

COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF 2006

BETWEEN:

MCINTYRE PAUL

Appellant

and

THE COMMISSIONER OF POLICE

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

DR. ROBERTSON THOMAS

3rd Respondent

THE POLICE SERVICE COMMISSION

4th Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Denys Barrow, SC
The Hon. Mrs. Dancia Penn-Sallah, QC

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. J. Gildon Richards for the Appellant
The Solicitor General (Mrs. Wynante Adrien-Roberts) and Ms. Sabriya Senhouse for the Respondents

2007: April 17; 18;
September 19.

JUDGMENT

- [1] **BARROW, J.A.:** This is the judgment of the Court. The appeal is by the claimant against the quantum of the award the master made on the assessment of the damages that Belle J decided should be paid to the claimant (the appellant) for his wrongful dismissal from office as a police constable. The appeal is complicated by the decision of the judge to grant a private law remedy in a claim that the appellant brought and prosecuted as a claim for public law remedies. There is no appeal against the judgment of Belle J.

A comedy of errors

- [2] The judge described the amazing confusion that led to the present pass as a comedy of errors. The short summary of the facts, gathered from the judgment of Belle J,¹ is that some 6 months after the appellant was posted in January 2003 to the St. Joseph police station the appellant was afflicted by an ailment to his leg. A consultant surgeon issued a medical report in these terms:

“I certify that Mr. Paul presented with thrombo-phlebitis of the left leg. This is due to incompetent superficial veins and recurrence and clot formation is likely in the future.

Excessive sitting, standing, walking, increased physical activity and parades are likely to precipitate acute episodes.

It is therefore recommended that the above-mentioned activities should be avoided at all costs in order to prevent clot formation and its pulmonary complications.”

- [3] Supported by that medical report the appellant, by letter dated 15th August 2003, requested a transfer from the St. Joseph station on medical grounds. He offered the suggestion that immigration duties at Canefield Airport would facilitate his recovery. It was not revealed how matters deteriorated from the appellant making that request to his being handed an order from the Commissioner, dated 9th February 2004, informing the appellant that the Commissioner had approved the finding of a Medical Board that the appellant's services as a police officer should be terminated on medical grounds. The judge found that the Certificate of the Medical Board, which stated the appellant had been examined on 30th December 2003, was patently false. The error was corrected in a memorandum dated 13th April 2004 by which the Commissioner advised the appellant that the Police Services Commission had revoked its decision to terminate the appellant on medical grounds.

- [4] The Commissioner also sent a memorandum dated 13th April 2004 to the appellant telling him to resume duties at St. Joseph police station with immediate effect. The appellant received this notification on 26th April. He did not report. On 23 June 2004 the Commissioner sent another memorandum to the appellant headed “Abandonment”. The

¹ Commonwealth of Dominica Claim No: DOMHCV 2004/0167, Macintyre Paul v The Commissioner of Police and others, dated 28 July 2005

Commissioner informed the appellant that pursuant to section 45 of the Police Service Commission Regulation he had declared that the appellant had resigned his office and his post vacant.

The claim and the orders made

- [5] On 28th July 2004 the appellant filed a Fixed Date Claim Form applying for judicial review and administrative orders against the respondents in respect of the two decisions. These were, firstly, the decision terminating the appellant's appointment on medical grounds and, secondly, the decision conveyed in the memorandum declaring the appellant's post vacant. In addition, the appellant sought an order of *certiorari* to remove into court and quash the decisions, as well as certain declarations and damages, inclusive of general damages, exemplary damages, interest and costs.
- [6] Because the purported termination on medical grounds had been withdrawn the judge made no order in relation to that decision. He held, however, that the decision to declare that the appellant had vacated his office was bad. He also held that the decision to send the appellant back to his old posting upon his restoration to office, without giving the appellant the opportunity to make representations in support of the medically-recommended reassignment to a less strenuous position that the appellant had requested, was unreasonable, in denial of the appellant's legitimate expectation and void for breach of natural justice. Accordingly, the judge made the following orders:
- (1) "The decision of the Commissioner of Police that the Applicant had resigned his post and declaring vacant his office in the Police Force is declared unconstitutional, illegal and ultra vires sections 84 (13) and 92 of the Constitution of The Commonwealth of Dominica; it is also ultra vires regulation 45 of the PSC Regulations.
 - (2) The termination of the Claimant's employment with the Dominica Police Force is therefore declared wrongful.
 - (3) The Court also declares that the decision to recall the Claimant to work after revocation of the dismissal on medical grounds, without further consultation is was

(sic) unreasonable and in breach of a legitimate expectation of a fair hearing in the circumstances.

- (4) Costs are awarded to the Applicant in accordance with Part 65 of the CPR 2000.
- (5) Damages for wrongful dismissal and the unconstitutional action against the Claimant are to be assessed by the Court at a future date.”

The consequences of the declarations

[7] Both sides agree that the appellant made no claim for wrongful dismissal and that the judge sent this case down that path entirely on his own motion.

[8] Lord Bingham made it clear in **Dr. Astley McLaughlin v His Excellency the Governor of the Cayman Islands**² that he was stating no new law in holding that the consequence of declaring the dismissal of a public officer to be unconstitutional, or wrongful or illegal is that the public officer continues to hold office. His Lordship stated:

“14. It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal. These propositions are vouched by a large body of high authority which includes *Wood v Woad* (1874) 9 Ex 190, at 198 (Kelly CB) and 204 (Amphlett B); *Vine v National Dock Labour Board* [1956] 1 QB 658 at 675-676 (Jenkins LJ) and [1957] AC 488 at 500 (Viscount Kilmuir LC), 503-504 (Lord Morton of Henryton), 506-507 (Lord Cohen); *Ridge v Baldwin* [1964] AC 40, 80-81 (Lord Reid), 139-140 (Lord Devlin); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170-171 (Lord Reid), 195-196 (Lord Pearce), 207 (Lord Wilberforce); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1584 (Lord Reid), 1598-1599 (Lord Wilberforce); *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 (Lord Diplock); *Calvin v Carr* [1980] AC 574, 589-590 (Lord Wilberforce for the Board); *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, 740 (Viscount Dilhorne for the Board); *Boddington v British Transport Police* [1999] 2 AC 143, 154-156 (Lord Irvine of Lairg LC); Wade and Forsyth, *Administrative Law*, 9th ed (2004), pp 300-301.”

² Privy Council Appeal No 83 of 2006, judgment delivered 23rd July 2007

- [9] Because public law remedies are, for the most part, discretionary, His Lordship stated, “a claimant may be disabled from obtaining the full relief he seeks whether on grounds of lack of standing, delay or his own conduct, or grounds pertaining to the facts of the particular case.”³ Lord Bingham identified **Chief Constable of the North Wales Police v Evans**⁴ and **Jhagroo v Teaching Service Commission**⁵ as examples of cases in which declarations that would have been awarded in different circumstances were withheld and which, therefore, demonstrate the exercise of discretion.
- [10] In the latter case the Privy Council, although sympathetic to the ill fortune that had descended upon a terminated teacher who had by the time of the appeal become a double amputee, decided that because of the appellant’s own circumstances as well as the length of time that had elapsed during which another person had most likely been appointed to the post, it would be inappropriate to make an order restoring the appellant to his former post. In those circumstances the Board refused a declaration that the appellant was still a member of the Teaching Service⁶ but their Lordships granted a declaration to the effect that the appellant had held office for an indeterminate period and remitted the matter to the High Court “for the assessment of damages on the footing that the appellant’s position was held for an indeterminate period and could only be terminated in one of the ways set out in section 62 of the Act.”⁷
- [11] The circumstances were for the granting of the desired declaration in the **McLaughlin** case, in which the appellant insisted that he wanted his status as a public officer affirmed and he was not interested in being compensated for loss of office. He therefore claimed to be paid arrears of salary for the period during which he was excluded from office and was prepared to give credit for income earned in alternative employment in the period. The Privy Council declared (1) that the purported dismissal of Dr. McLaughlin was ineffective in law to determine his tenure of office, and (2) that he was entitled to recover arrears of salary for the past 8 years and to the payment of pension contributions on his behalf,

³ Paragraph 16

⁴ [1982] 1 WLR 1155

⁵ (2002) 61 WIR 510

⁶ Paragraph 42

⁷ Paragraph 44

making allowance for his earnings in mitigation, until he resigned or his tenure of office lawfully came to an end.

[12] A comparison of the **Jhagroo** case and the **McLaughlin** case shows the consequences of making or not making a declaration that a dismissal was invalid, either of which the court may choose to do as a matter of discretion. What emerges is that damages for wrongful dismissal from a public office may be awarded when the court does not make a declaration that the dismissal was invalid, which was the course adopted in **Jhagroo**. Where, however, the court makes a declaration that the dismissal was invalid, as was done in **McLaughlin**, the court will order payment of arrears of salary and not damages.

[13] In the instant case the effect of the judge's declaration, that the decision of the Commissioner that the appellant had resigned and declaring his office vacant was "unconstitutional, illegal and ultra vires", necessarily meant that the decision was invalid, as in the case of Dr. **McLaughlin**, and so ineffective to determine the appellant's tenure of office. On that basis the appellant was entitled, in the same way as Dr. **McLaughlin**, to arrears of salary and benefits; not damages for wrongful dismissal. Lord Bingham made the point distinctly in the **McLaughlin** case that the wrongfulness of a purported dismissal of a public officer made the purported dismissal ineffective. His Lordship stated:

"There is no analogy with wrongful dismissal, where a dismissal may be unlawful but nonetheless effective."⁸

In the instant case the effect of the declarations of illegality and unconstitutionality is that there was no effective dismissal. If there was no dismissal there can be no damages for wrongful dismissal.

[14] It follows that the two sets of orders in the instant case are fundamentally inconsistent. There is no appeal by either side against the judge's decision. In fact the respondents had appealed against the decision of Belle J to this court but withdrew that appeal. Unlike the appellant in the **McLaughlin** case, who maintained to the end that what he sought was restoration to office in the public service, the present appellant has vigorously pursued

⁸ Paragraph 17

compensation since the judge ordered damages to be assessed. It is therefore the common position of the parties that this is how matters must proceed because, as has been emphasized, it is only the master's decision on the assessment of damages that has been appealed.

- [15] That being the case it is necessary that this court set matters right by removing the inconsistency. Section 32 of the **Supreme Court Act**⁹ gives this court the power to confirm vary, amend or set aside the order or make such order as the High Court might have, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require notwithstanding there was no appeal against any particular part of the decision. In exercise of that power we set aside the orders and in particular the three declarations made by the judge.¹⁰ In their place we make the following orders:

- “(1) It is declared that the claimant was wrongfully dismissed from his employment with the Dominica Police Force;
- (2) The respondents shall pay the claimant damages for wrongful dismissal to be assessed on the footing that the claimant held office for an indeterminate period that could only have been properly terminated in one of the ways set out in the Police Service Commission Regulations Chap. 1:01, reg. 44,46, 47.
- (3) Damages shall be assessed by a master;
- (4) The claimant shall be paid prescribed costs.”

We now turn to the master's assessment of damages.

The Master's award

- [16] The master made the following awards to the appellant:
- \$140,160.00 (Salary)
 - \$ 10,000.00 (Medical Care)

⁹ Chapter 4:02

¹⁰ Reproduced at paragraph 6, above.

\$ 10,800.00 (Lodging)
\$ 10,000.00 (Promotion)
\$ 10,000.00 (Constitutional)
\$ 80,000.00 (Pension)

\$260,960.00

[17] In addition to the total award of \$260,960.00, the Master awarded the appellant prescribed costs in the amount of \$47,500, and interest on the award at the rate of 5% from the date of the filing of the claim until payment.

[18] In arriving at his award, the Master stated:

“The Claimant is now 40 years old. He expected to remain a Police Officer until he attained the age of 60 at which time he would have had to retire. The measure of damages to which the Claimant is entitled, is a sum to put him in the position he would have enjoyed if his employment contract had been fully performed. In this case, the Claimant is entitled to the amount he would have earned in salary and benefits over the unexpired term of his employment. Barring injury or retirement the Claimant would have worked for 20 more years. He may have been promoted. His salary at the date of his dismissal was \$2,413.00 per month. Account must be taken of the fact that the Claimant would have had to expend a certain sum to earn his salary over the two decades.”

[19] The master used the multiplier and multiplicand method to determine the amount of the award. He arrived at a multiplicand by deducting from the appellant's former monthly salary of \$2,413.00 the sum of \$1,275.00, being the average monthly income the appellant earned in the two-year period between termination and assessment of damages, and this yielded a net loss of income of \$1,168.00 monthly or \$14,016.00 per annum. The master adopted a multiplier of 10 years purchase, which he discounted to reflect the fact that the appellant was receiving “as a lump sum, what he would otherwise have earned over two decades” and also “to reflect the effect of the vicissitudes of life...” It was on this basis the master arrived at an award of $\$14,016 \times 10 \text{ years} = \$140,160.00$ to compensate the appellant for his wrongful dismissal.

[20] Bound by the order of Belle J that this was not a case where an award of exemplary damages was merited, the master refused to make the award that counsel for the appellant persisted in seeking. The master awarded loss of housing allowance for 10 years, using the same multiplier he had used for loss of salary. In making his award of \$10,000.00 for loss of the opportunity for promotion the master recognized he was using an arbitrary figure in the sense that it was merely an estimate of a possible increase in earnings. In awarding the sum of \$10,000.00 for loss of the benefit of free medical care the master recognized that he was again making an estimate of an unquantifiable because it was uncertain whether the appellant would ever have needed to avail himself of free medical care. The master regarded the loss of a similar benefit to the appellant's family as too speculative. For loss of pension entitlement the appellant was entitled to a capitalized sum, the master decided but not calculated on the footing of 30 years' pension payments. Instead the master awarded 5 years' pension at the maximum rate of \$1,354.00 per month, which he rounded off to \$80,000.00. The appellant would be able to invest that sum for the next twenty years to secure for himself a reasonable return, the master felt. Because gratuity was payable at the discretion of the employer and not as a right to which the appellant was entitled, the master stated, he made no award for loss of gratuity.

[21] The amount the appellant sought in his affidavit on the assessment was \$1,445,252.60. The total the master awarded was \$260,960.00. The appellant has appealed against the quantum that the master awarded under virtually every head. The grounds of appeal are directed to the separate heads.

Loss of income

[22] Ground 1 of the appeal is that "the Master erred in law and on the facts in [the] method he used and the manner in which he determined that the appellant was entitled to only \$140,160.00 as compensation for salary he had lost by the wrongful dismissal." Alternatively, the appellant complained as part of this ground, the master erred in awarding the amount he did for loss of salary considering that the appellant's salary for the period of employment at the rate he was receiving would have been \$579,120.00.

- [23] In his skeleton argument counsel for the appellant submitted, in reliance on the exposition in the dissenting judgment of Lord Denning M.R. in *Lavarack v Woods of Colchester Limited*¹¹, that the applicable principle of law in assessing damages was for the court to “first determine the monetary value of the remainder of the contract, deduct amounts earned or reasonably expected to be earned in mitigation and award the appellant the balance as assessed damages.” As the passage quoted above¹² from the master’s decision shows, the master clearly accepted this principle so it could not be argued that he went wrong in the principle he decided to apply.
- [24] Instead, counsel submitted that the master went wrong by deviating from “this conventional approach”. The departure, and the error, as the appellant asserted in the ground of appeal and in the written submissions, are that the master failed to simply multiply the lost salary by 20 years and award this sum, less any amount for mitigation. The written submissions make it clear beyond any doubt that counsel for the appellant contends that 20 years loss of salary was the appellant’s entitlement.
- [25] Contrary to the representation made to this court that the master went off on his own to apply the multiplicand/multiplier method of calculating loss of prospective income, the written submissions that counsel for the appellant made to the master on the assessment reveal that counsel expressly invited the master to assess damages on this basis. Under the heading ‘The measure of damages’ counsel made the following submission to the master:
- “The Claimant is also entitled to recover **prospective loss** of earning capacity, especially where there is no foreseeable likelihood that the Claimant can obtain employment of a similar type as the employment he has lost. Such loss may be calculated on the same principles applied in cases of personal injury. Where such principles are applied damages are calculated by applying a multiplier to the Plaintiff’s annual loss of earning capacity.

¹¹ [1967] 1 QB 278 at 287

¹² Paragraph [17]

[See **McGregor On Damages 15th Ed. par. 1171;**
Edwards v Society of Graphical And Allied Traders [1970] 1 W.L.R.
379
(principles applied)” (Underlining added).

- [26] Having so submitted to the master counsel cannot now be permitted, without the slightest justification or explanation, to contend that the method he invited the master to use was wrong. Even if the attempt by counsel for the appellant to now impeach the method he invited the master to use were not prevented as an abuse of the process of the court, we are satisfied that as a matter of principle the method adopted is quite permissible. **McGregor On Damages**¹³, on which counsel for the appellant heavily relied, refers to the case of **Edwards v Society of Graphical & Allied Trades**¹⁴ as one in which the court accepted the invitation, in a wrongful dismissal case, to adopt the practice in personal injury cases and calculate the damages by applying a multiplier to the claimant’s annual loss of earning capacity. It does not matter that on appeal¹⁵ the Court of Appeal chose to use a different method because they thought the sum produced, using the personal injury method, was too high in failing to take into account the employee’s ability to earn an income in other employment. The court of appeal did not cast any doubt on the principle.
- [27] The essence of the multiplier, as stated in **McGregor on Damages**¹⁶, is that it is “a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payment over the years.” We would have thought it too obvious for argument that if a person were to get now the equivalent of the total salary that he would be paid in monthly instalments over 20 years that person would be getting a sum significantly in excess of what he would be entitled to. Apparently this proposition did not register in the mind of counsel who persisted in seeking on appeal the aggregate of the monthly salary

¹³ 17th ed., at 28-008

¹⁴ [1970] 1 WLR 379

¹⁵ [1971] Ch. 354

¹⁶ At 35-051

the appellant would have earned in the office for 20 years to come, less sums earned or reasonably expected to be earned in substitute employment.

[28] As any commonly available annuity table will show, if the appellant were paid now his salary for 20 years, amounting to \$579,120.00, that sum deposited to earn interest at, say, 5 percent per annum, would yield a payment of \$3,786.50 per month for the next 20 years and a total of \$908,774.00 at the end of 20 years. This illustrates why the appellant is not entitled to damages calculated as his counsel suggests.

[29] It is also illustrative to consider the present value of the lump sum payment the master awarded as damages for loss of salary (\$140,160.00). Deposited on interest at the rate of 5 per cent per annum that sum would yield a monthly payment of \$915.37 – compared to the \$1,168.00 that the master found is the appellant's net monthly loss of salary.

[30] We make a number of brief observations about the illustrations. The purpose of the illustrations was extremely limited; it was simply to see the master's award in perspective by using another method. The annuity method is simply another available method¹⁷; it is not a method that this court is or is not endorsing. Whether and when it will be used in any future case will depend on the evidence that is adduced, the submissions of counsel and the decision of the judge. Further, the rate of interest of 5% per annum is not a rate this court is suggesting or adopting. The appellant provided no evidence whatever as to available investments in the jurisdiction or rates of interest on long term deposits. We use that rate of interest only as a point of reference suggested by the fact that judgment debts carry interest at the rate of 5 per cent per annum under **The Judgment Act**.¹⁸ In fact the master ordered that the damages he quantified should carry interest at this rate from the date of the filing of the claim form. We do not speculate, in the absence of any relevant evidence, as to the rate of interest that the appellant can realistically expect to earn on the damages awarded. It was the duty of counsel for the appellant to produce that evidence.

¹⁷ See McGregor 28-008

¹⁸ Chapter 4:70 para. 7 Laws of The Commonwealth of Dominica 1990

[31] We note also that the master mentioned that the multiplier he chose was one that had to be further discounted, beyond the discount for the lump sum payment, for the vicissitudes of life. As the treatment in **McGregor on Damages**¹⁹ mentions, there is respectable authority²⁰ to support this course. The lump sum that the master awarded, therefore, did not need to be as much as would yield \$1168.00 per month. In other words, if the appellant had produced evidence to show that a realistic rate of interest on a long term deposit of \$140,160.00 was, in fact, 5 per cent, which yields a lesser monthly sum than \$1,168.00 over 20 years or would yield that figure for less than 20 years, that would be no basis for faulting the master's award because it would be consistent with his decision to further discount the multiplier for the vicissitudes of life. It would also be consistent with his decision that the amount to be awarded to the appellant should be discounted for the fact that the appellant would have had to spend some part of his income incidental to earning the income.

[32] Counsel for the appellant has signally failed to provide any informed basis for interfering with the master's award under this head. Counsel's unwavering contention that the appellant was entitled to be paid now a minimum lump sum of \$2,413.00 monthly x 12 months x 20 years = \$579,129.60, less an amount for mitigation, was misconceived. We dismiss the appeal against the master's award of damages for prospective loss of salary.

Lump sum

[33] Ground 2, which concerned the discounting of the award to account for the lump sum payment, complained that the "deduction" the master should have made "should be minimal".

[34] This is an unusual case in the area of wrongful dismissal because the employment was for an indeterminate period and could not be freely terminated at the option of the employer. The respondents have not challenged the master's approach to prospective loss of salary

¹⁹ At 28-008

²⁰ Yelland's Case (1867) L.R. 4 Eq. 350

based on the appellant continuing in office for 20 years. In the usual contract of employment of indefinite duration, where there has been wrongful dismissal an award of damages equivalent to 12 months salary and benefits is at the upper limit, as this court found on a review of the authorities in **Dominica Agricultural and Industrial Development Bank v Mavis Williams**.²¹ Therefore, in the usual wrongful dismissal case there is no practice of discounting the multiplier, no doubt because the acceleration of the payment is for a relatively short period.

- [35] In the more unusual cases of wrongful termination of fixed term contracts the period for which damages for loss of salary is awarded will vary according to the length of the term to which the parties had agreed but the collective impression of this court is that contracts for a term of 5 years or more are rare. Although in a case involving a fixed term contract an argument could be made for discounting the straight multiplier that is used to calculate the loss of salary, because an advanced payment is being made of salary that would be paid over a number of years, this court is not aware of it being done or expressly done. In this case, however, in which the remaining term was notionally 20 years, the master was manifestly correct in deciding he needed to use a multiplier that accounted for the lump sum payment. For the reasons we have given in considering the previous ground, the submission that the master should have used a minimal discount is without merit. We dismiss this ground of appeal.

Breach of constitutional right

- [36] As a matter of principle the appellant cannot be entitled to an award of damages for breach of his constitutional rights in addition to compensatory damages for loss of prospective salary. This court appreciates that the judge decided that the appellant was entitled to the declarations of unconstitutional action, damages for unconstitutional action and damages for wrongful dismissal. However, we have already decided that the declarations of unconstitutionality cannot be allowed to stand. It follows that the award of damages for such action also cannot be allowed to stand. Therefore, instead of increasing the award of

²¹ (Judgment) Civ. App. No. 20 of 2005 29th January 2007

damages for breach of the constitution, which counsel sought, we are constrained to quash that award, in exercise of the power given by section 32 of the **Supreme Court Act**.

- [37] In passing, we mention that even though it was not a ground of appeal counsel for the appellant again argued that the appellant should be awarded exemplary damages. Counsel simply ignored the judge's decision that the conduct of the respondents did not fall into the category of cases for which such an award may be made. Counsel similarly ignored the point, which he correctly made in his written submissions that exemplary damages are awarded in tort and not in contract. Since this was never a claim in tort and has now firmly evolved into a claim in contract exemplary damages are simply not available and counsel's persistence was pointless.

Lodging allowance

- [38] In his affidavit as to damage the appellant stated that in addition to his basic salary he received \$47.50 as additional allowance and \$90.00 lodging allowance. The master made an award in respect of lodging allowance but none in respect of the additional allowance. The master's award for loss of lodging allowance followed his award for loss of salary, which is to say the master applied the multiplicand/multiplier method to this item of salary and used the same multiplier. For the reasons we have given in relation to loss of salary we find no basis for interfering with this award. We dismiss the appeal against this item.
- [39] In his written submissions counsel for the appellant asked this court to make an award for loss of the additional allowance. We have no idea why the master did not make an award in respect of this item, which the appellant's salary slip indicates was paid to him along with his monthly salary. It appears the master simply overlooked the matter of compensating for the loss of the additional allowance. The respondents offered no submissions in resistance to the appellant's appeal that we should make an award for this loss. Accordingly we award the appellant damages for loss of additional allowance in the sum of \$5,700.00 which we arrive at by using the same multiplier that the master used in making the award for loss of lodging allowance ($\$47.50 \times 12 \times 10 = \$5,700.00$)

Pension

- [40] Before the master counsel for the appellant sought to recover prospective loss of pension payments for 30 years. The master refused to assume the appellant would live for 30 years after his sixtieth birthday. The master also discounted the award because he was making a lump sum payment. The master said he found the evidence on this point from the appellant unsatisfactory. Driven to make the best estimate he could, in the circumstances, the master awarded \$80,000.00 under this head representing 5 years of pension at the rate of \$1,354.00 per month, which was the rate the appellant would receive if he retired as a corporal. The master expressly adverted to the appellant investing this sum over the next 20 years to secure for himself a reasonable return.
- [41] Counsel argued for an increase on the basis that what the master did was to award the appellant a pension based on the expectation that the appellant would live to age 65 years. Counsel argued that male life expectancy in the Commonwealth of Dominica was 75 years and therefore the master should have awarded pension for 15 years. With respect, we think counsel completely misses the point, to which the master specifically adverted, that the appellant was being awarded now a sum of money that he would otherwise not receive until 20 years from now. And even then, the appellant would receive monthly payments over a projected period of 15 years and not in a lump sum. Counsel also missed the other fundamental and related point to which the master also adverted – that the award he was making should be looked at to see what return it would produce at the end of 20 years, which is when the appellant would have become entitled to his first pension payment.
- [42] Counsel has offered no basis for interfering with the master's award in relation to the loss of the opportunity to earn the prospective pension. We dismiss this ground of appeal.

Gratuity

- [43] The master refused to make an award in respect of gratuity on the basis that the payment of gratuity by definition is at the discretion of the employer and not as of right of the appellant. It does not appear that the terms of the relevant statutory provisions were brought to the attention of the master. The **Police Pensions Act**²² provides at section 5 (1) that a subordinate officer or constable who resigns after serving ten or more years

“... shall be granted a gratuity calculated on the same basis as the gratuity payable in the case of an officer in the public service who has exercised an option to receive a reduced pension and gratuity under regulation 24 (1) of the Pensions regulations.” (Emphasis added).

- [44] Counsel for the appellant also referred to section 96 (1) of the **Constitution** which stipulates that where a person or authority has a discretion to grant or withhold “pension benefits”, which includes gratuity²³,

“those benefits shall be granted and not be withheld ... unless the Public Service Commission concurs in the refusal to grant the benefit or as the case may be, in the decision to withhold them ...” (Emphasis added).

- [45] We think the language of these provisions leaves no room for doubt that the appellant lost the prospect of receiving a gratuity that he would have had every reasonable expectation of being paid upon reaching retirement age in the police service. If there had been any room for doubt that doubt would have been removed by the fact that in this case the appellant was paid gratuity for the 19 years and 1 month that he served.

- [46] The figure the appellant said he would receive upon reaching retirement age would be the further sum of \$30,350.17. As with the other items of prospective loss the award for this item must be discounted to take account of the lump sum payment being made 20 years before it would be due and for the vicissitudes of life. So as to be consistent with the approach of the master we divide that figure (\$30,350.17) by the 20 years over which it would be earned and use a multiplier of 7.5 to arrive at an award of \$11,381.25 ($\$30,350.17 / 20 = \$1,517.50 \times 7.5 = \$11,381.25$). That multiplier falls midway between

²² Chapter 23.80

²³ section 96 (5) and (6)

the multiplier of 5 years that the master used in respect of pension, which would be paid over a period of 15 years beginning 20 years from now, and the multiplier of 10 years that the master used in respect of loss of salary, which would have been paid over a period of 20 years beginning now. As the master suggested, this sum properly invested over 20 years should produce a reasonable return for the appellant on the day he would have expected to receive his gratuity.

The respondents' case

- [47] The Solicitor General sought to get around the failure of the respondents to file a cross appeal by urging the court to rely on section 32 of the **Supreme Court Act**²⁴ that permits the court to vary the decision of the court below notwithstanding that there was no appeal on a point. The point the Solicitor General wished to argue was that the appellant made no claim for wrongful dismissal and, thus, no claim for special damages. A claim for special damages must be specifically pleaded, the Solicitor General argued, and if not pleaded the amount that should have been pleaded may not be awarded.
- [48] Accepting the proposition to be as stated, which we do purely for the purpose of argument, the peculiar history of this claim, which started off solely as a claim in public law, makes it impossible to apply that rule. It is not the case that the appellant failed to plead special damage when he should have done so; he could not have done so because he never made a claim that could have included an award of special damages. Actually, we remain at a loss as to the basis on which the appellant claimed the general damages that he did. The rule that a claimant must plead special damage applies to private law claims and, until the judge altered the nature of the claim, the appellant claimed only in public law. When the appellant filed his affidavit of damage he gave detailed particulars of the special as well as the general damages he sought and, therefore, we regard the appellant as being compliant with the rule at the time he was required to be.

²⁴ Chapter 4:02

[49] Before leaving the respondents' contention we observe that it was based on a similarity of outlook by the Solicitor General to the view expressed by counsel for the appellant in his written submissions that "damages for loss of salary arising from wrongful dismissal are special damages."²⁵ As expressed in this part of his submissions counsel for the appellant regarded the claim as being for 20 years' worth of salary and therefore as a claim for special damages. Counsel cited no authority for the proposition that future loss of salary is special damage and it is a proposition that goes contrary to the normal view expressed, for instance, in the treatment of loss of earning capacity and related benefits in **McGregor on Damages**. In the context of personal injury claims that text states:

"Both earnings already lost by the time of trial and prospective loss of earnings are included [in damages for loss of earning capacity]. While the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage, there would appear to be no substantive difference between the two, the dividing line depending purely on the accident of the time the case comes on for hearing."²⁶

[50] Moreover, even if the point could have succeeded, the savings the respondents would have achieved with that success would have been modest. On the correct view of special damage it would be only the earnings lost to the appellant between his wrongful dismissal and the date of trial that would comprise special damage and so would be caught by the rule. But, as we have stated, because the claim that went to trial did not permit the pleading of any claim for special damage, we think the point could not succeed on the merits, even if we were to permit the respondents to rely on the point notwithstanding that the respondents did not cross-appeal. Ultimately, however, we regard the absence of any cross-appeal as the fundamental basis for disallowing this argument. Earlier in this judgment²⁷ the court relied on section 32 of the **Supreme Court Act** to alter the orders pronounced by the trial judge so as to put the case on a proper legal basis and enable it to proceed free of legal inconsistency. The court's reliance on the section for that purpose is a world apart from the respondents' attempt to rely on the section to seek to get around the fact that they have no extant appeal, having appealed and abandoned the appeal. It is not an attempt we can countenance.

²⁵ At 2.12

²⁶ At 35-047

²⁷ At paragraph [15], above

Conclusion

[51] We summarise the result of the appeal. In place of the orders pronounced by Belle J in his judgment dated 28 July 2005 we make the following orders:

- “(1) It is declared that the claimant was wrongfully dismissed from his employment with the Dominica Police Force;
- (2) The respondents shall pay the claimant damages for wrongful dismissal to be assessed on the footing that the claimant held office for an indeterminate period that could only have been properly terminated in one of the ways set out in the Police Service Commission Regulations Chap. 1:01, reg. 44, 46 and 47;
- (3) Damages shall be assessed by a master;
- (4) The claimant shall be paid prescribed costs.”

[52] In place of the award made by the master, the appellant is awarded damages for wrongful dismissal in the total sum of \$268,041.25 . That total is made up of the following amounts for the losses indicated:

\$140,160.00	(Salary)
\$ 10,000.00	(Medical Care)
\$ 10,800.00	(Lodging)
\$ 5,700.00	(Additional allowance)
\$ 10,000.00	(Promotion)
\$ 80,000.00	(Pension)
\$ 11,381.25	(Gratuity)

\$268,041.25

[53] There was no appeal against the master’s order that the appellant shall be paid interest at the rate of 5 per cent per annum from the date of filing of the claim until payment and therefore we will not interfere with that order. Consequently, there is no need to consider

whether to separate the award into pre- and post-judgment amounts, as is done with personal injury awards, which amounts attract different rates of interest.

- [54] The appellant was awarded prescribed costs in the court below and the result of the appeal has only a trifling effect on those costs, which we quantify at \$48,304.13. The appellant failed on four out of six items of the award that he sought to increase although he managed to increase the total award by some eight thousand dollars. The respondents lost on the attempt to cross-appeal. In the circumstances we think it appropriate to order that each party shall bear his own costs of the appeal.