

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2009/0054
BETWEEN:

LEVI MAXIMAE

Claimant

and

[1] THE CHIEF OF POLICE
[2] THE POLICE SERVICE COMMISSION
[3] THE ATTORNEY GENERAL OF DOMINICA

Defendants

Appearances:

Mr. Levi Maximae in Person
Miss Pearl D. Williams for the Defendants

2015: September 30
November 23,27
2016: November 21

JUDGMENT

- [1] STEPHENSON J: The claimant in this matter was a member of the Commonwealth of Dominica Police Force representing himself, he filed claims against the defendants relating to his employment. The defendants did not offer a defence to the matter as it regards the liability, but contested the quantum of damages claimed by the claimant.
- [2] The claimant claims a total sum of 48 million dollars Eastern Caribbean Currency "EC" (\$48,000,000.00) plus pre judgment interest on the damages awarded at the rate of 5% per annum from the date of the service of the claim to the date of judgment plus post judgment interest from the date of judgment down to the date of actual payment at the rate of 15% per annum plus costs to be assessed by the court in accordance with rule 56.13(5) of Civil Procedure Rules 2000 "CPR 2000".

- [3] **The claimant's application was initially denied by Cottle J.** on 31st July 2013.
- [4] On 14th November 2014, the Court of Appeal granted a declaration in favour of the claimant on the basis that the Chief of Police breached section 31 of the Police Service Commission Regulations¹ in so far as he failed to forward **the claimant's** staff reports to the Police Service Commission and other relevant ministries. It is the claimant's case that this affected his prospects of being promoted.
- [5] The matter was remitted to this court for a determination as to whether or not the appellant is entitled to damages resulting from the breach of regulation 31 and if so, in what quantum.²
- [6] The issues:
- [7] The claimant submits that the issues before the court is the determination of the quantum of damages for:
- i. Loss of earnings from 1985 to the compulsory retirement/pension age;
 - ii. Accumulated leave;
 - iii. Gratuity and pension benefits;
 - iv. Award for damages for the injuries suffered;
 - v. Aggravated and exemplary damages for the high handed, flagrant and outrageous conduct on the part of the defendants;
 - vi. Damages for the breaches of his constitutional rights.

¹ Chapter 1:01 of the Laws of Dominica (Made under S84 of the Constitution of the Commonwealth of Dominica)

² The Court of Appeal's Order is stated as

"Court orders as follows:

a. *A declaration that the Chief of Police was in breach of the Police Service Commission Regulations in so far as he failed to forward to the Secretary of the Police Service Commission and the Permanent Secretary responsible for the Police service a report each year in relation to the appellant.*

b. *The matter is remitted to the lower court for a determination as to whether or not the appellant is entitled to damages resulting in breach of regulation 31 and if so, in what quantum."*

- [8] The defendants contend that the issues before the court are as stated in the order of the Court of Appeal.³
- [9] It is clear that based on the order of the Court of Appeal the issues to be decided are as follows:
- i. Whether the claimant is entitled to damages for the breach⁴ as declared by the Court of Appeal?
 - ii. If he is entitled to damages, the quantum?
- [10] The claimant has sought in the course of his submissions to convince this court **that he was entitled to damages arising not from the defendants' breach solely but** for damages under additional heads. The court in the course of its judgment will review these submissions.

The Claimant's Case

- [11] **The claimant's submissions** were lengthy but can be summarized without injustice as appears in the following paragraphs.
- [12] The claimant in the case at bar instituted proceedings against the Attorney General for constitutional redress, claiming damages including exemplary damages. His claim is that he was denied the opportunity to be promoted as a member of the Dominica Police Force and from being employed by the Bermuda Police Service. The claimant also claims loss of earnings on a vindictory basis.

³ *ibid*

⁴On the 14th November 2014 the Court of Appeal made the following declaration “... *that the Chief of Police was in breach of the Police Service Regulations in so far as he failed to forward to the Secretary of the Police Service Commission and the Permanent Secretary responsible for the Police service a report each year in relation to the appellant*”. Taken from the Digest of the Court of Appeal sitting in Dominica on the 14th November 2014.

[13] Mr. Maximea, appearing for himself, submitted that the purpose of the award of damages should be to put him in the place he would have been in but for the breaches by the defendants.

[14] He also submitted that there should be an award for the tort of misfeasance in public office made in his favour. He cited the following authorities in support of his submissions:

- i. Marin and another –v- Attorney General of Belize⁵
- ii. Maria Caines –v- The Labour Chief et al⁶

[15] The claimant submitted that in the computation of damages the court must have regard to the general principles on the law of damages, and consideration must be given to making awards under the following heads of damages:

1) Loss of earnings:

The claimant submitted that first element to be considered is his claim under his appointment as a police officer under Section 92 of the Constitution.⁷ The claimant contended that the effect of Section 92 of the Constitution is that the Chief of Police and the Police Service Commission had no power to deny him promotion in the Police Service and to exclude him from his chosen profession as a police detective and to deny him the opportunity to be appointed a member of the Bermuda Police Force⁸.

The claimant further submitted that under this head he is entitled to:

⁵[2011] CCJ 9 (AJ) @ Para 12

⁶SKBHCV2011/0177 @ para 16 & 17)

⁷Re: Angela Innis –v- The Attorney General of St Christopher & Nevis (Privy Council Appeal number 29 of 2007);

⁸*Para 9 of claimant's closing submissions filed on the 23 November 2015*

- (a) Damages for the foreseeable and consequential loss of earnings. That the measure of damages would be loss of earnings – if he was promoted to the rank of Cpl of police on 1 January 1986 and promoted through the ranks to the office of Supt. Of Police in 2003, and loss of earnings – if he was employed by the Bermuda Police force as a detective Sgt of Police promoted through the ranks to being the Chief of police until he reached the age of compulsory retirement that is age 65.⁹

2) Aggravated & Exemplary Damages

The claimant claimed that he is entitled to this head of damages for the injuries inflicted on him. He submitted that the following elements ought to be taken into consideration to punish the defendants in an exemplary manner:

- a) **the defendants' deliberate conduct;**
- b) the motive which influenced the decision;
- c) the outrageous, high handed and vindictive conduct of the defendants;
- d) the contempt shown by the defendants to the his rights;
- e) the conduct of the defendants and that of their legal practitioners at the trial of the actions itself;¹⁰

3) Damages for the infringements of his constitutional rights

The claimant submits that the court should take into account:

- a) the complexity of the issues;
- b) the importance of the rights and

⁹Re: Astley MC Lauglin –v- His Excellency the Governor of the Cayman Islands (PC Appeal NO 83/2006) and Re: Marin et anor v Attorney General of Belize [2011]CCJ 9 (AJ)

¹⁰McGregor on Damages 17th E.(2003) at page 1721

c) the gravity as well as the duration of the contraventions.¹¹

[16] The claimant submitted¹² **that as a result of the defendants' breaches of the Police Service Commission Regulations**, his rights to promotion in accordance with section 92 of the Constitution was severely affected and that the longer these breaches continue the more sustained these damages are getting.¹³

Quantification of Damages

i. Loss of earnings¹⁴

[17] The claimant submitted that in determining his loss of earnings the court must begin at the minimum loss of a Corporal of Police which base must increase quickly over time taking the following factors into account:

- i. that his chances of promotion were extremely high;
- ii. that he was selected over the present Chief of Police for special training and to fill supervisory positions in 1995 and 1996;
- iii. that he could have continued to outrank the present Chief of Police Daniel Carbon in the police service competitive process;
- iv. the fact that the defendants have taken no issue with or challenged his claim that he was denied promotion to hold office as Chief of Police and the appointment with the Bermuda Police Force in their pleadings or evidence;
- v. the serious nature, gravity and duration of the defendants' conduct;
- vi. the foreseeability of the losses
- vii. that the defendants now seek to tarnish his unblemished reputation to justify their actions.

¹¹ Re: **Angela Inniss –v- The Attorney General of St Christopher and Nevis** [2008] UKPC 42, 73 WIR 187

¹² See Paragraph 10 of the Claimant's closing submissions

¹³ Re: **Benjamin –v- Public Service Commission** Civil Appeal No 9 of 1988 (Grenada) at page 8 and **Felix Durity –v- Attorney General of T&T** (Privy Council) No 83 of 2007

¹⁴ See paragraph 12 of the claimant's submissions

- [18] The claimant contended that because the process was so outrageously unfair and the decision so flagrantly deviant that the loss suffered must be deemed substantial and in the circumstances he is entitled to be awarded the average of the minimum he would have earned as a Corporal of Police from 1 January 1986 and the maximum he would have earned as the Chief of Police over the period of his tenure of office.¹⁵
- [19] The claimant in his submissions¹⁶ then laid out the figures which the court ought to take into consideration in arriving at the sum of EC \$545,695.02 being loss of earnings he would be entitled to as a member of the Dominica Police Force. The claimant also made further submissions as to the figures which the court ought to award in the sum of EC \$345,980.17, and future loss of earnings amounting to EC \$5,217,125.17. The claimant also submitted that he was entitled to the further sum of EC \$5,020,275.00 being the sum as loss of future earnings so long as he remains ready, willing and able to render the service required of him as Chief of Police in the Bermuda Police Service, remains in office and until his tenure is lawfully brought to an end by resignation or lawful dismissal.¹⁷
- [20] The claimant also claimed loss of benefits from 2004 to present equivalent to EC \$514,900.00 and gratuity in the sum of EC \$1,930,875.00 calculated at 20% of the total salary on the satisfactory completion of the term of engagement in the Bermuda Police Service.¹⁸
- [21] In his submissions to the court the claimant sought to persuade the court that the **defendants' actions inflicted grievous** injury on him.

¹⁵ See paragraph 13 of the Claimant's submissions

¹⁶ See paragraphs 15,16 & 17 ibid

¹⁷ Re: **Dr Astley Mc Laughlin –v- His Excellency the Governor of The Cayman Islands** (Privy Council Appeal number 83 of 2006 at para 20, Re: **Chief Constable –v- Evans** [1982] 3 All E R 141 at 145 h-I and 146c, Re: **Dattareya Panday-v- The Judicial & Legal Service Commission** Privy Council No.33 of 2007 at Paragraph 21, Re: **Angela Inniss –v- The Attorney General of St Christopher and Nevis** op cit at paragraphs 19 and **Michael Magloire –v- The Attorney General** HCVAP2008/019 and 020 at paragraphs 5 & 10)

¹⁸ See paragraph 18 of the Claimant's submissions

- [22] The claimant submitted that the figures presented by him as to his entitlement is well accounted for, entirely reasonable, properly quantified and justified and reflects the loss of earning suffered by him.
- [23] The claimant also submitted that he is entitled to aggravated damages having regard to the relevant facts and also as a result of the deliberate and persistent denial to promote him in the Police Force also, from excluding him from his chosen profession that is, to be a police detective. That this course of action has severely injured his reputation, credibility and integrity. The claimant contended that these occurrences have been very humiliating and embarrassing to him causing him much distress and suffering.¹⁹
- [24] The claimant also submitted that the court ought to take into consideration the amount of humiliation, shame and embarrassment that he has suffered because officers who were less qualified than him were made to outshine him in the Police Force and the injuries inflicted on him by the unfounded, false and malicious allegations of indiscipline which were leveled against him in an effort to tarnish his good name reputation and integrity and justify the denial to promote him.
- [25] The claimant also submitted that the elements of distress and inconvenience in the case at bar are far more than that considered by the court in the *Horace Fraser – v- the Judicial and Legal Services Commission*²⁰.
- [26] **The claimant also contended that the defendants' actions caused him grief or annoyance in the way and manner that they conducted the litigation in this case which caused further aggravation, humiliation, distress, shame, embarrassment, grief, agony, anguish, pain and suffering and this must be reflected in the award made by the court.**²¹
- [27] The claimant further posited that the injuries that he has suffered are more insidious than the loss of earnings and therefore justifies an award much heavier

¹⁹Paragraphs 19-22 of the claimant's submissions

²⁰Privy Council Appeal No 116 of 2006

²¹ Paragraphs 25 ibid

than the award made in the Angela Inniss²² case. Further according to the claimant his claim for aggravated damages should seek to compensate him for the damages to his reputation and his professional status and integrity as well as the mental psychological, emotional and physical injuries he has endured due to the **defendants' flagrant** misconduct.²³

[28] The claimant further contended that he is entitled to aggravated and exemplary damages equivalent to his loss of earnings in the sum of \$12,000,000.00. This is as a result of the defendants continued outrageous, high handed and vindictive behavior. He submitted that the defendants conduct and attitude and that of their legal practitioner were flagrant, outrageous and high handed and demonstrated a callous disregard for the rule of law, his rights to equal treatment under the law and equal protection of the law, the Honourable Court and its processes. He **further contends that the defendants' behaviour puts the case out of the ordinary** and it was so grave as to justify an award of damages of a very substantial sum in exemplary damages.²⁴

[29] The claimant submitted that he is also entitled to substantial damages to ensure that the breaches of his constitutional rights are vindicated. He submitted that the sum awarded must be large enough to provide an incentive to the defendants and other state agencies not to repeat the infringing conduct.²⁵

[30] The claimant relied on the following decisions in support of his submission that the court should award him vindicatory damages :

- (1) AG of Trinidad & Tobago –v- Ramanoop²⁶
- (2) Johnson –v- Unisys Ltd²⁷
- (3) Richard Duncan –v- The Attorney General²⁸

²² Op cit

²³ Paragraph 26 of the claimant's submissions

²⁴ See paragraphs 28 – 31 of the Claimant's submissions.

²⁵ See paragraphs 32 – 43 ibid

²⁶ [2005] UKPC 15, [2005] 2 WLR 1324

²⁷ [2001] 2 All E R 801

- (4) Gene Pestaina –v- The Minister of Legal Affairs et al ²⁹
- (5) Kanda –v- Government of the Federation of Malaya³⁰
- (6) McIntyre Paul –v- Chief of Police³¹
- (7) Angela Inniss Case³²
- (8) Felix Durity Case³³

[31] The claimant also claims pre judgment interest pursuant to rules 8.6(4), 56.8(2)(c)(ii) and 56.13(3) of CPR 2000. The claimant submitted that he is entitled to pre judgment interest based on the fact that the defendant has never conceded liability, their failure to comply with several relevant rules, practice directions, court orders and directions thereby prolonging the matter and inordinately causing unnecessary and substantial hardship and prejudice to him.

[32] The claimant further urged the court to make an award that reflects the court **taking into consideration the seriousness of the defendants' conduct; such award reflecting the court acknowledgment of the defendants' misconduct and to protect the weak and defenceless persons in the Police Force.**

The Defendants' Case

[33] The defendants rigorously opposed **the claimant's** claim for damages and the question of quantum to be awarded. They made a number of submissions in support of their contention that the claimant did not suffer any loss as is claimed and that the declaration made by the Court of Appeal is a sufficient remedy in the case at bar³⁴. The defendants in the course of their submissions also submit that if damages should be awarded to the defendant it should be between \$20,000³⁵

²⁸ Civil Appeal 13 of 1997

²⁹ Civil Suit DOMHCV2001/0262

³⁰ [1962] AC 322

³¹ Claim DOMHCV2004/0167

³² Op cit

³³ Op cit

³⁴ Paragraph 20 of the Claimant's closing submissions filed on the 27 November 2016

³⁵ Paragraph 41 ibid

and \$35,000³⁶ and that would be adequate compensation for the claimant's distress and hurt feelings.

[34] The defendants questioned too whether the claimant has suffered loss and submitted that in the case of R (Greenfield –v- Secretary of State of the Home Department)³⁷ that the court will only award damages where it is satisfied that there has been a loss suffered as a result of a violation.

[35] **The defendants identified what they considered to be the claimant's claim as follows that:**

- i. **the defendant's breach of section 31** of the Police Service Commissions Regulations affected his prospects of promotion;
- ii. had it not been for the Chief of Police's **failure to evaluate his performance** as a police officer he would have been promoted through the ranks of the Police Force to rank of Chief of Police and as a result of not being promoted he suffered mental anguish, injury to feelings and financial loss/distress.

[36] The defendants contend that the claimant did not suffer any loss in terms of promotion and consequently the alleged claims of mental anguish, injury to feelings and financial distress must fail.³⁸

[37] The defendants submitted that the claimant failed to adduce evidence:

- i. that as a result of the breach of section 31 of the Police Service Commission Regulations³⁹ he was not promoted through the ranks of the Police Force to the position of Chief of Police;
- ii. demonstrating that he has lost so that the court may come to a reasonable assessment of his loss;⁴⁰

³⁶ Paragraph 32 *ibid*

³⁷ [2005] 1 WLR 673

³⁸ Paragraph 19 *ibid*

³⁹ *Op cit*

⁴⁰ Paragraph 26 of the Claimant's closing submissions *op cit*

- iii. of what acting appointments he might have been appointed to and over what period so that it could be determined what he might have earned in the absence of those appointments;
- iv. how all of what has occurred might have impacted his pension if his pension was in fact affected;
- v. of his mental anguish as there is not medical evidence in this regard;
- vi. that he was constructively dismissed from the Police Force.

[38] The defendants also submitted that under cross examination the defendant admitted that he did not provide evidence of what salaries and perks he would have earned if he were promoted to Inspector. Further, it was submitted that the claimant provided evidence to the court that he was not devoted to his duties as is required by section 20(k) of the Police Service Commission Regulations in that he admitted under cross examination that he did not follow instructions from his superior when he was posted at the Immigration Department.⁴¹ The defendant made specific reference to the claimants admitted refusal to write up two diplomatic passports when he was instructed to do so and that he admitted to absenting himself from duty on more than one occasion. Such actions the defendants submit showed a lack of devotion to his work which would have significantly impacted his chances of being promoted.

[39] Learned counsel for the defendants, Miss Pearl Williams submitted that where there is a lack of certainty in identifying loss and damage and resulting money damages the court can apply the doctrine of “loss of opportunity”. Learned counsel made reference to the dicta of Lord Diplock in *Mallet –v- McMonagle*⁴²

“In determining what did happen in the past the court decides on the balance of the probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depends upon its view as to what will happen in the future or what would have happened and reflect those chances, whether they are more or less than even, in the **amount of damages which it awards**”.

⁴¹ Paragraph 34 of the defendant’s closing submissions

⁴² [1970] AC 166,176

[40] Learned Counsel submitted that there is therefore a distinction between the cases where the assessment of damages involves:

- i. Past Events: where the court will award all or nothing on the basis of the balance of probabilities and for which the doctrine of loss of a chance has no application. Re: Davis –v- Taylor⁴³
- ii. Future Events: which is mix of past events and future events then a percentage will be awarded because the damages are based on probability or chance.

[41] Learned Counsel for the defendants submitted that the courts will assess the loss of the chance of having a job or promotion; by taking the percentage chance that the claimant would have obtained the job or the promotion and awarding the percentage of the lost salary. The court would then arrive at a multiplicand which would be multiplied by the appropriate multiplier.⁴⁴

[42] Miss Williams also submitted that where the chance is exceptionally difficult to calculate, the court would then depart from the normal multiplicand/multiplier based assessment and make an award of a lump sum.⁴⁵

[43] The defendants also submitted that there should be no award for exemplary and aggravated damages as there is no evidence before the court that the action or inaction by the Chief of Police not to evaluate his performance was high handed, oppressive or unconstitutional.

The Court's considerations

[44] The claimant in the case at bar instituted proceedings against the defendants for constitutional redress, damages for misfeasance in public office and for exemplary and aggravated damages. His claims arose out of failure by the Chief of Police to forward to the Secretary of the Police Service Commission and the Permanent Secretary responsible for the Police Service a performance report each year on

⁴³ [1974]AC 207

⁴⁴ Halsbury's Loss of England – Damages – Volume 29 (2014)/7

⁴⁵ Doughty –v- Stena Offshore Ltd (10th November 1997) Unreported CA

him⁴⁶ which he submits resulted in him being denied the opportunity to be promoted through the ranks of the Dominica Police Force to the highest possible rank. The claimant also claims loss of earnings on a vindictory basis.

[45] The matter has been remitted to this court for a determination as to whether or not the appellant is entitled to damages resulting in breach of regulation 31 of the Police Service Commission Regulations and if so, in what quantum.

[46] Regulation 31 provides

- (1) **The** Chief shall forward to the Secretary and Permanent Secretary in each year-
 - (a) in respect of all police officers who are within the scale of pay, a report no later than sixty days before an increment is due to an officer, and
 - (b) in respect of all police officers who are at the maximum in the scale of pay or who received a fixed pay, a staff report not later than the anniversary of the date of appointment of an officer to the office.
- (2) A staff report shall relate to the period of service during the immediately preceding twelve months
- (3) In the preparation of a staff report, the Chief shall be guided by his one deliberate judgment and shall in the report-
 - (a) make an unbiased assessment **of the police officer's performance** and conduct over the past twelve months; and
 - (b) give an indication of the future prospects of the police officer.
- (4) A staff report shall be in such form as may from time to time be prescribed by the Commission and shall be made in respect of every police officer whether he holds an acting appointment, temporary appointment or is employed for a specified period."

[47] Section 20 of the said regulations makes provision for the principles of selection for promotion and provides as follows:

(1) In considering the eligibility of police officers for promotion, the Commission shall take into account as respects each officer –

⁴⁶ As declared by the Court of Appeal

- (a) *his general fitness;*
- (b) *the position of his name on the seniority list or his position on the list of results of the promotion exam;*
- (c) *any special qualifications;*
- (d) *any special courses of training that he may have undergone (whether at the expense of the Government or otherwise);*
- (e) *the evaluation of his overall performance as reflected in annual staff reports by the Permanent Secretary, by the Commissioner or other police officer under whom the police officer worked;*
- (f) *any letters of commendation or special reports in respect of any special work done by the police officer;*
- (g) *the duties of which he has had knowledge and experience;*
- (h) *any specific recommendation of the Commissioner for filling the particular office;*
- (i) *any previous employment of his in the Service or the public service, or otherwise;*
- (j) *any special reports for which the Commissioner may call;*
- (k) *his devotion to duty.*

[48] It is noted that there are some eleven (11) factors to be taken into account by the Chief of Police, one of those factors being “the evaluation of his overall performance as reflected in annual staff reports by the Permanent Secretary, by **the ‘Chief or other police officer under whom the police officer worked...’**”

[49] The Court of Appeal has declared that in failing to forward the **claimant’s** performance reports as required that the Chief breached section 13 of the Police Service Regulations. Now at the heart of the issue before this court is whether the

failure of the Chief to submit the staff reports as has been declared by the Court of Appeal, entitled the claimant to obtain an award for damages.

[50] It is the claimant's contention that failure of the Chief to submit his reports resulted in him being denied opportunities for promotion up through the ranks of the Dominica Police Force and also possible appointment to the Bermuda Police Service. I will say here and now, that the claimant cannot succeed on this issue as the court fails to see that the Chief's **failure would have affected the claimant's** ability to be recruited to the Bermuda Police Service let alone promoted up the ranks of the said service to the position of Commissioner of Police. The claimant therefore does not succeed on this aspect of the case.

[51] The claimant also claimed that in the circumstances he has suffered loss of income, humiliation and stress and contended also that the failure of the Chiefs⁴⁷ of Police through the years were motivated by malice thereby entitling him to an award of exemplary and punitive damages.

[52] The claimant also contended that the Chiefs' actions, that is, the breach of the Police Service Regulations amounted to misfeasance in public office thereby entitling him to be awarded vindictory damages.

[53] The first question to be considered is whether or not failure by the Chiefs to submit the claimant's staff/performance report accounted for his not being promoted through the ranks of the Dominica Police Service. Immediately the answer would be no as a review of Section 20 of the said Police Service Commission **Regulations reveals that the evaluation of the officer's** performance as reflected in the annual staff reports by the Permanent secretary is only but one of the factors to be considered by the Chief of Police regarding promotion within the ranks of the force.

[54] It is important to look at one other aspect of the promotion process in this way, is there evidence before the court that the claimant fulfilled all the other requirements listed in Regulation 20(2) of the Police Service Commission Regulations thereby

⁴⁷ Throughout the time span that the claimant was in the Dominica Police Force there were a number of Chiefs of Police, Mr Daniel Carbon being the most recent Chief.

making the failure to comply with Regulation 31 the sole reason that he was not considered for promotion?

- [55] The claimant has failed to adduce any evidence before the court in this regard.
- [56] The claimant submits that there has been misfeasance in public office which has caused him to suffer loss and damage and he made extensive submissions in support of his claim. The defendants do not agree that there was any Misfeasance in public office by the defendants however they made no submission in this regard.
- [57] What is the tort of Misfeasance in public office? In the case of *Three Rivers District Council et al*⁴⁸ it was held that misfeasance in public office is a tort which involves alleging bad faith against a public officer. In the case at bar there is no issue that the defendants satisfy part of this requirement, that is, there is no issue that the defendants were public officers.
- [58] It was also held that a claim for misfeasance in public office requires the following elements to be present for the tort to be proved:
- (i) an act, conduct or omission that is unlawful or otherwise unauthorised; In the case at bar the Court of Appeal declared that there was a breach of the Police Regulations that is that there was an unlawful act;
 - (ii) the defendant must have done the act or conduct (or omitted to do what was required to be done), either intentionally (targeted malice); or recklessly, knowing both that he has no power to do the act complained of and that the act will probably injure the claimant (untargeted malice). The claimant has submitted that there was malice by the defendants directed towards him, however, he has failed to adduce any evidence to prove on a balance of probabilities that there was any malice by the defendants as is required by the law.
 - (iii) the claimant is required to prove damage which was caused to him as a result of defendants act and malice.

⁴⁸ [2000] 3 All E R 1

- [59] It was also held that the essence of the cause of action as a whole “*is a deliberate and dishonest wrongful abuse of the powers given to a public officer. The tort of misfeasance in public office is capable of being committed by a public commission having statutory power*”.⁴⁹
- [60] It is to be noted that when one looks at the span of years where the claimant is saying he was denied promotion, this court takes judicial notice of what is public knowledge, that there were a number of individuals who were Chiefs of Police of the Commonwealth of Dominica Police Force, more particularly there was no single Chief of Police who the claimant has adduced evidence to prove on a balance of probabilities acted maliciously towards him or that their actions were all motivated or actuated by malice.
- [61] The Court of Appeal has declared that the Chief of Police was in breach of the Police Service Regulations; however it has been held in the case of *X et al –v- Bedfordshire CC M (a minor) –v- Newham BC*⁵⁰ that an *ultra vires* act will not per se give rise to liability in tort.
- [62] The claimant in the current case would have to show that the defendants acted with malice towards him in the sense of having intent to injure him by failing to submit his performance reports as is required by the Police Service Commission Regulations.
- [63] The claimant contended that the defendants were actuated by malice. However he has not adduced any evidence of actual malice by the defendants. This is not a case which this court can say that the claimant produced evidence that the defendants were motivated by malice or ill will when they failed to forward the reports to the Police Service Commission. The claimant has not adduced any evidence that the Chief (s) of police acted for personal reasons of antipathy towards him.

⁴⁹ *Re: Jones –v- Swansea City Council* [1989] 3 ALL E R

⁵⁰ [1995] 3 ALL E R 353, [1995] 2 AC 633

[64] In the case at bar the claimant is making a claim to cover consequential economic loss such as his failure to pay his mortgage **as a result of the defendants'** misfeasance in public office. The question is, is such loss recoverable? It is trite law that a claimant can only recover loss that is reasonably foreseeable loss suffered by him. Did the defendants make the unlawful decisions knowing at the time that it would cause loss to the claimant? Again taking into consideration the evidence adduced by the claimant in support of his claim the answer would be no.

[65] The Supreme Court of Canada reviewed the ingredients of misfeasance in public office in *Odhavji Estate v Woodhouse*⁵¹ Lacobucci J who gave the judgment of a court had this to say

"To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law."⁵²

[66] Taking into account all the matters advanced by the claimant, this court finds that the claimant has failed to make out a case of misfeasance in public office by the defendants as claimed.

Aggravated and exemplary damages

[67] The claimant also claims aggravated and exemplary damages. Aggravated damages may be awarded to compensate a claimant whose injury has been aggravated by the conduct of the defendants. It is compensation which takes into account the motives and conduct of the defendant over and above the ordinary

⁵¹[2003] 3 SCR 263.

⁵²(at para 32)

damages flowing from the injury done to the plaintiff. Did the defendants' actions **clearly establish a flagrant disregard of the claimant's constitutional rights?** Is there evidence before the court to assist in drawing such an inference? (emphasis mine)

- [68] Aggravated damages are considered to be damages assessed to compensate a claimant for the additional distress or injury to feelings arising from the manner in which a defendant committed a wrong against a claimant.
- [69] These damages will not only compensate the claimant but will provide a measure of punishment to the defendant. Aggravated damages are awarded where there is conduct that requires an exceptional remedy. Aggravated damages are compensatory in nature and operate to compensate for insult and injured pride.
- [70] It has been opined that when considering a claim for aggravated damages it is important to first enquire into what objects an exemplary award is supposed to pursue.
- [71] The award is considered as having a threefold purpose that is to punish, deter and prevent. Where the defendant has committed a wrong in an unconscionable manner and for this he should be penalised. At the same time this should be an attempt to both deter him from repeating his conduct, and deter others from acting in a similar way.
- [72] **In order for there to be an award of aggravated damages, the defendants'** behaviour should have not only caused injury but it should have been accompanied by high handed, insulting and oppressive conduct which would warrant such an award. The award if the court so finds, would compensate the **claimant for the distress and injury to his feelings caused by the defendants'** conduct.

- [73] The claimant contended that by virtue of their breach of the Police Regulations, the defendants' deliberate and persistent conduct had adverse and traumatic effects on him. That their actions denied him the opportunity to practice his chosen profession as a police detective and to enjoy promotion to higher ranks of the police force. He contended that the defendants by their actions deliberately and persistently denied him promotion and excluded him from his chosen profession.⁵³
- [74] The claimant contends that the Chief of Police deliberately excluded from his personal file his special training reports, commendations and recommendations for promotions.⁵⁴
- [75] The claimant put forth also that they included in his personal file, reports of unfounded allegations of indiscipline and adverse reports which had a negative impact which went to the root of his reputation. The claimant also contended that his office as a police constable vying for promotion was brought into contempt, dispute and ridicule⁵⁵ and that the defendants conduct was calculated to and did damage and disparage him which caused him great despair.

Damages

- [76] It is noted that the declaration made by the Court of Appeal in this matter, addressed the failure of the Chief of Police to forward the **claimant's annual police reviews** to the Police Service Commission in breach of the Police Service Commission Regulations and the matter was remitted to this court with the specific direction as to whether as a result of this breach there should be an award for damages. This direction is pretty fact specific and in my view does not extend to further **allegations by the claimant regarding the personal reports on the claimant's file.** **Therefore this aspect of the claimant's claim will not be considered in** deciding whether damages should be awarded and the quantum of same.

⁵³ Affidavit in support of application for assessment of damages filed on the 19 November 2014 at paragraph 38

⁵⁴ Ibid para 68

⁵⁵ ibid

[77] The claimant in his lengthy and detailed affidavit sworn in support of his application for assessment of damages claimed that the actions of the defendant struck at the very heart of the protection to which he is entitled to under sections 8(8), 84(13) and 92(2) of the Constitution.

[78] The claimant claims that he has suffered damages. It is trite law that for there to be an award of damages the claimant must have suffered damages and essentially three(3) conditions must be satisfied:

- (1) There must be a claim for damages in the statement of claim;
- (2) The claim for damages must arise from the matter that forms the basis of the application for Judicial Review;
- (3) If the applicant had brought an action for damages at the time when he made the application for judicial Review, he could be awarded damages.⁵⁶

[79] The claimant has also claimed **substantial damages for “net loss of salary, allowances and other benefits including gratuity and pension for the period that remained for the subsistence of the police professions in the sum of \$12,000,000.00 (twelve million).”**⁵⁷

[80] The claimant essentially submitted that had it not been for the wrong actions of the Chief of Police he was denied the opportunity to be promoted through the ranks of the Commonwealth of Dominica Police Force from the rank of Constable to the rank of Chief of Police. The claimant contends that he was appointed to act on nine different occasions prior to becoming Corporal and that he was appointed to act in the office of Sergeant. The claimant also argues that the Chiefs of Police actions also deprived him of the opportunity to be employed into the ranks of the Bermuda Police Service and to be promoted through the ranks of that service too to the rank of Chief of Police.

[81] Additionally, the claimant also made a claim for loss of future earnings and gratuity as he was constructively dismissed.

⁵⁶ Re: Eddy Ventose at Page 428

⁵⁷ Re: Paragraph 47 of the claimant’s closing submissions

- [82] According to the evidence of the current Chief of Police Mr. Daniel Carbon, the claimant failed to report for duty, and on the 23rd August 2007 he was written to when he failed to take up his shift on the 21st August 2007. The claimant was **spoken to and again “on the 14th April 2011 was written to informing him that he had absented himself from duty without seeking or obtaining vacation leave or being awarded any other type of leave which would excuse his absence from duty”**⁵⁸
- [83] Police Chief Carbon went on to state that on the 17th April 2011 the claimant **wrote a letter to the “Chief of Police informing him that he could no longer put up** with the conduct which blatantly violated his rights protected under the Constitution and stated that he quit and was not obliged to give any notice in law.”⁵⁹ The Claimant was subsequently dismissed from the Dominica Police Force.
- [84] Learned Counsel for the defendants submitted that the claimant in his evidence was promoted to the rank of Corporal irrespective of the breach of section 31 of the Police Regulations. However, in terms of his being promoted through the ranks of the police the defendants submit that the claimant has failed to provide any evidence that it is as a result of the breach of section 31 that he was not promoted to these ranks. Learned Counsel Miss Pearl Williams submitted that **“promotion to these ranks were merely the claimant’s own desire and opinion”**.⁶⁰
- [85] It is noted that under cross examination the claimant did admit that he had no evidence before the court to show that he should have been promoted or indeed would have definitely been promoted. The claimant also under cross examination admitted that his prospects for promotion and his reputation was his own opinion.
- [86] **Learned Counsel Miss Williams submitted that the “Doctrine of Loss of Chance”** can be considered. Reference was made to *Mallet –v- McMonagle*⁶¹ where Lord Diplock said

⁵⁸ Paragraph 3(iii) (e)

⁵⁹ Paragraph 3(iii) (f)

⁶⁰ Paragraph 17 of the Defendant’s closing submissions

⁶¹ [1970] AC 166,176

“In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depends upon its view as to what will happen in the future or what would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the changes that the particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.”

- [87] The claimant submits that the failure of the Chief of Police to submit his annual reports to the Police Service Commissions and the Permanent Secretary caused him not to be promoted through the ranks of the Police Force he has failed however to show that because the reports were not submitted that this caused him not to be promoted. He also failed to show that even if he was promoted, he would have made it to the gazette high ranks of the force.
- [88] This court is satisfied that there are other factors to be considered separate and apart from annual reports for the promotion of a police officer. Further, the claimant has failed to establish by evidence that these factors were in fact taken into consideration and the failure to submit the annual reports were the sole cause of him not being promoted.
- [89] In his claim and witness statement the claimant spoke to his qualifications, what he considered to be his superior skill, ability and eligibility for promotion. He also spoke of his hurt feelings and feelings of humiliation. However there is nothing in his evidence that spoke to his pecuniary losses for which he seeks compensation.

Claim for Vindictory Damages

- [90] The claimant made a claim for vindictory damages. Is this a case where there should be such an award? The first consideration is whether or not the declaration made by the Court of Appeal is sufficient relief for the claimant in the circumstances of the case?
- [91] Vindictory damages are said to be damages that are awarded to vindicate the right of the claimant to carry on their life free from unjustified executive interference, mistreatment or oppression. In the case of *Inniss –v- A-G of Saint*

Christopher and Nevis⁶² the court awarded what was called Constitutional vindicatory damages of \$50,000.00 in addition to damages awarded as Contractual damages.

[92] The appropriateness of an award of vindicatory damages must be specifically justified when there exists the possibility of a parallel compensatory award such as damages for breach of contract. *Re: Ramanoop –v- A-G of Trinidad & Tobago*⁶³

[93] The Court of Appeal in the case at bar has already declared that there was a breach by the defendants of the Police Service Commission Regulations which in this case would amount to a breach of constitutional right in that the said regulations are made pursuant to section 84 of the Constitution of the Commonwealth of Dominica.

[94] Lord Hope in delivering the opinion of the Board⁶⁴ had this to say regarding the granting of relief and the declaratory judgment

*“The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. ...”*⁶⁵

[95] Lord Hope also said that

*“... Vindication of the right should be the criterion, not punishment which was inherent in the concept of exemplary damages”*⁶⁶.

[96] In the *Inniss Case*⁶⁷ Lord Hope further said that the principles on which the damages for breaches of constitutional rights are to be assessed are not greatly developed. Lord Hope went on to say that there is sufficient guidance available from judgments from the “Board” as it regards the principles on which Constitutional Damages are to be assessed.

⁶² [2008] UKPC 42, 73 WIR 187

⁶³ Op cit

⁶⁴ The Privy Council

⁶⁵ *Inniss Case* op cit at paragraph 21

⁶⁶ *Ibid* at paragraph 23

⁶⁷ Op cit

[97] In exercising its constitutional jurisdiction the court is concerned to uphold or to vindicate the constitutional right. (Re: Ramanoop Case)⁶⁸In that case it was stated that

“... it was apt to encompass an award to reflect the sense of public outrage, emphasise the gravity of the breach and deter further breaches ...”

[98] It was also stated that the expression of punitive or exemplary damages is to be avoided.

[99] It has been held that the purpose of vindictory damages is to vindicate the right of the claimant to carry on his or her life free from unjustified executive interference, mistreatment or oppression. The test can be stated as

*“The sum appropriate to be awarded to achieve this purpose will depend on the nature of the particular infringement and the circumstances relating to that infringement. ...”*⁶⁹

[100] Where a plaintiff has suffered injury through denial of a right he is entitled to compensation for that injury which might include distress and injured feelings⁷⁰. Reference was made by Lord Hope to the decision of the New Zealand Court of Appeal in the case of *Taunoa and others v Attorney General*.⁷¹

[101] Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award.

[102] It is established that the purpose of the award is to vindicate the claimant. The purpose is not to punish the executive. Vindication involves an assertion that the right is a valuable one. The award is to act as a deterrent to further breaches of constitutional rights.

⁶⁸ Op cit

⁶⁹Re: Privy Council decision in the Inniss Case

⁷⁰ibid

⁷¹[2007] 5 LRC 680

- [103] **The commissioners' action in the case at bar in my view** can be likened to that of **the commission's action in the Fraser**⁷² case. In that case it was held to be an error by the commission to follow its own procedure which is a situation that can be applied to the case at bar in that the Police Commissioners failed to follow the procedure set down in the Police Service Regulations.
- [104] The Inniss Case⁷³ is to be distinguished from the case at bar on the grounds that in that case the actions of the defendant were found to be deliberate in that the executive chose to ignore the constitutional rights because it was an obstacle to the removal of Inniss from her post quickly. The actions of the executive struck at the very heart of the protection to which the appellant was entitled to under the constitution.
- [105] In the circumstances of this case, the court is minded to award the claimant damages on the same basis that the court made the award in the Fraser Case⁷⁴. **There is no evidence before the court that the defendants'** actions in failing to provide the annual performance reports were deliberate but more in the view of a failure to follow the procedure set down in the Police Service Regulations.
- [106] In the case at bar there is no evidence before the court that the claimant was deliberately besieged or the subject matter of any malicious conduct and by his own admission he agreed that his prospects for promotion and his reputation was his own opinion. While the failure by the Chiefs of Police is to be frowned on and some element of warning and deterrent is to be included in the quantum of any award, this court may make. In the circumstances of this case I see no basis to make the substantial award of damages to vindicate the claimant, I therefore consider that the sum of EC \$20,000.00 as offered by the defendants to be a sufficient lump sum to award as redress to the claimant as was held in the Fraser Case.⁷⁵

⁷² Op cit

⁷³ Op cit

⁷⁴ Op cit

⁷⁵ ibid

[107] **As it regards the claimant's termination from the Police Force, based on the** evidence adduced before the court, the claimant abandoned his job. I do not find that a case of constructive dismissal was made out as alleged by the claimant. He is therefore not entitled to damages associated with Constructive Dismissal.⁷⁶

[108] In any event the purpose of this hearing was to decide whether or not the claimant was entitled to damages as compensation for the Chiefs of Police failure to submit his performance reports to the Permanent Secretary as is required by the Police Service Commission Regulations.

[109] This court also finds that the claimant is not entitled to aggravated and exemplary damages or loss of future earning as claimed.

Pre Judgment Interest

[110] The claimant has made a claim for pre judgment interest. Neither party has addressed me on this aspect of the case. I have to be satisfied that I have the jurisdiction to make such an order.

[111] A perusal of the CPR and the Judgment Act has failed to reveal provision in the law for the awarding of Pre judgment interest in Civil proceedings in Dominica. Section 11(1) of the Eastern Caribbean Supreme Court (Dominica) act states that the jurisdiction vested in the High Court in Dominica in civil proceedings *Inter alia* shall be exercised in accordance with the provisions of the act. Where there is no special provision the jurisdiction shall be exercised as may be in conformity with the law and practice administered on the 1st June 1984 in the High Court of Justice in England.

[112] The first statute in England to give the courts a general power to award pre-judgment interest on debts and damages was the Law Reform (Miscellaneous Provisions) Act 1934. Under section 3, a court of record was given a general discretion in any proceedings tried before it to grant interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part

⁷⁶ **The claimant claimed loss of earnings to compulsory retirement, accumulated leave and gratuity which would fall under this head of damages.**

of the period between the date when the cause of action arose and the date of the judgment. Interest had to be simple.

- [113] This sectioned remained the law by virtue of section 35A of the Administration of Justice Act 1983, which was the law applied by the English Courts as at the 1st June 1984. Under section 35A of this Act, a court of record was given a general discretion in any proceedings tried before it to grant interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.
- [114] The High Court of Justice is a Court of Record and therefore the court has a general discretion to grant pre judgment interest. What are the matters to be taken into consideration by the court in order to grant pre judgment interest?
- [115] Thomas J in William Tyson and Cloesta Tyson –v- Nagico Insurance Co Ltd⁷⁷ found that the High Court in St Christopher and Nevis had the jurisdiction to grant pre judgment interest. He said that “...*The overriding consideration from the court is whether the defendant acted unreasonably in the circumstances...*”⁷⁸ **I agree with his statement.**
- [116] In the case at bar the claimant all be in support of his application for aggravated **damages submitted that the defendants’ behaviour in the conduct of this matter was high handed, he drew to the court’s attention the fact that a defence was not filed, that they allegedly absented themselves from some of the sittings of the court and in fact prolonged and dragged out this matter.**
- [117] I have perused the file and I do note that the defendants indeed did not file a defence and it is noted that they made an offer of settlement in this matter that I

⁷⁷SBKHCV2011/0024

⁷⁸ Ibid para 26

consider to be very reasonable given the fact and circumstances of this case. On the other hand the claimant refused to consider the offer made by the defendant and instead sought what is considered to be extremely exaggerated and inflated claims which were not realistic and could not possibly be granted by this court. It is the defendant who has been unreasonable in this matter and accordingly I am **not motivated to exercise this court's discretion to grant him pre judgment interest.**

[118] Premised on the foregoing, it is hereby ordered as follows:

- (1) Damages is awarded to the claimant for breach of his Constitutional rights in the sum of EC\$20,000.00;
- (2) All other claims made by the claimant are denied;
- (3) Interest on the judgment sum of \$20,000.00 at the rate of 5% per annum **as provided for by the Judgment's act from today's** date to the date of payment.
- (4) Costs **is to the Claimant's costs** to be assessed Costs if not agreed in accordance with Rule 63.12 of CPR 2000.

[119] I wish to thank Counsel and the Claimant for their submissions made in this matter.

M E Birnie Stephenson

M E Birnie Stephenson
High Court judge