BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 0011 of 2011

BETWEEN:

RICHARD GLENDON ISHMAEL

Claimant

AND

THE QUEEN ELIZABETH HOSPITAL BOARD

Defendant

Before:

The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court

Appearances:

Mr. Leslie F. Haynes, Q.C. in association with Ms. Laura F. Harvey-Read and Ms. Karen A. Perreira for the Claimant

Mr. Hal McLaren Gollop in association with Mr. Michael R. Yearwood and Mr. Wayne Clarke for the Defendant

----

2011: January 6, 10, 12 and 24

June, 14

March 14, 15 and 30

2013: June, 24

JUDGMENT

[1] **Cornelius, J**: In this action, Dr. Richard Ishmael seeks injunctive relief and damages for breach of his employment contract against his current employer, the Queen Elizabeth Hospital Board, for an allegedly wrongful suspension

imposed upon him.

THE CLAIM

[2] Dr. Ishmael, the Claimant, is a Barbadian cardiologist of some repute, possessing impressive academic qualifications and professional experience. He is employed by the Defendant under a fixed term contract and also lectures at the School of Clinical Medicine and Research at UWI, Cave Hill, specializing in pediatric cardiology.

[3] The Defendant is a body corporate established pursuant to **section 5** of the ***Queen Elizabeth Hospital Act, Chapter 54 of the Laws of Barbados***. Pursuant to **section 6(1)** of this Act its function is to administer and manage the sole public hospital on the Island, the Queen Elizabeth Hospital (hereinafter sometimes referred to as "QEH").

[4] Since 1988, the Claimant has been employed at the QEH as a consultant within the Department of Cardiovascular Services. The terms and conditions of his employment have usually been governed by written contracts of employment for fixed terms of around three years. After the Defendant was established by the ***Queen Elizabeth Hospital Act***, these contracts of employment have been between Dr. Ishmael and the Defendant instead of directly with the Government of Barbados.

[5] By letter dated December 10, 2010, the QEH through its CEO suspended Dr. Ishmael with full pay subject to an investigation. It is this suspension and any proposed investigation that Dr. Ishmael seeks to impugn and prevent.

THE FACTS

[6] The facts leading to the letter of suspension are largely undisputed. On May 1, 2007, the Claimant and the Defendant entered into one of their usual formal contracts of employment (hereinafter called "the Agreement"). The Agreement was the last written contract of employment between them and, like the previous contracts, was for a fixed term. The fixed term of the Agreement was a period of three years commencing on May 1, 2007 and expiring on April 30, 2010.

[7] By its fourth clause the Agreement was subject to the terms and conditions set forth in the schedules annexed to it, as well as the Letter of Appointment. Clause 4 further provided that the Claimant was subject to the provisions of the ***QEH Act***, the Terms and Conditions of Service for Employees of the Queen Elizabeth Hospital and any administrative directives as may be put in force by the Defendant.

[8] The Terms and Conditions of Service for Employees of the Queen Elizabeth Hospital (hereinafter called "the Terms and Conditions of Service") include a Code of Conduct outlining the responsibilities owed by QEH employees to the Hospital and to patients in its care, as well as a Disciplinary Procedure to be followed where the conduct of an employee is called into question. The Terms and Conditions of Service also include separate sections on the Employment Policy, Training and Development, Performance Appraisal, Remuneration, Leave of Absence, Health and Safety, Security and Retirement.

[9] The Disciplinary Procedure set out in the Terms and Conditions of Service categorizes the offences by employees meriting disciplinary action as being either major or minor in nature and establishes two different and separate procedures for the adjudication of each category of offence. The relevant provisions of the Terms and Conditions of Service incorporated into the Agreement will be discussed in greater detail further in the judgment.

[10] Upon the expiry of the Agreement, the Claimant continued to provide his services and exercise his duties as Consultant within the Department of Cardiovascular Services, while the Defendant continued to pay him for so doing under the same terms and conditions as established under the Agreement. As of the date of trial, the Claimant continues to be employed by the Defendant under these same terms and conditions. Both parties appear to have accepted that these terms and conditions, including the Terms and Conditions of Service, remain applicable to their employment relationship.

[11] On November 17, 2010, the Claimant wrote a letter regarding an incident that had occurred at the Hospital involving attempts that were allegedly made to transfer the treatment of an English tourist admitted to the Hospital as a cardiac patient in October 2010 to a private institution. The letter was allegedly written in his capacity as Consultant Cardiologist of the QEH and bore the official QEH letterhead. In that letter, the Claimant made some allegations about the conduct of certain individuals during the course of that incident.

[12] The Claimant's letter was addressed to Dr. Delores Lewis, who was the QEH Director of Medical Services. It was copied to the Hospital's Chief Executive Officer (CEO), its Chairman, the heads of various departments and other consultants within the Claimant's own department of Cardiovascular Services. It was also copied to a number of persons outside the Hospital, namely the Minister of Health, the Chairman of the Medical Council and the President of the Barbados Association of Medical Practitioners (BAMP).

[13] On December 1, 2010, some time after the letter was sent, the acting Director of Medical Services, Dr. Cave, telephoned Dr. Ishmael and invited him to attend a meeting with the Defendant's CEO on that same date. Dr. Ishmael

declined to do so, stating as his reason the fact that he had neither received the agenda of the meeting nor sufficient notice of it.

[14] The very next day, the Claimant received a letter dated December 2, 2010 from Dr. Dexter James, the CEO of the Hospital, in which Dr. James requested that the Claimant meet with him that very day. Dr. James indicated in his letter that the purpose of the meeting was "*to ascertain the reasoning precipitating the correspondence of November 17 2010 to the DMS and an explanation as to why it was circulated to persons other than personnel of the Board of Directors of the Queen Elizabeth Hospital*".

[15] In his letter Dr. James also warned the Claimant that if the Claimant failed to attend the meeting, his failure to do so would be regarded "*as an act of insubordination which merits the advice and direction of the Human Resources Committee*".

[16] The Claimant met with Dr. James as requested. Dr. Cave was also present at the meeting and in that meeting the Claimant explained why he had written the letter. He indicated that all of the persons who received the letter were persons involved with the governance of medicine at the QEH specifically or in Barbados more generally and persons who he believed should be informed about the event that had taken place.

[17] Dr. James, the CEO of the Hospital, wrote and had delivered to the Claimant a letter dated December 10, 2010 entitled "*Re – Notice of Suspension*" (hereinafter called "the suspension letter"). Through the suspension letter, Dr. James informed the Claimant that:

> "*By your letter of November 17, 2010 you alleged that the Director of Medical Services of the Queen Elizabeth Hospital and the Minister of Health engaged in conduct with a view of sending a seriously ill-patient of the Queen Elizabeth Hospital to a private institution run by Dr. Alfred Sparman, an unqualified individual with questionable credentials and a checkered history.*
>
> *Further and in the alternative, you without lawful permission or authority and in breach of Clause 9.2.2 of the Terms and Conditions of Service for the Employees of the Queen Elizabeth Hospital thereof, on November 17, 2010, made use of the QEH letter head to transmit internal operational matters to persons other than those who are lawfully authorized to receive such matters and in so doing, conveyed information to persons outside the governance framework of the Queen Elizabeth Hospital."*

[18] The letter from the CEO further stated that:

> *"Your action is an offence as set out at 5.2.1 and 5.2.5 of the Terms and Conditions of Service for the Employees of the Queen Elizabeth Hospital."*

[19] The CEO, acting on behalf of the Defendant, then sought in that letter to suspend Dr. Ishmael on full pay and with immediate effect allegedly pursuant to Clause 5.2.2 of the Terms and Conditions of Service.

[20] The suspension letter also informed Dr. Ishmael that pursuant to Clause 5.2.17 of the Terms and Conditions of Service an enquiry into the allegations would be carried out on or before January 14, 2011 and that charges may be brought against him arising out of the investigations.

[21] Despite the suspension, the Claimant was summoned to, and did visit, the Hospital on two separate occasions in order to help treat critically ill pediatric patients. Neither visit was prevented by the Defendant. Aside from these visits, the Claimant complied with the suspension imposed upon him. However, by a letter dated December 27, 2010 addressed to the CEO of the Hospital, the Claimant by his attorney-at-law, Mr. Leslie Haynes, Q.C., contested the suspension and outlined the grounds on which he did so.

[22] Dr. James never responded to the letter sent by the Claimant's attorney-at-law and the Claimant by an Application filed on January 6, 2011 under a Certificate of Urgency and supported by an affidavit sworn by him, applied for an interim injunction restraining the Defendant whether by its servants, agents or howsoever otherwise, until judgment in the matter or further order from (i) continuing and/or enforcing the suspension imposed by way of the letter of suspension; and (ii) commencing or carrying out the enquiry mentioned in that letter.

[23] On January 6, 2011 the Defendant, through its counsel Mr. Hal Gollop, gave an undertaking until the determination of the substantive matter:

(i) to preserve *the status quo* which existed immediately prior to the purported suspension of the Claimant by the letter dated December 10, 2010; and

(ii) not to commence and/or carry out an enquiry as alluded to in the letter of December 10, 2010.

[24] The undertaking was accepted by the Court and respected by the Defendant whose CEO by a letter dated January 6, 2011 lifted the suspension of the Claimant with immediate effect. However, in that letter the CEO also informed the Claimant that the lifting of the suspension did not in any way "*abridge, abrogate, prejudice and/or fetters our existing rights regarding our good governance and or internal investigation*".

[25] The Court now has to determine the substantive matter set out in the Statement of Claim filed on behalf of the Claimant in which the Claimant has alleged breach of the express and implied terms of his contract of employment and sought the following relief:

(i) a declaration that the suspension imposed upon the Claimant by the suspension letter is invalid, null and void;

(ii) an injunction restraining the Defendant whether by its servants, agents or howsoever otherwise from continuing and/or enforcing the suspension imposed upon the Claimant through the suspension letter and/or otherwise interfering with the performance of the Claimant's duties;

(iii) an injunction restraining the Defendant whether by its servants, agents or howsoever otherwise from commencing and carrying out the enquiry alluded to in the suspension letter;

(iv) damages; and

(v) costs.

ISSUES

[26] The primary issue in this matter before the Court is whether the purported suspension of the Claimant by the Defendant through the suspension letter was in breach of the Terms and Conditions of Service and/or the implied terms of the contract of employment between the Claimant and the Defendant.

[27] Secondly, this Court also has to consider whether the commencement of the enquiry alluded to in the suspension letter would be in breach of the Terms and Conditions of Service and/or the implied terms of the contract of employment between the Claimant and the Defendant.

[28] Should the Court find the suspension of the Claimant to have been wrongful and thus, null and void, the Court has then to determine whether the Claimant is entitled to general damages, as well as aggravated or punitive damages, for the contractual breaches.

EVIDENCE BEFORE THE COURT

[29] The Claimant and the CEO of the Defendant, Dr. Dexter James, both filed affidavits and/or witness statements and were cross-examined on the contents of these documents by respective opposing counsel.

Evidence of Dr. Ishmael

[30] The Claimant, Dr. Ishmael, filed two affidavits dated January 6, 2011 and January 10, 2011 respectively. In the former affidavit, he deposed that his purported suspension by the Defendant prevented him from being able to practice his profession in the manner that he had been doing. He indicated that he had suffered irreparable harm to his reputation and sustained loss of income from his private practice as a result of the suspension although the loss of income allegedly suffered was not detailed.

[31] In his examination-in-chief Dr. Ishmael gave further evidence as to the effect of the suspension upon him. He testified that the suspension prevented him from seeing to the patients he had at the Hospital, whether adult or pediatric, and also prevented him from attending to his outpatient clinic. He revealed that he had, accordingly, been obliged to transfer these patients to other colleagues. He testified that he was also prevented from admitting his private patients to the QEH and, as he could no longer admit patients to or attend to patients at the Hospital, general practitioners could also no longer refer patients to him.

[32] Dr. Ishmael gave evidence that that the suspension caused him substantial embarrassment, particularly as in all the years that he had been practicing medicine nothing similar had ever happened. He admitted that during the period of suspension he continued to have access to Bayview Hospital, a private hospital on the Island, but indicated that he had to fill out an application form to Bayview at the beginning of the year in which he was forced to reveal and attempt to explain the suspension from QEH.

[33] On cross-examination, the Claimant testified that the harm caused by the suspension was irreparable because the fact that the suspension occurred could never be denied and had to be placed upon his resume. Dr. Ishmael maintained that even if an inquiry revealed that he committed no wrong, the suspension would still be of consequence, as it could not be removed from his record. Dr. Ishmael further asserted that should he have to apply for a job, particularly if he had to do so in any other country, he would be forced to reveal in every such instance that he had been suspended.

[34] He accepted, however, that the fact of his suspension did not affect his competence as a physician and agreed that that this could be appreciated by the average Barbadian. He maintained, however, that the suspension would have a

far greater impact upon his reputation outside of the Island.

[35] Dr. Ishmael also insisted in his cross-examination that he thought it was important to write the letter that he had written because the incident affected the governance of medical services at the QEH and Barbados and the integrity of the management of the Hospital. He agreed that his letter could be reasonably interpreted as questioning the integrity of persons in the Hospital as well as persons associated with it. He also admitted that the contents of the letter were based not on his own direct knowledge, but on information he had received from other persons.

[36] The Claimant explained that he wrote the letter on official QEH letterhead because the letter was written in his capacity as Consultant Cardiologist and related to the work of the hospital, and he took the view that the QEH letterhead was not limited to correspondence within the Hospital but was also used in communication with persons outside QEH. He maintained that he copied his letter to persons he thought were appropriate and opined that BAMP and the Medical Council, as the bodies responsible for the governance of the medical profession in Barbados, were suitable recipients.

[37] The Court found Dr. Ishmael to be a well-prepared and truthful witness, and accepts his evidence as to the facts, circumstances and effects of his suspension.

Evidence of Dr. James

[38] Dr. James, the CEO of the Hospital, filed a Witness Statement on behalf of the Defendant in this matter on February 4, 2011. The Witness Statement of Dr. James was not amplified but he was cross-examined on its contents.

[39] In his Witness Statement, Dr. James indicated that he had received the letter sent by the Claimant on November 29, 2012 and described that letter as being "*openly critical*" of certain individuals and the act of sending it as a "*very unusual and extreme form of conduct*" on the part of the Claimant.

[40] The Court was not favorably impressed with the testimony of Dr. James. During his cross-examination Dr. James confirmed that the letter written by Dr. Ishmael came to his attention on November 29, 2010 and that he had read it and had been fully aware of its contents on that date. He sought to point out that although this letter had been dated November 17, 2010, it had been received sometime after that.

[41] Dr. James also testified that he had attempted to meet with Dr. Ishmael on the earliest possible date available to both of them and, according to him, December 2, 2010 had been that date. The meeting with Dr. Ishmael on December 2, 2010 was intended to be fact-finding in nature and to ascertain among other things why Dr. Ishmael had taken such a long time to send his letter and what drove him to write the letter. Dr. James claimed that it was through that meeting that he became aware of the concerns motivating Dr. Ishmael to send the letter he did. He denied that he had learnt nothing further from that meeting that he had not already known from reading the letter.

[42] Dr. James further explained in his Witness Statement that it was on December 3, 2010, after he had reflected upon his meeting with Dr. Ishmael and reviewed the letter, that he formed the opinion that the Claimant had breached the Terms and Conditions of Service by (i) using the QEH letterhead to convey internal operational matters to persons other than those who are lawfully authorized to receive them without permission or lawful authority to do so; and (ii) conveying information to persons outside of the administration of the QEH. He was of the opinion that these actions constituted major offences under Section 5.2.5.

[43] Dr. James appeared somewhat evasive as to whether one or two offences had been placed against Dr. Ishmael. He implied the existence of more than one offence in his suspension letter, as well as his Witness Statement, but maintained in cross-examination that there had only been one offence. However, he agreed that the suspension letter may have made it seem as if there was more than one charge and explained reluctantly that the letter may have been badly drafted.

[44] Moreover, despite categorically stating in his Witness Statement the offence/s that he believed Dr. Ishmael to have committed, Dr. James appeared confused in his cross-examination as to the precise nature of the offence laid against the Claimant and the relationship of the offence as set out in the suspension letter to the specific provision of the Terms and Conditions of Service that it had been alleged had been breached.

[45] He indicated at one point that the charge in the letter implied that the letterhead was used for purposes other than the work of the hospital but did not seem certain as to whether the letter expressly stated so or whether it could be implied from it by its reference to Clause 9.22, which he maintained was the section of the Terms and Conditions of Service that had been breached by the Claimant.

[46] Dr. James denied, despite Mr. Haynes' assertions to the contrary, however, that he had failed to follow the Terms and Conditions of Service by not bringing the charge within seven days. He insisted in cross-examination that his letter of suspension was not out of time because, according to him, he had formed the opinion on the matter on December 3, 2010 and time only began to run after he had formed his opinion. This interpretation of the Terms and Conditions of Service, he asserted, was feasible because the CEO was obliged to form his opinion expeditiously.

[47] While agreeing that that he was exercising powers under section 5.2.22 when he suspended Dr. Ishmael by the suspension letter, he maintained that the reference in the suspension letter to section 5.2.2 was merely a typographical

error. He also testified that the suspension letter set out the reasons for the suspension in accordance with the Terms and Conditions of Service.

[48] Dr. James accepted that as the CEO of the Queen Elizabeth Hospital he had the discretion under section 5.2.22 to determine whether the Claimant, who was the sole pediatric cardiologist at the Hospital, should be suspended and confirmed that the decision to suspend had been made by him. It was the evidence of Dr. James that he thought it necessary to suspend Dr. Ishmael because he believed the matters contained in the letter from Dr. Ishmael dated November 17, 2010 were "*sufficiently grave and serious*" and that Dr. Ishmael should be removed from the Hospital so as to not prejudice or affect in any way the investigations pertaining to the matters contained in the letter. It was his opinion that the suspension would help to ensure that these investigations were carried out expeditiously and he stated that he even established a time frame by which they could be conducted.

[49] While testifying that the letter from the Claimant had made allegations about other parties, Dr. James admitted that the persons against whom allegations of misconduct were made had not been suspended.

[50] Dr. James explained the purpose of the enquiry as not only to determine whether the charge set out in paragraph 2 of the suspension letter was made out, but for other matters as well. The CEO hesitantly conceded that the Terms and Conditions of Service did not provide for an enquiry to determine other matters, but asserted that the contents of Dr. Ishmael's letter raised a number of issues and concerns relating to security and confidentiality that could potentially impair the good governance of the institution and believed it appropriate for the enquiry to look into these other matters.

[51] Dr. James also admitted in cross-examination that the letterhead of the Hospital was used in correspondence to persons outside the QEH, provided that the content of the letter related to the work of the Hospital and was, according to him, sent by persons authorized to do so.

[52] In contrast to the evidence of Dr. Ishmael, the Court found the evidence of Dr. James to be, as mentioned before, rather unsatisfactory: vacillating, and at times evasive and hesitant.

SUBMISSIONS TO THE COURT

[53] The argument for the Claimant is quite straightforward. His case is that his suspension was wrongful and in breach of the express and implied terms of his contract of employment with the Defendant. The Claimant is, as a consequence, entitled to damages.

[54] Counsel for the Claimant sought to impugn the suspension on the following four grounds:

(i) The CEO purported to act pursuant to Clause 5.2.2 which neither empowered nor authorized him to suspend the Claimant;

(ii) The alleged offence contained in the suspension letter cannot, without more, amount to an offence within the definition of Clause 5.2.5 or otherwise;

(iii) Clause 9.2.2 does not make it an offence to use the letterhead of QEH to convey information to persons not employed or otherwise unconnected to the Defendant; and

(iv) If the suspension letter contained charges, these charges were not brought within the 7 days allowed under clause 5.2.22 and cannot, therefore, now be brought.

[55] The Defendant countered, firstly, with the argument that the subject of the claim was essentially breach of an employment contract, which was a private law matter. He pointed out that the Claimant had not denied that the Defendant had a power to suspend him under the terms and conditions of the employment contract and stressed that it was clear that the terms and conditions governing the employment relationship between the Claimant and Defendant permitted the Defendant to suspend the Claimant.

[56] Secondly, he contended that at common law a master had the right to suspend an employee with pay. Counsel relied on the case of ***Emerald Holder v Caribbean Air Cargo Co. Ltd. (unreported) High Court of Barbados Civil Suit No. 719 of 1983, Decision of June 8, 1984*** and argued that the employee could not maintain an action against his employer for such a suspension unless the contract did not provide for suspension and the suspension was effected without pay.

[57] Thirdly, it is submitted that Claimant had misinterpreted the Regulations, insofar as Clause 5.2.5 clearly stated that major offences included, but were not limited to those listed in that clause. Under Clause 9.22, the letterhead of the Queen Elizabeth Hospital was the property of the Hospital and could only be used for official correspondence, and breach of Clause 9.22 constituted a major offence under Clause 5.2.5 and was therefore an offence for which the Defendant could suspend the Claimant.

[58] Some time was spent on the definition of the word "*aware*" in Clause 5.2.22 which mandated the Chief Executive

Officer to bring a charge against an employee "*within seven (7) days of becoming aware of the committal of a major offence*". The Defendant urged the Court to accept a wide definition. In counsel's view, the word "*aware*" should not be interpreted restrictively so as to mean the time at which the CEO was aware of the facts of the matter, but should instead be interpreted so as to include not only his knowledge of the facts but his contemplation of whether the facts gave rise to a major offence. This interpretation, argued Counsel for the Defendant, led to the clear conclusion that the charge had been laid against the Claimant within the time period stipulated by the Terms and Conditions of Service.

[59] Finally, Counsel for the Defendant contended that the question of the validity of the charge should be left to the domestic tribunal conducting the investigation unless there was persuasive evidence to suggest that the issues had been prejudged or that prescribed procedures would not be followed. He argued that there was no such evidence in this case.

THE VALIDITY OF THE SUSPENSION

[60] It is common ground that despite the expiry of the last formal contract of employment between them on April 30, 2010, its terms and conditions, including the Terms and Conditions of Service incorporated into it, remain applicable. In any event, this is clearly evident from the evidence placed before the Court.

[61] Both parties agree that that the Defendant's power to suspend the Claimant pending the investigation into an offence allegedly committed by the Claimant was grounded in the Terms and Conditions of Service. Therefore, in order to rule upon the validity of the suspension, the Court is called upon to interpret the relevant provisions of the Terms and Conditions for Service to determine whether the suspension of the Claimant was conducted in accordance with these provisions. The interpretation of a contract is a question of law and in interpreting the Terms and Conditions of Service, which form part of the Claimant's employment contract, the Court is required to interpret or construe the provisions so as to ascertain and then give effect to the mutual intention of the contracting parties, as objectively determined from the ordinary and plain meaning of the words used when considered against the backdrop of the surrounding circumstances including the background knowledge reasonably available to the parties and the object of the contract: ***Kim Lewison, The Interpretation of Contracts (Third Edition*).**

The Terms and Conditions of Service

[62] Part 5.2 of the Terms and Conditions of Service establishes the Disciplinary Procedure by which the Defendant addresses and determines allegations of misconduct against QEH employees. The first clause of this part, Clause 5.2.1, provides that disciplinary action may be taken against an employee if the Defendant is satisfied that the employee has committed an offence.

[63] Clause 5.2.2 stipulates that disciplinary proceedings may be instituted or continued against an employee under investigation for the commission of an offence leading to criminal charges.

[64] Clauses 5.2.3 to 5.2.5 deal with the categorization of offences into major and minor. Clause 5.2.3 provide as follows:

> *5.2.3 Employees shall be subject to disciplinary charge for a minor or major offence. A 'minor offence' means offences involving misconduct that does not warrant dismissal and a 'major offence' means misconduct of a serious nature which warrants the dismissal of the offending employee.*

[65] Clause 5.2.4 lists the minor offences and indicates that they include but are not limited to unjustified tardiness, malingering while on duty, failure to keep stipulated records, use of improper language while on duty and incivility.

[66] The major offences are listed in Clause 5.2.5 but are not confined to those listed therein. The offences listed in that provision include dishonesty, fighting, absence without justifiable reason or prior permission and the failure to observe any laws, orders, rules or regulations that ought to be observed. The Defendant has contended that the Claimant has failed to observe a regulation that ought to be observed, namely Clause 9.2.2 of the Terms and Conditions of Service.

[67] Part 9 of the Terms and Conditions of Service is entitled "*Security.*" Clause 9.2 concerns property. Clause 9.2.2 of this part provides as follows:

> *Letterheads, Official Seals and Franking Stamps*
>
> *9.2.2 Letterheads, Official Seals and Franking Stamps are the property of the Board and should only be used for the work of the hospital.*

[68] Clauses 5.2.6 to 5.2.16 of the Terms and Conditions of Service deal with the adjudication of minor offences while clauses 5.2.17 to 5.2.32 concern the adjudication of major offences. In both instances, the employee accused of the offence must be informed in writing of the alleged offence and told that an enquiry into the matter will be conducted. The employee also has a right to be represented and heard before any disciplinary action is taken and has to be advised of their right to do so.

[69] Aside from this similarity, the procedures established for the adjudication of the two types of offences are very different. Most importantly, at least for the purpose of this case, Clause 5.2.22 provides that:

> *5.2.22 The Chief Executive Officer shall within seven (7) days of becoming aware of the committal of a major offence bring a charge against that employee and may suspend him/her pending an investigation.*

[70] Clause 5.2.23 further stipulates that any employee suspended shall be suspended in writing with or such pay as the Board may decide.

[71] The Court now turns to the first prong in the Claimant's submissions on the validity of the suspension.

[72] It is beyond dispute that in his letter of suspension, the CEO, Dr. James, claimed to have suspended the Claimant pursuant to clause 5.2.2 of the Terms and Conditions of Service. It is also clear that the 5.2.2 written in the letter appeared as such was a result of the inadvertent omission of a number 2 – a mere typographical error. This was admitted by Dr. James in both his affidavit and witness statement and his evidence in this respect is accepted by the Court.

[73] A typographical error, such as that which has occurred here, is a technicality and is not itself sufficient to invalidate the suspension, although it may be symptomatic of the carelessness and haste which has characterized the actions of the Defendant in this matter. Had this been the only ground on which the Claimant had pursued his claim that the suspension was wrongful, the claim would surely have failed.

[74] The claim is also grounded in the argument that the alleged offence set out in the letter of suspension does not amount to an offence under 5.2.5 of the Terms and Conditions of Service and further that Clause 9.2.2 does not, without more, make it an offence to use the letterhead of QEH to convey information to persons not employed or otherwise unconnected to the Defendant.

[75] The offence, as stated in the letter of suspension, is that the Claimant, without lawful permission or authority and in breach of Clause 9.2.2 used the QEH letterhead to "*transmit internal operational matters to persons other than those who are lawfully authorized to receive such matters*" and by doing so conveyed information to persons outside the governance framework of the QEH. Counsel for the Defendant stressed in his written submissions that Clause 5.2.5 which pertained to major offences was not limited to the offences explicitly set out in that provision and, further, if it was so limited, the offence against the Claimant constituted "*failure to observe any laws, orders, rules or regulations that ought to have been observed*".

[76] The Court notes that the Disciplinary Procedure is incorporated in Part 5 of the Terms and Conditions of Service, following immediately after Part 4 which establishes a Code of Conduct. It stands to reason that the Disciplinary Procedure was intended primarily to govern breaches of the Code of Conduct preceding it. However, the generality of clause 5.2.5 does not preclude the breach of any other regulation from amounting to a major offence and it is not for the Court to limit the language of this section in any way.

[77] Further, a major offence is defined as a misconduct of a serious nature warranting the dismissal of the offending employee. Such serious misconduct could well arise from using the property of the QEH for purposes other than the work of the Hospital, although the Court finds it difficult to accept that the use of the letterhead in this particular situation satisfied the definition of serious misconduct. However, the issue of whether the use of the letterhead amounts to a serious misconduct is not a finding that the Court is bound to make at this stage, if at all.

[78] Counsel for the Claimant rightfully noted that Clause 9.2.2 provides that QEH letterheads should only be used for the work of the Hospital and submitted that if the Defendant was alleging breach of this clause, a full statement of charge would have mentioned that the Claimant used the letterhead for purposes other than the work of the Hospital.

[79] In his evidence, Dr. James had expressed that the fact that the Claimant had used the letterhead for purposes other than the work of the Hospital was implied within the charge as set out in the suspension letter, but Counsel for the Claimant contended that such an argument stretched the ordinary language of the charge set out. Counsel for the Defendant, on the other hand, submitted that the evidence of the Defendant was that those persons outside QEH to whom information was sent were not entitled to receive that information and sending the Claimant's letter to them did not further the work of the Hospital. He argued that whether or not the Claimant was entitled to send his letter to the persons to whom he sent it was for the Court to determine.

[80] The Court accepts that QEH does not exist in a vacuum and in furtherance of its work the letterhead is very likely to be regularly used to communicate with persons outside the governance framework of the Hospital. Dr. James conceded this in his evidence.

[81] As to the charge that the CEO attempted to set out in the suspension letter, it is clear that this charge and the letter itself were very badly drafted. The letter of suspension was drafted, it would appear, without a full understanding of the Terms and Conditions of Service, and without seeking, it is devoutly to be hoped, any legal advice on the situation

and how to effectively deal with it. It is not immediately apparent on the face of the letter precisely what offence was being alleged against the Claimant and the evidence of its author was crucial to understanding the letter, although the Court notes that the author himself did not appear to fully understand how the charge laid against the Claimant related to the Terms and Conditions of Service.

[82] ***Stevenson v United Road Transport Union [1977] 2 All ER 941 at p 951***, to which Counsel for the Claimant drew the Court's attention, is authority for the proposition that where there was no certainty as to a charge, the charge will be a nullity or bad for duplicity or ambiguity. Thus, the charge, if one could indeed discern one from the suspension letter, was without doubt ambiguous. It was not apparent on the face of the letter what specific charge or charges were being placed against the Claimant and the charge set out in it had only been understood after the author of the suspension letter, Dr. James, attempted to justify it, with only moderate success, in his cross-examination.

[83] The Court accepts the submission of Counsel for the Claimant that the offence as drafted in the letter did not fully correspond with what is prohibited by Clause 9.2.2., and is of the view that no reasonable tribunal could regard the charge as being a valid one.

[84] I turn now to the final ground advanced by the Claimant, which is that the Defendant brought charges against the Claimant outside of the time stipulated by clause 5.2.22. This ground requires the Court to interpret the relevant clause and any interpretation of the Regulation must of course begin with the ordinary words of the provisions, the language of which appears to be clear and unambiguous.

[85] Clause 5.2.22 provides that a charge shall be brought against an employee within 7 days of the CEO becoming aware of the committal of an offence. As the Court noted earlier, Counsel for the Defendant has urged upon the Court an expansive interpretation of the term "*becoming aware*". He has argued that the term should be interpreted to include not only having knowledge of the facts giving rise to the allegation but also to the forming the opinion that these facts constituted an offence.

[86] The word "*aware*" is defined by the ***Oxford Dictionary of English (Second Edition)*** as "*having knowledge of a fact*" while "*become*" refers to a change of condition according to ***Volume 1 of Stroud's Judicial Dictionary of Words and Phrases (Sixth Edition)***.

[87] Accordingly, I am not swayed by the Defendant's submission on this point. Had the drafters of the Terms and Conditions of Service wished for the 7 days to run after a conclusion was formed on the facts they should have explicitly stated this to be so.

[88] The Defendant has not offered any reason why his interpretation should be favored when it clearly does not accord with the ordinary and natural language of Clause 5.2.22 and I therefore reject his submission that there is any need to construe this section in any other way than it was clearly intended to be construed.

[89] Accordingly, the offence laid against the Claimant was laid out of time and the suspension was therefore wrongful and in breach of the Terms and Conditions of Service.

[90] The Terms and Conditions of Service were drafted to establish a proper practice and procedure to be used in dealing with a wide array of employment issues. With respect to the disciplinary procedure specifically, this procedure was clearly intended to ensure that any allegation against any employee suspected of being guilty of an offence was dealt with expeditiously and fairly.

[91] Suspension of an employee, whether or not with full pay, is not a decision to be lightly taken. The power to suspend should not be wielded arbitrarily. It is a decision that should be exercised within permitted limits only. In this case the permitted limits have swollen and overflowed their borders.

Should the Court prevent the commencement and continuation of the investigation?

[92] The Defendant, relying on ***Longley v National Union of Journalists [1987] IRLR 109*** and ***Ali v Southwark LBC (supra)***, has strenuously argued that the Court should not intervene to prevent the commencement of the inquiry, The Claimant has relied on the same cases as Counsel for the Defendant to argue that this was an exceptional case justifying the intervention of the Court.

[93] Gibson, LJ of the English Court of Appeal held in ***Longley v National Union of Journalists (supra)*** that:

> *"…the court would not interfere to prevent a domestic tribunal from hearing and adjudicating a complaint unless the court was satisfied that no reasonable tribunal acting bona fide could uphold the complaint, and that only in the most exceptional circumstances would it be right for the Court to interfere…"*

[94] The Court went on to state:

"Where there is no reason to doubt the intention of the tribunal's members to act fairly and responsibly in the matter, the tribunal should be left to deal with the case unless there is some good reason to protect the plaintiff from having to face the proceedings which are brought under the rules of the society to which he belongs. An example of such a reason might be that the tribunal has in the past misconstrued and misapplied the rules and is likely to do so again in a similar case."

[95] The Court is obliged to agree with Counsel for the Claimant in finding that the case before it is an exceptional case. The time period for laying a charge against the Claimant under the Terms and Conditions of Service has been completely ignored by the Defendant.

[96] The time period for placing the charge is mandatory in nature. The Defendant is obligated to comply strictly with it, as opposed to being merely guided by it. The Court can therefore only conclude that the failure to follow the time period for laying the charge against the Claimant means that the Defendant has no authority to conduct an enquiry in so far as it relates to the offence with which the Claimant was charged through the letter of suspension. To do so would place the Defendant once more in breach of the Terms and Conditions of Service.

DAMAGES

[97] The Claimant not only sought damages for breach of contract, but aggravated or punitive damages also. His claim for damages and aggravated or punitive damages was strongly resisted by the Defendant, who argued that the Claimant was not entitled to the damages sought, even if the suspension was found by the Court to have been wrongful, as it has been. *Restituto ad integrum*, it was submitted, was the purpose of an award of damages for breach of contract and the Claimant had failed to provide any evidence of any financial loss suffered as a result of the suspension. Further, the Claimant had in fact been suspended with full pay during the term of the suspension and had not therefore sustained any financial loss directly attributable to it.

[98] On the question of damages Counsel for the Claimant relied on the English case of ***Ashby v White (1703) 2 Ld Raym 938*** to argue that the law presumed or implied damage in every breach of contract. He submitted that the Claimant was accordingly entitled to damages regardless of whether he established any loss, but wisely conceded at trial that the damages recoverable for breach of contract would be nominal in nature.

[99] However, Counsel maintained that as the suspension had been imposed by the Defendant in bad faith the case was one which also merited aggravated or punitive damages. According to Mr. Haynes, Q.C. the Claimant's evidence was that the damage to his reputation resulting from the suspension would persist in causing him embarrassment because he would have to reveal and explain its occurrence on every application to any other institution. Given the esteem with which Claimant was both locally and internationally held and the continuing impact of the suspension upon his reputation, the aggravated damages to which the Claimant was entitled was in the region of $600,000.00. In making this submission, Counsel relied solely upon the case of ***Watson v Durham [2008] EWCA Civ 1266***.

General and Nominal Damages

[100] The Court will deal first with the issue of damages generally and then that of aggravated or punitive damages.

[101] The Court has found that the Defendant, in suspending the Claimant in the manner in which it has done, has breached the contractual obligations owed to the Claimant without lawful excuse or justification. The Claimant is therefore entitled to damages for this contractual breach.

[102] The purpose of an award of damages for a breach of contract is, as counsel for the Defendant rightly asserted, to effect *restitutio in integrum*. Accordingly, the Claimant is entitled to be compensated for damage, loss or injury which was directly suffered as a result of that breach and which was in the reasonable contemplation of the parties to the contract.

[103] The Court is aware that the Claimant had been suspended on full pay and that the suspension did not therefore have an impact on the salary that he earned from his position as Consultant Cardiologist at the QEH. However, Dr. Ishmael testified that the suspension impacted upon the income he obtained in private practice, as he was unable to bring his patients to the hospital for a period of two weeks. He was also required to transfer the care of patients he already had at the Hospital to other doctors. Nevertheless, there has been no attempt by the Claimant or his Counsel to detail the nature of this loss in such a manner as to enable the Court to quantify it. In fact, the Court observed that Counsel for the Claimant actually conceded that nominal damages would be appropriate in the circumstances of the case.

[104] Nominal damages have been described as "*a sum of money that may be spoken of, but has no existence in point of quantity*": ***Beaumont v Greathead (1846) 2 C.B. 494 at 499, per Maule, J***. Nominal damages are awarded by the Court in 2 circumstances: (i) where there is a wrong or *injuria* upon which to base a judgment for the Claimant but no actual loss or damage; or (ii) where loss has occurred and has been shown, but no evidence has been adduced as to how the loss in question is to be quantified: ***McGregor on Damages (Eighteenth Edition) paras 10-001-10-005; Perez v Commercial Free Zone Management Agency BLR Vol. 4 at p. 195 at p. 202 per Barrow, J***.

[105] The Court is mindful of the dictum of Lord Halsbury, LC in ***The Owners of the Steamship "Mediana" v the***

Owners, Masters and Crew of the Lightship "Comet" [1900] AC 113 at 116, in which the learned judge stressed that the term "*nominal damages*" does not mean "*small damages*". The Court is also aware that the Privy Council held in ***Greer v. Alstons Engineering Sales Service Ltd [2003] UKPC 46*** that where a Claimant fails to lead evidence to quantify the loss sustained in an otherwise good claim for damages, the claim was not to be dismissed, but instead it was "*the duty of the court to recognise it by an award that is not out of scale*" (para 9).

[106] Although Counsel for the Claimant conceded that his client was entitled to nominal damages and Counsel for the Defendant contended that any damages awarded to the Claimant should only be nominal in nature, neither counsel has given the Court any assistance at all in determining the appropriate figure to be awarded as nominal damages on the facts of this case.

[107] The Court has examined judgments in this jurisdiction where nominal damages were awarded. From a review of these awards, it is clear that nominal damages vary quite greatly, ranging from the sum of $10.00 at one end to that of $5,000.00 on the other.

[108] For example, in the unreported cases of ***Oliver v New India Assurance Co. Ltd., Court of Appeal of Barbados, Decision of April 28, 1961*** and ***Davis et al v Wood, High Court of Barbados Suit No. 1075 of 1984, Decision of February 20, 1986,*** judgment to the nominal amount of $10.00 was given as damages for breach of contract. The Court had given this tiny sum in damages as the Claimant in the first case had not called any evidence at all, while in the second the Court found that although the contract had been breached, the Defendant, who had counterclaimed against the Claimant, had not proved that he had actually suffered any damage.

[109] Nominal damages of a somewhat greater amount were granted by Inniss, J. of the High Court in ***Hulse v Knights Limited (unreported) High Court of Barbados Suit No. 1792 of 1998, Decision of January 19, 2004,*** where he awarded the sum of $1,500.00 as damages when he found that while a provision of the contract between the parties had been breached, he simultaneously held that no loss had ensued from the breach.

[110] At the higher end of the scale are the cases of ***Alleyne v the Attorney-General (unreported) High Court of Barbados Suit No. 1144 of 1998, Decision of April 22, 2005*** and ***Boyce et al v. the Attorney General (unreported) Supreme Court of Barbados Suit No. 1990 of 1998*** the Claimants had instituted an action in negligence upon the accidental incineration of the bodies of their children, who had died in child-birth. In each case, the Court held that although the Claimants had been unable to establish psychiatric loss resulting from the Defendant's negligence, they were nonetheless entitled to the sum of $5,000.00 as nominal damages.

[111] In the event that there is any doubt as to whether nominal damages at the higher end of the scale are applicable to contractual actions, I also take notice of 2 regional decisions, ***Alexander v J. J. Yachting (SVG) Ltd et al (unreported), High Court of St. Vincent and the Grenadines Suit No. 436 of 2006, Decision of April 14, 2010*** and ***Ramas v Higinio (unreported) Supreme Court of Belize, Suit No. 609 of 2006, Decision of June 9, 2009***, where the Court found that the while the Claimant had sustained loss he had failed to substantiate the sum claimed and was therefore only entitled to nominal damages in the sum of $10,000 EC (which is approximately $7,000) and $6,000 BZD (approximately $6,000).

[112] I find that the Claimant has suffered some loss resulting from his unlawful suspension by the Defendant, but that as he has failed to adduce any evidence of the value of his loss, he is entitled to nominal damages only. I consider that in the instant case, the amount to which he is entitled as nominal damages should fall at the highest end of that spectrum of nominal damages awarded in this jurisdiction, given the facts of the case. Accordingly, I find that the sum of **$5,000.00** is a fair figure for the award of nominal damages.

Aggravated or Exemplary Damages

[113] The Court now turns to the question of aggravated or punitive damages. As mentioned above, Dr. Ishmael is claiming $600, 000.00 in aggravated and/or punitive damages. The case of ***Watson v Durham (supra),*** the only case relied upon by Mr. Haynes, Q.C. on this point, does not provide any assistance at all in determining whether this is an appropriate situation in which to award aggravated or punitive damages and the appropriate quantum of such damages; the paragraph to which Counsel for the Claimant referred in his written submission merely underlies the serious impact of suspension upon an employee and the fact that it may cast a shadow over him.

[114] In fact, this court emphasizes that no assistance at all has been given to the Court with regard to the assessment of this aspect of the claim, either from the Claimant or the Defendant, but in view of the fact that the case has been agreed at pre-trial to be valued at $600,000.00, the damages claimed, it behoves the court to direct its mind closely to the issue of aggravated and exemplary damages.

[115] Although the primary object of an award of damages is to compensate the Claimant for loss suffered, where the Defendant's conduct is "*sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like*", the Court may award damages whose purpose is to punish the Defendant: ***McGregor on Damages (Eighteenth Edition) at para 11.001***. Such damages have at times been described as exemplary, punitive, vindictive or even retributory: ***Ibid***.

[116] Perhaps because vindictive does not accurately reflect the reason for the award and because retributory is too ambiguous (per Lord Halisham, LC in ***Broome v Cassell & Co [1972] AC 1027 at 1073***), these terms have generally

disappeared from use. As to whether the damages should be known as exemplary or punitive, the Court will adopt the term "*exemplary damages*" instead of "*punitive damages*" for modern contract law appears to prefer the latter term to the former for the reason given by Lord Halisham, LC in ***Broome v Cassell*** that:

> *Speaking for myself, I prefer "exemplary," not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.*

[117] It is important to note that while aggravated damages may also have a penal element, they are quite distinct from exemplary damages, at least in theory: ***Kralj v McGrath [1986] 1 All ER 54, 57-58 per Woolf, J***. The former has been described as "*a solatium to the plaintiff*" awarded to compensate him for injury to his feelings and dignity resulting from the Defendant's conduct while the latter was overtly retributory and intended as "*a punishment to the Defendant*": ***Rookes v Barnard [1964] AC 1129 at p 1121 per Lord Devlin***. Thus aggravated damages, essentially extra compensation to the claimant for injury to his feelings and dignity, remain compensatory, exemplary damages, punitive. While the distinction between the two may be difficult to discern, it is necessary to deal with each separately as the Claimant has claimed damages under both heads.

[118] As I indicated earlier, exemplary or punitive damages are intended to punish a Defendant for his conduct in inflicting the harm for which the Defendant must be compensated. I have already held that Dr. Ishmael is awarded nominal damages of $5,000.00 for the breach of contract.

[119] I turn first to the award of aggravated damages, cognizant of the direction stated by Lord Reid in the House of Lords case of ***Broome v Cassell & Co. [1972] 1 All. E.R. 801 (U.K.H.L) at page 839*** that compensatory damages must be considered first and exemplary damages considered afterwards. Although the Court was referring to damages for tort, as opposed to contract, it is a useful direction.

[120] What is the nature of aggravated damages and when should they be awarded? The answer may be distilled from a rich heritage of cases beginning with the case of ***Addis v. Gramaphone Co. [1909] A.C. 78***, and ***Peso Silver Mines Ltd v. Cropper [1996] S.C.R 673, 58 D.L.R (2d) 1*** which establish the rule that in cases for breach of contract damages are generally limited to the financial loss sustained from the fact of the breach, such as the increased difficulty in finding new employment after a wrong dismissal. While aggravated damages may be awarded in tort to compensate a claimant for injured feelings, no such claim is usually available for breaches of contract. Breach of a contract, said Lord Cooke, is to be regarded as "*an incident of commercial life which players in the game are expected to meet with mental fortitude*": ***Johnson v Gore Wood Inc [1996] 2 All ER 35 at p. 46***. Accordingly, in ***Kralj v McGrath [1986] 1 All ER 54 at p. 61***, Woolf, J. declared:

> *"It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages."*

[121] While as a matter of policy a Claimant is generally not entitled to claim aggravated damages, Claimants have been awarded damages for mental distress, despite the general rule set out by the House of Lords in ***Addis (supra)*** that motives and conduct are not to be taken into account in assessing damages for contractual breaches and damages for hurt feelings and distress in actions for breach of contract were therefore not permitted. Such awards have been made in the "*lost holiday cases*" where the contractual breach affected the convenience or enjoyment of the Claimant in certain limited circumstances.

[122] The first category is better described as arising where the predominant object of a contract was, as least from the Claimant's perspective, to obtain mental or emotional satisfaction of some sort or where the Claimant's mental distress was a direct consequence of physical inconvenience resulting from the Defendant's breach: ***Oxford Principles of English Law: English Private Law (Second Edition) p. 1637 at para 21.49***. The classic case in this category is that arising from a ruined holiday, an example of which is ***Jarvis v Swan's Tours Ltd. [1973] QB 233*** where the Plaintiff was awarded damages for mental distress, inconvenience, disappointment and frustration where the holiday he paid for and received was not that which had been advertised by the Defendant in its brochure.

[123] This category of cases is not, however, limited to cases involving contracts for holidays. Lord Denning, MR awarded damages for the vexation and anxiety suffered by a plaintiff where defendant solicitors, due to omissions and errors, breached their contractual duty to obtain an injunction restraining her ex-boyfriend from molesting her: ***Heywood v Wellers [1976] QB 446***. A "*modest sum*" was also awarded for mental distress occasioned by the physical inconvenience and discomfort resulting from the failure of a surveyor to properly carry out his contractual duties: ***Watts v Morrow [1991] 1 WLR 1421 per Gibson, LJ***. Nevertheless, the English Court of Appeal has made it clear that contracts of employment containing an implied duty of trust and confidence did not fall into the exceptional category of cases whose purpose was to, *inter alia*, provide pleasure: ***French v Barclays Bank plc [1998] I.R.L.R. 646***.

[124] An exception may also be found in cases involving wrongfully dishonored cheques. While ***Addis v Gramaphone Co. Ltd. (supra)*** is primarily authority for the principle that aggravated or exemplary damages are not available for contractual breaches regardless of how they occurred, the House of Lords also suggested therein that a claimant could not be compensated either for loss of reputation or the difficulty he may encounter in finding another job (***per Lord Shaw at 503***). However, the House of Lords could not deny, however, that the rule proscribing an award of damages for loss of reputation in contractual claims had its exceptions.

[125] For example, it was well established by a fairly lengthy pedigree of authority that a trader whose bank wrongfully fails to honor a cheque may be able to recover loss of financial reputation despite the inability to quantify such loss and this rule has now been extended to customers who are not traders: ***Kpoharor v Woolwich Building Society [1996] 4 All ER 119***.

[126] Pecuniary loss, as distinct from non-pecuniary loss, flowing from loss of reputation sustained as a result of contractual breach is also generally available: ***Aerial Advertising Co. Ltd v Bachelors Peas Ltd [1938] 2 All ER 788***. Thus, in ***Malik v Bank of Credit and Commerce International [1998] AC 20*** the House of Lords held that former employees of a bank that had been found to be engaging in money-laundering and tax evasion may be able to recover damages for pecuniary loss flowing from the employer's breach of the implied term not to undermine the employee's trust and confidence where this breach prejudicially affected the employees' future employment prospects. Lord Nicholls of Birkenhead warned at p. 38 that:

> *Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.*

[127] The House recognized that ***Addis v Gramophone Co. Ltd (supra)*** was understood as authority for the principle that any loss suffered as a consequence of an adverse impact on the employee's chances of obtaining alternative employment could not be recovered as damages in an action for wrongful dismissal, but held that the observations made in ***Addis*** on this particular point could not be read as precluding the recovery of damages where the manner of dismissal involved a breach of the trust and confidence term implied into each employment contract; it was the breach of that implied term that caused financial loss. The Court stressed, however, that damages was not awarded at large for damage to the employee's reputation, but was instead awarded to compensate the employee for damage to his reputation as a professional person or as a person carrying on a business and, therefore, proof of consequential handicap in the labour market was necessary.

[128] In this case, the basis of the award of aggravated damages is that of a loss of reputation claimed by Dr. Ishmael. As was also stated in ***Chitty on Contracts (Thirtieth Edition) at paragraph 26-086:***

> *"Damages for loss of reputation as such are not normally awarded for breach of contract, since protection of reputation is the role of the tort of defamation. However, where the breach of contract causes a loss of reputation which in turn causes foreseeable financial loss to the claimant, he may recover damages for that financial loss..."*

[129] **Malik's case**, mentioned above is authority for that proposition.

[130] The evidence on which the claim for aggravated damages is founded is very slender. The evidence of Dr. Ishmael that he had to reveal his suspension to Bayview Hospital and must reveal the fact of his suspension in all future job applications and that it remained a "*black mark*" against him is not sufficient to assist the Court and certainly not sufficient to ground compensation for loss of reputation in this instance. The evidence here is that Dr Ishmael will have difficulty in finding future employment, when he has not been dismissed and is not currently seeking such employment. Damages of this nature are, in this instance, too remote to be claimed and quantified as a pecuniary loss.

[131] I am fortified in this view by a line of Canadian authorities, albeit on wrongful dismissal but still strongly relevant here, which culminated in the case of ***Vorvis v Insurance Corporation of B. C, 25 C.C.E.L, [1989] 1 S.C.R 1085***. The jurisprudence in Canada recognizes the award of aggravated damages in contract, particularly employment contracts in some limited degree, and the jurisprudence is worth noting.

[132] In ***Vorvis,*** the appellant, a solicitor employed by an insurance company, was dismissed in circumstances where it was found by the Court that he had been treated in a "*most offensive manner*" and harassed and humiliated to an alarming degree. The Court, however, upheld the decision of the trial judge to refuse an award of both aggravated and punitive damages. It found by a majority that the behavior of the supervisor, who carried out this program and caused terror in the appellant, could not ground an award for aggravated damages for mental distress, as it had not been "*sufficiently offensive, standing alone, to constitute actionable wrong*" and was not independently actionable as a tort. Even the strong dissenting judgment in ***Vorvis*** of Justice Wilson, who was in favour of widening the ambit of aggravated damages, concluded that on the facts, aggravated damages should not be granted.

[133] Laskin, JA made the current position in Canada even clearer in para 22 of his judgment in ***Whiten v Pilot Insurance Co (February 5, 1999), Doc. CA C23973 (Ont. C.A.)***, which was cited in the later Canadian decision of ***Beaird v Westinghouse Canada Inc. (1999) 41 C.C.E.L (2d) 167,*** where he explained that:

> *For an award of punitive damages to be made, two requirements must be met: first, the defendant must have committed an independent or separate actionable wrong causing damage to the plaintiff; and second, the defendant's conduct must be sufficiently "harsh, vindictive, reprehensible and malicious" [**Vorvis**, p. 208] or "so malicious, oppressive and high-handed that it offends the Court's sense of decency" [**Hill v Church of Scientology of Toronto** [1995] 2 S.C.R. 1130 at 1208].*

[134] This Court finds the line of Canadian authorities most appealing, and is inclined towards the view that aggravated

damages, in line with ***Vorvis***, may not be granted if the breach of contract is not otherwise independently actionable as a tort and that tort has been properly pleaded. The actions of Dr. James and the course of conduct of which evidence was given cannot constitute any actionable wrong. In fact, the Claimants have not drawn my attention to what that might constitute the same, which is not surprising as they did not give this Court any guidance whatsoever on how or on what basis these damages should be calculated.

[135] On neither the English nor the Canadian authorities can the Claimant find succor with regard to his claim for aggravated damages. Accordingly, the claim for aggravated damages is refused.

[136] I turn now to the claim for exemplary damages. While different in nature, the same evidence may support both a claim for aggravated damages as for exemplary damages. Needless to say, the same lack of evidence may cause them both to falter.

[137] Exemplary damages are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such a nature that it merits punishment. The learned textbook writer Harvey McGregor, in the eighteenth edition of his text on damages, observes at paragraph 11-016 that the Court has historically set its face against awarding exemplary damages for breach of contract, and this is particularly so in claims for wrongful dismissal, and to my mind employment contracts generally.

[138] As mentioned above, the authority most commonly cited for this principle is ***Addis v Gramaphone Co. [1902] CA 488*** where the House of Lords held that damages for wrongful dismissal could not include compensation for the manner of dismissal, for injured feelings or for the loss which may be sustained from the fact that the dismissal of itself makes it more difficult for a person to obtain fresh employment. In giving this judgment, Lord Atkinson made the following observation:

> "*In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present,*"

[139] Similarly in ***Sealy v First Caribbean International Bank (Barbados) Ltd (unreported) Court of Appeal of Barbados, Civil Appeal No. 10 of 2008, Decision of September 18, 2009 at para [67]***, Simmonds, CJ observed in a case involving the wrongful dishonor of a cheque that:

> *"It is well established, of course, that [exemplary] damages cannot be awarded for purely breach of contract …"*

[140] It may well be argued, although it was not in this case, that just as the categories of cases in which exemplary damage has been awarded have moved past the categories established by ***Rookes v Barnard [1964] AC 1129***, the time has come to set new limits on exemplary damages with a view to their expansion to cases for breach of contract. In fact, in ***Malik (supra)*** Lord Nicholls said that if the facts of ***Addis*** were decided today, the Claimant would have a remedy at common law for breach of contract. I should note that none of this has been urged upon me by Counsel.

[141] That such movement has been seen in Canada is clear, however the case of ***Vorvis (supra)*** establishes that, as with exemplary damages, there must be an actionable wrong:

> *"When then can punitive damages be awarded? It must never be forgotten that when awarded…a punishment is imposed upon a person by a Court by the operation of judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment is not to be imposed in a civilized community without justification of law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff."* (Per Mr. Justice McIntyre at page 101)

[142] It is my view that the time may soon come when this Court is asked to extend the limits of exemplary damages, and I consider that in doing so the Canadian cases would be most instructive, but this is neither the time nor the case, on the evidence or on the arguments, to do so. There is nothing in the evidence which indicates that the conduct of the Defendant was, in the words of the textbook writer in ***McGregor (supra),*** "*sufficiently outrageous to merit punishment*" or disclosed malice, fraud, cruelty, insolence or the like.

[143] Accordingly, the claim for exemplary damages also fails.

INJUNCTIVE RELIEF

[144] At trial, Counsel for the Defendant indicated that he did not object to the declaration sought by the Claimant should the Court find the suspension to have been wrongful, but maintained, however, that the need for the injunction restraining the Defendant from suspending the Claimant had been overtaken by events in the matter. The injunction restraining the Defendant from commencing or conducting the enquiry was therefore not appropriate as the Court should only in the most exceptional of circumstances interfere with the investigation of a matter by a domestic tribunal.

[145] It was his submission that to grant the perpetual injunction as prayed for by the Claimant would be to suggest that the

Defendant could at all times in the future conduct itself in a manner prejudicial to the Claimant and that there could be no cure to the irregularities of which the Claimant complained. He once again relied upon ***Ali v Southwark LBC [1988] IRLR 100*** to support this submission.

[146] The Claimant's argument is that no reasonable tribunal acting *bona fide* could read the charge as being a valid charge and the investigation into it should therefore be halted. He agreed with opposing counsel that the Court should only in the most exceptional situation prevent a domestic tribunal from investigating a matter but submitted that such an exceptional situation existed in this case and the Court should therefore grant the injunctions sought.

[147] The grant of injunctive relief by the High Court, whether under **section 44 (b)** of the ***Supreme Court of Judicature Act, Cap. 117A of the Laws of Barbados*** or under its inherent jurisdiction, is discretionary. The Court will grant this relief where, given the circumstances of the case, it considers it appropriate to do so in the interests of justice. In this case the Claimant seeks a prohibitory injunction.

[148] In exercising my discretion whether to grant or refuse the injunction, I must consider whether it is just and convenient to do so, and in determining this, damages must be inadequate. If the Claimant here can be fully compensated by an award of damages, no injunction will be granted.

[149] As the suspension of the Claimant by the letter of December 10, 2010 has long been lifted and given the content of the Declaration sought by the Claimant, the Court finds that in these circumstances, it is not necessary to grant an injunction against the Defendant restraining him from suspending the Claimant. The injunction to this effect is therefore denied.

[150] When lifting the suspension, the Defendant by its CEO went out of its way to warn the Claimant that it did not in any way relinquish any rights it had to conduct an internal investigation into the matter, implying that such an investigation pertained to the good governance of the Hospital. The Court is of the opinion that the Terms and Conditions of Service and the alleged breaches of the same by the Claimant do not prevent the Defendant from conducting an internal investigation into the issues raised in the Claimant's letter, should it consider it necessary to do so.

[151] However, it is the conclusion of this Court that the provisions of the Terms and Conditions of Services do not permit any such investigation in relation to the charge that the Defendant had wrongfully placed against the Claimant by the letter of suspension. I agree that this is an exceptional case in which the Court should interfere to injunct a domestic tribunal from investigating a charge, where that charge has been found by this Court to be an invalid one.

[152] In coming to that conclusion I hold that damages would be inadequate to compensate the Claimant. Indeed there is no place whatsoever for damages here. To permit the investigation would negate the findings of this Court on the validity of the charge altogether. As has been said, in applications for an injunction, a Defendant cannot be allowed to purchase his wrongdoing with damages. In these circumstances, the Court grants the second injunction sought by the Claimant.

CONCLUSION

[153] Having found that the Defendant had wrongfully and unlawfully suspended the Claimant, contrary to the Terms and Conditions of Service, the Court grants the Declaration sought by the Claimants, as well as nominal damages, and accordingly makes the following orders:

(i) A Declaration that the suspension of the Claimant by the letter of suspension from the CEO of the Defendant dated December 10, 2010 was in breach of the Terms and Conditions of Service for Employees of the Queen Elizabeth Hospital and therefore the contract of employment between the Claimant and the Defendant and thus invalid, null and void;

(ii) An injunction restraining the Defendant, whether by its servants, agents (including the Chief Executive Officer of the Queen Elizabeth) or howsoever otherwise from commencing and carrying out an enquiry as alluded to in the letter of December 10, 2010; and

(iii) Damages for breach of contract in the sum of $5,000.00 and since that suspension was lifted after two weeks, interest at the rate of 6% is awarded from the date of judgment.

[154] The Court also orders that costs are awarded to the Claimant, certified for 2 Counsel. The parties may apply for a costs hearing before me.

Jacqueline A. R. Cornelius

Judge of the High Court