

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD BISHOP P  
THE HON MISS JUSTICE EDWARDS JA  
THE HON MR D JUSTICE FRASER JA**

**SUPREME COURT CIVIL APPEAL NO COA2022CV00077**

<b>BETWEEN</b>	<b>TALBERT SMITH</b>	<b>APPELLANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>RESPONDENT</b>
<b>AND</b>	<b>WEST INDIES ALUMINA COMPANY</b>	<b>INTERESTED PARTY</b>

**Ms Keisha Spence instructed by Henlin Gibson Henlin for the appellant**

**Ms Katherine K Francis and Romario Miller for the respondent instructed by the Director of State Proceedings**

**Ms Kathryn Williams instructed by Livingston Alexander and Levy for the interested party**

**4, 8 and 29 November 2024**

**Constitutional law - Breach of the right to a fair trial within a reasonable time - Matter heard but no judgment delivered - Trial judge retiring without delivering judgment - Declaration that there was a breach of constitutional rights - No retrial ordered - Damages awarded - Whether damages awarded adequate - Section 16 of the Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica**

**MCDONALD-BISHOP P**

[1] I have read, in draft, the reasons for decision of Edwards JA and agree that they reflect my own reasons for concurring in the decision of the court as detailed in para. [5] below. There is nothing I could usefully add.

## **EDWARDS JA**

### **Introduction**

[2] On 31 May 2022, Mr Talbert Smith ('the appellant') was awarded damages for the breach of his constitutional right to a fair hearing within a reasonable time, in the sum of \$2,150,000.00 (with interest at the rate of 6%), by K Anderson J ('the learned judge'), in the Supreme Court. Mr Smith had filed a claim against the State, represented by the Attorney General of Jamaica, claiming that his right to a fair hearing within a reasonable time, guaranteed under section 16 of the Charter of Fundamental Rights and Freedoms ('The Charter') of the Constitution of Jamaica, was breached when a judge of the Supreme Court heard a claim he had brought against his former employer, but failed to deliver a judgment in a timely manner. The trial judge eventually retired without delivering the judgment.

[3] The learned judge agreed with the appellant that his right had been breached by the failure of the trial judge in the original claim to deliver judgment in a timely manner and, by implication, the failure of the court to have the matter retried within a reasonable time. The learned judge granted the appellant the declarations he sought, which were that, his right had been breached, the trial was a nullity, and retrial was an impossibility, and awarded him damages as a result. The full orders of the learned judge were as follows:

- "1. It is declared that the Claimant's constitutional right to a fair hearing within a reasonable time under Section 16(2) under the Charter of Rights have [sic] been breached,
2. Trial of Claim No. 2009 HCV 01479... is declared as being a nullity and that claim shall not be retried".
3. The Claimant is awarded as against the Defendant general in the sum of Two Million One Hundred and Fifty Thousand Dollars (\$2, 150,000.00) with interest at the rate of 6% with effect as at January 31, 2015 until May 31, 2022.
4. The Claimant and the interested party are each awarded against the Defendant the cost of this claim with such costs to be taxed if not sooner agreed.

5. The Claimant's Attorneys-at-Law shall file and serve this Order."

[4] The appellant, being dissatisfied with the sum awarded, which he believed to be too low to adequately vindicate the breach of his right, filed this appeal against the award. This appeal, therefore, is only concerned with the issue of whether the learned judge wrongly exercised his discretion when he awarded damages in the sum of \$2,150,000.00.

[5] Having heard submissions of counsel from both sides, on 8 November 2024, we gave a decision in this matter and made the following orders:

1. The appeal is allowed.
2. Order 3 of the judgment and orders of K Anderson J dated 31 May 2022 is set aside.
3. Substituted for the said order is the order that the appellant, Mr Talbert Smith, is awarded damages against the Attorney General of Jamaica in the sum of \$2,650,000.00, with interest at the rate of 6% thereon, from 31 January 2015 to 31 May 2022.
4. Costs of this appeal is to the appellant against the Attorney General of Jamaica to be taxed if not sooner agreed.

At the time of delivering our decision, we promised that our written reasons would follow. We now deliver on that promise.

### **Background**

[6] The appellant's original claim was filed in the Supreme Court on 30 March 2009 (Claim No 2009HCV01479), against his former employer, the West Indies Alumina Company ('the interested party'). He sought damages for wrongful dismissal and/or breach of contract in the sum of \$19,000,000.00 "and ongoing".

[7] The circumstances that led to that claim were that, in April of 2003, a complaint was made regarding certain conduct of the appellant in the course of his employment. At the time, he was employed to the interested party as a grade 1 ropeway operator. Arising from that complaint, the appellant was arrested and charged, in May 2003, with the offences of fraudulent conversion and obtaining money by menaces. Whilst those matters were ongoing, based on the same complaint, and following a disciplinary hearing by his employer, he was suspended from work, and later dismissed in October of 2003, with six week's pay in lieu of notice. The matters before the court subsequently ended in the appellant's favour, the fraudulent conversion charges having been dropped by the prosecution at the preliminary enquiry stage, and the appellant having been acquitted of the charge of obtaining money by menaces following a trial in June of 2007. Despite his stated wish, he was not reinstated in his employment.

[8] The claim for wrongful dismissal and/or breach of contract was filed in 2009, six months before the statute of limitations would have run out. The claim was heard between 6-8 December 2010, with judgment reserved. The trial judge retired in January of 2015. Judgment in the claim was never delivered.

[9] After judgment was reserved two letters were written enquiring about the status of the matter. The first was written by the appellant's then attorney-at-law, addressed to the trial judge and routed through the trial judge's clerk, in November of 2011. The second was written by the appellant himself to the then Chief Justice, in August 2015, after the trial judge had retired. No evidence of any response to those letters was provided to this court. Thereafter, no further action was taken until 3 June 2020, when a fixed date claim form was filed against the Attorney General of Jamaica, seeking declarations and/or damages for injury, loss, damage and expenses incurred, on the basis that the appellant's "right to a fair trial and to a fair trial within a reasonable time", pursuant to section 16(2) of the Charter had been breached due to the failure of the trial judge to deliver judgment in the matter. The appellant's original claim was never set down for retrial.

[10] The reliefs sought by the appellant, in full, were as follows:

"1. A declaration that the judge...who heard the trial, having retired can no longer deliver the judgment on the trial thereby rendering the delivery of judgment an impossibility.

2. A declaration or order that the trial... on the 6<sup>th</sup> [sic] 7<sup>th</sup> and 8<sup>th</sup> days of December 2010 be vacated and declared null and void

...

3. A declaration that the delay in and/or the impossibility of rendering a judgment in this matter is a breach of the Claimant's right to a fair trial within a reasonable time.

4. A declaration that the Claimants' right to a fair trial under section 16(2) of the Charter of Fundamental Rights and Freedoms has been breached.

[Sic] A declaration and/or order that in all the circumstances a new trial is unreasonable and unjust.

5. An order that the Claimant is entitled to damages.

6. The costs of this claim and the costs thrown away in Claim No. 2009 HCV 01479 be [sic] the Claimant to be taxed if not agreed."

[11] The claim was supported by an affidavit from the appellant filed 3 June 2020, in which he detailed, *inter alia*, the history of the matter, the steps he and his then attorney-at-law had taken to obtain judgment in the matter, the prejudice he had suffered due to the inordinate delay since judgment was reserved, and the fact that it was impossible for the trial judge to still deliver judgment, the trial judge having retired. The appellant also spoke to the prejudice it would cause him if he was made to have a retrial of the matter considering that, to his knowledge, trial dates were then being set for 2025 and 2026.

[12] The respondent opposed the claim by way of the affidavit of Apryl July, filed 3 November 2020, speaking only to the possibility of a trial before 2025 based on information received from the court administrator at the time.

[13] The claim was amended on 24 November 2021 to add the West Indies Alumina Company as an interested party. An affidavit of Chamet Aiken, the manager of the

Legal and Property Department of the company, was filed on behalf of the interested party on 17 February 2022. In that affidavit, Ms Aiken spoke to the circumstances that led to the claim, and her belief that the company would not be able to have a fair trial if the matter was to be retried. She noted the company's support of the appellant's assertions that a retrial would be unreasonable and unjust, and asserted that the company had also been denied a right to a fair trial within a reasonable time. She also stated the company's support of the appellant's claim for declaratory relief as set out in his amended fixed date claim form.

[14] Having heard the matter, the learned judge granted the declarations sought and awarded damages in the sum mentioned above, as well as costs to the appellant and the interested party against the Attorney General.

[15] The learned judge's decision was delivered orally and no written reasons were provided to this court. At the written request of this court for reasons for the decision, if any existed, the court was advised that no written reasons were available. The parties have, however, provided an agreed synopsis of the oral reasons reportedly given by the learned judge for holding that the appellant's constitutional right to a fair hearing within a reasonable time was breached. However, the synopsis did not include the learned judge's reasons for awarding damages in the sum that he did.

### **The appeal**

[16] The notice of appeal, filed on 12 July 2022, relies on a single ground of appeal, as follows:

"a. The learned Justice erred as a matter of fact and/or law in finding that the sum of Two Million One Hundred and Fifty Thousand Dollars (\$2,150,000.00) adequately compensates and/or vindicates the [appellant] in the circumstances for breach of his constitutional rights guaranteed by Section 16(2) of the Charter of Fundamental Rights and Freedom having regard to the following findings that:

- i. There would be no retrial of Claim No. 2009 HCV 01479.
- ii. A retrial is unfair and/or prejudicial in the circumstances.

- iii. The original claim being Claim No. 2009 HCV 01479 is a nullity.
- iv. By virtue of the Attorney General's] delay of approximately 19 years, the [appellant] has been deprived of his opportunity to vindicate his rights in respect of his claim for wrongful dismissal."

[17] Further, the appellant asked this court to vary the learned judge's order in respect of damages to read:

"The [appellant] is awarded as against the [Attorney General] general damages in the sum of Ten Million One Hundred and Fifty Thousand Dollars (\$10,150,000.00) with interest at the rate of 6% with effect as at January 31, 2015 until May 31, 2022."

[18] He also sought costs of the appeal and any other order the court thinks fit.

### **The submissions**

#### **(a) The appellant**

[19] Counsel for the appellant made written and oral submissions to this court. The gravamen of those submissions can be summarised without doing damage to them. Counsel submitted that the sum awarded by the learned judge is disproportionate, and does not, based on the circumstances of the case, vindicate the breach of the appellant's section 16(2) right, nor does it demonstrate that the right was important or valuable.

[20] Counsel relied on the authority of **The Attorney General of Jamaica v Clifford James** [2023] JMCA Civ 6 for the basis upon which this court will disturb an award of damages. She also relied on **Ernest Smith & Co (A firm) et al; consolidated with Hugh Thompson v The Attorney General of Jamaica** [2020] JMFC Full 7 ('**Ernest Smith**') for the requisite approach a court should take in awarding damages for the breach of a constitutional right in similar circumstances where the trial judge retired without handing down judgment. However, counsel submitted that the appellant should be awarded a larger sum than that awarded in

**Ernest Smith**, as there are distinguishing facts in the instant case that warrant a higher sum.

[21] In that regard, counsel highlighted that, in that case, where the award of \$1,500,000.00 was made for vindictory damages, it was the decision on the assessment of damages that was outstanding, as judgment had already been given in the substantive claim. Counsel contended that the case was distinguishable on the basis that the claimants in **Ernest Smith** were not left without a remedy. The appellant's position, she postulated, was worse, as he has been left totally without a remedy for his initial causes of action against the interested party, and has also lost the right to pursue a claim and recover damages for malicious prosecution. Due to the delay (10 years from the date judgment was reserved to the filing of the claim for breach of his constitutional right), a retrial, she said, is now impossible and a new claim would be statute barred.

[22] Counsel submitted that the position that the appellant was placed in by an organ of the State goes to the heart of public confidence and will lead to high levels of public outrage. Counsel contended that a fair trial within a reasonable time was an important mechanism to resolve disputes, and therefore, the gravity of the breach was extremely significant in this case.

[23] Counsel also pointed to the fact that the appellant had made attempts to obtain the judgment during the period of delay.

[24] The learned judge, it was submitted, did not have sufficient regard to those circumstances, and, therefore, came to an erroneous estimate of the loss suffered by the appellant. Counsel argued, in her written submissions, that the proper approach the court should have taken in calculating the award, was to consider the value of the appellant's original claim that was "snatched away by the judicial system", and to seek to put the appellant back "in the position he would have been in, had the breach not occurred". Counsel, however, resiled from that position and conceded in her oral arguments that the award for constitutional damages could not be referenced to the judgment sum he may have been awarded on the original claim. However, she maintained it should be substantial. A substantial award, she said, would act as a



deterrent against the State acting in such a manner, and should not be so low as to trivialize the breach. The sum awarded by the learned judge, counsel contended, had just that effect.

[25] Accordingly, it was submitted that \$10,000,000.00 would be the appropriate award in the circumstances. Counsel, however, was unable to justify how she arrived at that sum, despite being pressed to do so.

(b) The respondent

[26] Counsel for the respondent, Miss Francis, also relied on the case of **The Attorney General of Jamaica v Clifford James** for the approach this court should take regarding an appeal as to damages. Counsel submitted that the sum awarded by the learned judge was appropriate, and was in accordance with the measure of damages for constitutional breaches set out in the relevant authorities. Several authorities were relied on to demonstrate that damages were awarded in such cases to vindicate the right which had been breached, and were based on the nature of that right and the gravity of the breach. These authorities included **Ernest Smith, Inniss v The Attorney General of Saint Christopher and Nevis** [2008] UKPC 42 ('Inniss'), **Horace Fraser v Judicial and Legal Services Commission & Anor** [2008] UKPC 25 ('Horace Fraser'), **Merson v Cartwright and another** 2005] UKPC 38, **Taunoa and others v AG** [2007] 5 LRC 680 ('Taunoa'), and **Daniel Forde and Ian Forde v The Attorney General** (unreported), High Court, Saint Lucia, SLUH2017/0276, judgment delivered 27 March 2018.

[27] Counsel also highlighted that, in **Ernest Smith**, the court limited the damages to the "inconvenience and the natural anxiety/distress" flowing from the breach, indicating that damages could not be awarded for the prejudice and inconvenience caused by the "nominate torts".

[28] Consequently, it was submitted that there was no indication that the learned judge had misdirected himself as to the requisite law, or that the amount awarded was erroneous.

## Discussion and disposal of the appeal

[29] In assessing an appeal of an award of damages, this court is always hesitant to interfere with the award, and will only do so where it is shown that the learned judge acted based on a wrong principle of law, or where the sum awarded was so high or so small so as to make it a “wholly erroneous estimate of the damage”, having regard to cases of a similar nature (see **The Attorney General of Jamaica v Clifford James**, at paras. [18] and [19]; and **Flint v Lovell** [1934] All ER Rep 200).

[30] There were no submissions or evidence in the record of appeal in relation to the question of damages to indicate what would have been considered by the learned judge in his assessment. This court having been hampered at the hearing by the absence of any reasons or basis for the level of the award made, we would like to remind judges who have the duty to award damages, at first instance, of the words of the Board in **Inniss**, at para. 16, that:

“...their awards are open to appeal and that an appeal court will be at a disadvantage in reviewing the award if the basis for it is not explained. A breakdown of the various elements that make up the total sum awarded should always be given so that it can be examined, if necessary, on appeal.”

[31] Therefore, in the absence of the judge’s reasons explaining the award of damages, we had to do the best we could to make our own assessment of the damages that should be awarded in order to determine whether the sum awarded at the judge’s discretion was inadequate to vindicate the breach of the appellant’s rights.

[32] We started with the incontrovertible fact that it was open to the learned judge to grant damages for breach of the appellant’s constitutional rights. Although the measure of damages for breaches of the constitution is not as clearly developed or defined as in the law of torts, sufficient guidance may be found in the cases cited by the parties. The relevant authorities indicate that, in assessing damages for the breach of a constitutional right, the court is concerned with upholding and vindicating the constitutional right which has been breached. The measure of damages is based on the nature of the right and the gravity of the breach, and should be a sum that is sufficient to vindicate the right and reflect the sense of public outrage at the breach.

It should also be sufficient to act as a deterrent to future breaches (see **Attorney General of Trinidad and Tobago v Ramanoop** [2005] UKPC 15). The approach is vindicatory rather than compensatory, and the award may not necessarily be substantial in size.

[33] The court may, however, award compensatory damages where the breach of the right has occasioned damage to the claimant, including distress, injured feelings, and physical injury. The court should not, however, proceed on a similar basis as awards made in tort, but the sum should act as “an incentive” to the state not to repeat the egregious conduct, and to ensure that the claimant is not made to feel that the award trivializes the breach (see **Taunoa**).

[34] The award is also not meant to be punitive and is not a means of punishment to “teach the executive not to misbehave” (see **Merson v Cartwright and another**, at para. [18]).

[35] From the cases, it can be seen that past awards of vindicatory damages have generally ranged from nominal to moderate, but have on occasion, been substantial. However, although the court should have regard to cases of a similar nature, the appropriate award will depend on the circumstances of each case and is within the discretion of the court. (see **The Attorney General of Jamaica v Clifford James** at paras. [18] to [19] and [48] to [50], and **Attorney General of Trinidad and Tobago v Ramanoop** at paras. 17 to 19).

[36] Due regard must be given to the importance of the right and the gravity of the breach in determining what sum is adequate to vindicate the right. That includes an acknowledgment that the right is a valuable one to the claimant.

[37] The right that the appellant invokes is enshrined in section 16(2) of the Charter and states as follows:

“In the determination of a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.”

What the appellant complains of is a breach of the reasonable time guarantee that is but a part of the rights found in section 16(2), which is, to borrow from E Brown J (as he then was) in **Ernest Smith**, a “compendious statement of the fundamental right to due process”. It is generally accepted that a “fair hearing within a reasonable time” includes the delivery of the decision in the case, and also includes the appellate process.

[38] Interestingly, both counsel relied on the case of **Ernest Smith** in making their submissions before this court. Before considering that case, I will first consider the case of **Inniss**, which was considered by both Y Brown J and Wolfe-Reece J in their judgments in the Full Court’s decision in **Ernest Smith**.

[39] **Inniss** is a decision of the Privy Council. In that case, a Registrar of the High Court and Additional Magistrate of the Federation of St Christopher and Nevis was dismissed by the State (by letter from the Permanent Secretary of the Establishment Division, acting on behalf of the government) before the expiry of her two-year contract. She filed a constitutional motion in the High Court claiming that her dismissal was null and void, as it had been effected without due regard to the proper procedures for so doing and the constitutional protections afforded to the Registrar as a judicial officer under section 83 of the Constitution of St Christopher and Nevis. Section 83(3) provides that the power to exercise disciplinary control over persons holding or acting in positions to which the section applies, or to remove those persons from office, lies with the Governor General acting in accordance with the recommendation of the Judicial and Legal Services Commission. No such recommendation was made, and the decision to terminate was not taken by the Governor General. The section also requires the Judicial and Legal Services Commission to consult with the Public Service Commission before making any recommendation to the Governor General. None of that procedure took place. Ms Inniss’ termination was not in accordance with these constitutional provisions. She applied, in the High Court, for declarations under section 96 of the Constitution of St Christopher and Nevis for declaratory relief and damages. She succeeded at first instance and was awarded damages in the sum of EC\$100,000.00. The finding that her constitutional rights had been breached was overturned by the Court of Appeal.

[40] On Ms Inniss' appeal to the Privy Council, the Board referred to its decision in **Horace Fraser**, in which it had found that there had been a constitutional breach in relation to conduct of the State in the removal of a Magistrate in St Lucia. The case of **Horace Fraser** considered the effect of the provisions in sections 91(2) and 91(3) of the Constitution of St Lucia, which gave the power to appoint, discipline and remove Magistrates to the Judicial and Legal Services Commission. Mr Fraser's appointment as a Magistrate was terminated by the Permanent Secretary in the Ministry of the Public Service, whereupon Mr Fraser sought constitutional relief against the Judicial and Legal Services Commission and the Attorney General of St Lucia, representing the Government of St Lucia, and damages for breach of contract. At first instance, Mr Fraser was awarded damages for breach of contract and EC\$10,000.00 for distress and inconvenience for the breach of his constitutional rights, which occurred as a result of a failure by the Judicial and Legal Services Commission to follow proper disciplinary procedures in its own code for Disciplinary Proceedings. The award for constitutional redress was overturned by the Court of Appeal.

[41] Counsel for the Commission in **Horace Fraser** had relied on the Court of Appeal's decision in **Inniss** that there had been no constitutional breach in the premature termination of Ms Inniss, but the Board in **Horace Fraser**, which it had heard before it heard **Inniss**, held itself in no doubt that the decision of the Court of Appeal in **Inniss** had been wrong, as also the decision of the Court of Appeal in **Horace Fraser**. The Board in **Horace Fraser** held that the appellant's contract had been constitutionally protected and set aside the decision of the Court of Appeal, which was to the contrary. The Board reinstated the decision and award of EC\$10,000.00 made at first instance. Relying on its decision in **Attorney General of Trinidad and Tobago v Ramanoop**, and specifically the statements made at para. 19, the Board declared that it saw no basis to disturb that level of award.

[42] Following the decision by the Board in **Horace Fraser**, the respondents in **Inniss**, conceded before the Board that the Court of Appeal's decision had been wrong and that the only question for the Board to determine in Ms Inniss' case was the question of damages.

[43] In **Inniss**, the Board had to first address the issue of entitlement to damages for breach of contract, as Ms Inniss had been prematurely terminated by an improper procedure. The second issue, and the one more relevant to this case, was Ms Inniss' entitlement to damages for breach of her constitutional rights. The Board, having discussed the guiding principles, applied them to the circumstances of the case before it, and determined that a "relatively substantial" award for the deliberate breach of Ms Inniss' constitutional rights was justified. The Board awarded the appellant EC\$50,000.00 for breach of her constitutional rights, and EC\$50,000.00 for breach of her contract, ultimately arriving at the same sum as the trial judge, but for reasons which had not been given by the judge.

[44] In **Ernest Smith**, where the trial judge (the same one as in the appellant's case) retired before handing down judgment in relation to the assessment of damages in the claimant's initial claim, the Full Court, by majority, awarded vindictory damages to each claimant in the sum of \$1,500,000.00. In coming to this award, having examined the relevant authorities, Wolf-Reece J, considered that the right was an important one that went to the "core of our democracy", and that if it were eroded, several negative consequences would result, including the fact that the public may lose trust in the judiciary (see para. [196] of the Full Court's judgment). Wolf-Reece J went on to compare the breach in that case with breaches in other cases, including **Horace Fraser** and **Inniss**.

[45] Wolfe Reece J found that the breach in **Inniss** was graver but, nevertheless, the award made was moderate. She concluded that, in the case before her, an award which was "neither substantial nor moderate but...sufficient to illustrate disdain for the breach and mark in the mind of the judiciary and the public at large that the right is valuable" was appropriate (see para. [197]).

[46] Wolf-Reece J ultimately concluded that an award of damages was necessary to show public outrage for the breach and vindicate the claimants' rights, but that the award should be limited to the "inconvenience and the natural anxiety/distress that flows from court proceedings", refusing to make any award for any prejudice and inconvenience suffered as a result of the "nominate torts".

[47] In the instant case, the appellant will never have a trial. This is the difference between his case and that of the case of **Ernest Smith**, as noted by his counsel. In **Ernest Smith**, the court was able to order that there be an expedited rehearing in relation to the assessment of damages in the initial claims, since the issue of liability had already been settled. It is to be noted, however, that in the instant case, the appellant waited five years after judgment was reserved, and another five years after he knew the judge had retired, to assert his right to a trial within a reasonable time by filing his claim for redress. In asserting that right, he also asserted that he would be prejudiced by a re-trial after such a long delay and asked for a declaration that there should be no re-trial of his original claim.

[48] Due to the delay, and at his own request, citing the possibility of prejudice, the appellant will never have a trial in his original claim. He has, therefore, lost the protection of the law (see the statements of the Board in **Boodhoo and Another v Attorney General** [2004] UKPC 17 at para. 12). The claimants in **Ernest Smith**, at least, had the opportunity to be heard on the issue of damages for the nominate tort.

[49] However, we do not believe this difference placed the appellant in a substantially worse position than the claimants in **Ernest Smith**. The delay in the case of **Ernest Smith** caused those claimants the distress and inconvenience of not knowing when the judgment awarding them damages would be handed down, if ever. They, unlike the appellant, already had something of value in hand, which was their judgment on liability. However, in the case of the appellant, his chance of securing a judgment on liability in his favour was, at best, speculative.

[50] The delay in the appellant's case is regrettable. It was a relatively simple case and there is no reasonable excuse for the delay, except to note that there was a time when it was erroneously thought that judges who had heard cases before retirement could hand down a judgment even after retirement (before the decision of this court in **Paul Chen Young and others v Eagle Merchant bank and others** [2018] JMCA App 7, definitively settled the issue). The situation has, no doubt, caused the appellant distress and inconvenience, but beyond that, it has caused him the loss of a

chance of securing a favourable judgment in his claim, and due regard must be paid to that fact.

[51] Counsel for the respondents submitted that the award in **Ernest Smith**, when updated in 2023, was \$1,900,000.00. The award made to the appellant would, therefore, be in the same general ballpark as that made in **Ernest Smith**. The award in **Ernest Smith** was stated by Wolfe-Reece J to be sufficient, not being nominal nor moderate. The claimant in **Inniss** lost her job in an unceremonious, deliberate and unconstitutional manner, and the award from the Privy Council was EC\$50,000.00, which the Board considered to be a substantial award.

[52] In the case of **Daniel Forde and Ian Forde v The Attorney General** the Eastern Caribbean Supreme Court made a nominal award of EC\$5,000.00. However, in that case, although there had been a delay in the delivery of the judgment, judgment was eventually delivered and the claimant filed an appeal against the judgment. In granting nominal damages for the breach of the constitutional right to a fair hearing within a reasonable time, the judge in that case considered, among other things, not only the importance of the delivery of timely judgments, but also that: the claimant had not done enough to secure an earlier delivery of the judgment; the judgment had been delivered and was being appealed; one of the grounds of appeal was the delay and the effect of that delay on the quality of the judgment; and that no public outrage at the delay had been identified in the case.

[53] In the instant case, to justify this court's interference with the award made in the court below, it had to be demonstrated that the award was a completely wrong sum, in the sense that it was too high or too low in comparison to other awards, or was arrived at by a failure to take account of relevant factors. Given the absence of the judge's reasons, the court is not in a position to say what the judge took into account and to say he failed to take into account relevant considerations or had taken into account irrelevant consideration. Having conducted the assessment afresh, as we were obliged to do in the absence of the judge's reasons, we took into account as a crucial consideration, that what the appellant has lost, he will never regain.



[54] As a result of the delay in handing down the judgment and the delay in having a retrial within a reasonable time, the appellant will never have a hearing and, therefore, never have a chance at recovering for the cause of action claimed. Thus he has lost the protection of the law. In the absence of the learned judge's reasons for granting that level of award, this court was not able to say whether sufficient thought was given to this fact by the learned judge when he arrived at that sum.

[55] In the light of the analysis conducted, and taking into account the appellant's own dilatory conduct in asserting his rights at an earlier stage (see **Herbert Bell v Director of Public Prosecutions and Another** [1985] 1 AC 937 at pages 951 to 952 for the applicability of that factor), we took the view that the sum of \$2,650,000.00 was sufficient to: (a) pay due regard to the gravity of the breach, (b) emphasise the importance of and vindicate the appellant's right, (c) reflect the sense of public outrage, and (d) act as a deterrent to any further such breaches.

[56] The evaluation of the circumstances of the appellant's case against the background of the law distilled from the relevant cases led the court to conclude that the sum awarded by the learned judge was a wholly erroneous estimate of the damages due to the appellant. Accordingly, we formed the view that interference with the learned judge's award was warranted.

[57] It was for the aforementioned reasons that we made the orders listed at para. [5] above.

#### **D FRASER JA**

[58] I, too, have read the reasons for decision of my sister Edwards JA and they accord with my own reasons for agreeing with the orders made as set out in para. [5]. There is nothing further for me to add.