

EASTERN CARIBBEAN SUPREME COURT
ST. CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2011/0177

BETWEEN:

MARIA CAINES

Claimant

And

[1] THE LABOUR COMMISSIONER

[2] THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Defendants

Appearances:

Mr Anthony Gonsalves of Gonsalves and Hamel-Smith for the Claimant

Mr Leon Charles Attorney General Chambers for the Defendants

2011: July 19th

2013: February 22nd

JUDGMENT

[1] **Thomas J (Ag)** This matter is before the court for the assessment of damages payable to the claimant with respect to her action filed against the defendants on 19th July, 2011. This ended with an order of this court for the assessment of damages consequent on the non-appearance of the defendants on the first hearing of the fixed date claim.

[2] The background facts are adequately set out in the submissions filed on behalf of the claimant and which the court adopts and reproduces:

1. "In or around March 2010 the Claimant submitted a claim to the First Defendant for severance pay pursuant to the Protection of Employment Act Cap. 18:27.

2. On the 10th day of March 2011 (14 months after application was made) and after receiving no response from the First Defendant, the Claimant made an application for mandamus for the First Defendant to make a decision on the Claimant's severance pay application. The application was set to be heard on 3rd June 2011. On the day before the scheduled hearing of the application, i.e. on the 2nd day of June 2011, the First Defendant made a decision on the Claimant's application for severance pay as contained in/evidenced by the First Defendant's letter to the Claimant's Solicitor. The First Defendant's decision was that the Claimant had been employed with the Four Seasons Resort Estate(s) (Limited) in a contract for the provision of services and accordingly was not eligible for severance pay. No reasons were given for his decision.
3. The Claimant through her Solicitors by letter dated 9th June 2011 to the First Defendant was asked to reconsider his position and to inform the Claimant's Solicitor by 17th June 2011. The First Defendant never responded to this letter.
4. The Claimant applied for and was granted leave to apply for judicial review on 28th June 2011. On 18th July 2011 the Claimant made an application by fixed date claim for a number of orders, inter alia, an order of certiorari to quash the decision of the First Defendant as contained in his letter of 2nd June 2011. This application for judicial review was supported by an affidavit of the Claimant also filed on 18th July 2011.
5. No defence was filed to the Claimant's claim for judicial review.
6. On the 21st October 2011, the matter came on for first hearing before His Lordship Justice Errol Thomas. The First Defendant was not present and no explanation was offered for his non-appearance before the Court. The Court granted the Claimant's order as prayed. The First Defendant's decision was quashed and the matter was remitted to the First Defendant for his reconsideration".

[3] It is important also to reproduce the relief sought by the claimant in her statement of claim:

1. "An order of certiorari to remove into this Honourable Court and to quash the decision of the First-named Defendant the Labour Commissioner, contained in/evidenced by a letter from the First-named Defendant to the Claimant's Solicitor dated 2nd June 2011 whereby the First-named Defendant determined that the Claimant had been employed with the Four Seasons Resort Estate(s) (Limited) in a contract for the provision of services and accordingly was not eligible for severance pay. This decision of the First-named Defendant was in response to the Claimant's Claim for severance payment, submitted to the First-named Defendant in March 2010 consequent upon the termination of the Claimant's employment from Four Seasons Resort Estates Limited.
2. An Order that consequent upon the Order of Certiorari that the matter be remitted to the First-named Defendant and that the First-named

Defendant be ordered to reconsider the Claimant's application for severance pay in accordance with the findings of the Court.

3. Damages including exemplary damages.
4. Such other orders and relief as the Court deems just in the circumstances.
5. That the costs of and occasioned by this be paid by the Defendants".

ISSUE

The issue for determination is the quantum of damages, including exemplary damages that should be awarded to the Claimant with respect to the actions of the First-named Defendant

The Law

- [4] Part 56 of the **Civil Procedure Rule**, 2000 provide for the remedies available under an application for judicial review. And Rule 56.8(2) provides that:

"In particular the Court may, on a claim for judicial review or for relief under the Constitution award

- a) damages;
- b) restitution; or
- c) an order for return of property to the claimant of the
 - i. claimant has included in the claim form a claim for any such remedy out of any matter to which the claim for an administrative order relates; or
 - ii. facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief, and
 - iii. court is satisfied that, at the time of the application was made the claimant could have issued a claim for such remedy".

Does the claimant fall within Rule 56.8(2)?

Submissions

- [5] On behalf of the claimant the relevant submissions are as follows:

- "10. In the case at bar, the claimant has included in her fixed date claim form a claim for damages including exemplary damages as an additional remedy in relation to the conduct of the First Defendant.
11. The First Defendant is the person authorized under the Protection of Employment Act Cap. 18.27 ('The Act') to make a determination as to the rights of an applicant to severance payments based on the criteria set out in the statute. An important

case is based on the fact that the First Defendant acted in bad faith and that his decision to deny the Claimant severance pay, despite the weight of the evidence to the contrary was arbitrary and unlawful. The Act does not provide an express remedy for breach of duty by the First Defendant. However, section 34 of the Act provides a remedy to an aggrieved party to enforce his or her rights under statute. The aforesaid section provides that an employee may recover by civil proceedings in a court of competent jurisdiction. The notice of payment and severance payment to which he is entitled under the Act. Our submission is that the claimant has a recognized cause of action for breach of statutory duty and/or misfeasance in public office by the First Defendant. Se: Southern Development Limited v Bird and other HCVAP2006/020A Attorney General of Antigua and Barbuda per Thomas JA (Ag) at paragraph 29-32. It cannot be doubted that in case where a Claimant can prove on a balance of probabilities that the Labour Commissioner has acted improperly to deny what is a valid and incontestable claim for severance payment that this constitutes misfeasance in public office. Therefore this is a case where an award of damage would be appropriate”.

[6] For the Defendant the submissions are in these terms”

- “10. It is the Defendant’s contention that the Claimant has failed to produce any evidence showing that the actions of the 1st Defendant cause had loss and damage or that there was any breach of statutory duty. Therefore, the Defendants submit that the Claimant does not satisfy the conditions for the award of damages and so is not entitled to the same.
11. However, if this Honourable Court finds that the Claimant is entitled to an award of damages, the Defendants submit that the award should be compensatory only”.

The Claimant’s Pleadings

[7] In the Fixed Date Claim filed on 18th July 2011, the claimant’s case is that her solicitor was in receipt of a letter from the First Defendant dated 2nd June 2011 whereby the First Defendant determined that the claimant had been employed with Four Seasons Resort Estate(s) (Limited) in a contract for the provision of services. (i.e as an independent contractor and as such was not entitled to severance pay). According to the claimant, this decision of the first-named defendant was in response to the claimant’s claim for severance payment submitted to the first-

named defendant in March 2010 consequent upon the termination of the Claimant's employment from the Four Seasons Resorts Estates Limited.

[8] In the claimant's statement of claim the pleadings in support of her case that she was employed under a contract of service rather than a contract for services are set out. However, given the requirements of Part 56.8(2) of the Rules it becomes necessary to detail the pleadings set out at paragraph 4 of the statement of claim"

"4. It is the Claimant's contention that the First-named Defendant in coming to the aforesaid decision fell into the following errors:

(i) The First-named Defendant failed to take into account relevant matters/considerations and/or to give them due weight. These matters incontrovertibly demonstrate that the Claimant was employed with the Four Seasons Resort Estates Limited (hereinafter 'FSRE') under a contract of service and was at time of her termination, an employee or servant and not an independent contractor. These relevant matters are:

- a. The initial position advertised by FSRE was that of Sales Assistant (Temporary). This was not, nor was it advertised as being, an independent contractor position. It was advertised as an employee (i.e. servant) position. This was the position that the Claimant applied for and which was addressed in her letter of application. Both FSRE and the Claimant viewed the Claimant's employment to be a contractor of service.
- b. The actual terms of employment are referable to a contract of service. The revised terms of the employment letter between the FRSE and the Claimant dated May 27, 1999 again clearly demonstrates that both FSRE and the Claimant considered and intended the relationship to be that of a normal employer-employee/servant, and not that of employer and independent contractor.
- c. The revised terms of employment between FSRE and the Claimant set out in the letter of May 27, 1999 were indicative of a contract of service. The hours of work were dictated by the employer and the Claimant was obliged to comply. The Claimant's work permit was applied for by FSRE and the work permit was in fact granted to the Claimant in her capacity as an employee of FSRE, not in any capacity of the Claimant carrying on any business of her own. In

support of this a copy of a letter from the Nevis Island Administration dated 20 March 1998 clearly describes the Claimant as an employee. The Claimant was entitled to paid vacation and was covered by the Hotel Equity Fund V Limited's insurance policy with premiums being paid by FSRE. As far as termination was concerned, this was also referable to the statutory minimum provided by law. This clearly implied the statutory minimum established for employee/servants as there is no similar statutory minimum established for independent contractors.

- d. The Claimant's letter of termination, a copy of which was provided to the First-named Defendant showed the Claimant to be a servant or employee, not an independent contractor.
- e. FSRE has on various occasions provided letters to various third parties describing the Claimant as a full time employee of FSRE. Specifically letter dated May 8, 2000 to Mr. Laurie Lawrence, letter dated June 11, 2002 to Mr. Robin Shaw, Manager of Bank of Nova Scotia, letter dated June 6, 2003 to Mr. Eric Leonhardt of Republic Bank. Letter dated January 5, 2005 from Mr. Timothy Cook addressed "To Whom It May Concern", letter dated May 25, 2006 to Mr. Lester Liburd, Deputy Comptroller – Customs Department, letter dated April 12, 2007 to Mrs. Augustine, Branch Manager of Bank of Nova Scotia, and letter dated 29 October, 2008 addressed to the Bank of Nevis. These were all indicative of the Claimant being a servant and not and not an independent contractor.
- f. FSRE provided the office space, materials, equipment and necessary tools for the Claimant to carry out her work.
- g. FSRE provided to the Claimant an office in the lobby of the Four Seasons Resort in Nevis for the sole purpose of sale and marketing the development. The said office was outfitted with office furniture including a desk and chair for the Claimant, her assistant's desk and chair, a model of the development, carpeting and file cabinets, light fixtures etc.
- h. FSRE provides the Claimant with a computer and her assistant's computer and they were both linked in a network with the rest of the company. FSRE also provided a fax machine, copier, printer and telephones.

- i. FSRE provided the Claimant with an administrative assistant (paid by FSRE) to assist her in her duties.
 - j. FSRE provided the Claimant with business cards, stationery, a website and all sales and marketing materials to the marketing of FSRE.
 - k. FSRE provided general office supplies to the Claimant and her assistant.
 - l. The Claimant was provided by FSRE with a budget to pay for on and off site client events, dining and entertainment, website development, advertising, marketing, general staffing etc. of the office. The budget was prepared and reviewed annually by FSRE's General Manager and shareholders board.
 - m. The Claimant attended semi-annual company board meetings and was responsible for providing reports attesting to the marketing and sales activity of the company.
 - n. The Claimant was provided with a golf cart and gas to drive for touring clients.
 - o. The Claimant was supplied with the FSRE company logo detailed clothing as part of her work attire. These items exclusively distributed to FSRE employees only.
 - p. The Claimant was supplied with a company cell phone.
 - q. Manager privileges were accorded to the Claimant during her employment with FSRE such as complimentary golf and tennis, signing privileges at the restaurant and duty free concessions.
 - r. The Claimant's management contract included meal benefits, insurance benefits and paid vacation benefits.
 - s. All sales and work contract were made between FSRE and the buyer and/or owner in question. Commissions payable and work orders were billed to the client by FSRE and were paid to FSRE.
- (ii) It was 'Wednesbury' unreasonable for the First-named Defendant, taking the foregoing factors into account, to conclude that the Claimant was employed under a contract for the provision of services, i.e., was carrying on a business of her own (i.e. was an independent contractor) and was an employee.
- (iii) The decision of the First-named Defendant was not made in good faith as there was no basis or evidence upon which the First-named Defendant could have reasonably concluded that the Claimant was not an employee and was carrying on a business of her own account.

- (iv) The First-named Defendant obviously failed to ask himself the right question which was whether on the facts the Claimant was carrying on a business of her own and failed to consider the features that would be indicative of whether the Claimant was a servant or employee, or was in fact carrying on a business of her own.
- (v) The First-named Defendant pre-determined the application with a pre-existing intention to deny the Claimant's claim and did not give any or any real consideration to or any or any proper review of the merits of the application. The First-named Defendant did not want to determine the application in the first place and took over 14 months to make a decision on the application, without any proper reason to justify that delay.
- (vi) The decision of the First-named Defendant was so wrong in law that no reasonable person could, on a proper view of the facts, have sensibly taken that view".

[9] The submissions on behalf of the Defendants can be dismissed on short order since no defence was filed and an attempt is now being made to 'plead' in the said submissions. The legal consequence is that the defendants accepted the claimant's case. This is basic. In any event, the claimant deposes as follows at paragraph 10 of her affidavit in support.

"10. I am personally and directly affected by the decision about which the decision about which the complaint is made as it is in relation to my severance payment claim. The determination that the First-named Defendant has made is directly in relation to myself. Further, I am in arrears with my loan payment to my bankers and am in danger of losing my house as a letter from her bankers dated December 28, 2010¹ attests. I am duly entitled to claim and to receive severance pay, based on my satisfaction of the requirements of the Act".

[10] It is in this context that it is submitted on behalf of the claimant that:"the claimant has a recognized cause of action for breach of statutory duty and/or misfeasance in public office by the First Defendant. It cannot be doubted that in a case where a claimant can prove a balance of probabilities that the Labour Commissioner has

¹ This letter is exhibited as MC11 and indicates that the arrears amount is \$53,766.23 plus late of \$600.00. it goes on to demand payment of the total outstanding balance of \$3,483,504.81 "within 10 days of this letter, if the arrears are not paid

acted improperly and/or intentionally to deny which is a valid and incontestable claim for severance payment that constitutes misfeasance in public office”.

[11] The court agrees having regard to the pleadings showing that there was an abundance of evidence of a contract of service, the time taken to deliver the decision, being 14 months, far exceeded what is reasonably contemplated by regulation 28 of the **Protection of Employment Regulations** (Severance Payments), the decision being unreasonable having regard to all the circumstances, the decision being given a day before an action in court was due to commence; and, as a result, claimant’s financial situation she ran into arrears on her bank loan.

[12] It is therefore the determination of the court that a case of misfeasance is made out and it is a proper case for the consideration of damages, including exemplary damages.

The cause of action and the award of damages?

[13] To the point it will be recalled that by virtue of Rule 56.8(2) of CPR 2000 the court may award damages if the

- “(i) claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
- (ii) facts set out in the claimant’s affidavit or statement of case justify the granting of such remedy or relief; and
- (iii) the court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy”.

[14] In addition to the portions of the statement of claim quoted above, the court finds it necessary to refer to the following extracts from the claimant’s affidavit in support given the prescriptions of Rule 56.8(2):

- “6. There was no basis or evidence upon which the First-named Defendant could have reasonably or properly concluded that I was not an employee and that I was carrying on a business of my own. The First-named Defendant gave no explanation, reasons for or justification for his conclusion.

7. It is clear that to come to the conclusion that he did, the First-named Defendant obviously failed to ask himself the right question as to whether I was carrying on a business of my own and/or failed to consider all of the features that would be indicative of whether I was in fact a servant/employee or was carrying on a business of my own.
8. It is clear that the First-named Defendant determined my application with an obvious pre-existing position intended to deny my claim and did not give any real consideration to, and did not properly review the merits of my application. The First-named Defendant took over 14 months to make a decision on my application and only made an application for mandamus and only on the day before the hearing. The fact that no evidence or grounds exist at all support the determination of the First-named Defendant, and that the evidence points incontrovertibly in the opposite direction to his findings shows that the First-named Defendant acted unreasonably and in bad faith and thereby abused his position with the clear intention of denying me my entitlement. The First-named Defendant's decision was palpably wrong that on the facts reasonable person could have taken that view".

The Learning

- [15] In **Winfield and Jolowicz on Tort**² the following is stated regarding misfeasance in a public office:

"It is based upon breach of statutory duty in an action against a public authority, the tort is a traceable back to the 17th century, and was described in modern times by the Privy Council as 'well-established' in *Dunlop v. Woollahra Municipal Council*. The law was comprehensively reviewed by the House of Lords in two appeals in *Three Rivers District Council v Bank of England*, here referred to as *Three Rivers I* and *Three Rivers II*. The purpose of the tort is to give compensation to those who have suffered loss as a result of improper abuse of public power, it being based on the principle that such power may be exercised only for the public good and not for ulterior and improper purposes. It applied to an unlawful (that is to say, unauthorised) act by a person holding a public office (which includes a public body such as a local authority, a government department of the Bank of England) provided it is done with the requisite mental element. Although the mental element is restricted to intention or 'recklessness' the tort has a considerable reach, for there is no requirement that the actionable breach of statutory duty and a decision which is taken contrary to the requirements of natural justice. The mental element relates both to the validity of the act and its effects upon the

² Sixteenth Edition at para. 7.18

claimant. As to the first, the officer must act and its effect upon the claimant. As to the first, the act is unlawful or be consciously indifferent as to its lawfulness – mere negligence is not enough. As to the effect on the claimant, there are two situations. The first is what has been called ‘target malice’, that is to say, the case where the defendant acts with the *purpose* of causing harm to the claimant. An example of this category is *Roncarelli v. Duplessis* (although the case was actually decided under the civil law of Quebec) where the defendant, Prime Minister and Attorney-General of Quebec, deprived the claimant of his restaurant licence as an act of revenge for standing bail for members of the Jehovah’s Witnesses sect, against whose activities there had been a campaign. Alternatively, the defendant will be liable if he is aware that this act will probably (or in the ordinary course of things) cause danger to the type in fact suffered by the claimant of he is consciously indifferent to that risk. So, turning a blind eye to either invalidity or consequences will do, but not failure to appreciate the risk of those matters. This ‘represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions’. In some circumstances the public officer may be exposed to an action for negligence; judicial review is, of course available on the basis of the invalidity of the act in question and without reference to fault, but there is no claim for damages unless there is a tort”.

The matter of Damages

[16] It is a celebrated and ancient principle that the purpose of the award of damages is to put the claimant in the position he or she would be in but for the breach. With respect to misfeasance it is no different. The problem the court faces is that no authority was cited to the court on this matter. Nor is the court aware of the quantum of severance payment the claimant sought based on the calculations under the relevant law³. However, in the recent decision of the Caribbean Court of Justice in **Marin and another v. Attorney General of Belize**⁴ it was restated that a claimant is entitled to damages based on misfeasance:

“The tort is not complete unless the claimant can establish that he has suffered natural damage. This expression embraces a wide variety of

³ In exhibit MC1 (being the Severance Pay Claim Form the figure of \$474,830.41 given as the amount of wages earned in the past 52 weeks. In Exhibit MC9 further indication as to the claimants earnings between 2002 to 2004 is given by Timothy Cook, Controller, Four Seasons Resorts Estates. The amounts are US\$99,863.41, US\$114,094.54 and US\$199,389.82 respectfully

⁴ [2011] CCJ 9 (AJ) at para 12 per de le Bastide P and Saunders J.

detriments. Economic loss is perhaps the most common but economic loss is not asserted for material damage to be proved. A successful party is entitled to be compensated in keeping with the settled principle that compensation should seek to put the claimant, so far as money can, in the same position as if the tort had not been committed. In exceptional circumstances, a claimant may also be awarded exemplary damages, which may be granted in order to permit the wrongdoer, both for the oppressive arbitrary nature of the wrongdoing and its calamitous impact upon the victim”.

[17] In the context of the claimant, **McGregor on Damages**⁵ the learning is as follows at para 8-001:

“A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damages and as to the amount. If he satisfies the court on neither, his action will fail, on at the most he will be awarded nominal damages where the right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit the award of nominal damages⁶.

[18] In the circumstances outlined above plus the learning and the law the court awards the claimant \$10,000.00 as nominal damages.

Exemplary Damages

[19] The claimant seeks exemplary damages on account the first defendant’s conduct was “so egregious” as to justify such an award. In this case the following factors are cited: the fact that the first defendant took 14 months to give his decision, which renders his conduct “oppressive and arbitrary”, the decision given was not made in good faith since no reasons, explanation or basis were given by the first defendant for the decision; the claimant was not given an opportunity to representations or be heard, the failure of the first-defendant to file a defence thereby highlighting the frivolous and unsupportable nature of the decision.

[20] The award of exemplary damages is vehemently opposed by the defendants in their submission. The main contention being that exemplary damages are only

⁵ [2011] CCj 9 (AJ), Supra

⁶ See also: Greer v Alstons Engineering Sales and Services [2003] UKPC 46 at para 6

awarded where a constitutional right has been infringed, and for this proposition the case of **Inniss v The Attorney General of St. Kitts and Nevis**⁷.

[21] The submissions on behalf of defendants go on to say that since what is alleged to have been infringed is statutory, rather than constitutional, what is required is an appropriate compensatory award. Further still:

“The difficulty is arriving at a compensatory award in this case is that there is no evidence for the Claimant on which to make any assessment as to what the Claimant may have lost. The Defendants therefore submit that, in the absence of such evidence, any damage awarded to the Claimant should be nominal. The Defendants submit that the sum of EC \$3000.00 is adequate compensation”.

[22] The Inniss case did involve the breach of a constitutional right but that is not the end of the world. Indeed, judicial review is the *ultra vires* doctrine writ large and by virtue of Rule 56.8 of CPR 2000 – court in judicial proceedings is authorized to award damages.

[23] Exemplary damages has its origins in the common law⁸ and has been applied where breaches of constitutional rights are involved and otherwise⁹. One of the circumstances which the House of Lords laid down as justifying an award of exemplary damages is high handed action by a public official.

[24] There can be no doubt that the first defendant action, or lack of it, falls to be categorized as high handed having regard to the submissions on behalf of the claimant which the court accepts. Accordingly, the court awards the sum of \$20,000.00 as exemplary damages.

⁷ Privy Council Appeal No. 29 of 2007

⁸ See: *Rooks v. Bernard* [1964] AC 1129; *Cassell & Co v Broome* [1972] AC 1027

⁹ *Lane v Holloway* [1968] Q.B. 379. See also *Marin v Attorney General of Belize*, *supra* at para. 12

Costs

[28] On the matter of costs the submissions are those on behalf of the claimant only and are as follows:

"Costs in judicial review matters are governed by Part 56.13 (4), (5) and (6) of the Rules. The court may make order as to costs as appears just. The rules do not speak to costs of a successful applicant. Accordingly costs should be calculated pursuant to Rule 65.5(1) and (2)(b)(iii) – Prescribed Costs. The Defendants should be ordered to pay to the Claimant costs in the sum of EC\$14,000.00"

[29] The court agrees.

ORDER

[30] **IT IS HEREBY ORDERED** as follows:-

1. The claimant's case is a proper case for the consideration of damages, including exemplary damages, having regard to Rule 56.8(2) of CPR 2000;
2. In the claimant's case in the absence of evidence of the actual loss suffered, and the court being of the view that the claimant should be awarded damages awards nominal damages of \$10,000.00;
3. The actions of first defendant evoke the award of exemplary damages and as such the award is \$20,000.00;
4. The defendants must pay the claimant costs in the amount of \$14,000.00.

Errol L Thomas
High Court Judge (Ag)