IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G274 OF 2012

BETWEEN:

BEVERLY HEMMINGS

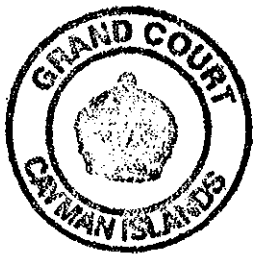
Plaintiff

AND:

P.M.C. LTD (Trading as) CHRISSIE TOMLINSON HOSPITAL

Respondent

Appearances:	**Mr Irvin Banks for the Plaintiff**
	Mr. Philip Boni of Higgs & Johnson for the Defendant
Before:	**Hon. Justice Richard Williams**
Heard:	**6th February 2013**
Draft Judgment circulated:	**22nd February 2013**
Date of Judgment:	**28th February 2013**



JUDGMENT

Applications

1. In a Writ of Summons and Statement of Claim filed on 8th June 2012, the Plaintiff claimed (i) damages for wrongful dismissal for breach of the Plaintiff's employment contract, (ii) a payment for breach of contract in respect of accrued

banked hours, (iii) a payment for a breach of contract concerning lost overtime pay, (iv) damages as the manner of dismissal amounted to a breach of the implied term of trust and confidence between the employer and employee and (v) damages for defamation.

2. As the hearing progressed, Mr. Banks who was appearing for the Plaintiff indicated that the claims in relation to accrued banking hours, overtime and defamation were no longer being pursued. Mr. Banks indicated that only the claims for damages for wrongful dismissal due to a failure to follow a proper disciplinary process and for breaches of the implied term of trust and confidence remained for the Court to determine.

3. The Plaintiff alleges that she has suffered a loss of the earnings, vacation pay, pension and health benefits which she would have received if the fixed term contract had run to its natural conclusion. The Plaintiff seeks damages for "*damage to feelings and loss of dignity*" and "*potential loss of work at a comparable salary*" due to a loss of reputation and preclusion from further employment in her chosen field.

4. The matter comes before me on the Defendant's application to strike out the Writ and Statement of Claim, with an alternative prayer for summary judgment or in the alternative for the determination of certain questions of law pursuant to Order 14A. The Defendant's position is that all the remaining claims are bad in law.

5. The attack on the Statement of Claim made by the Defendant is best described by looking at the orders in his Summons filed on 10th September 2012 which are still sought, namely that:

(i) paragraphs 6 to 56 of the Writ of Summons and Statement of Claim be struck out pursuant to Order 18, rule 19 as disclosing no reasonable cause of action and/or on the basis that they are an abuse of process.

(ii) each one of the Plaintiff's claims for breach of contract be dismissed and judgment be entered for the Defendant pursuant to Order 14.

(iii) the Plaintiff's claim for breach of contract (as set out in paragraphs 6 to 56 of the Writ of Summons and Statement of Claim) be dismissed and judgment be entered for the Defendant pursuant to Order 14A.

Background

6. The facts as indicated in the Statement of Claim which are relevant to the remaining claims can be summarised as follows. The Defendant, PMC Ltd, trades as the Chrissie Tomlinson Memorial Hospital, a private hospital in the Cayman Islands. The Plaintiff was a licensed practical nurse employed at the hospital from 4th May 2007 for a number of years under 3 different contracts. The last, and the relevant, contract was a *"Fixed Term Professional Contract"* ("the contract") signed on 12th July 2011 and due to run from 12th July 2011 until11th July 2012.

During the hearing Mr. Banks conceded that this was the governing contract and that the term was for the abovementioned dates.

7. The Plaintiff's employment ended on 1st September 2011, with ten months and nine days remaining on her contract, following her dismissal by a letter dated 2nd August 2011. The basis for dismissal set out in the letter was that she had received a final warning on 9th February 2010 and that she had repeated similar gross misconduct on 13th July 2011 when she left her shift early at 4.45 a.m. leaving her colleague *"with 4 patients on Medical and Surgical Ward and 1 maternity patient in active labour"* thereby threatening *"the safe operation of the hospital and left patients at risk."* The Plaintiff strenuously denies the allegations that gave rise to the initial warning letter as well those resulting in the issuance of the dismissal letter. The Plaintiff contends that she had been given permission to leave when she did and that, if a proper investigation had been carried out pursuant to a reasonable disciplinary process, the Defendant would have had to recognise that her actions could not have been construed as being misconduct. In other words, the Plaintiff contends that she would not have been dismissed but for the Defendant's failure to follow a proper disciplinary procedure.

8. Clause 10 of the contract provided that the Defendant may terminate the contract without notice or pay in lieu of notice for any breach of ethical or professional standards, professional misconduct in the opinion of the Defendant or for violation

of any terms of the contractual agreement or serious violation of workplace policy. Clause 15 of the relevant contract provided an option to either party to terminate the contract on 30 days written notice without cause. Despite the contents of Clause 10 and the Defendant dismissing the Plaintiff for cause, she was actually provided with 30 day's written notice.

9. The Plaintiff contends at paragraph 51 of her Statement of Claim that the Defendant cannot rely on Clause 15 as the dismissal was for cause. The Defendant contends that it matters not if the dismissal was for cause, relying upon the doctrine of "least burdensome obligation".

The Law

10. The general principle in contract law is that the purpose of damages is to put the innocent party in the position that they would have been but for the breach of contract. Thus, if an employer terminates a contract without notice and does so in breach of contract, the employee may have a claim for breach of contract. This would be a claim for wrongful dismissal. Damages for the wrongful dismissal, even in a fixed contract case, would amount to the number of weeks that the employee should have served in notice but was denied. Although not pleaded in this case, if the employer fails to follow a contractual disciplinary procedure then damages for wrongful dismissal may possibly include losses incurred during the period of time it would have taken for the employer to put the contractual

procedure into effect and be concluded.[1] However, the applicability of this proposition is not entirely clear following the views expressed by Lord Dyson at paragraph 60, Lord Phillips at paragraph 87 and Lord Mance at paragraphs 106-108 in the two Supreme Court cases of ***Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Minister of Defence*** [2011] UKSC 58, [2012] IRLR 129.

11. In a complaint of unfair dismissal, the reason for which the employer actually chose to dismiss the employee is of central importance. In an action for wrongful dismissal, it is possible to justify the dismissal on information acquired after the dismissal. In the matter before me the Defendant had a clear contractual power to dismiss the Plaintiff without cause on 30 days notice and by doing this, albeit by giving another reason, it does not amount to a breach of contract.

12. Under the doctrine of "least burdensome obligation" where the contract provides an express right to terminate on notice and the contractual right to terminate is not circumscribed by the implied term of trust and confidence, there is a forceful argument that damages arising out of the termination of employment should be confined to the contractual notice period. In the matter before me, the Plaintiff's

[1] Gunton v Richmond-upon-Thames LBC [1981] Ch448, [1980] 3 All ER 577

least burdensome manner of terminating Miss Hemmings'[2] contract would have been to have used its power to dismiss on 30 days notice.

13. In the Grand Court case of ***Roulstone and Coffee v Cayman Airways Limited*** (1992 – 93) CILR 259, Schofield J referred to the following sentiments of Buckley, L.J expressed in the English Court of Appeal case of ***Gunton v Richmond-upon-Thames London Borough Council*** [1981] Ch. At 469:

> *"Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so: see McGregor on Damages, 13th ed. (1972), paras 884, 886 and 888."*

[2] BuckleyJ in Gunton, Allied Maples Ltd v Simmons & Simmons (a firm) [1995] 4 All ER 907, Lavarack v Woods of Colchester Ltd [1967] 1 QB 278

Strike Out

14. Mr. Boni asserts that there is no claim at common law for the damages sought caused by the fact or manner of dismissal. Mr. Boni contends that the Plaintiff is attempting *"to dress up an unfair dismissal complaint as a contract complaint and thereby circumvent the statutory provisions limiting rights of action in unfair dismissal cases."* As a consequence, Mr. Boni submits that the Writ of Summons and the Statement of Claim disclose no cause of action against the Defendant and that they are an abuse of process.

15. Although I may consider affidavit evidence concerning whether there has been an abuse of process, I cannot look at any filed affidavit when considering the application on the ground of no reasonable cause of action: see Order 18 r.19(2). For the latter ground, I have to consider whether, if the allegations in the Statement of Claim were proved at trial, they could support the causes of action asserted against the Defendant. However I must not fall into the temptation, which may arise following receipt of detailed and lengthy submissions in this striking out application, of attempting to now try the issue and make findings of fact. A cause of action with some prospect of success will not be struck out provided the pleadings raise a question fit to be tried; it does not matter that the case might be weak or is unlikely to succeed. A cause of action which is unknown in law will be struck out, as will a cause of action pleaded without some material averment. I may strike out the pleading or part of the pleading if the facts pleaded do not

constitute the cause of action alleged, or if the relief pleaded is not such as could be ordered by law.

16. I am also conscious that Courts must be careful not to strike out claims made where facts upon which application of principle of law depend are not yet clear, where the law is uncertain or is in a state of development. Lord Browne-Wilkinson stated the following at 557 in ***Barrett v Enfield Borough Council*** [2001] 2 AC 550:

> *"In my speech in the X v Bedfordshire Case [1995] 2 AC 633, at pp. 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

17. With one eye on Lord Browne-Wilkinson's statement in **Barrett,** I have regard to the recent and important decision from the highest level, the Supreme Court in

England and Wales in ***Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Minister of Defence*** [2011] UKSC 58, [2012] IRLR 129 ***("Edwards")*** . The Supreme Court reaffirmed, albeit by a majority of 4 to 3, the approach in ***Johnson v Unisys Ltd*** [2001] ICR 480 ("***Johnson***"). The two appeals were heard together.

18. Due to the significance of the ***Edwards*** case, there is merit in setting out the facts. The claimant in the first claim, Mr. Edwards, was a consultant surgeon who had been summarily dismissed on the grounds of gross professional and personal misconduct following a disciplinary panel's finding that he inappropriately examined a female patient. He argued that, in breach of an express term of his contract, the disciplinary panel did not include a legally qualified chair, a clinician in the same medical discipline, or allow him legal representation before the panel. Mr. Edwards's contention was that, had these terms not been breached, the panel would not have made their findings of misconduct.

19. The second claimant, Mr. Botham, was a youth worker who had been dismissed for gross misconduct following allegations of behaving inappropriately towards two teenage girls. When he went before an employment tribunal he successfully claimed unfair and wrongful dismissal, and was awarded the maximum damages available for unfair dismissal, reduced by 55% for contribution. He later issued proceedings in the High Court seeking damages for breach of contract, because the

disciplinary process had been in breach of the Ministry of Defence personnel manual.

20. Both Mr. Edwards and Mr. Botham claimed that the breach of the dismissal procedures had damaged their reputations and prevented them from securing comparable employment.

21. The issue before the Supreme Court was the measure of damages recoverable in law and the substance of their claims was assumed to be correct. The Supreme Court held by a majority that both Appellants' claim for ongoing post-termination damages should fail. The majority held that the disciplinary process could not be separated from the dismissal which followed it. Mr. Edwards sought to claim for damage to his reputation caused by the findings of the disciplinary panel, but these findings were the same as the reason for his dismissal, about which he could not claim for damages to reputation. The panel's findings were therefore not independent of the dismissal process, and so Mr. Edwards' claims fell within what has become termed the ***Johnson*** exclusion area. Similarly it was felt that Mr. Botham's claims were also held to flow directly from his dismissal and were also precluded.

22. The main majority decision was given by Lord Dyson (with whom Lord Mance concurred and Lord Walker agreed). Lord Phillips agreed in the result, but reached

it by a different route. Lady Hale, Lord Kerr and Lord Wilson dissented in ***Edwards***, and Lady Hale also dissented in ***Botham***.

23. In earlier case of ***Johnson*** the House of Lords were dealing with an employee who was dismissed for misconduct. The claim was that he had suffered a mental breakdown as a consequence of the manner of his dismissal, and was unable to work. It was alleged, as in the matter before me, that the manner of the dismissal amounted to a breach of the implied term of trust and confidence.

24. The relevant part of the Headnote in ***Johnson*** reads:

> *"... Under part X of the Employment Rights Act 1996 Parliament had provided the employee with a limited remedy for the conduct of which he complained; that although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the manner of his dismissal, it would be an improper exercise of the judicial function of this House to take such a step in the light of the evident intention of Parliament that such claims should be heard by specialist tribunal's and the remedy restricted in application and extent."*

25. Part VII of the Labour Law (2011 Revision) sets out the law of unfair dismissal in the Cayman Islands. Section 51 provides for instances when a dismissal would be fair. If it is contended that a dismissal has been unfair the complaint must be filed with the Director of Labour and can be determined by the Labour Tribunal. The regime established in the Cayman Islands is very similar to that set up in England and Wales under the Employment Rights Act 1996. It is evident that the Legislature intended the Labour Tribunal to be the forum in which employees would be entitled to bring their unfair dismissal complaints. Therefore, the procedure includes a specialist tribunal, strict time limits[3] and limits on the amount of compensation that can be claimed.[4] On the face of the legislation it appears that the intention of the Legislators in both England and Wales and the Cayman Islands was similar - an intention to set up a specialised tribunal, governed by legislation, to deal with unfair dismissal complaints

26. Mr. Banks contends that the House of Lords in ***Johnson*** placed great emphasis on the efficiency and sophistication of the statutory unfair dismissal regime in England. Mr. Banks accepted that the House of Lords had commented that the co-existence of two systems, one under the Act and one at common law would be a "*recipe for chaos.*" Mr. Banks submits that the regime in place in the Cayman Islands is not as sophisticated and well run as the same in England. In his written submissions he expresses a view that "*there has been a dismal failure to advance*

[3] Section 54(2) Labour Law
[4] Section 55(3) Labour Law

our unfair dismissal legislation on a par with the UK." Mr. Banks criticises the make-up and training of those who sit on the Labour Tribunal in the Cayman Islands. He concludes that the Court should not adopt an approach that unfair dismissal cases should only be heard by the Labour Tribunal stating that, *"nothing in the Labour Law.... precludes an employee filing a common-law action for wrongful dismissal, and proclaiming additional damages...."*

27. Although I accept that there may be greater resources and more sophistication and maturity in the tribunals sitting in England and Wales when compared to the Labour Tribunal in the Cayman Islands, and I note the view expressed by Lady Hale at para. 111 in her dissenting judgment in ***Edwards*** that the unfair dismissal legislation was intended to provide a supplemental and not exhaustive remedy, I do not agree that this means that there should be unfair dismissal cases being heard in parallel courts. This would be inconsistent with the clear intention of the legislators in the Cayman Islands.

28. My view is fortified by the Grand Court decision of Schofield J in ***Roulstone***. Schofield J commented at page 260 line 35 that:

> *"This court does not recognize unfair dismissal as a cause of action. An employee who is wrongfully dismissed has his remedies before this court at common law. But the common law does not provide a remedy for unfair dismissal. Unfair dismissal is*

recognized by the Labour Law and the remedy open to an employee under that Law is complaint to the Director of Labour, and thereafter, by a party aggrieved by the Director's decision to an Appeals Tribunal. A final appeal lies to this court from the Tribunal's decision.... No cause of action in the first instance lies with the court. Accordingly, I strike out the prayer in the statement of claim damages for unfair dismissal."

29. In ***Roulstone*** the plaintiffs, who were flight attendants, brought proceedings seeking damages for unfair dismissal, or in the alternative, damages for wrongful dismissal. Although their employment agreements provided for dismissal without cause after giving 14 days written notice, they were given their due allowances and one month's salary in lieu of notice. I note with interest the Headnote in ***Roulstone*** which reads:

"In a case of wrongful dismissal the aggrieved party would be entitled to damages equivalent to the wages he would have earned from the date of dismissal to the end of his employment contract, that being the earliest date at which the employer would have been able properly to terminate the contract. However, this was not a case of wrongful dismissal as it was normally lawful for an employer seeking to terminate an employee's services to give salary in lieu of notice and there was nothing in the plaintiffs'

employment contracts or the nature of their employment to suggest that this course was improper or inappropriate. On the contrary, since the defendant had offered to each plaintiff benefits in excess of their entitlements (namely one month's salary instead of two weeks' salary): and since these were in excess also of any damages which could have been awarded even if they were proof of wrongful dismissal, these proceedings were an abuse of process and would Accordingly struck out."

30. In the matter before me, I again remind myself that, the Plaintiff had an unrestrained power to dismiss on 30 days notice and that in fact it gave the required 30 days notice as set out in the contract of employment.

31. Lord Hoffmann, who gave the lead speech in the House of Lords in ***Johnson***, held that the claimed breach of contract was not actionable in damages, principally because the manner of dismissal was a matter which fell squarely within the unfair dismissal jurisdiction of the employment tribunal, and it would be wrong for the courts to develop a parallel common law remedy.

32. Lord Hoffmann said in ***Johnson*** that alleged breaches of the employer's disciplinary procedure did not provide a basis for common law action in damages. Lord Hoffmann said at paragraph 66:

"My Lords, given this background to the disciplinary procedures [particularly as being the subject of the relevant ACAS Code of Practice], I find it impossible to believe that Parliament, when it provided in section 3(1) of the 1996 Act that the statement of particulars of employment was to contain a note of any applicable disciplinary rules, all the parties themselves, intended that the inclusion of those rules should give rise to a common law action in damages which would create the means of circumventing the restrictions and limits which Parliament had imposed on compensation for unfair dismissal. The whole of the reasoning which led me to the conclusion that the court should not imply a term which has this result also in my opinion supports the view that the disciplinary procedures do not do so either. It is I suppose possible but that they may have contractual effect in determining whether the employer can dismiss summarily in the sense of not having to give four weeks' notice or payment in lieu. But I do not think that they can have been intended to qualify the employer's common law power to dismiss without cause on giving such notice, or to create contractual duties which are independently actionable."

33. I am conscious that, unlike the legislation in England and Wales, Sections 6(1) and 6(2) of the Labour Law (2011 Revision) do not require the employer to place details of applicable disciplinary rules in the written statement of his conditions of employment. I am also conscious that Lord Hoffman felt the inclusion of this requirement to be of some significance, However, despite this, upon reading Part VII of the Labour Law I am still satisfied that the intention of the Legislature in the Cayman Islands was to set up a special and separate procedure and that only this regime would provide a remedy in respect of the manner of dismissal. The right to claim damages for unfair dismissal is not one developed in the common law but by statute. The Legislature did not intend that an employee could choose to pursue his complaint of unfair dismissal in the ordinary courts, free from the limitations put in place for the exercise of the statutory jurisdiction. I note that Section 6 (2) (j) requires the employer to state the length of notice the employee is obliged to give and is entitled to receive to terminate the employment contract.

34. Lord Dyson in ***Edwards*** followed Lord Hoffmann's approach and held that the disciplinary process could not be separated from the dismissal which followed it. Lord Dyson stated at paragraph 39 that:

> *"Unless they otherwise expressly agree, the parties to an employment contract do not intend that a failure to comply with contractually binding disciplinary procedures will give rise to a common law claim for damages."*

35. Lord Dyson at paragraph 43 dealt with the suggestion that unfair dismissal legislation should not be read as taking away a right to common law damages. Lord Dyson stated that the right to claim damages had not existed before unfair dismissal was introduced in 1971 by the Industrial Relations Act. He noted that there was no decided case prior to 1971 in which an employee was awarded damages for breach of contract for the unfair manner of their dismissal. He concluded that Parliament had in mind that only the statutory unfair dismissal regime would provide a remedy in respect of the manner of dismissal.

36. Having regard to Lord Hoffman's reasoning in ***Johnson,*** a common law action in relation to the dismissal procedure does not exist in the matter before me. There was no express agreement between the parties that a failure to comply with any contractually binding disciplinary procedures would give rise to common law claim for damages. In these circumstances, it would be wrong to create such a common law claim as it would conflict with the statutory unfair dismissal procedure in place in the Cayman Islands. The loss claimed arises by reason of dismissal and does not flow directly from any alleged failure of the Plaintiff to act fairly when taking steps leading to the dismissal.

37. Turning now to deal specifically with the claim based on an implied term for breach of trust and confidence. In ***Addis v Gramophone. Ltd*** [1909] A.C. 488 it was held that in an action for breach of contract, including an action for wrongful

dismissal, it was not possible to recover damages for distress or injured feelings for the manner of the dismissal. It was held that damages for dismissal in breach of the contract were only available to compensate for loss of earnings during the notice period. The effect of the decision is summarised in the headnote as follows:

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

38. Lord Phillips in ***Edwards*** allowed both appeals, but for different reasons than those formulated by the three members who formed the majority. He considered that both claims were prevented because they were effectively claims for "stigma" damages. He relied upon the decision in ***Addis*** when concluding that such damages could not be awarded in respect for wrongful dismissal and should not be allowed for failure to follow a disciplinary procedure.

39. Mr. Banks claims that ***Addis*** does not make it impossible to recover damages for loss of reputation or future prospects on the labour market where the employer is in breach of trust and confidence. Mr. Banks places great emphasis on the House of Lords decision in ***Malik v Bank of Credit & Commerce International SA*** and ***Mahmud v BCCI,*** [1998] AC 20. In ***Malik*** the House of Lords appeared to

recognize the availability of what have been termed "stigma" damages. In ***Malik*** the employees were appealing against a decision that they were not entitled to recover damages for injury to their reputation and resultant difficulties in finding employment due to their association with BCCI. In Malik it was assumed for the purposes of the argument that BCCI operated its banking business in a corrupt and dishonest way; that the nature of such conduct was widely known and that the employees were handicapped on the labour market due to being tainted by their nexus with BCCI. At trial, none of the employees was actually found to have suffered any "stigma" on the job market.[5]

40. In ***Malik*** it was held that BCCI was under an implied obligation not to conduct a corrupt and fraudulent business and that this was part of an implied contractual obligation not to engage in conduct likely to undermine the relationship of confidence and trust between employer and employee. The House of Lords decided that where the breach adversely affected future employment prospects, such continuing financial losses were, in principle, recoverable subject to questions of foreseeability, remoteness and mitigation. It is important to note that the breach of contract was caused by the assumption that the bank was operating the business in a corrupt and dishonest manner and this was separate from, and independent of, the termination of the contract of employment by reason of redundancy. It was not something that was linked to a dismissal.

[5] BCCI v Ali (No 3) [2002] 1258

41. In ***Malik*** the House of Lords distinguished ***Addis*** and found that that it was an unacceptably narrow interpretation of the implied trust and confidence term to limit recovery to premature termination losses. Lord Nicholls commented at page 39 para D:

> *"In my view these observations (made by the House of Lords IN Addis) cannot be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term and this caused financial loss, Addis v Gramophone Co. Ltd was decided in the days before this implied term was adumbrated. Now that this term exists and is normally implied in every contract of employment, damages for its breach should be assessed in accordance with ordinary contractual principles."*

42. In ***Johnson*** the House of Lords, when considering the claim seeking damages for breach of implied term of breach of confidence, rejected the approach in ***Malik***. It is important to note that the breach in ***Johnson***, as in the matter before me but unlike in ***Malik***, was alleged to have come about due to the manner of the dismissal. The Plaintiff had suffered a mental breakdown as a result of the manner and fact of his dismissal. The re-amended particulars of claim alleged that it was an implied term of the plaintiff's contract of employment with the defendant that the defendant, its servants or agents (a) would not, without reasonable and proper

cause, conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the plaintiff and the defendant, its servants or agents; (b) would not, without reasonable and proper cause, conduct themselves in an unacceptable manner so as to harm the professional development of the plaintiff; (c) would not, without reasonable and proper cause, conduct themselves in an unacceptable manner so as to harm the physical or psychological health of the plaintiff or his financial welfare; (d) would operate its established disciplinary procedures in accordance with its own written rules and the rules of natural justice and would take reasonable care not to harm the plaintiff's future employment prospects by harsh or oppressive behaviour or by any other unacceptable conduct. The re-amended pleading went on to allege that the defendant, its servants or agents were in breach of the above implied terms in that they failed: *"(i) to put allegations to the plaintiff; (ii) to accord the plaintiff an opportunity to defend himself; (iii) to provide a full explanation of allegations against the plaintiff; (iv) to comply with the defendant's disciplinary procedures and the rules of natural justice."*

43. The House of Lords was wary of extending the implied term to dismissal and found that the greatest obstacle to doing so was, as already mentioned herein, the existence of the statutory right to unfair dismissal.

44. Lord Hoffmann doubted whether, even as a matter of the common law, the implied term of trust and confidence could be invoked so as to regulate the employer's power to dismiss. At paragraph 46 in ***Johnson*** he stated :

> *"In the way it has always been formulated, [the implied term] is concerned with preserving the continuing relationship which should subsist between the employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated."*

45. It seems that actions of an employer in breach of the implied term of trust and confidence, but not within the scope of the dismissal itself, may give rise to a claim. In ***Eastwood v Magnox Electric and McCabe v Cornwall County Council*** [2004] UKHL 35 the House of Lords considered the "Johnson exclusion area". The Law Lords held that the exclusion area prohibited claims for damages in relation to a breach of the implied term of trust and confidence arising out of dismissal, but allowed claims which '*precede and are independent of*' the dismissal. Lord Nicholls stated the following at paragraphs 27 to 29:

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

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

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

29. Exceptionally this is not so. Exceptionally financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings

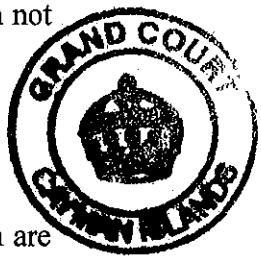
proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."

46. As already highlighted herein, in the case of ***Edwards*** the Supreme Court was dealing with claims based on breach of the express contractual term, rather than breach of trust and confidence. The majority decision makes it clear that the "Johnson exclusion area", which prevents contractual claims for the manner of dismissal, applies irrespective of whether the claim is based on breach of an implied term or the express contractual term. There may be circumstances, as highlighted by Lord Nicholls, in which an individual's claims appear to fall within the "Johnson exclusion area" but can be shown to be independent of the dismissal. This would be a question of fact, and it will depend on whether the procedural breach forms part of the dismissal process.

Conclusion: Strike-Out Application

47. I have to decide the issues before me based on the pleaded case. The Plaintiff's case is that there have been breaches of contract and of the Labour Law (2011 Revision) due to an inadequate disciplinary procedure being followed leading to her dismissal. The Plaintiff's case is that in not providing the Plaintiff due process in answering allegations against her of alleged misconduct in January 2010 and 13 July 2011, in other words failing to carry out a proper investigation, there was a breach of the implied term as to trust and confidence.

48. This Court may award damages for wrongful dismissal but has no jurisdiction to award damages for unfair dismissal. The Plaintiff's action is one at common law. I feel the ratio of ***Johnson*** and the decision in ***Eastwood*** and ***Edwards,*** although not strictly binding, to be so persuasive that I should not depart from them.



49. Even assuming the allegations made by the Plaintiff in the Statement of Claim are true, they are intrinsically linked with the manner of dismissal and would inevitably fail. The Defendant's alleged failure to act fairly in the steps leading to dismissal has not of itself caused the Plaintiff loss. Any loss arose when the Plaintiff was dismissed and arose by reason of her dismissal. The allegations cannot be regarded as being independent of the dismissal nor as giving rise to loss independently of the manner of the dismissal. The claim for loss falls squarely into the "Johnson exclusion area". The allegations do not amount to a common law cause of action which precedes, and is independent of, the dismissal, and thus cannot be regarded as the type of exception considered by Lord Nicholls in ***Eastwood***.

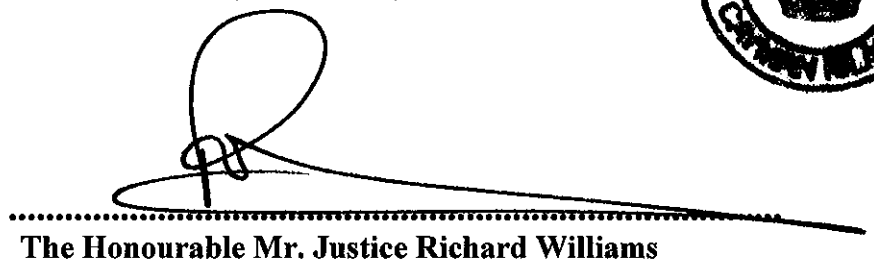
50. Accordingly I strike out the Writ of Summons and Statement of Claim as disclosing no cause of action.

51. Having reached this conclusion I need not go on and consider the remaining parts of the Defendant's Summons.

52. Having regard to the order made, ordinarily costs should follow the event, with an order for the Plaintiff to pay the Defendant's costs. As I have not given the parties the opportunity to address me on the issue of costs, I will give Counsel the opportunity to make submissions as to costs if the ordinary order is opposed.

53. I would invite Counsel to draw up the order but will hear arguments, including costs, if any issues remain.

Dated this 28th day of February 2013.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT