

RELIANCE ON THE NOTICE CLAUSE IN CONTRACTS OF EMPLOYMENT PART 1



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Addis v Gramophone and Beyond

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INTRODUCTION

1. The primary question that this paper seeks to address is whether an employer can place reliance on the notice clause in a contract of employment in Court proceedings and the effect of doing so in quantification of damages in claims for wrongful dismissal.
2. The law relating to wrongful dismissal and the damages which should flow when a claimant is found by the Court to have been wrongfully dismissed continue to be an area of law which is hotly debated.
3. The starting point of any discussion on this area of law is invariably the oft cited case of ***Addis v Gramophone*** and thereafter progresses to a review of the decisions of the Court made subsequently. The most notable of which is the case of **Malik Appellant and Bank of Credit and Commerce International**. Both these case set out important principles regarding the law related to wrongful dismissal.
4. The object of this paper is to examine the UK and Jamaican authorities in this area and to look at what the best direction is for our Courts to take in this area of law, with the caveat that a significant jurisprudence is developing as a consequence of the March 2010 amendment to the **Labour Relations and Industrial Disputes Act**, which provides another avenue by which employees can air their grievances against their employer.
5. The two most significant differences between a claim commenced at Court and one commenced before the Industrial Disputes Tribunal is that the IDT can order reinstatement and has a much broader scope within which it can order damages. This area will be explored by my co-presenter. The Court has no power to order reinstatement and has a much narrower scope within which it can award damages for wrongful dismissal.

DEFINITION OF WRONGFUL DISMISSAL AT COMMON LAW

6. Lord Hoffman in the House of Lords decision of *Johnson v Unisys Ltd* cited the case of *Wallace v United Grain Growers Ltd* [1997] 152 DLR (4th) 1, 39 in which it was held that:

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

Likewise in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1581 Lord Reid said:

'At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.'

7. The above statements of law, on their face appear fairly straightforward and reflect the focus of the Court on the contractual terms agreed between the parties.

8. However, the issue of liability for wrongful dismissal is inextricably linked to the level of damages which can be awarded by the Court if a finding that a claimant was wrongfully dismissed is made.

DAMAGES

9. The House of Lords decision of **Addis v Gramophone Co Ltd** [1909] AC 488 is the locus classicus on quantifying the award of damages for wrongful dismissal. In **Addis** the Court held:

“In an action for wrongful dismissal the jury, in assessing the damages, are debarred from awarding exemplary damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant, and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain fresh employment.”

10. The **Addis** case has often been cited to support the proposition that damages cannot be awarded for the manner of the dismissal and any hurt feelings resulting therefrom.

11. Almost 90 years later the House of Lords in the case of **Malik [Appellant] v Bank of Credit and Commerce International** [1998] A.C. 20, expanded the heads of damage in case where an employee is seeking damages from their employer regarding their employment. Lord Nichols held:

“At common law damages are awarded to compensate for wrongful dismissal. Thus, loss which an employee would have suffered even if the dismissal had been after due notice is irrecoverable, because such loss does not derive from the wrongful element in the dismissal. Further, it is difficult to see how the mere fact of wrongful dismissal, rather than dismissal after due notice, could of itself handicap an employee in the labour market. All this is in line with *Addis*. But the manner and circumstances of the dismissal, as measured by the standards

of conduct now identified in the implied trust and confidence term, may give rise to such a handicap. The law would be blemished if this were not recognised today. There now exists the separate cause of action whose absence Lord Shaw of Dunfermline noted with 'a certain regret': see *Addis v Gramophone Co Ltd* [1909] AC 488, 504. The trust and confidence term has removed the cause for his regret.

12. The **Malek** case gave rise to claims being made by an employee for damages for breach of the implied relationship of trust and confidence that exists between an employer and employee. The Court found that damages could be awarded for breach of the relationship of trust and confidence and that an award of damages could be made under this head which exceeds the sum awardable for pay in lieu of notice, which, as previously stated, is the usual measure of damages for wrongful dismissal.
13. However the House of Lords case of **Johnson v Unisys Ltd** [2001] 2 All ER, 801 made clear that it is only in very limited circumstances that an employee is likely to be able to establish a claim for damages for breach of the implied term of trust and confidence. In the **Johnson** case it was held:

The employee could not rely on the fact that he was dismissed without a fair hearing and in breach of the employer's disciplinary procedure in order to establish that his dismissal was a breach of the implied obligation of trust and confidence.

An implied term cannot contradict an express term in the contract that the employer was entitled to dismiss without cause on giving due notice. In the present case, therefore, in the face of an express provision that the employer was entitled to terminate the employment on four weeks' notice without any reason, it was not possible to imply a term that the employer would not do so except for some good cause and after giving the employee a reasonable opportunity to demonstrate that no such cause existed.

Lord Nicholls: ...”a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed.”

Lord Steyn: The notice provision in the contract is valid and effective. Nobody suggests the contrary. On the other hand, the employer may become liable in damages if he acts in breach of the independent implied obligation by dismissing the employee in a harsh and humiliating manner. There is no conflict between the express and implied terms.

14. The Jamaican Courts have, despite at times some wavering, have consistently applied the **Addis** principles in wrongful dismissal cases.
15. In the Jamaican Court of Appeal decision of **Cocoa Industry Board and other v Melbourne** (1993) 30 JLR 242 it was held that, once the dismissal was in accordance with the terms of the contract it could not be unlawful.

Wolfe JA, as he then was, stated:

“It is settled law that where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is usage to that effect, the measure of damages for breach is the amount of such wages, which is to be regarded as liquidated damages. See **Kaiser Bauxite Co. v. Vincent Cadien** (unreported) S.C.C.A 49/91 delivered July 29, 1983.”

This case also applied **Addis v Gramophone** and held that aggravated damages were not payable for the manner of the dismissal.

16. In the Supreme Court decision of **Sandra Chin and NEM Insurance Company (Jamaica) Ltd**, Claim No. 1998/C-091, decided May 29, 2008, the Court referred to the **Addis** and **Malik** decisions and determined that, the only sum payable was notice pay and that, as

this had been paid, there was no other obligation on the part of the Employer.

17. In the Supreme Court decision of **Janice Elliot v Euro Star Motors Limited**, Claim No. C.L. 2000/E024, decided November 12, 2009, the Court held, at paragraph 27 of the Judgment that, “where appropriate notice has been given or payment in lieu thereof has been made, consistent with the terms of the contract, there is no obligation to give reasons for dismissal.”

Further:

“...there is no common law right for an employee to be given reasons for his dismissal by his employer. Nor under the Employment (Termination and Redundancy Payments) Act is any such right given.”

This case also applied **Addis v Gramophone**.

18. The Court of Appeal decision of **United General Insurance Company Limited and Marilyn Hamilton**, Supreme Court Civil Appeal No. 88/08, decided May 15, 2009, primarily dealt with whether an application to strike out a claimant’s statement of case or to strike out certain paragraphs of the particulars of claim or to grant summary judgment was properly refused in case where wrongful dismissal was among the allegations made. However, this is the first local appellate decision in which the Court seemed as if it was minded to move away from the **Addis** decision and line of previous cases.

19. In the **UGI** case, the Court of Appeal upheld the decision of the Judge at first instance and Morrison JA recognised that the decision of **Addis** was under siege and that there may be scope for it to be overturned in an appropriate case. Morrison J.A. held as follows:

*“33. In the instant case, the respondent specifically pleads a breach of an implied term of trust and confidence. Despite **Malik & Mahmud** and the subsequent cases, she may yet face some formidable hurdles in establishing this at trial. In the first place, apart from the obiter comments of Lord Nicholls in **Malik & Mahmud** (at page 10)*

and **Johnson v Unisys** (at page 803) and the sustained assault by Lord Steyn on **Addis** in his judgments in both those cases and in **Eastwood v Magnox Electric**, there has not been uniform support for the extension of the implied term of trust and confidence to a manner of dismissal case, which this case plainly is. Secondly, any development of a new implied term that the power of dismissal will be exercised fairly and in good faith (the possible solution favoured by Lords Hoffman and Millett) will still have to overcome the obstacle of **Addis** itself, as a decision of the House of Lords that has withstood the test of a hundred years, and the fact that it has readily been followed and applied in this jurisdiction.

34. However, these difficulties notwithstanding, I do not think it can be said that, applying the language of Rule 15.2, the respondent "has no real prospect of succeeding on the claim or issue". Nor can I say, adopting Lord Woolf MR's formulation in **Swain v Hillman** (at page 92) that her prospects of success are no more than "fanciful". For instance, while the Industrial Disputes Tribunal may, in cases of industrial disputes within its jurisdiction, order reinstatement or compensation if it finds that the dismissal of a worker is "unjustifiable" (Labour Relations and Industrial Disputes Act, section 12(5) (c) (i) and (ii)), there is no comprehensive unfair dismissal legislation in Jamaica, such as that which posed what Lord Nicholls characterised as "an insuperable obstacle" to a successful claim for damages arising out of the manner of dismissal in **Johnson v Unisys** (page 803). This point may, arguably, also admit of the opposite proposition, which is that by providing a remedy for unjustifiable dismissal to a limited category of workers, the legislature in Jamaica must be taken to have considered and rejected extending it beyond that category. This is itself an indication, in my view, that the question of whether it is open to our courts to develop the law in this area by implying a suitable term in the contract of employment is, to borrow from Lord Hoffman this time, "finely balanced" (**Johnson v Unisys**, page 819)"

20. In the Supreme Court decision of **Edward Gabbidon v RBTT Bank of Jamaica**, Claim No. HCV02775 2005, decided June 24, 2010, P.A. Williams J examined the line of UK Judgments and the Jamaican judgments and found that no reason for termination of employment needed to be given and that the principles set out in **Addis v Gramophone** were still good law.

21. In the Supreme Court case of **Casey Wilson-Brown and National Solid Waste Management and Joan Gordon Webley**, Claim No. 2008 HCV 04100, [2012] JMSC Civ. 24, decided March 1st 2012 Brown J applied the decisions of **Addis** and **Cocoa Industry Board** and held that damages for wrongful dismissal were limited to notice pay.
22. In the Court of Appeal decision of **Rosmond Johnson v Restaurants of Jamaica (T/A Kentucky Fried Chicken)** Resident Magistrate's Civil Appeal No. 17/2011, [2012] JMCA Civ 13, decided March 30, 2012, the Court found that the Labour Relations Code was not incorporated by reference in cases where the claim was brought directly to the Court and was not commenced through the IDT process. Further, that a contract of employment could be terminated on the provision of reasonable notice.
23. In the **Johnson** case the UK House of Lords examined the statutory regime created by their Parliament and concluded that it would be against public policy for the Court to create a separate regime with unlimited jurisdiction to award damages in circumstances where it is clear that the legislature intended to specifically limit the sums which could be awarded for such breaches of contract.
24. In Jamaica the jurisdiction of the IDT to award damages is unlimited, as is that of the Supreme Court. Therefore the rationale of **Johnson** is not entirely applicable to the Jamaican legislative framework. This was adverted to by Morrison JA in the **UGI** case.
25. However, I would submit that the Jamaican Parliament has already created a regime by which employment disputes should ideally be dealt with, and, as at March 2010 has expanded the IDT jurisdiction to the greater Jamaican employee population. It is worthy of note that the **UGI** case was decided in 2009, before the 2010 amendment to the LRIDA and that Morrison JA specifically referred to the fact that, at the time of his decision, access to the IDT was limited.
26. It is this writer's view that the expansion of access to the IDT's jurisdiction by Parliament has removed the rationale for the Courts to

further expand the categories for which damages are payable in employment cases.

27. Consequently, the Jamaican Courts should not take unto themselves a jurisdiction that was specifically assigned to the IDT by Parliament. If an employee wishes to secure greater damages for unjustifiable dismissal than is open to the Court to award on a wrongful dismissal claim, then they can readily avail themselves of the IDT's jurisdiction.
28. The proper use of the Court's resources, as referred to in Part 1 of the Civil Procedure Rules 2002, must be one of the primary considerations of the Court in making a ruling which may potentially expand its case load.
29. An example of this is the requirement for a party to certify in civil proceedings that their claim exceeds the jurisdiction of the Resident Magistrate's Court and the potential penalty in costs for bringing a claim in the Supreme Court, which could have been brought in the Resident Magistrate's Court. This demonstrates the focus on limiting the work of the Court to matters which it is best suited to deal with and adjudicate upon.
30. It is perhaps that rationale that influenced the Court of Appeal in the **Rosmond** case to revert to what appears on its face to be a return to the more restricted view of the jurisdiction of the Court in this area, rather than engaging in an exploration of the potential expansion of the heads of damages beyond **Addis v Gramophone**.
31. It therefore remains open to employers, in the context of Court proceedings, to rely on a defence that the employee was terminated pursuant to the terms of the contract of employment and/or that reasonable notice was given or payment in lieu thereof. There is no requirement to state a reason for termination of employment once notice or payment in lieu thereof is given.
32. If the employee succeeds in having the employment dispute referred to the IDT by the Minister, the defence which the employer must utilise is quite different. The defence in this area is addressed by my co-presenter. Consequently, in answer to the question as to whether

a notice clause in a contract of employment can still be relied on, without more, the answer is a definite “maybe” and will depend on whether the employee takes the matter to the IDT or directly to the Court.

Thank you for your time and attention.

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