[2015] SC (Bda) 81Civ (23 November 2015)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2013: CIVIL APPEAL NO: 250

IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT

AND IN THE MATTER OF AN APPEAL OF A DECISION OF A BOARD OF INQUIRY APPOINTED UNDER THE HUMAN RIGHTS ACT DATED ON OR ABOAT THE 23 JULY 2013

BETWEEN:

THE COMMISSIONER OF POLICE

Appellant

-v-

THE QUEEN

Respondent

APPELLATE JURISDICTION
2015: CIVIL APPEAL NO: 238

IN THE MATTER OF SECTION 21 OF THE HUMAN RIGHTS ACT, 1981

AND IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT

BETWEEN:

MICHAEL ANTHONY HARKIN

Appellant

-And-

THE COMMISSIONER OF POLICE

Respondent

JUDGMENT

(in Court)

Date of hearing: October 6, 2015

Date of Judgment: November 23rd , 2015

Mr Richard Horseman, Wakefield Quin Limited, for the Commissioner ("the Respondent")

Mr Allan Doughty, Beesmont Law Limited, for Mr Harkin ("the Applicant")

Background

1. The Applicant was employed with the Bermuda Police Service ("BPS") on a 5 year work permit which commenced on February 27, 2005. He filed a Complaint dated December 12, 2009 against the Respondent under the Human Rights Act 1981 ("the Act"). It alleged that the Respondent had discriminated against him in breach of section 2(2)(a) of the Act on the grounds of his race, place of origin or ancestry. The particulars were that the Applicant had qualified for promotion from the rank of constable to the rank of sergeant and the Respondent had deferred his promotion until it was clarified that the Applicant would obtain a new work permit after his then permit expired on February 27, 2010. When the Applicant filed a grievance about not being promoted at the same time as other officers who had also passed the qualifying exams and alleging a breach of his rights under the Act, the Respondent replied advising the Applicant that his employment would not be extended. In this respect, a breach of section 8(a) of the Act was alleged.

2. The Complaint was referred to a Board of Inquiry (Mr Paul King, Chairman, Ms Keren Lomas and Ms Pamela Fowkes) ("the Board"). The Board decided that the Applicant had been discriminated against, in a Decision dated July 23, 2013 ("the Liability Decision"). By Notice of Originating Motion dated August 6, 2013, the Respondent appealed to this Court against the Liability Decision. The Board assessed the compensation due to the Applicant in a decision dated May 11, 2015 ("the Quantum Decision"). By Notice of Originating Motion dated June 1, 2015, the Applicant appealed to this Court against the Quantum Decision.

The Liability Decision

<u>The Board's Decision</u>

3. The Board firstly summarised the Applicant's case. By letter dated July 29, 2009, the Promotions Board formally recommended him for promotion and advised him that he had ranked fourth out of eight candidates. On August 14, 2009 when eight other

constables were promoted, the Applicant was told he could not be considered for promotion unless or until his work permit was renewed. He considered this treatment to be discriminatory on place of origin grounds. On October 16, 2009 he requested the Respondent (then Commissioner George Jackson) to renew his permit and on the same date filed a grievance with a Mr Michael Trott of the Human Resources Department complaining of discriminatory treatment. By letter dated November 30, 2009, the Respondent notified the Applicant that his employment would terminate on expiry of his contract, in part because the Applicant felt he had been discriminated against. After this, he was demoted from his Authorized Firearms Officer post and assigned to the Magistrates' Court. the Board quotes a reference provided by an Inspector of the BPS upon which the Applicant relied:

> "*I highly recommend without reservations PC Harkin is a solid individual who takes pride in his policing duties and was a vital member of the Bermuda Police Armed Response Vehicle Program.*"

4. The Board accepted that the Applicant was less than a flawless performer, but rejected as irrelevant minor performance complaints identified by the Respondent in the course of the proceedings before the Board but never relied upon as a ground for not continuing the Applicant's employment at the material time. The Board then proceeded to summarise the Respondent's case. This was primarily (a) that the expiring contract of the Applicant was a permissible reason for differential treatment, and (b) the fact that two other non-Bermudians were promoted was inconsistent with the Applicant being discriminated against on place of origin grounds. On the retaliation to the filing of the Human Rights Act complaint limb of the case, the Respondent relied on the fact that notice of a formal complaint was only received when the complaint was filed on December 15, 2015. This was after the termination of employment decision had already been made. A further technical point was raised as to whether the Respondent was the correct party, both in principle and because the office holder had changed since the material time for the purposes of the complaint.

5. The Board dealt firstly with the identity of the Respondent issue by citing section 31 of the Act, which provides that the Act applies to "*an act done on behalf of the Crown by a statutory body, or a person holding a statutory office*" (section 31(1)(b)). The Board accepted the submission of the Applicant that the Respondent, as the statutory office holder charged with the administration of the BPS by section 3 of the Police Act 1974, was the appropriate respondent to the Applicant's Complaint. The Board concluded:

> "48…*We are further satisfied that it is the person holding that statutory office at the time the complaint comes before the Board of Inquiry that is the correct Respondent because otherwise the Complainant would be without a remedy in the event that a predecessor made the employment decision in question.*

49. We accept the Complainant's submission. We are further reinforced in our finding by the fact that the contract between the Complainant and the Respondent was actually made between the COP and the Complainant… "

6. On the central discrimination issue, the Board found as follows:

"*59. The Respondent further contended that the Complainant had a fixed term contract which expired February 2013 which meant that a new work permit would have to be granted before the Complainant's promotion could be offered. And since Section 6(9A) provides that nothing under Section 6 confers upon any person any right to employment, once the contract had expired the Complainant would not have been entitled to continue employment.*

60. We do not accept this contention as it was clear…that no advertisement need to be placed in the press to protect the rights of Bermudians when such contracts were sought to be renewed, and that 5 year contracts were regularly being renewed for a further 5 year term. The COP would have been better advised to tell the Complainant he had earned promotion subject to the renewal of his work permit….

63. We do not accept the argument that the promotion of 20 British officers, 18 of whom were white like the Complainant, detracts from the complaint that the Complainant himself was discriminated within the provisions of Section 2(2) and section 6(1)(f) and (g) of the HRA…

66. the Complainant referred us to the Canadian case of Ontario Human Rights Commission and Theresa O'Malley (Vincent)-v- Simpson-Sears Limited [1985] 2 SCR 536 to illustrate that it is immaterial whether the employer intended, or did not intend, to discriminate…

68 In cross-examination the Respondent admitted that the deferral of the Complainant's promotion was outside the BPS (GP) guidelines for the Promotion Process (PP) for Police Officers (PO) to which we were referred. The Respondent in cross-examination acknowledges that the Complainant was eligible for promotion under those guidelines…

70….The Respondent told us his discretion not to promote is not limited to the type of examples set in Paragraph 9.2. We cannot determine that here; his discretion must be exercised reasonably and whether he did so will have to be decided on a case by case basis….it is clear the Respondent could have made an application for renewal of the Complainant's contract at any time after the Complainant's ranking was known."

7. The Board made the following key findings on the retaliation aspect of the Complaint:

> "*82. We accept from the evidence that the Complainant disclosed to…the HR Manager, that he had consulted the Human Rights Commission…*
>
> *83. In these circumstances we have no difficulty in finding that on 30th November 2009 Commissioner Jackson terminated the Complainant's contract to penalize the Complainant for lodging his grievance alleging discrimination, and that the transfer on 7th December 2009 to a less well paid position was similarly motivated…*
>
> *85….Was the Complainant's disclosure to the HR Manager 'in a proceeding under the Act' or does the signed complaint itself initiate a proceeding under the Act?*
>
> *86. The parties' counsel did not assist us with this narrow issue but we have resolved it in favour of the Complainant because on a the reading of Section 14H(1) a complaint to the Commission may be made orally, electronically or in writing….*
>
> *87. Consequently it appears to us that a proceeding under this Act commenced when the Complainant consulted the Human Rights Commission and gave the Commission all of the facts.*"

The Respondent's Grounds of Appeal

8. The Respondent challenged all of these findings on appeal. Although, as I indicated in the course of the hearing, the proper respondent point seemed on its face to be wholly unarguable, the more substantive grounds of appeal merited close analysis. Nevertheless, in summary, the Respondent complained that:

    (1) the proper respondent was the Attorney-General or the appropriate Minister under the Crown Proceedings Act 1966. The Respondent's office was not amenable to suit for the acts of other Police Officers or a previous office holder;

    (2) the Board erred in law in failing to find that section 6 (9A) and 6(9) of the Act excluded a complaint of employment discrimination by a non-Bermudian on contract;

(3) the findings of retaliation were unsupported by the evidence.

Findings: Was the Respondent the correct party?

9. When public authorities are being sued, the question of who the right defendant is may often be somewhat academic. The central concern is to ensure that the appropriate Crown servants responsible for the most directly involved emanation of the Crown (be it a Government Department or Ministry) are able to participate in the furnishing of instructions, and are not accidentally left out in the cold. Thus, the Crown Proceedings Act provides that, for actions in tort, the Attorney-General may be sued in cases of doubt. The Crown Proceedings Act 1966 has no formal application to public law proceedings, be it applications for judicial review or complaints under the Human Rights Act, as Mr Doughty argued. Nor does the 1966 Act apply to contractual claims. A claim based on a contract will logically be brought against a corresponding party to the contract in question.

10. As the Board correctly found, section 31 of the Act itself explains which emanations of the Crown may be sued and it does so in broad terms not designed to facilitate technical objections being taken as to the identity of the chosen respondent. Section 31 provides as follows:

> "***Application to Crown etc***
> *31 (1)This Act applies—*
>
> > *(a) to an act done by a person in the course of service of the Crown—*
> >
> > > *(i)in a civil capacity in respect of the Government of Bermuda; or*
> > > *(ii)in a military capacity in Bermuda; or*
> > >
> > > *(iii)to an act done on behalf of the Crown by a statutory body, or*
> >
> > *(b) a person holding a statutory office,*
>
> *as it applies to an act done by a private person.*
>
> *(2)A reference in this Act to employment applies to—*
>
> > *(a) service of the Crown in a civil capacity in respect of the Government of Bermuda; or*

(b) service of the Crown in a military capacity in Bermuda; or

(c) service on behalf of the Crown for purposes of a statutory body or purposes of a person holding a statutory office,

as it applies to employment by a private person; and for that purpose a reference express or implied to a contract of employment includes a reference to the terms of service.

(3)In this section, 'statutory' means set up by or in pursuance of a statutory provision."

11. The BPS is created by the Police Act 1974 but not as a statutory corporation with separate legal personality. This is presumably why the Board ordered by consent on January 17, 2013 that the Commissioner should be substituted as Respondent for the BPS. The Board could have rejected the proper respondent complaint on the simple grounds that the Respondent was estopped from taking at the hearing stage. Instead it analysed the Police Act and rightly concluded that the Respondent was a person holding a statutory office who was responsible for the administration of the Police. This was a very straightforward basis for the Respondent to be viewed as the most appropriate party, even though all that was really necessary to be satisfied of was that he was an appropriate or competent party to respond to a statutory complaint about the administration of the BPS.

12. That the Respondent is the natural party to be complained against finds indirect support in the fact that the Commissioner has occasionally been named as the sole respondent to employment-related public law proceedings in the past[1]. But he has also admittedly been joined alongside other parties with overlapping responsibilities[2]. In the present case there was no suggestion of overlapping responsibility in relation to the impugned termination decision which was quite clearly made by the Commissioner. And the best indicator as to who the appropriate respondent was in an employment-related claim was correctly identified by the Board as the relevant contract of employment. The letter evidencing the terms of the Applicant's appointment and employment was signed on behalf of the Commissioner of Police.

13. The soundness of the approach adopted is supported by an authority upon which the Respondent's counsel relied for other purposes. In *Caines-v- The Public Service Commission*[2008] Bda LR 25 where it was also belatedly suggested that the appropriate party was not before the Court, Ground CJ opined as follows:

"*15. The Board found at p. 8 of the decision that the Governor was the appellant's employer, apparently because the appointment of public officers is vested, by the Constitution, in the Governor. The Governor was not a respondent to the complaint, and Mr. Diel complains that that point was only*

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[1] See e.g. *Dawson-v-Commissioner of Police* [2013] Bda LR 57; *Commissioner of Police-v-Allen* [2011] Bda LR 14 (Court of Appeal); *Thomas-v- Commissioner of Police* [2006] Bda LR 54.

[2] See e.g. *Williams-v-Public Service Commission and Commissioner of Police* [2005] Bda LR 6; *Perinchief-v-Governor of Bermuda; Public Service Commission; Attorney-General & Commissioner of Police* [1996] Bda LR 67.

taken in closing submissions, and he was not given an opportunity to amend to meet it, or to address the issue in evidence.

16. It seems to me, with respect, that this is a complete red-herring. Government employees are employed by the Government of Bermuda. The full way of expressing that is "the service of the Crown in a civil capacity in respect of the government of Bermuda[7]*". However, in most of the extra-constitutional legislation governing the public service that is handily condensed to 'the Government of Bermuda*[8]*'. For these and similar purposes, the Government of Bermuda is deemed to have a personal identity as a corporation sole…*

18. In the circumstances, therefore, the Board had the relevant agencies before it, being the Public Service Commission and the Collector of Customs, who had chaired the interview panel which made the initial recommendations concerning this post. The essence of the appellant's complaint was that he had been refused promotion on the grounds of race or national origin, and either or both of the Public Service Commission and the Collector could, in theory, have been responsible for that. It would not have advanced matters in any way for the Governor to have been joined."

14. Claims brought against the holders of public offices in their public capacity are in no way dependent on the identity of the individual post-holder in any event. This is essentially because when a statute confers authority on a Minister or public officer, the authority and corresponding responsibility attaches to the office, whoever its holder may be from time to time, not to the individual office-holder. This proposition is so obvious it ought to be necessary to find explicit authority to support it. It is best demonstrated by the fact that civil claims have routinely been pursued against Government Ministers in circumstances where the identity of the portfolio-holder has changed without any suggestion being made that the wrong party is being sued. However this principle does find some support in the provisions of section 25 of the Interpretation Act 1951, which provides:

> "*(2)Where any Act or statutory instrument confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office or by a person duly appointed to act in that office.*"

15. Accordingly Ground 1 of the Respondent's appeal against the Liability Decision fails.

Findings: did the Board err in law in holding that a contract worker could validly complain of employment discrimination in the contract renewal context and/or at all?

16. Mr Horseman complained that the Board did not appear to have understood an important aspect of the Respondent's case in answer to the Complaint, namely that section 6 excluded complaints by contract workers which expressly or impliedly were based on an assertion that their contracts should have been renewed. In fact the Board

directly addressed the relevant provisions of the Act, but found that they did not apply. The crucial reasoning was that on the facts, no question of preferring a Bermudian arose and, further, the primary complaint was about a failure to promote and a dismissal, not a failure to renew a contract.

17. The starting point is to analyse the way in which section 6 approaches discrimination. Section 6(1) bears reproduction in full:

> "*6(1) Subject to subsection (6) no person shall discriminate against any person in any of the ways set out in section 2(2) by—*
>
> *(a) refusing to refer or to recruit any person or class of persons (as defined in section 2) for employment;*
> *(b) dismissing, demoting or refusing to employ or continue to employ any person;*
> *(bb) paying one employee at a rate of pay less than the rate of pay paid to another employee employed by him for substantially the same work, the performance of which requires equal education, skill, experience, effort and responsibility and which is performed under the same or substantially similar working conditions, except where the payments are made pursuant to—*
>
> *(i) a seniority system;*
> *(ii) a merit system; or*
> *(iii) a system that measures earnings by quantity or quality of production or performance;*
>
> *(c) refusing to train, promote or transfer an employee;*
> *(d) subjecting an employee to probation or apprenticeship, or enlarging a period of probation or apprenticeship;*
> *(e) establishing or maintaining any employment classification or category that by its description or operation excludes any person or class of persons (as defined in section 2) from employment or continued employment;*
> *(f) maintaining separate lines of progression for advancement in employment or separate seniority lists, in either case based upon criteria specified* in section 2(2)(a), where the *maintenance will adversely affect any employee; or*
> *(g) providing in respect of any employee any special term or condition of employment:*
>
> *Provided that nothing in this subsection shall render unlawful the maintenance of fixed quotas by reference to sex in regard to the employment of persons in the Bermuda Regiment, the Bermuda Police, the Prisons service or in regard to the employment of persons in a hospital to care for persons suffering from mental disorder.*"
> [Emphasis added]

18. It is obvious that section 6(1) applies to the "Bermuda Police" in that the proviso restricts the operation of the section as regards gender-based quotas for the Police. It is equally clear that some forms of prohibited employment discrimination more directly conflict with preferential job access for Bermudians than others. Refusing to "continue to employ" under paragraph (b) is an example of such a potential conflict. The prohibition on discriminatory promotion practices is not. Two subsections were expressly relied upon by the Respondent as, in effect, neutralising the operation of section 6(1) in favour of the Applicant:

> "*(9) For the avoidance of doubt it is hereby declared that the provisions of this section relating to limitation of or preference in employment shall not apply in respect of any person who on his own behalf or on behalf of any other person seeks to give preference to the employment of a Bermudian or who bona fide for reasons of national security takes into account the nationality of any person when selecting any person for employment.*
>
> *(9A)For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to employment.*"

19. Subsection (9) was correctly (and unsurprisingly) found by the Tribunal not to be a bar to relief for the Applicant in the present case because, on the facts, the impugned decision of the Respondent to terminate his employment when his contract expired was not based on any or any identified desire to prefer a Bermudian for his position. The explicitly stated reason for the decision not to seek to renew the Applicant's contract was the fact that he had complained of being discriminated against in relation to the promotion process. Section 6(9) does no more than to permit employers to give preference to Bermudians in the hiring process, as an exception to the general rule that employees may not be discriminated on any of the prohibited grounds listed in section 2(2) of the Act. The first listed prohibited grounds of discrimination are "*his race, place of origin, colour, or ethnic or national origins*" (section 2(2)(a)(i)).

20. The Privy Council's observations in *Thompson-v-Dental Board* [2008] UKPC 8, upon which the Respondent's counsel relied, make the practical and legally compelling point that section 6(9) is only engaged by a complaint the facts of which raise the issue of giving preference to a Bermudian in the employment domain:

> "*44. If Dr Dyer had refused to employ Dr Thompson because he was not Bermudian, then section 6(9) might very well have been in point. However, Dr Thompson's complaint was not that Dr Dyer refused to employ him in breach of section 6, but that the respondent refused to let him practise his profession in breach of section 5 of the 1981 Act.*"

21. The Board analysed the impact of subsection (9A) in this way. Once the Applicant's contract had expired, he would have been unable to assert a right to have his contract renewed. However, this finding was somewhat inconsistent with the related finding that the Respondent ought to have promoted the Applicant subject to renewal of his work permit. The latter finding implies that the Respondent ought to have pursued a

contract renewal in circumstances where there was ordinarily done and there was no indication of any competing Bermudian applicants. So while I would not altogether agree with the way in which the Board formulated its findings on this issue, I reject Mr Horseman's criticism that the "*real question to be decided is whether the Appellant could be forced to offer a new five year contract*" (Submissions, paragraph 18).

22. In my judgment the proper way of construing section 6(9A) is according to the natural and ordinary meaning of its words: "*nothing in this section confers upon any person any right to employment.*" That simply means that section 6 cannot be used as the basis for asserting a freestanding right to employment that does not already exist independently of the statute. If an employee has a contractual or substantive public law legitimate expectation that his employment will be continued or renewed, a breach of that right which involves discrimination prohibited by section 6 can indeed be complained of. What is impermissible is for a complainant to use the statute as leverage to enlarge their pre-existing non-statutory employment rights. Section 6 cannot be used, for example, as a shield to protect an employee from being summarily dismissed on well-founded grounds of gross misconduct; or, alternatively, by an employee whose contract has expired from using section 6 as the basis for asserting a right to renewal. Nor can it be used by an employee as a sword to claim a right to a job (or continued employment) where no other legal basis for the claim exists.

23. In the present case it was open to the Board to find based on the evidence before it that, but for the existence of a discriminatory promotion policy and the Applicant's discrimination complaint, the Respondent would have sought to renew the contract prior to its expiration in circumstances where there was no evidence of any Bermudians also applying for the post in question. If the Respondent had simply promoted the Applicant subject to the renewal of his contract on terms similar to other promotion candidates, no question of discrimination would have arisen. Or, to put it another way, the Applicant's central case on the separate lines of progression the promotion procedure embodied did not entail asserting a right to employment derived from section 6 of the Act.

24. Finally, the Respondent's counsel complained that the Board erred in law by failing apply the right test as to what amounted to discrimination. Mr Horseman submitted that it was necessary to show that the former Commissioner was motivated by racial bias. The Respondent's case was that this essential element of discrimination was not proved as two other white British officers were promoted during the same promotion cycle. Counsel relied on the following brief extract from the judgment of Ground CJ in *Caines-v- The Public Service Commission*[2008] Bda LR 25:

> "*22… The question before the Board was not whether the Public Service Commission was entitled to appoint Mrs. Crown, but whether in doing so, and in failing to appoint the appellant, they were motivated by racial bias.*"

25. At first blush, it is difficult to extract from this judicial snippet a statement of principle that whenever one is complaining of employment discrimination one has to prove that the relevant actor was "*motivated by…bias*". This merely appears to be a concise summary of the issue which fell for determination in that particular case. This

first impression is not merely confirmed by a fuller reading of the *Caines* judgment. There was no direct evidence of differential treatment in that case and this Court merely upheld the board of inquiry's findings that there were no primary facts from which discrimination could be inferred. There was no detailed consideration of what range of conduct the concept of discrimination embraced at all.

26. The initial impression that Ground CJ's description of discrimination was not a comprehensive one is also confirmed by a fuller appreciation of how the Act defines discrimination. Firstly, section 2(2) creates two forms of discrimination, (a) what is commonly referred to as direct discrimination and (b) what is commonly referred to as indirect discrimination. It is self-evident that motivations are wholly irrelevant to indirect discrimination. However, even direct discrimination is a far from inflexible and static concept. Section 2(2) provides:

> "*For the purposes of this Act a person shall be deemed to discriminate against another person—*
>
> *(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because-*
>
> *(i)of his race, place of origin, colour, or ethnic or national origins…"*

27. This definition of 'direct' discrimination in my judgment does not require proof of a subjective intention to discriminate in every case. This would turn the Act into a mere shadow of the sort of legislation it is clearly designed to be. It is a notorious fact that it is extremely difficult to prove an actual intention to discriminate and that most discriminatory acts are not motivated by a conscious desire to discriminate. Discrimination is defined in terms which clearly encompass <u>objectively</u> unfavourable differential treatment which is <u>objectively</u> attributable to the complainant's, *inter alia*, race or place of origin. The primary form of direct discrimination is treating someone less favourably than others because of his race, etc. The second form of direct discrimination is "deliberately" refusing to contract on the same terms as other persons generally because of the complainant's race, etc. And the third form of direct discrimination is "deliberately" treating a person differently because of their race etc. In the first instance, subjective motivations are wholly irrelevant. In the second and third instances, subjective motivations are clearly potentially relevant.

28. The nature of the subjective motivation which a complainant has to prove where 'deliberate' discrimination is alleged remains, to my mind, a somewhat fluid construct. The need to prove that a respondent to a complaint was 'motivated by bias' perhaps fits more naturally with a complaint of race discrimination or discrimination on the grounds that the complainant came from a <u>particular</u> place. No such motivation would be necessary if the complaint was of a generalised procedural nature, as here. The Applicant here essentially says: 'the promotion procedure was applied to me in a different and less favourable way than it was applied to other persons generally because I was a foreigner'. The Respondent effectively admits deliberately treating

the Applicant less favourably to Bermudians because of his general place of origin (i.e because he was not from Bermuda). The argument that other officers of the same race and place of origin as the Applicant were promoted would only be a potential answer to a claim of discrimination of the specific allegation was that the Respondent was actually biased against white British Police Officers. This was never the Applicant's case. The Applicant's case was that the promotion policy was applied to him in a uniquely unfavourable way which would not have occurred had he been Bermudian. The discrimination complained of was refusing to promote the Applicant because he was on a contract which would expire before (or shortly after) he could complete the probationary requirements for a new rank he had qualified for. The fact that other officers with similar attributes to the Applicant were promoted because they had comfortably enough time left on their contracts to fulfil the probationary requirements of promotion was entirely beside the point.

29. As a general rule, it can never be an answer to an otherwise valid complaint of discrimination on any ground that the employer has not treated other employees with the same protected characteristic unfairly. Again, such an interpretation would dilute the justice to Act seeks to administer to a dramatic extent. Most discrimination is selectively applied and carried out by persons following procedures for which they have rational justifications without any conscious perception that they are being biased. Construing discrimination as defined by section 2(2) of the Act as requiring proof of actual bias in every case is inconsistent with the scheme of the Act as a carefully crafted instrument designed to give robust protection to human rights in Bermuda. In the employment discrimination sphere, the Act seeks to maintain a delicate and somewhat difficult to grasp balance between two potentially conflicting principles: (1) prohibiting discrimination generally and (2) permitting discrimination in favour of Bermudians at the hiring stage. In the popular imagination, this very limited 'license to discriminate' may well be conceived as an unconditional license to treat non-Bermudians in an unfavourable manner. But this is clearly not what section 6 intends to achieve in legal terms.

30. The Tribunal correctly accepted Mr Doughty's submissions on this issue which he repeated before this Court. This was to rely on the following judicial statements of broad principle made by the Supreme Court of Canada (that country's highest appellate court) construing a similar human rights statute, the Ontario Human Rights Code on which our own Human Rights Act is at least partially based. In *O'Malley-v-Simpson Sears Ltd* [1985] 2 SCR 536 at 547, McIntyre J, delivering the judgment of the Court, made the following statements which I endorse as reflecting the Bermudian legal position:

> "*The Code aims at the removal of discrimination. That is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide the relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.*"

31. That would be sufficient to dispose of this point. But Mr Doughty further relied upon even more explicitly powerful Supreme Court of Canada authority for the proposition that it is not an answer to an employment discrimination complaint to establish that not all members of the relevant group have been treated in a similarly unfair manner. Although this case concerned the specific context of a sexual harassment complaint, this context perhaps best illuminates why it makes no sense to regard the fact that not all persons of the same group (be it gender, race or place of origin) have been discriminated as a valid defence. I accordingly accept the following analysis of Dickson CJ in *Janzen-v-Platy Enterprises Ltd* [1989] 1 SCR 1252 at 1288 as reflecting the general Bermudian law position:

> "*The fallacy in the position adopted by the Court of Appeal is the belief that sex discrimination only exists where gender is the sole ingredient in the discriminatory action and where, therefore, all members of the affected gender are treated identically. While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. It nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action…*"

32. These high level principles may be brought down to earth and applied to the practical factual matrix of the present case in the following way. The Respondent's written promotion procedure did not purport to authorise discriminatory treatment of contract officers at all. Promotion was available for Police Officers on contract but no written or formal policy had been adopted to cover the particular scenario of a foreign candidate becoming eligible near the end of their contract so that it would be difficult (or impossible) for them to complete the probationary period if immediately promoted to the new rank. The only grounds for deferring a promotion for which a candidate was eligible was expressed in the '*Promotion Process for Police Officers*' policy document were the following, none of which applied to the Applicant:

> "*13.1 No promotion board can guarantee the promotion of a candidate. Where candidates have met all the eligibility requirements and have been rank ordered, the Commissioner may defer a candidate for promotion if they have been convicted of a discipline offence and received a sentence greater than a severe reprimand for an offence against the discipline code during the previous two years. The Commissioner of Police also reserves the right to delay promotion pending a disciplinary or criminal investigation or where current performance issues need to be addressed.*"

33. The same document also imposed a requirement of six months' probation period before the promotion became permanent (paragraph 11.1). So it was at least

theoretically possible for the Applicant to have been promoted alongside his colleagues on August 8, 2009 and to have completed his probationary period by February 8, 2010, before the expiry of his contract. This policy background demonstrates that it was reasonable for the Applicant to have sought and expected promotion when he became eligible because the existing policy did not contemplate that the expiry of his contract just over six months later would be a potential ground for deferring his promotion or denying it altogether.

34. In refusing to promote the Applicant, having allowed to him to qualify for promotion because of the pending expiry of his contract, the Respondent was treating him less favourably than other officers, including other contract officers at an earlier cycle in their contracts. The fact that other foreign officers were not directly affected by the *ad hoc* policy stance adopted towards the Applicant in no way detracted from the fact that he was, because of his place of origin (the principal reason why he was on a fixed term contract), treated in a discriminatory manner. The treatment complained might well initially be viewed as attributable to the unintended consequences flowing from an imperfect or incomplete promotions policy. However the initial discriminatory treatment was aggravated by a deliberate decision not to renew the Applicant's contract because he had complained of the earlier discriminatory treatment.

35. There was in these circumstances based on substantially agreed facts unequivocal evidence that the Applicant as a foreign contract officer was treated less favourably than Bermudian officers would be treated by reason of the fact that he was from another place and required Immigration approval to continue his employment beyond the expiry of his current contract. For these reasons the grounds of appeal which challenge the finding that discrimination was proved must be rejected.

Findings: did the Board err in finding that the retaliation complaint was proved?

36. Mr Horseman's submission that the Board erred in finding that the retaliation limb of the complaint required this Court to carefully analyse a statutory provision this Court had not fully considered before. Section 8 of the Act provides:

> "***Discrimination etc. prohibited for taking part in proceedings under Act***
> *8. No person shall—*
>
> *(a) refuse to employ or to continue to employ any person;*
>
> *(b) threaten to dismiss or demote or threaten to penalize in any other way any person in regard to his employment or any term or condition thereof;*
>
> *(c) treat prejudicially any person in regard to his employment or any term or condition thereof; or*
>
> *(d) intimidate or coerce or impose any pecuniary or other penalty upon any person,*

in order to prevent any other person from making a complaint or disclosure or from testifying or participating in any other way in a proceeding under this Act, or with a view to penalizing any person for having made such a complaint or disclosure or for having testified or participated as aforesaid.

37. In the face of irrefutable written evidence signed by the former Commissioner himself of a decision not to continue to employ the Applicant because he had complained of discrimination, it is unsurprising that the Respondent raised primarily a technical legal defence. A gloss on this position was the fact that it was also disputed that the Applicant's subsequent demotion, which was also said to be retaliatory, was connected with the discrimination complaint. The following facts were essentially agreed:

(a) the Applicant filed a human rights grievance with the Respondent's Human Resources Department in relation to his non-promotion which revealed that he had consulted with the Human Rights Commission on or about October 26, 2009. On or about the same date requested a renewal of his contract which was due to expire on February 27, 2010;

(b) on or about November 16, 2009, the Deputy Commissioner wrote the Applicant explaining why his promotion was being deferred and inviting him to withdraw his grievance. It gave no real comfort that his promotion would be granted assuming he was granted a fresh contract and characterised his complaint as being one of "*racial discrimination*" (although the grievance used the broader term "*race, place of origin or ancestry*"). The language used in the November 16, 2009 letter suggests that the former Commissioner was likely aggrieved by his perception that he was being accused of racial discrimination. This specific allegation was probably never seriously advanced, and certainly was never proved;

(c) by letter dated November 30, 2009, the Commissioner notified the Applicant that his contract would not be renewed for the following stated reasons:

> "*The grounds of your grievance are that the Commissioner had acted in contravention of Section 2 of the Human Rights Act 1981 by discriminating against you on the basis of race, place of origin or ancestry…The Deputy Commissioner invited you to reconsider your grievance in light of the reasons provided. He also explained that your complaint, if it remained, could not be dealt with by way of a Grievance Advisory Board, as the nature of the grievance falls outside the remit on what they can adjudicate. I am not aware that you have responded to this letter.*
>
> *In any event it is clear that my decision and rationale do not sit well with you. Our employment relationship is no longer harmonious as you feel discriminated against. Although this is*

clearly not the case, I have carefully considered all the attendant facts in this matter, and I am satisfied that it would not be appropriate to invite you to continue your service by way of a new employment contract...";

(d) it was clear that the former Commissioner and then Deputy Commissioner were aware of an internal complaint that the Applicant's human rights had been infringed. There was no clear evidence that either senior Police Officer had actual knowledge of the fact that the Applicant had consulted with the Commission before he filed his formal complaint on or about December 15, 2009;

(e) the Applicant was transferred from his post of Specialist Firearms Officer to that of Court Officer the Magistrates' Court with a resultant loss of overtime earnings on or about December 7, 2009;

(f) the Applicant filed his formal complaint with the Commission on or about December 15, 2009.

38. The key factual matrix ultimately turns on a construction of the former Commissioner's November 30, 2009 letter and surrounding undisputed facts. In pithy summary, a decision not to renew the Applicant's contract was clearly made on the explicit ground that he had made and declined to withdraw a complaint that the Commissioner had infringed the Applicant's rights under the Human Right Act. The Grievance Advisory Board considered it was not competent to deal with this complaint; by necessary implication, the Applicant's only remedy was a complaint to the Human Rights Commission. The transfer of the Applicant to the Court Officer position, if not retaliation in and of itself, was an administrative step which flowed directly from the non-renewal decision, which was itself a reaction to the assertion of a human rights complaint to the BPS which the BPS considered could only be adjudicated through the complaint mechanisms under the Act. I reject the criticisms of the Board's findings on the transfer issue and adopt the lucid submission of Mr Doughty in his Written Submissions in this regard:

> "*8.6.3 It was reasonable for BOI to infer, on the basis of the evidence before it, that Mr. Harkin's transfer was part of the continuum of the ending of Mr. Harkin's Contract which was previously found to amount to unlawful retaliation.*"

39. What is the scope of retaliation under section 8 of the Act? The ways in which retaliation can be committed are spelt out in paragraphs (a) to (d), but the motivations or objectives which must accompany the punitive actions are defined in the body of section 8 as follows:

(1) preventing a person from making a complaint under the Act;

(2) preventing a person from making a disclosure under the Act;

(3) preventing a person from testifying in a proceeding under the Act;

(4) preventing a person from participating in any other way in a proceeding under the Act; and

(5) penalizing a person for having made a complaint or disclosure, or for having testified or otherwise participated in a proceeding under the Act.

40. The first two ways in which retaliatory action can engage section 8 of the Act do not require a complaint to the Commission to have been made. The last three clearly presuppose an existing (or at least a pending or prospective proceeding). It appears the Board approached the retaliation issue on the narrow basis that the Applicant had to prove retaliation in relation to a pending proceeding under the Act based on the way the Applicant put his case. In fact the evidence clearly supported a finding that the motivation for the retaliation was either:

(a) (most directly) to punish the Applicant for having disclosed a breach of the Act (i.e. filing the grievance); or

(b) (inferentially) to deter the Applicant from making a complaint by terminating his employment and making it impossible in practical terms for him to achieve his promotion goal, not to mention making it difficult for him to prosecute a complaint.

41. Mr Horseman rightly submitted that the Board erred in finding that a "proceeding" for section 8 purposes had already been commenced merely by the Applicant consulting with the Commission and that there was, in any event, no evidential basis for a finding that the Respondent had any relevant knowledge that this consultation had taken place. Subject to an important *caveat*, I reject Mr Doughty's submission that the Board should have gone further and found that constructive knowledge would be enough for the following reasons:

(a) Section 8 embodies two distinct knowledge concepts. Firstly, and implicitly, the person alleged to be retaliating must obviously have knowledge of the fact that an allegation of a human rights infringement has been made. I do not adopt the more liberal approach commended by the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society et al-v-Attorney-General of Canada et al*, 2015 CHRT 14 to the effect that constructive knowledge would be enough as regards this threshold knowledge requirement. In my judgment, actual knowledge of an allegation which might mature into a formal complaint and ultimate proceeding before a board of inquiry will almost invariably be required;

(b) however, the second knowledge element in section 8 is the express requirement that the allegedly retaliatory action be accompanied by the requisite 'motivational intent'. The *First Nations Child and Family Caring Society* decision does support, in the Bermudian statutory context, an evidential approach which favours proof of

the requisite 'motivational intent' by circumstances where a clear perception of retaliation exists.

42. In other words, where in objective terms a clear case of retaliation made out by the evidence as regards an employer or other respondent with actual knowledge that a human rights violation has been made (by a complainant) or is being supported (by a potential witness), it will not usually be an answer for a respondent to maintain that he believed he was justified and was not motivated in purely subjective terms by an actual retaliatory intent. Requiring proof of a purely subjective motivational intent would render section 8 almost nugatory. Few acts later alleged to constitute retaliation are carried out by persons consciously aware that their actions are offensive to the provisions of section 8 of the Human Rights Act and/or similar provisions elsewhere. However, in cases such as the present, the relevant employer actors should (if they had the requisite intent at the time) be able with hindsight to appreciate that, had they stood back and applied their mind to the issue, their actions were in objective terms retaliatory. So it will generally suffice to demonstrate that the employer in taking action which objectively manifested a retaliatory intent (the law presumes that persons intend the normal consequences of their actions) at least ought to have known that they were taking retaliatory steps. The Tribunal was in my judgment correct to find that a breach of section 8 had occurred even though the former Commissioner seemingly believed at the time that the termination decision was justified for what amounted to insubordination. According to the Respondent's Witness Statement:

> "*32….The Complainant was not denied rehire because he had filed a formal grievance: he was not rehired due to his refusal to accept what his superior was telling him and for refusing to wait a reasonable period while his work permit issue was being sorted out.*"

43. So it would not have been appropriate for the Board to go further and find that constructive knowledge of the human rights violation allegation was sufficient. Mr Doughty himself, however, could have gone further and argued that section 8, liberally construed to give efficacy to its legislative purpose, should be read as embracing retaliatory action taken both before and after a proceeding has been commenced, whether or not a 'proceeding' starts with the filing of a complaint under the Act or the reference of a complaint to a board of inquiry. The natural and ordinary meaning of the term "proceeding" in the context in which it is used in section 8 suggests to me the proceeding for the hearing of a complaint which commences when a complaint has been investigated by the Commission and referred for determination to a board of inquiry. This construction does not mean that section 8 is only engaged at this stage. Before one looks at case law or legislative precedents from other jurisdictions, one must carefully analyse the local statute itself. Case law from other jurisdictions may only serve to cloud the central issue where the statutory context is materially different. For instance:

    (a) it was clear from *First Nations Child and Family Caring Society et al-v-Attorney-General of Canada et al*, 2015 CHRT 14, the relevant statutory provision only prohibited retaliation against persons who had filed complaints;

(b) the same point emerges from other cases which the Applicant's counsel properly placed before the Court and the Respondent's counsel gratefully adopted on this issue: *Cariboo Chevrolet Pontiac Buick GMC Ltd-v-Becker* 2006 BCSC 43; *Gichuru-v-Law Society of British Columbia (No 2)*, 2008 BCHRT 44; *Virk-v- Bell Canada (Ontario)* 2005 CHRT 2.

44. It is clear beyond serious or sensible argument that retaliatory action taken "*in or to prevent any other person from making a complaint*" can only be asserted at the pre-complaint or the pre-proceeding stage. Retaliatory action taken "*in order to prevent any other person from making a…disclosure*", on reflection, also contemplates primarily the pre-complaint and pre-proceedings stage. This limb of section 8 is surely directed at prohibiting attempts to suppress information about an incident involving an alleged contravention of the Act, irrespective of whether a complaint has yet been formally made to the Commission or is before a board of inquiry. It is impossible without absurd results to construe the relevant statutory words as, for example, effectively permitting retaliatory action to be taken by an employer against complainants or potential witnesses to matters involving an alleged contravention if the retaliatory action is taken before a complaint is formally made or proceedings have commenced, and only operating so as to prohibit such punitive action if is taken at a later stage.

45. Looked at more broadly, if this interpretation of section 8 were right, employees throughout the land would have to be advised by their Human Resource Departments or trade union representatives to file a complaint with the Commission before they seek internal resolution of a human rights complaint. Because should they fail to complain to the Commission first, they will have no legal remedy under the Act for pre-complaint retaliation. I am bound to reject this interpretation of section 8.

46. The same logic applies, with modified effect, in relation to action taken "*in order to prevent any other person from …testifying or participating in any other way in a proceeding under this Act*". Under this limb of section 8, which might be described as a witness protection provision, there must at the very least be a proceeding before a board of inquiry in contemplation. It is not necessary for me to decide for present purposes whether this limb of the section could only potentially be engaged after a complaint has been referred to a board of inquiry and not when evidence is being gathered during the investigative phase. But I do decide for the purposes of the present appeal that the words "*in a proceeding under this Act*" only mandatorily apply to retaliatory action involving the following two motivations:

(a) "*in order to prevent any other person from …testifying or participating in any other way in a proceeding*"; and

(b) "*with a view to penalizing any person for having… testified or participated as aforesaid.*"

47. This finding is admittedly inconsistent with the impression created by the headnote: "*Discrimination etc. prohibited for taking part in proceedings under Act".* While headnotes may often be a useful aid to interpretation, they cannot be used to override the clear terms of the body of a statutory enactment. In my judgment it is ultimately

clear that section 8, properly construed, prohibits retaliatory action taking the form of disclosure of discriminatory or other conduct prohibited by the Act both before and after a complaint has been filed and both before and after proceedings have been commenced for the hearing of a complaint by a board of inquiry.

48. I find that although the Board erred in finding that a breach of section 8 occurred on the precise legal and factual basis that they did, they ought to have found a breach of section 8 occurred, based on the effectively admitted fact that the termination decision was taken as a direct result of the fact that the Applicant made a human rights complaint. Moreover, by the Respondent's own contemporaneous account (it is now conceded the position adopted was wrong), this complaint could only be pursued by way of a complaint to the Commission. The unarguably punitive action can either be construed as motivated by a desire to either:

    (a) prevent the Applicant from effectively making a complaint to the Commission; or

    (b) (more obviously) to penalize the Applicant for having made the discrimination allegation as part of the internal grievance complaint, which complaint constituted a disclosure for the purposes of section 8 of the Act.

49. The Board correctly found that the disclosure limb of section 6 applied and that retaliation had been proved. In reaching that substantively sound conclusion, the Board found (feeling, according to the Liability Decision itself at paragraph 86, that it had not been adequately assisted by counsel on point (c) below):

    (a) (correctly) that, as contended by the Applicant, his BPS grievance constituted a disclosure for section 8 purposes;

    (b) (wrongly) that section 8 required the disclosure to be made in a proceeding under the Act; and

    (c) (wrongly) that a proceeding had in fact commenced when the Applicant consulted the Commission.

50. Order 55 rule 7 provides:

> "(7) *The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.*"

51. I find that no substantial wrong or miscarriage of justice has been occasioned by the flawed reasoning on one facet the retaliation issue which Mr Horseman legitimately

complained of on behalf of the Respondent. In the exercise of my discretion, this ground of appeal is accordingly not allowed.

The Quantum Decision

The Decision

52. The Board on May 11, 2015 made the following key findings on quantum:

> "*Having considered the matter carefully, and having considered in particular the case of Red Deer College v Michaels (1976 2 SCR 324) on the issue of mitigation, and the Board not being satisfied on the evidence that the Complainant had done everything he could reasonably do to mitigate his losses, and there being no sufficient evidence of such mitigation, the Board determined to reduce the agreed expert report valuations dated 27th August 2014, by two-fifths (2/5ths). Accordingly, the award for loss of wages is $192,030.00, less the cost of living differential of 29.71% ($57,052.11), making the total amount of $134,977.89. Such amount includes overtime as we have factored same in our determination of $134,977.89.*
>
> *As to the loss of pension, again we have similarly applied the formula of 3/5ths of $83,677.26 making an award of $50,206.36.*
>
> *However, we do find that these figures will need to be adjusted upwards to cover the Complainant's tax liability in the United Kingdom and the Respondent shall be satisfied that any and all such payment is paid to the appropriate government body.*
>
> *In terms of the damage period, the Board has decided that three (3) years is a fair and reasonable period, and finally, in terms of an amount for injury to feelings, the Board awards $3000.* "

Grounds of Appeal

53. The Applicant complained that the Board erred in law by finding that he had failed to mitigate his loss, erred in fact in assessing his loss of wages and pension award, erred in law in limiting the compensation period to three years and erred in law by giving insufficient reasons for its decision.

Mitigation of loss

54. Mr Doughty submitted that the Applicant started work within a mere seven weeks after his Bermudian employment ended. However, this aspect of mitigation of loss was not an issue the Board was required to decide. It was not an issue raised by the Respondent in his written submissions or at the hearing as a disputed issue. On page 2 of the Patterson and Partners Ltd Report, it is asserted that the Applicant started working with West Midlands Police on April 1, 2010. This was in fact less than 5

weeks after his contract terminated on February 27, 2010. The UK earnings figures which were agreed by the experts in paragraph 3.1 of their Joint Report were apparently based on this uncontroversial fact. On the face of it, the Applicant acted reasonably to mitigate his loss as far as seeking new employment promptly.

55. The Board further appears to have considered that the case of *Red Deer College-v-Michaels* [1976] 2 SCR 354 established the proposition that the onus lay on the Applicant to prove he had taken reasonable steps to mitigate his loss. In fact the converse is the general rule. The Supreme Court of Canada (Laskin CJ) found as follows:

> "*In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences. This is the way I read what is said on the matter in such leading textbooks on the subject as Cheshire and Fifoot's, Law of Contract, 8th ed. (1972), at p. 599, and Corbin, Contracts, vol. 5 (1964), at p. 248.*"

56. However, the Respondent did specifically raise by way of submission the proposition that the Applicant's evidence was deficient in failing to demonstrate that he had taken full advantage of overtime to maximize his earnings and minimise his losses (Respondent's Submissions on Quantum, paragraph 21). The suggestion made in those submissions that there was no evidence as to when he started his fresh employment was misconceived as it ignored the Applicant's expert evidence. The Respondent's expert also made the point that the Applicant's UK wages were based on overtime worth only 2.85% of his gross salary whilst his overtime in Bermuda had been 35% of his gross salary in 2009 (Krys Global Report, paragraph 2.3). It was opined that the damages claimed should be reduced proportionately (paragraph 4.22), which I infer to support a deduction of just under 32%. This matter was one of the issues not agreed in the Joint Expert Report.

57. The Board chose to make a deduction of 2/5ths or 40% without explaining the basis for this decision. The expert evidence adduced by the Respondent clearly supported a discount of (rounding up) 32% to take into account the fact that it appeared that there had been a failure to mitigate his loss by availing himself of overtime opportunities. It was for the Applicant to respond to this evidence if he wished to contend that no such opportunities in fact existed.

58. I set aside the Board's decision to deduct 2/5ths of the award to which the Applicant would otherwise have been entitled and direct that the appropriate deduction should be 32%.

Pension award

59. I find that the deduction of 2/5ths from the full loss of pension award which the Applicant sought (Written Submissions on Compensation, paragraph 5.4.20) based on the Joint Experts Report (paragraph 4.6) should be set aside. This sum was agreed by the experts and there is no logical connection between a failure to mitigate loss as regards overtime and the quantum of the loss of pension benefit item.

60. The Applicant is entitled to receive the full sum of $83, 677.26 which the Board agreed in principle was the full measure of loss for this head of damage.

The appropriate loss of earnings period

61. It is unfortunate that the Board gave no reasons for its decision to assess loss of earnings over the three year period contended for as a maximum by the Respondent, as opposed to the five year period contended for by the Applicant. There was no coherent rationale advanced before the Board or on appeal to this Court as to why the period of loss should be measured by reference to the three year period ending with the date of the hearing on liability.

62. The Applicant's claim for a five year period was based on the simple hypothesis that but for the discrimination which intervened, he would have been re-employed under a fresh five year contract. There was no direct evidence adduced at the quantum stage to support a finding that that there was a real possibility that renewal might not have occurred (e.g. because a Bermudian might have applied). The Board rejected the suggestion at the liability phase that other grounds existed for not seeking a contract renewal for the Applicant. Indeed, the Respondent under cross-examination during the liability phase described the then Commissioner's position on the promotion issue as follows:

> "*…he couldn't effect the promotion…until he had clearance from Immigration that there'd be a subsequent work permit.*
>
> *I think the inference from that is, let us get your work permit sorted out and then we'll promote you…*"[3]

63. The principles governing the award of compensation in human rights cases upon which Mr Doughty relied before the Board, and which the Board did not dissent from, included reliance on the Ontario Court of Appeal decision in *Airport Taxi Cab (Malton) Association-v-Piazza* (1989) 10 CHRR D/6347. In effect, the principle of full compensation was contended for. The Court in that case was considering a statutory provision (section 19(b) of the Ontario Human Rights Code) which is substantially the same as the following provisions of our own Act:

[3] Transcript, 19.02.2013, page 95, lines 11-17. The crux of the present case is the Board's finding that no such inference was justified and that the Respondent ought to have explicitly promised to promote the Applicant subject his obtaining a renewed work permit.

"20. (1)*A tribunal after hearing a complaint shall decide whether or not any party has contravened this Act, and may do any one or more of the following—*

> *(a) order any party who has contravened this Act to do any act or thing that, in the opinion of the tribunal, constitutes a full compliance with such provision and to rectify any injury caused to the complainant by the contravention and to make financial restitution therefor,*

Provided that financial restitution shall not be ordered for any loss which might have been avoided if the complainant had taken reasonable steps to avoid it…"

64. Zuber JA explained the corresponding Ontario compensation provision as follows:

> "*As will be seen, this section simply empowers the board to order compensation. The purpose of the compensation is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred. I find nothing in the language of the foregoing section which would import into it the limit on compensation which is imposed by the common law with respect to claims for wrongful dismissal.*"

65. The Respondent advanced no or no coherent reasons as to why section 20(1)(a) of the Act should not be seen as embodying the principle of full compensation, subject to appropriate deductions for failure to mitigate loss. No authority was advanced in support of the bare submission that section 20(1)(a) did not embody a power to award compensation for 'future' loss. The fact that tribunals in other cases have determined shorter compensation periods has no bearing on what is appropriate to meet the needs of full compensation on the peculiar facts of the present case. I find that the Board erred in selecting three years as the appropriate loss of earnings period. I set aside the award for this head of loss and substitute the five year period salary and pension loss with costs of living adjustment figure which the Respondent conceded would apply in this event (Submissions on quantum, paragraph 16), namely $308,641. This conclusion is without prejudice to the above determination that a discount of 32% (for failure to mitigate loss as regards overtime) should be applied.

Conclusion

66. The Respondent's appeal against the Liability Decision is dismissed. The Applicant was discriminated against on the grounds of his place of origin in that the promotion procedure was applied to him in a prejudicial manner by virtue of his being a contract worker. No question of actual prejudice in the sense of conscious discrimination arose.

67. The Applicant's appeal against the Quantum Decision is allowed in part to the following extent:

    (a) the appropriate loss of earnings period is five rather than three years;

(b) the appropriate deduction for failure to mitigate loss is 32% rather than 40%;

(c) the loss of pension award is the agreed figure of $83,677.26 without the 40% deduction.

68. I will hear counsel as to costs and any other matters arising from the present Judgment, in particular the precise terms of the final Order.

Dated this 23rd day of November, 2015 ______________________

IAN RC KAWALEY CJ