IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: C.L.R-037 of 2000

BETWEEN	**CURTIS REID**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**JENTECH LIMITED**	**2ND DEFENDANT**
AND	**WAYNE REID**	**3RD DEFENDANT**

Mr. Glenroy Mellish for the Claimant (formerly represented by Captain Paul Beswick and Mr. Terry Ballantyne instructed by Ballantyne Beswick & Co); Mr. Ransford Braham and Mr. Miguel Williams instructed by Livingston Alexander and Levy for the 1st Defendant; Mr. Garfield Haisley, Ms. Taneisha Watkins and Mr. John Givans instructed by Vaccianna and Whittingham for the 2nd and 3rd Defendants.

Whether breach of employment contract of the Claimant; whether implied term of mutual trust and confidence is available to assist the Claimant; Whether damages recoverable for breach of implied term in addition to damages for wrongful dismissal; whether the rule in *Addis v Gramaphone Company* is still good law; tort of conspiracy; whether proven; defence to charge of conspiracy to injure.

Heard : April 11th, 14th, 15th, 16th, 17th,18th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th and 30th, 2008; December 20th, 2010 and September 30th, 2011.

CORAM: ANDERSON J.

[1] This is a case which has meandered its way like a slow-moving stream, through these courts. The length of the proceedings was in no small part due to the bifurcated nature of the suit which involved a jury trial of the libel action and separate submissions in relation to the claim for wrongful dismissal and conspiracy. The libel part of the proceedings was first hampered by the difficulty of finding an appropriate jury and then ensuring that copies of witness statements, amended pursuant to applications to the Court to strike out sections of statements, were available to jurors.

[2] As can be seen from the caption, the suit was filed by the Claimant in 2000. In his statement of case, the Claimant pursued a claim for libel against the 1st Defendant and a claim for damages for wrongful dismissal against the first defendant and damages for conspiracy to injure against the defendants. Set out below are the reliefs asked for in the statement of claim.

- Against the 1st defendant, damages for wrongful dismissal of 5 years income from the Plaintiff. The plaintiff will give credit for any income earned between the time of dismissal and the time of trial. The plaintiff will by discovery determine the exact amount due and payable on an annual basis at the time of his dismissal and the amount by which such sum would have been increased over the plaintiff's remaining tenure with the 1st defendant as a result of salary adjustments.
- Against the 2nd and 3rd defendants, Damages for injurious falsehood or alternatively damages for libel.
- Against the 1st, 2nd and 3rd Defendants damages for conspiracy to interfere with the Claimant's employment and the plaintiff's contractual and business relations with the 1st defendant,
- Against the 1st defendant an account of the plaintiff's emoluments
- Interest on damages awarded
- Costs and attorneys costs.
- Such further and other relief

[3] Insofar as the claim for libel was concerned, that part of the proceedings was heard with a jury which completed its deliberations after closing submissions by the various counsel for all the parties. After hearing the submissions and the directions from the Court, the jury returned a verdict that the Claimant had been libeled and awarded him damages for the libel.

[4] Despite the fact that all the evidence in relation to the claims in the statement of case had been adduced by the time the jury had to deliberate on its verdict and also the best efforts of the court, it proved remarkably difficult to get the various counsel to provide timely submissions on the remaining aspects of the claim. In the result, while some written submissions were ready and filed by early March 2009, other submissions were only provided in November 2010 and final oral submissions were only made on December 20, 2010.

[5] The delay in providing this final ruling is regretted. This judgment delivered here, of course, only relates to the part of the claim for damages for wrongful dismissal and conspiracy.

The factual basis of the claim.

]6] The essential facts giving rise to the claim are neither complex nor disputed. Mr. Curtis Reid, ("the Claimant") began his employment in May 1977 with the Jamaica Telephone Company Limited (JTC) which morphed into Telecommunications of Jamaica Limited when there was a statutory merger between JTC and Jamaica International Telecommunications Ltd. (JAMINTEL) effected by Act 4 of 1996. This merged entity was later to become Cable and Wireless Jamaica Limited, the 1st Defendant ("C&WJ"). By virtue of section 4 of the statute it was made abundantly clear that persons who had been previously in the employ of either JTC or JAMINTEL would continue to be employed on the same terms and conditions by the new entity.

[7] On February 19, 1999, when he was three (3) years away from retirement, the Claimant was dismissed. At the time of his dismissal he was Head of the Building Department of the 1st Defendant. Among his duties as Department Head was the engaging of consultants on behalf of C&WJ. The terms of employment which embodied the contract between the Claimant and C&WJ, provided that it was terminable by three (3) months notice by either party. (It is not in doubt that payment of three (3) months salary in lieu of notice would fulfill this term of the contract). The Claimant was dismissed pursuant to the terms of a document entitled "Telecommunications of Jamaica Limited Terms and Conditions of Employment for Senior Management" dated April 1, 1996. Clause 2.10 of that document provided for termination of the contract of employment by three (3) months' notice. He was, indeed, paid three (3) month's salary in lieu of notice and acknowledged receipt thereof. The clause was in the following terms:

Your employment with the company may be terminated as follows:

1) "By either party giving the other three months notice in writing (the company may agree to treat all or part of this period as payments in lieu of notice)

2) Summarily by the company without notice or pay in lieu of notice for

   a. Gross misconduct on or off the job,

   b. Gross negligence or continual poor job performance.

   c. Serious breach of contract".

[8] That clause was expressly relied upon by the 1st Defendant as providing a proper basis for the termination of the Claimant's employment. But the 1st Defendant submitted that alternatively, even if that were not the appropriate document to ground the termination, the court should find in the alternative that pursuant to the terms of the letter from the Jamaica Telephone Company Limited dated April 27, 1977, (the original employment letter) the termination was not wrongful. That letter confirmed the employment of the Claimant in the position of Senior Building Engineer. The letter contained the following provision:

"It is to be understood that you may be transferred to any department or sent to any section of the company in the Island, either temporarily or permanently. It is the normal practice of the company, however, to continue to employ staff in the area in which they are recruited.

Termination of employment will be subject to the following notice period or pay in lieu of notice:

(a) Not less than two (2) weeks' notice if the period of continuous employment is less than five (5) years;

(b) Not less than four (4) weeks' notice if the period of continuous employment is less than ten (10) years;

(c) Not less than six (6) weeks' notice if the period of continuous employment is less than fifteen (15) years;

(d) Not less than eight (8) weeks' notice if the period of continuous employment is fifteen (15) years or more and shall be in writing unless it is given in the presence of a credible witness".

[9] A copy of this letter was signed by the Claimant accepting the listed conditions as terms of his employment. It is clear that the employment of the Claimant subsisted for more than fifteen (15) years and by virtue of this fact, he would be entitled to the benefit of (d) above. Three (3) months' notice was consistent with that provision.

[10] It was submitted on behalf of the Claimant that despite the purported compliance with the terms and conditions for termination of employment, the Claimant was wrongfully dismissed and he was accordingly entitled to damages for wrongful dismissal. Counsel for the Claimant submitted that:

- The 1st Defendant breached implied and express terms of the contract of employment and therefore damages are at large.
- That the *manner of his dismissal having caused the Claimant loss and damages*, this court may make an award to compensate him notwithstanding the decision in **Addis v The Gramophone Company [1908-1910 All ER 1].**
- That the Defendants conspired to interfere with his employment and with his contractual and business relations with the 1st Defendant.

[11] Despite the submission of a breach of implied and express terms of the employment contract, Claimant's counsel did not point to any *express* clause of any agreement (save as to a comment on a code of Conduct, dealt with below in discussing the second issue) which had been breached by the 1st Defendant. Counsel submitted that "although the 1st Defendant purported to resist the claim for wrongful dismissal on the basis of clause 2.10, it was clear that the Claimant was advancing that his rights arose despite the existence of the said clause". It should be noted, in passing, that the Claimant in his evidence under cross examination, seemed to suggest that he was not aware of the existence of the

document and the particular clause but I find as a matter of fact, not only that he was aware of it, but it formed term of his employment contract.

[12] As I understand the submission of the Claimant's attorney, notwithstanding the existence of clause 2.10 aforesaid or its legal efficacy, the Claimant is asserting that an existing right known to Jamaican Law has been breached by the manner of the dismissal, and that damages flow therefrom. The Claimant's counsel submitted that certain cases which have been decided since 1998 have called into question the principles set out in **Addis v Gramaphone Company** [1908-1910] All ER 1.

[13] The issues which this court is being asked to decide are as follows:

Was the dismissal of the Claimant by the 1st Defendant "wrongful" or a breach of contract?

If it is not, is there a basis for finding that the Claimant is otherwise entitled to damages?

Has the Claimant established that there has been an actionable conspiracy against him by the defendants?

Breach of Contract

[14] The dismissal letter dated February 19, 1999, contained allegations of misconduct and/or incompetence against the Claimant, on the basis of which allegations, could they have been proven, it may have been possible to dismiss the Claimant "for cause". As a result of that fact, one submission made by the Claimant's counsel was that having outlined those certain complaints against the Claimant, the 1st Defendant must be taken to have opted to dismiss "for cause". It was thereby precluded from relying on any provision in the agreement for dismissal by three (3) months' notice or three (3) months' pay in lieu of notice. Indeed, the submission was made that the C&WJ "cannot escape the consequences of a breach of the employment contract by placing reliance on the right to dismiss with notice. It is clear from the Claimant's pleading that he was alleging that the dismissal was wrongful for a reason other than a *failure to give*

the agreed notice". (My emphasis) (I should merely observe here, for what it is worth, that the Claimant's submission refers to "agreed notice").

[15] Claimant's counsel also submitted that the 1st Defendant failed to substantiate the allegations made in the letter of February 10, 1999 and accordingly C&WJ would not have been able to dismiss for cause. Dismissal was therefore wrongful. The misconception in this submission is that there was no pleading made by C&WJ that the Claimant's dismissal was "for cause", in any event, , however, it is not clear to me whether the essence of the submissions of the Claimant's counsel is that the Claimant's dismissal was wrongful, *per se*, or that even if it were not, there is still an actionable wrong done to the Claimant by the manner of his dismissal, for which he is entitled to damages which are more, indeed substantially more, than the sums lost as emoluments.

[16] The 1st defendant's counsel submitted that either by virtue of the 1977 letter or the 1995 "Telecommunications of Jamaica Limited Terms and Conditions of Employment for Senior Management", the claimant had been properly terminated. He rejects the claim that there has been any wrongful dismissal. It was submitted that it was trite law that where a contract provided for a particular period of notice and that notice is given or payment in lieu of notice is made, then dismissal is not wrongful. Where the contract does not provide for a specific period of notice then a reasonable period is to be implied. What is reasonable will depend upon the nature of the employment and all the other circumstances of the case. In the instant case the 1st defendant had faithfully performed according to the terms of the 1977 letter or the 1995 document. In either case, the dismissal was in accordance with the terms of the employment contract.

[17] The 1st defendant cited in support of this proposition a passage from **Harvey on Industrial Relations and Employment Law Volume 1 paragraph 2101**:

> "At common law a contract for an indefinite period is terminable given by either party to the other. The length of the notice depends upon what was agreed expressly or impliedly. In the absence of any indication to the contrary the court will infer that the contract was terminable by reasonable

notice. What is reasonable is assessed by reference to all the circumstances of the case (seniority, length of service, nature of employment, frequency of pay days etc). Statute now lays down certain minimum periods of notice which take effect as implied terms in the contract (ERA 1966 section 86). The court will not imply a shorter period than that required by the statute, but it may imply a longer period. (**Hill v C.A Parsons and Co. Ltd**. [1972] Ch 305; [1971] All ER 1345. Termination by an employer upon notice is statutory dismissal; and termination by an employee upon notice may, exceptionally, also be deemed a dismissal within the statute".

[18] Insofar as the question of the Claimant's dismissal letter having contained allegations of professional misconduct and impropriety and whether this meant that there had been a dismissal "for cause", the 1st defendant submitted that there was authority for the proposition that this did not negate the validity of the otherwise proper notice. Counsel for the 1st Defendant cited the decision of the Jamaican Court of Appeal in **Cocoa Industry Board and Others v Burchell Melbourne** (1993) 30 JLR 242. There the dismissal letter which contained payment in lieu of notice also included reasons for dismissal of the employee. The Court of Appeal held that the payment was effective in terminating the employment of the respondent, Melbourne, notwithstanding the giving of reasons.

[19] Mr. Melbourne's contract of employment provided for termination by one month's notice or one month's pay in lieu of notice. The termination letter stated:

"With reference to employment to the company, please be advised that a decision has been taken to terminate your services as Bookkeeper on the Water Valley Farm with effect from June 10, 1988.

The decision is based on the fact that not only is your overall performance below expectation, but that you have betrayed the confidence and trust placed in you as a responsible officer.

Enclosed is the company's cheque for $3,234.03 representing your salary to the 10th June, plus payment for untaken vacation leave, and one month's salary in lieu of notice less your indebtedness to the company."

[20] On the hearing in the Court of Appeal Wolfe J. A. as he then was, stated: -

"It was further urged that the letter of dismissal, exhibit 6, clearly demonstrated that the appellant was purporting to terminate the contract for cause. Not establishing cause, the dismissal was unlawful and one month's pay in lieu of notice could not avail the appellant. This submission is flawed. The manual – Exhibit 10 – at Paragraph 205 deals with termination. Paragraph 205 states:

> 'Terminations may be effective in one of the following ways: (a) immediately that is my mutual consent; (b) by reasonable notice on either side or summary for adequate cause'.

Letter of dismissal, Exhibit 6, did purport to set out reasons for the dismissal. However, the letter clearly stated that the respondent was being paid one month's pay in lieu of notice. The relevant portions of Exhibit 6 are set out hereunder.

> 'The decision is based on the fact that not only is your overall performance below expectation, but that you have betrayed the confidence and trust placed in you as a responsible officer'.

The Manual clearly states that dismissal for cause attracts summary dismissal. That is dismissal without the necessity to give notice or wages in lieu of notice. Having stated that there were reasons for dismissal, the appellants were entitled to dismiss the respondent without notice or without wages in lieu of notice. The tendering of one month's wages in lieu of notice is cogent evidence that the dismissal was not for cause. The appellant, in terminating the contract, employed one of the methods permitted by the manual, Exhibit 10, to terminate a contract. More particularly the contract was terminated by the methods stipulated in the letter of appointment.

In the circumstances, we are unable to conclude the learned Judge was correct in holding that the respondent was unlawfully dismissed".

[21] This case was followed in a recent decision **Gordon v Fair Trading Commission** HCV 2699 of 2005, a decision of Brooks J. delivered March 28, 2008. That case also involved dismissal pursuant to the terms of the contract although the letter of dismissal gave reasons on the basis of which the employee could have been dismissed. There his lordship stated:

"The fact that the letter mentioned other matters does not detract from its stated adherence to the contract. The FTC was not obliged to pursue any

disciplinary process with Miss Gordon. I would adopt the words of Wolfe, J.A. (as he then was) in *Cocoa Industry Board and others v Melbourne* (1993) 30 J.L.R. 242...."

[22] I am of the view that these cases provide a complete answer to the submission that the inclusion of allegations of misconduct in the termination letter prevents C&WJ from acting pursuant to the terms of notice provided for in the contract and I so hold. Dismissal by the 1st defendant is on this account, not wrong.

Is there other basis for finding that there has been an actionable wrong?

[23] The Claimant's counsel's other submissions suggest that, in light of recent decisions, the Court should find that the pre-dismissal conduct by the employer which breaches the implied term of trust and confidence can give rise to a cause of action. In those circumstances, damages may be assessed on the usual compensatory principles. It is not clearly articulated in the Claimant's submissions but it appears that the purported breach to which reference was being made was a "breach of an implied term of mutual trust and confidence". According to the submission, it was the "leveling of accusations of professional misconduct and impropriety and the decision to act upon them in these circumstances" by the 1st defendant against the Claimant which constituted a breach of the implied term referred to above. Despite the submission by the Claimant's counsel, there is no evidence of the 1st Defendant deciding to act upon "accusations of professional misconduct and impropriety". The further fact is, as the counsel for C&WJ has pointed out, there is no pleading in the Claimant's statement of claim to support such a submission. But even if there were such pleading, it is not at all clear that the Claimant has established that there is such a claim in this jurisdiction for which redress is available.

[24] The Claimant cited a number of post 1998 decisions of United Kingdom courts as providing a basis for this court to find in his favour. The cases hint at a retreat from the principle set out over one hundred (100) years ago in the **Addis** case. In particular reference is made to decisions of the United Kingdom House of Lords **Eastwood and Another v Magnox Electric plc** [2004] UKHL 35. In that

case their lordships discussed two decisions of the House of Lords, **Mahmud v Bank of Credit and Commerce International SA** [1998] AC 20 and **Johnson v Unisys** [2003] 1 AC 518. Both these cases considered the case of **Addis v Gramaphone Company** [1908-1910] All ER 1. This latter was a case in which Lord Loreburn LC made the following interesting observation to which as judges we can so often relate.

> My Lords, it is difficult to imagine a better illustration of the way in which litigation between exasperated litigants can breed barren controversies and increase costs in a matter of itself simple enough.

[25] There, the issue was whether a litigant who had been wrongfully dismissed was entitled to damages other than those flowing from the breach occasioned by the wrongful dismissal or ought otherwise to be entitled to damages because of the manner of the dismissal. The headnote of the case is in the following terms:

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

Lord Shaw of Dumfermline put the matter thus:

> "...., apart from the wrongful dismissal, and on the hypothesis that the defendants are to be held liable in the full amount of all the emoluments and allowances which would have been earned by the plaintiff but for the breach of contract, there seems nothing in these circumstances, singly or together, which would be recognized by the law as a separate ground of action. If there should be, it will, on the principle I have referred to, remain; but if there be not, I cannot see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, ex hypothesi, is already fully compensated. A certain regret which accompanies the conclusion which I have reached on the facts of this particular case is abated by the consciousness that the settlement by your Lordships' House of the important question of principle and practice may go some length in preventing the intrusion of not a few matters of prejudice hitherto introduced for the inflation of damages in cases of wrongful dismissal and now definitely declared to be irrelevant and inadmissible on that issue.

[26] In **Eastwood**, Lord Nicholls recounted how the United Kingdom had arrived at its present position starting with **Addis** in 1905. He referred to the increasing discomfort over the possibility of unfair treatment of employees. This had led to the establishment of a commission headed by Lord Donovan which made recommendations that the law should be changed by 'early legislation'. Statute should establish machinery to safeguard employees against unfair dismissal. The result, according to Lord Nichols in **Eastwood** was the following:

> "Parliament gave effect to this recommendation in the Industrial Relations Act 1971. The relevant provisions are now contained in Part X of the Employment Rights Act 1996. An employee has the right not to be unfairly dismissed by his employer: (section 94). The remedies for unfair dismissal are set out in Chapter II of Part X. A complaint may be made to an employment tribunal. If the tribunal upholds the complaint the tribunal may make an order for reinstatement or re-engagement or an award of compensation for unfair dismissal calculated as provided in the Act".

[27] Despite the references to the cases and citations of various judgments in the United Kingdom House of Lords, particularly judgments of Lord Hoffmann, I am unable to accept that there is in this jurisdiction a claim maintainable on the basis of the manner of dismissal being a breach of an implied term of mutual trust and confidence. In urging the Court to accept such a proposition, Claimant's counsel cited the decision of Lord Nicholls in **Eastwood & Anor. v Magnox Electric plc** [2004] UKHL 35. There his lordship said:

> "Both parties to an employment contract owe a duty to conduct themselves in a way which will enable the contract to be performed. The developed formulation of this duty became, so far as the employer is concerned, that an employer will not, without reasonable and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.....This term, implied as a legal incident of employment contracts, provides the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress."

[28] It bears noting that his lordship was referring to a case in which an employee "resigns in response to the outrageous conduct by an employer". This is clearly not the case here and for that reason, I do not believe it assists the Claimant.

Counsel also cited the part of Lord Nicholls speech in **Eastwood** where he stated:

> "If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal."

[29] The problem with this citation in the context of this case is that the Claimant has not demonstrated that any cause of action "exists independently of the dismissal". After all, he who asserts must prove. The Claimant's counsel refers to the evidence of the 1st defendant confronting the Claimant with a report of the 2nd defendant and not giving him notice of it before requiring him to comment upon it, and to respond to allegations of professional misconduct including colluding with another to cause C&WJ financial loss.

[30] Further, it was submitted that in any event, no enquiry had been conducted into the allegations and that an enquiry would have been a necessary pre-requisite to a decision to dismiss for cause. The short answer to this proposition is that there has not been, as I have found above, any dismissal for cause. And even if there had been, there is no evidence that any provable losses have been occasioned to the Claimant by any such breach as distinct from the actual dismissal.

[31] In seeking to give credence to his submission that there has been a breach of an "express term" of his contract of employment, the Claimant pointed to the evidence that there was a "Code of Conduct" for all employees. The Code provided, inter alia:

> "If an employee's performance and conduct are less than the standard required, disciplinary action will be taken as available to the Company. Where this is necessary, its primary purpose will be to encourage improvement of employee performance or conduct".

Under paragraph 3: (Expectation of Employees) it was provided:

"management employees are expected to ...recommend or take remedial and/or disciplinary action where appropriate against employees in an impartial, fair and timely manner".

[32] Paragraph 5 dealt with unsatisfactory performance and required that if the employee was considered to be incompetent, the employee should be assisted through supervision and training and given a reasonable time to meet the required standards of performance. It is also normally appropriate for managers to advise and counsel employees prior to initiating formal disciplinary action. It was submitted that the 1st Defendant breached these "terms of the contract' in that his dismissal was effected without regard to these provisions. Further, that the Claimant had a "contractual right" to have the Code observed in any disciplinary action that was contemplated against him.

[33] In support of this proposition, the Claimant's counsel relied upon the recent decision of the English court of Appeal, **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2009} EWHC 2011 QB. I shall set out briefly the factual situation in that case.

Mr. Edwards, a consultant surgeon for an NHS Trust was dismissed for gross professional and personal misconduct following a disciplinary hearing and was subsequently unable to find employment. The contract under which he was employed provided, by clause 8, that either party could terminate it on three months' notice to the other. It also provided by clause 13 that in matters of personal conduct Mr. Edwards would be subject to the hospital's general procedures and that in matters of professional misconduct he would be subject to a procedure agreed by the Local Negotiating Committee in respect of medical practitioners.

In February 2006, following a disciplinary hearing, he was summarily dismissed from his post for gross professional and personal misconduct. He has since been able to obtain work as a locum with another NHS Trust, but has been unable to obtain a permanent consultant post and says that he will not be able to do so in the future because of the finding against him. He says that he has therefore been unable to pursue his medical career in the manner which he would have wished. The Investigating Committee of the General Medical Council later summarily dismissed a complaint against him based on the same allegations.

Mr. Edwards maintained that the Trust failed to follow the contractual disciplinary procedure correctly, in particular, by failing to appoint a person with legal qualifications to chair the panel which considered his case, by failing to appoint as a member of the panel a clinician of the same medical discipline as himself and by refusing to allow him to be legally represented at the hearing. He also maintains that if the procedure had not suffered from those defects no finding of misconduct would have been made against him. Accordingly, on 15th August 2008 he commenced proceedings against the Trust seeking damages for breach of his contract of employment.

[34] He claimed damages for loss of earnings, loss of future earnings up to what would have been his normal retirement age and loss of pension benefits. On the first hearing before Judge Nicols, the judge determined that all that the claimant could receive in damages was three months' pay in lieu of notice. On an appeal to the District Court, Jones J. varied the first order to say that the claimant would also be allowed to recover damages for the period during which a proper enquiry under the terms of the contract would be held. Edwards then appealed to the England and Wales Court of Appeal on the basis that the effect of Jones J's order was to restrict the damages which he would be able to recover, even if his case otherwise succeeded in full, to a small proportion of his total claim. The defendant Trust also applied for an Order under the English CPR Rule 24 for an order to strike out the claim, which the court said was properly an application for summary judgment on the basis that the claimant could not recover any more than Jones J. had been prepared to allow. The only issue for trial, therefore, was the extent of the damages which the claimant might be allowed to recover in the event he was successful that there had been a breach of contract with respect to the procedure for dismissal. Accordingly, this was treated as a preliminary issue

[35] The Court of Appeal held that the Trust was not entitled to an order for summary judgment. It rejected the proposition that even where there was a clear breach of contract by the employer prior to the dismissal, the damages were limited to what was provable as loss of income flowing from the dismissal. Indeed, Moore-Bick

LJ in defining the *Johnson exclusion* said at paragraph 23 of the Court of Appeal judgment:

> In my view, the ratio of **Johnson v Unisys** is that the common law does not imply into a contract of employment a term that the employer will not act unfairly towards the employee in relation to his dismissal and that the courts are not at liberty to develop the common law implied term of trust and confidence in order to give rise to such an obligation. However, the speeches recognise that where a breach of contract by the employer can be identified, the employee is entitled to obtain any remedy available to him under the general law.

[36] The court therefore held that in the **Edwards** case where there had been a breach of a term of the claimant's contract by virtue of a failure to carry out the contractual procedure, the claimant should have an opportunity to establish that he was entitled to damages beyond that merely flowing from the dismissal, per se. As Moore-Bick LJ said at paragraph 40:

> I accept that in the present state of the law, as represented by **Addis v Gramophone Co. Ltd** and **Johnson v Unisys**, damage caused to an employee's reputation by the manner of his dismissal is not normally recoverable. That is because the conduct of which he complains does not amount to a breach of contract and damages are not recoverable for personal distress or loss of reputation, except in a limited class of cases. However, the proposition that a breach of contract in the form of a failure to comply with an agreed disciplinary procedure gives rise to no claim is difficult to accept in principle and is difficult to reconcile with the decision in **Gunton v Richmond-upon-Thames** itself. Had the contract in that case not imposed an obligation on the council to pursue disciplinary proceedings before dismissing the claimant, he could have been dismissed simply on one month's notice. He had no greater security of employment and the damages he could recover for summary dismissal in breach of contract would have been limited to one month's loss of earnings. The decision that he could also recover damages for loss of earnings during the period required to carry out the agreed disciplinary procedure reflects the fact that he had a right to have that procedure followed. In my view, the decision supports the conclusion that a term of that kind has legal effect and is capable of sounding in damages if broken.

[37] The Court of Appeal refused the summary judgment application and in effect ruled that any complaint about the dismissal itself must be made under the statutory unfair dismissal procedures under the ERA1996 (where the level of

compensation is capped), However where there is an allegation about a separate breach of an express contractual term, such as disciplinary procedures, there is no restriction on a person's ability to bring such a claim. The effect of Edwards is that it clarifies that the manner of dismissal which does not amount to a breach of the terms of the contract is not a breach of the implied term of mutual trust and confidence. For the Claimant to succeed here, therefore, he must demonstrate that the "code" is a term of his contract of employment. I hold that there is no evidence before me on which the court could reasonably conclude that this was so.

[38] In this regard, it should be noted that the court rejected a submission from Mr. Edwards' counsel that it was necessary to imply into her client's contract a term that the Trust would not terminate his contract otherwise than for good cause, thereby giving him the right, subject to good behavior, to remain in his employment until his retirement. One reason for such rejection is that it would be incompatible with clause 8 which allows for termination by appropriate period of notice. Certainly, in the case at bar, no procedure is even defined to which Mr. Reid could claim a right which had been denied. Moreover, the words of the code do not mandate any particular action. Instead it says some things may be done "where appropriate" or "where necessary".

[39] Apart from the assertion in the submissions, there is no credible evidence that this "Code" formed a term of the contract of employment. Further, when one looks closely at the terms being highlighted by the Claimant's counsel, it appears to be directed at ensuring that management staff, which included the Claimant, dealt with other non-management staff in a way which would enhance employee performance. There was no independent evidence that the Code was ever treated as a term of the employment contact of the management staff. If that finding is correct, and I have no doubt that it is, then there has been no breach of any express term of the Claimant's contract of employment, and I so hold.

[40] It is true that the cases cited by the Claimant do raise questions about the breadth and continuing sanctity of the rule in **Addis**. There appears to be an emerging view that in the current social context, it is no longer correct to treat a contract of employment as a normal commercial contract. This has led to the efforts to find some additional remedy for the aggrieved employee who is dismissed. Certainly in the UK (and to a similar extent in this jurisdiction) in light of the statutory framework in which industrial relations operate, the flexibility of the common law to provide additional remedies, is limited. The conceptual approach seems to be to provide a remedy for the "manner of the dismissal". The preferred solution would be to imply a term that the power of dismissal would be exercised fairly and in good faith. Although there is no definite agreement on how this would be achieved, at least the precise limits of the so-called Johnson exclusion are, at least, being more clearly defined and **Edwards** is a useful marker in the process.

[41] The constraints on the efforts to provide some additional remedy for the aggrieved employee were noted in the decision of Morrison J.A. in the unreported decision of **United General Insurance Company Limited v Marilyn Hamilton** SCCA 88 of 2008 in the Jamaican Court of Appeal. Similarly to the **Edwards** case, this also had to do with an appeal from a refusal to grant summary judgment.

[43] In the course of his judgment, the learned judge cited and analyzed the same authorities that have been cited in the Claimant's submissions in this case. These are **Malik & Mahmud v Bank of Credit and Commerce International (in Liquidation)**, **Eastwood and Another v Magnox Electric plc** and **Johnson v Unisys** [2001] 2 ALL ER 801. These cases seemed to confirm the view that there exists an implied term of trust and confidence in a contract of employment. They have been characterized as assaults on the rule in **Addis**. Notwithstanding those judgments, the Court of Appeal still regarded **Addis** as being good law. In the course of his judgment Morrison JA said.

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

[44] Counsel for C&WJ in the course of his submissions pointed out that in dealing with the issue of whether damages could be obtained for the manner of dismissal, Morrison JA recognized in the United General Insurance case that the legislature in Jamaica, by providing a remedy must be taken to have considered and rejected extending the remedy beyond that category. This must be taken to mean that the common law cannot be extended by the Courts to provide for damages for the manner of dismissal. Indeed, it is the conclusion at which the England and Wales Court of Appeal arrived, as seen from the leading judgment of Moore-Bick in **Edwards** discussed above.

[45] It was also implicitly recognized by the English Court of Appeal that until the House of Lords reverses the principle articulated in Addis, it remains good law. There is no doubt that courts in this jurisdiction have continued to treat as good law, the principle in **Addis.** This has been seen in the **Cocoa Industry Board** case, **Kaiser Bauxite Company v Cadien** 1993 20 JLR 168 and the **UGI v Marilyn Hamilton** case as well as **Gordon v FTC.** They clearly reinforce the Addis principle. Further, as noted in C&WJ's submissions, the Claimant here has already received the amount due pursuant to the notice provision in the contract.

[46] Lord Nicholls dicta in **Eastwood and Another v Magnox Electric** is also instructive. In the course of that judgment his lordship stated:

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

[47] Regrettably, the Claimant has failed to show how any loss he purportedly suffered arose by reason of any breach or act other than his dismissal. It must follow that the ordinary principles of Addis apply and the Claimant's claim for damages must fail, him having been provided with payment in lieu and having failed to establish any pre-dismissal breach of his contract.

CONSPIRACY

[48] The Claimant has pleaded that the 1st Defendant conspired with the 2nd and 3rd defendants to cause him injury. The defendants, and each of them, have denied that they were involved or participated in any conspiracy against the Claimant. The basis for the conspiracy was the Claimant's support for the designs of Technical Enterprises as opposed to the designs of then C&WJ director, Engineer Milton Weise. Apart from stating as the reason for the conspiracy the Claimant's support for the competing design, no specific averments are made which point to a conspiracy. Again, the maxim that he who alleges must prove, is relevant. It is not sufficient to merely state a series of facts and then invite the court to draw as the only possible inference, the fact of a conspiracy.

[49] Clerk and Lindsell on Torts, 12th Edition defines the tort of conspiracy in the following terms:

> "The nature of conspiracy. A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. As a tort, conspiracy arises chiefly from a combination of which the 'real purpose ... is the inflicting of damages on A as distinguished from serving the bona fide and legitimate interest of these who so combine, resulting in damage to A. A malevolent intent, though it may be evidence of an illegitimate purpose, is not an essential ingredient of the tort. The principles have been developed largely in the course of

this century and must not be regarded as incapable of further development.

It is now clear that a 'conspiracy to injury might give rise to civil liability even though the end were brought about by conduct and acts which by themselves, and apart from the element of combination or concerted action, could not be regarded as a legal wrong.' It is with this form of conspiracy that this section is chiefly concerned, because a conspiracy to do unlawful acts will normally involve acts tortious in themselves, often within the two preceding sections. The tort of conspiracy, where the acts would without combination be lawful, forms a qualification to the general rule that the mere agreement of many persons to act in concert cannot make the act of any one or more wrongful, if it would not be wrongful when done by each alone independently."

[50] The rule in **Crofter Hand Woven Harris Tweed v. Veitch** [1942] 1All ER 142, (a case which all parties seem to accept states the law) may be summarized in the following terms:

The execution of an agreement which has as its predominant object the aim of causing loss to the plaintiff's business interests is actionable as tort of conspiracy. The predominant intent to injure is essential: if the predominant object of the combination is to further the defendant's own interests, the tort will not be committed.

Lord Wright in the **Crofter Hand Woven Harris Tweed** case stated:

"...where the acts are per se lawful, the presence or absence of intention to injure is the determining feature, and that such an intention is rebutted by a finding that the combiner's real object was to advance their interest"

He stated further:

I approach the question on the assumption that the appellants have to prove that they have been damnified by tortious action. They do not prove that by showing that they have been harmed by the acts done by the respondents in combination, these acts being apart from any question of combination, otherwise within the respondent's right. *It is not then for the respondents to justify these acts*. *The appellants must establish that they have been damnified by a conspiracy to injure, that is, that there was a willful and concerted intention to injure without cause, and consequent damage".* (Emphasis Mine)

[51] I agree with the submissions of counsel for the 2nd and 3rd defendants that the Claimant's submissions where it accuses those defendants of "turning a blind eye" to the exclusion of the Claimant from the evaluation process which they had been engaged to undertake, seems to be an acceptance that the elements of the tort have not been made out. I would go further to note the Claimant's counsel's own submission at paragraph 37 of his original submissions. He cites Clerk and Lindsell on Torts 18th Edition, paragraph 24-130, where it is stated:

> ".....everything turns on the distinction between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any....just cause".

[52] I also accept the submission made by Claimant's counsel where he quoted the same authors at paragraph 24-134, referring to the judgment of Lord Simon in **Crofter Hand Woven Harris Tweed v. Veitch** as saying:

> "It is plain that a combination may have more than one object or purpose. If so, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interests of the combiners (no illegal means being employed) it is not a tortious conspiracy even though it causes damage to another person.

[53] From the foregoing, it seems trite that where a person asserts that he is the victim of a tortious conspiracy, he must show that the predominant purpose of the combination was to cause him injury. The Claimant must therefore show this at least on a balance of probabilities. The Claimant points to the decision to engage the 2nd and 3rd defendants to review projects at Coopers Hill and other stations where there were conflicts in the specifications and costs between those provided by Technical enterprises and those provided by director Weise. The correspondence which emerged during the taking of the evidence indicates quite unequivocally that the 1st Defendant was seeking to satisfy itself about the appropriateness of each of the designs. In particular, it was concerned about the proposed costs of the competing designs and sought to inform its decision by engaging the 2nd and 3d defendants to assist with this decision-making process.

[54] It is for the Claimant to show that the predominant purpose of the combination was to injure him. But the Claimant must also show what damage he has suffered. Has the Claimant done so on a balance of probabilities? I do not believe that he has and must also in respect of this head of claim find for the defendants.

[55] Given the findings, on the issue of liability, it is un-necessary to consider the submissions which the Claimant has made in respect of damages. I would however wish to reiterate my finding of fact that the damages which are the subject of the claim by the Claimant would, if they were payable, all flow from his dismissal and not from any other breach of his contact. But I should also observe that some of the submissions do not derive from any evidence led by the Claimant. Thus, for example, there are submissions about the age of the Claimant's wife; the state of his health and his expected longevity. There are also submissions on the annual value of a fully maintained motor car and an assumption that the value of a telephone benefit would have doubled in time. I mention these only to emphasize the need to ensure that pleadings and consequent submissions must have their basis in evidence.

[56] I therefore make the following orders

Judgment for the defendants on the claim for damages for wrongful dismissal and for conspiracy.

Costs to the defendants to be taxed if not agreed.

ROY K. ANDERSON

PUISNE JUDGE

SEPTEMBER 30th, 2011.