



[2020] JMSC Civ. 35

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2012 HCV 01524**

BETWEEN	DALE AUSTIN	CLAIMANT
AND	THE PUBLIC SERVICE COMMISSION	1st DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	2nd DEFENDANT

IN OPEN COURT

Ms. Judith Clarke Cooper and Ms. Jamila Thomas for the Claimant

Mr. Garth McBean Q.C. and Mr. Lorenzo Eccleston for the Defendants

Heard: 10th October 2019 and 6th March 2020

Assessment of Damages – following judicial review – constitutional damages – status of evidence tendered at judicial review proceedings where assessment of damages is conducted separately – Public Service Regulations – Staff Orders for the Public Service – Pensions (Public Service) Regulations – vindictory damages

GEORGE, J.

Background

[1] This Assessment of Damages hearing has its genesis in judicial review proceedings which were conducted primarily in the favour of the Claimant on the 28th day of November 2018.

The origin of the judicial review proceedings

- [2] The Claimant contended that in October 2011, after recruitment exercises which began in July 2011, he commenced duties at the Attorney General's Chambers in the capacity of Assistant Crown Counsel in the Litigation Division. This state of affairs subsisted until sometime in March 2012 when he was advised by the Solicitor General, at this time, that a directive had come from the first defendant that he be dismissed with immediate effect. This dismissal was premised, he averred, on the first defendant's claim that they had received information that the Claimant has a list of dishonoured debts to a number of third parties that he (the Claimant) had engaged in fraudulent conduct. These are allegations which the Claimant strenuously denied then and continue to deny presently.
- [3] In giving a background to this Claim, the Claimant recounted how after his employment with the 2nd Defendant began, consequent on the knowledge of the Attorney General (at that time) of his background and expertise in communications, he undertook the additional responsibility of being the speech writer for him for official functions. He went on to detail, that in December of 2011, the Attorney General demitted office following the result of the general elections. There was also he said, several notable personnel changes in his department at the 2nd Defendant's Chambers. His dismissal followed the result of the general election.
- [4] After intervention by the Solicitor General at the time, the Claimant attended a meeting, on March 7, 2012 where several persons including the Chief Personnel Officer of the First Defendant, Lois Parkes was present. It was the Claimant's evidence, that prior to the meeting a request was made by the Solicitor General that he be provided with the details of the allegations and the material which the first defendant had concerning the matter. This disclosure was to be done in a bid to enable the Claimant to respond. Up to the time of the meeting, the Claimant was not provided with the requested disclosure and he was further advised by Miss Parkes that no information would be provided for his response. He was thereafter advised to speak, if, he had anything to say and then leave. This utterance was

met by the Claimant's vehement denial of the allegations against him which he stated were outright falsehoods which could not survive even the most basic verification efforts. He also submitted to Miss Parkes, a letter from his Attorney at the time, Wilkinson and Company, dated March 7, 2012 urging that the letter of termination be withdrawn and requesting a meeting with the parties.

[5] The Claimant later, on the same day as the meeting at the First Defendant, discovered that interviews were conducted to fill his post and that a candidate had in fact been identified. His Attorneys, thereafter, on March 12, 2012, received a letter dated March 9, 2012 from the Office of the Services commissions under the signature of Miss Parkes, indicating that his employment was terminated as there was an adverse report returned in respect of him after a security vetting was done. Given the basis of the dismissal, Miss Parkes indicated that the meeting proposed by the Claimant's Attorney in their March 7, 2012 letter, would be unwise.

[6] It was this letter that prompted the institution of the judicial review proceedings by the Claimant which was decided on November 28, 2018.

The Orders of the Full Court

[7] The following were the orders granted by the Full Court:

- (1) An Order of Certiorari to quash the decision to terminate the appointment of the claimant;
- (2) An Order of Mandamus directing the first defendant to reinstate the claimant as at the 5th day of March 2012;
- (3) A declaration that at all material times, the claimant was acting in a substantive post and was not a temporary employee within the meaning of the Public Service Regulations;
- (4) A declaration that the Claimant was denied a fair hearing;

- (5) A declaration that the failure to give the claimant a fair hearing was unlawful and in breach of the rules of natural justice;
- (6) A declaration that the Claimant's purported termination in reliance on schedule 2 of regulation 19(b) of the Public Service Regulations was procedurally invalid and unlawful;
- (7) A declaration that by his dismissal the claimant was deprived protection under section 125 of the Constitution and Public Sector Regulations;
- (8) A declaration that the claimant was deprived of having the benefit of the principles of due process;
- (9) A declaration the Claimant has a legitimate expectation to be treated consistently and in the same manner that the Public Sector Regulations stipulate that public officers are to be treated when adverse allegations are made against them;
- (10) A declaration that the claimant's termination was in breach of natural justice;
- (11) A declaration that the purported termination of the claimant is null and void;
- (12) A declaration that the purported dismissal of the claimant was Wednesbury unreasonable;
- (13) A declaration that public officers occupying posts created under the Civil Service Establishment Order cannot be engaged by way of contract on such terms and on conditions as the Offices of the Services Commission sees fit;
- (14) An order that the police report be remitted into the custody of the claimant; and
- (15) Damages to be assessed on a date set by the Registrar within the Hilary term of 2019.

[8] The following orders were denied:

- (1) A declaration that the claimant had a legitimate expectation that he would be subject to an assessment and, if successful, would be appointed permanently;
- (2) A declaration that the claimant's right to privacy has been breached;
- (3) A declaration that the claimant had been reinstated.

[9] It is important to note that the learned Lawrence-Beswick J in the decision of the Full Court, **Dale Austin v The Public Service Commission and The Attorney General** [2018] JMFC Full 6, expressed at paragraph 138 that *"I accept that he has suffered some loss as a result of the termination of his employment in these circumstances and would order damages to be assessed..."* It is therefore, on the premise of this finding, that the Assessment of Damages hearing is conducted. Consequently, this Court's sole task is to arrive at an award to compensate the Claimant for the losses he has suffered. This Court will thus, in its assessment, be guided by the findings of the Full Court.

[10] **The salient findings of the Full Court decision (Dale Austin v The Public Services Commission and The Attorney General of Jamaica (supra)) are highlighted hereunder:**

- (1) "A letter from the Office of the Services Commissions informed Mr. Austin, an Attorney-at-Law, that he was temporarily employed with effect from October 3, 2011 in the Attorney General's Chambers, Ministry of Justice. He was to commence work as an Assistant Crown Counsel. The conditions of engagement included provision for the termination of his "temporary employment" by one month's notice in writing by either side or by the payment of one month's salary in lieu of notice. Mr. Austin assumed duties on October 3, 2011, as directed, in the Attorney General's Chambers and worked there for approximately five months when he received a letter from the Office of the Services Commissions terminating his employment with immediate effect."

- (2) "The termination letter contained no reasons for the termination, but the Commission subsequently informed Mr. Austin that it was based on allegations that he had been determined to be of unreliable and dishonest character by the National Intelligence Bureau, (NIB), a branch of the Jamaica Constabulary Force. According to NIB it had investigated Mr. Austin and had found that he was indebted. The Commission regarded that report as being unfavourable and therefore dismissed him. Mr. Austin was not informed of the allegations made against him and was not given the opportunity to verify their accuracy or respond to them before his employment was terminated."
- (3) "After receiving the termination letter, Mr. Austin retained Counsel to act on his behalf and requested a meeting with the Commission. Counsel being unable to attend the scheduled meeting wrote, expressing concern about the circumstances of Mr. Austin's dismissal, highlighting the fact that he had not been given the opportunity to respond to the report. The Commission responded and refused to meet about the concerns. It explained that where an individual is employed, a security vetting is done to assess the suitability of the applicant. The letter disclosed that such a vetting had been done on Mr. Austin and the report was adverse... Not only did Mr. Austin assert that the report was untrue, but he filed a suit separate from this suit, seeking damages for defamation as a result of the publication of the report to several bodies."
- (4) "...the word "temporary" in the letter which stated the terms of Mr. Austin's employment, must be interpreted to mean, lasting only for a limited period in the context of the employee not enjoying the expectation of being permanently employed without a further assessment... Mr. Austin's employment should be under the Constitution because he is the holder of public office. Therefore, he must be told of the advice that he be terminated and be given the opportunity for the advice to be reviewed... without being designated to any particular type of employee category, Mr. Austin's treatment must nonetheless accord with the Constitution and indeed the laws of natural justice... outside of the provisions for termination of employment of a public officer, the Constitution provides for a just resolution of contentious issues

where it provides for a fair hearing within a reasonable time by an independent and impartial court or authority established.”

- (5) “Mr. Austin’s employment was with the Attorney General’s Department by way purportedly, of the Office of Services Commissions. If, as an attorney-at-law, his employment was terminated by what amounts to character flaws, the repercussions would likely be extensive. It is in my judgment fair to say that he should reasonably not expect to be employed by any other person or institution because an attorney-at-law’s good character is fundamental to his profession. It is tantamount to being a tool of the trade... there was no acknowledgment or recognition by the Commission that the information on which it decided to terminate Mr. Austin’s employment could be erroneous in part or in whole. There is no suggestion that there was an urgent situation requiring immediate termination of Mr. Austin’s employment. Indeed, the contrary is true. The evidence is that he had been assessed and the report was that he had worked well, and continued to work well, if not excellently... the single act of termination based on an allegation of a purported serious character flaw had the potential to end his professional life and could reasonably be expected to affect his standing in society. It would also conceivably affect any non-legal job he sought in the Civil Service for which the Services Commission identifies new employees.”
- (6) “Mr. Austin held a position which was gazetted as being pensionable, and he would have become pensionable if he were confirmed permanently in the post... the conditions of his employment must be considered to be those of a pensionable post.”
- (7) “...found no authority for the Commission to enter into a contract for temporary employment of an Assistant Crown Counsel which it purported to do... the purported contract would therefore be void and the method of termination of employment detailed there would be of no effect.”
- (8) “The principle that no one is to be condemned without a fair opportunity to be heard, is fundamental to our system of justice. Any contrary approach must be clearly provided for in legislation and may nonetheless be subsequently determined to be

unconstitutional. In the circumstances of this case, where the person being condemned was a public officer, holding a position which would be pensionable, the need for a fair hearing was patent... Mr. Austin should have been informed of the allegations before the letter of termination was dispatched to him. It is of interest that he has maintained his innocence and it appears that no effort has been made by the defendants to verify their information during the several years that have passed since litigation has commenced.

- (9) "...there is insufficient evidence to show that the defendants, by conducting a background check on Mr. Austin have caused his constitutional right to privacy to be breached... Mr. Austin's banking information is to remain private unless ordered by the Court. It ought not to be disseminated to the public without his consent. However, in the absence of sufficient evidence of how the investigation took place and who provided the information and to whom, it cannot be properly concluded that there is a breach of the banker/client relationship. In relation to the tort of breach of confidence the cause of action could only be sustained against a person or entity with whom the confidential relationship existed. There is no evidence of that person or entity."
- (10) "...the presence of debts in and of itself cannot be a bar to employment in the Chambers. If that were so, the Commission may be hard pressed to find any person to fill that position and indeed to fill any of the very many positions in the Establishment, surely for debts to result in termination, they must be associated with some illegality or some other socially unacceptable behaviour, as for example, compulsive gambling which may leave the officer open to blackmail... the actions of the 1st defendant are unreasonable in the *Wednesbury* sense."
- (11) 'Mr. Austin has submitted that he has been denied the ability to access a motor vehicle at concessionary rates and has also been denied salary increments although he has successfully completed performance evaluations. He says these benefits have been afforded to his colleague. At the time of the purported dismissal Mr. Austin had occupied his position for approximately five months. There is no evidence before

me that at that time Mr. Austin would have been entitled to these benefits. There is no evidence of the circumstances of his colleagues who have benefitted, that is to say what criterion was applied to them and what was there [sic] status at the Chambers, that is to say whether they were permanently appointed.”

(12) “The evidence of the circumstances surrounding the termination of Mr. Austin’s employment fall short of a constitutional breach of his right to equitable and humane treatment.”

[11] The Court is guided by these findings as it seeks to arrive at an appropriate sum to compensate the Claimant for the losses suffered.

[12] The Claimant has outlined in his written submissions four headings under which he proposes compensation ought to be awarded. They are as follows: i) loss in salary and emoluments, ii) constitutional redress and relief by way of damages, iii) relief in respect of the non-accrual superannuation and pensionable entitlements for the payments of Mr. Austin's pension and special damages. This tribunal finds that these categories of assessment is a convenient way of approaching the matter.

Preliminary Point

[13] At the commencement of the Assessment of Damages hearing; the Court raised the issue of whether the evidence solicited, during the liability phase of the proceedings automatically formed part of the evidence in the Assessment of Damages. This issue arose as a result of an application by the Defendants for several paragraphs of the Witness Statement of the claimant to be struck out. On this point, the Claimant submitted that the Defendants are not permitted to submit that the Claimant’s unchallenged evidence (the Claimant was not cross examined at the judicial review hearing) ought not to be accepted by the Court. In support of this view, they cited the authors of **Phipson on Evidence** wherein it was stated that "in general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the

evidence should not be accepted." The Claimant went on to state that "the unchallenged evidence in the proceedings whether taken by affidavit or witness statement or orally in or after the liability phase is already in evidence... since the defendants have never availed themselves of the opportunity to challenge the claimant in cross-examination, they cannot now properly seek to submit that any of Mr. Austin's evidence ought not to be accepted."

- [14] The submission of the Claimant on this point presupposes that the evidence tendered during the liability phase of the proceedings automatically formed part of the evidence in the Assessment of Damages hearing. However, this position does not find favour with the Court when it is juxtaposed against the decision of the Court of Appeal in **Leroy Mills v Lawson and Skyers** (1990) 27 JLR 196 (CA). In **Mills** one of the questions which the Court was tasked with resolving whether an Assessment of Damages is a trial. It was submitted by the Respondent therein that a civil trial necessarily required a determination of liability as well as damages at one and the same time and thus where a judge determines the issue of liability alone; as is procedurally and practicably possible, that would not be a trial. The Court was of the view that for this submission to be logical it would also mean that if liability were admitted or judgment entered with damages to be assessed, then the assessment issue was not a trial. The Court ultimately disagreed with this submission and said *"on either issue, a judicial determination is called for. The party in these circumstances the plaintiff would be required to prove his claim; he must discharge the burden of proof cast upon him. He must call evidence which the judge must hear and consider. He must then decide as a matter of law whether the claim (whether it be as to liability or as to damages) has satisfied the standard of proof necessary."* This decision makes it clear that the present Assessment of Damages, though flowing from the decision in the judicial review/full court proceedings; was in and of itself a trial. It would therefore stand to reason that evidence would have to be lead at that hearing in proof of the damages to which the Claimant asserts entitlement and unless led through the person of the Claimant or some other witness, no fact or averment can form part of the evidence at the

Assessment of Damages hearing. It would therefore mean, that although there was a trial on liability, the evidence which was tendered in proof of liability cannot and does not automatically form part of the Assessment of Damages hearing, since that hearing is a fresh trial, before a new tribunal.

- [15] Consequently, in proceeding at the new trial the Defendant would have a right to challenge any evidence which is being tendered at the Assessment of Damages hearing, notwithstanding that they launched no challenge to the evidence of the Claimant at the time that the Court was conducting the trial on liability. Failing to challenge the Claimant at the trial on liability is a premise from which the inference can be drawn that liability is not being contested. However, because liability is not in dispute does not automatically mean that the Defendants have accepted as true the losses which it is claimed was suffered as a result of the Defendants' wrong. Thus, the purpose of the Assessment of Damages is to so far as possible; to discover the true extent of such loss. The Defendants' role therefore, if they so choose to exercise it, is to contest the evidence of the Claimant, whether through cross examination, submissions on admissibility or otherwise.
- [16] Were the Court to find that the Defendants having not challenged the Claimant at the trial on the liability, they were precluded from challenging his evidence at the Assessment of Damages hearing, it would be operating in contravention of the Defendants' right to a fair hearing as enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms in the Constitution. This is consistent with the Court of Appeal decision in **Al-Tec Inc Limited v James Hogan, Renee Lattibudaire and the Attorney General** [2019] JMCA Civ 9 and **Natasha Richards and Phillip Richards v Judan Brown** [2019] JMCA Civ 72 which found that the now repealed Rule which restricted a Defendant being heard at an Assessment of Damages hearing after a default judgment had been entered against him, was unconstitutional. Though different than the case at bar in that the Defendants at bar were not found liable by virtue of a default judgment but rather after a decision on the merits of the case, the principle is still applicable as the cases were contemplating an instance in which the Claimant's evidence was

unchallenged and there was a finding of liability on the unchallenged evidence. Thus the ruling in these two cases would have some applicability here.

- [17] It must be mentioned that the Court also disagrees with the submission that Fixed Date Claim Form and Affidavits in Support would form part of the evidence at the Assessment of Damages. In the strictest sense, this is not so. Rather these documents would be the pleadings and evidence which set out the parameters of the claim against the Defendants. They would therefore at the liability stage of the proceedings guide the Court on what breach the Claimant is inviting it to find occurred; meanwhile at the Assessment of Damages hearing the pleadings would indicate to the Court the extent to which the Claimant asserts that the breach resulted in losses to him. However, it is the Witness Statement which is permitted to stand as the evidence in chief and would amount to the evidence in the matter and the affidavits would so stand, if permitted by the Court, on the application of the Claimant.
- [18] On the totality of the foregoing, it is within the purview of the Defendants to challenge any evidence tendered by the Claimant at the Assessment of Damages hearing.

Loss in Salary and Emoluments

- [19] It is the Claimant's position that he continues to be denied basic entitlements, including, successive salary increments despite having passed the requisite assessment margins and lawfully performing the functions of his office to which he has been reinstated by the First Defendant. This was so despite the fact that his other colleagues, including those who started in their positions at the same time as the Claimant, have received salary increases. Salary increments, he states, are paid, on an annual basis to all attorneys and other officers of the Chambers who attained a passing grade in their performance evaluations.
- [20] In respect of the increments he claims he is entitled to, as professed in his evidence-in-chief, that the existing annualised salary scale for his position with

successive salary increment points were as follows: \$1,850,870.00 p.a.; \$1,999,641.00 p.a.; \$2,049,632.00 p.a.; \$2,100,873.00 p.a.; \$2,153,395.00 p.a.; \$2,207,230.00 p.a.; \$2,262,411.00 p.a.; \$2,318,971.00 p.a. In support of the amount of increment to which he was entitled the Salaries Legal Officers (JLG/LO 1-6) scale was tendered as an exhibit. Further to the increments to which the Claimant is claiming entitlement, he indicated that upon reaching the end of the salary scale for the post or after five (5) years in the same post, whichever came first, the Attorney-at-Law in the Litigation division would then be entitled to a seniority allowance equivalent to the last three salary increments which he or she would have been entitled to. The Claimant advanced that this salary scale existed for the period when he commenced duties in the Attorney General's Chambers up until April 1, 2017, when it was changed.

[21] By submissions, it was argued that the Claimant was entitled to damages arising from his loss of emoluments and salary increments as a result of the defendants' failures to pay the said monies accruing to him from October 3, 2011 to present. It was submitted, that for each year that the Claimant's job performance was appraised and assessed to be at least satisfactory, he was entitled to increment movements in his salary. Flowing from this, the Court was invited to either utilize a mathematical approach to arriving at an appropriate award or alternatively, using the approach approved in the case of **Angela Innis v Attorney General of St. Christopher and Nevis** [2008] UKPC 42, of making a lump sum award.

[22] The Defendants for their part do not appear to be challenging the Claimant's entitlement to damages for his loss in salary emoluments and increments. In fact, at paragraph 12 of their written submissions, it was expressly stated that "in view of the fact that the Claimant has now been appointed he would be entitled to compensations for salary and emoluments lost." Thereafter, at paragraph 37 it was stated that "pursuant to orders (ii) and (iii) of the Court orders referred to in paragraph 2 herein, the Claimant has been reinstated with effect from March 5, 2012. Further, the Claimant having been reinstated, his appointment to the post of Assistant Crown Counsel followed retroactively with effect from September 1,

2012.” The Defendants have however challenged the accuracy of the sum being claimed by the Claimant under this head. Furthermore, they have submitted that the facts in the case at bar do not support a lump sum award as was done in the case of **Angela Innis v Attorney General of St. Kitts and Nevis** (supra) as the Claimant at bar, remained gainfully employed and received a salary, whereas in that case the Claimant was not so employed and status quo was not preserved.

- [23] The Court’s approach to resolving the issue of whether the Claimant is entitled to damages for loss of salary emoluments and increments is to first determine if the Claimant would have ordinarily been entitled to these sums. To this end, the Court takes notice of the **Staff Orders for the Public Service, Government of Jamaica** which were last revised in 2004. The Preface to those Staff Orders states that “one way of revitalizing the Civil Service is to build a service which defines the jobs and tasks to be done, the qualifications and skills required to do them and then to establish a system of rewards incentives and advancement based on actual performance.” The Staff Orders then went on to address the subject of increments at Chapters 6.2.13 and 6.4. It should be noted that this Court is not of the view that the Full Court’s finding that the Claimant’s appointment was not in accordance with the Staff Orders precludes it from considering the said Staff Orders in determining the issue of increments to which the Claimant may be entitled. The Court has formed the view that the Staff Orders are applicable in this regard as it is the only document which addresses the subject of increments in any detail; more specifically, it appears to be the only document in the civil service, which sets out in detail the applicable principles and procedure for the payment of increments.
- [24] Chapter 6.2.13 defined an increment as “*a sum of money within a salary scale by which salary is increased annually.*” Meanwhile, Chapter 6.4 set out the conditions under which increments are paid and states specifically at Chapter 6.4.1(i) and 6.4.1(ii) respectively that:

- (1) *“Increments are normally paid on the anniversary date of appointment, to permanent employees who demonstrate fully satisfactory performance on the job during the previous year.”*
- (2) *“Increments may be paid to employees who are employed on a temporary basis in positions which are on the establishment and are not vacant, subject to fully satisfactory job performance.”*

[25] It is thus apparent, that only permanent employees who have been appointed in their position, are entitled to increments. Although, temporary employees (those not employed in a vacant post) may be paid such increments. This is however, clearly discretionary, as is connoted by the use of the word “may” in the provision and this discretion is obviously to be exercised with regard to the performance of the public officer.

[26] The unchallenged evidence of the Claimant as is found at paragraph 8 of his Witness Statement is that he was “selected for appointment to one of the vacant posts as Assistant Crown Counsel in the Litigation Division of the Attorney General’s Chambers.” This tribunal is therefore satisfied on a balance of probabilities that the Claimant was not employed on a temporary basis, in the context considered by the Staff Orders. Furthermore, the Full Court did find that he was not a temporary employee at all when it stated that it *“found no authority for the Commission to enter into a contract for temporary employment of an Assistant Crown Counsel which it purported to do... the purported contract would therefore be void... Mr. Austin’s employment should be under the Constitution because he is the holder of a public office...”* He would therefore, for the intent and purpose of the Staff orders, having been employed in a vacant post, be considered as a permanent employee. Notwithstanding this, he would only become entitled to increments on being appointed to the post of Assistant Crown Counsel.

[27] It would appear that so far as the Defendants are concerned, the Claimant has been appointed to the post of Assistant Crown Counsel. However, the Court notes

that nowhere in the evidence of Mr. Austin was any mention made to being appointed, in fact at paragraphs 41 and 42 of his Witness Statement filed March 08, 2019 and which was permitted to stand as his evidence in chief, the Claimant stated "...I have not even been confirmed in my present post. This, despite the fact that the Assessment Panel of the Attorney General's Chambers recommended by permanent appointment by way of a Special Report since July 3, 2012..." In amplification of paragraph 42 of the Witness Statement, he said "to date since the judicial review, I have neither been promoted nor has the Defendant complied with any orders of the full court. To date the Special Report has not been acted on, neither has the increments related to my annual reports been paid over or addressed in any way." The aspect of the amplification which speaks to the Special Report, that is, the report which recommended his permanent appointment, having not been acted upon, clearly communicates to the Court, that as at the date of the Assessment of Damages hearing the Claimant had not been appointed in the post of Assistant Crown Counsel.

- [28] The Court notes, that the Claimant made mention in amplification that the Defendants had not complied with the orders of the full court. However, in so far as it concerns the appointment of the Claimant to the post of Assistant Crown Counsel, this tribunal bears in mind that the Defendants were not mandated by the full court to appoint the Claimant. Instead, what the full court ordered, was that the Claimant was to be reinstated as at the 5th day of March 2012. The reinstatement is not synonymous with the Claimant's appointment. To this Court's mind, the effect of the order of reinstatement was to restore the state of affairs which existed as at that date, that is the 5th day of March 2012. Based on the Claimant's own evidence of having not been confirmed in his present post, it is evident that on the 5th day of March 2012, he was acting in the post of Assistant Crown Counsel. This view is bolstered by the full court's refusal of the declaration "*that the claimant had a legitimate expectation that he would be subject to an assessment and, if successful, would be appointed permanently.*" The Court notes that the Defendants' have stated that the appointment took effect retroactively from

September 12, 2012, that is, six months after the claimant is said to have been reinstated.

- [29] However, this Court can see no way in which such a submission could stand when consideration is taken of the Full Court finding that the Claimant's employment should be under the Constitution. The section of that Constitution that is here brought into focus is section 125. However, this Court notes that save vesting the power of appointment to public offices in the Governor General, the section is silent on any specific procedure or timeline affixed to appointment. Thus the Defendants argument of retroactive effect is not supported by the Constitution, under the provisions of which the Full Court indicated the Claimant should have been employed. **It should also be noted that although the Full Court found that the Defendant should have been employed under the Constitution, he was not; neither was he employed under the Public Service Regulations nor the Staff Orders.** Thus in respect of his employment, the Full Court at paragraph 84 found that "equity regards as done what ought to have been..." Unlike the Constitution, The Public Service Regulations and the Staff Orders make provisions in respect of timelines attached to appointments. However, neither of these provisions lend any support to the Defendants' argument that the Claimant was retroactively appointed. The Public Service Regulations at section 14(1)(a) provides that "*the Commission shall make recommendations to the Governor-General with respect to appointments, promotions and transfers of suitable officers.*" It is evident from this that appointment to post is not automatic once a six-month period has elapsed, instead, there is a requirement that a recommendation be made by the 1st Defendant to the Governor General. There is no evidence before the Court that such a recommendation has been made. Meanwhile, under the Staff Orders at Chapter 1.4 "persons entering the Public Service may be appointed on a temporary or permanent basis, at the discretion of the appointing authority." It was further stated at Chapter 1.4.1 and Chapter 1.4.2, respectively, that "in instances where the appointment is to a position which on the Public Service Establishment, is clearly vacant and the candidate has met all the requirements of the position, the

temporary appointment should not normally exceed six (6) months,” and “upon permanent appointment persons will receive a letter of appointment from the appointing authority setting out the terms and conditions of the appointment which may include the requirement for probation and medical certification.” It is therefore without question that the Staff Order imposes specific procedure which must be followed when an appointment is being made and there is no evidence before the Court that this was done. Consequently, in the absence of such evidence, this Court is not at liberty to proceed on the basis that the Claimant has been appointed.

- [30] Therefore, on the evidence to which the Court is privy, the Claimant has not been appointed in the post of Assistant Crown Counsel and is thus currently acting in the post. As the Court has accepted that the position he is acting in is a vacant post, he would, based on the prescription of the Staff orders, only be entitled to increments after the anniversary of his appointment to the post. This is presently a future date yet to be determined. Were the Claimant employed on a temporary basis in a non-vacant post, then the Court’s consideration would be to assess whether his performance was such that the Defendants ought to have exercised their discretion and made the payment of the increments. Further to the preceding, even without this Court’s independent assessment, it is noted that the Full Court had refused the Claimant’s claim of entitlement to increments. The Full Court was of the view, as expressed at paragraph 133 that *“at the time of the purported dismissal Mr. Austin had occupied his position for approximately five months. There is no evidence before me that at that time Mr. Austin would have been entitled to these benefits. There is no evidence of the circumstances of his colleagues who have benefited, that is to say what criterion was applied to them and what was there [sic] status at the Chambers, that is to say whether or not they were permanently appointed.”* In accordance then with this position of the Full Court, this Court being tasked with conducting the Assessment of Damages in respect of the areas of liability which the Full Court found existed, would not have been at liberty, in any event, to have granted an award for any increments as claimed by the Claimant.

[31] The Claimant has also submitted that he is entitled to a seniority allowance which he says is payable to an Attorney-at-Law in the Litigation division on reaching the end of the salary scale for the post or after five (5) years in the same post, whichever came first. This allowance he states would be equivalent to the last three salary increments which he or she would have been entitled to. There was no evidence led to support this but the Court notes that seniority allowance is in fact provided for in the Staff Orders.

[32] At Chapter 6.7.2(i) of the Staff Orders it is provided that *“an officer who holds a post to which an annual salary scale is attached, and who has served at the maximum salary scale for three (3) years or more will be eligible to receive a seniority allowance at a rate equivalent to the highest incremental rate of his/her salary scale, subject to paragraph (iii) of this section, except where there is established evidence that he/she is not performing satisfactorily.”* The exhibited annualized salary scale is sufficient to satisfy this Court that the Claimant held a post to which an annual salary scale is attached.

A review of the annualized salary scale for officers at the level at which the Claimant is employed, that is JLG/LO 1-6, were entitled to an annual allowance for laundry, library and robing. In respect of Allowances, Chapter 6.2.12 of the Staff Orders states thus *“that element of pay which is payable separately in addition to salary, is attached to a post where required and takes into account such considerations as attire, tools of trade and extraneous duties.”* From this, it is apparent that the allowance is attached to the post and is not contingent on whether the public officer has been appointed to the post or is acting in it. Therefore, it would stand to reason that the Claimant would as part of his salary be entitled to the annual allowances attached to his position as Assistant Crown Counsel which is represented on the salary scale as a level 2 Legal officer. The Court however observed that the Certificate of Pay for the years 2017 and 2018 which are exhibits 8 and 9 respectively, do not reflect any payment for these allowances to the Claimant. The Claimant however, did not lead any evidence in respect of this and this, beyond

making this observation, it is not with the remit of the Court to grant an award for these allowances.

Constitution Redress and Relief by way of Damages

[33] It is the Claimant's contention, as projected in his written submissions, that the sum of Thirty-Five Million Dollars (\$35,000,000) is an appropriate award in respect of the breach of his constitutional rights. In support of this submission, heavy reliance was placed on the Privy Council's decision in **Angela Innis v Attorney General of St. Kitts & Nevis** (supra). More particularly, it was argued, that the wrong experienced by the Claimant at bar was far more egregious than in **Innis**. As a result of this, it was averred that a four-fold increase in the award which made to Miss Innis, is warranted. This four-fold figure would therefore take into consideration not only the breach of the constitutional rights of the Claimant, but also the manner in which the breach came about, the hurt feelings and the toll that the breach had on the Claimant as well as what the Claimant says is the evidence of targeted malice against him. In respect of the constitutional redress, the Claimant by his submissions, also invited the Court to find that his fundamental constitutional right to "equality before the law" which is secured by section 13(3)(g) of the Constitution was contravened. According to the Claimant, the findings and declarations of the Full Court make it unavoidable to make an award which recognizes such a breach. In furtherance of this view, the Court's attention was drawn to the Privy Council decision in **Jamaicans for Justice Defendant v Police Service Commission and another** [2019] UKPC 12 where it stated that "*...the right to equality before the law, like the right to equal protection of the law, affords every person protections against irrationality, unreasonable, fundamental unfairness or arbitrary exercise of power...*" Thus, it was reasoned that as the Claimant was denied equal protection of the law which is guaranteed by section 13(3)(g) he was entitled to redress for that contravention. The Claimant posited that such redress accorded with principles emanating from the Privy Council, in so far as it concerned the correct approach to interpreting fundamental rights provisions, which is, it argued, to give constitutional provisions a wide, purposive

and liberal interpretation. In support of this latter point, the Claimant cited the authorities **Minister of Home Affairs v Fisher** [1980] AC 319, **AG of Gambia v Joe** [1984] AC 689, **Reyes v The Queen** (2002) 60 W.I.R. 42 and **Lambert Watson v The Queen** (2004) 64 W.I.R. 241.

- [34] The Defendants on the other hand, on the question of constitutional redress, have submitted that the ruling of the Full Court did not state that the Public Service Commission could not engage public officers by way of contract. Rather, according to the Defendants, the effect of the declaration of the Full Court was to qualify the circumstances under which the Public Service Commission could engage public officers by way of contract. Furthermore, the Defendants are of the view that it is apparent from the decision of the Full Court, more particularly the declarations granted (specifically the declaration that the Claimant's termination was null and void) and those refused, that "it was the method of termination of the contract which the Court declared as void and not the contract itself which referred to and by necessary implication incorporated the provisions of the Public Service Regulations and by extension thereof the Civil Service Establishment Order." Flowing from this point of view, the Defendants have argued that any damages to be awarded to the Claimant ought not to exceed the amount which would have been payable had the contract been terminated in accordance with the Public Service Regulations and Civil Service Establishment Order.
- [35] On the issue of quantum, the Defendants drew the Court's attention to the cases of **Angela Innis v Attorney General of St. Kitts and Nevis** (supra) and **Horace Fraser v Judicial and Legal Services Commission and the Attorney General** [2008] UKPC 26. On the strength of the dicta in these authorities, it was submitted that the 1st Defendant could not be said to have chosen to ignore the proper procedure for terminating the Claimant, unlike the case of Angela Innis. Thus, it was advanced that the circumstances in the case of **Horace Fisher** were more closely aligned to the case at bar. As a result of this, the Defendant objected to the approach proposed on behalf of the Claimant of making an award which was four times more than the award in **Innis**. It was instead submitted, that any award to

the Claimant, for constitutional redress, should be much less than in Innis and closer to the award in Fraser. In a bid to strengthen this position, reliance was based on the cases of Taunoa and others v Attorney General [2007] LRC 680 and Brendon Courtney Bain v The University of the West Indies [2017] JMFC Full 3. These cases, which both concerned situations where in addition to the constitutional breach (public law) the aggrieved parties suffered a wrong in private law for which they were entitled to compensation, essentially espoused the principle that damages do not automatically flow from the breach of a constitutional right (see: Brendon Courtney Bain) and further that if damages are to be payable for such a breach *it “should be limited to what is adequate to mark an additional wrong in the breach”* (see: Taunoa and others). Proceeding on this basis, the Defendants submitted that since the status quo remained, that is, the Claimant continued in his employment with the 2nd Defendants and continued receiving his salary, the Full Court having granted declaratory relief, the Claimant ought not to be granted an award four-fold that in Innis (supra) as such an award would not operate as a vindication of the Claimant’s right but rather to punish the Executive. The case of Felix Augustus Durity v The Attorney General of Trinidad and Tobago [2022] UKPC 20 was referenced in support of the latter point.

- [36] Before the Court considers an appropriate sum to award the Claimant for the breach of his constitutional rights, both the Claimant and Defendant, have raised issues in their submissions which may have some bearing in the Court’s assessment and therefore must be first addressed.
- [37] For the Claimant, he asked the Court to find that his right under section 13(3)(g), that is, the right to equality before the law, has been contravened. This right he avers affords him protection against irrationality, unreasonable, fundamental unfairness or arbitrary exercise of power (see: Jamaicans for Justice Defendant v Police Service Commission and another (supra)). Although not explicitly stated by the Claimant which declarations of the Full Court would have given rise to this finding, based on the scope of the section, it would appear that it is the

declaration that the Claimant's purported dismissal was Wednesbury unreasonable, which would have fallen within the ambit of the section.

[38] Although the Court finds some merit in the argument being made by the Claimant on this point, it is regrettably not a finding which the Court is able to make at this juncture, as a result of the fact that an Assessment of Damage, hearing, is a trial, albeit a trial on quantum. Consequently, it is not within the ambit of this tribunal to make findings on substantive matters, as the substantive issues have already been adjudicated by the Full Court. Thus the appropriate forum where this issue ought properly to have been raised was at the Full Court stage (liability stage) of the proceedings. In fact, this is not an issue which has arisen as a result of the Full Court decision. To the contrary, having sought a declaration that the purported dismissal was Wednesbury unreasonable, it must have been foreseeable that if that declaration was granted then the effect of section 13(3)(g) would have been triggered and thus a declaration should have been sought from the Full Court in respect of it. That having not been done, the Claimant cannot now seek to rely on the section to support his argument for a higher award in respect of the relief to which he is entitled as a result of the breach of this constitutional right. If the Court were to permit this, it would be tantamount to the Claimant receiving a declaration on substantive issues through the backdoor.

[39] The Defendants have submitted that the damages to which the Claimant is entitled should be limited to the amount payable had the contract been terminated in accordance with the terms of the Public Service Regulations and by extension the Civil Service Order. This argument is premised on what they say is the finding of the Full Court that it was the method of termination which was null and void and not the contract itself. This argument has no footing on which to stand when paragraph 71 of the Full Court decision is considered. At that paragraph, it was expressly stated by the learned Lawrence-Beswick J, "I have found no authority for the Commission to enter into a contract for temporary employment of an Assistant Crown Counsel which it purported to do. Where then does that leave the appointment and employment of Mr. Austin? The purported contract would

therefore be void and the method of termination of employment detailed there would be of no effect.” It is thus apparent that the Full Court found that both the contract itself and the method of termination were void. The Defendants’ argument therefore crumbles in the face of this finding.

[40] Having addressed these preliminary issues which arose during the submissions, the Court’s next task is to determine an appropriate award to compensate the Claimant for the contravention of his rights under the Constitution. To this end, the Court notes the Full Court’s declaration that the Claimant was denied a fair hearing and that he was deprived of having the benefit of the principles, which are rights provided for by sections 13(3)(r) and 16(2) respectively. It is noteworthy though that these two sections are inextricably intertwined as section 13(3)(r) whilst establishing the right to due process makes specific mention of the fact that that right is provided for in section 16. Therefore, the breaches of these sections should not be considered separately when an appropriate award is being contemplated.

[41] To assist it in determining the relief due to the Claimant as a result of the breach of his constitutional rights, the Court finds that the case of Angela Innis which was cited by both parties, is of relevance. In that case, the appellant who was a barrister and a solicitor of the High Court of St. Christopher and Nevis was appointed to the offices of the registrar of the High Court and of additional magistrate. In pursuance of this appointment, she entered into a contract with the Governor-General to serve in that capacity for a period of two years. That contract provided that it was terminable at any time by giving three months’ notice in writing or on the payment of one month’s salary. Some five months, shy of when the contract period would have elapsed, the appellant received written correspondence purporting to terminate her contract. She resisted the termination on the basis that the Constitution prescribed the procedure for her removal from office. Proceedings were therefore commenced by the appellant in the High Court seeking a declaration that the letter of termination was null and void as it contravened the relevant section of the Constitution. In the High Court, the judge found that her removal was in contravention of the relevant provision of the Constitution and the

Defendant was ordered to pay damages for breach of her constitutional rights including exemplary damages. The Attorney General appealed and on appeal the High Court's finding that the appellant's constitutional rights were breached was reversed. The appellant appealed to the Privy Council which restored the decision of the High Court. In restoring the decision of the High Court, the Privy Council made pronouncements on considerations which the Court should take into account in arriving at an award for the constitutional breach. It was stated that *"allowance had to be made for the importance of the right and gravity of the breach in the assessment of any award. The purpose of the award, whether it was made to redress the contravention or as relief, was to vindicate the right. It is not to punish the Executive. But vindication involves an assertion that the right is a valuable one... 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 to have proper regard."*

[42] Useful guidance was also gleaned from the decision in **Merson v Cartwright and another** [2005] ALL ER (D) 144 wherein it was held that *"if a case was one for an award of damages by way of constitutional redress, the nature of the damages awarded might be compensatory but had always to be vindicatory. Accordingly, the damages might, in an appropriate case exceed a purely compensatory amount. The purpose of a vindicatory award was not a punitive purpose or to teach the executive not to misbehave, but to indicate the right of the complainant... to carry on his life... from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve that purpose would depend upon the particular infringement and the circumstances relating to that infringement. It would be a sum at the discretion of the trial judge."*

[43] From the aforementioned authorities, it is evidence, that any relief to be granted to the Claimant in recognition of the breach of his rights under the Constitution is meant to affirm the rights of the aggrieved individual. Whilst bearing this in mind, the Court must also take into consideration the exact nature of the breach and how

it came about. The Court's contemplation of the latter, will no doubt play an integral part in the relief ultimately granted to the aggrieved party.

[44] The Defendants have argued that the Claimant ought not to be given a substantial award as they claim that the breach of the Claimant's constitutional right arose as a result of an error in procedure, a situation which they say closely aligns the situation with which the Court was faced in Horace Fraser. This submission however, does not find favour with the Court. Even if the circumstances were such that the Defendants, particularly the 1st Defendant, was originally misguided as to the proper manner in which the Claimant was to be terminated, their conduct throughout the currency of this matter would deprive them of the deniability which would have accorded the defendants on Horace Fraser. This the Court disagrees with the submission that the case of Horace Fraser has more applicability to the case at bar than Angela Innis.

[45] Applying therefore the dictum in Merson, this Court's starting point is to consider the exact nature of the breach. Based on the declaration of the Full Court, the constitutional breach suffered by the Claimant was a contravention of his right to due process of the law which arose as a result of the Defendants' failure to afford him a fair hearing. This finding was supported by the Claimant's unchallenged testimony at the Assessment of Damages Hearing, that prior to receiving the letter of termination, no allegations had been levied against him neither had he been given an opportunity to be heard on the allegations which formed the basis on which he was being terminated.

[46] Having considered the nature of the breach the Court's next task is to consider the circumstances surrounding the breach. Once more the Claimant's evidence in this regard is unchallenged. It was evident from the Claimant's testimony that the first time he became aware that something was amiss was when he received the letter of termination. To further compound matters this letter of termination did not provide any reason(s) for his dismissal, although he was given reasons by the Solicitor General who had been advised of them by the 1st Defendant.

Notwithstanding, a request by the Solicitor General that he be provided with reasons at a meeting which he (the Solicitor General) requested be convened with the Claimant, the 1st Defendant explicitly refused to give those reasons to the Claimant and in fact told him that he would be offered no information to respond to and further told him that if he had anything to say he was to do so then leave. This no doubt was humiliating treatment being meted out to the Claimant and this was apparently only the beginning. A letter from his Attorney which was personally delivered to the 1st Defendant made the observation that they had “failed to state any reasons for the termination or to give Mr. Austin an opportunity to be heard prior to the termination.” That letter also contained a request for the termination to be withdrawn pending a meeting of the parties to try and have the matter amicably resolved. The 1st Defendant’s only response to this letter was to state that an adverse report was returned in respect of the Claimant after a security vetting and the meeting was refused. Thus from the initial stages, the Defendants operated in a manner which was contrary to the principles of natural justice, in that he was not informed of what the allegations against him were and neither was there any willingness to hear from him.

- [47] The Defendant’s argument that their actions were the result of a genuine error flies in the face of sound reasoning when one considers that in September 2012, the Attorney General at the time, Patrick Atkinson QC wrote to the 1st Defendant and expressed that: “We note the report made to your office by the National Intelligence Bureau of Jamaica Constabulary Force in which a number of statements are made including that Mr Austin “is described as being unreliable and dishonest... has a history of not honour his debts.” We are concerned that this report was acted upon so as to lead to the termination of Mr. Austin’s temporary engagement without Mr. Austin having been given the opportunity to seek clarification, respond to or rebut these allegations.” When this correspondence is considered against the backdrop of the fact that the Attorney general is the person responsible for representing the agents of the State, (pursuant to the Crown Proceedings Act), it would not be far-fetched to conclude that the person occupying the post of Attorney general had an

appreciation of the proper procedure which ought to have been followed. Thus, the Attorney General being the legal representative of the State and by extension the representative of the 1st Defendant should any proceedings be brought against it, having expressed an opinion similar to the view originally expressed by the Claimant's Attorney-at-Law, would have prompted any reasonable person to revisit the manner in which the termination of the Claimant was done and to at the very least try to procedurally right the perceived wrong. It is understandable that the claimant suspects malice.

[48] The conduct of the Defendants became even more egregious when one considers the finding of the Full Court, that, notwithstanding the Claimant's continued protests of his innocence, the Defendants have not undertaken any investigation to confirm the veracity of the original allegations. This failure on the part of the Defendants is to this Court indicative of malice. The Court is of this view as, if there was no ill intent by the Defendants there is no reason, and indeed none has been proffered, which can address why they neglected to carry out further investigations once the Claimant protested and continued without any heed to the fact that the protestations may have had some merit.

[49] The status of the Claimant at the 2nd Defendant's Chambers assumes some relevance here. Notwithstanding having been engaged and working at the 2nd Defendant's Chambers in a vacant post since 2012, to date he has not been appointed. This is notwithstanding the overall assessment in most, if not all evaluations done of him, indicate that he exceeds the requirement. Indeed, in recognition of his performance, the comments of the Assessment Panels as seen in the Special Report was that the Claimant "is a valuable member of the Chambers. It is recommended that he be permanently appointed." Consequent on the failure to appoint the Claimant, he is, according to his unchallenged evidence, presently the lowest paid Attorney although he is simultaneously the most experienced male in the litigation department and has been assigned as a manager for civil crown matters in the Parish Courts. Furthermore, his lack of promotion has implications for his entitlements more particularly any future pension

(see further discussion below). It is therefore evident that this state of affairs, which persists to present, has flowed directly from the breach of his right to due process and has blighted his prospects of advancement at the 2nd Defendant's office. The Court finds solace in this conclusion when it considers the finding of the Full Court found at paragraph 108 where it was said: *"this single act of termination based on an allegation of a purported serious character flaw had the potential to affect his standing in society. It would also conceivably affect any non-legal job he sought in the Civil Service for which the 1st Defendant is the sole employer."*

[50] Finally, in considering the circumstances surrounding the breach, the Court finds it is useful to assess the effect that the breach has had on the Claimant personally. In support of this, the Claimant has averred that as a result of the manner and circumstances surrounding his dismissal, he went into shock and was hospitalised for four (4) days. He states that psychiatric tests revealed that he sustained ten percent (10%) residual mental and behavioural disorder impairment. He was diagnosed as suffering from major depressive disorder/major depression. This evidence was not tested by the Defendants under cross examination and the Court accepts this evidence as being true on a balance of probabilities.

[51] The Court having considered the circumstances surrounding the breach of the Claimant's constitutional rights, find that there exists a multiplicity of aggravating features which accompanied the breach. The Court deems it particularly outrageous that the 1st Defendant, persisted in its maintenance of the wrongful termination of the Claimant, notwithstanding that they were advised, by the Attorney General, that they may have erred procedurally. Added to this is the fact that interviews were conducted and a candidate identified to replace the Claimant, even though from the outset the Claimant had registered, both personally and through the office of his Attorney-at-Law his objection to not only his termination but the basis of and manner in which it was done, is in the opinion of this tribunal indicative of a deliberate attempt by the 1st Defendant to remove him from his post at all cost. The evidence, not least of which is the fact that the 1st Defendant defended its erroneous conduct for eight years until the matter was resolved

primarily in favour of the Claimant, shows that it was unrelenting in its bid to dismiss the Claimant. Furthermore, it is obvious, that there was no regard for whether the basis on which the Claimant was purportedly dismissed was true, since up to this point, no steps have been taken by the 1st Defendant to verify the allegations against the Claimant. This fact alone is sufficient to satisfy this tribunal, that the 1st Defendant either had an agenda against the Claimant for whatever reason, best known to it, or was reckless as to whether their action against him was inspired by erroneous information. Either of these state of affairs is unacceptable and an aggravation of the circumstances surrounding the breach of the Claimant's constitutional rights.

[52] When the foregoing is considered against the background that the 1st Defendant is an entity of the state, and as such it is expected that it would not only have been seized of the principles of natural justice, but would have applied them in their treatment of persons employed in the public service, the aggravation in the circumstances of the breach is further revealed. Accordingly, the failure of the 1st Defendant to comply with established standards cannot be excused or underplayed. As agents of the state, they are expected to comply with the constitution, the laws and procedures as well as the rules of natural justice and ultimately fairness.

[53] It is noteworthy, that the Court's attention was also drawn to the fact that as a result of the 1st Defendant's conduct, the Claimant's professional standing has been tainted. The evaluations of the Claimant, clearly evidence that he is excellent at the work that he undertakes at the office of the 2nd Defendant and consistently exceeds the requirements imposed on him. It would therefore follow, that an individual who possesses the Claimant's work ethic and who produces the results which he does would have great prospects of advancement, if not at the 2nd Defendant, at some other entity within the civil service. This was however, not the case as flowing from the 1st Defendant's conduct, after eight years of service, he remains the lowest paid Attorney at the 2nd Defendant's office. This is a state of affairs which exists in an environment where the Claimant is the most experienced

male litigator and has even been given managerial responsibilities in addition to his functions as Assistant Crown Counsel. Since it is the 1st Defendant who bears the responsibility of making recommendations for appointments, it is not surprising that the Claimant has not been appointed in or moved from the position at which he entered the civil service. It is patent that the 1st Defendant, quite improperly exercised its powers in a manner which was prejudicial to the Claimant. This conclusion is strengthened when it is considered against the backdrop that the Claimant was not paid allowances attached to the post in which he was employed. Some allowances are not dependent on permanent appointments, but rather on employment in a post, the Claimant therefore having remained in his position, pending the determination of the judicial review claim, was entitled to the monthly allowances affixed to the position of Assistant Crown Counsel and the Court can find no reason, (and no reason was offered by the Defendants, to justify the failure to remit the monthly allowances to the Claimant.

- [54] A significant aggravating factor is the negative effect that the breach has had on the Claimant and in particular his health. The conduct of the 1st Defendant was so calculated, persistent and extensive that it resulted in the Claimant's hospitalization for four days, as he went into shock. To further compound the situation, the circumstances had a detrimental effect to the mental health of the Claimant, which manifested itself in the nature of major depressive disorder/major depression.
- [55] Hence, the submission of the Defendant, that the case at bar is more closely aligned to the case of **Horace Fraser** where there was an error on the part of the Commission in the following the procedure, is without merit.
- [56] It is based on the totality of the foregoing, that the Court cannot agree with the submission of the Defendant that as the Claimant remained employed a lump sum award as was done in **Innis** is not supported. This submission cannot be maintained especially when it is noted that the Court in Innis made an award of EC \$50,000 to represent the sum remaining in her contract and another EC \$50,000 as compensation for the constitutional breach. This Court is at liberty to consider

the nature and circumstances of the breach and make an award to vindicate the right of the Claimant.

[57] As regards the Claimant's submission that the entire award in *Angela Innis* of EC \$100,000 should be awarded to the Claimant, four-fold, the Court notes firstly, that that award took account of the breach of contract as well as made an award for the constitutional breach. As a breach of contract is not a feature of the case at bar it would not be appropriate to take the entire sum into account. Therefore, the Court will only use as its guide the sum of EC \$50,000 which was awarded in respect of the constitutional breach. At the time of the award in February 2000, EC \$50,000 was equivalent to Seven Hundred Seventy-Two Thousand Six Hundred Fifty-Seven Jamaican Dollars Thirty-Six Cents (\$772,657.36). Using the Consumer Price Index of January 2020, that sum now updates to Three Million Eight Hundred Ninety-Nine Thousand Seven Hundred Thirty-Two Dollars and Ninety Cents (\$3,899,732.90). The Court however agrees that an award greater than that awarded in *Innis* is appropriate as the circumstances surrounding the breach were more egregious. In *Innis* the most egregious nature of the breach was that the Claimant had a strained relationship between herself, senior civil servants and a senior member of the judiciary and as such the Court had "*absolutely no doubt that the letter was the result of a desire on the part of the Executive to rid itself of, as he put it, 'this 'turbulent' Registrar'*". This bears similarity to the unverified allegations levied against the Claimant herein. However, the Claimant at bar, had far more serious extensive surrounding circumstances and effects, which have been delineated at paragraphs forty-nine (49) to fifty-seven (57) hereof.

[58] The finding of the Privy Council in **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15 assumed some relevance in the Court's determination of an appropriate award. It was stated there that "*when exercising this constitution jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him*

*compensation... 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 the breach, and deter further breaches**" (my emphasis). In Merson v Cartwright (supra), the Privy Council in discussing an appropriate award to vindicate the right of the complainant stated "*it will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.*" The decision in Ramanoop further affirms the purpose which an award of vindicatory damages is meant to serve.*

- [59] Due process of the law and the right to a fair hearing are inextricably interwoven into the fabric of employer/employee relationships through this country and it is therefore a right which assumes much importance and its importance requires emphasis in the case at bar. Considering the importance of the right, and the constitutional elements in this case, it is necessary to send a clear message. The circumstances surrounding the breaches herein warrants an award which contains a measure of deterrence, a recognition that the breach is not trivial and vindication of those rights. The court also recognises that the purpose of the award is not to punish the Executive. Notwithstanding this, the court finds that a significant award is necessary.
- [60] The Court finds that an award four-fold the award granted in Innis for the breach of her constitutional rights, is an appropriate award for vindicatory damages. The Court therefore awards the sum of Fifteen Million Five Hundred Ninety-Five Thousand Nine Hundred Thirty-One Dollar Sixty Cents (\$15,598,931.60).

Pension

- [61] In respect of entitlement to pension, the Claimant has asked that the Court make an Order that the Defendants forthwith and in any event within thirty (30) days retroactively address and repay the losses in respect of the Claimant's pensionable entitlements and superannuation account payments. Meanwhile, the Defendants proceeding on the erroneous basis that the Claimant's appointment took place retroactively from September 1, 2012 have argued that the entire period of the Claimant's employment in the government beginning from September 1, 2012 would be considered as pensionable service when determining his pensionable benefits which would accrue on retirement and/or resignation from the government service.
- [62] In resolving this issue, the Court first notes that The Pension (Public Service) Act, 2017 provides at section 4(1) that: "Subject to the provisions of this Act, pensions, gratuities and other allowances shall be payable to pensionable officers in accordance with this Act and regulations made hereunder." The Court makes further reference to The Pensions (Public Service) Regulations, 2018, which provide at section 11 that *"subject to the provisions of the Act and these Regulations, every pensionable officer under the Government of this Island, who has been employed in the public service for ten years or more, may be granted, on retirement, a pension..."* A further reading of this section reveals the requirement for the pensionable officer to be permanently appointed in the public service and in fact sets out specific criteria in calculating the pension of those individuals "born on or before 1963 and permanently appointed in the public service before April 1, 2018" and those officers born after March 31, 1963 and permanently appointed in the public service before April 1, 2018: Given the Claimant's acting status, section 9 of the Regulations is of utility. That section provides: *"Any period during which a pensionable officer has performed only acting service in a pensionable office may be taken into account as pensionable service if the period of such acting service (a) is not taken into account as part of the pensionable officer's own pensionable service; and (b) is immediately preceded or*

followed by service in a substantive capacity in a pensionable office under the Government.” The clear intent of these sections is that though any period of acting may be taken into account in order to fulfill the ten years of service requirement for eligibility to be paid a pension, such period only becomes relevant after the officer has been permanently appointed in the post. This conclusion is consistent with the view expressed by the Court at paragraph 70 of the Full Court decision where it was found that: *“Mr. Austin held a position which was gazetted as being pensionable, and he would become pensionable if he were confirmed permanently in the post.”* Hence, proceeding on the Court’s earlier finding that the Claimant has not been permanently appointed in his post, then the pre-requisites have not yet been satisfied for the Claimant to be deemed pensionable. The Court as such cannot make the orders sought by the Claimant in respect of this claim. In any event, this tribunal is not of the view that an Assessment of Damages hearing is the proper forum at which this declaration should be sought. This is a matter for the Court who has conducted the trial on liability as it would have been within that Court’s purview to grant an order of mandamus ordering the 1st Defendant to perform its statutory duty, as found under the Pensions Act. In any event the Court would expect that the 1st Defendant would do whatsoever is required on the Claimant’s permanent appointment to ensure that his pensionable benefits accrue to him.

Special Damages

- [63] The Claimant has made a claim for special damages in the sum of Two Hundred Sixty-Five Thousands Dollars which represents the cost associated with his initial legal fee and cost of transportation.
- [64] It is trite that special damages must be specifically pleaded and proved. It is also accepted that there exist certain items of special damages which may be difficult to specifically prove such as transportation. Nonetheless, there should be evidence as to how the cost was incurred. This court does not find that the Claimant has proffered any evidence in proof of his assertion that he has in fact expended these

out of pocket expenses. Whilst the Court accepts that it is likely, due to the nature of the proceedings, he would have incurred these costs, the Claimant ought to have lead some evidence which would have satisfied the Court on a balance of probabilities for this. For example, there should have been an invoice from the Attorney or a receipt evidencing the cost associated with the initial fee and in respect of transportation there should have at least been testimony of how this sum was incurred, for example whether it was to charter a vehicle or to purchase gas for his vehicle.

[65] The Claimant having not done this the Court is not satisfied on a balance of probabilities that these out of pocket expenses were expended by the Claimant. Thus the special damages claimed will not be awarded.

Disposition

[66] Proceeding from the Court's findings herein, the following are the orders of the Court:

- (1) Vindictory damages in the sum Fifteen Million Five Hundred Ninety-Eight Thousand Nine Hundred Thirty-One Dollars Sixty Cent (\$15,598,931.60) with interest from March 9, 2012 to March 6, 2020.
- (2) Costs to the Claimant to be taxed if not agreed.