



[2013] JMSC Civil 181

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV04597

BETWEEN

ERLIN HALL

CLAIMANT

A N D

THE COMMISSIONER
OF CORRECTIONS

1ST DEFENDANT

A N D

THE ATTORNEY GENERAL
FOR JAMAICA

2ND DEFENDANT

IN CHAMBERS

Appearances

Mr. Maurice Frankson instructed by Gaynair and Fraser for the Claimant.

Miss Marlene Chisholm instructed by the Director of State Proceedings for the Defendants.

Miss Nicole Rowe Legal Officer for the Office of the Services Commissions.

Heard: May1, 2013 and July 5, 2013

Pensions Act – Retirement – Employee not at work for over fifteen (15) years – whether entitled to outstanding salary, allowances and leave pay – whether entitled to all retirement benefits.

P.A. Williams, J.

[1] Erlin Hall, the claimant, was a young man barely twenty-three (23) years of age when he joined the Department of Correctional Services on April 10, 1969 and was appointed to be a Warder. In November 2011 approval was given for him to be retired from the Public Service in accordance with provisions of Section 6 (1) (1) of the Pensions Act, with effect from the 11th May 2006. It was decided by the Public

Service Commission that his pension should be reduced by fifty percent on the twenty (20) years that he actually worked in the Government Service, as his conduct over the last seventeen (17) years was deemed to constitute an irregularity in the meaning of Section 5 of the Pensions Act.

[2] The claimant had not effectively been to work since 1987. He had been considered eligible to be medically boarded in order to determine his fitness for further service from 1989. Up to June 2011 this process had not been completed and the claimant had not reported for work. As his age for retirement approached and passed, he remained off the job and by 2011 he commenced this action by way of Fixed Date Claim Form seeking the following reliefs:-

1. A declaration that he was entitled to be retired from the public services at age sixty (60) years.
2. A declaration that he is entitled to his salary, allowances and leave pay from October 1987 to 2006 and his retirement benefits due from 2006.
3. An order that the 1st Defendant immediately retires the Claimant.
4. An order that the 1st Defendant pays to the Claimant all outstanding salaries, allowances and leave pay due to the Claimant for the period October 1987 to October 2006.
5. An order that the 1st Defendant pays or causes to be paid to the Claimant all his retirement benefits due from and since October 2006.
6. Any other and/or further relief that to this Honourable Court seems just.
7. Costs

[3]. This Fixed Date Claim Form was filed on the 19th of July 2011. The decision to retire him was made in May of the same year but not communicated to him until November. He pursues the claim now seeking a declaration that he was entitled to his salary, allowances and leave pay and all retirement benefits due from October 2006 and further that an order be made for him to receive payment of the sums due.

The Facts

[4] The facts relative to the claimant's employment with the Department of Corrections are not in dispute. Apart from the matters outlined by the claimant, there was unchallenged information presented in the affidavits of Eileen Gardner, who was at the time Director of Personnel with the Department, and Dr. Lois Parkes the Chief Personnel Officer at the office of the Services Commissions "OSC" and Secretary to the Public Service Commission. Further there was much documentary evidence which provided what can be regarded as clear independent evidence of the claimant's years of service.

[5] The first significant event affecting the claimant on the job was in September 1969 when he was injured by a bullet fired from a rifle which was in his possession which resulted in his losing the second toe on his right foot. He was incapacitated for some seventy-seven (77) days and was considered fit to resume duties in December 1969.

[6] He was promoted to Senior Warder SSG11 in June 1976 and worked at the General Penitentiary and the Rehabilitation Centre and the Gun Court Remand Centre thereafter for various period. He applied for and was granted the vacation leave accruing to him over the years; firstly one hundred and five (105) days from January 19, 1982 to June 18, 1982 and then the same amount of days with effect from August 19, 1985 resuming duties on January 17, 1986.

[7] The claimant said that there was residual effects of the injury he had suffered in 1969 which developed to an extent that he could no longer stand for long periods and he began to suffer from back pains and to have difficulty walking properly. The records indicate that he applied for twenty-eight (28) days sick leave from April 1, 1986 which was granted for him to resume on April 29, 1986. However on May 13, 1986 the Department received an airmail letter from the Claimant with a photocopy of a medical certificate dated April 25, 1986 from Adelphi Medical Service, 50 Greene Avenue,

Brooklyn, New York. The certificate stated that the claimant "has a heart murmur which requires further investigation, taking couple of months period."

[8] The Department wrote to the Claimant at an address in Queens, New York advising him that the medical certificate submitted was a photocopy bearing insufficient information and therefore could not be acted upon. He was also reminded that he had breached regulations by proceeding abroad and not requesting permission to do. This letter was dated June 11, 1986 and requested a response within fourteen (14) days thereafter. The claimant resumed duties at the General Penitentiary after completing in total eighty-five (85) days sick leave. He then applied for sick leave to cover the period retroactively from April 29, 1986 to June 23, 1986. This application was supported by two medical certificates. One from Madhu S. Dagli MD FAAFP of 1207 East 233rd Street, Bronx, New York, dated "6/21/86." It stated "This is to inform you that Erlin Hall is having backache since 4/29/86. It is gradually improving. Can return to work on 6/23/86. The second was from Dr. A.R. Russell of 38 Doncaster Drive, Kingston 2, dated 6/23/86 which certified that the claimant was under his medical care and was unfit for work, recommending "2 days sick leave from 6/23/1986".

[9] Approximately six (6) months after this resumption, the claimant applied for five (5) days sick leave supported by a medical certificate from Dr. Val O. Lyons. This certificate was in the usual standard form and merely certified that the claimant was under the doctor's care and unfit to carry out his duty for five (5) days from the 28/11/86.

[10] On March 3, 1987 the claimant reported that he had been injured during an incident involving another warder and a prisoner. In particular, he complained of injury to his left hand and little finger of the right hand. Later there was complaint of a severe pain across his wrist which he alleged was the result of being thrown to the ground by the prisoner. He was granted thirty-two (32) days sick leave by the Prison's Medical Officer and resumed duties on April 8, 1987.

[11] A little over a month later on June 23, 1987 he applied for thirty (30) days sick leave and was approved to take one (1) day departmental leave and twenty-nine (29) days no-pay leave to resume on July 23, 1987. However, come July 23, he applied for twenty-eight (28) days sick leave to August 24, 1987; thereafter he applied for thirty (30) days from August 20, 1987 to September 19, 1987.

[12] On September 19, 1987, the claimant was sent on interdiction pending the outcome of disciplinary proceedings which had been instituted against him in relation to the escape of a prisoner whilst he was on duty. He was paid half ($\frac{1}{2}$) salary during the period in interdiction. However, in February 1988 he wrote seeking permission to leave the island to attend a "medical exam appointment for 10th of March 88". He noted in that letter that this was due to ill health he had been experiencing for "past months".

[13] There was another letter dated the 28th of June, 1988 where he informed that he had a medical problem, cardiac murmur which he had "been going through for the past one (1) year and nine (9) months". He advised that he was going to the United States to which he had "a date the 14th July, 1988". He also stated that he "may be confine to the United States for more frequent treatment for about five (5) months. This visit and previous visit was on the advice of my Doctor, Dr. Frazer".

[14] The matter of his interdiction was resolved in September 1988. He was informed by way of letter dated September 1, 1988 that he had been acquitted of the charge and that he should be reinstated with effect from September 19, 1987. He was to be paid the salary withheld from him for the period and was instructed to resume duties on September 5, 1988. He did not resume duties at that time but applied for sick leave continuously for various periods from September 5 to December 27, 1988. These applications were supported by medical certificates from Madho S. Dagli MD FAAFP of Bronx, New York. These certificates spoke to the claimant suffering from severe backache and pain in his right leg/foot.

[15] On January 3, 1989, the claimant was summoned to attend a meeting at the "OSC" where he was interviewed by the Chief Personnel Officer. As a result, the Department of Corrections was advised to take immediate steps to have him medically boarded in order to determine his fitness for further service.

[16] On the 1st of February 1989 the claimant was written to by the 1st defendant requesting that he obtain a comprehensive medical report from his doctor as to his medical condition and submit to the office. A letter was also written to the Doctor himself requesting said report explaining that it was needed such that a medical board could be convened to determine if the claimant was fit for further service with the department.

[17] There were no more medical certificates from this doctor after December 19, 1988, however after this period, there were submitted certificates from the medical officer certifying that the claimant was suffering from a medico surgical complication and was unfit to carry out his occupation. These were submitted for each month from December 1988 to August 1989.

[18] On August 11, 1989 he was examined by Dr. C.O. Grey, the medical officer at the General Penitentiary. He noted that the claimant complained of occasional back discomfort and some cramping in the leg. On examination the doctor found the claimant appeared to be fit looking gentleman in no obvious distress, with no back discomfort at the time. The only finding of significance was mildly elevated blood pressure. The doctor concluded his report by stating:-

"My assessment is that this gentleman is physically fit. I see no reason why he is unable to work and therefore cannot approve any further extension of leave of absence. I have started him on medication for his mildly elevated hypertension which in no way should prevent him from working".

[19] There is no indication that he claimant resumed work but rather by letter dated May 18, 1990 the matter was referred to the Chief Medical Officer of the Ministry of

Health seeking advise. The medical certificates and the report from Dr. Gray were submitted for a determination as to whether the claimant was fit to resume duties. The response received dated June 4, 1990 advised that his salary should be discontinued if he was off the job. Further it was noted that the claimant was fit for further service and therefore should report to work failing which and in the absence of medical certificates, it would become a disciplinary matter.

[20] In a letter dated September 28, 1990 the claimant was informed that approval had been given for him to be summarily dismissed from the public service with effect from 10th September 1989 in keeping with the Regulation 37 (4) of the Public Service regulations 1961, consequent on his absence from duty without permission for more than five (5) days. The claimant signed to receiving this letter on November 20, 1990.

[21] The claimant filed an application in the Supreme Court for an Order of Certiorari to quash the decision by the Public Service Commission to summarily dismiss him. The matter was heard in July of 1991 with his application granted on July 5, 1991 and a written decision in the matter was delivered on September 29, 1993. It is reported at **Erlin Hall v. Public Service Commission** (1993) 30 JLR 442. It was held therein:-
S 37 (4) of the Public Service Regulation state:-

“The absence of any officer from duty for a period of five (5) days or more without permission renders him liable to summary dismissal.....” This regulation does not give an absolute discretion to anyone to dispense with the services of the applicant would having regard to the principles of natural justice. An officer cannot be lawfully dismissed without first telling him what is charged against him and hearing his defence or explanation. In failing to do so the Commissioner breached the rules of natural justice. The decision is therefore quashed to enable the Commission to make right this wrong.

[22] Mr. Justice Langrin at page 444 of the judgment stated.....

“We wish to emphasize that the only matter which we are deciding is that the process by which the Public Service Commission reached its decision in this case was unfair in this respect, that the applicant was never told the reasons

why his dismissal was being considered, and that he was given no opportunity of making an explanation about the matters of complaint against him. We are far from saying that if the procedure had been fair, the respondent commission would not have been entitled to reach the decision that it did. Whether the decision itself was fair and reasonable is not a matter that can be raised in the present proceedings”.

And at page 445 it was expressly stated -

“Nothing that we did on July 5, 1991 reinstated the applicant in his former position as a senior warder”.

[23] In his affidavits, the claimant speaks to a comprehensive medical report prepared by Dr. C. A. Francis MD and dated the 22nd of August, 1990 stating that he was medically unfit and suggesting that arrangements be made so that he be able to curtail his professional responsibilities on medical grounds. He does not exhibit this report and although he said it was submitted to the relevant authorities, neither of the affidavits for the defendants refer to or exhibit this document.

[24] In a letter dated October 6, 1994 the claimant's attorneys-at-law H.G. Bartholomew and Company wrote to the “OSC” over the signature of Mr. Authur G. Kitchin. In it, he acknowledged their letter which had been given to the Hon. Attorney General dated 29th September, 1994 and he advised that the claimant would be available for medical examination during the month of December 1994. In her affidavit Dr. Lois Parkes explains that a decision had been taken in September 1994 to hear an application by the claimant for premature retirement on medical grounds.

[25] In a letter dated the 3rd of November 1994, Mr. Kitchin again wrote to the “OSC” advising that the claimant would be available for medical examination from the last week of January 1995 to the end of February 1995. He requested an indication of the date, time and place of the said medical examination. By the 10th of January 1995 there had been no reply but a telephone conversation had taken place between Mr. Kitchin and someone at the Offices of the Services Commission. Mr. Kitchin referred to this in

his letter of that date advising that the claimant would be available during the week of February 20 to March 3, 1995. He closed this letter stating:-

"We expect to hear from you within a reasonable time informing us of the date, time and place of the said medical examination. Failure on your part to do as aforesaid will be construed by us as a breach of the undertaking given to the Court, and your continued efforts to delay and/or deny justice for Mr. Hall".

[26] The examination had not been conducted over the next year. In a letter dated January 24, 1996, a Miss L.V. Henry, on behalf of the Chief Personnel Officer outlined the efforts that had been made to secure a date of the Medical Board to Mr. Kitchin. She noted that they had had a conversation on that date and that he had written to the Attorney General's Chambers on the 19th of December 1995. She noted further that he had been advised that the Board had been arranged for Thursday 13th April 1995 between 9:00 a.m. and 10:00 a.m. at the Kingston Public Hospital. She pointed to the fact that it was on the 12th of April that he had contracted then advising that he had been unable to contact his client and requested a rescheduling. She concluded this letter by indicating that efforts were still being made to confirm March 6, 1996 as the date for the Medical Board to be convened.

[27] A follow-up letter was sent by Mss. Henry to Mr. Kitchin dated 25th of January 1996 confirming that the Medical Board to examine Mr. Hall would be convened by Dr. Lawson Douglas at 9:00 a.m. on the 7th of March 1996 at the Orthopedic Clinic at the K.P.H. Mr. Kitchin responded in a letter of February 19, 1996 advising that they had informed the claimant and as soon as confirmation of his attendance thereat was received he would advise accordingly.

[28] The correspondence that follows indicate that the Board was convened on March 7, 1996 and the claimant attended. However, the process was not completed as by way of a letter dated 24th June 1996 from the Senior Medical Officer at the Kingston Public Hospital the uncompleted Medical Board was returned to the Principal Medical Officer as had been requested. It was noted that the claimant was off the island and further it

was alleged that he had refused to attend clinic for the doctors to determine his cardiac status to complete his Medical Board.

[29] In a letter dated August 28, 1996 Miss L.V. Henry for the Chief Personnel Officer wrote to the attorney-at-law for the claimant advising that the matter could not be taken any further until the claimant made himself available for the completion the Medical Board as the matter could not be placed before the Public Service Commission for a decision to be made until the Chief Medical Officer submitted his report on the completion of the Medical Board.

[30] It was in August of 2004 that the claimant indicates in his affidavit that he gave certain instructions to his attorney. This resulted in Mr. Kitchin writing to the Chief Personnel Officer referring to letter of August 1996 and advising that the claimant was ready, willing and able to avail himself for the completion of the Medical Board. He requested a response at the earliest possible convenience of the date, place and time when the Board would be convened. He concluded with the following:-

“Kindly let me hear from you within fourteen (14) days from the date hereof, failing which I will be obliged to apply the Supreme court for an order as my client is anxious to conclude this long outstanding matter.

[31] Having acknowledged this letter by the 21st of September 2004, the “OSC” advised that the 1st defendant had been advised to make the appropriate arrangements with the Chief Medical Officer in the Ministry of Health for the reconvening of the Medical Board. By November 3, 2004, Mr. C. Govern for the 1st defendant wrote to Mr. Kitchin asking that an updated Medical Report on the claimant be submitted. This report was to “indicate current treatment, diagnosis and prognosis”. Mr. Kitchin acknowledged receipt of this letter by November 16, 2004 and advised that he was in the process of obtaining further instructions from the claimant and would communicate further as soon as they had been received.

[32] On October 2, 2006 a letter was written to Mr. Kitchin informing him that the 1st defendant was still awaiting a response in order to bring closure to the matter. Mr. Kitchin again acknowledged receipt of the letter and advised of his being in the process of obtaining further instructions from his client. Mr. Kitchin went on to state:-

"In the interim, I would be obliged if you determine all pay and allowances due and owing to my client from the date of his wrongful dismissal i.e. 10th September 1989 to 3rd November, 2004, the later being the date when you requested a medical certificate from my client and which to date he has not furnished, and thereafter forward to me your cheque for the same at your earliest possible convenience". This was contained in a letter dated October 9, 2006.

[33] The matter was referred to the OSC and Mr. Kitchin was so advised in a letter of October 26th, 2006. On April 9, 2008 he wrote to OSC enclosing a copy Medical Report as requested and advising that the claimant was "now ready, willing and able to make himself available to complete his Medical Board." He again concluded with request for a response within fourteen (14) days failing which he would be obliged to apply to the Supreme Court for an order.

[34] The claimant having been born in May 1946 had attained the formal retirement age in 2006. In August 2010 the claimant's current attorneys Gaynair and Fraser wrote to the OSC respectfully asking whether it was intended to convene a Medical Board to complete the review. The Public Service Commission held a meeting on May 18, 2011 to consider what was to be done and the decision was arrived at that the claimant having been in the public service for a total of thirty-seven (37) years and having attained the retirement age was eligible for a pension. However, since he had in effect only worked for twenty (20) years it was decided he should only benefit from the number of years he actually worked.

The case for the Claimant

[35] Although orders were made at the Case Management Conference on the 17th of February 2012 for the parties to file and exchange written submissions with authorities

by the 14th day of September 2012, when the matter came up for hearing on the 12th October this had not been complied with so time was extended for it to be done. The defendant filed their submissions in time for the hearing on the 1st of May and the claimant, to date, has not done so.

[36] In his affidavit responding to the facts as outlined in the affidavits filed on behalf of the defendant, the claimant made note of the Full Court hearing which had quashed the decision to dismiss him made in 1990. He pointed out that the court had stated inter alia that it was"quashing the decision thereby enabling the commission to have the wrong put right" and further that "nothing that we did on July 5, 1991reinstated the applicant in his former position as a Senior Warder". He went on to state:-

"That in the event, following the judgment of the Full Court, the Public Service Commission did nothing to have me reinstated".

[37] He further stated in relation to the issue of the Medical Board that when it was first convened it was improperly constituted, but he went on to maintain that he was examined by the doctor who told him that based in the medical report of Dr. Carl Fraser and his then current medical condition it would be recommended that he be referred to a heart specialist. He recognized the fact that it had taken some six years after the decision of the Full court before a Medical Board was convened. He however, insisted that after this improperly constituted Board had adjourned he had never been notified or advised of the reconvening of the Board and it is incorrect to say he refused to attend for completion of the Medical Board.

[38] He asserted that the onus was on the Public Service Commission to reconvene the Medical Board and to notify him to attend same but that the duty was never discharged up to the year 2004 when he became entitled to his retirement. He found it significant that Mrs. Eileen Gardner had stated in her affidavit that it was not until May of 2008 that the Public Service Commission had instructed the Department to make arrangements for the Medical Board to be reconvened. He accepted that in August 2004 he had advised the Public Service Commission that he was ready, willing and able

to attend a reconvened Medical Board and that following a request for an up-to-date medical report, he was able to submit one in April 2008.

[39] It is the claimant's contention that the question that arises is whether he was entitled to his full pension having regard to the position taken by the Public Service Commission that he should be paid no more than 50% of his pension entitlement on the basis that his conduct over the period of seventeen (17) years up to 2011 constituted an irregularity especially in light of the fact the termination of his employment was with effect from the 10th day of September 1989 and to the best of his knowledge, information and belief it had never been revoked.

[40] He went on to argue that there has been no evidence presented on which the Governor General could be satisfied that he had been guilty of negligence, irregularity or misconduct such that his pension should be reduced or withheld. He stated, "That in the seventeen (17) year period, 1994 to 2011 I remained dismissed from the service and was not and could not have been liable for any negligence, irregularity or misconduct".

[41] He concluded that in his view the situation now before the court is as a result of the failure and/or neglect of the Public Services Commission to discharge its duties and therefore blame cannot be laid at his feet.

[42] This was the thrust of the oral submissions made on behalf of the claimant by Mr. Frankson. He argued that the onus to reconvene the Medical Board remained on the Public Service Commission and it was not, nor could not be shifted. He maintained that, the claimant ought not to be in effect punished for the failure of the Public Service Commission.

The case for the Defendants

[43] In her submissions on behalf of the defendants, Miss Chisholm submitted that the issues for consideration are:

- (i) whether the claimant is entitled to be retired from the public service at the age of sixty (60) years?
- (ii) whether the claimant is entitled to claim salary for the days he was absent from work?

[44] It is regarded by the defendants that it is "common ground" that there had been no formal separation of the claimant from the public service when he attained the statutory retirement age of sixty (60). Thus it was opined that the legal position which would be considered by the Public Service Commission in May 2011 was that he was still employed though he was absent from work and not in receipt of a salary. Thus, it was conceded that in the circumstances, the issue of the claimant's retirement at the time he attained the age of sixty (60) was not in dispute.

[45] The observation is made that in effect the claimant had not resumed duties since September of 1987. It was at this time he was sent on interdiction and paid half salary pending the outcome of the disciplinary proceedings. He was acquitted of the charges and informed that he would be paid the remainder of the salary withheld during his interdiction and told to resume duties in September 5, 1990. There was failure to do this but instead he continued to submit a series of medical certificates until December 1988.

[46] After this review, Miss Chisholm went on to note that despite the ruling in his favour by the Full court on July 5, 1991 the claimant made no attempt to resume his duties. The subsequent attempts by the Service Commission to hear his application to be retired on medical grounds were consistently delayed by the claimant in the opinion of Miss Chisholm. This the defendants urged, caused a question to arise as to whether the persistent absenteeism was attributed to ill health or the fact that he was no longer living in Jamaica.

[47] The submission however in any event was ultimately that the claimant was not entitled to a paid sick leave after he exhausted the time allowed under the Staff Orders

for the Public Service 2004 (previously 1976). Further it was submitted that the common law principle of "no work no pay" is applicable in this case as the claimant had rendered no service for the period he claims entitlement. The case of **Sykes v. Minister of National Security and Justice** (2000) 59 of WIR 441 was referred to in support of this point.

[48] In her oral submissions, Miss Chisholm acknowledged that after the ruling by the Full Court, no effort had been made by either side for the claimant to be re-instated. Importantly however, she urged that the duty was on him to resume work. The position at that time was that it was unclear as to whether he was away from work due to illness or indeed was it known with certainty if he was residing in the island.

Analysis and decision

[49] It is recognized that the claimant has in effect not reported to work since April of 1987. It is somewhat questionable that medical certificates from Madhu Dagli MD FAAFP stopped being submitted once a request was made for a comprehensive medical report to facilitate the convening of a Medical Board to determine the claimant's fitness for work. This request was made in February of 1989 and there is no explanation offered for the failure of the doctor to comply with the request. Significantly, there was none forthcoming up to the time efforts were made to summarily dismiss him.

[50] Whilst it may be true that the uncertainty surrounding his status was compounded by the judgment of the Full Court, it would have been addressed if either the claimant had made the move to re-claim his position or the 1st defendant had taken the necessary steps to give him the fair hearing deemed necessary by that Court's decision. The claimant however, had accepted that he was never officially re-instated in his position. No explanation is forthcoming as to why he did not see it necessary to report to his job. It might appear somewhat incongruous that he should in one breath argue that he had never been re-instated yet he was entitled to his salary and benefits.

[51] The entitlements of the claimant on retirement is governed by the Persons Act. Hence it is useful to be reminded of its relevant provisions.

Section 5 (1) No officer shall have an absolute right to compensation for past services or to pension, gratuity, or other allowance; nor shall anything in this Act affect the right of the Crown to dismiss any officer at any time and without compensation.

(2) Where it is established to the satisfaction of the Governor General that an officer has been guilty of negligence, irregularity or misconduct, the pension gratuity, or other allowance, may be reduced or altogether withheld.

[52] It was to this section that the claimant's employers referred when the decision was taken to reduce his position by fifty (50) percent. His conduct over the seventeen (17) years of the total thirty-seven (37) years he had been in the government service was deemed to constitute an irregularity.

[53] The term irregularity is not defined in the Act. However, the fact that the claimant did not report to work, and did not submit any medical certificates or attempt to explain his prolonged absence from work would to my mind constitute a form of behavior which would have to be addressed appropriately. The claim to be entitled to be paid for a time when he did not work does not prima facie, appear to be appropriate.

[54] The claimant points to the fact that the Medical Board was not properly convened for many years and argued that the blame does not lie with him. It was already noted that the first attempt to convene the Board required a comprehensive medical report from his then doctor. Hence his failure to supply the report was the reason for that initial failure.

[55] After the Full Court decision, it was communicated to the "OCS" that the claimant would be available for a specific period but none was convened for that time. Correspondence between the claimant's attorney-at-law and the "OCS" suggest that the former had advised that he was unable to contact the claimant to confirm the date

subsequently agreed. It is noted that it was not until March of 1996 that the exercise commenced for the Medical Board. There is no challenge to the fact that it was not completed due to the failure of the claimant to attend clinic for the Doctors to determine his Cardiac Status. The claimant maintains that he was never notified or advised of the reconvening of the Board. It is noted however that in August 1996 a letter had been written to the claimant's attorney which clearly indicated that the completion of the Medical Board was dependent on the availability of the claimant. There is no explanation offered by the claimant as to why the next letter in apparent response to this was not until August of 2004 when his lawyer wrote to "OCS" indicating he was then "ready, willing and able to avail himself for the completion of his Medical Board". This delay from 1996 to 2004 was due to the claimant apparently not being available.

[56] The next request from the claimant's employers to his attorney-at-law was for an updated Medical Report which was to include his current treatment, diagnosis and prognosis. This letter was dated November 3, 2004. The response, enclosing the requested report, was in a letter dated April 9, 2008. This delay from 2004 to 2008 was again due to the claimant's failure to expeditiously supply the report and once again there is no explanation offered. In any event it is noted that he attained the retirement age from 11th May 2006.

[57] The position therefore is that the claimant having never been re-instated after being summarily dismissed, was unavailable to complete his Medical Board for eight (8) years and then was unable to supply an update medical report for a further four (4) years. Whatever onus there was on the "OSC" to reconvene the Medical Board could only have been fulfilled if the claimant had made himself available or supplied the relevant information. The claim by the claimant that the fault or blame laid with his employers is to my mind without merit.

[58] The general principle as stated in **Sykes v. Minister of National Security and Justice and Anor.** [supra] is applicable. At page 416 paragraph (f) Lord Scott of Foscote in delivering the oral advice of the Board said:-

“The withholding of a part of salary attributable to a period in which, in breach of contract, no work has been done in accordance with common law (Miles v. Wakefield Metropolitan District Council) and in accordance with the contract of employment between the parties”.

[59] In all the circumstances, there is no justification for rewarding the claimant by paying him for that time he was away from work. He cannot be deemed to be entitled to that which he has not earned. The decision to pay him fifty (50) percent on the twenty (20) years that he actually worked is to my mind eminently fair.

The Order

- i) The Fixed Date Claim Form dated July 18, 2011 is dismissed.
- ii) No order as to cost.