[2020] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD BISHOP JA

BETWEEN	**UNITED GENERAL INSURANCE COMPANY LIMITED**	**APPELLANT**
AND	**MARILYN HAMILTON**	**RESPONDENT**

Lord Anthony Gifford QC, Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the appellant

Captain Paul Beswick, Mrs Angel Beswick-Reid and Ms Georgette Buckley instructed by Ballantyne Beswick and Co for the respondent

14, 15, 16, 18 May, 20 June 2018 and 3 July 2020

PHILLIPS JA

[1] I have read, in draft, the very detailed and comprehensive reasons for judgment written by my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] On 28 July 2006, United General Insurance Company Limited (UGI) dismissed Mrs Marilyn Hamilton from her employment with it. She was its Information Systems

Manager. On dismissing Mrs Hamilton, UGI paid her one month's salary in lieu of notice, but, in its letter of dismissal, also accused her of impropriety in carrying out her duties. She was told to immediately gather her belongings and, having done so, she was escorted off UGI's property.

[3] Mrs Hamilton sued UGI for damages for wrongful dismissal, some unpaid benefits, to which she was entitled, as well as for libel (the claim pre-dated the Defamation Act, which abandoned the term libel) and unjust enrichment. She asserts that the reason given for her dismissal was false and that it tainted her employment prospects of in the information technology industry. The manner and circumstances of her dismissal, she maintains, breached the implied term of mutual trust and confidence that existed in her contract of employment. Mrs Hamilton states that the payment of a sum equivalent to the minimum notice period, which her contract of employment stipulated, was inadequate in the circumstances. She contends that a reasonable notice period would have been 36 months. She also contends that UGI unjustly enriched itself by wrongly withholding, upon dismissal, the payments that it had made to UGI's pension fund, in respect of her employment, during the course of her employment. She based the libel claim on the contents of the dismissal letter.

[4] UGI resisted her claim. It asserts that although Mrs Hamilton had committed an act which amounted to a repudiatory breach of her contract of employment, it terminated the contract by a payment in lieu of notice, for the required notice period, which is set out in that contract. The period, UGI asserts, is one month. UGI also denies that it was liable to Mrs Hamilton either for libel or for any of its pension contributions.

[5] The claim was tried in the Supreme Court before a judge sitting without a jury. The learned judge, on 13 December 2013, ruled in favour of Mrs Hamilton on the issues of the wrongful dismissal and UGI's pension payments. She, however, refused the claim for damages for libel. Following from the learned judge's orders, an assessment of damages was conducted before another judge of the Supreme Court (the second judge). The orders made by the second judge, shall be further considered below.

[6] UGI has appealed from the learned judge's decision on liability. One of its major grounds of appeal is that the learned judge failed to apply the principles set out in **Addis v Gramophone Company Limited** [1909] AC 488; [1908-1910] All ER Rep 1, HL (**Addis**), which prevents an award of damages for the manner of dismissal of an employee. The ruling in respect of the pension payment, UGI asserts, disregards the pension plan trust deed, and the rules promulgated thereunder. It is those instruments, UGI contends, that determine what was payable to Mrs Hamilton at the time of her dismissal, and from whom she is to claim it.

[7] Mrs Hamilton filed a counter-notice of appeal. She contends that the learned judge was wrong to have dismissed her claim for damages for libel.

Background to the claim

[8] Mrs Hamilton joined the staff of UGI on 10 January 2000. Her engagement was consequent on her acceptance of a letter from UGI dated 16 December 1999, which offered her employment. An important paragraph in that letter, for these purposes, speaks to the period of notice required to terminate the contract. It states:

> "During the three (3) months[’] probationary period, neither party will be required to give notice of termination. However, should your probation be extended beyond three (3) months the required notice period is two weeks as stipulated by Law. Once appointed, a minimum period of one month will be required."

[9] On or about 14 July 2006, UGI's e-mail system, unexpectedly shut down, causing severe dislocation and inconvenience. UGI's Vice-President for Systems, Ms Kristine Bolt, asked Mrs Hamilton, by e-mail, for explanations concerning the use of certain computer software, which was said to have been from another organisation and was linked to the system crash. Mrs Hamilton provided some explanations, asserting, in part, that the crash was due to a computer hard drive space insufficiency, rather than to the software. Apparently, the answers did not completely satisfy Ms Bolt, as, on 25 July 2006, she reiterated her request for an explanation of the presence of the software in UGI's environment.

[10] A management meeting, held on 27 July 2006, made reference to some of the measures that the information systems department was implementing to cure some of the challenges that had then been recently experienced. Mrs Hamilton participated in that meeting. There was no hint that her job was in jeopardy. UGI, however, dismissed her the following day.

[11] She was called to a meeting and handed a letter of dismissal. The letter accused her of knowingly putting "the organization at risk by introducing pirated software into the environment". It continued:

> "As a consequence, we will be terminating your services with immediate effect
>
> Kindly note that you will receive the following:-
>
> (ii) [sic] Pay in lieu of twenty-three (23) days[']
> Vacation Leave
>
> (ii) One (1) months' Notice Pay"

The letter went on to deal with the manner of payment of those amounts and her contribution to the pension scheme. It concluded with UGI's request that she "return [her] Staff Pin, Staff Identification and Blue Cross cards immediately". She says that she was offered the opportunity to resign but she refused it because she is innocent of UGI's charge.

[12] She described the dismissal in paragraph 33 of her witness statement:

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

[13] She said that she was so traumatised by the accusatory contents of the letter and the manner of her dismissal that she did not, thereafter, follow through on any applications for jobs in the information technology sector. She explained in her witness statement that she did not wish to have to tell any prospective employer the reason for her parting company with UGI. In addition, she said that she believed that UGI had published the letter of dismissal to its employees.

The learned judge's decision on the dismissal

[14] The learned judge, in a comprehensive written judgment, rejected UGI's basis for dismissing Mrs Hamilton and found, in respect of the claim for damages for wrongful dismissal, that:

a. the compact disks (CDs) on which the relevant e-mail software came, "were all in good standing" (paragraph [28]);

b. UGI's accusation that Mrs Hamilton had introduced unauthorised software into its environment "is untenable" (paragraph [42]);

c. Mrs Hamilton "was wrongfully dismissed on the bases put forward by [UGI]" (paragraph [44]);

d. the principle in **Addis** is binding on the Supreme Court (paragraphs [48] – [49]);

e. it is, in this jurisdiction, possible to secure compensation for a breach of an implied term of mutual trust and confidence, which results in financial loss (paragraph [50]);

f. Mrs Hamilton's claim, based as it is on the breach of the implied term of trust and confidence, is outside the realm of **Addis** (paragraph [55]);

g. the legislative framework in this country, unlike the English legislation, does not inhibit the development of the common law applicable to wrongful dismissal (paragraph [81]); and

h. the court should not be reticent in implying into the contract of employment, "a term which compensates an employee who has suffered financially as a result of the manner in which he was dismissed" (paragraph [85]).

[15] In dealing with the claim for damages for anxiety and depression, the learned judge found:

a. that there was a difficult question of causation to be considered, that is whether Mrs Hamilton's condition was caused by the fact of the dismissal or the manner of the dismissal (paragraph [90]); but

b. Mrs Hamilton had not provided any professional evidence to support her assertions of the psychological effect that the dismissal had on her and therefore she could recover no damages under this head (paragraphs [97]- [98]).

[16] In dealing with the claim for damages for inability to obtain employment, handicap on the labour market and reputation stigmatisation, the learned judge found:

a. that all those claims fell under the broad head of "inability to obtain employment as a result of reputational damage", and so Mrs Hamilton could not obtain compensation under the individual heads of loss (paragraph [103]);

b. damages for loss of reputation as a result of dismissal was recoverable and not inconsistent with **Addis** (paragraph [105]);

c. the dismissal was "calculated to destroy or seriously damage the relationship of trust and confidence" between the parties (paragraph [112]); and

d. Mrs Hamilton provided no evidence of rejection as a result of her dismissal (paragraph [116]);

e. she was not obliged, however, to apply for jobs and her failure "to expose herself to obloquy, cannot be unreasonable" (paragraph [120]).

[17] The learned judge therefore turned to the issue of the measure of damages for the wrongful dismissal. She accepted the principle that, barring an express notice period in the contract of employment, the measure of damages is generally to be based on the period that would be considered reasonable notice for the termination of the employment. In Mrs Hamilton's case, the learned judge found, the contract did not stipulate a specific notice period; instead, it specified a minimum notice period. It was

therefore open to the court to determine what a reasonable notice period, in the circumstances, was.

[18] She found that one year's salary in lieu of notice in the circumstances of:

a. the tenure of Mrs Hamilton's employment, namely, five plus years;

b. the responsibility of her position being a manager in a large corporation; and

c. Mrs Hamilton's age at the time of her dismissal, that is 57 years,

would normally have been reasonable, but for the aggravating factor of the manner of the dismissal, which had prevented her from seeking employment in the industry. That factor, the learned judge found, entitled Mrs Hamilton to pay in lieu of notice up to the date of her age of retirement. That age, the learned judge found, is 60 years. She therefore found that Mrs Hamilton was entitled to two additional years of compensation for the period of her "working life that she was deprived of because of [UGI's] breach" (paragraph [134]). The learned judge held, however, that a deduction should be made for the period that Mrs Hamilton was elsewhere employed between the years 2007 and 2009.

The appeal in respect of the decision on wrongful dismissal

The grounds of appeal

[19] The grounds of appeal in respect of wrongful dismissal are as follows:

"(i) The learned judge, having correctly held that the decision in **Addis v Gramophone Company Limited** was binding upon her, failed to apply that decision and to hold that the Respondent could not claim damages for any loss which she may have sustained from the fact that the dismissal of itself made it more difficult for her to obtain fresh employment.

(ii) The learned judge erred in not following her own decision in **Lindon Brown v Jamaica Flour Mills Limited**, in which she correctly ruled that neither the manner in which he was dismissed, injury to his feelings nor the fact that he had difficulty obtaining employment entitles him to damages.

(iii) The learned judge erred in holding that the case of **Malik v Bank of Credit and Commerce International SA** was applicable to the instant case, seeing that **Malik** was not a case of wrongful dismissal, and that **Addis** was a case of wrongful dismissal which was not overruled by **Malik**.

(iv) The learned judge erred in holding that at the time of the decision in **Malik** the court was 'not constrained by statute', and in failing to appreciate that at all relevant times in England there existed comprehensive legislation dealing with unfair dismissal, the **Employment Rights Act 1996** being a consolidation of previous enactments.

(v) The learned judge erred in not holding that in Jamaica as in England, Parliament had passed comprehensive legislation intended to provide remedies for unfair dismissal by a process of conciliation and reference to the Industrial Disputes Tribunal, and that therefore, as held in **Johnson v Unisys**, the Court was precluded from developing a parallel remedy by development of the common law.

(vi) The learned judge erred in holding that there was nothing in the Respondent's letter of engagement which provided any impediment in the way of implying a term into the contract as to the manner of dismissal, since the letter of engagement expressly

provided that the contract of employment was terminable on the Appellant giving a minimum of one month's notice of termination.

(vii) The learned judge erred in holding that it was not unreasonable for the Respondent to have taken no steps to apply for alternative employment, and in not holding that the Respondent on the evidence had taken no steps whatever to mitigate her loss.

(viii) The learned judge erred in awarding damages to the Respondent over the whole period up to her retirement date, being three years, such an award being contrary to law and unsustainable on the facts.

(ix) The learned judge erred in holding that there was an implied term that the Respondent should be given reasonable notice, and in not correctly construing the words 'Once appointed, a minimum period of one month will be required' as meaning that the Appellant could have lawfully terminated the contract on giving one month's notice.

(x) The learned judge erred in holding that one year's salary in lieu of notice was reasonable, whereas in the circumstances a period of six months' notice was the most which a reasonable tribunal could have found to be reasonable.

(xi) The learned judge erred in holding that the Respondent was contractually entitled to the Appellant's contribution to the pension scheme, and in particular in not appreciating that the Respondent's entitlements were governed by the Trust Deed and Rules of the scheme, which was a defined benefit scheme providing for pensions payable at normal retirement date.

(xii) The learned judge erred in construing the Rules of the scheme, and in not holding that the entitlements of the Respondent in a case of termination of employment before normal retirement date were limited to the exercise of the options provided by paragraph 8.01 of the Rules, one of which options she had exercised.

(xiii) The learned judge erred in ordering that the Appellant should pay non-taxable motor vehicle allowance in the amount of $40,000.00, when she had made no finding of fact that such allowance was not paid to the Respondent, and when the salary calculation prepared by the Appellant on termination clearly included the payment of the non-taxable motor vehicle allowance."

[20] Lord Gifford QC, for UGI, has helpfully grouped its numerous grounds of appeal according to the issues they raise. In respect of the dismissal, the issues are:

(1) What period of notice of termination, if any, was provided under the contract between the parties? (Grounds (vi) and (ix))

(2) If termination of the contract required reasonable notice, what period was reasonable? (Ground (x))

(3) Did the learned judge err in law in her interpretation of the authorities, and/or in her application of the facts as found, in allowing Mrs Hamilton to obtain damages amounting to three years' salary? (Grounds (i) to (iii) and (viii))

(4) Was the learned judge correct in holding that Parliament's enactment of the Labour Relations and Industrial Disputes Act did not preclude the changes in the common law which she decided to make? (Grounds (iv) and (v))

(5) Did the learned judge err in holding that Mrs Hamilton did not act unreasonably in mitigation of her loss? (Ground (vii))

[21] The issues of the pension monies and the libel will be addressed after the consideration of the dismissal issues. Lord Gifford stated that ground (xiii), concerning the non-taxable motor vehicle allowance, would not be pursued.

(1) What period of notice of termination, if any, was provided under the contract between the parties? (Grounds (vi) and (ix))

[22] In its statement of defence, and at the trial, UGI attempted to ride two horses at the same time — attempting to justify dismissal for cause when it had clearly dismissed Mrs Hamilton with pay in lieu of notice, according to its understanding of the contract of employment. The learned judge was improperly led, therefore, into hearing a mass of evidence on dismissal for cause, and conducting an extensive analysis as to whether Mrs Hamilton's dismissal had been justified. All unnecessarily. In any event, UGI's attempt to show that it had good cause to dismiss Mrs Hamilton was rejected by the learned judge.

[23] The decision of this court in **Cocoa Industry Board and Others v Melbourne** (1993) 30 JLR 242 has established that when an employer terminates the employment by making a payment in lieu of notice, the dismissal is not for cause, even if a reason is given, at the time of termination, for that dismissal. If there has been a payment in lieu of notice, it necessarily follows that the alternative open to the employer, namely, dismissal for cause, was not adopted. A dismissal for cause cannot properly include a

payment in lieu of notice, which is made in accordance with the contract of employment. Dismissal for cause, and a proper payment in lieu of notice, cannot co-exist. They are alternatives, and the payment trumps the alternative course.

[24] That reasoning reveals the incongruity of UGI's stance at the trial. UGI's witness, Mr Andre' Latty, testified that UGI, "as a gesture of good faith", paid Mrs Hamilton "a sum equivalent to her net emoluments for her notice period, specified in her contract as being one month". Not only was Mr Latty not employed to UGI at the time of the dismissal, and could not properly say what UGI's motive for making the payment was at the time, but his evidence conflicts with the relevant portion of the dismissal letter, which is an unqualified statement of, "One (1) month's Notice Pay". UGI, at the time, had made its choice as to the manner of dismissal. It, without more, cannot revert to the alternative method.

[25] It is true that an employer who, after dismissing an employee, discovers some reason for which he could have dismissed that employee for cause, may rely on that reason in any subsequent litigation concerning the dismissal (see **Boston Deep Sea Fishing & Ice Company v Ansell** (1888) 39 Ch D 339). The learned editors of Harvey on Industrial Relations and Employment Law correctly state, in part, at paragraph 410.01:

> "A complaint of wrongful dismissal may be defended upon the basis that the employee was liable to summary dismissal by reason of facts discovered by the employer after the dismissal…."

[26] UGI, however, cannot benefit from that principle. Although it claimed to have found, subsequent to the dismissal, some other piece of software that it alleged that Mrs Hamilton had improperly introduced to its environment (which claim was also proved to be unfounded), it was not a new reason for dismissal, but merely another instance of UGI's reason for deciding to dismiss her. It took its decision, as to the method of dismissal, that is, payment in lieu of notice, with its eyes wide open.

[27] Happily, UGI did not pursue its improper stance in pursuing this appeal. It has accepted the learned judge's finding of fact that it had no proper cause for dismissing Mrs Hamilton. The resultant issue, as the learned judge found, is the period of notice required in the circumstances.

[28] The essence of the principle on which this issue is to be discussed, is that the damages for wrongful dismissal, to which an employee is entitled, is the sum equivalent to the amount (wages and other contractual benefits) the employee would have earned during the agreed notice period (see **Cocoa Industry Board and Others v Melbourne**). If there is no agreed notice period, the employee is entitled to damages, which are equivalent to a period of notice that would be reasonable in the circumstances, for the employee to secure other employment. The circumstances include matters such as the employee's position, the length of the employment and the industry involved (see **Kaiser Bauxite Company v Cadien** (1983) 20 JLR 168). There is no need to imply a term for a reasonable notice period, where the contract is for a fixed term (see **Reda and another v Flag Ltd** [2002] UKPC 38; [2002] 61 WIR 118,

at paragraph [57]). There, however, is a statutory minimum notice period, established by the Employment (Termination and Redundancy Payments) Act (the ETRPA).

[29] Whilst there was no dispute between the parties in respect of those principles, they parted company on the issues of:

a. whether Mrs Hamilton's letter of engagement excluded the application of an implied term as to the manner of dismissal;

b. whether the letter of engagement specified the required period of notice or only a minimum period of notice; and

c. if it only specified a minimum period, what that minimum period was.

[30] It will be recalled that the term used in the engagement letter, in relation to notice of termination, stated, "[o]nce appointed, a minimum period of one month will be required". Lord Gifford submitted that "termination with a month's notice or more – by either party – would be within the permitted scope of the contract" (paragraph 61 of the written submissions on behalf of UGI). He argued that the learned judge fell into error in deciding that the term only established a minimum period of notice and that reasonable notice was required. Lord Gifford drew a parallel with the provisions of section 3 of the ETRPA, which specifies minimum periods of notice. He argued that the term in the contract, as in the ETRPA, meant, "not less than one month".

[31] Captain Beswick, on behalf of Mrs Hamilton, supported the learned judge's finding that the proper notice period is what is reasonable in the circumstances, but being not less than one month. He argued that even if a period of notice is specified in a contract of employment, if it is found to be unreasonable, "the measure of reasonableness at common law should be applied". He pointed to Mrs Hamilton's evidence at the trial, that the minimum reasonable notice period in the industry, for persons at her level, is 12 months.

[32] The first point to be made in assessing this issue is that the authorities state that where the parties have agreed on a specific provision in their contract, the court is not at liberty to imply a contrary provision. Lord Hoffmann made that point at paragraph [37] of **Johnson v Unisys Ltd** [2001] UKHL 13; [2001] 2 All ER 801 (**Johnson v Unisys**), where he said, in part:

> "The problem lies in extending or adapting any of these implied terms to dismissal. There are two reasons why dismissal presents special problems. **The first is that any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms of the contract but cannot contradict them.** Only Parliament may actually override what the parties have agreed…." (Emphasis supplied)

[33] In her close examination of the relevant authorities, the learned judge recognised that principle. At paragraph [64], she said, "an implied term cannot be at variance with the expressed terms of the contract...the statute and [Mrs Hamilton's] letter of engagement stood in the way of implying such a term". UGI does not have a

valid complaint in saying, in ground (vi), that the learned judge implied a term, which contradicted the notice clause in Mrs Hamilton's letter of engagement.

[34] UGI's more plausible complaint is that the learned judge misinterpreted the clause and placed too much emphasis on the term "minimum", which is set out therein. In that regard, UGI's complaint must also fail. The notice clause, on a plain reading, does not stipulate that the notice period is one month. It plainly states that the notice period cannot be less than a month. It is similar, as Lord Gifford has pointed out, to the relevant provision of section 3(1) of the ETRPA, which states, in part:

> "The notice required to be given by an employer to terminate the contract of employment of an employee who has been continuously employed for four weeks or more shall be-
>
> (a) not less than two weeks' notice if his period of continuous employment is less than five years;
>
> (b) not less than four weeks' notice if his period of continuous employment is five years or more but less than ten years:
>
> (c) …"

[35] Those statutory provisions are very similar to their equivalent in the English statute, The Employment Rights Act 1996. Section 86 of that Act states, in part, as follows:

> "(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—
>
> (a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) ..."

[36] Lord Gifford's submission restricting the meaning of the clause in the engagement letter cannot be accepted. The learned editors of Harvey on Industrial Relations and Employment Law state, at paragraph 410.04, that the statute does not restrict the court from awarding a longer period than the statutory minimum, as being reasonable notice:

> "…The court will not imply a shorter period of notice than that required by the statute, **but it may imply a longer period** (*Hill v C A Parsons & Co Ltd [1972] Ch 305*, *[1971] 3 All ER 1345, CA*)…." (Emphasis supplied)

The learned editors of Halsbury's Laws of England, 2014, Volume 41, at paragraph 733, also opine that "an implied term of reasonable notice may be greater than the statutory minimum applicable to all employees".

[37] Those views are accepted as being consistent with the authorities on the point.

[38] The learned judge's interpretation of the clause, as allowing a longer period according to the circumstances, is, with respect, correct.

[39] The next issue is the relevant period in the circumstances.

(2) If termination of the contract required reasonable notice, what period was reasonable? (Ground (x))

[40] Lord Gifford, as an alternative to his main submissions on the point of notice, addressed the issue of reasonable notice. He quoted Chitty on Contracts 28th Edition, Volume 2 at paragraph 39-142:

> "All the circumstances, such as the type of employment, local, trade or professional customs on the topic, the intervals at which remuneration is paid, or the period in relation to which remuneration is stated (e.g. '£450 a year'), have been regarded as relevant in fixing what amounts to reasonable notice in an individual case. [The decided cases cited by the learned editors] do not lay down any rule of law and are merely guides to what may be held to be reasonable in different circumstances"

[41] Learned Queen's Counsel cited a range of examples of the notice period deemed to be reasonable in various circumstances and occupations. He argued that for a lower tiered manager such as Mrs Hamilton, the appropriate notice period was three to six months. He submitted, "one year was well in excess of the range".

[42] Lord Gifford's submissions falter for lack of evidence. The learned editors of Halsbury's Laws of England, 2014, Volume 41, at paragraph 733, correctly state that the relevant notice period, in any particular case, is a question of fact:

> "In the absence of an express stipulation or customary arrangement as to notice, a contract of employment is terminable at common law by reasonable notice. **The question as to what is a reasonable period of notice is one of fact, depending on all the circumstances of the case and the nature of the employment**…" (Emphasis supplied)

[43] The evidence in the case must therefore be examined. Mrs Hamilton testified that the customary minimum period in the industry, at her level, is one year. She said, in part, at paragraph 28 of her witness statement filed on 5 March 2010:

> "…Persons in the station of my employment normally expect that a minimum reasonable period of notice is 12 months. This is about the time it will take to obtain employment commensurate with my level of experience and qualifications. This time period is increased if the job market is depressed or there are other special circumstances which hinder an applicant from obtaining employment. One of those circumstances is advancing years since employers typically do not like to hire new employees who are older since it means the investment in training will not have as long as [sic] period of time for recoupment as with a younger employee."

[44] UGI did not adduce any evidence to challenge Mrs Hamilton's assertion. The most that could be said in UGI's favour in this regard is that:

a. she entered into a contract in respect of that very position, in which she agreed to a significantly lower minimum notice period; and

b. she testified that she saw advertisements for suitable positions, and this indicated that the job market was not depressed.

Neither factor can properly erode the effect of Mrs Hamilton's evidence. Firstly, her dismissal was over five years after the signing of the engagement letter, and therefore it does not address the state of the market at the time of the dismissal. Secondly, it was in March 2010 that she wrote her witness statement containing the details of the advertisements. That is almost four years after the dismissal, and it does not state the

number or frequency of the advertisements that she saw. Her age is an important third point. Her evidence that employers do not readily employ older people was unchallenged and it would affect the period of time that it would take her to find alternative employment. Nonetheless, this case, in this regard, rests on its own facts.

[45] Had UGI provided contrary evidence, or otherwise challenged Mrs Hamilton's evidence as to the notice period in the industry, this court may well have decided that 12 months is too long in the circumstances. The case of **Hill v C A Parsons & Co Ltd** [1971] 3 All ER 1345, cited by the learned editors of Harvey on Industrial Relations and Employment Law, concerned a 63 year old, senior engineer, who after 35 years of service, with two years left before retirement, was given one month's notice of the termination of his contract of employment. The contract did not specify a notice period. Lord Denning MR, as part of the majority, opined that the notice given was too short. He said, in part, at page 1349:

> "In the letter of [dismissal] the company purported to terminate Mr Hill's employment by giving one month's notice. They had no power to do any such thing. In order to terminate his employment, they would have to give reasonable notice. **I should have thought that, for a professional man of his standing and, I may add, his length of service, reasonable notice would be at least six months, and may be 12 months**. At any rate, one month is far too short…."

Mrs Hamilton's period of employment was much shorter than Mr Hill's. She had only five years' association with UGI. Although the notice period approved by the learned judge in Mrs Hamilton's case seems long when compared to Mr Hill's case, this court cannot, in the absence of evidence, disturb that determination. This is a finding of fact that is

based on evidence. An appellate court will not lightly disturb it (see **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25 at paragraphs [32]-[36]).

[46] On the evidence, the notice period that UGI applied, in making its payment in lieu of notice, is unreasonably short. That constituted a breach of the contract of employment. The breach amounts to wrongful dismissal. The compensation payable is that which the learned judge found, on the evidence, to be in line with what constitutes reasonable notice.

[47] UGI cannot succeed on this issue.

(3) Did the learned judge err in law in her interpretation of the authorities, and/or in her application of the facts as found, in allowing [Mrs Hamilton] to obtain damages amounting to three years' salary? (Grounds (i) to (iii) and (viii))

[48] The parties also parted ways in respect of the issue of implication of the term of mutual trust and confidence into every contract of employment. That implied term was cemented into the common law by the House of Lords in in **Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)** [1997] 3 All ER 1 (**Malik**).

[49] UGI relies on the principles emanating from **Johnson v Unisys** to argue that the implied term does not apply to the manner of dismissal. Since Mrs Hamilton has based her case on the manner of her dismissal being a breach of that implied term, UGI argues, the learned judge was wrong to have awarded her aggravated damages for the manner of dismissal. Learned counsel also relied on **Lindon Brown v Jamaica Flour**

Mills (unreported) Supreme Court, Jamaica, Claim No CL 2000/B199, judgment delivered 15 December 2006, in support of those submissions.

[50] UGI noted, however, that the learned judge did not specifically state that the award of two additional year's compensation was for a breach of the implied term of mutual trust and confidence. Lord Gifford submitted that the learned judge, nonetheless, made that award based on the "aggravating factor of [UGI's] actions". He said at paragraph 70 of his written submissions:

> "Thus the learned judge, having ruled that there was insufficient proof of any causal link between the reasons for [Mrs Hamilton's] dismissal and her inability to obtain employment, found a way to award the same level of damages through another route, namely the aggravating factor of [UGI's] actions. It is respectfully submitted that this was contradictory, as the award cannot stand with the conclusions on causation, and impermissible, because an award of aggravated damages is not available for breach of contract."

[51] Captain Beswick, on the other hand, strenuously contended that **Malik** had overtaken **Addis** in circumstances such as those in the present case, and that a dismissal in breach of the implied term of mutual trust and confidence was wrongful, justiciable and subject to compensation in damages. He argued that **Johnson v Unisys** did not apply in this jurisdiction. Learned counsel submitted that **Johnson v Unisys** was predicated on the existence of legislation that was far different from that which existed in this jurisdiction, and therefore, the principle emanating from **Johnson v Unisys** was inapplicable here.

[52] In applying the principle in **Malik** to the instant case, Captain Beswick submitted that once Mrs Hamilton was able to prove that her dismissal was wrongful, she is entitled to recover damages, "consequent on the wrongful dismissal and the loss of her employment" (paragraph 74 of his written submissions). He continued in that paragraph, stating:

> "These damages include the pecuniary loss associated with the loss of salary and direct financial remuneration, the loss of pension benefits, the loss of health benefits and other benefits such as clothing allowance, lunch allowance and motor vehicle allowance, and the loss of advantage on the labour market which arises because of the stigma, and the associated psychological damage flowing from the manner of her dismissal, i.e., the dismissal for alleged dishonesty at the workplace."

[53] Learned counsel, at the paragraph following immediately after paragraph 76 (incorrectly numbered "54"), neatly summarised Mrs Hamilton's case:

> "[Mrs Hamilton] did prove during the course of the trial:-
>
> (a) that [UGI] breached the contract of employment.
>
> (i) [UGI] dismissed [Mrs Hamilton] for cause and did not rely on the notice period of one month in its decision to dismiss [her].
>
> (b) even if [UGI] is relying on the notice period as its basis for dismissing [Mrs Hamilton], one month's notice is not reasonable for an employee in a managerial post.
>
> (c) that [Mrs Hamilton] did all that was reasonably expected of her to mitigate her losses."

Captain Beswick then went on to show, in his opinion, the way in which Mrs Hamilton had justified the award made by the learned judge.

[54] As Lord Gifford has properly pointed out, the learned judge did not state the term that she implied into Mrs Hamilton's contract to justify awarding two additional years' compensation to Mrs Hamilton. It is true that she unequivocally states that the additional years flow from the loss Mrs Hamilton suffered as a result of UGI's breach of contract. The juridical basis for the additional two years is, however, unclear.

[55] The learned judge seems, at paragraphs [67] – [69], to accept that the common law principle is that the only remedy for wrongful dismissal is a payment in lieu of notice. It is also apparent that the learned judge rejects:

a. as being an anachronism, the continued applicability of **Addis**;

b. the applicability of the equivalent English legislation; and

c. the applicability of **Johnson v Unisys**, based as it is on the English legislation,

to this jurisdiction. She said, in part, at paragraph [82] that judges in this jurisdiction were at liberty to develop the common law differently from the way the English had. She said, in part, at paragraphs [82] and [83]:

> "[82] …Jamaica is therefore free of the statutory impediment which blocks the development of the English common law in relation to dismissal cases which are in breach of contract and not captured by **Addis**.
>
> [83] In light of the the [sic] absence of statutory impediment, the court, is at liberty to develop the common law to reflect a modern, post master/ servant relationship…."

[56] Accordingly, the learned judge found that the courts in this jurisdiction should imply a term that was suitable to circumstances such as those in this case. She said, at paragraph [85]:

> "In the absence of Statutory impediment, it is unthinkable, in light of modern developments, such as:
>
> (a) the erasure of the words 'master servant' from the legal vocabulary of employment law and;
>
> (b) recognition of the employee's contribution to the work force
>
> **that there should be retincence [sic] about implying a term which compensates an employee who has suffered financially as a result of the manner in which he was dismissed and which results in pecuniary loss**." (Emphasis supplied)

She, however, did not give a name to that implied term.

[57] The learned judge applied to this case, the principle of compensation for the manner of dismissal. She found that UGI's manner of dismissal was reprehensible. At paragraph [91], she described it as "contumelious and infradig [sic]". She found that Mrs Hamilton had suffered loss from the manner of her dismissal. At paragraph [120] the learned judge explained the way in which the loss arose:

> "[Mrs Hamilton] was therefore forced into an invidious situation: apply for jobs and face the likely [embarrassment] of having to disclose the reason for the separation from her previous job or, forbear, and be accused of failing to mitigate. This is a classic case of 'be damned if you do and damned if you don't.' This court holds the view that the failure of [Mrs Hamilton] to expose herself to obloquy, cannot be unreasonable."

The learned judge made a similar statement at paragraph [132]:

> "The invidiousness of [Mrs Hamilton's] position as aforesaid was a result of the reasons given by [UGI] for terminating her services. The actions of the [UGI], therefore, created circumstances which prevented her from seeking employment as she would be forced to disclose the reason and suffer further humiliation. She is therefore entitled to be paid up to the time she would have retired. She was age fifty-seven at the time of her dismissal. The issue for determination is, at what age would she retire."

[58] The learned judge found the appropriate retirement age to be 60 years. She said, in part, at paragraph [134]:

> "…She is therefore entitled to be paid for the two remaining years of working life that she was deprived of because of the defendant's breach. She is, in the circumstances entitled to be compensated for three years [sic] salary which is inclusive of one year's salary in lieu of notice. Deduction, however, must [be] made for the period she was employed between the years two thousand and seven and two thousand and nine."

[59] Although she did not name the implied term that she thought to be appropriate, the learned judge's reasoning is reminiscent of the reasoning of the majority of the Supreme Court of Canada in **Wallace v United Grain Growers Limited** [1997] 3 SCR 701; 152 DLR (4th) 1. In that case, Iacobucci J, writing for the majority, explained that the notice period could be extended to compensate for the egregious manner in which an employee is dismissed. He said, at paragraph 95, that "employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period".

[60] Iacobucci J asserted, at paragraph 98, that "in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should

refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". Such behaviour, he held, based on previous decisions in Canadian courts, "ought to merit compensation by way of an addition to the notice period" (see paragraph 101). He also drew support, for his position, from the fact that compensation for injured feelings was available in other areas of the law, such as defamation (see paragraph 105).

[61] **Wallace v United Grain Growers** was considered by this court in **Gabbidon v Sagicor Bank Jamaica Limited** [2020] JMCA Civ 9, but was not followed. The court held that the reasoning in **Wallace v United Grain Growers** was not easy to follow and seemed to have been drawn from the existing case law in that country (see paragraphs [52] – [53] of **Gabbidon v Sagicor Bank**).

[62] **Wallace v United Grain Growers** was considered in **Johnson v Unisys**. Lord Hoffmann, at paragraph 49 of the judgment queried the validity, in this regard, of the approach of the majority in **Wallace v United Grain Growers**. He said, in part:

> "…But the common law decides cases according to principle and cannot impose arbitrary limitations on liability because of the circumstances of the particular case. Only statute can lay down limiting rules based upon policy rather than principle. In this connection it is interesting to notice that, although the majority in *Wallace v United Grain Growers Ltd* were unwilling to accept an implied term as to the manner of dismissal, they treated it as relevant to the period of notice which should reasonably have been given. **McLachlin J said that this was illogical and so perhaps it is**. But one can understand a desire to place some limit upon the employer's potential liability under this head." (Emphasis supplied)

[63] **Gabbidon v Sagicor Bank** also considered the general impact of **Malik**. That case confirmed that the principles in **Malik** applied to this jurisdiction, subject to the restrictions that an implied term could not conflict with an express contractual term or compete with a statutory provision.

[64] **Malik**, in this context, establishes two important principles. The first principle is that courts are entitled to imply that the contract of employment contains a term that the parties will not conduct themselves in such a way as to destroy or seriously damage their mutual relationship of trust and confidence. The second principle is that an employee, in principle, could be awarded damages for loss of reputation caused by a breach of the implied term of mutual trust and confidence. **Gabbidon v Sagicor Bank**, therefore, accepts that the implied term of trust and confidence applies in this jurisdiction.

[65] **Gabbidon v Sagicor Bank** considered **Johnson v Unisys** and also found that it applied in this jurisdiction. The applicability arose from the finding that the LRIDA had the same effect on this jurisdiction that the equivalent English legislation had on employment law in that country. That is, it prevented the court from extending the common law in respect of wrongful dismissal.

[66] **Johnson v Unisys** establishes that breaches of the implied term of mutual trust and confidence, which result in a dismissal, are not actionable at common law. The impact of **Johnson v Unisys** is explained in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58;

[2012] 2 All ER 278 (**Edwards v Chesterfield Royal Hospital**). Lord Dyson SCJ, at paragraph [24] of his judgment in **Edwards v Chesterfield Royal Hospital**, stated:

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

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

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

[67] Lord Nicholls of Birkenhead in **Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others** [2004] 3 All ER 991; [2005] 1 AC 503 (**Eastwood v Magnox**) explained the **Johnson** exclusion area. He said, at paragraph [28] of his judgment:

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

> **loss falls squarely within the *Johnson* exclusion area**." (Emphasis supplied)

[68] It is for those reasons that the breach of mutual trust and confidence is not justiciable if it occurs at the time of dismissal. The acceptance in **Gabbidon v Sagicor** of the principles in **Johnson v Unisys**, and the **Johnson** exclusion area, may be found at paragraph [80] of the judgment.

[69] **Lindon Brown v Jamaica Flour Mills**, cited by learned Queen's Counsel, is but one of a number of decisions of our Supreme Court, which apply the **Addis** principle and reject the concept of compensation for the manner of dismissal. Some of those decisions were cited in **Gabbidon v Sagicor**.

[70] Based on that reasoning, the learned judge's rejection of **Johnson v Unisys**, and the **Johnson** exclusion area, cannot be supported. Since that rejection forms the basis for her reasoning in awarding Mrs Hamilton an additional two years' compensation, that award must be set aside.

[71] UGI must succeed on this issue.

(4) Was the learned judge correct in holding that Parliament's enactment of the Labour Relations and Industrial Disputes Act did not preclude the changes in the common law which she decided to make? (Grounds (iv) and (v))

[72] Captain Beswick devoted a significant portion of his submissions to the fact that Mrs Hamilton's dismissal occurred prior to the amendment of the LRIDA in 2010. That amendment allowed the Industrial Disputes Tribunal to consider the cases of non-

unionised individuals. Unless the court provided a remedy, such as the learned judge properly provided, Captain Beswick submitted, Mrs Hamilton would be left without a remedy for the improper dismissal by UGI.

[73] This issue has already been assessed in the discussion of issue (3). Accordingly, the learned judge's thoughtful finding, that the LRIDA did not preclude the adjustment that she sought to make to the common law, cannot be supported.

[74] It is necessary to explain, however, that although Mrs Hamilton's case arose before the 2010 amendment to the LRIDA, which allowed individual employees' cases to be taken to the IDT, the finding in **Gabbidon v Sagicor Bank** is that persons in her situation would still be bound by the **Addis** principle. The reasoning is that Parliament had taken a decision not to include such persons within the ambit of the statute. The result is that the common law principles governed the situation with respect to those persons until the 2010 amendment to the LRIDA brought them under its purview (see paragraphs [89] – [90] of **Gabbidon v Sagicor Bank**). Accordingly, Mrs Hamilton, and other persons who were dismissed prior to the 2010 amendment, would not have the benefit of relief for the manner of dismissal.

(5) Did the learned judge err in holding that the Respondent did not act unreasonably in mitigation of her loss? (Ground (vii))

[75] The finding that Mrs Hamilton is entitled to a year's notice, but not entitled to the additional two years' notice, effectively renders a discussion of the issue of mitigation unnecessary. She had no obligation to prove attempts to obtain employment during the

period deemed to be the reasonable notice period, and whether she made any attempts thereafter, is irrelevant.

[76] For completeness, however, it must be said that Lord Gifford's submissions on this issue are meritorious. Learned Queen's Counsel pointed out that the learned judge was not consistent in her reasoning with regard to Mrs Hamilton's approach to mitigating her loss.

[77] The learned judge refused to award to Mrs Hamilton any damages for loss of reputation. She properly found that Mrs Hamilton had provided no evidence of any rejection by potential employers, which flowed from her dismissal. Nonetheless, the learned judge found that Mrs Hamilton was not unreasonable in refraining from applying for employment.

[78] The learned judge's position is relevant to a discourse by A I Ogus, the learned author of The Law of Damages, Butterworths 1973, at page 89:

> "It would be a mistake to take literally the dictum of VISCOUNT HALDANE, L.C. in [**British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited** [1912] AC 673, at page 689] that the plaintiff is under a 'duty' to mitigate. This is, strictly speaking inaccurate: no other person can enforce against the plaintiff a legal obligation to mitigate his loss. The only sanction is that his damages will be reduced. It is a 'duty' or 'obligation' owed to himself. The point is, of course, only a verbal one."

The learned author's view reflects the opinion of Pearson LJ in **Darbishire v Warran** [1963] 1 WLR 1067, in which the learned judge of appeal said, in part, at page 1075:

> "The true meaning [of the term 'duty to mitigate the loss'] is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the defendant."

[79] The authorities also state that it is the defendant's duty to show that the plaintiff failed to do that which was reasonable to mitigate loss, and that the court should not be "over-eager to discharge the defendant's burden" (see Ogus, The Law of Damages, page 89, and **Banco de Portugal v Waterlow and Sons Limited** [1932] AC 452).

[80] The duty to mitigate was also explained by this court in **Richard Sinclair v Vivolyn Taylor** [2012] JMCA Civ 30. In **Sinclair**, which is a personal injury case, Phillips JA enunciated that an injured party may not recover losses which could have reasonably been avoided. She said at paragraphs [34]- [35]:

> "[34] With regard to the award for general damages being excessive on the basis of the failure of the respondent to follow instructions, **the law is clear, and the basic rule of mitigation is that a plaintiff may not recover losses which he should reasonably have avoided**. In fact, the principles relating to mitigation of damages have been set out clearly and applied in our courts. Langrin J (as he then was) in **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189 said:
>
> > 'It is a general principle that a person who has been injured by the acts of another party **must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid.** The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business.'

> [35] However, the duty to mitigate involves taking reasonable steps to avoid one's losses, and in **Erlington Nielssen and Lovetta Nielssen v Ridgeway Development Ltd** (1998) 35 JLR 675, Rattray P stated:
>
> > '…In any event in the face of a dispute existing up to the time of litigation and indeed up to the appeal, between the plaintiff and the respondent as to the existence of structural defects which the respondent refused to remedy and which the learned trial judge found did in fact exist, it could not be reasonably expected that the plaintiff would proceed on the basis of a duty to mitigate to employ other persons to remedy these defects. **A failure to mitigate could not harness the plaintiffs with any liability to the defendant/respondent**.'"(Emphasis supplied)

[81] Although the learned author of The Law of Damages opines that the point about the obligation to mitigate is only verbal, it is practically demonstrated in this case. It is UGI's duty to show that Mrs Hamilton did not do enough to mitigate her loss. Mrs Hamilton discharged that duty for UGI, when she candidly stated that she had made no applications for employment in the information technology field. Further, whereas Mrs Hamilton was not obliged to seek new employment, the point made in **Darbishire v Warran** explains that UGI would not be obliged to compensate her for the loss of income that resulted from her "extravagance" of abstinence.

[82] Mrs Hamilton's situation was not a unique one. Employees and employers often part company with different viewpoints as to the reason for the parting or the validity of the reason for dismissal. The employee cannot be justified in withdrawing from the workforce because he or she is of the view that the employer acted unreasonably. The employee also should not hide the reason for dismissal from a prospective employer.

The employee, however, does have the benefit of giving his or her side of the events to the prospective employer. It is not impractical or unreasonable to have required that approach from Mrs Hamilton.

[83] Indeed, Lord Gifford suggested a practical method by which Mrs Hamilton could have approached the issue with any prospective employer. He said, in part, at paragraph 74 of his written submissions:

> "… [Mrs Hamilton] refused to even apply for a post in her field of expertise. The learned judge commented that she would have to face 'the likely embarrassment of having to disclose the reason for the separation from her previous job'. We submit respectfully that there was no good reason why [Mrs Hamilton] could not say to a potential new employer: 'I was dismissed on the basis of a false allegation that I introduced pirated software. I did no such thing and I am seeking redress.'"

[84] Captain Beswick, in supporting Mrs Hamilton's approach, submitted that she had a genuine fear of having to disclose the circumstances of her dismissal. Insofar as the stating of the pursuit of redress for UGI's breach is concerned, Captain Beswick cited the first instance judgment in **Acklam v Sentinel Insurance Company** [1959] 2 Lloyd's Rep 683 at page 695, where Salmon J said that the vindication by litigation was not necessarily an advantage in securing new employment:

> "…It is true that [Mr Acklam's] character for honesty and ability has been completely vindicated in this action; **but employers are not usually eager, in circumstances such as these, to employ a man who has brought an action against a former employer**…" (Emphasis supplied)

[85] Learned counsel also cited the cases of **Yetton v Eastwoods Froy Ltd** [1967] 1 WLR 104; [1966] 3 All ER 353 and **Basnett v J & A Jackson Ltd** [1976] IRLR 154 in support of his submissions. In those cases, the court, again at first instance, held that an employee was justified, after being wrongfully dismissed, in refusing the employer's offer to re-employ him in a lower position.

[86] Captain Beswick's submissions cannot be accepted. None of the cases that he has cited justifies an employee withdrawing from the workforce entirely, on the basis that an employer has wrongfully dismissed the employee. The "duty" to mitigate, requires that employee to "get back on the horse" despite the fact that the horse had previously thrown him or her. If the employee refrains from doing so, he or she cannot charge the employer with the resultant loss.

[87] For those reasons, it must be held that the learned judge was too "tender-hearted", to use Lord Gifford's term, toward Mrs Hamilton. This ground would have been decided in UGI's favour.

[88] That is the last issue that concerns the wrongful dismissal grounds.

The appeal in respect of the decision on the Trust Deed and Rules of the Pension Scheme?

[89] Grounds (xi) and (xii) of the grounds of appeal respectively state:

> "(xi) The learned judge erred in holding that the Respondent was contractually entitled to the Appellant's contribution to the pension scheme, and in particular in not appreciating that the Respondent's entitlements were governed by the Trust Deed and Rules of the scheme, which was a defined benefit

scheme providing for pensions payable at normal retirement date.

(xii) The learned judge erred in construing the Rules of the scheme, and in not holding that the entitlements of the Respondent in a case of termination of employment before normal retirement date were limited to the exercise of the options provided by paragraph 8.01 of the Rules, one of which options she had exercised."

[90] Mrs Hamilton's claim in respect of the pension matters, was that she was entitled to:

a. an accounting and payment of all of UGI's contributions to the pension scheme, in respect of her employment, during the time of her employment; and

b. the payment of all contributions that UGI would have made to the pension scheme, in respect of her employment, between the date of her dismissal and the time of her retirement.

She asserted that UGI's contributions to the pension scheme were part of her salary and she was entitled, upon the termination of her employment, to both her contributions and UGI's contributions to the scheme.

[91] She testified that she was never informed, during the course of her employment that UGI's contribution would not be paid to her upon the termination of her employment. She contended that, during her employment with UGI, she was never

made aware of a pension scheme trust deed or rules thereunder, and that she did not sign any such document.

[92] Mrs Hamilton seemed to have been of the erroneous view that retirement age would have been age 65. As has been mentioned above, the learned judge correctly found that the retirement age was 60 years.

[93] Mr Latty, on behalf of UGI, testified that employees were obliged to become members of the pension scheme. He said that UGI paid both its contributions, and those of its employees, into a pension trust fund. The trust deed and the rules under the deed, he said, are what determine the payments made upon termination, both before, and upon, retirement. He also testified that the scheme does not allow the employer's contributions to be paid to the employee on termination before retirement. The trust deed and rules were admitted into evidence. UGI is not the trustee.

[94] Mr Latty testified that Mrs Hamilton and UGI each contributed to the pension scheme, as agreed, during the time of her employment. Upon termination of her employment, he said, she chose the option of an immediate refund of all her contributions, rather than a deferment to her age of retirement. If she had chosen the latter, he testified, she would have been entitled to a pension, which was based on both her contributions and those made by UGI. She was paid, he said, the amount due to her in accordance with her election.

[95] The learned judge, at paragraphs [150] – [152] found that the trust deed did not address the circumstances of a wrongful dismissal and that, following **Acklam v**

Sentinel Insurance Co Ltd, there was no basis to read such a circumstance into the document. She found that Mrs Hamilton was entitled to UGI's contribution based on her being placed into the position she would have been if she had not been wrongfully dismissed.

[96] Mr George, on behalf of UGI, addressed this court on this issue. He submitted that where a pension scheme is created by employing the machinery of a trust, it is the trust instrument to which the parties must look for rights and remedies. He also submitted that the proper defendants to any claim, for remedies under the pension scheme, are the trustees. He relied, in support of these submissions, on **Air Jamaica Limited v Joy Charlton and Others** [1999] UKPC 20; (1999) 54 WIR 359 [1999] 1 WLR 1399.

[97] In applying those principles to the present case, Mr George submitted that Mrs Hamilton, from as early as the receipt of her letter of engagement, was aware that she would be participating in a pension scheme. Learned counsel argued that the learned judge was wrong in law in stating that Mrs Hamilton "[b]y virtue of her letter of engagement … was contractually entitled to [UGI's] contribution [to the pension fund] as a fringe benefit" (paragraph [148] of the judgment). All the letter of engagement conferred on Mrs Hamilton, in this regard, Mr George submitted, was membership in the pension scheme in accordance with its rules.

[98] In addressing the learned judge's consideration of the pension scheme rules, Mr George submitted that the learned judge's interpretation of the effect of the rules was

flawed. Learned counsel argued that the learned judge erred in construing the word "withdrawal" from the pension scheme, as used in rule 8.01 of the rules, as not including wrongful termination. Rule 9.02, Mr George submitted, made it plain that the term "withdrawal" was synonymous with "termination of employment". On that interpretation, learned counsel submitted, Mrs Hamilton's choice, to take her own contributions to the scheme, was legitimate and binding. It did not entitle her to UGI's contributions to the scheme, in respect of her employment.

[99] Mr George also submitted that Mrs Hamilton's claim that UGI and "its pension scheme" were unjustly enriched by the retention of UGI's contribution to the scheme, in respect of her employment, was flawed. Learned counsel contended that UGI had parted with the contributions and therefore could not have been enriched by the fact that Mrs Hamilton did not receive them.

[100] Captain Beswick stoutly resisted UGI's assertions on this issue. Learned counsel advanced three basic reasons for refusing the appeal in respect of the pension issue. He contended, firstly, that Mrs Hamilton's entitlement to UGI's contributions was a matter of contract. Secondly, he argued, Mrs Hamilton was not a signatory to the pension scheme rules and therefore was not bound by them. Thirdly, learned counsel submitted, UGI was obliged to put Mrs Hamilton in the same position that she would have been if it had not breached the contract, by wrongfully dismissing her.

[101] In respect of his first basic contention, Captain Beswick submitted that the engagement letter made it mandatory for Mrs Hamilton to contribute to the pension

scheme, but did not state that its contributions would not be payable except at retirement. That condition, he argued, could not now be imposed. He contended that UGI's contribution to the pension scheme flowed from her work and she was entitled to them. He relied, in part, for support of those submissions, on **Parry v Cleaver** [1970] AC 1, **Hopkins v Norcross plc** [1992] IRLR 304 (which was affirmed by the Court of Appeal of England and Wales in **Norcros** [sic] **plc v Hopkins** [1994] IRLR 18) and **Vivion Scully and Another v Gerald Coley and Others** [2009] UKPC 29.

[102] Captain Beswick's second contention is based on his submission that Mr Latty admitted that he saw no evidence that Mrs Hamilton had signed the pension scheme deed. Additionally, learned counsel contended that nowhere in Mrs Hamilton's engagement letter was there any reference to any pension rules. He strongly urged that she could not properly be bound by either the trust deed or the pension scheme rules.

[103] Learned counsel's other plank of support in this regard is that UGI was obliged in law to place Mrs Hamilton in the same position that she would have been, if it had not wrongfully terminated her contract. That included, he submitted, paying to her the monies that it would have contributed to the pension scheme on account of her employment. He relied, in part, for support for these submissions, on **Acklam v Sentinel Insurance Company** and **United General Insurance Company Limited v Marilyn Hamilton** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 88/2008, judgment delivered 15 May 2009. The latter case is a decision on an interlocutory aspect of this case before it came on for trial.

[104] The assessment of this issue should begin with a determination of whether Mrs Hamilton was bound by the pension scheme rules. The relevant portion of the letter of engagement states:

> "As Fringe Benefits, the Company provides:
> …
>
> (3) Group Pension Scheme with obligatory contribution of 5 percent of salary with the option to contribute an additional 5 percent. The Company makes a contribution of 5 percent."
>
> …".

[105] Mrs Hamilton fully acknowledged the existence of the pension scheme and submitted to its terms.

a. She signed the letter of engagement agreeing to its terms, including the requirement of membership in the scheme.

b. For the duration of her employment she submitted to the monthly deduction of both the obligatory and voluntary contributions to the scheme.

c. At the time of the termination of her employment she chose one of the options available to her under the pension scheme rules. The relevant part of the document containing the options states:

> "AS A RESULT OF MY TERMINATION OF SERVICE ON 2006 JULY 28 [SIC] AND THE RESULTANT TERMINATION OF MY MEMBERSHIP TO [SIC] THE ABOVEMENTIONED PLAN ON THAT DATE I HEREBY ELECT THE OPTION CHECKED BELOW FOR THE PROPOSAL OF

ANY MONIES THAT ARE DUE ME FROM THE PENSION PLAN.

OPTION 1	TO RECEIVE THE REFUND OF REQUIRED AND/OR VOLUNTARY CONTRIBUTIONS TOGETHER WITH ANY INTEREST THAT MIGHT HAVE BEEN EARNED THEREON, PAYABLE TO ME IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE PENSION PLAN.
OPTION 2	TO RECEIVE A PAID-UP DEFERRED PENSION BENEFIT, COMMENCING AT MY NORMAL RETIREMENT DATE IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE PENSION PLAN."

It is common ground that Mrs Hamilton chose option 1, and was paid according to its terms.

d. In the cross-examination of Mr Latty, it was not suggested to him that:

(i) the pension scheme did not exist;

(ii) the trust deed or the pension scheme rules were recent inventions; or

(iii) the trust deed or the pension scheme rules were not used as indicated in the letter of engagement.

Mrs Hamilton cannot properly say that she was not bound by the terms of the pension scheme rules.

[106] Two further points, in this context, must be addressed. Captain Beswick stated that Morrison JA (as he then was), in **United General Insurance Company Limited v Marilyn Hamilton**, stated that there was no evidence of the existence of a trust fund, so as to apply to this case, the reasoning of the Privy Council in **Air Jamaica Limited v Joy Charlton and Others**, that it is the trust deed that regulates remedies and rights in respect of pension schemes. Morrison JA noted, at paragraph 37, that Mr George "readily acknowledged that this was an evidential gap" in UGI's case.

[107] It must be noted that that judgment was delivered in May 2009. UGI sought to fill the "evidential gap". Mr Latty's witness statement, filed on 8 June 2010, asserted that Mrs Hamilton was a member of the pension scheme. He exhibited the trust deed and asserted that Mrs Hamilton made her contribution and her election for refund, in accordance with the scheme. That statement became evidence at the trial. The result is that the reasoning of the Privy Council in **Air Jamaica Limited v Joy Charlton and Others** applies.

[108] In **Air Jamaica Limited v Joy Charlton and Others**, Lord Millett, in delivering the judgment of their Lordships' Board made it clear that after the employer had paid the contractually due contributions into the pension scheme fund, the trust deed regulates what is paid out of the fund thereafter. He said, at paragraphs 25 and 26 of the judgment:

> "25. This is not to say that the trust is like a traditional family trust under which a settlor voluntarily settles property for the benefit of the object of his bounty. The employee members of an occupational pension scheme are not voluntary settlors. **As has been repeatedly observed,**

> **their rights are derived from their contracts of employment as well as from the trust instrument**. Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often not inappropriately described as deferred pay. **This does not mean, however, that they have contractual rights to their pensions**. It means only that, in construing the trust instrument, regard must be had to the nature of an occupational pension and the employment relationship that forms its genesis.
>
> 26. In the present case prospective employees were informed that the Company maintained a pension scheme for its staff and that membership was compulsory for those under 55 years of age. They were told the amount of the employee's contribution, and that the company paid 'An amount not less than the employee's contribution, plus any amount necessary to support the financial viability of the scheme'. Even if these can be regarded as imposing contractual obligations on the Company, **the only obligation which was undertaken by the Company, and one which it has fully performed, was to make contributions to the fund. The obligation to make pension payments was not a contractual obligation undertaken by the Company, but a trust obligation imposed on the trustees.** Their Lordships agree with the observation of Carey JA, who was dissenting in the Court of Appeal, that each employee becomes a Member of the pension scheme by virtue of his employment, but that his **entitlement to a pension arises under the trusts of the scheme**." (Emphasis supplied)

[109] The second point concerns a view taken by the learned judge. At paragraph [147], she suggested that Mrs Hamilton made her election on termination, in circumstances where she, realistically, had no choice. The learned judge said:

> "In light of the unexpected and swift summary dismissal of the claimant with one month's pay, it is not difficult to understand why she selected option one. Option two would have meant a wait of a number of years until her retirement. **She testified, of the well-nigh insurmountable obstacles which faced her in any attempt to obtain**

> **employment**. There was no other option open to her which included taking her contribution with employers [sic] contribution. She was suddenly forced into a state of unemployment and was forced to make a selection." (Emphasis supplied)

[110] The learned judge's reasoning cannot be supported in this regard. Not only has she imported subsequent events into the decision-making process, but there was no evidence of coercion on Mrs Hamilton to select the option that she did. It may be that Mrs Hamilton was upset in the circumstances and made her choice out of pique or frustration, but she made that choice voluntarily.

[111] Having concluded that Mrs Hamilton was bound by the terms of the pension scheme rules, it is necessary to address another point that the learned judge made. She held that rule 8.01 of those rules was conclusive for finding that UGI's contributions to the pension scheme could not be withheld from Mrs Hamilton. The learned judge said at paragraphs [150] - [151]:

> "[150] In any event, short shrift can be made of [the issue of whether UGI's contribution could be withheld]. Clause 8.01 of the [pension scheme rules] specifically speaks to the employee who withdraws from the scheme before retirement. Ms. Hamilton did not of her volition, withdraw from the scheme. Her services were wrongfully terminated. She is therefore entitled to what she has lost as a result of [UGI's] breach. Had [UGI] not terminated her employment wrongfully, she would have been entitled to her contributions plus that of employer's.
>
> [151] I find support for this view in Salmon's J [sic] statement. [sic] in the case of **Acklam v Sentinel Insurance Co Ltd** [1959] 2 QB 683, 697, as similar case. He enunciated:

> '[The pension scheme rule in Mr Acklam's case] does not say that if he does exercise one of the options he then forfeits any rights which he might otherwise have had by reason of wrongful dismissal and I refuse to read any such words into the contract. If that is what was intended and I am sure it was not-it could and should have been plainly stated.'"

[112] The learned judge concluded in paragraph [152] that Mrs Hamilton "is therefore entitled to [UGI's] contributions from the time she became a permanent member of" UGI's staff.

[113] **Acklam v Sentinel Insurance** is not entirely on all fours with this case, in that, unlike Mrs Hamilton, Mr Acklam's contract did not allow his employer to dismiss him other than for misconduct or negligence. It is not a critical distinction for this issue. The critical distinction is that it does not seem that the pension scheme in Mr Acklam's case was operated by a separate legal entity from the employer. At best, it is not clear, and there was no issue made of it in the case. It is noted that, at one point in correspondence between the parties in that case, it was the defendant who offered to pay to Mr Acklam his contributions to the scheme (see page 696). This suggests that it had control of those funds rather than the funds being under the control of a separate entity.

[114] The distinction is important for these purposes. It is to be noted that the learned judge has again conflated two separate issues, namely, the entitlement under the pension scheme rules, and the issue of UGI compensating Mrs Hamilton for that which she lost as a result of wrongfully dismissing her. That conflation resulted in an order for

an account of "the contributions that UGI should have made between 10th January 2000 to the 29th July 2006 and payment of the amount due to [Mrs Hamilton]" (order 3 of the orders made by the learned judge).

[115] In neither scenario, however, is UGI liable to Mrs Hamilton in this regard. If Mrs Hamilton was bound by the pension scheme rules, then the monies that UGI had paid into the pension scheme trust fund, in respect of Mrs Hamilton's employment, were not recoverable from UGI. Rule 8.01, even if accurately interpreted by the learned judge, was not applicable against UGI, but instead against the trustees of the pension scheme. If, on the other hand, the learned judge was seeking to have UGI compensate Mrs Hamilton for what she had lost, as a result of UGI having wrongfully terminated her contract, the loss of UGI's contribution to the pension scheme is not to be included in that remedy. That loss resulted from Mrs Hamilton's election at the time of her termination. She chose not to defer payment until retirement. Had she chosen the option of a pension at retirement age, she would have had UGI's contribution.

[116] The remaining aspect of this issue is whether the amount that UGI would have paid into the pension scheme, during the notice period, should be paid to Mrs Hamilton. The basic principle to be applied is that Mrs Hamilton is to be paid everything that she would have been paid during the relevant notice period, which has been assessed above to be one year. There are two reasons, however, for stating that UGI's contribution to the pension scheme should not be paid to Mrs Hamilton. The first is that UGI would have paid those sums to match that which Mrs Hamilton paid into the scheme. She paid nothing into the scheme and therefore UGI was not obliged to pay

anything into the scheme. The second reason is that the pension scheme was designed as a retirement benefit. It is a benefit that Mrs Hamilton, for her own reasons, decided that she did not want. She chose the option that did not include UGI's contributions. It would be wrong to order UGI to pay them to her.

[117] No doubt, the retort would be that UGI created Mrs Hamilton's situation. That is undoubtedly true, but the intervening factors of the contractual term, namely the requirement of matching payments into the scheme, and Mrs Hamilton's choice, break the connection between the termination and the situation with the pension scheme.

[118] For those reasons it must be held that the learned judge erred in ordering that UGI was liable to Mrs Hamilton for its pension scheme contributions, in respect of her employment, both during the time of her employment and for the appropriate notice period, resulting from the wrongful dismissal.

[119] The cases cited by Captain Beswick do not assist greatly. The principle in **Parry v Cleaver**, that the contributions to the pension scheme amounts to deferred pay, is accepted by their Lordships in **Air Jamaica Limited v Joy Charlton and Others**. That fact does not affect the point that Mrs Hamilton decided to reject the option that allowed for receipt of the "deferred pay". The issue in **Norcros plc v Hopkins** was not whether Mr Hopkins was entitled to his pension, it concerned whether he could properly receive both the pension payments, to which he was entitled at the time that he received them, and damages for wrongful dismissal. The Court of Appeal confirmed that there should be no deduction from the damages to account for the pension payments.

Vivion Scully and Another v Gerald Coley and Others has nothing in common with the present case. It dealt with the interpretation of the trust deed as to who, on its terms, was entitled to the residue of the trust fund, after all the contributors had all been paid. Their Lordships ruled that there are no special rules for the construction of pension scheme documents, but that the rules must be considered as a whole as well as along with the trust deed.

[120] The last issue to be considered is that of the learned judge's decision on Mrs Hamilton's claim for libel.

The counter-notice of appeal

[121] The counter-notice of appeal concerns Mrs Hamilton's claim that UGI's letter of dismissal constitutes a libel. The essence of Mrs Hamilton's claim in respect of the libel is contained in paragraph 20 of her further amended particulars of claim. She said:

> "…the publication of the letter of dismissal constituted a libel against [me] in that [UGI] issued and published words and statements concerning [me] which in their natural and ordinary meaning meant and were intended to be understood to mean that [I] was a dishonest person and an untrustworthy and disreputable manager who could not be trusted to perform honestly and with the confidence expected of a senior information technology manager."

[122] Despite Mrs Hamilton's conjecture that the letter was published to employees at UGI, there was no evidence that the letter was shown to anyone except her. Accordingly, the learned judge found that there had been no publication of the letter of dismissal. As a result, the learned judge ruled that Mrs Hamilton had not proved a libel

and was not entitled to any damages in that regard (see paragraph [154] of her judgment).

[123] Mrs Hamilton's grounds of appeal in her counter-notice of appeal state as follows:

> "a. That the learned judge failed to properly consider that if [Mrs Hamilton] had actually shown or allowed anyone else to know of or read her dismissal letter that she would not be alleging constructive publication but actual publication of the defamatory statement.
>
> b. That the learned judge failed to recognise that the concept of constructive publication as advanced on behalf of [Mrs Hamilton] contributed to the reason why [she] found it difficult and/or impractical to attend job interviews as she was concerned that, in so doing she would be participating and/or assisting [UGI] in further libelling her…
>
> c. The Learned Judge failed to be consistent in her reasoning and/or follow her own previous findings in relation to [Mrs Hamilton's] allegation that she was libelled…."

[124] The essence of Captain Beswick's submissions on these grounds is that the learned judge should have found that there was constructive publication of the defamatory dismissal letter. Learned counsel argued that "where the nature of the defamatory statement is such as to effectively force a claimant to publish the statement, the defendant must be treated as having in fact published the offending material". Learned counsel sought to draw parallels in the criminal law and in family law in order to support his submissions. Unsurprisingly, he did not cite any authority, which was directly on point. The decided cases all point to the need for actual publication.

[125] Lord Gifford pointed to the well-established principle that publication is an essential element of defamation. He argued that, without publication, there is no person other than the claimant whose mind is affected by the defamatory material. Learned Queen's Counsel argued that qualified privilege also applied, in that UGI was under a duty to inform Mrs Hamilton of its reason for dismissing her, and that she had a corresponding right to receive that communication. In addition, he submitted, even if Mrs Hamilton had shared the letter with a prospective employer, there would have been a similar duty and right between UGI and that prospective employer. He relied on, among others, the cases of **Edwards v Wooton** (1607) 12 Co Rep 35, **John Lamb's case** (1610) 9 Co Rep 59 b; (1610) 77 ER 822 and **Sadgrove v Hole** [1901] 2 KB 1 for support.

[126] Learned Queen's Counsel is on good ground with his response. The learned editors of Halsbury's Laws of England Volume 32 (2019) correctly set out, at paragraphs 560 – 562, the relevant principles of law. They state:

> "**560. Need for publication.**
>
> No action for a libel will lie unless there has been a publication. The claimant must allege and prove that the defendant published, or caused to be published, 'of and concerning the claimant', the words complained of to a third person, namely to some person other than the claimant.
>
> **561. Publication to a third person.**
>
> There is sufficient publication to a third person if there is publication to a stranger, or to the claimant's wife or husband, or to the claimant's or defendant's employees, or indeed to any person other than the claimant himself….

> **562. What amounts to publication.**
>
> For the purposes of a claim for libel, publication is the communication of defamatory matter to a third person. Merely to write down defamatory words is not to publish a libel. Even to deliver a defamatory statement to another is not to publish it to him if he does not become aware of the defamatory words. Publication consists in the making known of the defamatory statement (in the case of libel, after it has been reduced to some permanent form)…." (Bold headings as in original)

[127] The learned editors of Carter-Ruck on Libel and Privacy, Sixth Edition, express a similar view. At paragraph 5.1 they state:

> "To found an action for defamation there must have been a publication of the words or matter of which complaint is made. The law of defamation is concerned with the protection of a person's reputation. As a person's reputation is the estimation in which he is held by others, and not the opinion he holds of himself, it follows that unless a statement is communicated to a person other than the claimant no action will lie. This communication is called 'publication'. **A defamatory statement communicated to the claimant may injure his self-esteem but it does not, in the absence of publication to a third person, damage his reputation**. Thus, it is the publication of the defamatory statement that is the foundation or gist of the action, until the statement is published, the cause of action for both libel and slander is not complete." (Emphasis supplied)

[128] The learned editors of Gatley on Libel and Slander, Ninth Edition, express similar views at paragraphs 1.4 and 6.1.

[129] The common thread in all those texts is the need for the communication of the defamatory material to some person other than the claimant. None of those learned writers address the concept of constructive publication. The learned editors of Carter-

Ruck on Libel and Privacy, in a footnote to paragraph 5.1, do suggest, however, that if the claimant is under a duty to communicate the defamatory material to another, then a claim will lie. They state, without citing authority:

> "…Communication to the person defamed may be sufficient to give rise to a claim where the person to whom the communication is made is under a duty to communicate the material to another."

Although Captain Beswick would, undoubtedly, adopt that opinion, it cannot be said that Mrs Hamilton was under a duty to communicate the dismissal letter to any other person, including a prospective employer.

[130] The reasoning in the decided cases also stresses the need for communication to a third party.

[131] In **John Lamb's case**, the court gave sage guidance as to what constitutes publication. It said, in part:

> "…for if one reads a libel, that is no publication of it, or if he hears it read, it is not publication of it, **for before he reads or hears it, he cannot know it to be a libel**; or if he hears or reads it, he repeats it, or any part of it in the hearing of others, or after that he knows it to be a libel, he reads it to others, that is an unlawful publication of it; or if he writes a copy of it, and does not publish it to others, it is no publication of the libel…" (Emphasis supplied)

[132] Similarly, in **Pullman and Another v Walter Hill & Co Limited** [1891] 1 QB 524 Page 527, Esher MR stated:

> "…What is the meaning of 'publication'? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. **If the statement is sent straight to the person of whom it is**

> **written, there is no publication of it; for you cannot publish a libel of a man to himself**…." (Emphasis supplied)

[133] Not only did Mrs Hamilton keep the letter to herself, she was not obliged to share it with anyone. She could, as mentioned earlier, explain to a prospective employer, that UGI made a false statement about her conduct.

[134] The learned judge was correct in finding that there had been no publication of the dismissal letter. The counter-notice of appeal fails.

Summary and conclusion

[135] Mrs Hamilton was wrongfully dismissed by UGI because, on the evidence, it did not give her the notice that was required at that time, in the industry, for persons at her level. The contract of employment, contrary to UGI's contention, did not stipulate a specific notice period; it only created a minimum period. UGI is therefore liable to pay Mrs Hamilton salary and perquisites, for one year, as ordered by the learned judge.

[136] The learned judge was, however, in error in deciding that Mrs Hamilton was entitled to:

a. two additional years' notice pay as compensation for the manner in which she was dismissed;

b. UGI's contributions to the pension scheme, in respect of Mrs Hamilton's employment, during the time for which she was employed; and

c. the equivalent of the sum UGI would have paid into the pension scheme, in respect of Mrs Hamilton's employment, during the one year notice period to which she is entitled.

[137] Insofar as the law of wrongful dismissal is concerned, the learned judge erred when she found that the **Addis** principle was no longer applicable to circumstances such as the dismissal in this case.

[138] In respect of the pension payments, the learned judge did not give sufficient weight to the fact that:

a. the pension scheme was not operated by UGI, but by a third party; and

b. Mrs Hamilton elected not to take UGI's contribution which was available to her upon her reaching retirement age.

[139] The learned judge was, however correct in ruling that Mrs Hamilton was not entitled to damages for libel. The learned judge correctly held that Mrs Hamilton had not proved publication, to any third party, of UGI's letter of dismissal, which Mrs Hamilton alleged to be libellous.

[140] In the result, the appeal should be held to succeed in part and the counter-notice of appeal should fail. The consequence of those findings is that both the orders

made by the learned judge as well as the assessment of damages by the second judge, flowing as it did from the judgment of the learned judge, must be set aside, in part.

The orders by the learned judge

[141] The learned judge made the following orders:

> "In light of the foregoing, damages awarded as follows:
>
> (1) For wrongful termination of her employment and loss as a result of handicap/loss of advantage on the labour market in the sum equivalent to three (3) years[′] net earnings including payment for breach from 29th July 2006 with an increase of 8.25% annually. Deduction to be made for the period she was employed[.]
>
> (2) Non-taxable motor vehicle allowance for two (2) months in the amount of Forty Thousand Dollars ($40,000).
>
> (3) An account of:
>
> (a) all employees' benefits including [UGI's] pension contributions for a period of three (3) years at the rates at which the same would have been obtained by [Mrs Hamilton]were it not for [UGI's] breach;
>
> (b) the contributions [UGI] should have made between 10th January 2000 to the 29th July 2006 and payment of the amount due to [Mrs Hamilton].

(4) Interest due to [Mrs Hamilton] at the commercial rate from the 29th July 2006 to the date of the judgment. (Regarding [sic] [Mrs Hamilton's] pension entitlement from the point of her retirement had [UGI] not breached the contract).

(5) Cost[s] to [Mrs Hamilton] to be agreed or taxed.

(6) Liberty to apply"

[142] Based on the ruling in this appeal, the following further orders should be made:

1. Order 1 is set aside and in its place it is ordered that UGI shall pay to Mrs Hamilton 12 months' salary and perquisites. Deduction is to be made for the payment made at the time of dismissal.
2. Order 2 shall stand.
3. Order 3 is set aside.
4. Order 4 is set aside and in its place it is ordered that interest shall be paid on all sums due to Mrs Hamilton at commercial rates from 28 July 2006 to the 13 December 2013.
5. Order 5 is set aside and in its place it is ordered that UGI shall pay Mrs Hamilton one half of her costs.
6. Order 6 shall stand.

The order by the second judge

[143] The second judge made her order on 9 March 2018. The relevant portion of the order states:

> "1. For damages for wrongful termination – Salary and emoluments for 12 months from July 2006 to June 2007, inclusive of employer's contribution to pension, motor vehicle upkeep, gas allowance and lunch subsidy with an increase of 8.25% from January 2007 to June 2007 of $3,567,836.88 with interest at 19.52% from the 28th July, 2006 to the 13th December, 2013 the day of judgment. Thereafter at 6% until payment;
>
> 2. For damages for handicap on the labour market, 2 years[`] salary and emoluments, inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, reflecting an increase of 8.25% per year as follows:-
>
> a. From July 2007 to June 2008 the sum of $3,779,449.49;
>
> b. From July 2008 to June 2009 the sum of $4,116,211.49;
>
> Total Salary and emoluments awarded for the three (3) years being $11,463,497.86 with interest at 19.52% from the 28th July, 2006 to the 13th

December, 2013 the day of judgment. Thereafter at 6% until payment;

3. Employer's contribution to pension to be refunded from January 2000 to June 2006 being $740,000.700 [sic] with interest at 19.52% from the 30th November, 2009 to the 13th December, 2013 the date of Judgment. Thereafter at the rate of 6% until payment;
4. Motor vehicle allowance of $40,000 with interest at 19.52% from 28th July, 2006 to the 13th December, 2013 the date of judgment. Thereafter at 6% until payment;
5. Health and Life insurance of $1,785,355.56 with interest at 19.52% from 28th July, 2006 to the 13th December, 2013 the date of judgment. Thereafter at 6% until payment;
6. The payment for one month['s] notice already paid to [Mrs Hamilton] is to be deducted from the judgment sum;
7. Costs of the assessment awarded to [Mrs Hamilton] to be agreed or taxed;
8. Stay of execution of orders number 2 and 3 until the determination of the appeal in the Court of Appeal;

9. Stay of execution granted on the award of 2/3rds of the costs of the assessment until the determination of the appeal in the Court of Appeal;

10. [Mrs Hamilton's] Attorney-at-Law to prepare, file and serve Court orders made herein."

[144] Based on the ruling in this appeal, the following further orders should be made so as to avoid a re-hearing of the assessment of damages:

1. Order 1 is modified to allow damages for wrongful termination only for the period of 12 months inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, less the payment made at the time of dismissal, with interest thereon at 19.52% from 28 July 2006 to 13 December 2013, which is the date of judgment. Thereafter at 6% until payment.
2. Orders 2-4 and 6 are set aside.
3. Order 5 is modified to limit the payment in respect of health and life insurance to 12 months only.
4. Order 7 is modified to award Mrs Hamilton one-half of the costs of the assessment of damages.
5. Orders 8, 9 and 10 shall stand.

Costs

[145] The general principle with regard to costs is that the unsuccessful party should pay the costs of the successful party in respect of the appeal. There, however, was an agreement between the parties, which adjusts that position. The consent order, filed on 22 March 2018 includes the following as order 6:

> "[UGI] undertakes in the event of the appeal being allowed whether completely or in part (a) to pay the costs of [Mrs Hamilton] to the appeal, to be agreed or taxed, limited to the appearance of two counsel and an instructing attorney at the first five days of the Appeal (b) not to seek or enforce any order for costs against [Mrs Hamilton] to the appeal. In the event of the appeal being dismissed wholly or in part [Mrs Hamilton] will be entitled to seek orders for costs of the appeal. The costs of the action in the court below shall be determined by the Court of Appeal after hearing the appeal."

[146] It should be left to counsel to make written submissions as to costs in this court, taking that consent order into account and guided by the following orders:

a. the appeal allowed in part;

b. the counter-notice of appeal is dismissed;

c. Mrs Hamilton's costs of the trial before the learned judge is reduced by one-half; and

d. the costs of the assessment of damages by The second judge is reduced by one-half.

[147] The submissions should be filed and served within 14 days of the date hereof.

[148] It cannot be ignored that this judgment has been long delayed. We sincerely apologise to the parties for the delay and the inconvenience caused thereby.

MCDONALD-BISHOP JA

[149] I have read the draft judgments of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

(a) The appeal is allowed in part.

(b) The counter-notice of appeal is dismissed.

(c) The orders made by the learned trial judge are adjusted as follows:

1. Order 1 is set aside and in its place it is ordered that UGI shall pay to Mrs Hamilton 12 months' salary and perquisites. Deduction is to be made for the payment made at the time of dismissal.
2. Order 2 shall stand.
3. Order 3 is set aside.
4. Order 4 is set aside and in its place it is ordered that interest shall be paid on all sums due to Mrs Hamilton at commercial rates from 28 July 2006 to the 13 December 2013.
5. Order 5 is set aside and in its place it is ordered that UGI shall pay Mrs Hamilton one half of her costs.

6. Order 6 shall stand.

(d) The orders made herein in the Supreme Court on 9 March 2018 are adjusted as follows:

1. Order 1 is modified to allow damages for wrongful termination only for the period of 12 months inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, less the payment made at the time of dismissal, with interest thereon at 19.52% from 28 July 2006 to 13 December 2013, which is the date of judgment. Thereafter at 6% until payment.
2. Orders 2-4 and 6 are set aside.
3. Order 5 is modified to limit the payment in respect of health and life insurance to 12 months only.
4. Order 7 is modified to award Mrs Hamilton one-half of the costs of the assessment of damages.
5. Orders 8, 9 and 10 shall stand.

(e) Mrs Hamilton's costs of the trial before the learned judge is reduced by one-half.

(f) The costs of the assessment of damages ordered on 9 March 2018 are reduced by one-half.

(g) Counsel for the parties shall, within 14 days of the date hereof, file and serve written submissions as to the costs of the appeal.