

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2018/0144

BETWEEN:

COMBLE DETERVILLE

Claimant

and

CASTRIES CONSTITUENCY COUNCIL

Defendant

Appearances:

Mr. Ramon Raveneau of council for the claimant
Ms. Eugenia Dickson of council for the defendant

2018: June 7
2018: July 11
2019: May 22.

JUDGMENT

- [1] **ACTIE M:** The matter is for assessment of damages consequent upon the dismissal of the claimant.

Background

- [2] The claimant was first appointed as constable with the Castries Constituency Council (CCC) on 1st September 1998 and was promoted to the post of Assistant Head Constable on October 18, 2005. From 2010, he was appointed to act in the vacant position of Head Constable until the position of Head Constable was determined or regularized. On July 15, 2013, he was reverted to his substantive

post to assume the position of Officer-in-Charge within the City Constabulary to report directly to the Town Clerk.

- [3] After the June 2016 general elections, the CCC appointed Mr. Peterson Francis as Mayor of Castries. It appears from the evidence that disagreements between the Mayor and the claimant began soon after, resulting in the termination of the claimant's employment on 16th March 2017.
- [4] The claimant referred the matter to the Civil Service Association (CSA) who in turn referred the matter to the Labour Commissioner for conciliation in keeping with the Labour Act. By letter dated February 7, 2018, the Labour Commissioner informed the claimant that the issue involving his dismissal was not resolved at the level of the Department of Labour and, as such, the claimant was free to pursue his cause via other means.
- [5] On March 14, 2018, the claimant filed a claim form with a statement of claim against the Castries Constituency Council for damages for wrongful and or unfair dismissal. On 26th April 2018, the claimant obtained judgment in default of acknowledgment of service on terms to be decided by the court.
- [6] The chronology of events leading to the claimant's dismissal is outlined in the following paragraphs in order to put the issues in perspective for the purpose of the assessment.
- [7] Mr. Peterson Francis, the newly appointed Mayor, in a letter to the claimant dated September 8, 2016, referred to a meeting that he (the Mayor) convened on the 29th August 2016 with the defendant along with a corporal and the executive secretary of the CCC. At that meeting, Mr. Francis informed the claimant that the CCC required all senior constables to work at nights having regard to the crime situation in the city. Mr. Francis directed that the roster be changed on the following day i.e. August 30, 2016 to reflect the directives. The intention was for the claimant and the corporals to work at nights to enhance the supervision of the lower ranked

constables. Mr. Francis's letter further stated that a letter written to the claimant on August 30, 2016 requesting a reason for the failure to carry out the instructions and giving the claimant forty-eight (48) hours to respond, remained unanswered. The letter continued as follows;

"you are invited to attend a hearing on Thursday September 15, 2016 at 9.00 am where you will be provided with an opportunity to be heard on the above matters....

You are entitled to have your legal representative at the hearing. A decision will be taken following the hearing.

Your employment with the constituency council is suspended pending the conclusion of the meeting referred to above".

Please be guided accordingly
Yours Sincerely
Peterson Francis
Mayor"

- [8] On 9th September 2016, the legal practitioner for the claimant responded in writing to Mr. Francis's letter. The letter states that the notice was in total disregard of the law, which required 14 days' notice. Counsel indicated his unavailability to attend the hearing and advised that the meeting should not be convened on the scheduled date. The letter also indicated that the claimant reports to the Town Clerk and the duties directed by the Mayor were not in keeping with the duties of Head Constable/Officer-in-Charge as outlined in the standing orders. The claimant was advised by his attorney-at-law not to attend the hearing.

- [9] Mr. Francis, in a letter dated September 12, 2016 responded to the legal practitioner in the following terms.

"Re: Notice of Natural Justice Hearing pursuant to section 140 of the Labour Act No 37 of 2008

Dear Sir,
I acknowledge receipt of your letter in the above captioned dated and received on September 9, 2016.

I note, with considerable dismay, your legal advice to your client to not to participate in the disciplinary hearing scheduled for September 15, 2016.

Please note that the Castries Constituency Council will proceed with the scheduled disciplinary hearing with or without your client's attendance.

As such, I encourage you and your client to attend the said hearing. I am for obvious reasons copying this letter to the attention of your client and the St Lucia Civil Service Association.

Yours sincerely
Peterson D. Francis
Mayor"

- [10] On October 14, 2016, the Town Clerk, Vaughn Louis Fernand, wrote to the claimant stating:

"Upon reviewing your personal file the Council is yet to determine your present rank. Please furnish the Council with any correspondence or information that you may have in your possession regarding same.

Your urgent response would be appreciated.

Yours Sincerely
Vaughn Louis-Fernand
Town Clerk
CC Peterson D. Francis, Mayor"

- [11] The Town Clerk in a letter dated October 17, 2016 and copied to the Mayor, informed the claimant that the Council had lifted his suspension and he was required to resume normal duties effective the following day on October 18, 2016.

- [12] In a memorandum dated October 20, 2016, the Town Clerk informed the claimant that the Council noted that the uniform that he currently wore was inconsistent with his rank. The claimant was advised to desist from the practice with immediate effect. On October 26, 2016, the Town Clerk wrote to the claimant again regarding the continuous use of the uniform and stated: "You are therefore firmly informed that failing to adhere to the said directive you are not to remain on Council's premises until the anomaly is rectified."

- [13] On December 12, 2016, Ms. Dany Dariah, a Labour Officer from the Department of Labour, wrote to the Town Clerk referencing a meeting held between the Council and the CSA. Ms. Dariah informed the Town Clerk that the referral of the dispute to

the Labour Commissioner was legitimate as it was in keeping with: (1) section 33.2 of the Collective Agreement between the CSA and the Council; and (2) the provisions of the Labour Act. The letter informed the Council that the Labour Commissioner will engage the conciliatory process at the Department of Labour in an effort to amicably resolve the dispute at a date and time convenient to all parties concerned.

[14] On January 18, 2017, Mr. Francis wrote to the claimant in the following terms;

“Dear Mr. Deterville,

On December 2, 2016 the Castries Constituency Council instructed you to proceed on vacation leave for a duration of 64 days. You are expected to resume your employment duties with the Constituency Council on March 10, 2017.

The Council also intends to resume your pending disciplinary hearing arising from its letter to you dated September 8, 2016. As such, you are invited to attend the resumption of your disciplinary hearing on March 10, 2017.

Yours Sincerely
Peterson D. Francis
Mayor”

[15] By letter dated February 2, 2017, Ms. Dany Dariah, invited Mr. Francis to a meeting on February 16, 2017 in an effort to amicably resolve the matter. Mr. Francis did not attend the meeting and neither did a representative of the Council.

[16] On 8th March 2017, counsel for the claimant wrote to Mr. Francis noting, among other things, his non-appearance at the meeting scheduled at the Department of Labour. The letter also informed of the claimant’s intended resumption of work on 10th March 2017 in plain clothes to avoid any disruption, as he had been previously directed by the Town Clerk to desist from wearing his uniform, a uniform he had worn since 2008. The letter again encouraged Mr. Francis to assist in the completion of the matter by engaging and cooperating with the Department of Labour.

[17] On 10th March 2017, i.e. date of resumption from leave, counsel for the claimant again wrote to Mr. Francis informing him that the matter was yet to be determined by the Department of Labour. The letter further states:

“we trust that due respect will be accorded to the Labour Department for the handling of the current matters between the Council and our client and we await the setting of a mutually convenient date for the conclusion of the matter.”

[18] By letter dated 16th March 2017, the Chief Executive Officer of the CCC informed the claimant of the termination of his employment with immediate effect after a disciplinary hearing on the 10th March 2017. Paragraph 7 of the letter reads:

“The Constituency Council was satisfied that the disciplinary proceedings against you were engaged prior to your attorney’s request to the Labour Department and that it (The Constituency Council) was moreover entitled to proceed with the hearing as the provisions of the Labour Act do not contemplate an intervention of the Labour Department after an employer has engaged a disciplinary process against an employee.”

Law and Analysis

[19] The starting point is that an employee's remedy for unfair dismissal, whether actual or constructive, is a statutory cause of action which does not engage the court's jurisdiction. In the most recent decision emanating from this court in **Dennis**

Boitnott v Coconut Bay Management Limited et al¹, Smith J states:

[19] In relation to Mr. Stephen, his cause of action is unfair dismissal, a statutory (as opposed to common law) cause of action. The Courts have consistently applied the principle that remedies for unfair dismissal must first be sought under provisions of the statute that created it. [4] He is therefore obliged to pursue those remedies available to him under the Code and, if dissatisfied with the decisions of the Labour Commissioner or the Labour Tribunal, he may seek the appropriate remedies in public law as opposed to private law.”

¹ SLUHCV2018/0193 delivered on December 12,2018

[20] **The Labour Act** does not oust the court's unlimited jurisdiction in matters arising under the Act unless where it is expressly stated. A claimant has the recourse to the court only after having exhausted all available remedies under the Act. **Section 455 of the Labour Act** is instructive and reads as follows: -

“Except where expressly exempted in this Act, an application for redress of any alleged contravention of this Act may be made to a court only after a complaint has been made to the Labour Commissioner or to the Tribunal or to any other tribunal established for the purposes of dispute resolution under this Act has been exhausted.”

[21] The claimant pursued his matter at the Department of Labour prior to the filing of this claim. The claimant having obtained judgment against the defendant is now asking this court to make a determination on compensation consequent upon his dismissal. Any award made will be in keeping with the provisions of the Labour Act and the Collective Agreement signed between the parties.

Damages

[22] **Section 419 of the Labour Act** provides an exhaustive list of remedies which the Labour Commissioner can recommend upon the determination of a matter under the Act. The sections reads:

419: Powers of labour commissioner to recommend remedies

- (1) Where the Labour Commissioner makes a statement of finding in accordance with section 415, he or she may recommend an appropriate remedy and in particular may:
 - (a) in an unfair dismissal matter, recommend the payment of a sum of money equal to the loss of remuneration sustained from the date of dismissal;
 - (b) recommend the reinstatement or re-engagement of any employee where appropriate and in accordance with this Act;
 - (c) in any case alleging an infringement of a provision of this Act, recommend that the act, conduct or omission found to be unlawful be ceased and, or not repeated, including any act, conduct or omission which is part of a collective agreement or other agreement;
 - (d) direct the payment of remuneration where due;
 - (e) direct an employee to repay loans advanced as wages under section 48;
 - (f) direct any sum payable at the termination of employment including—

- i. any severance or redundancy payment due under this Act,
 - ii. any vacation, notice or other benefits, or
- (g) recommend the taking of vacation leave or maternity leave when due in accordance with this Act.”

Loss of gratuity

- [23] The claimant pleaded the sum of \$153,800.00 as gratuity based on his annual salary times the number of years of service. The defendant contends that the proper formula for calculating gratuity payment is contained in a collective agreement between the defendant and the claimant's union by using the terminal annual salary x number of years of service x 10% up to a maximum of 26 1/2 years making a sum of \$111,082.48.
- [24] On 2nd April 2019, the parties conceded the point and accordingly gratuity in the sum \$111,082.48 is awarded to the claimant.

Severance Pay

- [25] **Section 419(f)(i) of the Labour Act** provides for payment of any severance or redundancy payment due. **Sections 160 and 161 of the Labour Act** deal with redundancy and severance, respectively. Section 160 provides the formula for the computation of basic pay for an award upon redundancy. Section 161 of the Act provides for payment of severance benefits in accordance with regulations made by the Minister or in keeping with existing collective agreements and practices. At present, there are no regulations governing the computation of severance pay as required by the Act. The Court takes judicial notice of the opinion of the Labour Commissioner filed on 6th August 2018 where he states that a basic award for severance is calculated using the same formula for redundancy under Section 160 of the Labour Act.
- [26] **Section 160 of the Labour Act** provides the methodology for the computation of redundancy pay as follows:
- (1) On termination of employment due to redundancy an employee who has completed no less than 2 years of continuous employment with his

or her employer is entitled to be paid by the employer redundancy pay equivalent to—

- (a) one week's basic pay for each completed year of service up to the first 3 years;
 - (b) two weeks' basic pay for each completed year of service in excess of 3 years and up to 7 years; or
 - (c) three weeks' basic pay for each completed year of service in excess of 7 years of service.
- (2) For the purposes of subsection (1), the amount of a week's pay shall be the amount the employee would be entitled to in the last week of his or her employment or \$350 whichever is lower.

[27] It is first necessary to determine the claimant's weekly wage rate to arrive at the full entitlement for severance/redundancy pay. The claimant commenced his employment with the defendant in September 1998. He was in continuous employment for nineteen (19) years with a basic monthly salary of \$3,573.16 at the date of termination in 2017. The weekly rate is calculated as $\$3,573.13 \times 12 = \$42,877.56 / 52 = 824.56$ (weekly rate). Section 160(2) provides that the amount of a week's pay shall be the amount the employee would be entitled to in the last week of his or her employment or \$350 whichever is lower. The claimant's weekly pay is higher and in keeping with the formula, the claimant is awarded the sum of \$16,450.00 i.e. $\$350 \times 47 \text{ weeks} = \$16,450.00$.

Immediate Loss of Earnings

[28] The claimant claims for immediate loss of earnings in the sum of \$44,210.56. In the court of appeal decision in **Antigua Village Condo Corporation v Jennifer Watt**², Chief Justice Sir Vincent Floissac states that loss of immediate earnings would be loss of earnings from the date of dismissal to the date of trial/judgment. It is the amount to which the employee is entitled to by way of wages in lieu of notice but subject to the rules of mitigation and reasonable steps to obtain suitable employment to mitigate his loss during the period.³

² Antigua Civil Appeal No 6 of 1992

³ Halsbury Laws of England 4th Ed. Para 1195

- [29] The claimant states that he has obtained employment as a security guard since his termination at a salary of \$810.00 which is a decrease of \$2,763.16 from his previous monthly salary. The claimant seeks compensation for the diminution in wages for 16 months in the sum of \$44,210.56.
- [30] The claimant presented an affidavit from Alban Poleon, a police officer who operates a security business providing private security business for various companies and businesses. Mr. Poleon indicates that he pays the claimant cash and does not provide issue him a salary slip.
- [31] Counsel for the defendant states that the claimant was under a duty to mitigate his loss. Counsel further states that the claimant has not shown that he took reasonable steps to get a more lucrative salary having regard to his experience as a security personnel for over 19 years and the great demand for experienced security officers in light of the present climate in St. Lucia.
- [32] It is the responsibility of the person in breach to compensate the aggrieved party for all loss suffered consequent upon his/her wrongful action. However, there is a corresponding duty on the aggrieved to take reasonable steps to mitigate his or her loss.
- [33] I am in agreement with defendant that the claimant has failed to prove that attempts made in obtaining better paid employment for over 16 months since his dismissal. The bare affidavit of Mr. Alban Poleon does not indicate whether the claimant is paid weekly, fortnightly or by jobs since he states that he provides security services to various companies. The Court is not too convinced by the affidavit in support of the amount claimed under this head as it is noted that it was the same Alban Poleon who served the statement of claim and documents on the defendant as evidenced in his affidavit on June 4, 2018. I am of the view that the claimant failed to mitigate his losses for the past sixteen (16) months. I will allow a diminution for a period of three months making a sum total of \$8,289.48.

Loss by reason of manner of dismissal

- [34] The claimant seeks loss by reason of manner of dismissal and relies on the decision of Chief Justice Sir Vincent Floissac in **Antigua Village Condo Corporation v Jennifer Watt**. Compensation in respect of the manner and circumstances of dismissal is awarded only if it would give rise to a risk of financial loss by, for instance, making the employee less acceptable to potential employers, cited with approval the decision of Sir John Donaldson P in **Norton Tool Co. Ltd v Tewson**⁴ at p188 :

"As the respondent secured employment within four weeks of his dismissal and we have taken full account of his loss during this period, we need only consider whether the manner and circumstances of his dismissal could give rise to any risk of financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal."

- [35] The claimant has since obtained employment and again has not indicated that his dismissal has had any negative effect on potential employment. Accordingly no award is made under this head.

Future loss of earnings

- [36] The claimant relies on the **Jennifer Watt** matter which was determined based on the Industrial Court Act. **Section 419(a) of the Labour Act** speaks to immediate loss sustained at the date of dismissal.
- [37] The claimant did not provide any evidence of unemployment for any period since his dismissal or any negative impact on future employment as a result of the dismissal. In the circumstances, no award is made under this head.

Exemplary Damages

- [38] The claimant claims exemplary damages in the sum of \$100,000.00. Exemplary damages are awarded under three heads as set out by Lord Devlin in **Rookes v**

⁴ (1973) 1 A.E.R. 183

Barnard⁵ namely: (1) oppressive, arbitrary or unconstitutional conduct by government servants; (2) conduct calculated to result in profit and (3) authorization by statute.

[39] It had been the rule in the case of **Addis v Gramophone Co Ltd**⁶ that exemplary damages could not be awarded in breaches of contract of employment. However, in recent years, there has been a radical shift from this over 100-year-old principle.

[40] An example close to home of this radical shift is found in the decision of the Court of Appeal of Trinidad and Tobago in **Torres v Point Lisas Industrial Port Development Corporation Ltd**⁷. In **Torres**, the appellant had been employed by the respondent, a state enterprise, as an estate constable. The respondent accused the appellant of theft from the respondent's warehouse and threatened him with arrest and search if he failed to tender his resignation immediately. The respondent falsely informed the appellant that he was in possession of a search warrant and an arrest warrant to search the premises and to arrest him. No such warrants had ever been obtained. The appellant signed a letter of resignation. The appellant filed a claim for damages for unfair and or unlawful dismissal. At first instance, the judge found the appellant to have been constructively dismissed. He found that the threat was not lawful and amounted to a breach of contract of employment and had extinguished any voluntary element in the resignation. The judge however refused to grant the appellant a declaration of unlawful and/or wrongful dismissal and refused to allow the appellant's application, made after close of the appellant's case, to amend his claim to include a claim for exemplary damages. On appeal, the principal issue for the court was whether an award of exemplary damages was appropriate for breach of contract, in the instant case by way of wrongful dismissal. The Court of Appeal held that:

“(1) an award of exemplary damages was available in breach of contract cases. It was within the competence of the court to develop the law to permit

⁵[1964] A.C 1129

⁶ [1909] AC 488

⁷ (2007) 74 WIR 431

the award of exemplary damages where the defendant's conduct had been reprehensible and to determine on principle whether exemplary damages should be allowed in claims in contract. (Per Warner JA) The proper approach would be to focus on the conduct of the defendant as a whole: whether the facts disclosed reprehensible conduct tending to take advantage of every chance of success to the plaintiff's disadvantage; whether it was outrageous, highhanded and egregious; whether the misconduct was planned and deliberate; whether the defendant had tried to conceal the misconduct. If the breach was committed in such a manner in disregard of the plaintiff's rights, then an award of exemplary damages would be appropriate. However, the award of exemplary damages in breach of contract cases would be rare. (Per Mendonca JA) The correct approach was to assess the conduct in the context of all the circumstances and determine whether it was deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. What was relevant was the quality of the conduct of the contract breaker and not the legal category of the wrong."

- [41] The decision of the Court of Appeal of Trinidad and Tobago, although highly persuasive, is not binding on this court. However, this decision gives much needed guidance on the circumstances where exemplary damages can be granted in cases of breach of contract and I gratefully adopt the principles stated therein.
- [42] The question is whether an award of exemplary damages for wrongful dismissal should be made in this case at bar. The claimant had been in the defendant's employment for approximately 19 years from 1st September 1998. He was promoted to the post of Assistant Head Constable in 2005 and acted in the vacant position of Head Constable from 2010. It appears that the post of Head Constable was uncertain and had to be regularized. In 2013, the claimant was reverted to his substantive post and assumed the position of Officer-in-Charge responding directly to the Town Clerk.
- [43] The issue is whether the cumulative actions of the defendant justify an award for exemplary damages. The test in determining whether exemplary damages should be awarded in an unfair/wrongful dismissal case was propounded by Warner J.A. in **Torres** as follows:

"The test

[54] I think that the proper approach would be to focus on the conduct of the defendant as a whole: Do the facts disclose reprehensible conduct tending to take advantage of every chance of success to the plaintiff's disadvantage? Was it outrageous, highhanded and egregious? Was the misconduct planned and deliberate? Did the defendant try to conceal the misconduct? If the breach was committed in such a manner in disregard of the plaintiff's rights, then an award of exemplary damages would be appropriate. It follows from what has been expressed above, however, that the award of exemplary damages in breach of contract cases ought to be rare.

[55] The award however ought to be proportionate to a defendant's conduct. If therefore a defendant misuses his ascendancy or trust against another in vulnerable position then an award to express public outrage and to deter further breaches ought to be made."

[44] The series of events culminating in the dismissal of the claimant lead to the inescapable conclusion that the defendant's conduct was domineering, highhanded and reprehensible. It was a term in the claimant's contract that he would report directly to the Town Clerk. However, it appears that that the Mayor unilaterally issued directives to the claimant, giving him one day's notice to commence working the night shift without regards to his terms of employment, years of service in senior positions and as head of the constabulary. The Mayor proceeded to suspend the claimant on September 8, 2016.

[45] In a letter dated October 17, 2016 the Town Clerk lifted the suspension. The claimant was then sent on sixty-four (64) days' vacation leave as soon as the suspension was lifted. The Mayor continued what can be termed harassment and intimidation even while the claimant was on vacation leave with a letter informing the claimant that the disciplinary matter will commence on the same day of his resumption from his vacation. The uncertainty of his employment on return from his vacation leave surely must have been stressful.

[46] The pattern of intimidation continued with the Town Clerk insisting that the claimant's uniform was not in keeping with his rank and requesting that he should not remain on the compound wearing the uniform which he wore since 2008. This

seemed to be unwarranted as the claimant had been appointed to act as head constable over an extended period of time until the position of head constable was regularized.

[47] The Mayor acted in total disregard to the labour laws which had been engaged in an attempt to resolve the issue. The Mayor proceeded to dismiss the claimant in light of the pending hearing before the Department of Labour which is a creature of statute with responsibility to deal with industrial relations issues. The Mayor continued with the disciplinary action in clear defiance of the letter from the claimant's counsel and Ms. Dariah from the Department of Labour. The Mayor's arrogance continued right down to the time of judgment when he failed to file a defence to the claimant's claim thus giving rise to the extant default judgment. It is clear that the Mayor's conduct and motive was designed to achieve just one result namely, the dismissal of the claimant.

[48] Lord Devlin in **Rookes v Barnard** said:

“... where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.”

[49] I have assessed the defendant's conduct in the context of all the circumstances in this case. I am of the view that the defendant's conduct was oppressive, highhanded, reprehensible and an abuse of power. The Mayor acted in clear disregard of the claimant's rights under the Labour Act. An award of exemplary damages is not a penalty but is design as a mark of disapproval of such conduct and to deter persons from repeating it. Taking all into consideration, I award exemplary damages in the sum of \$25,000.00.

ORDER

- [50] In summary, the defendant shall pay the claimant the following sums:
- a. Gratuity payment in the sum of \$111,082.48 with interest at the rate of 3% from the date of dismissal to the date of judgment and at the rate of 6% from judgment until payment in full.
 - b. Severance pay in the sum \$16,450.00 with interest at the rate of 6% from judgment until payment in full.
 - c. Immediate loss of earnings in the sum of \$8,289.48 with interest at the rate of 3% from the date of dismissal to the date of judgment and at the rate of 6% from judgment until payment in full.
 - d. Exemplary Damages in the sum of \$25,000.00 with interest at the rate of 6% from judgment until payment in full.
 - e. Prescribed Costs on the global sum in accordance with CPR 65.5.

**Master Agnes Actie
High Court Master**

By the Court

Registrar