EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: GDAHCV2014/0082

Between Gemma Bain-Thomas

Claimant

and

The Attorney General of Grenada

Defendant

Appearances:

Mr. Rohan Phillip of counsel for the Claimant
Mr. Adebayo Onowu of counsel for the Defendant

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2018: December, 13th
2019: March 12th

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JUDGMENT

[1] MOISE, M.: This is an application for an assessment of damages. On 22nd September, 2017 the Court of Appeal determined that the removal of the claimant from the office of secretary to the Cabinet was a breach of section 85(2) of the Constitution of Grenada. Damages were therefore awarded to the claimant to be assessed if the parties could not agree within a period of 28 days. The parties have arrived at a settlement in respect of compensation for loss of earnings and other emoluments but could not agree on the amount to be awarded in vindicatory damages. This is therefore the sole issue left for determination.

Vindicatory Damages

[2] It is unnecessary to repeat the facts of this matter in great detail as these have been carefully outlined in the judgment of Blenman JA delivered by the court of appeal on 22nd September, 2017. I will therefore relate to facts only insofar as they are relevant to the legal principles on which this assessment is based.

[3] As the claimant rightly acknowledges, the law as it relates to the award of vindicatory damages is still in its developmental stage. This much was stated by Lord Hope in the case of *Angela Innis v. The Attorney General of Saint Christopher and Nevis*[1] where he states that "*[t]he principles on which damages for breaches of constitutional rights are to be assessed are not greatly developed***."** For a time there appeared to be a concern that cases where there has been a breach of a fundamental right may be treated differently from those as the present, where the claimant was also entitled to compensatory damages as would have been awarded in an action for breach of contract. It had been argued in prior cases that where the claimant was awarded compensatory damages, the award of vindicatory damages need not be significant but was merely an additional award for the sole purpose of vindicating the claimant. However, in *Innis v. the AG* Lord Hope noted that the general principles for an award of vindicatory damages need not be delineated in this way. In that regard he outlined the general principles in the following manner:

> *The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.*

[4] One of the judgments considered by Lord Hope in his analysis of the parameters of vindicatory damages was that of *The Attorney General of Trinidad and Tobago v. Ramanoop*[2]*.* In that case Lord Nichols addresses the issue at paragraph 19 of his judgment where he states as follows:

> *An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of*

[1] [2008] UKPC 42
[2] [2006] 1 AC 328

*the breach, and deter further breaches. All these elements have a place in this* ***additional award. "Redress" in section 14 is apt to encompass such an award if*** *the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object.* ***Accordingly, the expressions "punitive damages" or "exemplary damages" are*** *better avoided as descriptions of this type of additional award.*

[5] These are the general principles which the court must consider when assessing damages in such cases. It is indeed broad and imprecise guidance. However that may be simply due to the range of circumstances within which the award of vindicatory damages may fall to be considered. The question is what amounts to a reasonable award sufficient to vindicate the claimant for the effect of the defendant's breach. Insofar as that is the case, the parties are at odds as to what a reasonable award should be. The claimant argues that the starting point ought to be an award in the range of what was made in the case of *Innis v. The AG*; which was $50,000.00. This, according to counsel for the claimant should be at least doubled after considering the significance of the breach in this case and further adjusted to cater for the aggravating factors. An award of $300,000.00 is therefore being sought. The defendant on the other hand argues that an award in the range of what was ordered in the case of *Horace Fraser v. The Judicial and Legal Services Commission*[3] is more appropriate. In that case the court awarded the sum of $10,000.00 in vindicatory damages where the claimant's contract to the post of Magistrate was terminated.

[6] The distinction between the awards in these two cases is explained by Lord Hope in the case of *Innis v. The AG*. In relation to the award in *Fraser v. The JLSC* he notes that "*the breach in that case was due to an error by the Commission in faili****ng to follow its own procedures."*** This was distinguishable from *Innis v. the AG* where ***"****the Executive chose to ignore the* ***constitutional right because it was an obstacle to the appellant's removal*** *from her post quickly."* Lord Hope went on to state that the breach in the *Innis* case "*struck at the very heart of the protection to which the appellant was entitled under section 83(3). This was a breach*

[3] [2008] UKPC 25

*of a substantially higher order than that with which the court was concerned in Fraser. There is much more to this case than the element of distress and inconvenience that the award was directed to in that case."*

[7] Counsel for the defendant argues that the circumstances of this case warrant a mere nominal award as in the case of *Fraser v. The JLSC* for two main reasons. Firstly he argues that in *Innis* there was an outright dismissal of the claimant from her office, whereas in the present case there was not a dismissal but rather a transfer to a less suitable position within the public service. He argues secondly that the breach in this case was not intentional and invites the court to take notice of the comment of Blenman JA in the court of appeal judgment where she states that the defendant was faced with a dilemma in there not being a comparable post within the public service to which the claimant could have been transferred. Counsel further refers the court to the case of *Daniel and Ian Ford v. The Attorney General of Saint Lucia*[4] where the sum of $5000.00 was awarded to the claimant. In that case the claimant was successful in proving that his constitutional rights were infringed when a judge failed to deliver a judgment in his case for a period of 3 years and 9 months after the hearing of the matter. I am however not of the view that the case of *Daniel Ford v. the AG* is of any assistance in determining a suitable award in the present case. The facts are simply distinguishable and I am unable to find any justification for relying on it.

[8] I am not of the view that the nature of the breach in this case is one which warrants a mere nominal award. To put the facts into context I refer to paragraph 100 of the judgment of Blenman JA where she states as follows:

> *"For what it is worth, it must be placed on record that Ms. Bain-Thomas is a public officer who has more than thirty (30) years' service in Grenada. I have no reservation in stating that it is also egregious that the post of which Ms. Bain-Thomas has been* ***"transferred" has her now*** *reporting to someone of a lower grade to her and in relation to whom she was the functional superior, she having held the highest office in the PSG namely Secretary to the Cabinet and Head of the Public Service. This in my judgment undermines the respectability and security of tenure of the public office of Secretary to the Cabinet and could never have been in the contemplation of the framers of the*

[4] SLUHCV2017/0276

*Constitution. In effect, quite apart from the transfer appearing to be arbitrary and capricious, it amounts to an effective demotion.*

[9] Contrary to the submissions of the respondent, the defendant's action was found to be egregious and undermined the respectability and security of tenure of the public office which was held by the claimant. In an over 30 year career the claimant rose to the highest office within the ranks the public service of Grenada. This post was constitutionally entrenched. She was effectively demoted and a perusal of the judgments of the high court and court of appeal do not reveal any justifiable reasons for such actions. To my mind, the dilemma to which Blenman JA refers was entirely self-inflicted and the defendant simply had no justification for placing itself in that position. Blenman JA notes at paragraph 102 of her judgment that ***"t****he Secretary to the Cabinet is a public officer in the PSG which is clothed with the security of tenure superior to that which other public officers have. Of interest is the fact that the post of Executive Director can, as it was created* ***be abolished by an ordinary Act of Parliament."*** As her ladyship notes, the claimant was removed from a position of seniority with security of tenure and placed in a position where she can be dismissed by the public service commission or have this position abolished by a simple act of parliament. Consideration must therefore not only be given to remuneration but also the dignity of the office she held and in particular the factors of ***"responsibility, status, challenges of the posts, rank in the public service hierarchy and I would add qualification."***

[10] The claimant in her affidavit spoke to the humiliation this caused her and her family, and I am left in no doubt that she is entitled to an award which is significant enough to vindicate her in what she has endured. The claimant also outlines in her affidavit the number of occasions on which she wrote to the relevant personnel and expressed significant concern as it relates to her employment. She was placed on leave for an extended period of time. At one point in the communication she recommended that she be retired in the public interest and this too was rejected. From the evidence I also find that there must have been a period of uncertainty as to her future career. I can see no reason a public servant at such a level, who holds a constitutionally protected post within the service should have been treated in such a manner.

[11] Further to this, I agree with the submissions of counsel for the claimant where he states that the court ought to consider the level of public outrage which must, of necessity, be implied in a case

such as the present. The claimant held the most senior position in the public service. Breach of the constitution in such a case is not merely a beach against the individual, but against the sanctity of the office which she held and which she herself would have a duty to preserve. In the midst of the discussions she recommended a course of action which would have her retire in the public interest and her offer was rejected. The defendant chose instead to place her as a subordinate in a department with no constitutional protection and I have no difficulty in accepting her assertion where she speaks to the embarrassment and discomfort this would have caused her.

[12] In the circumstances I agree with the submissions of the claimant that an award in the range of that which was ordered in *Innis v. The AG* is a reasonable starting point. However, I do not agree that the sum of $300,000.00 should be awarded. Counsel submits firstly, that the award in *Innis* should be doubled. He justifies this by relying on the case of *Levi Maximae v. the Chief of Police et al*[5]. In that case the learned judge was of the view that the breach attracted an award in line with that which was awarded in *Fraser v. the JLSC*. She then went on to award the sum of $20,000.00. Counsel submits therefore that if the court is minded to award a sum in line with the damages in the *Innis* case, a similar approach should be taken and that the award should be doubled in the first instance.

[13] I am not of the view that this is an acceptable approach to take. The judge in the *Maximea* case did not go into any detail as to the reasons for simply doubling the award. For my part I prefer a different approach. The *Innis* case was decided in 2008. If one is to cater for inflation and the current value of that award, it would amount to approximately $59,600.00 as at December 2018. This is a comparable award at today's date.

[14] Counsel for the claimant then goes on to argue that after doubling the award the court should consider further aggravating factors. He argues that the breach in this case was more egregious and aggravating than that of *Innis v. The AG*. Whilst I agree that the breach in the present case was egregious I do note that in the *Innis* case there may have been a more direct financial effect that the decision would have had on the claimant. She was dismissed and the repercussions this would have had on her income and the impact on her employability in the future were factors with the Privy Council took into consideration. These may be distinguished from the facts of the present

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[5] DOMHCV2009/0054

case. That is not to say that I would disregard the aggravating factors in this case. I am simply not of the view that the award should be so far outside of the range of what was awarded in *Innis v. The AG* for the reasons submitted by counsel for the claimant.

[15] Taking all of these into account I would start with the current value of the award in the *Innis* case which is $59,600.00 and would add to that in order to address what I considered to be the aggravating factors in the case. As is known all too well, an award of this nature is not a precise calculation. Awards in similar cases operate as a guide. I would therefore award the sum of $75,000.00 to the claimant as vindicatory damages. I believe that this is a reasonable award in the circumstances of this case. I note that costs have been awarded in the high court and court of appeal for the substantive claim. I would therefore award costs in the sum of $1000.00 on the assessment of damages.

[16] I therefore make the following orders:

(a) The Defendant will pay the sum of $75,000.00 in vindicatory damages to the claimant;
(b) The defendant will pay interest on this award at the statutory rate from the date of delivery of this judgment.
(c) The defendant will pay the sum of $1000.00 in costs on the assessment of damages.

Ermin Moise
Master

By the Court

Registrar