

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

COMMONWEALTH OF DOMINICA
Claim No. DOMHCV 0314/2014

PERICSON ISIDORE

Claimant

- and -

MARPIN 2K4 LTD

Defendant

Before the Honourable Madame Justice Jacqueline Josiah-Graham

Appearances:

Mrs. Cara Shillingford-Marsh for the Claimant; and
Ms. Danielle Wilson for the Defendant

2022: December 5, 6

2022: December 29

2023: June 26

JUDGMENT

INTRODUCTION

- [1] **JOSIAH-GRAHAM, J:** - This claim, filed on September 5, 2014, seeks compensation for wrongful dismissal and breach of the implied duty of mutual trust and confidence owed an employee by an employer. The Claimant was employed by the Defendant Company as General Manager from October 1, 2012 to December 31, 2012 on a fixed term contract. Afterwards, from January 1, 2013 until November 29, 2013, he continued in this position receiving the same benefits without any extension beyond the expiration of the fixed term contract.

FACTUAL BACKGROUND

- [2] The Claimant's tenure with the Defendant company commenced on January 10, 2011 when he was employed as its Business Sales Manager. At the time he was forty-three years old. By letter dated August 19, 2011 he was confirmed in the position of Business Sales Manager effective July 10, 2011 after a successful probation period of six months. Shortly after, on October 1, 2011, he assumed the position of Systems Operations Manager when he agreed to new terms of employment to take effect from the said October 1, 2011 and to be part of the permanent establishment. In January 2012 he was made Acting General Manager until October 1, 2012 when he was appointed General Manager by a fixed-term contract contained in a letter dated November 9, 2012. The relevant term of the contract contained in the letter reads -

"1. Contract Terms of Employment

Your contract shall commence on October 1, 2012 and end on December 31, 2012 and shall be in respect of a position which is part of the permanent establishment *at the end of which*

if not extended you will revert to your substantive post of marketing manager Marpin 2K4...
[Emphasis added]

- [3] At the end of the contract on December 31, 2012, he continued functioning in the post of General Manager until his termination and was not reverted to his substantive job position and no further correspondence on an extension or on his status was made. Also, at the time of the dismissal, there was no term in the contract providing for notice upon termination either in the General Manager's position nor in the substantive job position. The sole clause for determination of his contract is provided at Clause 9 of the agreement dated November 9, 2012 provides for termination by the Board where there is misconduct on the part of the employee. The clause states -

9. Termination of Contract

"Any breach of the provisions of this contract or any act or omission, which in the opinion of the Board constitutes misconduct on your part, shall render you liable to immediate dismissal and thereupon the Board may terminate this contract forthwith and without making any compensation thereof."

- [4] The Claimant's case is that it is only in the event of termination for a cause that the notification period does not apply and termination can occur with immediate effect. As his termination by letter dated November 29, 2013 was without cause, it was unlawful. The termination letter was signed and handed to him by the Chairman of the Board of Directors, at a meeting he was suddenly summoned to attend around mid-afternoon on the same day. At that meeting, the Chairman offered him to resign instead of being summarily dismissed.
- [5] According to the Claimant, there was no notice, or no properly determined payment in lieu of notice and, as such, the Claimant seeks relief for breach of contract and/or wrongful dismissal inclusive of loss of salary, loss of free cable, phone and internet services and loss of gratuity; damages including aggravated and exemplary damages for breach of contract, interest and costs. He also claims that the manner and circumstances of his dismissal were in breach of the implied term of mutual trust and confidence between employer and employee, and he also seeks damages for financial loss he suffered as result of the Defendant's breach.
- [6] At the time of his employment, the Defendant was a provider of cable television, internet, optical fibre and telephone services in Dominica. Marpin 2k4 Limited was established following a receivership action and lengthy legal battle by WRB Enterprises Inc. and the Dominica Social Security about 2009¹. Following the filing of this claim, Marpin 2K4 Limited's business was integrated into FLOW Dominica's operations when it was thereby acquired on or about May 12, 2017.
- [7] While there is no dispute that the Claimant's services were terminated without cause and without notice, the Defendant resists the claim that termination of the claimant's employment was wrongful. The Defendant insists that it was within its lawful right to terminate the employee and to make payment in lieu of notice, and that further, the decision to terminate the Claimant was not based on cause but on

¹ Nature Island Investment Company Ltd v Marpins Telecoms & Broadcasting Ltd (In Receivership) CA 1 of 2005

consideration of the company's financial circumstances and what was in the company's best interest at the time. The Defendant relies on the termination letter. The content of the termination letter states -

"November 29, 2013

Mr. Pericson Isidore
General Manager
Marpin 2K4 Limited
Great Marlborough Street
Roseau
DOMINICA

Dear Mr. Isidore,

We make reference to your employment as General Manager of the Company, Marpin 2k4 Limited and regret to inform you that the Company has decided to terminate your employment with immediate effect.

We have been advised that as a result of the said termination you are entitled to three months pay in lieu of notice.

Kindly deliver all company properties in your possession including keys, documents, computer flash drives etc to the accountant, Ms. Maria Jno Jules, whereupon a cheque for the total sum payable will be handed to you.

Thank you for your service to the company and we do wish you well in your future endeavours.

Please be guided accordingly.

Yours Faithfully

[Signed]
Francis Emanuel (Mr.)
Chairman-Board of Directors

PROCEDURAL BACKGROUND

- [8] The trial of this matter took place some seven years after pre-trial review had been completed. The claim for wrongful dismissal was filed on September 5, 2014; notice of acknowledgment of service was filed on October 7, 2014; defence was filed on October 14, 2014; reply to defence was filed on October 27, 2014; witness statements and summaries for the Claimant and Defendant were filed in July and August 2015; three trial bundles were prepared and filed in November 2015, and the matter was set down for a trial date.
- [9] Prior to the trial the Claimant moved the Court by an application dated March 24, 2021 for an order for summary judgment and interim payment pursuant to CPR 15.2 of the Eastern Caribbean Supreme Court Rules 2000 as amended. In the Affidavit in Support of that application, the Claimant avers that it had been more than six (6) years since the claim had completed pre-trial review and awaiting a trial date.
- [10] The application for summary judgment was heard on October 7, 2022. The Court dismissed the application and fixed the trial to come on expeditiously. That this trial did not take place earlier is unfortunate, however there are a number of events which account for the delay, including a major mold infestation at the Court Office's former location which necessitated the reconstruction of many court files and accommodation, the passage of Hurricane Maria in September 2017 which caused major flooding of the Court Office's former location and destroyed many files, and the COVID pandemic which resulted in trial delays.

Issues for Determination:

- [11] The issues for determination are -
- i. Was the Claimant given notice of termination?
 - ii. If not, what would constitute reasonable notice in the particular circumstances?
 - iii. Whether the Defendant breached the implied duty of mutual trust and confidence between employer and employee causing the Claimant financial loss and damage?
 - iv. The duty to mitigate loss.
 - v. Whether the Claimant is entitled to exemplary and/or aggravated damages?

Claimant's Submissions

- [12] Learned Counsel for the Claimant submits that when he was presented with the letter of termination on November 29, 2013, which took immediate effect, this constituted a breach of his contract of employment because he was not given adequate notice and there was no cause for his termination. Such reasonable notice, Counsel contends, would be 12 months' pay in lieu of notice, instead of the three (3) months' salary in lieu of notice offered by the Defendant.
- [13] The Claimant also claims that the implied term of mutual trust and confidence of his employment contract with the Defendant was also breached. He contends, first, that the said termination was effected on the same day that the Dominica Electricity Services Company Limited (DOMLEC) disconnected the electricity supply at the Defendant's Morne Daniel studio. As both incidents were featured on radio and online news outlets, the Claimant in his evidence states that the Defendant's decision to terminate him on the same day led members of the public to draw an inference that the disconnection and termination were related. Secondly, the Claimant contends that under the expired November 9, 2012 contract, there was no clause in this contract that permitted the Chairman to terminate his employment without cause. His contention is that under this contract, only the Board of Directors had the authority to terminate him.
- [14] These, he claims, are breaches of the implied term of mutual trust and confidence that neither party would, without reasonable cause, act in such a way as to destroy or seriously damage the relationship of confidence and trust between them or to diminish his chances of obtaining future employment by bringing his professional competence into disrepute.
- [15] The Claimant's Counsel also contends that owing to the timing of his termination he has been unable to find suitable alternative employment, which created financial difficulties as some of his obligations could not be taken care of, and he has had to travel out of state in search of employment, thereby incurring additional expenses. He also claims to have been unable to make payments on his mortgage and loans. This has resulted in an increase in the interest charged by the bank and as such he has suffered financial loss in that respect.

Defendant's Submissions

- [16] The Defendant denies that the termination of the Claimant's employment was wrongful. The Defendant admits that the Claimant was terminated without notice and that he was given three months' payment in lieu of notice, which it determined was appropriate. For the Defendant, the question of whether or not the Claimant was wrongfully dismissed from the Defendant's employ hinged on the adequacy of notice or payment in lieu thereof. That payment, together with the allowances he would have already received for that period, [which they submit he was not entitled to²], is appropriate according to the Defendant.
- [17] Learned Counsel for the Defendant contends that the Claimant's substantive position was Business Sales Manager and that he was employed under a contract of employment which did not stipulate its duration or expiry (permanent employment). Counsel asserts that, where a contract of employment does not stipulate its duration or expiry (a contract of an indefinite period), an employer may lawfully terminate the contract of employment upon reasonable notice or on payment of a sum in lieu of reasonable notice. Counsel submits that the Claimant's employment was terminated in writing and upon payment of a sum in lieu of reasonable notice of termination.
- [18] On the claim for breach of implied terms of trust and confidence, the Defendant denies that there was any express or implied term that the Claimant could not be terminated on the same day that its electricity supply was disconnected. The Defendant emphasized that it never held the Claimant responsible for the accumulated electricity bill and that it was understood at the time that its cash flow did not permit regular and substantial payment on its arrears. The Defendant also submitted that the Claimant was aware of these expenses and was involved in the company's efforts to address the financial challenges the company faced.
- [19] Counsel for the Defendant contends that if the Claimant suffered any harm or disadvantage, or was unable to find employment, or his reputation was destroyed, these were not brought about by any unlawful action on its part. Counsel argued further that the decision to end the Claimant's tenure was based on consideration of what was in the company's best interest at that time, and that the Claimant is not entitled to any of the reliefs sought and his claim should be dismissed with costs. She asserts that the Claimant was paid a sum which was equivalent to his emoluments in lieu of notice.

Wrongful Dismissal

- [20] Essentially, the breach of contract of employment for wrongful dismissal may be constituted by (i) a failure of the employer to give adequate notice of the termination of the contract; (ii) a failure to make an adequate payment in lieu of notice (PILON); (iii) a failure to comply with a contractually required procedure on dismissal; or (iv) an unjustifiable summary termination of the contract.
- [21] Wooding CJ in *Fernandes (Distillers) Ltd v Transport and Industrial Workers' Union* (1968)³ held that "A wrongful dismissal is a determination of employment in breach of contract which cannot be justified at

² DOMHCVAP 2004/0020 - Dexter Ducreay v Dominica Water & Sewage co. Ltd. at paragraph 7

³ 13 WIR 336. He said, in part, at 340:

law ...". In **Johnson v Unisys Ltd**⁴ Lord Hoffmann, at paras. [35] – [36] sets out some context for this position wherein he states:

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

[22] The learned authors of **Halsbury's Laws of England**⁵ are also helpful. It states wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely:

- (1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and
- (2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily.

[23] The primary remedy for an employee who has been wrongfully dismissed from employment is damages representing the deficit in the notice period. An award of damages is to compensate the employee for the losses suffered from not having been terminated in accordance with the contract, which is to say upon determination of reasonable notice or upon payment of salary and other contractual entitlements, if any, in lieu of notice: **Dominica Agricultural Industrial Development Bank and Mavis Williams**⁶; **Ambo v Dominica Air and Seaport Authority**⁷.

Issue 1: Notice

[24] In the instant claim, as indicated before, there was very little in dispute as it relates to the factual matrix regarding the termination on November 29, 2013. The Claimant continued in the position of General Manager, having never reverted to the marketing manager position following the fixed term appointment which ceased on December 31, 2012, as a permanent employee until he was dismissed on November 29, 2013. Despite submitting in its written submission that the Defendant's substantive position was Business Operations Manager, in its defence, the Defendant admitted the Claimant's evidence *g that upon expiration of the said fixed term contract, the Claimant continued his employment with the Defendant in the position of General Manager as a permanent employee [until his termination]. The terms of the Claimant's employment were agreed to both orally and by conduct*". The Claimant's

⁴ [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518

⁵ Employment (Volume 39 (2021)), para 832

⁶ Civil Appeal No. 20 of 2005 Para 44

⁷ DOMHCV2010/0297

employment as General Manager was therefore not a fact in issue. Also, in its defence and at trial, the Defendant admitted that there was no notice period in the contract and that they relied on the contractual right to dismiss an employee with payment in lieu of notice.

- [25] The Court finds, in view of the admissions of the Defendant and because the termination was communicated by letter which had been written in circumstances where the Claimant, when he attended the meeting with the Company directors on November 29, 2013, was given the option to resign instead of the dismissal, that the dismissal effected without notice on November 29, 2013 was wrongful if the Defendant failed to make an adequate payment in lieu of notice.
- [26] Accordingly, the next issue for determination is whether the three months' payment in lieu of notice given to the Defendant was adequate in all the circumstances.

Issue 2: Reasonable Notice of Termination

- [27] With respect to the adequacy of payment in lieu of notice, Counsel for the Claimant submits that the Claimant was entitled to the payment of 12 months' salary and not 3 months, which was paid by the Defendant.
- [28] The Defendant objects. It is the company's submission that the Claimant's original contract provides for three months' notice, therefore, it was correct to offer him the three month's salary in lieu of notice, which he has already received. The Defendant also contended that in its view the three months' notice was adequate since the appointment as General Manager was for a "short stint" , being for a fixed term of 3 months and thereafter for 11 months.
- [29] Here the common law on establishment of cause for dismissal must be applied. In **Trolley's Employment Handbook** Twenty First Edition at paragraph 48.6, the author in dealing with the issue of the termination of employment vis-à-vis the contractual notice period wrote:

"The contract of employment will usually specify the period of notice to be given to terminate the contract; indeed, the written particulars given to the employee must include the length of notice which the employee is obliged to give or entitled to receive (see 8.5 **Contract of Employment**).

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

- [30] The observation by the Privy Council in the Bermudian case of **Reda & Anor v Flag Ltd (Bermuda)** [2002] UKPC 38, at page18, is helpful:

“The appellants observe that dismissal without cause is not the same as dismissal without notice, and submit that the implication of a requirement of reasonable notice would accordingly not be inconsistent with the express terms of the contract. So far their Lordships agree with them. But they part company from them at the next stage of their argument viz that all contracts of employment are, as a matter of law, subject to an implied term that they are terminable on reasonable notice, and that such a term can be displaced only by clear words: see **Lefebvre v HOJ Industries Ltd** [1992] 1SCR 831.

In their Lordships' view there is no such rule. **The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice:** see **Chitty on Contracts** (28th Ed.) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contracts which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision of the contrary. **Lefebvre v HOJ Industries Ltd** was such a contract. But there is no need for the law to imply such a requirement in a case where the contract is for a fixed term.” [Emphasis supplied]

- [31] In the instant case it is manifest that the Claimant was not employed under a contract which was determinable on 3 months' notice.
- [32] By letter dated November 9, 2012, when he entered into a fixed term contract as General Manager, the relevant term of the contract provided that any breach of the provisions of the contract which in the opinion of the Board amounted to misconduct would result in immediate termination of the contract without compensation. As stated earlier, there was no term in the letter dated November 9, 2012 providing a notice period for termination. The sole clause for determination of his contract is provided at Clause 9 of the fixed term agreement dated November 9, 2012.
- [33] Interestingly, the Claimant's letter of appointment dated October 1, 2012 as General Manager identifies his substantive position as the Marketing Manager and his letter of appointment prior to this position of General Manager dated October 1, 2011 confirmed his appointment to Systems Operations Manager. There is no position as Marketing Manager. At the trial the Defendant admitted as a fact, confirmed by the Claimant under cross examination, that the substantive position at the time of separation was Operations Manager on permanent employment.
- [34] The records show the three confirmed positions of his employment with Marpin 2K4 as being Business Sales Manager for 9 months (January 10-September 30, 2011); Operations Manager for 12 months (October 1, 2011 to September 30, 2012) and General Manager for 14 months (October 1, 2012 to November 29, 2013). The total period of his employment with Marpin 2K4 Limited was two years, eleven months with the General Manager position being the longest position held in the Company. The appointments to these three positions were not disputed at the trial.
- [35] Further, on the evidence there are no contractual terms for termination either agreed or proposed between the parties for the position of General Manager. There is also no evidence, in the letter of termination or in the written or oral communication between the parties regarding his termination, giving

any indication of an agreement with the notice period. In fact, it is the Claimant's case that such a non-existent term may not be implied. The sum of three months' pay in lieu of notice was stated in the termination letter dated November 29, 2013. An examination of that letter admitted at the trial shows the offer of three months' pay in lieu of notice was the first time such term was raised with him.

- [36] Such a term of reasonable notice for termination may not be arbitrarily implied by the conduct of only one party to an employment contract. In **Duke v. Reliance System Ltd**⁸. Browne-Wilkinson J stated the following:

"a policy adopted by an employer unilaterally cannot be a term of an employee's contract on the ground that it is established custom and practice unless it is at least shown that the policy has been drawn to the attention of the employee and has been followed without exception."

- [37] In the judgment of the Caribbean Court of Justice (CCJ) in **Marriette Warrington v Dominica Broadcasting Corporation**⁹, a case from Dominica under the Labour Contracts Act, the Court expressed displeasure at the practice of employers leaving it open to tell an employee, at whatever stage the employer chooses, that a certain term which could be unfair to the employee, was a term of the employment. Although this is a claim under common law, it is worth emphasising the point made by Barrow, JCCJ delivering the judgment of the Court when he stated it was a fundamental purpose of an employee's contract for the terms of the labour relationship to be made certain by being reduced to writing. At paragraph [46] His Honour states –

"It may now be appreciated that the Labour Contracts Act was intended to protect employees by prohibiting the very conduct the Corporation seeks, even now, to uphold – to deny certainty to an employee as to the terms of her contract of employment. That proscribed conduct enabled employers in the past to abuse employees by leaving it open to employers to tell an employee, at whatever stage the employer chose, that a certain term, however unfair to the employee, was a term of the employment. This is what the Act was passed to prohibit."

- [38] In the instant case on expiration of the November 9, 2012 contract the Claimant continued in the position of General Manager under the same terms and conditions contained in the said contract. Though the fixed term contract expired, he held the same position, was paid the same salary, received the same benefits, performed the same duties, and by effluxion of the November 2012 continued as part of the permanent establishment until the dismissal. No terms were agreed for his continuation.
- [39] The Court accordingly holds the view that the implied term that reasonable notice be given in circumstances where there was no cause for the termination cannot be fixed by the employer only. Further, with the payment of three months' notice in circumstances when none was initially agreed, there is now an issue of what is reasonable in these circumstances, as notice terms were not previously determined and agreed contractually by the parties for termination. The meeting held on the day of the termination did not agree terms for termination. Had he resigned voluntarily with terms that were agreed

⁸ [1982] IRLR 347, referenced in footnote 9 of paragraph 3.25 of The Law of Contract, 3rd Edition, Butterworths, pg. 640

⁹ CCJ Appeal No DMCV2018/001 [unreported]

to by both parties then it would follow that he would be bound by his negotiated termination conditions:
Cecelia Deterville v Foster & INCE Cruise Services (St Lucia) Ltd¹⁰.

[40] According to the House of Lords in **Delaney v Staples**¹¹ there are four instances where dismissals could be executed lawfully by giving the employee a payment in lieu of notice. These four instances are as follows:

- (1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum;
- (2) The contract of employment provides expressly that the employee may be terminated either by notice or, on payment of a sum in lieu of notice, summarily;
- (3) At the end of the employment the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice;
- (4) Without the agreement of the employee, the employer summarily dismisses the employee and tender payment in lieu of proper notice... The employer is in breach of the contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment". [Emphasis supplied]

[41] Being therefore entitled to common law notice, it must be determined exactly how much notice would be appropriate. Over the years, the authorities have identified key factors which inform the determination of how much notice is reasonable. The traditional analysis to determining an employee's entitlement to notice incorporates the character of employment; an employee's age, the length of service, seniority, and the availability of comparable work. This determination must be firmly rooted in both the material facts and the court's prior and established case law.

[42] The statement of Barrow JA, as he then was, in the case of **Dominica Agricultural and Industrial Development Bank v Mavis Williams**¹², following the ruling of Flossiac CJ in **Saunders v St. Kitts Manufacturing Corporation**¹³ is also helpful:

"Reasonable notice was a matter of law, he stated, that its determination always depended on the circumstances of each case. The court should consider, among other things, the employee's qualifications, his stature in the position which he held, his skill, his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment."

¹⁰ SLUHCv2008/0811

¹¹ [1992] 1 All ER 944

¹² Appeal No. 20 of 2005

¹³ Civil Appeal No. 1 of 1993

- [43] Similarly, in the more recent case of **Deca Penn v Scotiabank (BVI) Ltd**¹⁴ Ellis J noted the following at paragraph 24 of her judgment:

“In determining what constitutes reasonable notice of termination, the courts have generally considered all of the circumstances of the case including the nature and character of employment including seniority and stature, salary and benefits; the employee's age, the employee's experience, training and qualifications, the length of service, and the availability of similar employment.”

- [44] This is supported by several other decisions, thereafter, including the decision of **Rogan Gardiner v Woolworths Ltd**¹⁵. In this case the Court referred to the fourth edition of **Macken, McCarry and Sappideen, the Law of Employment (1997)**. At paras. 116-168, the authors set out the factors that may be relevant for the determination of the period of reasonable notice. The Court stated:

“In the fourth edition of Macken, McCarry and Sappideen, the Law of Employment, (1997) 116-168, the authors state that the considerations which may be relevant to the determination of the period of reasonable notice include the ‘high grade’ and importance of the position; the size of the salary; the nature of the employment; the employee's length of service; the professional standing, age, qualifications, experience, and job mobility of the employee; the expected period of time it would take the employee to find alternative employment; and the period that, apart from the dismissal, the employee would have continued in the employment. The authors note that the factors which are relevant in any particular case must, of course, depend upon the particular facts of the case.”

- [45] For the 12 months' severance benefits in lieu of notice that the Claimants seeks, his Counsel submits that the authorities clearly show that notice well in excess of three months is required to terminate the employment of an employee holding the position of general manager.

- [46] As observed by Counsel for the Defendant in closing submissions, several authorities which dealt with the issue of adequacy of notice which is required when terminating persons holding managerial/supervisory positions with varying notice periods were cited in the case of **Claudia Henry v Roseau Co-operative Credit Union Ltd**.¹⁶ paragraph 38 of the Judgment states thus:

"Some of the periods of notice determined by various courts with respect of wrongful dismissal are as follows: in **Julie Saunders v St. Kitts Sugar Manufacturing Corporation**¹⁷, the appellant was 56 years old, 34 years' service, specialized training in the then vital sugar industry; 10 months' notice was held to be reasonable; in **Ambo v Dominica Air and Sea Ports Authority**¹⁸, the claimant was 40 years old, worked as a supervisor in the security department, worked with the organisation for 5 years, was a former police officer for 12 years, was also a trained plumber; the court held that seven months' notice was reasonable; in **Dominica Agricultural and Industrial Development Bank v Mavis Williams**¹⁹, the respondent had been employed by the defendant for some 21 years and was an Assistant Manager, Securities; dismissed for gross misconduct because of her part in a loan to her boyfriend which involved her persuading her uncle to make his certificate of title

¹⁴ BVIHCV2009/0277

¹⁵ [2012] WASCA 31

¹⁶ DOMHCV2010/0206

¹⁷ Suit No. 1 of 1993

¹⁸ DOMHCV2010/0297

¹⁹ Civil Appeal No. 20 of 2005 Commonwealth of Dominica Judgment delivered on 29 January 2007 [unreported]

available as security for the loan, the boyfriend defaulted on the loan; the court held that 12 months' notice was reasonable; in **Garnet L. Didier v Geest Industries (W.I) Ltd**²⁰, the appellant was, at the time of his dismissal, the respondent's Manager of Land and Agricultural Consultant in Dominica; he was dismissed after he was selected to contest the general elections in 1990; 9 months was held to be reasonable notice; in **Waithe v Caribbean International Airways Ltd**²¹, the plaintiff was an experienced Air Traffic Controller with impressive qualifications, served as a Deputy Airport Manager and Senior Research Officer with the Ministry of Civil Aviation prior to being employed by the defendant as General Manager - having regard to the plaintiffs experience, training and qualifications, the court held that 12 months' notice was appropriate.

[47] In the case of **Claudia Henry**, ten months' notice was deemed reasonable. Here, the Claimant's age unknown, had been employed with the Defendant for 27 years prior to her dismissal. At the time of her dismissal, she was Operations Manager which she held for two years prior to her dismissal and had a degree in Business Administration and a Master's Degree.

[48] In addition to the cases referred to in the case of **Claudia Henry**²², the Claimant cites the following Canadian cases and the CCJ case as comparable cases to the present circumstances for an award of 12 months' salary:

- the Canadian case of **McGuire v Wardair Canada Ltd**²³ the plaintiff was appointed as general manager of Wardair Canada Ltd. with no written service contract and no resolution of the directors appointing him. He was employed by the Defendant between March 1963 and December 1966. His services were terminated without notice or compensation. The trial judge found that the plaintiff was entitled to one year's salary in lieu of notice.²⁴ In addition, Kirby J stated in that particular case, the circumstances leading up to the plaintiff's initial employment and subsequent appointment as general manager, the exceptional nature of his relationship to the company and his competence were all relevant in determining what notice was reasonable. Another factor to be considered was the availability of similar employment, having regard to the employee's experience, training and qualifications. A person in the plaintiff's position was not obliged to accept employment of a different kind or of a lower category and in such cases, it was immaterial that the rate of wages offered was the same.
- **Darren Pohl v Hudson's Bay Company**²⁵ where the Claimant was employed as sales manager at the date of his termination. He worked with the company for 28 years and was then dismissed without cause. The Ontario Supreme Court of Justice found that the appropriate notice termination period was twenty-four (24) months.
- **Warrington v Dominica Broadcasting Corporation**²⁶ where the Caribbean Court of Justice found that six months' notice was reasonable in circumstances where the Defendant's General Manager's employment was terminated after she had been part of the permanent establishment for a period of 15 months after the expiration of her last

²⁰ Civil Appeal No. 6 of 1999 (Dominica)

²¹ [1987] 39 WIR 61 (Bdos: HC)

²² DOMHCV2010/0206

²³ 71 WWR 705

²⁴ See pages 716-721 of judgment

²⁵ 2022 ONSC 5230

²⁶ [2018] CCJ 31

contract. The Appellant had previously been employed by the Defendant under consecutive fixed term contracts.

- Similarly, in the ECSC cases of **Margaret Penn v British Virgin Islands Ports Authority**²⁷ twelve months was also considered to be reasonable notice for a managing director and in **Satyaprakash Rajmangal v British Virgin Islands Electricity Corporation**²⁸ Joseph-Olivetti J at paragraph [43] stated –

“Mr. Rajmangal was employed with the Corporation on a permanent and pensionable basis for approximately 16 years. He is highly qualified, holding a Bachelor of Science degree in mechanical engineering and a master’s degree in Business Administration. He was employed as the generation engineer and he was the head of the Generation Department. From his evidence he was unemployed after his dismissal from the Corporation until February 2007, when he was employed by BVI Marine Management at a much lower salary of \$2,500 per month. He made several attempts to get a job both in the BVI and the wider Caribbean but was not successful. To my mind 12 months’ notice is a reasonable period that should have been given to Mr. Rajmangal in all the circumstances of the case.”

[49] The Claimant’s contention that twelve (12) months’ notice would be appropriate is based on the factors submitted in his claim being his age, education and qualifications, the years of employment with the Defendant, his salary and benefits, the difficulty which he faced when seeking alternative employment and the positions he held at the time of his termination, first acting, then on a fixed-term contract and later in the intervening period between the expiration of the fixed term contract and the dismissal continuing in the same post on the permanent establishment of the Defendant. These Learned Counsel for the Claimant particularised are as follows –

- He was employed with the Defendant company for two years and eleven months, of which he worked as General Manager for 14 months before his employment was terminated.
- He held increasingly elevated managerial positions throughout his employ at the Defendant Company, first as Business Sales Manager for 9 months [January 10-September 30, 2011] then Operations Manager for 12 months [October 1, 2011 to September 30, 2012] and subsequently as General Manager for 14 months [October 1, 2012 to November 29, 2013] he occupied the most senior position of responsibility in the organization which employed 73 employees.
- He was terminated at the age of 44 and his educational qualifications, training and experience include a Post Graduate Degree in Business Administration obtained in 2010 from Leicester University, and a Diploma in Management obtained in 2003 from the University of the West Indies; a national diploma in operational communications from Cable and Wireless College in St. Lucia; and certifications from Nortel and Mitel. He was employed with Cable and Wireless (Dominica) for over 15 years prior to working in the Defendant’s company. That the Defendant company was a leading technology company providing services in cable and wireless and internet.
- He was unable to obtain suitable alternative employment and would be likely to encounter challenges in securing an available similar/comparative employment, his professional reputation having been destroyed putting him at a disadvantage on the local and regional job market.

²⁷ BVIHCV 109/2000

²⁸ BVIHCV 2006/0270

[50] Of the cases cited by the Claimant in support of their proposition that twelve months' notice is adequate, Learned Counsel for the Defendant submitted that, "on the face of it, three months' notice paid by them as reasonable appears anorexic in comparison to the decided cases", however, they contend that, while what is generally considered adequate notice for general managers in other cases is usually in the region of twelve (12) months, the circumstances of the case at bar differs. Counsel urged the Court to take into consideration the specific circumstances of this case and to distinguish it from the authorities which suggest longer periods of notice, particularly:

- a. That the Claimant's substantive position was that of business operations manager and not general manager;
- b. That the Claimant was employed with the Defendant for a period of less than three (3) years and was employed as general manager for an even shorter period; [that being for three months];
- c. Following the expiration of the Claimant's fixed-term contract, which was fully performed, the Claimant continued on as General Manager for only eleven (11) months;
- d. The Claimant had no prior experience as a general manager before he undertook that position in the Defendant's employ or specific qualifications in that area;
- e. The Claimant was relatively young, being only 44 years of age at the time of his dismissal, with approximately twenty more years before retirement, sufficient time to secure alternate employment and to earn any benefits which would have been afforded him due to tenure.

[51] Counsel for the Defendant contended that the purpose of an award for wrongful dismissal is not punitive in nature. It is to compensate a Claimant for the period of notice he would have received had adequate notice been given. In light of the above, she submitted that it would be untenable to expect employers to give twelve (12) months' notice or payment in lieu thereof to an employee who is employed for such a short stint. In this case, after the expiration of the fixed-term contract, which they submit was fully performed, the Claimant was employed for less time (11 months only) than the period of notice he is claiming.

[52] The Defendant urged the Court to consider that prior to his elevation, the Claimant had no prior experience in that position or specific qualifications in organisational management and that he was also relatively young, being only 44 years of age at the time of his dismissal, with approximately twenty more years before retirement, sufficient time to secure alternate employment and to earn any benefits which would have been afforded him due to tenure.

[53] On the authorities, the Court views the case of **Claudia v Roseau Co-operative Credit Union** a helpful comparator to the present case. In that case, the Claimant's age unknown, served the Defendant company for some 27 years from a Junior Clerical Officer prior to her dismissal. At the time of her dismissal however, she held the position of Operations Manager, had considerable duties, served in the post of Operations Manager to which she held for two years from December 2006 to October 2008. She had a degree in Business Administration and a Masters' Degree. The Court held reasonable notice for determination of the Plaintiff's services to be ten months. At paragraph 39 it is noted the conclusion of Thomas, J. ag,

“Therefore, it seems reasonable to conclude that the courts in the Commonwealth Caribbean region have applied the higher period of notice to top management coupled with their qualifications and period of service and in some cases the narrowness of the specialization, for example an aspect of aviation. **The other cases would fall of course below this threshold.**”

[54] In the instant case, on an analysis of the evidence and the factors comprising the Claimant’s age, years of service, seniority, the availability of comparable work, character of the employment, experience, training and qualifications and the nature of the job he performed, it is my view that three months’ notice was inadequate for him to find a replacement job. The period is unreasonably short.²⁹ I also disagree with twelve months’ notice submitted by the Claimant. The Claimant only served this company for 2 years 11 months with 14 months in the position of General Manager. In my view, eight months’ salary ought to have been paid in lieu of notice.

[55] In the CCJ case of **Warrington v Dominica Broadcasting Corporation**³⁰ where the Court found that six months’ notice was reasonable in circumstances where the the General Manager’s employment was terminated after she had been part of the permanent establishment for a period of 15 months, the Saunders, PCCJ, at paragraph 65 stated:

“Law must be premised on principle and must also make sense... it would be unreal to suppose that, throughout the 15 months after the expiry of the 2004 contract, there was no employment arrangement in existence between Ms Warrington and the Board. Ms Warrington was dutifully carrying out the functions of the office and for this she was being paid. The Board was always fully aware of this. If either party desired to end that relationship, they were obliged to do so on notice.”

[56] In this case I have considered the Claimant’s age at the time of the dismissal, being 44, with many years before retirement age. Further, he appears employable and capable of managing the technology company at the level of General Manager as was testified at the trial and evidenced in the pleadings. I have also considered the Claimant’s substantive position on permanent employment as Business Operations Manager and that he has worked at the company for a short period being two years and eleven months only; that the Claimant held the General Manager’s position for 14 months of his total employment with the company, three with a fixed term contract and 11 months following the expiration of the fixed-term contract before his termination. He acted as General Manager but with the clear agreement that at the end of his formal stint as General Manager.

[57] The Defendant acquiesced his continuation as General Manager, albeit not formally, which he continued to perform and was not reverted to his substantive position when the fixed term contract expired. Any future prospect for him would have naturally been to seek a job at the level of senior management having already served in such positions including the position of General Manager for 14 months. With the sudden separation, he had to restart his professional climb, having reached the level of general manager for a technology company from zero. I’ve also taken note that he was not reverted to his substantive position, but terminated with immediate effect. I have also considered the likely time

²⁹ *Marriette Warrington v Dominica Broadcasting Corporation* [2018] CCJ 31 para [66]

³⁰ [2018] CCJ 31

to obtain comparable employment on the authorities regarding the notice period for top management³¹ positions in the Caribbean. I note that he was terminated at the end of the month of November, a time when, given the nature of his skills, there would not easily be an opening for a position as he held due to the Christmas and New Year season. Employment in the job market at this level and around this season is not always buoyant.

- [58] In these circumstances, I find that the Claimant was wrongfully dismissed, the Defendant having dismissed the Claimant without notice and without the payment of adequate compensation in lieu of notice. In my view, on a balance of probabilities, the Claimant was entitled to eight months' salary in lieu of notice, and I so find.

Issue 3: Whether the Defendant breached the implied duty of mutual trust and confidence

- [59] The particulars of breach of mutual trust and confidence are quite extensive. They encompass allegations of political undertones, interference by directors of shareholding companies, issues of redundancy strategy to meet debt obligations, the Claimant's view of his contributions to bring the company to viability and the issue of who to terminate and allegations of malice by the Defendant.

- [60] The implied term of mutual trust and confidence relates to a term of the contract of employment that each party will not, without reasonable and proper cause, act in such a way as would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between it and the other party to the contract.³² In **Woods v WM Car Services Petersborough Limited**³³, the Employment Appeal Tribunal stated:³⁴

“...it is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employee (sic) and employee: *Courtaulds Northern Textiles Ltd. v. Andrew* [1979] I.R.L.R. 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and its cumulative impact assessed: *Post Office v. Roberts*.”³⁵

- [61] The locus classicus case for future loss based on a breach of implied mutual trust and confidence is **Malik v Bank of Credit and Commerce International (BCCI)**³⁶. In that case Lord Nicholls of Birkenhead stated:

“The starting point is to note that the purpose of the trust and confidence implied term is to facilitate the proper functioning of the contract. If the employer commits a breach of the term, and in consequence the contract comes to an end prematurely, the employee loses the benefits he should have received had the contract run its course until it expired or was duly

³¹ *Claudia Henry v Roseau Co-Operative Credit Union* DOMHCV2010/0206

³² Cabrelli, David: *Employment Law*, 5th ed. Pearson Education Limited, UK, page 29

³³ [1981] ICR 666

³⁴ See *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237 at paragraph 51.

³⁵ *Post Office v. Roberts* [1980] I.R.L.R. 347, pages 670-671

³⁶ [1998] AC 20 (HL)

terminated. In addition to financial benefits such as salary and commission and pension rights, the losses caused by the premature termination of the contract (the premature termination losses) may include other promised benefits, for instance, a course of training, or publicity for an actor or pop star...".

- [62] In **BCCI**³⁷ the House of Lords held that there was an implied term of the contract of employment that trust and confidence inherent in the employment relationship should be maintained and preserved. Translated into the language of implied duties, this imposes reciprocal duties on the employer and the employee to maintain such trust and confidence. As opined by Lord Nicholls the most central term of the contract of employment is undoubtedly the implied term of mutual trust and confidence, which from the perspective of the obligations imposed upon the employer has been expressed as a duty upon the employer not, without reasonable and proper cause, to act in such a way as would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between the employer and its employees. The mutual duty of trust and confidence is an "*overarching obligation implied by law as an incident of the contract of employment*": **Johnson v Unisys Limited**³⁸.

- [63] Lord Nicholls explained that:

"The bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages."³⁹

- [64] Compensation for breach of mutual trust and confidence includes damages in respect of the financial loss suffered as a result of not being able to find new jobs, subject to the usual principles such as causation, remoteness and mitigation.

- [65] Lord Steyn in the same **BCCI** case gave a useful overview of what he regarded as the purpose of the implied term of mutual trust and confidence:

"The implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."⁴⁰

- [66] Lord Steyn emphasized the point that only conduct '*likely to destroy or seriously damage*' trust and confidence would give rise to a breach of the term.⁴¹ This principle in **BCCI** was embraced in **Johnson**

³⁷ On the facts, **the bank was run fraudulently and was eventually closed down**. The claimants argued that it was difficult for them to find new jobs because of their association with the bank. The claimants in that case were employees of the BCCI bank. The bank collapsed, owing \$6 billion. It had been having problems for some time, but these problems had been hidden by the fraudulent dealings of the senior officers of the bank. These facts became public knowledge. As a result of the collapse, all 1,400 employees lost their jobs and two sued claiming damages for injury to their reputation and their employment prospects as a result of their association with a dishonest and corrupt employer. The House of Lords upheld their potential claim on the basis that the conduct of the employer was a breach of the duty of trust. This was despite the fact that the employees did not know of the breach until after the employment ended.

³⁸ [2001] IRLR 279

³⁹ *ibid* 34–5.

⁴⁰ *ibid* 46

⁴¹ *ibid* 47.

v Unisys Ltd⁴² and the purpose of the implication of this term into a contract of employment is to facilitate the proper functioning of the contract.

- [67] The House of Lords in **BCCI**, carved out a new head of damages where the employer (by virtue of the dishonest manner in which it operated its business) breached the implied contractual term of mutual trust and confidence, thereby making it virtually impossible for the employee to source employment after being dismissed.⁴³ This is referred to as the “stigma” damages.
- [68] The ‘stigma’ attached to the employee must, however, result in an ascertainable financial loss, recoverable as damages, and does not extend to an employer’s actions occurring at dismissal but only to its prior behaviour which could lead to dismissal since this mischief is addressed by unfair dismissal legislation. ‘Stigma’ damages, is therefore losses which the employee has suffered as a result of his or her inability to obtain alternative employment in the labour market as a result of the stigma associated with the dishonest or fraudulent practices of his or her former employer.
- [69] Thus, in **Johnson v Unisys Ltd**⁴⁴ the House of Lords refused to extend the common law wrongful dismissal claim for damages in cases where the employers’ impugned actions occurred at the point of dismissal; therefore, it dismissed Mr. Johnson’s assertion that the manner of the dismissal caused a mental breakdown which inhibited his ability to find work.
- [70] In **Johnson v Unisys**⁴⁵ the claimant, who had already recovered the then maximum compensation for unfair dismissal, sought to argue that the manner of his dismissal had been in breach of the implied term of mutual trust and confidence. It had made him depressed and unable to work, thereby causing him economic loss. The House of Lords rejected his claim. Lord Hoffmann gave three main reasons for his decision. First, he held that an implied obligation to dismiss the employee only with proper cause and after a fair procedure would be inconsistent with the employer’s express power to dismiss the employee with four weeks’ notice. Second, although the first problem could be overcome by judicial creativity in the design of the implied term, to do so would go beyond incremental common law development and would potentially impose very substantial liability on employers. Third, Parliament had created a remedy for employees in the law of unfair dismissal, with a limitation on the damages to be awarded, so it was not appropriate to develop the common law to ‘get around’ Parliament’s wishes.
- [71] This decision is however contrasted with the decision in **Eastwood v Magnox Electric plc**⁴⁶. In this case the claim for damages was allowed since the employer’s actions amounted to a campaign to demoralise and undermine the employee but was instigated before the dismissal procedure began, resulting in psychiatric injury.

⁴² [2001] UKHL 13

⁴³ Bank of Credit and Commerce International (BCCI) v Ali [2002] IRLR 460 – the stigma must be the real and substantial cause of the employee’s inability to gain employment.

⁴⁴ [2001] IRLR 279; principle was recently affirmed in Edwards v Chesterfield NHS Foundation; Botham v Ministry of Defence [2012] IRLR 129.

⁴⁵ [2001] UKHL 13, [2003] 1 AC 518

⁴⁶ [2004] IRLR 733, [2004] 3 All ER 991 HL.

- [72] The effect of **Johnson** on such claims was clarified in the **Eastwood** case.⁴⁷ Here, it was held that what is often referred to as the 'Johnson exclusion area' related only to the dismissal itself. Employees who already had a cause of action for breach of the implied term prior to the dismissal could still claim, even if they were subsequently dismissed. In the **Eastwood** case, the claimants were employees who had been dismissed after very inadequate investigations or disciplinary procedures conducted by their employers. Provided that they could demonstrate economic loss flowing from these procedures (as opposed to the dismissal), they could claim.
- [73] In spite of this broadening of the scope of an action for wrongful dismissal, it must be remembered that the decision in **Addis v Gramophone Co Ltd**⁴⁸ (**Addis**) has not been overruled. That case held that an employee could not claim damages in respect of the difficulties which he or she might have experienced in gaining alternative employment on the labour market.
- [74] In addition, a more recent case on this issue, the UK Supreme Court decision in the case of **Edwards v Chesterfield Royal Hospital NHS Foundation Trust**⁴⁹, is instructive. This case of **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** did not concern the implied term of mutual trust and confidence, but it did consider the so-called 'Johnson exclusion area' in relation to alleged infringements of express contractual disciplinary procedures. Mr. Edwards argued that the disciplinary panel which decided to dismiss him was improperly constituted and did not follow a fair procedure. The majority held that any harm to Mr. Edwards caused by these problems did not arise independently of the decision to dismiss him, so his claim was precluded by the decision in Johnson.
- [75] The Caribbean Court of Justice (CCJ), has cited with approval the common law principle set out in **BCCI** of good faith which implies into every contract of employment a term of mutual trust and confidence to "ensure that employees are treated fairly and that employers do not conduct themselves in a manner that destroys or seriously damages the relationship of confidence and trust between employer and employee: **Sandy Lane Hotel Co. Ltd. & Cato, Johnson, Poyer**⁵⁰.
- [76] The CCJ also cited with approval the reasoning of Lord Nicholls in **Eastwood v Magnox Electric plc**⁵¹ wherein he said the implied term of trust and confidence "means, in short, that an employer must treat his employees fairly. In his conduct of business, and in his treatment of his employees, an employer must act responsibly and in good faith"⁵². In principle, Lord Nicholls added, "this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of which affect a subsisting employment relationship"⁵³.
- [77] The Claimant claims that the manner and circumstances of his dismissal were in breach of the implied term of mutual trust and confidence when the Chairman terminated his employment without first raising

⁴⁷ *Eastwood v Magnox Electric Plc* [2004] UKHL 35, [2005] 1 AC 503

⁴⁸ [1909] AC 488

⁴⁹ *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22

⁵⁰ [2022] CCJ 8 (AJ) BB

⁵¹ [2005] 1 AC 503

⁵² Para [11]

⁵³ Para [11]

the issue with the other directors at a properly constituted board meeting and putting the matter to a vote. The Claimant claims a further breach of mutual trust and confidence occurred on the fact that his employment was terminated on the same day that the Defendant's electricity supply was disconnected at two of its locations. Here, his contention is that the timing of his termination led many to believe that he was responsible for the electricity disconnection and that he was incompetent.

- [78] The two issues raised, (1) improperly constituted board meeting and (2) the electricity issue, will be addressed separately.

1. The Improperly Constituted Board Meeting

- [79] In light of the authorities referred to above, it is fair to say, that in order to succeed in a claim for breach of mutual trust and confidence, an employee needs to show that the effect of the employer's conduct was likely to destroy or seriously damage trust and confidence between the parties, even if that effect was not intended.

- [80] Learned Counsel for the Claimant submits the Caribbean Court of Justice's (CCJ) case of **Sandy Lane Hotel Co Ltd v Juliana Cato et al**⁵⁴ in which at paragraphs 67- 68 the Court cited with approval the common law principle of good faith in **BCCI**, observed that the common law implies into every contract of employment a term of mutual trust and confidence to ensure that employees are treated fairly and that employers do not conduct themselves in a manner that destroys or seriously damages the relationship of confidence and trust between employer and employee.

- [81] The Claimant also points to the CCJ's⁵⁵ approval of the reasoning of Lord Nicholls in **Eastwood v Magnox Electric plc**⁵⁶ where his Lordship states:

"The implied term of trust and confidence "means, in short, that an employer must treat his employees fairly. In his conduct of business, and in his treatment of his employees, an employer must act responsibly and in good faith. In principle, this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of which affect a subsisting employment relationship. It makes little sense, for instance, that the implied obligation to act fairly should apply when an employer is considering whether to suspend an employee but not when the employer is proposing to take the more drastic step of dismissing him".

- [82] However, in **Johnson v Unisys Ltd**⁵⁷ the House of Lords held that an employee will not be awarded damages on the basis of wrongful dismissal where it was claimed that the act or manner of the dismissal breached the employer's implied duty of trust and confidence. Also, in the case of **Eastwood v Magnox Electric plc**⁵⁸, the House of Lords held that the implied term could not be used to control or regulate the exercise of an employer's discretionary power to dismiss an employee.

⁵⁴ [2022] CCJ 8 (AJ) BB para 67 and 68

⁵⁵ [2022] CCJ 8 (AJ) BB para 69

⁵⁶ [2005] 1 AC 503

⁵⁷ [2001] IRLR 279

⁵⁸ [2005] 1 AC 503

- [83] On the facts of **Sandy Lane**, the CCJ found that the employer had breached the implied term of trust and confidence by failing to adhere to the procedure for termination set out in a document entitled “Champion Rules of the Game” which was handed to the employee upon employment, and which was accepted as forming part of the employment contract. At paragraph 73 of the judgment, the Court held “It was a breach not only of those express terms but also of the implied term of mutual trust and confidence for the Company to ignore these aspects of its own Rules and to send home these Employees, who had given a combined total of almost 30 years’ service, with the bare minimum one week’s notice.”
- [84] The Claimant contends that the facts of **Sandy Lane** apply to his case as “he is in a similar position as the employees in **Sandy Lane** in the sense that the failure of the Defendant Company to follow the correct procedure in relation to his dismissal is similar to the case in Sandy Lane. In this circumstance because the provisions of the **Protection of Employment Act Chap 89:02** do not apply to persons who hold managerial positions such as ‘general manager’, he is therefore unable to file a claim for unfair dismissal under the Act and seeks remedy under this head in contract for wrongful dismissal and breach of trust and confidence”.
- [85] I disagree. In the **Sandy Lane** case, the employees were all dismissed in breach of the Rules which were set out in their contracts. Each of them was required to meet individually with the Human Resources Manager (“the HR Manager”). The HR Manager told them about claims made by a particular hotel guest (the “Mystery Shopper”) in a Report given by that guest to the Company, that they had performed poorly in serving that person. They all protested the claims, with Ms. Cato stating that she didn’t even work in the specified facility on the evening in question (as alleged in the Report), and Ms. Poyer indicating that two weeks earlier the Reservationist Manager had congratulated her for an excellent interaction with the Mystery Shopper. The Manager had informed Ms. Poyer then that training would be provided on areas that needed to be improved. In spite of this, all three employees were handed already prepared letters of dismissal (‘the Letters’) by the HR Manager, together with a week’s wages in lieu of notice and outstanding monies due to them. They were asked to collect their personal items and then escorted off the property. The employees did not have an opportunity to respond to the allegations proffered against them neither was any training done in keeping with the recommendations of the report.
- [86] The letters allege that an investigation revealed that there was sub-standard performance in relation to the Mystery Shopper; that this poor performance led to a decline in the overall rating of the Company; and that each employee would be dismissed with a week’s wages in lieu of notice. The HR Manager admitted that the purpose of the meetings was to terminate the contracts, but that this was done in accordance with the contracts as she looked at the contracts and used the best option available to terminate the employees.
- [87] The Court found that the Company could not rely only on the letters of employment as a defence to the claims, as no provision for payment in lieu of notice is to be found in those letters. Without resort to the

Rules, which include this provision for payment in lieu of notice, dismissal with such payment in lieu would be a breach of contract and, therefore, wrongful. The Rules did provide, for much more than just payment in lieu of notice.

[88] In the instant case, the Claimant's contention is that under the expired November 9, 2012 contract there was no clause in this contract which permitted the Chairman to terminate his employment. He contended that only the Board of Directors had the authority to terminate him. This decision, the Claimant's Counsel contends, was a unilateral decision made by the Directors who were appointed by the Dominica Social Security directors' and that this amounted to a breach of what the parties had agreed concerning termination - that the Claimant would only be terminated by the Board of Directors. This he asserts made him form the opinion that he had committed an act of misconduct. However, it is not enough for him to form such an opinion. The Claimant's contract provides for the Board's termination in circumstances only where there was misconduct on his part. Misconduct in law must be tangible, not based on an employee's opinion. Misconduct amounts to a substantial or intentional disregard of the employer's interests or a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment.

[89] There is no evidence that the Claimant's tenure was terminated for misconduct. There was also no disputing that he was terminated for no cause. There was no question concerning his capability or ability in the performance of his duties. Neither was any evidence led alleging incompetence or any such conduct warranting the sanction of his termination based on the termination clause 9 in the Contract. As stated earlier, the contract states -

"Any breach of the provisions of this contract or any act or omission, which in the opinion of the Board constitutes misconduct on your part, shall render you liable to immediate dismissal and thereupon **the Board** may terminate this contract forthwith and without making any compensation thereof."

[90] At the trial, evidence relating to the termination of the Claimant's employment was adduced regarding the decision taken by the Board of Directors prior to his termination. The Board of the Defendant company comprised six (6) directors of which three (3) were appointed by Dominica Social Security while three (3) were appointed by Dominica Private Power.

[91] Section 6.3 of the Bylaws of Marpin 2K4 Ltd required a quorum of four directors at a board meeting in order to make binding decisions of the Board. Specifically, section 6.3 says "*no business shall be transacted at a meeting of directors unless a quorum is present*" and section 6.2 require that all directors must be given notice of a meeting of the Board of Directors in order for that meeting to be validly called.

[92] The evidence was conflicting. The Chairman in his evidence in chief stated that the decision to terminate the Claimant's employment was taken at a board meeting held on the 13th of November 2013. Under cross examination he was unable to recall the board members who were present when the decision was made. In addition, no minutes of the board was produced which showed that such a decision was taken the Board. When it was put to him that only the Dominica Social Security directors took the

decision to terminate the Claimant and that the Dominica Private Power directors were not aware, he responded *"I am not sure about what you are saying... I think they were aware. As Chairman more than the majority could make a decision on any matter... one recognized them as directors of Marpin"*.

- [93] When it was put to him that a quorum of four was needed for a valid board meeting, Mr. Emanuel stated *"I cannot be sure about that ..."*. He then said that he had a discussion with Nigel Wardle and *'it was explained to him'*. When it was put to Mr. Emanuel that Nigel Wardle was not aware of the decision to terminate the Claimant's employment prior to November 29, 2013, he stated *"I am not saying that definitively"*.
- [94] The evidence of Nigel Wardle, who was a director of the Defendant Company in November of 2013 and a witness at the trial for the Claimant in these proceedings, is that he was not aware of any decision taken at board level to terminate the Claimant's employment. In fact, Mr. Wardle's evidence is that he never received any notice of any meeting wherein a decision to terminate the Claimant was taken. He was not notified by any of the other two (2) Dominica Private Power appointed directors that such a meeting was held in his absence.
- [95] The documentary evidence provided by the Claimant in the form of a screenshot of his conversation with Nigel Wardle dated November 29, 2013 shows that when Mr. Wardle was told about the termination on that date, he responded *"Not known to us can u send me a copy of the letter..."*.
- [96] These bits of evidence about the decision of the Board on a balance of probabilities, does not show the decision to terminate the Claimant was made by the Board of Directors, neither is there any evidence that the Claimant was fired for misconduct thereby warranting the decision by the Board. In both the General Manager's position and the substantive position, there was no agreement that termination for no cause was to be carried out by the Board of Directors and therefore, in my view, whether or not there was a quorum did not matter.
- [97] Looming large from the evidence at the trial is the Company's implied term to act in the best interest of the company. The evidence led shows the Company was in financial straits and there was ongoing discussion of ways and means to reduce costs. These discussions and meetings included decisions and communication with the Claimant General Manager on redundancy and manpower issues of lower-level staff. The General Manager was also part of the effort to ensure costs containment of the operations and debt repayments brought forward from the prior management of the company.
- [98] The worsening financial position of the Defendant was not only confirmed by the Defendant's witness at the trial and in cross examination, but by the Claimant as well as Mr. Nigel Wardle who was the previous Chairman of the Board. It is also undisputed that the Defendant undertook several pruning actions in an effort to improve its financial position. The Claimant also testified of his knowledge of the company's financial position and his own actions to contain the spiraling costs of the Company.
- [99] Counsel for the Claimant suggested to the Defendant's witness that Mr. Isidore's termination was to punish he Mr. Isidore for his reluctance to follow instructions given by political directives. The Chairman

however denied this suggestion. In re-examination it was established that since the Claimant's termination there was no other managerial or non-management position employed by the Company. In fact, Mr. Emanuel was consistent in his testimony that the termination was in an effort to save costs because the Company could no longer pay its expenses out of its cashflow; it being on the verge of bankruptcy. Mr. Emanuel admitted that even regarding the termination benefits, the Company could not pay the Claimant in one payment, but did so over time and which resulted in overpayment, that the Company itself chose to absorb in the interest of the employee.

[100] With regard to the financial status, the evidence showed that the Company had considered several strategies to avoid redundancy including examining the costs structures of the Company and its payroll to know whether to make cost cuts. In addition to termination of the Claimant's employment contract, some employees were subsequently made redundant and some agreed to salary cuts in its efforts to improve its financial position and to realize a profit.

[101] On the evidence I find that there is no conduct by the Board that amounts to the breach of the implied duty of mutual trust and confidence. The contract provided for the Board's termination only in circumstances of misconduct. The termination occurring outside of the express term of the contract, there being no cause for the termination, does not amount to the test required in the circumstances. In the Supreme Court of Canada case, **Wallace v United Grain Growers Ltd**⁵⁹, McLachlin J, although dissenting, in part, at para 115 of the judgment states as follows:

The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal ... A wrongful dismissal action is not concerned with the wrong or rights of the dismissal itself. Far from making dismissal a wrong the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The reward for this breach of contract is an award of damages based on the period of notice which should have been given." [Emphasis supplied]

[102] The evidence also does not show the dismissal being the result of political directives to the board or to punish Mr. Isidore for any reluctance to follow instructions given by political directives. Having observed his demeanour at trial and his evidence, the court finds the witness Francis Emanuel credible. The Court notes that this witness had recently undergone surgery and was home recuperating but agreed to testify despite his condition so as not to delay the trial. The crux of his evidence is that the Company was desperately in financial trouble. The previous Chairman and witness for the Claimant, Nigel Wardle, whom I also found to be a credible witness, also admitted in cross examination that the company, in his words, "*was under duress to meet its financial needs*".

[103] Here the ECSC decision cited by the Defendant, **Michel Williams v National Bank of Dominica**⁶⁰ in which Cottle, J quoted the Dicta of Lord Millet at paragraphs 43 and 51, respectively, of the Privy Council decision of **Reda v Flag**⁶¹ is helpful:

⁵⁹ (1997) 152 DLR (4th) 1 para [115]

⁶⁰ DOMHCV2005/0002

⁶¹ 61 WIR 118

- "[43] The directors of Flag were, of course, obliged to exercise their power as directors in good faith and for the benefit of the company. As the Court of Appeal pointed out, however, this was a duty owed to the company and not its employees. There is no reason to doubt that, in resolving to exercise Flag's contractual right to terminate the appellants' contracts without cause and before a stock option plan had been established, the directors were loyally seeking to further the interest of Flag as they saw them.
- [44] Their Lordships accordingly agree with the Court of Appeal that Flag's express and unrestricted power to terminate the appellants' contracts of employment without cause was not qualified in any way, whether by reference to the implied term of trust and confidence or otherwise. Not surprisingly, the appellants have some difficulty in expressing the content of their contractual right which they allege has been broken. It was not a right to be offered participation in the plan before being dismissed, for Flag was under no obligation to establish the plan at all; nor was it a right not to be dismissed until after the plan had been introduced, for Flag was entitled to dismiss them without cause at any time."

2. The Electricity Disconnection Issue

- [104] The Claimant claimed a further breach of trust and confidence occurred based on the circumstances surrounding his dismissal. The Claimant's employment was terminated on the same day the Defendant's electricity was disconnected at two of its locations. His claim is that the timing of his termination led many to believe that he was responsible for the electricity disconnection and that he was incompetent.
- [105] The Claimant contends that there was a breach on the fact that his employment was terminated on the same day that its electricity supply was disconnected because this was widely published via radio and online media, which:
- (a) affected his future employment prospects;
 - (b) destroyed his professional reputation making him disadvantaged on the local and regional job market; and
 - (c) caused him increase in his interest charges as he was unable to pay his loan due to financial loss of income.
- [106] In his Particulars of Breach of Contract Claim, he states:
11. "The pending disconnection and disconnection were widely publicized on radio and internet media from the early hours of November 29th, 2013.
14. "Many persons have inferred and could reasonably, naturally and foreseeably inferred that the disconnection was caused by poor management and incompetence and that the Claimant was being fired for his poor management skills and incompetence. Additionally, many persons have and could have reasonably, naturally and foreseeably inferred from the timing of the Claimant's dismissal, that he was responsible for the Defendant's financial problems.
- ...

17. In the premises, the Defendant has breached the terms of its contract with the Claimant insofar as it has: failed to give reasonable notice of termination; destroyed the relationship of trust and confidence between itself and the Claimant; has diminished the Claimant's chances of obtaining future employment and has wrongfully and unjustifiably brought the Claimant's professional competence into disrepute."

- [107] The Claimant asserted that the decision made by the Chairman and DSS appointed directors to terminate his employment, was made maliciously and with the intention of causing damage to his reputation. The evidence in this case is that the Defendant was terminated on the same day that the electricity supply of the Defendant was cut. The Claimant asserts that by terminating his employment on the same day as the disconnection, and the wide publicity of both events that followed, the Defendant breached the implied term of trust and confidence, severely hampering the Claimant's ability to obtain alternate employment thereafter.
- [108] Counsel for the Defendant submitted that there is a stark absence of evidence in support of the foregoing assertions of the Claimant. Counsel submitted further that the culmination of both events on a particular date must be regarded as disjunctive or the alleged damage to the Claimant's reputation did not occur at all. Counsel argues the Claimant produced several publications regarding his termination and the comments posted thereunder. Of the several comments posted under these publications, a majority of persons either blamed other people/entities for the financial state of the Company, showed empathy to the Claimant, or gave him accolades. Any negative comments were negligible. They argue further that on a balance of probabilities, the Claimant has failed to establish a causal link between any loss he alleged occurred and his termination from the Defendant's employ.
- [109] I agree. On the evidence, it is undisputed that the Director Parry Bellot and Chairman Francis Emanuel pointed out to the Claimant the effect that this dismissal would have on his reputation and invited him to resign instead. The evidence of the Claimant does not show the companies to which he sent applications, rejecting his application for employment on the basis that he had been terminated from the Defendant's employ or that there was any doubt as to his capability flowing from his dismissal. There have been no allegations on the part of the Defendant that the Claimant was dismissed for incompetence. None of the publications on the disconnection and termination impute incompetence on the part of the Claimant.
- [110] The evidence does not disclose that there was any conduct in the course of the Claimant's employment which caused the defendant to suffer financial loss. The Claimant accepted that his contract was repudiated, and that the termination was effected without cause. In cross examination, the Claimant testified that he was called to a meeting at 2:00pm on November 29, 2013 with the Chairman of the Company, Francis Emanuel and a Director, Parry Bellot. He assumed the meeting related to the disconnection of the company's electricity due to non-payment as it was an issue that consumed his attention for most of the day and was likely to impact negatively on the Company's on-going operations. Instead, he was handed the letter of termination. After reading the letter, the Chairman offered that he resigns from the position instead to save the Company and discussed with him that his resignation would amount to the same benefits he would receive on termination as they are seeking to save the

Company. The Claimant asked to be excused from the meeting to return. He, however, collected his property, handed in the keys in his possession to one Maria Jno. Jules and exited the place of employment. At 4:30 pm, the Chairman telephoned him as he had not returned and himself and the Director, Parry Bellot, were still waiting for his return to the Boardroom. He did not return. The Claimant also admitted that he was aware that the Company was saving costs.

- [111] At the trial the only evidence posited by the Claimant that there was damage to the Claimant's reputation was that of one Frederick Baron, that he "*assumed*" that the Claimant was dismissed for incompetence. This assumption I find is clearly unfounded as there was no tangible evidence which demonstrated that the Claimant was deemed incompetent by the Defendant.
- [112] Accordingly, the claim by the Claimant that the Defendant timed his termination so that many believed that he was responsible for the electricity disconnection and that he was incompetent and which caused the Claimant to suffer financial loss, I do not find that the evidence establishes any implied breach of mutual trust and confidence with respect to the termination decision. In my view the actions complained of by the Claimant are not attributable to the company. The Claimant points to his belief which is attributable to the media and not to the Company. In this circumstance the employer ought not to be held liable.
- [113] As the cases show, the question cannot be answered by deciding whether his belief that the timing of his termination led many to believe that he was responsible for the electricity disconnection and that he was incompetent. On the authorities, an employee who alleges that he or she is entitled to compensation for 'stigma' damages must do so on the basis that the employer breached the implied term of mutual trust and confidence in running, as in the case of **BCCI**, a fraudulent, corrupt and dishonest business.
- [114] The fact that the Claimant was actively seeking to negotiate with DOMLEC with a view to ensuring the business' power was restored/reconnected was encompassed in his duties and forms no causal link between any loss he alleges occurred and his termination from the Company. The Defendant Company did not blame the Claimant for the challenges by DOMLEC. In fact, the Company admitted that the liability was one that was inherited when the Company was bought through receivership and which they were all actively seeking to manage in circumstances where the company was cash-strapped. The evidence does not show the Defendant was motivated by any ill-intention or otherwise.
- [115] There is also no evidence that the Defendant participated in the publicizing of either the termination of the Claimant, or the disconnection of electricity services to the Defendant, even when called upon to do so. On the evidence the publication appears to be made by Matthias Peltier, a Journalist and witness in this matter. He testified that after receiving information about the disconnection he sought to get confirmation from the Company, but to this day there was no communication from the Company, yet, he went ahead and published the information about disconnection and the termination. This witness admitted publishing the information without any confirmation even though as a journalist he is required to follow the protocols and guidelines regarding verification and confirmation of information before

publication. When put to him that he aired the statements for sensation, his only comment was that it was a live show and not a recording. An examination of the comments following the broadcast of Mathias Peltier showed no negative comments against the Claimant but empathy for the separation from the Company due to their financial challenges. Of further note is that the Company did not seek reimbursement of monies overpaid to the Claimant knowing full well he was overpaid. These acts do not demonstrate any spite, ill-will, improper or indirect motive, high handedness, insulting or oppressive behaviour which would entitle the Claimant to an award of exemplary or aggravated damages. They instead appear to safeguard against potential damage to Claimant's reputation which may have been occasioned by his termination.

- [116] One may argue that the Company should have at least put out a statement to assure the public, but the absence of a statement in circumstances where it was not a requirement or a contractual term, does not render the Company liable for financial loss claimed by the Claimant for breach of implied terms of mutual trust and confidence. This however does not amount to "stigma" damages. An entitlement to compensation for 'stigma' damages on the basis that because of the 'stigma' associated with his having worked previously with a company where the employer breached the implied term of mutual trust and confidence in running a fraudulent, corrupt and dishonest business which stigma: **BCCI**⁶².
- [117] In **BCCI** the bank was run fraudulently and was eventually closed down. The claimants argued that it was difficult for them to find new jobs because of their association with the bank. The claimants in that case were employees of the BCCI bank. The bank collapsed, owing \$6 billion. It had been having problems for some time, but these problems had been hidden by the fraudulent dealings of the senior officers of the bank. These facts became public knowledge. As a result of the collapse, all 1,400 employees lost their jobs and two sued claiming damages for injury to their reputation and their employment prospects as a result of their association with a dishonest and corrupt employer. The House of Lords upheld their potential claim on the basis that the conduct of the employer was a breach of the duty of trust. This was because the stigma attached to the company followed the employees and affected their own effort to find new employment. The common law has so far declined to award damages for embarrassment and injury to feelings engendered on dismissal. The principle seems to be hinged on the law of contract which governs employment relationships.
- [118] In the Jamaican case of **United General Insurance Company Limited v Marilyn Hamilton**⁶³ where the defendant sought a preliminary order to have certain claims made in the plaintiff's wrongful dismissal action struck out, Sinclair Haynes J in deciding the matter,⁶⁴ expressed the view that the claim made by the plaintiff was clearly one premised on the employer's alleged breach of the implied term of trust and confidence which caused the claimant to suffer financial loss. On examining the evidence, the court came to this view on the basis that it **was reasonable for the claimant not to expose herself to likely embarrassment by seeking employment in circumstances where she would have to disclose**

⁶² [1997] IRLR 462

⁶³ Claim No. HCV 01124 (unreported) delivered July 29, 2008 (SC); confirmed in Supreme Court Civil Appeal No. 88 of 2008 (unreported) delivered May 15, 2009.

⁶⁴ Marilyn Hamilton v United General Insurance Company Limited [2013] JMCC Comm. 18 (unreported) delivered December 13, 2013.

that she was allegedly dismissed for dishonest behavior. She was dismissed by her employer for cause being that she had behaved dishonestly by introducing unauthorized software into its computer systems, which caused its system to cease functioning and exposing it to liability to the owners of the intellectual property rights in software.

- [119] On the foregoing, it is the Court's view, on a balance of probability that the relationship came to an end in circumstances that did not breach the implied term of mutual trust and confidence of the Claimant's employment contract. Further, the Court is of the view that the issues raised have also not established a breach of the obligation, which caused financial loss. The Court finds that the Defendant in its implied obligations, acted in its best interest and without any malice or capricious⁶⁵ manner towards the Claimant.

The Duty to Mitigate Loss

- [120] Having found that the Claimant was wrongfully dismissed, accordingly, the measure of damages is then the amount which would have been earned in the proper reasonable notice period subject to mitigation and deduction for accelerated payment. The statement of Sir John Donaldson in the older case of **Yorkshire Engineering and Welding Company Limited v Burnham**⁶⁶ is helpful:

"The essence of the cause of action for wrongful dismissal is that the employee is dismissed prematurely. If it is a fixed term contract, he is dismissed before the end of the term. If it is a running contract, his contract is terminated without notice or with less notice than that to which he is entitled under the contract. The damages to which he is entitled consist of the net loss flowing from the premature nature of the dismissal. Prima facie the measure of damage is what the employee would have earned between the time of dismissal and the earliest moment at which he could properly have had his contract terminated less any benefits which he has received and which he would have received if he had been properly dismissed..."

- [121] With respect to mitigation, in a wrongful dismissal action, the terminated employees must make reasonable efforts to mitigate the damages that flow from the termination of their employment. This duty is most commonly discharged by actively seeking and obtaining comparable, alternative employment. Failure to do so is taken into account in determining whether there are any damages for wrongful dismissal. In the text, **Labour Law**, 8th Ed. the authors Simon Honeyball and John Bowers at page 81 posits:

"As in every contract, the employee is required to mitigate his loss as a result of its breach. He cannot sit back at home and mount up his losses in the confident expectation that he will be able to claim them from his former employers. In particular he must take reasonable steps to obtain another job, and if he succeeds in doing so any wages earned in the new position will be deducted from wages due over the period of notice. If, on the other hand, he does not try to find another post, a sum is taken away to represent his lack of effort. Each case depends on its own facts but the dismissed employee does not normally have to take the first job which comes along. He may also act reasonably in refusing to take another position in the company which has just dismissed him. He is entitled to preserve a skilled job, so that

⁶⁵ Malik v BCCI [57] (Lord Dyson)

a painter is not necessarily expected to take work as a general labourer (Edwards v SOGAT (1970)) nor a managing director as an assistant manager (Yetton v Eastwoods Froy Ltd (1967)).

- [122] On the facts, it is the Court's view that the Claimant had made reasonable best efforts to find comparable, full-time work after his employment with the Defendant was terminated, but ultimately had been unsuccessful in the notice period. The evidence shows that he did not receive any responses from the many letters seeking employment. Mr. Isidore who obtained employment inferior to his managerial position in the USA as an inventory consultant did so until September 2014 for one month. Accordingly, no amount is to be reduced for mitigation from the damages awarded to the Claimant.

Aggravated and/or Exemplary damages

- [123] Aggravated and/or exemplary damages which are awarded to an employee are an exception to the general rule that damages are meant to compensate the plaintiff, it is intended to punish the employer and deter similar behavior by others in the future: **Wallace v United Grain Growers Ltd**.⁶⁷
- [124] The object of exemplary damages to punish includes notions of condemnation or denunciation and deterrence - **Rookes v Barnard**⁶⁸. Exemplary damages are awarded where it is necessary to show that the law cannot be broken with impunity, to teach a wrongdoer that tort does not pay and to vindicate the strength of the law - **Rookes v Barnard**⁶⁹. An award of exemplary damages is therefore directed at the conduct of the wrongdoer. It is conduct that has been described in a variety of ways such as harsh, vindictive, reprehensible, malicious, wanton, willful, arrogant, cynical, oppressive, as being in contempt of the plaintiff's rights, contumelious, as offending the ordinary standards of morality or decent conduct in the community and outrageous.
- [125] The Claimant submits that if the employer acted maliciously in conducting the termination, this can result in the award of aggravated and/or exemplary damages to the employee.
- [126] In **Addis**⁷⁰ it was held that no compensation is recoverable for damage to reputation, embarrassment, injury to feelings, the manner of dismissal, and loss of earning capacity. In certain limited circumstances however, damages may be recoverable where one's reputation, which is associated with a public persona and is affected by the wrongful dismissal: **Marve v George Edwards (Darbe Theatre) Limited**⁷¹, or an apprentice who loses training and future employment opportunities as well as wages: **Dunk v George Waller**⁷².
- [127] On the evidence, the Claimant is not associated with a public persona, nor was he an apprentice and thus these exceptions would not apply to him. Accordingly, he would not be entitled to compensation for exemplary or aggravated damages. As stated by Lord Steyn in **Malik** damages applies only to

⁶⁷ [1997] 3 R.C.S.

⁶⁸ [1964] 1 ALL E.R. 367, 407

⁶⁹ [1964] 1 ALL E.R. 367, 407 411

⁷⁰ [1909] AC 488

⁷¹ [1928] 1 KB 269

⁷² [1970] 2 QB 163

financial loss such that the stigma must be a real or substantial cause of the employee's failure to obtain employment. Here the onus is on the Claimant to prove that he is entitled to exemplary or aggravated damages.

[128] The Claimant advanced the following evidence during the trial in support of his claim that the decision to terminate his employment was made maliciously:

- a. The demand made by Francis Emanuel for the Claimant to find a position for the employment of Kimani Felicite despite the company's financial position. He told the Claimant that a Government Minister wanted Ms. Felicite employed. The Claimant requested this instruction in writing and did not create the position since Mr. Emanuel never reduced the instructions into writing [Claimant's viva voce evidence in chief and paragraphs 32 to 41 of witness statement];
- b. The fact that Francis Emanuel told the Claimant that Lennox Linton should not have been engaged to sit on the interview panel because he was the Opposition Leader at that time and the Defendant is a Government place and Linton does not support the Government;
- c. During cross examination Mr. Francis Emanuel had initially denied overturning the decision to make broadcasting of the Miss World Pageant free. When shown an email dated September 23, 2013 from the Defendant's Financial Comptroller located at Vol 3 Tab 48, Mr. Emanuel then said that he is 'not sure' if he gave directions to air the Ms. World event as a free event;
- d. During further cross examination when asked whether the decision to cancel the pay per view event was influenced by 'outside factors' rather than the need to improve the Company's financial position, Francis Emanuel stated "...Let's put it that way... There could have been somebody asking or some people asking for that to be done but then these were the same companies like Mar... the Government and Social Security that pumped money into it when they should not have been pumping into it... Possibly the Government, somebody may have asked and I acceded to it but we have to understand that most of the monies...came from DSS and Government";
- e. The witness, Francis Emanuel also admitted during cross examination that 'there could have been requests [by the Government] made from time to time that were given. We live in Dominica which is a small society...';
- f. The unilateral decision of Francis Emanuel to overturn the previous Board's decision to make certain employees redundant; [See email dated September 26, 2013 from the Claimant to the Defendant's directors complaining about the overturning of the Board's redundancy decision; [paragraphs 17 and 18 of Claimant's witness statement]; and
- g. The decision of Francis Emanuel to pay his friend Keiron Pinard Byrne to do work which the Financial Comptroller had already done [paragraphs 42 and 43 of the Claimant's witness statement].

[129] These were instances identified as evidence of malice. Mr. Waddle, the Claimant's witness, by his own admission showed that the Claimant's status as an employee improved under Mr. Emanuel's chairmanship. The Company itself made no adverse comments regarding his tenure or termination. The evidence of the Chairman is that they took various steps including with the Claimant's knowledge and participation in keeping with his responsibilities to address the financial challenge the company

faced. The testimony amounts to a Company in dire financial straits seeking to avert a collapse. The Company could not even pay its electricity bills. In the circumstance no award is made for aggravating damages. The allegations of political interference were also candidly addressed and from my view of the evidence was not a factor in the termination of the Claimant.

- [130] Learned Counsel for the Defendant submits that any allegation or imputation of improper motive, oppression, or the like, by the Claimant is baseless. These allegations are speculative in nature without a single piece of evidence which can be relied on by the Claimant in that regard. For the Company, the wage bill for the other employees alone was lowered to assist the Company to pay its bills and alleviate the spiraling debt the company faced.
- [131] The Court finds no evidence that the manner of the engagement resulted in any damage to the Claimant's reputation as a result of his termination from the Defendant's employ. The evidence in the case at bar regarding the Claimant's treatment is that he was treated professionally and with respect by the Defendant. The evidence shows that after he received his letter of termination, the Claimant asked to be excused from the meeting to return, but instead he collected his property, handed in the keys and exited the place of employment while the Chairman and the Director continued waiting for his return to the meeting. A further point to note is that the Company did not seek reimbursement of monies overpaid to the Claimant knowing full well he was overpaid. I therefore agree with Counsel for the Defendant that these acts do not demonstrate any spite, ill-will, improper or indirect motive, high handedness, insulting or oppressive behaviour which would entitle the Claimant to an award of exemplary or aggravated damages.
- [132] At the termination of the Claimant the meeting appears to be cordial and respectful. The Defendant did make some effort to allow for mutually agreeable exit conditions. Although they did not provide an even playing field for the discussions, I do not see this as an appropriate case for the Defendant to be further penalized
- [133] On a balance of probabilities therefore, it is the Court's view that there were no aggravating factors in the evidence leading to the termination of the Claimant. The crux of the evidence behind the Claimant's termination is that the decision was purely financial, as stated earlier, to improve the financial position of the Defendant. It is also not my finding that the manner and conduct displayed justifies aggravated or exemplary damages. The evidence led did not show that the actions of the Defendant created circumstances that prevented the Claimant from seeking employment or from being recruited. There was no malice or capricious intent on the evidence.

Interest

- [134] First, having regard to the sums that should have been paid the Claimant is hereby awarded pre judgment interest. This being discretionary, is awarded based on special damages in lieu of notice to preserve the value of the award payable at the filing of the claim ordered at the date of judgment. The interest applies to the salary and benefits the Claimant is hereby awarded.

[135] In the Trinidad and Tobago case of **AG v Fitzroy Browne et al**⁷³ the court considered with regard to the pre-judgment rate of interest that the approach should be to align it with the rate of return on short term investments. I adopt that reasoning. Here, I have considered the recent case from the Court of Appeal⁷⁴ where the Court relied on the decision of Justice Singh from 2012 to determine the interest rate as there was no evidence before the Court of interest rates. The Court however, considers that there exists some evidence from the local banking sector which shows the interest rate over the period from the date of filing this claim in 2014 to today in the local commercial banks fluctuated between 2.5% -3.5% per annum. In this regard, I have considered these rates which are in line with the trends since 2012 for short term investments, that during the period and finds, in the interest of fairness, that an award of interest of the average being interest at the rate of 3.0% per annum is reasonable and hereby so award. Such interest to run from 5th September, 2014 when this claim was filed to today's date on the full sum due, less payments already made.

[136] Secondly, the statutory rate of judgment interest being 5% per annum from the date of judgment to the date of payment of the judgment is awarded in accordance to the **Judgments Act, Chap. 4:70**, s. 7 which provides:

“Every judgment debt shall carry interest at the rate of **five percent a year from the time of the entering up of the judgment**, or from the time of the commencement of this Act in cases of judgments then entered upon and not carrying interest, until the judgment is satisfied, and the interest may be recovered in the same manner as the amount of the judgment”.

Cost

[137] The rule is that the successful party is entitled to costs following the event. The Claimant having substantially won his case, is awarded prescribed costs to be paid by the Defendant pursuant to CPR 65.5 discounted by 25% to take into account the Defendant's partial success.

CONCLUSION

[138] On the foregoing, the Court finds that the action of the Defendant was not sufficient to cause harm such that harm is deemed under the breach of the implied term. The Defendant's termination of the Claimant from its employ without notice will result in damages. The Court finds further that the Defendant acted in its best interest and without any malice towards the Claimant. The Defendant did not breach the implied term of trust and confidence or any term of the Claimant's employment contract.

[139] The measure of damages awarded will be a sum equivalent to eight months' salary which would have been earned, between the time of actual termination and the time which the contract might lawfully have been terminated (by due notice) less the amounts paid by the Defendant as stated in the evidence and any compulsory statutory deductions.

⁷³ CA No 251 of 2012

⁷⁴ Peter Winston Appellant v Dianne Telemacque DOMHCVAP2012/0017 [25]

DISPOSITION

[140] In accordance with the above, it is hereby ordered that

1. The Claimant is awarded damages for wrongful dismissal and breach of his employment contract equivalent to 8 month's salary in lieu of notice, less any sums previously advanced by the Defendant on his termination and any statutory deduction(s).
2. Interest payable on the calculated sum pursuant to paragraph (1) at the rate 3% per annum from the date of filing the claim 5th September, 2014 to the date of this Judgment to be paid by the Defendant.
3. There will be no reduction for mitigation.
4. Judgment interest at the rate of 5% per annum to be paid by the Defendant from the date of Judgment to the date of payment of the judgment.
5. Prescribed costs to the Claimant pursuant to CPR 65.5 to be discounted by 25% to take into account the partial success.

POSTSCRIPT

The Court thanks counsel for their helpful submissions in this matter.

**Jacqueline Josiah-Graham
High Court Judge**

BY THE COURT

REGISTRAR