment in lieu of notice. In **Brown v Kiowsley Borough Council** [1986] 1 R.L.R 102 a teacher was offered a contract for an academic year which stipulated: "The appointment will last only as long as sufficient funds are

provided either by the Manpower Services Commission or by other firms/sponsors to fund it." One month before the expiration of the year she was informed of the unavailability of funds and that her employment would terminate at the end of the academic year. The Employment Appeal Tribunal held that in view of the wording of the letter of appointment the contract came to an end automatically in the event which happened, that is, insufficient funds.

Libel

The learned trial judge held:

> "The claim for libel is based on the publication of the calendar listing the Plaintiff as Senior Lecturer. There is no doubt that that was the Plaintiff's substantive post and his letter dated 24th December, 1994 (Exhibit 2) confirmed that."

I entirely agree with the learned trial judge. This claim also fails.

Conclusion

1) The effect of the May 1, 1987 letter was that the appellant's employment to the respondent was to continue and he was to remain on indefinite tenure as a Senior Lecturer. The appellant was to be Professor in Neuropsychology at least for the period March 11, 1987 to September 30, 1989 "in the first instance." The appointment could nevertheless be terminated within this period by six months' notice given by either party.

2) At the suggestion of the appellant (letter dated November 10, 1987) the appellant's appointment as Professor of Neuropsychology was by consensus ad idem extended to July 1990 in the first instance.

3) On the initiative of the appellant (letter dated March 21, 1989) his appointment as Professor was by agreement further extended to July 30, 1993 thereafter "subject to funds available".

4) After July 1993, there was no further extension of the appointment as Professor of Neuropsychology for a fixed or stated period: however it continued, "subject to funds". The requirement for the six months' notice was by consensus waived.

5) Funds having been exhausted the respondent was entitled on August 15, 1996 to advise the appellant that he should revert to his substantive post of Senior Lecturer on September 1, 1996.

6) The respondent was therefore not in breach of the contract as varied.

7) Although the appellant's appointment to the Chair was terminated by the respondent his employment with the respondent was not terminated by the respondent as it was agreed that the appellant should revert to his substantive post of Senior Lecturer in which he enjoyed indefinite tenure.

8) The respondent did not dismiss the appellant within the meaning of section 5 (5)(c) of the Employment (Termination and Redundancy Payments) Act.

9) The appellant's claim for libel is ill-founded.

Accordingly, I would dismiss the appeal with costs to the respondent.

ORDER

DOWNER JA:

By a majority [Panton, Smith JJA;(Downer JA dissenting)], appeal dismissed. Order of the court below affirmed. Costs to the respondent to be taxed if not agreed.