INTRODUCTION

The pound of flesh which I demand of him
Is dearly bought. 'Tis mine and I will have it.

-Shylock "The Merchant of Venice"

1. This claim examines the extent to which the Court should modify express terms in a contract of employment by implying, as a matter of law, general obligations on an employer of trust and confidence and to act in good faith towards an employee when making a decision to effect the employee’s termination of employment.

2. Freedom of contract in classical contract theory means that parties are free to negotiate whatever terms they prefer, be it “Antonio’s pound of flesh”. In some cases, the stronger party is free to impose terms upon the weaker and extract his/her “pound of flesh”. No term will be
implied unless it satisfies a strict test of necessity. However, such classical contract theories
applicable to commercial contracts may be out of step with modern employment contracts in
this jurisdiction.

3. The dynamics of modern employment contracts can hardly be characterised as the “master”
extracting his pound of flesh from the “servant”. Such terms to describe persons who should
be regarded as partners in production are not only irrelevant but inconsistent with our sense of
identity and self. We are no longer slaves and “massa day” has long since gone. The dynamics
of the free market where parties bargain and settle competing rights does not adequately
address the personal contract entered into between employer and employee. In such contracts,
the employee’s freedom of contract is relative to a number of factors, principally, the
employee’s need for employment, especially in harsh economic times, which hardly places the
employee on an equal footing to negotiating terms with employers. The “top down” approach
of viewing the employment relationship is slowly evolving into viewing employees as partners
in productivity. Employees are not widgets or small iron billets, inanimate objects of
production, but are humans with values of dignity and self-worth.

4. When the Law Lords in Addis v Gramophone Company Ltd [1909] AC 488 declared that
there could be no remedy for the manner of the dismissal of a “servant”, it was the language
of a different time unsuited for employment law in the 21st century Caribbean. Our Court of
Appeal in Aron Torres v Point Lisas Industrial Port Development Corporation Limited
C.A.CIV.84/2005 in recognising the availability of exemplary damages in breach of contract
cases, has since parted ways with Addis’ concept that the manner of dismissal is irrelevant in

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1 I reviewed some of our earlier judgments in the early 20th Century such as Rouse v Mendoza (1967) 12 WIR 1 and
further back to Dasent v Marwood (1919) per Russel J and Deane J when the term master and servant would still
bear some negative connotations for a population emerging from a plantocracy. Indeed in 1912 Russell J, in McNellie
v The Trinidad Lake Petroleum Co. Ltd lamented an unfortunate example being cited by counsel in his submissions
for an employer on the issue of obeying lawful orders:

“That is not the meaning which I had imagined to be the proper one to give to the term “lawful order”: so far
from it, I had, perhaps without very careful consideration, imagined it meant such an order as the law will
hold a master justified in giving and the servant bound to obey. But leaving that point aside, is it really true
that a servant may be dismissed for disobeying an unreasonable order? The proposition was boldly
advanced, but an illustration offered was certainly unfortunate: it was suggested that a man could
dismiss his servants for refusing to come out in a field and sing “God save the King”; but as ex hypothesi
that was not a service for which they had engaged, the example strikes against the limitation which counsel
himself admitted, viz.: that the order must be within the scope of the employment.”
determining an appropriate remedy for an employee whose contract has been wrongfully terminated.

5. Employment law in some jurisdictions, notably Canada, are now, in this century, fast recognising principles to guide the Court in humanizing employment relationships. These contracts are recognised as a species of relational contracts which require a different analysis from the norms of purely commercial contracts. There is nothing in principle to prevent our Courts from similarly interrogating such relationships with principles such as honesty, good faith, trust and confidence. In modern employment law, the treatment of the person, the humanity of relationships, the dignity and self-esteem associated with employment are valued much more greatly in these very personal relationships where both parties are enjoined in a cooperative joint exercise of productivity. In such relationships, as Lord Steyn observed, the reasonable expectations of honest persons must be protected.\(^2\)

6. The law has evolved over the years to imply general duties and principles in contracts of employment which oblige employers to generally treat employees fairly whether by implying a term of trust and confidence or that the party will act in good faith. The controversy arises when such implied terms clash with express terms of a contract and raises the question which term should take precedence or better, how are the competing rights of the employer and employee worked out to preserve the reasonable expectations of both parties. Such a controversy has given rise to this claim by the Claimant, Mr. Roger Carrington, a university lecturer of seven (7) years for wrongful dismissal against his employer, the Defendant, the University of Trinidad and Tobago (UTT).

7. Mr. Carrington was dismissed with six (6) weeks’ notice and without reason. He had successfully completed two (2) three (3) year fixed term contracts with UTT. He continued employment for about one (1) year after the expiration of his second contract while awaiting a formal renewal of a third contract. He honestly believed that his contract with the UTT would have been renewed based on his good performance and a recommendation that his contract be renewed. Despite that recommendation, the final decision was that his contract would not be renewed and he was dismissed. No reason has been advanced by UTT as to why his contract

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\(^2\) See paragraph 121 below.
was not renewed and Mr. Carrington is left to speculate as to what those reasons might have been. It took him about fifteen (15) months to find another job.

8. Mr. Carrington contends that there was an implied term that his contract for employment, was for a fixed term of three (3) years and that there was a duty to act fairly and a duty of trust and confidence between the parties. That duty was breached when he was not given a three year contract and he was dismissed without any reason provided as to why his contract was not renewed. Whereas UTT acknowledges that there can be an implied term of trust and confidence, it is unnecessary in the face of express terms and, on the facts of the case, they contend that no such duty was breached. Further, in any event, Mr. Carrington was on a month to month contract entitled only to one (1) months’ notice to determine his contract of employment.

9. This case, therefore, gives rise to a tension between a strict interpretation of the legal rights of an employer expressly provided in the contract to terminate with notice (without cause) and the right (implied by law) of the employee, nevertheless, to be treated fairly even in the exercise by the employer of such an express power or discretion. This claim also raises the question whether if implied duties such as: that UTT shall not breach the trust and confidence of the employee and that it will act in good faith exist, what is the content of those duties and how is a breach of such duties to be compensated in damages?

10. There is no dispute that UTT was entitled to terminate Mr. Carrington’s contract with notice. There is no dispute that UTT had the power under the contract not to renew his contract. There is no dispute that the final decision on renewals of contract is that of an Appointments and Performances Evaluation Committee (APEC). These are all clear terms of Mr. Carrington’s contract. It is equally accepted that Mr. Carrington received a good performance appraisal as a lecturer and one who had lived up to his end of the bargain by discharging his duties thereby assisting the UTT in its operations as a tertiary institute.

11. However, in interpreting the obligations of the parties in this contract of employment, the Court ought not to be restricted to classical contract doctrines. The Court instead should give life to the evolving notions of the reasonable expectations of honest persons in a relational contract.

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3 His second contract of employment dated 22nd June 2009 which commenced on 1st May 2009 and expired on 30th April 2012.
Contracts where principles of good faith, fairness, trust and confidence would regulate the exercise of the employer’s discretion. In such circumstances, it would dictate that in the special facts of this case, Mr. Carrington should know why he was not being retained, be given an opportunity to respond to any matter militating against his renewal or at the very least be given a reasonable period in which he can make an adjustment to his personal and work life.

12. To simply say that the common law, as established by the English authorities which rely on Addis do not recognise a remedy for the unfair manner of a dismissal, mummifies the development of our local jurisprudence on employment law. It entombs the relationship of employer and employee to the relics of a history of “master and servant” which rattles our understanding of the importance of labour in production, the respect that should be attributed to both employer and employee, the co-operative nature of the relationship and the underlying principles of mutual honesty and trust without which the relationship would be unintelligible and unworkable.

13. For the reasons set out in this judgment, there was implied in Mr. Carrington’s employment contract a duty to act with trust and confidence, an organising principle of good faith and a duty to act honestly in the performance of the contractual obligations. There was no obligation on UTT to renew Mr. Carrington’s three year contract. Mr. Carrington could not legitimately or reasonably expect such a renewal having regard to the express terms of the contract and the conduct of UTT. However, a non-renewal of a contract led to his dismissal. It would normally be a traumatic event in the circumstances in which the parties found themselves, with Mr. Carrington working about one (1) year without a formal contract. Mr. Carrington was entitled in these circumstances to know the reason for the non-renewal of his contract and the discretion to not renew the contract was to that extent to be exercised reasonably. In the absence of reasons for not renewing the contract, this Court is unable to ascertain whether UTT did act reasonably, honestly and in good faith in not renewing the contract. To that extent, UTT could be said to be in breach of its implied obligations to Mr. Carrington. However, the difficulty for him is the loss he alleges to have suffered.

14. It is unimaginable that Mr. Carrington, but for the provision of such reasons, would have been entitled to damages which he seeks of twelve (12) months’ salary and benefits. He has not been able to prove any loss as a result of that breach. He has demonstrated loss as a result of the
dismissal and not from the manner of dismissal. Mr. Carrington cannot point to any independent loss flowing from the breach of the implied term separate from the fact of his dismissal. He was entitled to no more than reasonable notice to terminate his contract which in all the circumstances would be no more than three months’ notice. As a Court will not award double compensation, the fact that he has already been paid a total of four (4) months wages has been taken into account, the net effect being that there is no further compensation to be awarded to him. His claim therefore fails.

15. At the trial most of the facts were not in contest and are to be gleaned from the agreed bundles of documents and largely untested testimony. In this judgment, I examine: the nature of the relationship between Mr. Carrington and UTT, the circumstances surrounding his dismissal, the express terms of the contract, the developing law on the implied terms of trust and confidence and good faith and the intersection between breach of such terms and the law of wrongful dismissal.

**Mr. Carrington and the UTT**

16. The UTT is one of the tertiary institutions in this country. It was established as a non-profit company under the Companies Act 1995 Chap. 81:01 on 14th September 2004. Mr. Carrington was its Senior Instructor for seven (7) years in the Centre for Production Systems. He was first employed on 1st May 2006 on a three (3) year contract. His contract was renewed and he entered into a second contract with UTT dated 22nd June 2009 (“the 2009 contract”). This contract expired on 30th April 2012. This contract provided for the following:

(i) A monthly salary of $20,837.25 which was subjected to annual review.
(ii) Allowance in lieu of pension of 20% of basic salary.
(iii) Housing allowance of 20% of basic salary.
(iv) Vehicle allowance of $6,000.00 per month.
(v) Cellular phone allowance of $920.00 per month.
(vi) Annual vacation leave of 20 business days.

17. His duties were expressly set out in the contract. These included but were not limited to:

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4 List of agreed bundle of documents filed 14th June 2017, Joint statement of issues filed 14th June 2017, witness statement of Leah Ramgattie filed 24th July 2017 and witness statement of Roger Carrington filed 24th July 2017.
a) Organizing, managing and delivering specific programs/courses offered by UTT.
b) Providing necessary leadership for successful execution of the instructional process.
c) Maintaining conformity to curriculum requirements and quality of delivery.
d) Providing operational supervision and functional direction to Instructors and support staff.
e) Developing course materials, handouts, project assignments and examinations.
f) Instructing classes as required to complete courses with the specific time frame.
g) Performing other related duties as requested by the Programme Professor.

Additionally, as an employee, he had to:

a) Observe and comply with all lawful and proper directions given to him by the Employer.
b) Faithfully and diligently perform his duties and exercise powers consistent with them, which are from time to time assigned or vested in him.
c) Use his best endeavours to promote the interests of the Employer.
d) Perform his duties at such places of business as the Employer requires.
e) Abide by the Employer’s procedures, rules and regulations for the time being in force as laid down from time to time by the Employer.
f) Not directly or indirectly take up any activities that conflict with the Employer’s interests.

18. He also performed other duties for UTT. He was UTT’s representative and member of the National Disaster Risk Reduction Sub-Committee of the Office of Disaster Preparedness and Management (ODPM) and he was UTT’s representative and member of the National Technical Committee and Mirror Committee for the Environmental Management at the Trinidad and Tobago Bureau of Standards.

19. Upon the expiration of his second contract of employment on 30th April 2012, Mr. Carrington continued to discharge his duties under the terms of the second contract of employment for a further twelve (12) months with the expectation that his contract would be renewed. He also received the same salary and benefits that he received under the terms of his second contract of employment. His vacation leave had rolled over from each year of his second contract.
20. The relationship during the second contract however, was not perfect and there were three significant moments when the relationship underwent significant stress. First in 2010 he was alleged to have sought, without authorisation, a United States of America (USA) visa for a person who was not a student to accompany students on a visit to the US on a study tour. That matter was resolved by an investigation by the Provost who found no wrongdoing on the part of Mr. Carrington. Second, in December 2010, an issue arose over his unwillingness to conduct tutorials together with lectures. He complained that he should be provided with additional resources to accomplish both tasks. This ended with a curt letter from UTT mandating that if he was unable to deliver both lectures and tutorials he would be dismissed. Nothing came out of this incident. Then he was engaged in a yearlong battle with UTT concerning allegations levelled against him for impropriety with students. This dispute engaged the attention of UTT’s legal department as Mr. Carrington threatened to bring a claim against UTT for defamation. This matter is important as by September 2012 long after the expiry of his second contract the matter was still unresolved. Needless to say that significant time by both parties would have been spent on this negative episode detracting from the overall functions of the institute.

21. Mr. Carrington contended that because there was an implied agreement between him and UTT that he would discharge his duties for UTT under the same terms of the expired second contract that he therefore entered into an Extended Agreement Period with UTT under the same terms of his previous contract. He holds that view as he continued working for as much as an additional year without demur from the UTT. Further, he received positive performance appraisals.

22. The last performance appraisal was conducted on 16th May 2012. There were two performance appraisals and he scored grade “B” on both occasions which is indicative of a “Very Good” grade. His second performance was assessed by two professors, Professor Stoute and Professor Jeanette Morris. Mrs. Lima Andrews-Cedeno attended the assessment as an observer from the Human Resource Department. He scored the highest in scholarship of service and lowest in scholarship of discovery. Both assessors recommended a three (3) year renewal. In his performance appraisal, Professor Jeanette Morris commented that:

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5 Paragraph 9 of the Defence filed on 30th November 2016.
“Mr Carrington’s teaching is good as evidence by his students’ evaluations. His research activity needs to be increased which he himself recognizes and he serves the University through co-ordinating year 1 and 2 common causes as well as serving and representing UTT on several committees. I recommend a 3 year renewal of contract and reassignment so that his skills can be utilized to greater advantage.”

23. Professor Stoute commented that:

“Mr. Carrington has indicated that he is willing to teach more but has not been assigned. He has sought teaching duties in several programs and has successfully taught in many. He needs to increase his research activities which he recognizes. The recommendation is for 3 years renewal with reassignment so that his skills can be utilized for the maximum benefit of UTT.”

24. However, to his surprise on 11th March 2013, Mr. Carrington received a letter from the Manager of Industrial Relations, Recruitment, Appointments and Compensation for UTT dated 6th March 2013, informing him that his contract would not be renewed and that his temporary month to month arrangement with UTT will cease on 30th April 2013.

“Reference is made to your contract of employment with the University of Trinidad and Tobago which commenced on May 1, 2009 for a fixed term of three (3) years. It should be noted that the referenced contract came to an end on April 30, 2012 and your services continued under a month-to-month arrangement with the University.

This letter serves to advise that the temporary month-to-month arrangement will cease on April 30, 2013 and your fixed term contract of employment will not be renewed.”

25. Although it is clear that no communication was issued to him that his contract was formally renewed, this was the first time it was being communicated to Mr. Carrington that he was on a month to month contract.

26. Thereafter, Mr. Carrington sought an explanation for his dismissal from the Vice President of Human Resources for UTT, Mr. Allan Raghunanan. Mr. Carrington contends that initially, Mr. Raghunanan did not want to provide him with an explanation for his dismissal but at his insistence, he was eventually informed by Mr. Raghunanan that he (Mr. Raghunanan) got instructions from the Provost to fire him. Due to this, Mr. Carrington further contended that
the decision to terminate him was not made by the appropriate body appointed to decide contract renewals which should have been the Appointments and Performances Evaluation Committee (APEC) and not the Provost.

27. There is a further dimension to his dismissal. Subsequent to his dismissal, Mr. Carrington lodged a complaint against UTT in relation to his dismissal before the Equal Opportunity Commission (EOC). The complaint was eventually compromised without admission of liability with UTT agreeing to pay compensation in the sum of $107,000.00 equivalent to three months wages and legal costs. The Claimant contended that the order of the EOC was confidential and ought not to be disclosed in these proceedings. At the trial, the parties left it to the Court to determine the admissibility of this evidence.

28. I am of the opinion that the order made by the EOC is relevant and ought to be disclosed. The Court is entitled ultimately when an employee is seeking common law remedies to be aware of any compensation received by the employee under statutory schemes which compensates the employee for the manner of the dismissal. A Court will be loath to award double compensation to the employee and in fact to do so would be an abuse of the statutory mechanisms which have been instituted for the benefit of the employee. See Claude Albert v Alstons Building Enterprises Ltd CA No. 37 of 200 per de la Bastide C.J.:

“...the employer is liable to pay to the employee by way of damages for wrongful dismissal the remuneration he would have received during the period of notice to which he was entitled less any amounts for which the employee must give credit. Broadly speaking the amounts for which the employee must give credit, subject to considerations, are any moneys received by the employee which he would not have received if his employer had not wrongfully dismissed him.”

29. In his statement of case, Mr. Carrington sets out two aspects of an implied contract. First, that by reason of the actions and conduct of the UTT he was given just reason to believe that as was done previously, he would in due course be provided with a formal three (3) year contract of employment and that in fact it is to be implied that they did enter into such a further extended agreement. Second, that there was implied into the contract of employment a duty of UTT to act fairly and justly towards him and to act or conduct itself in a manner not to destroy the relationship of trust and confidence which should be expected between himself and UTT.
30. He also contended that the period of notice given for his dismissal was unreasonable and insufficient on the following grounds:

a) He was dismissed during the middle of the academic term.

b) He had held a senior lecturing role at the Defendant institution for the past seven years.

c) He was employed in a highly technical and specialised Lecturing/Instructing role, one which could not be easily found elsewhere due to the specialised degree course taught specifically at the Defendant institution. As such, having been thrust suddenly back into the highly competitive labour market, the availability of a similar role elsewhere in Trinidad and Tobago, where there is only one other University, was scarce.

d) He had extensive training, qualifications and experience which had equipped him for his employment as a Senior Instructor for the Defendant.

e) His pay and benefits also were above the average rates, due to the nature and seniority of the position and the required technical skills, qualifications and experience that he brought to the role. The Defendant failed or refused to have regard to these facts and that he would have difficulty in finding a similar role with a similar level of pay and benefits.

f) The Defendant cynically caused or facilitated or permitted the Claimant to continue in his employment for a further year after the expiry of his second contract and thereby gave him good reason to believe that his contract would be renewed.

g) In addition, the Defendant’s reason for giving him six weeks’ notice was essentially self-serving in nature, namely so that some of the courses he was delivering at the time could be completed with little inconvenience caused to the Defendant.

31. He characterised the actions of UTT in the manner of the dismissal and their conduct after the dismissal as oppressive.

32. At paragraph 31 of the Statement of Case, he pleads the nub of his case:

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6 Paragraph 17 of the Statement of Case filed 14th October 2016.
“The Claimant avers that the Defendant acted in breach of the implied/extended contract of employment by its own conduct toward the Claimant, both in the nature and manner in which his employment was terminated, its failure to provide a sufficient period of notice to the Claimant and its refusal to provide any explanation for why his contract was not being renewed.”

33. UTT’s Defence\(^7\) is simple and straightforward. It follows classical contractual theory. It contends that Mr. Carrington was validly dismissed, that there was no mutual agreement between the parties to enter into an Extended Agreement Period and that there was no express or implied contract between the parties upon the expiration of Mr. Carrington’s second contract of employment. UTT further contended that the renewal of a contract must be approved by APEC and until that final determination is made, Mr. Carrington would have continued on a month to month contract on the same terms and conditions of the expired second contract of employment.

34. Mr. Carrington was dismissed without cause with notice and paid all entitlements due to him at that time of his dismissal.

35. UTT further stated that APEC is responsible for determining and renewing contracts and is not responsible for termination of employment. As such, Mr. Carrington’s month to month contract was validly terminated by the Provost, Dr. Fazal Ali, who had the authority to terminate the contract.

**Express terms on termination**

36. There is no dispute that Mr. Carrington’s second contract (the 2009 contract) clearly provided for written agreement to renew the contract and for the contract to be terminated either with cause or without cause. The 2009 contract expressly provided the following with respect to the termination of this relationship:

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8. TERMINATION:

A. Termination without cause
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\(^7\) Filed on 30\(^{th}\) November 2016.
i. This Agreement shall be deemed to be terminated at the expiry of the Initial Agreement Period unless both parties have entered into an Extended Agreement Period, the terms and conditions of such period to be determined by mutual agreement.

ii. Termination of this Agreement within the Initial Agreement Period shall be effected by three (3) months written notice by either party or by written agreement signed by both parties.

iii. The Employee shall be entitled to payment of his base salary for the un-expired portion of the duration of his employment in lieu of notice to terminate this agreement by the Employer.

B. Termination with Cause

i. This Agreement may be terminated by the Employer without notice or payment in lieu of notice under the following circumstances:

   a. If the Employee is found by the Employer to be guilty of dishonesty or any gross default or misconduct which may affect the business of the Employer.

   b. If in the opinion of the Employer, the Employee’s duties have consistently not be performed to a satisfactory standard.

   c. In the event of any serious or repeated breach or non-observance by the Employee of any of the stipulations contained in this Agreement.

   d. If the Employee is convicted of any criminal offence other than an offence under the road traffic legislation of Trinidad and Tobago.

12. NO VARIATION

The terms of this Agreement shall not be varied nor the Agreement terminated orally and none of the terms hereof shall be deemed to be waived or modified except by an express agreement in writing signed by the party against whom the waiver or modification is sought to be enforced.
13. ENTIRE AGREEMENT

The Agreement constitutes the entire agreement of the parties hereto with respect to the
matters set forth herein and supersedes any prior understanding or agreement, oral or
written with respect thereto. This Agreement may be signed in multiple counterparts,
each of which shall be deemed an original hereof. The captions of the several sections
and the subsections of this Agreement are not part of the context hereof, and are inserted
only for convenience in locating such subsections and shall be ignored in construing
this Agreement.”

37. Mr. Carrington’s employment was terminated without cause. The contract provided three
alternative routes under clause 8A to so terminate the contract. From the express terms of this
contract, the relationship could not have been formally extended except by mutual agreement.
The 2009 fixed term contract, therefore, could not have been formally renewed unless there
was an express agreement by the parties to do so. Mr. Carrington’s argument of an implied
contract for three years is a non-starter in light of the clear indices marked in the 2009 contract.
Although he worked for an additional year without a formal contract, it is reasonably to be
implied that the terms of his expired contract governed his relationship until UTT made its
decision on a formal renewal of his contract for a three year period. This is not to say that one
can further imply that his contract was impliedly renewed for three years. This is so as UTT
further explained to all of its staff its policy in relation to the renewal of contract, making it
abundantly clear that there could be no expectation that a contract would be renewed save for
by entering into a formal contract on terms.

UTT’S Policy on Renewal of Contracts

38. There could be no misunderstanding in relation to the process of the renewal of contracts.
UTT’s policy on renewal of contracts was reflected in their memoranda to staff dated 12th
August 2009, 1st February 2011 and 3rd February 2012. The contents of the memoranda are set
out below:

Memorandum 12th August 2009

“An impression has been created that UTT’s Human Resource policies provide for roll-
over of contract at the completion of the initial contract.
This impression is incorrect.

Performance review of all employees will be carried out before any decision is taken on the contract renewal.

It should be noted that transfers from one unit to another, for whatever reason, is subject to a specific process and the H.R Division does not have the authority to effect such transfers.

Please be guided accordingly.”

Memorandum 1st February 2011

“Members of the university community are reminded that there exists a process by which contracts which have become due are considered for renewal. By way of summary, the employee and his/her supervisor complete a performance assessment which is then reviewed by the Head Unit and submitted for consideration by the Appointments and Performance Evaluation Committee (APEC). APEC reviews the appraisal and the recommendations as submitted and determines a renewal of contract in accordance with an established framework. This decision is then communicated to the employee by the HR Unit which is also responsible for preparation of the contract document based on approved terms and conditions.

I wish to advise that the University continues to utilize this procedure in considering contract renewals. Any change in this mechanism will have to be brought to the attention of the Board of Governors, discussed, and if approved, communicated formally by the President or the Human Resources Unit to the University Community.

As at this time, there is no approval by the Board of Governors for a change in the mechanism as described above, nor is there a formal proposal before the Board for discussion.”

Memorandum 3rd February 2012

“As a follow up to my Memorandum dated January 12 and 16, 2012, I wish to update the UTT Community on the issue of Outstanding Contracts and the developments to date.
Firstly, the revised contractual template has been finalised and approved. I have asked Internal Audit to review all contracts for consistency and precision. This is ongoing and should be completed by the end of next week. This means that the preparation and printing of outstanding contracts as of June 2011 will commence as early as Monday February 6, 2012. Employees who have been approved for renewal of contracts can expect to receive their signed contracts beginning next week. I anticipate that this exercise will be completed before the end of February, 2012. Contracts which expired after June 2011 are also being addressed and the issuance of those approved for renewal is expected to be completed before the end of March, 2012.

I would now like to address some of your concerns regarding the terms and conditions of these contracts:

**Renewal of Contracts for Returning Employees**

- The start date of the contract will be the date of issue of the contract (not the date of expiration of your last/old contract);
- The terms and conditions re: vacation, allowance in lieu of pension, remain the same as in your previous contract.

**Issuances of Contracts to New Employees**

- The terms and conditions of contract for new employees will differ slightly from that of existing employees. Staff will become more aware of these in the roll out of the updated Human Resource Policies, expected to take place before the end of March 2012.

I thank you for your patience and continued dedication to UTT as we strive to make this the national institution of excellence of higher learning in the Republic of Trinidad and Tobago.”

**The Decision not to renew Mr. Carrington’s contract**

39. Mr. Carrington was at a loss to understand why his contract was not renewed. He wrote to UTT on 7th May 2013 through his attorney-at-law to enquire why his contract was not renewed. Thereafter, on 6th September 2013, his attorney wrote to UTT requesting documents under the Freedom of Information Act Chap 22:02 pertaining to the decision of UTT not to renew his
contract. In response, UTT on 10th October 2013, denied Mr. Carrington’s request under the Freedom Information Act citing that UTT was not a public authority under the Freedom of Information Act. These correspondence continued with UTT repeatedly failing to comply with the Freedom of Information request until Mr. Carrington successfully made an application for judicial review. Thereafter, UTT provided Mr. Carrington’s performance appraisals which indicated that he was performing satisfactorily.

40. At the trial, Mr Carrington’s evidence was not seriously tested in cross examination as most of his evidence forms part of an agreed set of facts between the parties. However, he accepts that he was aware that after June 2012 there was no agreement in writing and that the memorandum from UTT explained that there was no automatic contract roll over of contract and sets out the process for renewals. He admits that there was no decision by APEC for his contract to be renewed.

41. The Defendant’s sole witness was Ms. Leah Ramgattie, Senior Manager of Human Resource in UTT. In her examination in chief, she reiterated the rules and procedure for the renewal of contracts which was disseminated in the memoranda above. She stated that upon the expiration of Mr. Carrington’s 2009 contract, he continued working as a Senior Instructor with UTT. She noted that the assessors conducting the performance appraisal recommended a three (3) year renewal of contract and the assessment was submitted to Human Resources on 22nd May 2012. The recommendation was then sent to Provost as Head of the Academic Unit for his endorsement before it could have been submitted to APEC for final approval. However, the Provost did not endorse the recommendation and it was returned to Human Resources on 5th March 2013.

42. Under cross examination, Ms. Ramgattie explained that Mr. Carrington would have only been aware of the recommendation in relation to the renewal of his contract when the process was completed. She explained that when the assessors completed the performance appraisals, it then goes the Head of the Academic Unit in UTT which is the Provost. After the Provost signs it, it then goes to APEC and thereafter the employee would be given the Annual Assessment form and the overall recommendation. When questioned if it was unusual that the Provost

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8 Exhibits at pages 86 and 88 of the trial bundle filed on 24th July 2017.
would not endorse a recommendation when it was approved by two superior officers, she testified that it is not unusual for such a situation to occur. She stated:

“**MS. RAMGATTIE:** Well when the head of the unit reviews the evaluation of the appraiser, if there are any questions and so on, dialogue will take place and so on, between the head of the unit and the assessors. To say that it is unusual or that they would just tick endorse or not endorsed, um it has happened to an extent where there may not have been an agreement or a different—or maybe need for more information per se. So I can’t really say it is not usual. Sorry

**MR. LAMONT:** You mean you can’t really say it is unusual.

**MS. RAMGATTIE:** Sorry unusual.”

43. Further on, she was questioned by the Court to explain the framework in which the Provost reviews the performance assessment and this was what she had to say:

“**MS. RAMGATTIE:** Based on the appraisal forms you would have seen two, one by Professor Morris and one by Professor Stout. When we calculate the scores based on the research teaching and service then the overall recommendation is put forward to the Provost and based on the scores you are given a grade. For example if you have a score it might read down to a Grade A which is high score which means it is an outstanding performance appraisal and that can be translated into a 3 year renewal. So the framework would tell you the scores, it would tell you the grade and what the grade would mean in terms of a recommendation.

**COURT:** That is the overall grade taken into account what—whose grade?

**MS. RAMGATTIE:** The scores from the actual instrument because you have more than one instrument being presented by the assessors. So you have the overall grade from that.

**COURT:** And those instruments are?

**MS. RAMGATTIE:** The performance evaluation forms. Those are the instruments.”
44. No reasons were advanced at the time of the dismissal to Mr. Carrington as to why the contract was not renewed. The reason advanced by Ms. Ramgattie was that APEC’s final decision after considering all the grades was that a renewal could not have been offered. She was not personally aware of the reasons. Prior to commencing these proceedings however, UTT responded to a request to the EOC by letter 20th February 2014 explaining why his contract was not renewed.

“Question: Kindly indicate the reasons for the decision to not renew Mr. Carrington’s contract, explaining what criteria or consideration was utilised in arriving at said decision. Please also indicate the person or persons who would have made the decision and provide copies of any documentation generated in relation to this decision.

The decision not to renew the contract of Mr. Carrington was taken by the Provost of UTT after taking into account certain matters, including:

- Complaints by students about the inconsistent grading pattern employed by Mr. Carrington for the engineering Seminars (SEMN1001) Group Project
- Complaints about Mr. Carrington’s delivery of the Professional Development Workshop (PDWK1108)
- Mr. Carrington’s failure to properly deliver the Project Management Course (PMGT210B/BUSI 2009). In fact, even after Mr. Carrington’s departure from UTT, a letter was written to him asking for him to submit certain deliverables relating to this course.
- Mr. Carrington’s attendance record and negligible teaching load.”

45. Importantly, no reasons were advanced in the Defence of UTT for the non-renewal of the contract. The Defence strictly is that UTT was entitled to dismiss Mr. Carrington with notice and without cause.

**Agreed Issues**

46. The parties have agreed that the following issues are to be determined in this claim:

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10 Statement of Agreed Issues filed on 14th June 2017.
a. Whether a further contract of employment for a term of three (3) years upon the same conditions as the second contract arose by implication upon the end of the 2009 contract.

b. Whether the Claimant entered an Extended Agreement Period with the Defendant on 1st May 2012 under the same conditions as prevailed in the second contract.

c. Whether, at common law, there can be implied into an employment contract, an implied term that the Defendant would so conduct itself towards the Claimant to preserve the relationship of trust and confidence and a duty to act fairly (in matters of termination) where there is an express provision to terminate without cause.

d. Whether the Claimant was dismissed wrongfully.

e. Whether the Claimant suffered damage and loss attributable to such wrongful dismissal of breach of the implied term.

The parties’ submissions

47. Mr. Singh and Mr. Lamont elegantly advanced their rivalling propositions and I am grateful to them for their industry and assistance in unravelling what has turned out to be a difficult area of employment law. Mr. Singh for his part stood firmly on classical contractual theory armed with Johnson v Unisys Ltd [2001] 2 All ER 801 and Reda and anor v Flag Ltd [2002] UKPC 38 hostility to the implication of implied duties to circumscribe express power of dismissal. Mr. Lamont appealed to the reasoning of Malik v BCCL 1997 UKHL 23 and Bhasin v Hrynew [2014] 3 S.C.R. 494 to recognise that there is a separate cause of action arising from the manner of Mr. Carrington’s dismissal.

48. It is accepted by the parties that the dismissal of Mr. Carrington was without cause and no reason has been advanced to justify the non-renewal of his contract of employment. The main plank of the Claimant’s case is that if a duty of trust and confidence or to act fairly is to be implied in this contract of employment it would mean that (a) he was entitled to a three year contract and (b) Mr. Carrington was entitled to know the reason for his dismissal and be given an opportunity to be heard on these reasons before a decision is taken. These fundamental elements of fairness were allegedly breached by UTT. I summarise the parties main submissions briefly:
• The Claimant submitted that there was an implied contract arising out of the conduct of the parties and by reference to the previous contracts between the parties. See *Chitty on Contracts* 30th ed. para 2-031\(^\text{11}\)

• By virtue of the original contract coming to an end by the effluxion of time, a new offer was made by conduct with Mr. Carrington continuing his duties as under the expired contract which UTT benefitted from. See *Steven v Bromley and Son* 1919 2 KB 722, Scutton LJ stated:

  “It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. A well-known example of this is where an agent works on the terms that he shall receive a commission if successful. That excludes a claim on a quantum merit for work which does not result in success. But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding in so far as they are not inconsistent with the implied contract.”

• That there is an implied term of trust and confidence in the contract which can also be viewed as an obligation to treat the employee fairly. See *Malik v BCCL*.

• The Claimant also relies on *Malik* and the Canadian authority of *Bhasin v Hrynew* to support the contract in that UTT breached a separate term of the contract in terminating the contract without a fair hearing. The Defendant submitted that it is a fundamental principle that a term will be implied into a contract when it its necessary so as to give the contract business efficacy.

49. The Defendant contends that the onus is on the Claimant to demonstrate that the implication of a complete and new three year contract on the same terms as the previous contract was intended by the parties. The Claimant does not have to demonstrate that the intention of the

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\(^{11}\) “Where an offer or an acceptance or both are alleged to have been made by conduct the terms of the agreement are obviously more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. But sometimes the court can resolve the uncertainty by applying the standard of reasonableness or by reference to another contract (whether between the same parties or between one of them and a third party).”
parties would be reasonable in the circumstances since “a court when dealing with terms implied in fact must be careful not to slide into determining the intentions of reasonable parties.” Lutchmeesingh’s Transport Contractors Limited v National Infrastructure Development Company Limited CV2015-01192. See also The Moorcock (1889) 14. P.D. 64 and Hamlyn v Wood [1891] 2 QB 488.

50. Mr. Singh pointed out the three indices which militates against the implication of a three year term: the express terms of the contract, the memorandum from Kenneth Julien dated 12th August 2009 and the memorandum from Professor Kenneth Ramchand dated 1st February 2011.

51. The Defendant contended that three distinctions can be made from the English common law and the Canadian authorities. They submitted that in English common law there is no general principle of implying a term of good faith on the basis of:

(i) An imbalance between the two parties since the English common law safeguards the principle of freedom to contract and that one party would necessarily be in an advantageous position to the other.

(ii) The conduct of one party is wanting.

(iii) The predictable vulnerability of the other party.

52. Ultimately, the Claimant must demonstrate not only the terms to be implied but clearly the content of the duty which is alleged to have been breached.

**Implied terms and the contract of employment**

53. Nazir Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2 recently set out the circumstances in which terms are to be implied into a contract. Lord Hughes in addressing implied terms made the following observation:

“7. It is not necessary here to rehearse the extensive learning on when the court may properly imply a term into a contract, for it has only recently authoritatively been restated by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742. It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a
way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, “Oh, of course”) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”

54. In Hamlyn v Wood it was observed “I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.”

55. In Lutchmeesingh, I also reviewed the principles involved in implying terms in commercial contracts. The key features for implying a term would be its reasonableness which is the touchstone to determining its necessity either by reference to notions of obviousness “the officious bystander test” or to give the contract business efficacy. Express terms that are inconsistent with implied terms are a good indicator weighing against the implication of such terms. See also Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10 and Winston Barrow v NIB CV2005-0102.

56. These principles work against the Claimant in implying that his contract was renewed for a further three (3) years or that it is to be implied that he was engaged for a further three (3) years. Such a proposition is unsustainable in light of the following:

   a) The clear and unambiguous clauses in the Contract which indicate “deemed termination”, “to be determined by mutual agreement” and “by an express agreement”
are evidence of the parties’ intention not to have an agreement by implication and further if there was the question of renewal between the parties, they would have stated that the terms should be agreed in accordance with the Contract.

b) The clear statements of policy by UTT in the several memorandums to all staff informing Mr. Carrington that there will be no “rolling over” of contract.

c) The fact that he too was awaiting a renewal of a contract indicating that he was aware on a balance of probabilities that without a formal renewal he was not properly engaged. He may have been expecting a positive result or expected a renewal as a matter of course. However, that is a separate question from whether in fact his contract was renewed as a matter of implication. Such an implication satisfies neither the “business efficacy test” nor the “reasonableness test”.

d) See also the implication of terms which have a direct benefit for employees in a contract as a result of promises made by the employer Claude Albert v Alston’s Building Enterprises Ltd CA No. 37 of 2000.

57. The Claimant cannot demonstrate even by the conduct of the parties that both intended a renewal of a three year contract. A new three year contract cannot therefore be implied.

58. This is however not the end of the matter. Faced with that obvious difficulty, Mr. Carrington reaches for principles of fairness and reasonableness to assert that he has a three year contract and to question the manner of his dismissal. That is that he was given forty (40) days’ notice, no reason for his non-renewal and no opportunity to be heard on the question of his non-renewal. On the unique facts of this case, where the employee had received good performance appraisal reports and there was in fact a recommendation for his renewal of the contract, it sets the stage not to imply a new three year contract but rather to question the reasonableness of the conduct of UTT in determining his contract in the manner in which it was done.

59. This gives rise to the competing views that the common law provides no remedy for the manner in which a dismissal occurs and the organising principle of good faith which requires a Court to examine the circumstances of a dismissal to determine whether it was the act of a reasonable employer reasonably exercising the discretion it undoubtedly possesses to terminate a contract.
60. To properly analyse this aspect of the Claimant’s case, I first examine the special features of the employment contract which makes it amenable to the Court’s intervention to protect the vulnerable party. I then examine the terms of trust and confidence and duty of good faith which are now being implied by law in some jurisdictions to supplement the employer’s powers of dismissal.

**The employment contract—the importance of a relational contract**

61. The features underpinning classical contract law rarely feature in the reality of most employment relationships. That model of contract theory presupposes an open market, contracting parties bargaining and negotiating, making offers and counter offers until a deal is struck. In most employment contracts this is hardly the case.12 Academics such as Roger Rideout preferred to view the employment relationship as one of status than contract. For academics, such as Ian MacNeil, the employment contract can be viewed as a relational contract. See *The Relational Principle of Trust and Confidence*, Mathew Boyle, Oxford J Legal Studies (2007) 27 (4): 633. It involves personal relations where participants derive non-economic satisfaction from performing the contract and engage in social exchange. It tends towards long life and requires co-operation in performance of duties. There are largely unmeasurable benefits such as psychic satisfaction, prestige and personal power13.

62. In this complex relationship, there is an underlying tension where “one side is motivated by the rules of man-made business: increasing profit margin, maximising revenue, cutting costs; the other by the rules of nature: providing for family, protecting one’s self, meeting ones maximum individual potential.”14

63. The duty of trust and confidence is a reflection of a typical norm in a relational contract. Such norms such as contractual solidarity or a belief in being able to depend on one another. Mutuality and reciprocity is a key characteristic of the trust duty. The norm of harmonisation

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12 Save for such employees who are, by their stature, experience or demand for their special skill, able to negotiate terms.
14 *Therapeutic Jurisprudence A New Zealand Perspective* para 10.1 pg. 224 and *Judging in a Therapeutic Key* by Bruce J. Winick and David B. Wexler.
of relational conflict, and the norm of propriety of means. Failure to follow proper procedure in disciplining an employee can therefore amount to a breach of the trust duty. Another important norm in relational contracts is integrity from which spring notions of good faith and honesty. An underlying theme of acceptable conduct in employee relations is reasonable action.

64. Recent case law has recognised the need to pay special focus on relational contracts in which duties of trust, good faith and fidelity would more easily underpin the relationship of the parties and inform their contractual expectations. *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 11 (OB) is a useful case in which Legatt J recognised such relational contracts where greater duties of cooperation and good faith arise:

“...the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance others may be specific to a particular trade or commercial activity; others may be more specific still arising from features of the particular contractual relationship.”

65. In *Johnson v Unisys Ltd* [2001] 2 All ER 801, Lord Hoffman, Lord Millet and Lord Steyn, in his dissenting judgment, all called for special attention to be placed on the employment contract as a relational contract. Lord Hoffman recognised that:

“Over the last 30 years or so the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality.”

66. More importantly Lord Millet noted:

“The common law, which is premised on party autonomy, treated the employer and the employee as free and equal parties to the contract of employment. Each had the right, granted by the contract itself, to bring the contract to an end in accordance with its terms.

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16 *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 11 (OB), paragraph 134.
17 *Johnson v Unisys Ltd* [2001] 2 All ER 801, paragraph 35.
But by 1971 there was widespread feeling shared by both sides of industry that the legal position was unsatisfactory. In reality there was no comparison between the consequences for an employer if the employee terminated is employment and the consequence for an employee if he was dismissed. Many people build their lives around their jobs and plan their future in the expectation that they will continue. For many workers dismissal is a disaster.”  

67. Importantly, in the majority decision of Johnson, the Law Lords pointed out the development of statutory law as having an ameliorating effect on the application of classical contract theory. It was also the basis for their reluctance to also modernise the common law to treat with the reasonable expectation of the parties in the manner of the dismissal.

68. Iacobucci J in Wallace v United Grain Growers Ltd [1997] 3 SCR 701 was keen to observe that the application of classical contract theory was unsuited to the employment relationship. Examining the case where the Court could not compensate the employee for the manner of a dismissal, he said this at paragraph 90:

“Although these decisions are grounded in general principles of contract law, I believe, with respect, that they have all failed to take into account the unique characteristics of the particular type of contract with which they were concerned, namely, a contract of employment.”

69. He observed that appropriate recognition must be given to the special relationship these contracts govern. There are key factors to consider. First, the contact is not the result typically of open negotiation “the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does”19. Employees lack bargaining power and information necessary to achieve a more favourable contract. Second, the relation is between the bearer of power and one who is not the bearer of power.

18 Johnson v Unisys Ltd [2001] 2 All ER 801, paragraph 72.  
“In its inception it is an act of submission, in its operation it is a condition of subordination”.  

70. Employees have been described as a “vulnerable group” see Slaight Communications Inc. v Davidson [1989] 1 S.C.R. 1038. Iacobucci J neatly summarized it as follows:

“Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions… The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection… the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.”

71. It is in this context, from a principled approach in construing an employment contract, it should be treated as a special specie where rigid application of the rules of commercial contract will be anachronistic to the fluidity of employment relationships and where the implied duties of trust and confidence and good faith gains momentum and moulds our understanding of modern employment law.

**Implied Duty of Trust and Confidence and Good Faith**

72. The modernisation of the common law to deal with the realities of employment and to treat with employees as a vulnerable contracting party is justification for the implication of the terms of trust and confidence and latterly good faith.

73. UTT contends that an implied term of a duty of trust and confidence is inapplicable to dismissals as in such cases the contract ceases to exist and there is no relevance of a term to maintain trust and confidence as clearly such trust and confidence has broken down. The English authority of Johnson is on UTT’s side on this issue. The Defendant does not agree that the implication of a term of good faith is necessary. In any event, the Defendant’s position is that if these terms are implied on the facts, the terms have not been breached as the Defendant

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21 Wallace v United Grain Growers Ltd. [1997] 3 SCR 701, paragraphs 94 and 95.
has acted clearly within the express terms of the contract. This simply however begs the
question.

74. These terms of trust and confidence and good faith in some cases would regulate the exercise
of the employer’s discretion in complying with express terms. It could not be an answer
therefore to say simply that the employee is entitled to notice to determine the contract without
considering the manner in which that power is exercised. That is the powerful driving force of
the terms of trust and confidence and good faith.

**Trust and Confidence**

75. Harvey on *Industrial Relations and Employment Law*\(^ {22} \) provides a comprehensive
assessment of what he terms the “T&C” (trust and confidence) implied term. One must note
with caution the development of the modern law of employment in the United Kingdom (UK)
as many decisions have in fact been appeals from their Employment Appeals Tribunal dealing
with the concept of the statutory rights under their unfair dismissal legislation. To a certain
extent, the commentary in the judgment of *Johnson* pointed to a sensitivity of the Courts to
modernise their employment law both by statute and by the use of implied terms to maintain
the balance of power in this relational contract. However, the Law Lords in *Johnson* tried to
put the genie let loose in *Malik* back into its bottle.

76. *Malik* is the springboard for Mr. Carrington’s case on the characterisation of his dismissal as
a breach of his contract. Whereas *Malik* has been embraced in this jurisdiction as accurately
implying a term of trust and confidence into employment contracts,\(^ {23} \) it is yet to be decided in
this jurisdiction whether such a term is to be implied in the manner in which a dismissal is to
be effected.

77. The House of Lords in *Malik* held that an employer shall not without reasonable and proper
cause conduct itself in a manner calculated and likely to destroy or seriously damage the
relationship of trust and confidence between employer and employee. This formulation of the
duty has caused considerable controversy not so much as to its logic but as to its impact on the

\(^{22}\) Harvey on Industrial Relations and Employment Law Issue 246 November 2015.

\(^{23}\) See *Carmel Smith v Statutory Authorities Service Commission* CA 213 of 2007, *Angel Lawrence v
Government Human Resource Services Company Limited* CV 2017/1122 and *Richard Callender v Trinidad
and Tobago National Petroleum Marketing Company Limited* CA Civ P0012/2014.
traditional norms of contract and in particular to special relational contracts such as employer and employee. Indeed, recognising how such a term can put a significant brake on the flexibility and power of the employer to dismiss an employee with simply the proverbial “pink slip”, much controversy has since surrounded the application of the term to complaints of wrongful dismissal.

78. In *Malik*, the applicants were employees of a bank which for a number of years had carried on its business fraudulently. The case had been determined on the issue whether a cause of action for stigma award was available. It preceded on the basis of agreed facts. It was not the trial. The applicants’ employment was terminated in October 1991 on the grounds of redundancy and thereafter, they were unable to obtain employment in the financial services industry because of the stigma that was attached to them as employees of the bank. They submitted proof of debt in the liquidation claiming compensation for the alleged stigma but the proofs were rejected by the liquidators. The trial judge held that their claim failed to disclose a reasonable cause of action and could not sustain a claim for damages and the Court of Appeal dismissed their claim. On appeal to the House of Lords it was held that:

(i) there was an implied obligation on an employer that he would not carry on a dishonest or corrupt business, and if it could be shown that it was reasonably foreseeable that in consequence of his corruption there was a serious possibility that an employee's future employment prospects were handicapped, damages were recoverable for any such continuing financial losses sustained; and that it made no difference if the employee only heard of the employer's conduct after leaving the employment and

(ii) where a breach of contract gave rise to financial loss which on ordinary principles would be recoverable as damages for breach of contract, such damages did not cease to be recoverable because they might also be recoverable in an action for defamation.”

79. Lord Nicholls of Birkenhead noted the inherent vulnerability of the employee is good reason for implying such a term:

“Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the
parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees’ future employment prospects, by harsh and oppressive behaviour or by another form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.”  

80. In commenting on the implied term of “mutual trust and confidence” and the evolution of the term, Lord Nicholls of Birkenhead went on to say:

“Given that this case is concerned with alleged obligations of an employer I will concentrate on its effect on the position of employers. For convenience I will set out the term again. It is expressed to impose an obligation that the employer shall not:


… The evolution of the term is a comparatively recent development. The obligation probably has its origin in the general duty of co-operation between contracting parties: Hepple & O'Higgins, Employment Law, 4th ed. (1981), pp. 134-135, paras. 291-292. The reason for this development is part of the history of the development of employment law in this century. The notion of a "master and servant" relationship became obsolete. Lord Slynn of Hadley recently noted "the changes which have taken place in the employer-employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial

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24 Malik v BCCL 1997 UKHL 23 at 102.
decision, to care for the physical, financial and even psychological welfare of the employee.”

81. He further noted:

“This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.”

82. Lord Steyn was robust in his view that on the trust and confidence term as regulating the ability to terminate an employment contract:

“The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It may well be, as the Court of Appeal observes, that the decided cases involved instances of conduct which might be described "as conduct involving rather more direct treatment of employees:" [1996] I.C.R. 406, 412. So be it. But Morritt L.J. held, at p. 411, that the obligation:

"may be broken not only by an act directed at a particular employee but also by conduct which, when viewed objectively, is likely seriously to damage the relationship of employer and employee."

That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee a breach of the implied obligation may arise…”

83. Lord Steyn observed that the term of trust and confidence gave rise to a free standing duty and obligation and parties are free to treat that term as having been breached whether or not there is a dismissal.

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“The employee wishes to terminate the contract forthwith for breach of the implied obligation of trust and confidence. May he do so? Counsel for the bank says "No." Counsel says he will have to give notice and continue to serve his corrupt employer during the notice period or, alternatively, he must abandon his post in breach of contract. If a train of reasoning leads to an unbelievable consequence, it is in need of re-examination. Counsel's answer must be wrong: it is a classic case of a breach of the implied obligation. And the breach is of a gravity which entitles the employee to terminate his employment contract. Having arrived at this conclusion, it follows that termination is not necessarily the employee's only remedy.”28

84. However, having put a breach of that implied term as giving rise to a free standing remedy the employee is still subject to:

“...proof of causation and satisfying the principles of remoteness and mitigation, the employee ought on ordinary principles of contract law to be able to sue in contract for damages for financial loss caused by any damage to his employment prospects.”29

85. Lord Steyn noted that there is no inconsistency with a claim for a breach of the trust and confidence term after the relationship has in fact ended.

“This reasoning treats the decisive issue as being whether the relationship of trust and confidence has as a matter of fact survived until the moment of termination of the employment. It gives inadequate weight to the existence of an obligation in law. And there is nothing heterodox about allowing a claim for damages for a breach occurring during the contractual relationship where damage resulting from the breach only becomes manifest after the termination of the relationship. In truth the ignorance of an employee of a breach of the implied obligation is only relevant to the choice of remedies: obviously the employee cannot decide to terminate on a ground of which he is unaware.”30

86. Malik created a plank for a separate cause of action regardless of a dismissal and to interrogate the manner in which a dismissal was effected. As Harvey observed in his text Industrial

29 Malik v Bank of Credit and Commerce International [1997] 3 WLR 95 at 111.
30 Malik v Bank of Credit and Commerce International [1997] 3 WLR 95 at 112.
Relations and Employment Law, it came close to creating a common law unfair dismissal remedy. Johnson, however, closed the door on such a development “for the time being”. Johnson limited such an implication to procedures prior to a dismissal and not to the dismissal itself.

87. In Johnson, the Claimant was summarily dismissed for an alleged irregularity. He instituted proceedings for unfair dismissal against his employer. The Industrial Tribunal upheld his complaint holding that he was not given a fair opportunity by his employer to defend himself. Thereafter, in 1997, by virtue of a county court action, he sued his employer for breach of contract and negligence and sought damages for loss of earning from the fact and manner of his dismissal which he claimed caused him to suffer a nervous breakdown and made it impossible for him to find work. He contended that his employer had breached the implied term of trust and confidence between employer and employee by breaching its disciplinary procedure and failing to give him a fair hearing. The trial judge and Court of Appeal granted the employer’s application to have the Claimant’s claim struck out. The Claimant appealed to the House of Lords where the issue for determination was “whether the common law right to recover financial loss resulting from the manner of a dismissal was consistent with the statutory regime on unfair dismissal introduced in its original form by the Industrial Relations Act 1971 and currently in force under Part X of the Employment Rights Act 1996.” The appeal was dismissed.

88. The majority held that the trust and confidence term did not apply to a dismissal or the way in which the employment was terminated so as to give the employee a right to claim damages for psychiatric injury arising from the manner of his dismissal. Such an implied term could not contradict an express provision giving the employer the right to dismiss on contractual notice since the term itself is concerned with the preservation of a continuing relationship. They also held the view that the extension of a common law right to convert the manner in which the employee was dismissed could not co-exist with the statutory right to compensation for unfair dismissal under their special legislation.

89. The majority decision of Lord Hoffman and Lord Millet arrived at the same conclusion through different analysis. Lord Hoffman recognised the drastic alteration of the employer and employee relationship during the last century since Addis and that the contribution of the
common law to the employment revolution has been by the evolution of implied terms in the contract of employment and by modernising statutory law. He described the implied term of trust and confidence as far reaching. However he reasoned:

a) That implied terms may supplement express terms but they cannot contradict them.
b) Judges must have regard to the policies expressed by Parliament and ought not to create a parallel remedy for unfair dismissal which is adequately provided by Parliament.
c) Employment law requires a balancing of interest of employer and employee with proper regard to the dignity of the employee and the general economic interest.
d) The law entitled the employer and employee to terminate the relationship without cause. A wrong only arises if there is the failure to give reasonable notice.
e) An express term giving the company the power to terminate employment without reason is difficult to be supplanted by an implied term that it should do so for good cause and after giving him a reasonable opportunity to demonstrate that no cause exists.
f) The trust and confidence term should not be pressed too far in wrongful dismissal cases as it is concerned with preserving the continued relationship and “does not seem altogether appropriate for use in connection with the way in which the relationship was terminated”. Even if one was to imply a duty of good faith one is still faced with the express term of the employer’s power to dismiss without cause.

90. Lord Hoffman also pointed out some additional difficulties in implying such an obligation in unfair dismissal. First, in examining claims for psychiatric injury it gives rise to difficult questions for causation. Second, there is the open ended nature of liability making liability grossly disproportionate to the employer’s degree of fault. Third, the legislature has already provided a remedy for the manner of dismissal in unfair dismissal legislation. It would be wrong in in his view for the common law to offer the employee alternative routes to the same remedy.

91. Lord Hoffman, however, did recognise the logic of the argument for the implication of the term of honesty and good faith and the salutary principle in *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1 that:

“...the Courts could imply an obligation to exercise the power of dismissal in good faith. That did not mean that the employer could not dismiss without cause. The contract entitled
him to do so. But in so doing, he should be honest with the employee and refrain from untruthful, unfair or insensitive conduct. He should recognise that an employee losing his or her job was exceptionally vulnerable and behave accordingly. For breach of this implied obligation, McLachlin J would have awarded the employee, who had been dismissed in brutal circumstances, damages for mental distress.”

92. Despite this Lord Hoffman was not prepared to follow this trend of reasoning convinced of the authority of Addis and its limitations to actions for wrongful dismissal. Although, if damages is proved to be loss flowing from breach of another term of the contract, he was prepared to examine the manner of the dismissal and in those circumstances “Addis does not stand in the way”.

93. Lord Millet thought it was not an appropriate occasion to revisit Addis and sought refuge in the principle established in that century old authority that damages are awarded for breach of contract and not for the manner of the breach. He also held the view that such an implied term of trust and confidence does not survive the ending of the relationship and cannot be used to extend the relationship beyond its agreed duration. Indeed, when an employer dismisses an employee he no longer has trust and confidence in him. He too was of the view that to imply such a term which is sound in principle would be to create a parallel remedy and to run counter to Parliament’s policy of establishing specialist tribunals to deal with this question.

94. In contrast, Lord Steyn in his dissent, stuck firmly to his reasoning in Malik and was undeterred in the logic of that judgment and the direction it will naturally propel employment law. In his dissenting judgment, he recognised a separate cause of action for the manner in which the dismissal occurred. Lord Steyn was, like the majority, prepared to recognise the changing time and the changing legal evolution of the employment contract:

“Addis’s case was decided in the heyday of a judicial philosophy of market individualism in respect of what was then called the law of master and servant. The idea that in the eyes of the law the position of a servant was a subordinate one seemed natural and inevitable. And in Addis’s case it may have been the background to the adoption of a special restrictive rule denying in all cases to employees the right to recover financial loss which naturally

31 Johnson v Unisys Ltd [2001] 2 All ER 801, paragraph 43
flowed from the manner of their wrongful dismissal. Since 1909 there has been a fundamental change in legal culture... the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.”

95. Unlike the majority, he was prepared to take that evolution to its natural conclusion. He states that the evolution of the trust and confidence term was significant for employment law. It is not one to be implied as a fact but it is an overriding duty implied by law. To that extent, it can displace or cut down express terms so that employer’s rights are to be exercised in a manner not to destroy the relationship of trust and confidence between the employer and employee. He saw both the implied duty and the express terms co-existing. The employer is entitled to dismiss the employee on notice. But he acts in breach of the independent implied obligation in law if he dismisses the employee in a “harsh and humiliating manner”. What, however, would be the obstacle to the employee is to prove causation, how has the manner of his dismissal caused his loss that he has claimed.

96. In Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others [2004] UKHL 35, the House of Lords took the opportunity to reconcile Malik with Johnson. In giving deference to Parliament to create the remedy, it left the common law to be extrapolated from Johnson. Lord Nicholls in commenting on the implied term of trust and confidence noted at paragraphs 5 and 6:

“It is a well-established principle that a servant owes a duty of loyalty and faithfulness to his master. Thus, in a modern context an employee will be in breach of contract if he 'works to rule' in such a way as to frustrate the commercial objective of his contract of employment: Secretary of State for Employment v ASLEF (No 2) [1972] 2 QB 455, [1972] 2 All ER 949. From here it was a short step to recognise that both parties to an employment contract owe a duty to conduct themselves in a way which will enable the contract to be performed. The developed formulation of this duty became, so far as the employer is concerned, that an employer will not, without reasonable and proper cause, conduct himself

32 Johnson v Unisys Ltd [2001] 2 All ER 801, paragraph 18
in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. This formulation of a wide-ranging 'trust and confidence' implied term emerged in the late 1970s and the 1980s in cases such as Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, [1981] IRLR 347, affirmed [1982] ICR 693.

[6] This term, implied as a legal incident of employment contracts, provides the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress. Such conduct is a breach of a fundamental term of the contract of employment, and an employee who accepts this breach as a repudiation of the contract by the employer is ‘constructively’ dismissed by the employer. The employee can, accordingly, make a complaint of unfair dismissal to an employment tribunal.”

97. The House of Lords in Eastwood, however further put the matter in controversy by recognising a remedy for breach of the implied term in actions prior to a dismissal and not to the dismissal. This effectively translates to the employer being in a better position in dismissing an employee than suspending him. In the latter case, the implied obligations are in play while in the former it falls within the Johnson “zone of exclusion”. Lord Steyn however, in his judgment, sets out his grounds for the necessity to reconsider Johnson in a future case.

98. In my view, the trust and confidence terms as espoused in Malik is applicable to the manner in which a dismissal takes place and should be incorporated into our law as recognising an implication as a matter of law of such a term into contracts of employment and giving the party a remedy for breach of the term in the manner in which the dismissal is effected. Unfortunately, the reasons articulated to brake the further application of the trust and confidence term as established in Malik to the case of the manner of a dismissal are, in my view, not convincing and Lord Steyn’s approach would be more appropriate for our local circumstances.

100. Second, Lord Steyn gave a powerful dissent in Johnson (analysed above) which deserves noting and the logic of his argument is recognised by the majority.

101. Third, there is nothing inconsistent with the development of the common law remedy co-existing with a statutory right. It is not unusual and certainly nothing new for our High Court, for instance, to treat with several cases in employment law under the manifestation of public law, constitutional law or judicial review, when the real question is the manner of the dismissal. Our public law Courts have been occupied frequently with complaints of the manner of a dismissal in public law. We have not shirked from our responsibility to interrogate the manner of a dismissal even if the jurisprudence may be preoccupied with similar process issues that may engage employment tribunals.

102. Fourth, it is a fundamental right of access to justice that the litigant can access our Court for the determination of legitimate claims. Absent any statutory bar or jurisdictional edict set out by Parliament, the common law is free to unshackle itself from the prison of past outdated notions of employment law cast on “master and servant” theories and mould them into modern societal theory on the partners of productivity.

103. Fifth, our Court of Appeal in Aron Torres v Point Lisas Industrial Port Development Corporation Limited recently unshackled our carriage from the Addis train which propelled the conclusions in Johnson. This Court is free to examine whether there should be a zone of exclusivity of a breach arising from the manner of dismissal as espoused in Addis and Johnson. Mendonca JA pointed out that Addis, although a very persuasive authority, is not binding authority on our Courts. Ultimately it is a question of policy:

“I think in the end it is really a question of policy and it is for this Court to decide what the policy of the law of Trinidad and Tobago should be on this subject. The fact that it may never have been done before is not to the point. As Lord Nicholls remarked in A v Bottrill, supra, “Never say never is a sound judicial admonition”.

104. Sixth, the question for which the special expertise of the Industrial Court has been established in this jurisdiction is to examine the question whether a dismissal was harsh or oppressive or inconsistent with good industrial relationship practice. That is an entirely different test to the question of the breach of an implied term which demands reasonableness
in actions. In that jurisdiction, the Industrial Court has worked out its own jurisprudence on what amounts to good industrial relationship practice.

105. Seventh, in any event, the litigant who has standing in the Industrial Court is a Union and not the worker himself. In fact, it is accepted in this case that Mr. Carrington has no standing before the Industrial Court as it was determined by the RRCB that he was not a “worker”. The Industrial Relations Act Chap 88:01 seeks to regulate the relationship of workers through their bargaining agents and thus strive in that collective partnership of union and employer to achieve industrial relations peace. In this civil jurisdiction, this Court seeks to achieve the peaceful resolution of disputes through the development of reasoned principles established in common law. All the Law Lords in Johnson were satisfied with the ethos and logic of the implied term.

106. Finally the majority in Johnson only felt it necessary to place the common law development “on hold” and to retreat to a subordinate role to Parliament, justifiably so, in a jurisdiction that recognises the supremacy of Parliament. This is perfectly legitimate in the UK but misplaced in this jurisdiction which recognises the supremacy of the Constitution and fundamental human rights to due process.

107. Reda and anor v Flag Ltd [2002] UKPC 38 referred to by the parties provides a very important illustration of the intersection of express terms governing the employer’s power of dismissal and the implied term of trust and confidence. In that case the employees Mr. Reda and Mr. Jalil were directors of the company under fixed term contracts. Their employment came to an end a few months before their contract expired without notice being given by Flag, their employers but paid all remaining sums due under their contract. Flag was empowered to do so as the contract provided for three methods of termination during the contract (a) for cause (meaning misconduct) (b) for unsatisfactory performance or (c) without cause. The consequences for termination was different in each case. Lord Millet was prepared to accept that the contracts of employment contained an implied term that Flag would not without reasonable or probable cause deter the relationship of trust and confidence which should exist between employer and employee. However he held the view that such implied terms should yield to the express provisions of the contract and cannot circumscribe an express power of dismissal:
“it cannot be sensibly be used to extend the relationship beyond its agreed duration and their lordships would add it cannot sensibly be sued to circumscribe an express power of dismissal without cause.”

108. The Privy Council expressed the view that there was no room to imply a term that the employees were even entitled to reasonable notice in the face of the clear terms of the power of dismissal “without cause”. There was of course no pronouncement on a cause of action for a breach of the implied term which may arise in the manner of the dismissal and the decision pays deference to the Johnson line of reasoning. The Privy Council in Reda in following Johnson adopted the hostility to the implied term borne from the acceptance of Addis and the deference to statutory remedies. I do not think we would be forgiven if our common law is left wanting in this area although free of the inhibitions that prevail in the UK experience.

109. I do take note of the fact that one must exercise caution in following the jurisprudence of the UK in the development of their employment law with its unique unfair dismissal legislative history. I also note that the trust and confidence term did not gain favour in Australia. In the recent High Court of Australia decision of Commonwealth Bank of Australia v Stephen John Barker [2014] HCA 32 the High Court did not receive the trust and confidence term into their jurisdiction. It was felt that the term was complete and should be left for legislation. The term did not meet the necessity test. It was noted that its inherent uncertainty could act as the “Trojan horse in the sense of revealing only after the event the specific prohibitions which it imports into the contract…. The implied term would intrude a common law policy choice of broad and uncertain scope into an area of frequent, detailed and often contentious legislative activity.”

110. However, I feel compelled by the logic of Lord Steyn’s argument and recent commentary and having regard to the special features of this relational contract to accept the view that the common law should provide protection for a vulnerable contracting party which is consistent with known principles of reasonableness and good faith. Indeed the employee is obliged to comport to an obligation of trust and confidence of the employer at pain of dismissal, why should the obligation not be reciprocal? See Woods v WM Car Services [1981] ICR 666.

33 Reda and anor v Flag Ltd [2002] UKPC 38 at 117.
Such a term is consistent with the general duty to cooperate which exists in contract law. See also the application of the term in *Scally v Southern Health and Social Services Board* [1992] 1 AC 294.

111. On the facts of this case however, Mr. Carrington is hard pressed to demonstrate that there is any damage flowing from a breach of this term.

112. Firstly, the trust and confidence term cannot be availed to imply a new contract of employment for three years in light of the prevailing circumstances and the express terms of the contract. To do otherwise would make a nonsense of their business relations and would mischaracterise the reasonable expectation of both parties. Such an implication fails the officious bystander test, the necessity test and the reasonableness test. It is not unfair to either party in circumstances where both are fully aware of the process in which a third fixed contract would come into being.

113. Second, the trust and confidence terms can only be relevant to the exercise of the employer’s discretion not to renew the contract and the manner in which it sought to terminate the relationship. To this extent, it is difficult to see how the trust and confidence term can be breached in light of clear expectation that the contract can be terminated upon giving reasonable notice. The fact remains the APEC decided not to renew the contract and the recommendation was not approved by the head of department. It is a process which was contemplated by the parties. I will deal with this aspect of the Claimant’s case later in this judgment.

114. However, in failing to provide reasons for the decision not to renew or to provide an opportunity to challenge those reasons begs the question what is the loss which is suffered by that failure. One must also be careful not to encroach into the rights of the employer not to renew the contract and making the ability to dismiss with notice or without notice with cause a distinction without a difference. However, a better appreciation of the trust and confidence term in this context would be obtained from an understanding of the implied duty to act in good faith.
**The duty of Good Faith**

115. Implying an obligation of good faith in the contract of employment is not free from controversy either. An obligation of good faith is consistent with a key tenet of relational contract theory that is, a contract is a fundamentally co-operative exchange relationship.

116. In examining this duty of good faith in commercial contracts I had observed in *Lutchmeesingh*:

   “29. Leggatt J pronounced that the test of good faith is an objective one that “depends not on either party’s perception of whether particular conduct is improper but on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people.” (Emphasis mine) Therefore, the court is not concerned with the “subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.”

   …What good faith requires is sensitive to context:

   “The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest...the development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinising the motives of contracting parties.”

   See *Bhasin v Hrynew* [2014] 3 S.C.R. 494, para 70.

   The principle of good faith exemplifies the notion that, in carrying out his or her performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interest will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith.” *Bhasin v Hrynew* [2014] 3 S.C.R. 494, para 67.
32. Good faith, therefore, is not an objective standard or abstract formula superimposed on parties as to what “should” be fair or “ought to be” honest dealings. It is a principle which recognizing on the one hand a degree of proper and acceptable conduct but on the other recognizes commercial realities, legitimate self-interests of contractual parties, freedom of contract and being careful not to make moral judgments on legitimate commercial arrangements.”

117. I recognised the possibility of implying such a term in commercial contracts as a matter of fact, sensitive to context and with the challenge for the Claimant in identifying the content of the particular duty. A relational contract such as in the employment contract lends itself however, in my view to an easy acceptance that it should be an obvious duty on both parties implied by law.

118. In Bhasin and Hrynew (cited in Lutchmeesingh) the Supreme Court of Canada for the first time recognized that good faith is a general organizing principle of contract law, and they crafted a new substantive doctrine of honest contractual relations which was based on that general organizing principle. In the case, the Appellant, Mr. Bhasin, sold education savings plans on behalf of a company called Can-Am. Their relationship was governed by a dealership agreement that would automatically renew at the end of its three-year term unless either party provided six months written notice to the contrary. On numerous occasions, the Respondent, Hrynew, sought to purchase Mr. Bhasin’s agency without success. In the year 1999, the Alberta Securities Commission had some concerns in relation to Can-Am’s agents’ compliance with provincial securities regulation. The company was therefore mandated to conduct an audit of its enrolment agents. Can-Am decided that it would be in their best interest if Hrynew took over Mr. Bhasin’s company and contracts. It appointed Hrynew as the officer to conduct the securities audit, which gave him access to the books of all of Can-Am’s agents in Alberta, including, conveniently, Mr. Bhasin. It was an attempt by Can-Am to force Mr. Bhasin to merge his business with Hrynew’s. Mr. Bhasin, however, refused to allow Hrynew access to his business records because he viewed Hrynew’s appointment was inappropriate in the circumstance. With his refusal, Can-Am gave him notice that it would not renew his contract thus triggering Bhasin to institute proceedings against both Can-Am and Hrynew for conspiracy and bad faith.
The Supreme Court, in recognizing that Canadian common law in relation to the duty of good faith in contracts was unclear, stated that:

“Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear. Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While “appropriate regard” for the other party’s interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty.
to the other contracting party or a duty to put the interests of the other contracting party first.

This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. However, this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. ...Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

...It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one’s contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.
This new duty of honest performance is a general doctrine of contract law that imposes as a contractual duty a minimum standard of honesty in contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability. However, the precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.

The duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.”

120. This organising principle was not a free standing rule, the breach of which is enforceable in of itself, but it forms a standard that manifests itself in other recognised enforceable doctrines where the law already requires honest, candid, forthright or reasonable contractual performance. Leggatt J would in Astor Management AG (formerly known as MRI Holding AG) and another v Atalaya Mining plc (formerly known as Emed Mining Public Ltd) and others [2017] EWHC 425 (Comm) comment on this duty of good faith as follows at paragraph 80:

“A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed.”

121. Lord Steyn remarked in First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] BCLC 1409 at 1410:
“A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness.”

122. The duty to act in good faith in contractual relations has been recognised in various manifestations in the Commonwealth, notably New Zealand and Australia without fully accepting a duty in law. Its history and application in the Commonwealth was traced by Legatt J in Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512. He commented, however, that English common law has not reached the stage where it is ready to recognise a requirement of good faith as a duty implied by law in all commercial contracts. There was no difficulty, of course, in implying the duty as one of fact based on the presumed intention of the parties. Importantly, he recognised that a norm which underlies all contractual relationships is an expectation of honesty which depends upon trust. In defining the duty, Legatt J pointed out that the test of good faith is objective in the sense that it depends not on either party’s perception of whether the conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people.

123. Speaking extra judicially, Susan Kiefel J of the High Court of Australia noted that the obligations of good faith include to act honestly, reasonably, with fidelity to the bargain, and with fair dealing having regard to the interest of the parties and to co-operate in achieving the contractual objects.35

124. There is no obstacle jurisprudentially and no barrier in this jurisdiction to recognise as an implied obligation as a matter of law into employment contracts, the duty of good faith whether as an organising principle or of a specific obligation. It is a two way street for both employee and employer. Both parties owe this duty to one another. The hostility towards implying such

35 Good Faith in Contractual Performance” A background paper for the Judicial Colloquium Hong Kong September 2015 The Hon Justice Susan Kiefel AC High Court of Australia.
a term is, in my view, misplaced. It could hardly be said that such a principle is alien to the
demands the law already make on contracting parties.

The statutory context

125. In this jurisdiction, there are statutory remedies to complain of the manner of dismissal.
These are provided by the Industrial Relations Act Chapter 88:01 and recently the Equal
Opportunity Act Chapter 22:03 which established the Equal Opportunity Commission. Both
are specialist tribunals to investigate the circumstances in which the manner of a dismissal has
resulted in loss or damage. These tribunals engage in a specialist inquiry as to whether a
dismissal is harsh and oppressive and contrary to good industrial relations practice and in the
case of the Equal Opportunity Commission, whether the employer engaged in an act of
discrimination. There is only a limited right of appeal from such specialist inquires making it
clear that these bodies are responsible for developing this jurisprudence. See D & K
Investments Limited v Banking, Insurance and General Workers Union

126. Setting up special tribunals with such jurisdiction does not prevent the development of the
common law where the bounds of reason, logic and humanism should take it.

127. Litigants would be warned, however, not to use the implied duties of trust and confidence
and the duty of good faith to create a case when none exists and is unable to demonstrate actual
loss from such a breach of the obligation. They will be better placed to pursue such remedies
in those jurisdictions. Nevertheless, it is not an excuse for the Court to retreat into a shell of
judicial passivism.

128. I turn now to deal with Mr. Carrington’s two main contentions of breach of this implied
term or obligation: the failure to renew his contract and the failure to provide reasons for same.

Failing to renew the contract

129. Both parties must accept that there existed between Mr. Carrington and UTT at the time of
his dismissal an implied contract on the terms of the just concluded 2009 contract. UTT
describes this as a “holding over” on the terms of the contract on a month to month contract.
The Court was unable to find any authority for the view that an employee who “holds over”
after the expiration of a fixed term contract does so on a month to month contract. Such an analysis may be a borrowed analogy from the law of tenants holding over after the expiration of a lease. But in reality the party’s rights are to be construed by their conduct and by necessity must have intended that the terms of the expired contract would be applicable. This is seen from the continuation of duties and the payment of the same benefits set out in the 2009 contract. The failure to renew the contract is not to be misconstrued with the implied contract that existed between Mr. Carrington and UTT.

130. A contract will be implied from the conduct of the parties where the parties are in contractual relations and an apparent contractual lacuna arises which is filled by behaviour which can only reasonably be attributed to the existence of some contract, then a contract arises by implication to fill that lacuna and that contract is upon the terms of the just concluded contract or upon the terms which the parties must inevitably have agreed upon. They relied on the case of Pyrene Co Ltd v Scindia Navigation Co. Ltd [1954] 2 QB 402 where Devlin J opined:

“If this conclusion is wrong, there is an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods alongside the seller impliedly invited the ship-owner to load them, and the ship-owner by lifting the goods impliedly accepted that invitation. The implied contract so created must incorporate the ship owner’s usual terms; none other could have been contemplated; the ship-owner would not contract for the loading of the goods on terms different from those which he offered for the voyage as a whole. This simple solution was the one which Lord Sumner preferred in Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd. 22 and which was adopted in respect of the stevedores' liability in the cases I have mentioned.”

131. The reference by UTT to Mr. Carrington’s contract as a month to month contract was in fact to justify the period of notice that was given to effect the dismissal. Indeed Mr. Carrington was entitled to reasonable notice to terminate this contract. What is reasonable is to be determined from all the circumstances of his employment. In the absence of an express term providing for the termination of the contract of employment the employee is entitled to reasonable notice. What is reasonable depend upon the circumstances of the particular case. See Bardal v Glose and Mail Ltd [1960] 24 D.L.R. (2d) 140 (Ont. H.C.) at p 145 and
**Satnarine Bunsee v Alstons Building Enterprises Limited** HCA 5933 of 1988. Regard must be given to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

132. In **Richard Callender v The Trinidad and Tobago National Petroleum Marketing Company Limited** Civil Appeal No P012/2014 the Court of Appeal held that **Callender** was wrongfully terminated and entitled to three months’ notice. Paraphrasing McGregor on Damages 17th ed quoting **Marsh v National Autistic Society** 1993 ICR 453:

“that the measure of damages for wrongful dismissal is prima facie the amount that the claimant would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the claimant in minimising damages wither had obtained or should reasonably have obtained. However when the defendant has right to terminate the contract before the end of the term damages should only be awarded to the end of the earliest period at which the defendant could have so terminated the contract.”

See also **Vorvis v Insurance Corporation of British Columbia** [1989] 1 SCR 1085, **Satnarine Bunsee v Alstons Building Enterprises Limited** HCA 5953 of 1988.

133. As I have pointed out earlier in this judgment, this however by no means warrant the conclusion that the contract by implication was renewed for a further three year term. There was no obligation on UTT to renew Mr. Carrington’s contract for a further three year period. He was well aware of this. He may have held an expectation of a renewal as any employee would but it would be a stretch to say that UTT was under an obligation to so renew the contract. What they were obliged to do was to act honestly in complying with their process. Mr. Carrington must contend with express terms and the clearly enunciated policy of UTT which make it clear that his contract will not be renewed until the completion of a process ending with APEC’s communication. There is no dispute that the process was followed.

134. The Provost did not make a recommendation for the renewal. However, no reasons have been provided by the Provost. The witness for UTT was unable to provide any reasons why Mr. Carrington’s contract was not renewed. In those circumstances, far from the Court being
in a position to say that UTT acted capriciously or callously, the Court is starved of the information to properly assess whether UTT acted in good faith.

135. The argument that UTT was entitled to terminate the contract by giving notice misses the point that UTT first decided not to renew the contract of employment and this led to his dismissal. Had this decision been made at the end of the 2009 contract there would have been no controversy. His contract would have legitimately expired without any expectation of a renewal.

**Failing to give reasons**

136. On the facts of this case, UTT cannot be said to have acted dishonestly in relation to Mr. Carrington or misled him as they made it abundantly clear, legitimately, that there will be no rolling over of contracts. UTT was upfront with their employees. At worse, UTT could only be guilty of delay in processing the renewal or non-renewal of contract but that hardly can be a breach of the trust and confidence term or duty to act in good faith.

137. The only difference in this scenario and the unique facts here is that the employee had worked for an additional year with his annual leave rolling over and with good performance appraisals. Naturally, an employee in that situation would harbour a hope of favourable consideration or at best an expectation that his contract would soon be in hand as a matter of course. In my view, consistent with either the duty to act in good faith or the trust and confidence implied term, UTT was obliged to act honestly and fairly in the process of non-renewals.

138. He should have at least been given a reason for his non-renewal of his contract. This however, does not translate to an actionable breach of contract as he can hardly contend that a failure to provide reasons has resulted in him being out of employment for twelve (12) months.

139. At best, he is only entitled to reasonable notice which is, in my view, three months. I have taken into account all the circumstances, his status as a lecturer, the timing of the dismissal, the length of service, his earnings, the periodic nature of his payment and the fact that his expired 2009 contract made his employment terminable on three months’ notice. It is not fair, in my view, in light of the reasonable expectations of honest persons to regard Mr. Carrington’s employment to be terminable by three months’ notice in his first year of employment with
UTT but only entitled to one month after working for seven years in the circumstances of this case.

**Humanizing Employment Contracts**

140. Our Courts have recognised the evolving development of employment law having jettisoned Addis’ restriction on compensation for the manner in which a dismissal is effected. Our common law has found a new means to protect vulnerable employees in these relational contracts. In *Aron Torres* the Court of Appeal provided relief to employees who complained of the manner of their dismissal attracting awards of exemplary damages. Other authorities notably in Canada have considered the “bumping up” of the notice period to compensate the employee for dismissals that were effected on harsh or humiliating circumstances. See *Wallace* (supra).

141. The recognition of duties of trust and confidence and good faith similarly is simply a means of humanising employment contracts and to underscore the importance of the partners in production. The Court must continue to strike the right balance between preserving the dignity and value of employees with the demands for profit or achieving targets by employers.

142. To this extent, employers can consider exit interviews, conflict management skills or other humanising processes in dealing with the termination of staff and the accompanying trauma that may be occasioned by such actions.

**Conclusion**

143. For Mr. Carrington there was no automatic renewal of his 2009 contract to provide for another three year contract. Although, there are implied by law terms of trust and confidence and good faith into this contract of employment, there has not been demonstrated to be any loss resulting to Mr. Carrington beyond three months’ salary and benefits for which he has already been compensated.

144. In arriving at the conclusion that the express terms of effecting a dismissal of Mr. Carrington are to be modified by terms implied by law of trust and confidence and an organising principle of good faith is simply to take the common law to its next logical step in
dealing humanely with parties in a relational contract. The logic of Malik and Johnson together with the unique local setting of our partners in labour would take us there.

145. Far from treating the employee as the “pound of flesh” bargained for by the express terms of contracts, the underlying theme of these obligations are uncontroversial in simply protecting the reasonable expectations of honest persons in their contractual bargain. The challenge would be to identify the specific content of these duties in the context of the dismissal and the loss attributed to a breach of that duty. One bargaining party can insist on the “pound of flesh” but there should be not “one drop of blood”.

146. The claim therefore is dismissed.

Vasheist Kokaram
Judge