Privy Council Appeal No 40 of 2005

Samuel Wray *Appellant*

v.

The University of the West Indies *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 7th March 2007

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance

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*[Delivered by **Lord Walker of Gestingthorpe**]*

1. This appeal is concerned with a claim made by the appellant, Dr Samuel Wray, against his former employer, the University of the West Indies ("the University"). The claim is for damages for breach of his contract of employment, damages for libel and a statutory redundancy payment. There was also a claim for damages for negligence but it added nothing to the libel claim.

2. The appellant's case as put forward before the Board was different from his pleaded case. In response to the case put forward at first instance the University did not call any oral evidence, and the documentary evidence is far from complete. As a result there are no findings of fact, and scant material on which to make findings, on some of the unpleaded issues canvassed before the Board.

3. The appellant was born in 1939. He studied psychology at two English universities, obtaining a BSc degree from the University of London in 1968 and a PhD from the University of Hull in 1972. He taught at Hull for a few years before applying for the post of Lecturer in Psychology at the University's Mona Campus. He was appointed by letter dated 12 June 1973, initially for a period of three years, and he commenced his duties on 6 September 1973.

4. The University has three campuses in three different jurisdictions: Mona in Jamaica, St Augustine in Trinidad and Tobago, and Cave Hall in Barbados. The statutes and ordinances of the University (as revised in 1984, and again in 1996) reflect this federal structure. There is a University Council of senior staff drawn from all three campuses (Statute 16), and three separate Campus Councils (Statute 16A) with a defined balance of power between them (Statutes 17 and 17A). This appeal is concerned with events at the Mona Campus at Kingston, Jamaica (where the Vice-Chancellor and the central administration are located, and where the appellant worked) but a relevant background fact is what Downer JA (in his dissenting judgment in the Court of Appeal) referred to as "the problem of administering a federal university with three campuses".

5. The appellant's career at the University appears to have prospered from the start. Within a year he was made Head of the Department of Psychiatry, one of the departments within the Faculty of Medical Sciences. In February 1976 he was appointed Dean of this faculty (which then covered medical teaching and research at all three campuses and their associated facilities). In 1984 the Faculty was split into three, but a new post of University Faculty Dean was created, and the appellant held this office for a term of four years and then a further term of three years (ending on 30 July 1991). As Dean the appellant received a professorial salary, although he did not until 1987 hold a chair or have the title of professor.

6. In 1978 the appellant's appointment as Lecturer in Psychology was extended. The Registrar's letter dated 14 December 1978 offered him an extension

> "from 1st October 1979 on indefinite tenure. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year."

Their Lordships were told that the academic year ran from 1 August to 31 July (though some of the documentary evidence suggests that 1 October to 30 September is more likely). In any case the purpose of the rather unusual provision as to notice may have been to ensure that, in practice, appointments would terminate in the latter part of the academic year, but so that the University would have sufficient time to recruit new staff when necessary. The reference to "indefinite tenure" is not easy to reconcile with the provision for termination by either side at six months' notice, but in practice it put the burden on the University to give notice if it wished to terminate the appointment. Mr Samson (for the appellant) submitted that tenure was a mark of personal distinction, a submission given some support by para 13(a) of the new Ordinance No. 8 (Powers of Appointment, Promotion and Dismissal) introduced in 1996. Mr Samson also submitted that tenure was conferred on a particular individual, not on a particular post, though it is not clear how that would assist the appellant in this case.

7. The appellant accepted the offer of extension of his lectureship, but on 30 April 1979 it was overtaken by an offer of appointment as Senior Lecturer in Psychology for three years. The offer was in a form similar but not identical to that of the previous offer:

> "The appointment will take effect from 1 October, 1979 to 30 September, 1982 on indefinite tenure. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year. The retiring age is 60 years, but may be extended to 65 years on the invitation of Council, subject to the same conditions of notice."

The appellant signed an endorsed acceptance of promotion on these terms. His basic starting salary as a senior lecturer was stated to be J$12,483 a year, although as Dean he had since 1976 been receiving (and he continued to

receive) a salary on the professorial scale. His final salary, with allowances, in 1996 was (according to the statement of claim) a little over J$2m a year. The severe monetary inflation which has afflicted Jamaica throughout the last 20 years (although with varying severity at different times) is another relevant background fact which must be borne in mind.

8. As Dean, the appellant was during the 1980s involved in extensive discussions leading up to the creation of a professorship in neuropsychology to which he was eventually appointed. He had a special interest in the problems of teenage drug abuse, and thought that the professorship should focus on these problems. The University authorities were sympathetic to the proposal but said that funding would have to come from an outside source. Eventually funds were obtained from the W K Kellogg Foundation, an American charitable foundation. According to the appellant's oral evidence the Foundation put up US$80,000 as "seed money."

9. The outcome was that the University established the proposed chair "for two years in the first instance." The minutes of matters referred by the University's Finance & General Purposes Committee to its Academic Committee for a meeting on 13 December 1984 are the best documentary evidence put before the Board of the formal decision to establish the chair:

> "288. F & GPC noted that the Mona Planning and Estimates Committee had agreed to the proposal for the establishment of a Chair in Mental Health (Neuro-psychology) in the Faculty of Medicine for two years in the first instance, to be funded by the Kellogg Foundation, and continuation beyond that time to be subject to the availability of funding.
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> 289. F & GPC, after noting that the University Academic Committee, at its meeting earlier in that day, had also given its approval, approved the establishment of this Chair under the conditions stated, subject to the Appointments Committee approving the title to be given to the Chair."

The chair was advertised during 1986, described as follows:

> "Chair in Mental Health, Department of Child Health

> Applications are invited from suitably qualified Psychologists and Psychiatrists with extensive experience in research, training of postgraduates in medical sciences, undergraduate teaching of medical students and of working with Caribbean Governments in establishing health care projects. This is a new post established within the Faculty of Medical Sciences and will be for a duration of two years. Continuation of the appointment beyond the stipulated period will be subject to funding. Applicants should have expertise in the field of neuropsychological aspects of mental health in children and adolescents in a family context, and research experience in the neuro-pharmacological basis of brain function and behavioural mechanics underlying mental disorders particularly in the area of psychoactive drugs and other abuses."

10. The appellant applied for the chair. There seem to have been three short-listed candidates and the appellant was successful. He was offered the appointment by a letter dated 1 May 1987 which included the following paragraphs:

> "I am directed by the Council to offer you the post of Professor in Neuropsychology in the Department of Child Health, University of the West Indies, Mona.
>
> 2. The appointment will take effect from March 11, 1987 to September 30, 1989 in the first instance. The appointment is nevertheless terminable by six months' notice in writing on either side given to terminate not earlier than March 31 in any academic year. The retiring age is 65 years.
>
> 3. The appointment is subject to the Charter of the University and to its Statutes, Ordinances, Rules and Regulations for the time being.
>
> 4. The appointment is full-time and no outside employment may be undertaken without the consent of the University. Your duties will be as arranged by the Head of the Department of Child Health.

> 5. Your salary from the date of appointment will be J$69,363 per annum in the range J$56,481-$67,455; - J$69,363."

11. Mr Samson laid emphasis on the third paragraph of this letter and submitted that the Statutes and Ordinances of the University did not permit the creation of a chair for a limited period. He relied on para 1(b) of Statute 17 (Powers of the Council):

> "With the consent of the Senate to institute, confirm, abolish or hold in abeyance any Professorship, Readership or other academic office and any senior administrative office in the University with the exception of an academic office or a senior administrative office of a campus."

He submitted that a chair, once established, must continue indefinitely unless and until abolished or put into abeyance by a decision of the University Council. Their Lordships do not accept that submission. They see no reason to construe the general words of Statute 17(1)(b) in that restrictive way. To do so would produce an inflexible position and would ignore the realities of funding problems which affect most universities throughout the world.

12. On 10 November 1987 the appellant wrote to the acting University Registrar (with a copy to the Vice Chancellor) as follows:

> "I hereby return contract duly signed. Please note that as from the date of my appointment, I have been working in my new Department along with my duties as Dean. The Head of Department and myself have delineated a set of research projects including issues in Maternal and Child Health, Substance Abuse among children and teenagers and behavioural and neuropsychological problems in children.
>
> The two-year appointment is in accordance with the original funding for two years. May I suggest that as I am being paid at the professorial level as Dean until July 1988, the appointment be extended until July 1990 in the first instance."

In short, the appellant saw himself as performing the duties of two posts, each of which carried a professorial salary, and he was suggesting that this justified the extension of his chair in neuropsychology for two years after

July 1988 (when his term as Dean would come to an end). There is no evidence that the letter was ever answered. Nor is there any evidence that the proposal was ever agreed to (or indeed put before) the University Council. This failure of communication may have sown the seeds of later difficulties. In April 1988 the appellant received an increase in salary bringing him to the maximum in his range. Later in the year he was re-appointed as Dean for a final three-year term ending on 30 July 1991.

13. The next relevant documentary evidence is a memorandum written by the appellant to the University Registrar in response to a request for information about the chair in neuropsychology. The appellant wrote:

> "The appointment was made for two years subject to the availability of funding. First I would like to state that the funding earmarked for two years (1987-89) has not been used. As I indicated to the Registrar, Mr Robertson, at the time of accepting the appointment, that my Deanship went until August 31, 1988 and as Dean I was paid a Professorial salary. I have since been appointed Dean from 1.8.88 to 30.7.91 and in this regard I shall not be drawing down on the Professorial salary earmarked for the Chair."

The appellant's memorandum then referred to his onerous duties, to his varied activities as holder of the chair, and to further funding which he had negotiated (for other projects, including a further grant from the Kellogg Foundation for urgent work after Hurricane Gilbert hit Jamaica in September 1988). The memorandum concluded:

> "With regards the appointment my suggestion would be that it goes until 1993 and thereafter subject to funding. This timespan is explained as follows, until 1991 as Dean of FMS, Mona (to 30.7.91) and the funding for two years to 30.7.93 and thereafter subject to funds available."

14. Again, there is no evidence of an answer to the memorandum, or that the appellant's proposal was ever agreed to (or indeed put before) the Council. But throughout 1993 and 1994 he continued to be paid as a professor and to be accorded the title of professor. He was described as Professor of Neuropsychology in the University's official calendars published in or about August 1993 and August 1994.

15. In a chronology prepared to assist the Board Mr Samson listed 28 February in each of the successive years 1989 to 1996 as the "deadline" for the University's Appointments Committee to inform the appellant whether his contract was to be renewed for the next academic year (in each case, following on a recommendation to be made by the preceding 31 December by the University's Assessment and Appointments Committee). These entries in the chronology were based on paras 14 and 15 of Ordinance 8 (as it was before 1996, when it was entirely replaced). There is no evidence that these procedures were followed. However the appellant's pleaded case, and his case as argued in the courts below, was that his contract of employment as a professor was not renewed or varied, but simply continued indefinitely (because of the character of the chair) beyond the initial period of March 11, 1987 to September 30, 1989, until his appointment was eventually terminated by the University in August 1996.

16. The fact is that (as already mentioned) the case which has been put before their Lordships on behalf of the appellant is (in this and some other respects) different from the case put below. The appellant may well be right in suggesting that the University administration did not always comply with the rather complicated procedures and formalities apparently required by its Statutes and Ordinances. Oral evidence from one or more senior members of the University administration would have helped to clarify these uncertainties. But the University was not obliged to adduce evidence to meet a case which was not pleaded against it. Moreover the appellant has sought to ignore the formal requirements of the Statutes and Ordinances when it suits him to do so (for instance, in asserting that the proposals in his letter of 10 November 1987 and the further proposals in his memorandum of 21 March 1989 must have been agreed to by the University).

17. On the incomplete evidence which was adduced their Lordships are of opinion that (although the Chair in Neuropsychology was at all times clearly understood to be dependent on funding) the University must be treated as having extended it until July 1993. Whether or not the University observed the proper formalities for extending it, it treated the appellant as entitled to the chair and paid him accordingly. Indeed in an internal memorandum dated 23 July 1991 (just before the end of the appellant's final term of office as Dean) the Vice Chancellor referred to him reverting to his "substantive post" as Professor of Neuropsychology.

18. There is some documentary evidence that during 1992 and 1993 there was discussion, and even dissension, in the Mona Faculty of Medical

Science as to how the appellant's talents should be employed after his final term as Dean came to an end. The Vice-Chancellor's memorandum of 23 July 1991 referred to "controversy" about a suggestion that he should become director of the Medical Learning Resources Unit. A Registry memorandum of 14 April 1992 referred to questions raised by the Head of the Department of Psychiatry, and to a letter from the Head of the Department of Child Health, but the latter document is not before the Board. Matters seem to have drifted on until 27 April 1994, when the appellant applied to the Principal of Mona Campus for sabbatical leave during 1995-6. Eventually there was a meeting on 21 November 1994 between the appellant and the Vice-Chancellor (Sir Alister McIntyre). The meeting was also attended by the Vice-Chancellor's Executive Secretary and the Registrar.

19. The meeting on 21 November 1994, and the exchange of correspondence which followed it, served to bring some measure of legal certainty to what was by then an increasingly obscure issue – the nature and terms of the employment relationship between the University and the appellant. The meeting seems to have been recognised by both the main participants as important to the appellant's future employment by the University, and it has not been suggested that the Vice-Chancellor did not have actual or ostensible authority to bind the University. The appellant wrote to the Vice-Chancellor on 24 November 1994 "to confirm our understanding of the main issues emanating from our meeting" (with a copy to the Principal) and the Vice Chancellor answered by letter on 12 December 1994.

20. The appellant's letter summarised his career and referred to his recent work and his impending sabbatical leave (which he then hoped to start on 1 March 1995). The letter concluded with the following:

> "The question of further funding for the *Established Chair in Neuropsychology* is on the agenda. I have indicated to you *my deep reservations* about the procedure of this matter being discussed by the Faculty of Medical Sciences, Mona, while I occupy the Chair and, in view of comments expressed by the Dean, FMS (Mona).
>
> Regional Heads of Government have placed a high priority on the drug-abuse problem, including the effects on adolescent and women's health. The Academic Board (Mona) has also

> indicated Substance Abuse as one of its area for research and development.
>
> In the context of the above, I feel confident that funds could be obtained to execute the agenda of the Professor of Neuropsychology.
>
> In the event of this not being possible, I indicated to you, that I would 'take my chances' on the outcome of UWI's effort, and the 'chair can come to rest'.
>
> These and other matters, such as topping up the Senior Lecturer's salary, can be determined while I am on sabbatical leave."

The substance of the Vice Chancellor's reply was as follows:

> "I remind you that the Chair [of neuropsychology] was established 'for two years in the first instance, to be funded by the Kellogg Foundation, and continuation beyond that time to be subject to the availability of funding.' In light of the full utilisation of the funds provided by the Kellogg Foundation, any continuation of the Chair is now contingent on a proposal to that end from the Mona Campus supported by the Faculty of Medical Sciences and identifying the source of funding for the Chair.
>
> I have no personal objection to the advance of your sabbatical leave to start on March 1, 1995, as you have requested. I can, however, give no assurance at this stage that your salary can remain at the current professorial level during this period. I propose to consult further on the matter with the Principal and the University Appointments Committee."

21. In his oral evidence the appellant (whom the judge found to be a hesitant and sometimes self-contradicting witness) enlarged on his letter by explaining that the new Dean (Mr Dilip Raje) was very hostile to him, and he felt the matter would not be discussed fairly at campus level. In cross-examination he denied that the question of "topping up the Senior Lecturer's salary" arose in the context of the Chair in Neuro-psychology coming to an

end. The judge seems not to have accepted that, and their Lordships do not consider that the judge erred in that respect. It is clear from the appellant's own letter that at the meeting he appeared to be confident about obtaining further funding for the chair (the Vice Chancellor seems to have been much less confident about the future of the chair, especially as its continuation was contingent on a proposal from the Mona Campus). The appellant stated that he

> "would 'take my chances' on the outcome of UWI's effort, and the chair can come to rest."

That is the context in which he referred to the possibility of topping up a senior lecturer's salary. The only possible interpretation is that the appellant was accepting the prospect of spending his last few years before retirement as a senior lecturer, if further funding for the chair was not found.

22. The meeting and the exchange of correspondence did therefore produce a limited measure of certainty into a confused situation. But there was still a lack of precision on some important points. What was to be the time limit in the search for further funding? Who was to conduct the search? If the appellant were to revert to being a senior lecturer, would it be in the Department of Psychiatry (of which the appellant had been head, but which now had a new Head of Department, Dr Thesiger) or in some other department within the faculty, and what would be his duties?

23. In the opinion of their Lordships the meeting on 21 November 1994, evidenced by the exchange of letters, changed the contractual position in relation to the appellant's position of Professor of Neuro-psychology. The parties recognised that the original funding had been exhausted, that it could not continue without further funding, and that if it could not continue the appellant would revert to the position of Senior Lecturer. That was the University's pleaded case (see para 8 of the amended defence) which the appellant denied (see para 8 of the reply). The provision for termination by six months' notice during the term of the chair was no longer appropriate. But it would have been inconsistent with the spirit and letter of the exchanges in November 1994 for the university to have power to terminate the appellant's chair summarily. In their Lordships' view it is necessary to imply an obligation on the part of the University, if it concluded that further funding was indeed unobtainable, to give the appellant a reasonable period of written notice of the termination of his entitlement to the title and emoluments of a professor. Bearing in mind his status and long years of

service, and the apparent lack of a sense of urgency on the part of the University, their Lordships would set that period at three months.

24. On 28 June 1995 the Campus Registrar informed the appellant by letter that his sabbatical leave for the academic year 1995-6 had been approved in principle, and on 20 September and 12 October 1995 she sent further letters about his study leave. All these letters were addressed to him as 'Professor.' These documents are in striking contrast to the pleading (see para 9 of the amended defence) that in May 1995 the University communicated to the appellant orally that there was no basis for the creation of a permanent chair in neuropsychology; and with the fact that in or about August 1995 the official University calendar listed the appellant not as a professor but as a senior lecturer in the Department of Psychiatry (this being the alleged libel). The appellant's evidence was that this fact came to his notice in September 1995.

25. As Downer JA observed in his dissenting judgment, the University called no evidence in support of the averment of an oral communication in May 1995. The only documentary evidence which gives it even the slightest support is the attorney's letter which the appellant caused to be written on 7 June 1995. The letter was addressed to the Vice Chancellor, with copies to the Principal, the Registrar, the University Dean and the Campus Dean. It protested at what it described as the "disturbing" news that the University "is presently contemplating discontinuing the Chair of Neuropsychology and also ending Professor Wray's appointment at professorial level by having him revert to the significantly lower status of a Senior Lecturer." None of the addressees saw fit to answer the attorney's letter. In cross-examination the appellant said in explanation of the letter:

> "I had been hearing rumours. The campus is a small place."

He specifically denied the suggestion (put to him in cross-examination) that he had had an oral communication from Dr Nicholson, the University Dean.

26. The attorney's letter and these answers in cross-examination cannot, in their Lordships' opinion be taken as evidence of anything beyond some communication to the appellant that the future of his chair was still uncertain, and that there was a real prospect of his having to revert to the position of Senior Lecturer (as discussed with the Vice Chancellor in November 1994). That was how matters stood when the appellant went off

on his sabbatical leave, some of which he spent at universities or teaching hospitals in England and the United States.

27. On 15 August 1996 the Mona Campus Registrar wrote to the appellant, with copies to the Dean and the relevant Heads of Department. The letter (in its entirety) was as follows:

> "Dear Professor Wray,
>
> I write to advise you that the University Appointments Committee agreed that you should revert to your substantive post of Senior Lecturer.
>
> Please note that this decision was arrived at after careful consideration.
>
> The effective date should be September 1, 1996."

28. The appellant reacted promptly and with vigour. He issued a writ on 2 September 1996 and pleadings followed (they were later substantially amended). Yet the appellant continued to be paid by the University, at the professorial rate, down to and including January 1997. In that month (after the end of his sabbatical leave) he did not return to work at the Mona Campus, and the University's case was that that was the date at which he terminated his employment by his failure to return to work. It appears that the appellant later returned the payment which he had received for January 1997.

29. The case was tried by McIntosh J over five days during May 1999, and he gave judgment on 12 July 1999. Their Lordships have to say that even on the pleaded issues the judge's findings of fact were rather sparse, and he expressed derogatory views about the appellant (referring to his "machinations" and – with the obvious correction of 'Defendant's' to 'Plaintiff's' – his 'interest . . . in money and not in scholarship') which were not justified by any findings of primary fact made by the judge. He did not make any precise finding as to the terms of the appellant's employment after 1993. The essence of his judgment was that the chair came to an end when the funding ran out, that the appellant clearly accepted this in his 'topping-up' letter of 21 November 1994, and that because he had been paid until January 1997 he had no claim for pay in lieu of notice. In the judge's view there was no claim for libel because the appellant's substantive post was as a

senior lecturer, and the judge found "no evidence of any breach of statutory duty" on the part of the University. The judge did not mention the Employment (Termination and Redundancy Payments) Act, Act 31 of 1974 ("the 1974 Act") but that was presumably the statute which he had in mind.

30. The appellant appealed to the Court of Appeal (Downer, Panton and Smith JJA), which heard the appeal over five days during 2001, but did not give its reserved judgment until 30 July 2004. Downer JA gave a long dissenting judgment, which occupies more than 70 pages of the record. Their Lordships would pay tribute to Downer LJ's efforts to get to grips with the complexities of the case, and issues which (as he said) had not been fully explored below. In particular, Downer LJ referred extensively to the University's statutes and ordinances, which had received very little attention at first instance. But for reasons already mentioned their Lordships consider that Downer LJ fell into error in what he called "the heart of the case," that is his supposition that there was no power for the University to establish a chair for a limited period, and that by appointing the appellant the University incurred a liability to fund the chair indefinitely, unless and until it was terminated (in accordance with the statutes and ordinances of the University and also in accordance with the appellant's contract). Downer JA repeatedly described the letter of 15 August 1996 as having amounted to the appellant's constructive dismissal. He would not have awarded the appellant damages for breach of contract, because the appellant was paid until December 1996 (and returned the January 1997 payment), but he would have awarded him damages for libel of J$6m and a statutory redundancy payment (under the 1974 Act) of just over J$3.36m.

31. Panton JA and Smith JA gave separate judgments for dismissing the appeal. As it happens both of them seem to have confused the Kellogg Foundation's funding of the appellant's chair with its later funding of the Hurricane Gilbert emergency relief project (in which the appellant was in charge and attracted some criticism). These were two quite different funding exercises and the Hurricane Gilbert project is not directly relevant to the issues in this appeal (no disciplinary action was ever taken against the appellant over that project, although it may have contributed to hard feelings in some of those involved in the University administration). Panton JA concluded that (especially in view of the exchanges in November 1994) the University was entitled to give the appellant notice to revert to his previous position as Senior Lecturer; that there was no basis for the claim for libel; and that there was no evidence to substantiate the claim for redundancy payments. Smith JA agreed with Panton JA but also gave further reasons of

his own. In particular he discussed quite fully the issues arising under the 1974 Act, drawing an important distinction between the language of section 5(5)(c) of the 1974 Act and the English law relating to constructive dismissal. The appeal was therefore dismissed with costs.

32. The determination of the appellant's claim for breach of contract must start with ascertaining the terms on which he held his chair when he went on sabbatical leave in 1995. By then the initial term for which he had been formally appointed had long since expired. The provision for termination on six months' notice was originally directed to termination during the initial term. The University seems to have accepted that the chair was extended, informally, during the full term of the appellant's tenure of the office of Dean, and for two years thereafter (that is, until 31 July 1993). It may be assumed that the provision for termination on six months' notice may also have continued down to and during the 1992-3 academic year.

33. But in their Lordships' view the provision for six months' notice did not survive the exchanges which took place during November 1994, as already described. Those exchanges were intended to end the confusion and to clarify the appellant's position, one way or another, during his ensuing sabbatical leave. Both sides contemplated that the appellant would remain in the University's employment, either as a professor or as a senior lecturer, and that this matter of status would depend on the issue of further funding for the chair. Nevertheless the appellant was entitled to a reasonable period of notice, once a final decision about funding had been taken, before the termination of his professorship. For reasons already mentioned their Lordships consider that three months would have been a reasonable period. The period of notice given in the Registrar's letter of 15 August 1996 was barely more than a fortnight.

34. The appellant is therefore entitled to a declaration that the University was in breach of its contractual duty in failing to give three months' written notice. But since the appellant was paid his salary and emoluments at the appropriate professorial rate until November 1996 the appellant is not entitled to any damages for breach of contract.

35. Because of the view which he took on the breach of contract issue, McIntosh J made no findings of fact relevant to the appellant's claim for damages for libel based on his having been described as a senior lecturer in the University's official calendar for 1995-6 (published in or about August 1995). The judge did not even rule on whether, as a matter of law, this

description could have been defamatory. Nor were these points explored in the judgments of the majority in the Court of Appeal.

36. Their Lordships do not feel able to conclude that the words complained of could not possibly have been defamatory of the appellant. The words could not possibly be regarded as a grave libel. But the appellant gave evidence of his wounded feelings and his anxiety that academic colleagues in other universities might have thought the worse of him for calling himself a professor when he was not entitled to do so.

37. In these circumstances their Lordships have concluded, with some reluctance, that the issue of libel must be remitted to the Supreme Court of Jamaica to determine whether the appellant was libelled, and if so to fix the amount of the damages. Their Lordships reached this conclusion with reluctance because a great deal of time and money has already been expended on this unfortunate dispute, and if there was a libel it was a relatively innocuous one. The amount of damages proposed by Downer JA in his dissenting judgment appears to their Lordships to be much too high. In their Lordships' view both litigants' dignity would be better preserved if a modest sum could be agreed without the need for a further hearing.

38. There remains the issue of statutory redundancy pay. In Jamaica the law as to redundancy payments is contained in the 1974 Act (with some minor amendments, not relevant to this appeal, made in 1986) and in the Employment (Termination and Redundancy Payments) Regulations 1974 made under section 18 of the 1974 Act. These provisions are closely modelled on the British Redundancy Payments Act 1965 ("the British Act") which introduced redundancy payments in Great Britain.

39. Section 5(1) of the 1974 Act gives an employee a general right to a redundancy payment, after a qualifying period of two years' continuous employment, if he is dismissed by reason of redundancy. Section 5(2) provides:

> "For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to—
>
> > (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of

> which the employee has employed him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or
>
> (c) the fact that he has suffered personal injury which was caused by an accident arising out of or in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment."

Section 5(5) provides that for these purposes an employee is dismissed—

> "(a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice; or
>
> (b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or
>
> (c) if he is compelled, by reason of the employer's conduct, to terminate that contract without notice."

These provisions correspond to sections 1(1)(a), 1(2) and 3(1) respectively of the British Act, but with the important difference that section 3(1)(c) (corresponding to section 5(5)(c)) refers to circumstances "such that [the employee] is entitled so to terminate [the contract] by reason of the employer's conduct"—a less demanding test than "compelled".

40. It will be observed that section 5(5) (like section 3(1)) refers to termination of a contract, rather than to termination of employment. This distinction is more fully explained by section 5(6) of the 1974 Act (corresponding to section 3(2) of the British Act):

> "An employee shall not be taken for the purposes of this section to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and—
>
> (a) in a case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the
>
> renewal or re-engagement takes place immediately on the ending of his employment under the previous contract; or
>
> (b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than two weeks thereafter."

Section 5(6) amounts to an important qualification to the apparently wide definition in section 5(5).

41. There are further provisions in section 6(3) and (4) of the 1974 Act (corresponding to section 2(3) and (4) of the British Act) which apply if an employee is dismissed by reason of redundancy but then unreasonably refuses a written offer to re-engage him either on the same terms (section 6(3) and section 2(3)) or on terms which amount to an offer of "suitable employment in relation to the employee" (section 6(4) and section 2(4)). Section 6(4) is potentially relevant in this case:

> "An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would

> be employed and as to the other terms and conditions of his employment, would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before his dismissal, but—
>
> (a) the offer constitutes an offer of suitable employment in relation to the employee; and
>
> (b) the place in which he would be employed would not be more than ten miles from the place at which he was employed under the contract as in force immediately before his dismissal; and
>
> (c) the renewal or re-engagement would take effect on or before the relevant date but not later than two weeks after that date,
>
> and the employee has unreasonably refused that offer."

In this case the "relevant date" would have been 15 August 1996.

42. It is not easy to see how these statutory provisions (corresponding to statutory provisions which have caused many difficulties to employment tribunals and higher courts in Great Britain) might have applied to the circumstances of the appellant's career at the University. It may be helpful to consider the uncontentious event of the expiry of the appellant's fixed term of office as Dean. Immediately before 31 July 1991 he was, it seems, employed under a single contract but in two capacities (Dean of the Faculty of Medical Sciences and Professor of Neuropsychology). On that date his office of Dean expired but his employment continued (at the same salary) as a professor. Arguably that amounted to renewal "under the same contract" for the purposes of section 5(5); if not section 5(6) would seem to apply, provided that the formality of an appropriate written offer was made; otherwise section 6(4) would have been the University's last line of defence in the unlikely event that the appellant had (while continuing in his chair) claimed a redundancy payment for the loss of his office as Dean. A similar sort of analysis seems to be required in considering the redundancy claim which the appellant actually did make on the termination of his chair.

43. In considering this part of the appeal (which Mr Samson put forward as less important than the claim for damages for breach of contract) their Lordships are again faced with serious difficulties arising from the absence of findings of fact relevant to the redundancy issue. Apart from section 5(6) of the 1974 Act, it seems reasonably clear that the condition in section 5(5)(a) was satisfied, in that the contract under which the appellant was employed as a professor was terminated (by notice taking effect on 15 August 1996) even though the University intended and wished that his employment should continue. That potentially leads to three questions of some difficulty:

> (1) whether he was dismissed "by reason of redundancy" within the meaning of section 5(2)(b);
>
> (2) whether his apparent dismissal was displaced by section 5(6) renewal or re-engagement; and
>
> (3) whether his failure to return to work in January 1997 amounted to an unreasonable refusal of an offer of suitable employment under section 6(4).

44. Their Lordships have considered whether these issues ought to be remitted to the Supreme Court, as well as the libel issue, for further findings. But their Lordships have concluded that justice does not call for the remission of the redundancy payments issue. On the contrary, remission would be unjust to the University. The appellant's claim to a redundancy payment was pleaded in a perfunctory manner, the only particulars given being as to the amount of the payment claimed (see para 15 of the amended statement of claim). The appellant neither pleaded, nor gave or called any evidence, as to how his work as a senior lecturer had differed, or (if he were to revert to that status) could be expected to differ, from his work as a professor. Such evidence was needed if he was to make out a case of dismissal by reason of redundancy (see for instance the section headed "Work of a particular kind" in Harvey on Industrial Relations and Employment Law, paras 844-866, which show the complexity of these issues, especially when the employment is that of a professional person). Had the appellant called such evidence, the University might have called evidence challenging it, or seeking to establish that section 5(6) or section 6(4) of the 1974 Act was applicable. There is no reason why the appellant should be afforded a second opportunity, ten years after the events in question, to re-open this issue.

45. Because of the importance which Downer JA attached to the issue of constructive dismissal (effected, as Downer JA saw it, by the University's letter of 15 August 1996) it is appropriate to add that in their Lordships' view the letter did not amount to an occasion of constructive dismissal under the familiar *test* set out by Denning LJ in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761, still less under the more demanding test in s.5(5)(c) of the 1974 Act. The University's letter of 15 August 1996 was ungracious and inconsiderate, and (as their Lordships have held) amounted to a breach of an implied term requiring a reasonable period of notice before the appellant was required to revert to the status of senior lecturer. But it was not such a serious breach of contract as to entitle (still less compel) the appellant to terminate the employment relationship. The appellant seems to have acknowledged that by continuing to accept his salary and emoluments for a further four months.

46. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed, but only to the extent of

(1) making a declaration that the appellant was entitled to three months' written notice of the termination of his professorship; and

(2) remitting the libel issue to the Supreme Court for further consideration in the light of this opinion.

The parties should make written submissions within 28 days as to the costs of the proceedings before the Board and below.