IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00592

BETWEEN	**ARLEEN McBEAN**	**APPLICANT**
AND	**SHELDON GORDON**	**1ST RESPONDENT**
AND	**PATRAE ROWE**	**2ND RESPONDENT**
AND	**THE POLICE FEDERATION**	**3RD RESPONDENT**

IN CHAMBERS

Mrs Valerie Neita-Robertson, Q.C. and Mr. Hugh Wildman for the Claimant

Mrs Symone Mayhew and Miss Rushelle Johnson for the 1st and 2nd Respondents

Mrs Jacqueline Samuels-Brown, Q.C. and Ms Althea Grant for the 3rd Respondent

Heard: February 27, 2019

Application for Interim Injunction – Factors to be considered in granting Interim Injunction- Constabulary Force Act – Jamaica Police Federation – Whether a

final hearing of a dispute is unlikely to occur because the grant or refusal of an injunction would virtually bring the dispute to an end – Whether damages are an adequate remedy – American Cyanamid plus test – The effect of the absence of an undertaking in damages – Where would the greater risk of injustice lie.

BERTRAM LINTON, J

BACKGROUND

[1] In May of 2018, the Applicant and the 1st Respondent were elected as Chairman and General Secretary respectively of the Police Federation. The Applicant was entrusted with tasks which included but were not limited to, liaising with the government and engaging in salary negotiations with the Government of Jamaica, chairing meetings and advocating to the Commissioner of Police and the Ministry of National Security on general welfare issues and matters of Police Force efficiency.

[2] In September of 2018 however, the Applicant says that there were marked behavioural changes towards her by members of the Central Committee who were claiming that she had been circumventing the rules and procedures that governed the Federation.

[3] In October 2018, the 2nd Respondent states by way of affidavit evidence filed on February 26, 2019, (para 14) that he had shared via WhatsApp messages to members of the Central Committee, his concerns about the stewardship of the Applicant 'touching and concerning a wide range of matters' that he felt were unsatisfactory. The messages as he described them noted 'specific points that required discussion at the Central Committee level." He does not indicate if any of these issues were ever shared with the Applicant directly.

[4] The 2nd Respondent in his affidavit also stated that the messages with the concerns were leaked to persons outside of the Central Committee. They became the subject of discussion in the wider membership of the Police Federation. In the meantime, the publication came to the attention of the Applicant.

[5] At a meeting in November 2018 at which the contentious issues spoken of in the whats app messages were brought up the 2nd Respondent described the Applicant as making "loud outburst, cried and ranted in an Executive meeting to discuss the issues." It appeared that the meeting was by his account very antagonistic and that the General Secretary was to address the General Membership about the contents of the leaked messages.

[6] The court got the impression that as a result of the said meeting, there was a disconnect and dysfunction among the members of the Central Committee, and the parties seemed to have been operating without reference, agreement or consensus to each other.

[7] In or around mid-December 2018 the Applicant says that in her representative capacity as Chairman of the Federation she concluded salary negotiations with the Government on behalf of the Federation. Later that same month and into the new year she apparently continued soliciting funds and making plans for various projects of the federation, in that environment of disconnect.

[8] On the 28th of January 2019, the 1st Respondent convened a meeting for discussions to be had regarding concerns, queries and questions raised by the members of the Central Committee. The 1st Respondent at the meeting expressed his personal dissatisfaction with the Applicant's management style and stewardship. At paragraph 29, of her affidavit filed on February 29th 2019, the Applicant says that the 1st Respondent had in his hand a copy of a message by the 2nd Respondent which had gone viral. Consequently, the Applicant says

the members requested that the meeting be chaired by an independent third party who followed through on the issues which arose. On adjournment, another meeting was called for the next day (January 29, 2019) for further assessment of the issues.

[9] It is obvious to the court that the relationship between the claimant and the 1st and 2nd respondents had broken down so badly that things had become tense and the parties were no more in a position to deal with the issues among themselves.

[10] At the meeting on the 29th of January 2019, the Applicant was chairing the meeting when it seems that a decision was made for her to relinquish management of the meeting to the 1st Respondent who took over proceedings and invited motions from the floor. From uncontested accounts, the 2nd Respondent, moved a motion of no confidence in the leadership of the Applicant. This did not however seem to be a unanimous position among them as there was disapproval from a member of the Committee.

[11] Following up on activities which are unclear the 1st Respondent was subsequently elected as the new Chairman and the 2nd Respondent as the New General Secretary of the Central Committee.

THE APPLICATION

[12] The matter came before this court on the 18th of February 2019 because the Applicant sought an ex parte injunction. The injunction requested:

a) A mandatory injunction that the Applicant be reinstated to the post of Chairman of the Police Federation pending the determination of this claim.

b) Such further and other relief as this Honourable Court thinks fit.

c) Costs.

[13] The grounds of the application were as follows:

a) The Applicant is the duly elected Chairman of the Police Federation, arising from the 75th Annual Joint Central Conference held in May 2018.

b) The election, was in keeping with the provisions of the Constabulary Force Act, and in particular Section 67 of the said Act and the Second Schedule made there under.

c) Consequent on that election in May 2018, the Applicant is entitled as a matter of law, to serve for a period of one (1) year, subject to the provisions of Section 71(1) of the Constabulary Force Act.

d) On the 29th of January 2019, the 1st and 2nd Respondents arranged for a meeting of the Central Committee of the Police Federation, of which the Applicant is the Chairman, to be convened. At the meeting, the 1st Respondent assumed the role of Chairman of the said meeting and caused motions to be taken in the removal of the Applicant as the duly elected Chairman of the Police Federation.

e) At the said meeting, the 1st Respondent caused a motion to be taken resulting in the 2nd Respondent being appointed the General Secretary of the said Police Federation.

f) The Applicant contends that both the appointment of the 1st and 2nd Respondent as the purported Chairman and General Secretary of the Police Federation, respectively, are illegal, null and void and of no effect.

g) The Applicant contends that at the time of the purported removal of the Applicant as the duly elected Chairman of the Police Federation, none of the provisions contained in Section 71(1) of the Constabulary Force Act, was applicable to the Applicant.

h) The Applicant maintains that she remains the duly elected Chairman of the Police Federation and is entitled to serve in that office, subject to the provisions of Section 71(1) of the Constabulary Force Act, until the next Annual Joint Central Conferences of the Police Federation in May of 2019.

i) The Applicant, therefore, seeks the intervention of this Honourable Court, by way of a Mandatory Injunction to have the Applicant reinstated to the post of Chairman of the Police Federation, a post that she was legally elected to, to serve for s legally constituted period of 1 year.

[14] An ex parte injunction was granted and what is now before us is an inter partes hearing pending the trial of the Fixed Date Claim Form which was filed on the 22nd February 2019.

SUBMISSIONS

Applicant

[15] In the Applicant's oral submissions, Counsel, Mr Hugh Wildman, relied on Section 67 and the Second Schedule of the Constabulary Force Act where:

Section 67 states that: -

> *"(1) For the purpose of enabling the Sub-Officers and Constables of the Force to consider and bring to the notice of the Commissioner of Police and the Minister all the matters affecting their general welfare and efficiency, there shall be established in accordance with the Second Schedule an organization to be called the Police Federation which shall act through Branch Boards, Central Conferences and a Central Committee as provided in that Schedule.*
>
> *(2) No representations shall be made by the Federation in relation to any question of discipline, promotion, transfer, leave or any other matter, unless some question of principle is involved.*
>
> *(3) The Police Federation shall be entirely independent of and unassociated with anybody outside the Force.*
>
> *(4) The Minister may by order from time to time amend the Second Schedule.*
>
> *(5) Every order made under this section shall be subject to negative resolution."*

Second Schedule: -

1. *The Federation shall consist of all members for the time being of the Force below the rank of Assistant Superintendent and the Federation shall act through Branch Boards, Central Conference and a Central Committee as is hereinafter provided.*

2. *(a) Subject to the provisions of paragraph (b), the members of the force below the rank of inspector stationed in any police division shall form a branch of the Federation.*

   (b) The Water Police Station at Kingston and the Criminal Investigation Department, Kingston, shall each be deemed to constitute a division for the purposes of these Rules.

   (c) The Inspectors of the Force shall form a branch of the Federation

3. *(a) In each division there shall be constituted three Branch Boards, one for the Sergeants, one for the Corporals and one for the Acting Corporals and Constables.*

   (b) There shall be constituted a Branch Board for the Inspectors.

4. *(a) Subject to the provisions of paragraph (b), (c) and (d), the Branch Board for any rank shall consist of three members.*

[16] He argued that the Applicant is entitled to hold her position as chairman unless she is transferred out of the rank, disciplined or removed. The Applicant he insists was carrying out her functions effectively up to the 28th of January 2019. He describes the decisions at the meeting of the 29th of January 2019 as a complete nullity outside of the provisions of the Constabulary Force Act.

[17] Mr Wildman posited that this meeting, that saw to the removal of the Applicant as chairman, and the election of the 1st and 2nd Respondents as the Chairman and General Secretary respectively was a usurpation of power by men who have been sworn to uphold the law. He argued that the 1st and 2nd Respondents had purported to discipline and remove the Applicant in contradiction to Section 71(1) of the Constabulary Force Act which states that matters of discipline are to be dealt with by the Commissioner of Police. Section 71 (1) of the Constabulary Force Act says that:

> *"Notwithstanding anything to the contrary disciplinary proceedings may be taken against a person who is acting in the capacity of a member of the Police Federation under any of the specified provisions and for that purpose such provisions shall apply to him in that capacity in like manner as they apply to him in his capacity as member of the Force…."*

[18] In his submissions to the court, Counsel relied on **Barnard and Others v National Dock Labour Board and Others [1950] B. No. 2906** where he pointed out that the court is not concerned with the allegations made but whether they had the power and legal authority to remove the Applicant.

[19] In Barnard, the Appellant sought a declaration that the employer had improperly imposed disciplinary measures in that they were introduced by the Port Manager who was said to have possessed no relevant disciplinary powers. This was held to be unlawful by the London Dock Labour Board. The suspension of workers by the Manager was held to therefore be a nullity.

[20] Denning LJ stated:

> *'we are not asked to interfere with the decision of the statutory tribunal; we are asked to interfere with the position of a usurper…… These Courts have always had a jurisdiction to deal with such a case… the courts of equity have always had power to declare the orders of a*

usurper to be invalid and to set them aside. So at present day we can do likewise.'

[21] Reliance was placed on the case of **McLaughlin v Governor of the Cayman Islands [2007] UKPC 50** as to the issue of whether the Applicants post was valid and as to whether she was properly elected.

[22] In McLaughlin, the plaintiff had been wrongly dismissed from his post as a public officer. He appealed against a refusal to award him his pay. It was held that the dismissal from public office was unlawful and it was void and ineffective to remove him from office. His entitlement to his full salary and other benefits remained in effect.

[23] Lord Bingham said:

> *'It is settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal.'*

1st and 2nd Respondents

[24] Counsel for the 1st and 2nd Respondents, Mrs Symone Mayhew, in summary argues that the dispute that had arisen on the facts is one that is at the Central Committee level and they were the ones who selected the 1st and 2nd Respondents as their Chairman and General Secretary respectively. The fact that the Applicant was selected by the Central Committee was put forward by Counsel as the reason she may be removed by the said Committee. She relied on Section 35 of the Interpretation Act, which states that

> *"where by or under any Act a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, reappoint or reinstate any person appointed in exercise of the power."*

[25] Her stance was that there was nothing in the section 71(1) that speaks to the fact that the chairman must serve for a year and cannot be removed before the expiration of one year. She reasons that what section 71(1) was seeking to do was to indicate that members of the Federation are not immune from disciplinary action just because they are members of the Federation.

[26] Her submission therefore is that there is no serious issue to be tried or no high degree of assurance of success of the Applicant's claim at trial.

[27] She challenges the position taken by Counsel for the Applicant, and says that **McLaughlin v Governor of the Cayman Islands (supra)** was not relevant as it is not a disciplinary case and does not affect the Applicant's substantive post and that is the thrust of Section 71(1). Concerning **Barnard and Others v National Dock Labour Board and Others (supra)** she stated that it is not a disciplinary matter and this case is also irrelevant as the power to remove a Chairman of the Federation does not reside in the Commissioner of Police.

3rd Respondent

[28] Counsel for the 3rd Respondent, Mrs Jacqueline Samuels-Brown Q.C., adopted submissions of Counsel for the 1st and 2nd Respondents and added that the matter was not one of a disciplinary nature and reference to it as such is wrong as no disciplinary action was taken in this case. She asserted that the reference to the Applicant as having lost her 'job' or 'position' on the Central Committee is not to be conflated with her substantive post as a police officer.

[29] Counsel states alternatively that if Section 71(1) is applicable, then the Applicant should have been directed to internal proceedings. The submission is that there is no serious issue to be tried, as there was no breach of law by the Federation as it is the duty of the Central Committee of the Constabulary body to make decisions, which does not amount to disciplinary action. She asserts that the application is ill founded certainly against the Federation and ought not to be granted.

THE APPLICABLE PRINCIPLES

[30] In an effort to determine the circumstances under which to grant or refuse an interim injunction, the court is guided by Lord Diplock in the *locus classicus* of **American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396** where he identified the threshold to be met by asking questions such as:

a) Is there a serious issue to be tried?

The crux of this question is to determine whether the Applicant has a real prospect of succeeding on the claim. The court must be satisfied that the claim is not frivolous or vexatious. Once this threshold is met, the onus is on the court to consider whether the balance of convenience lies in favour of granting of refusing the said injunction.

b) Is the balance of convenience in favour of the granting of the injunction?

In deciding where the balance of convenience lies**,** there has to be consideration given to (a) whether the Applicant would be adequately compensated by damages, (b) whether the Respondents would be adequately protected by the Applicants undertaking in damages and (c) where doubt arises as to the adequacy of the respective remedies in damages for either the Applicant or the Respondent, factors such as preserving the status quo and as a very last resort, the relative strength of the parties' case.

[31] The purpose of granting the injunction was laid down in the decision of the Privy Council in the **National Commercial Bank Jamaica Ltd v Olint Corporation Limited [2009] UKPC 16.** The principles highlighted in **American Cyanamid Co. v Ethicon Ltd (supra)** were reiterated by Lord Hoffman where he expressed that:

> *"The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*

Is there a serious issue to be tried?

[32] The test laid down here was described by Lord Diplock in **American Cyanamid** Co. **v Ethicon Ltd (supra)** where he stated that:

"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

[33] Likewise, the test for 'serious question' was characterized in the case of **Australian Broadcasting Corporation v O'Neill [2006] HCA 46; 229 ALR 457** as:

> *"whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief".*

[34] As a general requirement, the Applicant is asked to show "*a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial."*

[35] My role is not to delve into a resolution of the opposing views raised by the parties but to determine as described by Gleeson CJ in **Australian Broadcasting Corporation v Lenah Game Meats Pty Limited [2001] HCA 63; 185 ALR 1**, that the issue raised by the Applicant has *"sufficiently plausible grounds for granting the final relief"*

[36] I consider from the evidence pointed out by Counsel for the 3rd Respondent that the Applicant did not actually lose her 'job' but her position as head of the Federation albeit with some level of publicity. We have to consider the precedent set by these circumstances, as it raises questions of how the removal of elected officers within the Federation is effected and with whom the power lies to effect such removal, in the face of accusations of misconduct and disagreement in that body. Is there a presumption that her removal was reversal of the election that had taken place, and is this what is meant by Section 22 of the Second Schedule of the Constabulary Force Act when it gives the Central Committee the power to "regulate their own procedures"?

[37] Is it a case where the same individuals who extend the post to you in an election become eligible to take it away, upon accusations and discussion? If the answer is yes, what is the mechanism used to determine how and when this occurs. What is the basis on which the removal is triggered? Can it be done based on 'a motion of no confidence ending the tenure, and fresh elections?' or is the decision to be imbued with the principles of Natural Justice? How do we deal with the issues raised?

[38] I am of the view that these questions are pertinent to the real issue at hand. I concede the fact that there has to be a decision making process and they are to be allowed to make decisions as the Act allows but the real and serious issue to be tried is how is this done and what is a fair and justiciable way to all the parties involved.

[39] Natural Justice contemplates two main areas (a) the right to a fair hearing or in other words procedural fairness and (b) the rule against bias. The process should be transparent and open and nobody is allowed to be a judge in their own cause. There is a requirement of fairness and it is widely accepted that a party is to be made aware of the charges/allegations being brought against them, given the opportunity to respond and have the opportunity to have a hearing. In essence, Natural Justice encapsulates the requirement of giving the party an opportunity and adequate notice in preparation of a defence.

[40] Lord Morris noted in **Ridge v Baldwin [1964] AC 40**, that:

> "*It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: Kanda v Government of Malaya. My Lords, here is something which is basic to our system; the importance of upholding it far transcends the significance of any particular case."*

[41] In the work of David McBean Q.C. and Isabel Perry, **INJUNCTIONS**, eighth edition at page 8, the position taken was that where a Defendant fails to raise an arguable defence there is no serious issue to be tried and the injunction in such a case should be granted generally without consideration to the adequacy of damages or the balance of convenience.

[42] The 1st and 2nd Respondents have said that Section 22 of the second schedule of the Constabulary Force Act, is the basis of the power to do what they did in replacing the Applicant. They contend basically that the applicant being transferred out of the rank she had represented, made her ineligible for the position, and their disapproval of her management style coupled with what they saw as her "unilateral approach to much of the Federation's business" (2nd

Respondent's affidavit filed on 26th February,2019), meant that a vacancy was created and the opportunity to relieve her of the position of chairman.

[43] From the facts before the court, the Applicant made a case that she was never told before the leaked messages of any problems with her leadership or given warning of any action which would put her post as chairman in jeopardy. She advanced that she was initially made aware of the issues touching and concerning her role as Chairman of the Federation through a leaked WhatsApp message. She says, this meeting on the 28th of January 2019 was not a scheduled meeting, the agenda prepared was unofficial at best, and notice was proposed to have been sent via WhatsApp message, which was exhibited into evidence as Exhibit AM1. The nature of the meeting was described by the 2nd Respondent in his WhatsApp message as an address of the 'concerns, queries and questions' raised in various talk groups 'expeditiously and truthfully and in a fulsome way

[44] The disparity in the versions advanced before the court, as to whether the Applicant was lawfully removed from her post as Chairman of the Police Federation, has convinced me that there is indeed a serious issue to be tried. Section 22 of the Second Schedule of the Constabulary Force Act says:

> *Subject to the provisions of these Rules, every Branch Board, Central Conference or the Central Committee may regulate their own procedure, including the appointment of committees or sub-committees: Provided that the first meeting of the several Boards, Conferences and of the Committee, shall be convened in such manner, and the procedure to be followed thereat shall be such, as the Commissioner of Police may direct.*

[45] The question then is: Is the procedure which is purely within the discretion of the members of the Central Committee subject to the rules of Natural Justice, where there are contending and contrasting accounts to be settled?

Is the balance of convenience in favour of the granting of the injunction?

[46] Having decided that there is a serious issue to be tired, the next step in our deliberations must be a decision on where the balance of convenience lies.

[47] One of the key considerations of the courts according to Brerton J in **Goyal v Chandra (2006) 68NSWLR,313** will be whether or not irreparable injury will occur if an injunction is not granted. The onus is on the Applicant therefore to show as a prerequisite that there is a threat of irreparable injury, which if not prevented by injunction cannot be afterwards compensated for by damages.

[48] In the affidavit of Patrae Rowe, the 1st Respondent, filed on the 26th of February 2019, the allegations against the Applicant are that she mismanaged the affairs of the Federation, she misdirected funds, she acted unilaterally without the authority and consensus of the Central Committee and her conduct has led to public embarrassment and disagreement among the Members of the Committee on more than one occasion.

[49] The affidavit of Arleen McBean in response filed on the 27th of February 2019, at paragraph 6, denies these allegations and states that the Applicant 'is unaware that she mismanaged the affairs of the Federation'. The Applicant advanced that the allegations are 'scandalous' and 'defamatory'. She claims to have been repeatedly disrespected by the 1st and 2nd Respondent in her post as chairman. She advanced that through their conduct, the 1st and 2nd Respondents have 'taken exception to the Applicant, being a Corporal and a female, speaking to them as the chairman, they being Senior Police Officers to the Applicant in the ranks of Inspector and Sergeant.'

Irreparable Injury

In most injunction cases, proving irreparable harm will be the most significant and most difficult hurdle to overcome and it is here where most injunctions are won or

lost. In order to show irreparable injury, the Applicant must demonstrate that it is harm that cannot be quantified in monetary terms or which cannot be cured. But it then begs the question as to what exactly is “irreparable harm”.

[50] Robert Sharpe, in **Injunctions and Specific Performance**, loose-leaf, (Aurora, on: Canada Law Book, 1992) at page 2 states that irreparable harm *“has not been given a definition of universal application: its meaning takes shape in the context of each particular case.*” Sharpe went on to identify irreparable harm as a consideration made on a case by case basis. He theorizes that the courts have held that irreparable harm includes loss of goodwill or irrevocable damage to reputation, loss of market share (though not necessarily irreparable if the loss is recoverable) and permanent loss of natural resources.

[51] I am persuaded therefore from the above narrative, in the various affidavits that there is a high possibility of irreparable injury to the Applicant’s reputation and the possibility of the loss of good will. It is the view of the court that the Applicant in this case stands to suffer irreparable harm in these circumstances if the injunction is not granted. By contrast the Respondents have a short tenure to the period scheduled for a new Committee to be appointed as the evidence is that elections are due in May of 2019.

Damages

[52] Once the court has determined whether the party seeking an interlocutory injunction has met the relevant initial thresholds, the focus shifts to the question of damages. If, having considered the affidavits before it, the court takes the view that a plaintiff would be adequately compensated by an award of damages, in the event of being successful at trial, an injunction should be refused. It is well established that when a plaintiff seeks an injunction at the interlocutory stage, the onus rests on him or her to convince the court that damages would not be an adequate remedy.

[53] As Clarke J. stated in **Sheridan v The Louis Fitzgerald Group Ltd. [2006] IEHC**

> *"It is well established that in order to obtain interim or interlocutory relief a plaintiff must satisfy the court that damages would not be adequate to compensate the plaintiff in the event that he should establish his case at trial but not have obtained an interlocutory injunction....In Smith Cline Beacham [sic] PLC v. Genthon BV (unreported, High Court, 28th February, 2003, Kelly J.) this court noted that the onus was on the plaintiff, as a matter of probability, to demonstrate the risk that damages would prove to be an inadequate remedy."*

[54] Clarke J. was satisfied that damages would be an adequate remedy and refused to grant an interlocutory injunction which would have permitted the plaintiff to remain in possession of a pub restaurant in Dublin's Temple Bar, pending the trial.

[55] On the authority of Brerton J in **Goyal v Chandra (supra)**, an application for an interlocutory injunction should not be granted where there is an adequate remedy in damages. However, if damages are available as a remedy but are inadequate, the onus is on court to use its discretion while considering among other things "the extent to which any damage to the plaintiffs can be cured by payment of damages rather than by the granting of an injunction". The germane question should be "is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?"

[56] It is evident from the facts in this case, however that it is unlikely that damages would suffice as the Applicant will be unable to get back what she lost in terms of her reputation or her position of leadership if the injunction is not granted. By contrast, the Respondents are in a less precarious position, as their tenure would be a short one, and there are few issues and allegations pending against their reputations save that they usurped the chairmanship.

Undertaking in Damages

[57] It has been raised by Counsel for the 2nd and 3rd Respondents that the there is no undertaking in damages from the Applicant and this is grounds without more to refuse the Application

[58] On this point, I adopt the dicta of Brereton J in **Goyal v Chandra (supra)** with regards to the failure to proffer an undertaking. He posited that in the usual course of an application for an injunction, the Applicant for an interlocutory or interim injunction will be asked to give the usual undertaking as to damages. The "usual undertaking as to damages" being an undertaking to submit to such order as the court may consider to be just for the payment of compensation, to be assessed by the court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking.

[59] He goes on to say if the usual undertaking is not given, this will weigh heavily against granting the order but in exceptional cases, an injunction may be granted without an undertaking. He noted however that the Applicant cannot be compelled to provide an undertaking.

[60] In my view, in Instances like these where the undertaking is of little value because the issue is not one of loss in monetary terms to the parties, or the circumstances are such that the parties' means is not relevant to the issues, the balance of convenience is neither in favour of the grant nor refusal of the injunction.

[61] I find that the case at hand has some exceptional circumstances which ought to be considered. These circumstances comprise the aspects of public interest involved in the case, and the irreparable injury to reputation that would be suffered by the Applicant /Respondents and of the potential upheaval and

dysfunction of the Police Federation, it being the body which represents the chief law enforcement body in the country.

[62] The Applicant was also accused of mismanaging the affairs of the Federation, misappropriating funds, and acting unilaterally without the authority and consensus of the Central Committee who argues that her conduct has led to public embarrassment and disagreement among the Members of the Committee on more than one occasion.

[63] The Respondents are accused of themselves, not acting in a fair or judicious manner, and not in keeping with the law in the manner and procedure which saw her replacement. These all create extremely untidy circumstances prevailing in the Federation and among members of the chief body responsible for law enforcement, an extremely undesirable and exceptional set of circumstances.

[64] Further, it is established in **Caravelle Investments v Martaban [1999] FCA 1505**; **(1999) 95 FCR 85** at page 25 that there is no inflexible rule that the moving party should be denied interlocutory relief if it cannot offer a meaningful undertaking, the failure to offer an adequate undertaking or an undertaking at all does affect the balance of convenience. The case says this should be looked at however on a case by case basis and especially in circumstances where the Applicant is bringing this case in order to protect the public interest or advance a cause on behalf of a class of persons.

[65] In this instance this Applicant brought this matter certainly to protect her reputation and there is a very high public interest component to a significant class of persons to the matter.

[66] Although there are various formulations, based on the type of injunctive relief sought, it is said in various legal authorities on the subject that it should not be regarded as a strict box ticking exercise.

[67] The general test applicable in for an interlocutory injunction is most often cited in **R.J.R Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311**. And established a three-part test for granting an injunction.

1. Is there a serious issue to be tried?
2. Will the Applicant suffer irreparable harm if the injunction is not granted? and
3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called “balance of convenience”)

[68] The court has regard to this formulation as they apply to the case at bar.

[69] For the reasons outlined, this court believes that the Applicant has made a strong prima facie case with a high degree of success at trial.

The Nature of the relief sought.

[70] It is settled law that an Applicant seeking an interlocutory order to restrain a Respondent must first convince the court that a fair or bona fide or serious question has been raised. The court may also grant mandatory relief at the interlocutory stage but it has long been recognised that mandatory orders are granted sparingly and that a different, i.e. higher, threshold must be met. Halsbury's Laws of England puts it as follows:

> *"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the claimant, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice*

of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

[71] Halsbury's analysis highlights the reality that the grant of mandatory relief may decide a case "at once" and that obtaining such relief requires "special circumstances". The proposition that an Applicant faces a significantly higher threshold when seeking mandatory relief at the interlocutory stage is by no means a recent development.

[72] Counsel for the 1st and 2nd Respondents, Mrs Mayhew, argues that this is an obvious case wherein the grant or refusal of the injunction will finally dispose of the matter. She argues that the Applicant's tenure would have come to an end in May 2019 and the new Committee would have been elected by the delegates of the different Branches. It was submitted that the Applicant would be unlikely to pursue the matter after May 2019. Counsel urged the court to closely examine the parties' cases to see which is stronger on the merits in order to determine whether to grant or refuse the injunction. The argument is that the Applicant's case is not overwhelmingly strong and there is no assurance that the Applicant would have been successful if the matter is tried.

[73] Counsels submissions are disagreed with in part in relation to the argument advanced that this is a case where the injunction will dispose of the matter. I am of the view that the Applicant has made a clear case for herself, which on the tenets of Natural Justice may well have reasonable and likely success at trial. The issue may well also stand to be adjudicated as a general set of rules may need to be established to deal with the circumstances that have arisen in the Police Federation.

[74] Owing to the recommendation made by Counsel for the claimant, that the court view the urgency and suitability of the remedy, I note the Cyanamid Plus test.

Cyanamid Plus Test

[75] This modification of the American Cyanamid guidelines may arise in certain circumstances. In the case of **Global Gaming Ventures (Group) Ltd and another v Global Gaming Ventures (Holdings) Ltd and another [2018] EWCA Civ 68**, the Court of Appeal of England and Wales provided guidance on the approach that should be taken by the courts in these circumstances, namely, in an application for injunctive relief where the Applicant is seeking the entirety of the relief in the underlying claim, as urgent and time sensitive. The requirement is that the relief must be given now, or there is no benefit to it being obtained at all in these type of cases. It was suggested that the courts should not assume that there will be a subsequent trial of the substantive issues, as is the presupposition of the American Cyanamid guidelines.

[76] The modification of the American Cyanamid test is professed as the American Cyanamid plus test. The plus test provides, that the courts should have such regard to the merits of the case as is possible, in an attempt to take the course which runs the least risk of injustice to the parties.

[77] **Global Gaming Ventures (supra)** provides the most recent example of the court applying the plus test and consequently overturning the decision of the lower court. An application for immediate injunctive relief in the form of an order for disclosure and inspection of documents relating to the operation and financing of a casino was the subject of the claim before the court. The immediate urgency was the ongoing marketing and imminent sale of shares in one of the casino group companies.

[78] Arnold J, the judge at first instance, did note that the relief sought on the application was the entirety of the relief sought in the Part 8 claim. However, his decision to dismiss the application was challenged on the basis (amongst others) that he was wrong to deal with the application on ordinary American Cyanamid

principles. It was argued that he should have instead applied the "plus test" and concentrated on the relative strength of each party's case, rather than merely asking himself whether there were serious issues to be tried and then deciding the application on the balance of convenience.

[79] The Court of Appeal agreed that this was a case where the ordinary American Cyanamid principles should be modified. The purpose of the disclosure was to monitor the imminent sale of the shares, and by the date of any trial the sale would have taken place. Accordingly, no opportunity would exist for "a more leisurely or detailed consideration" of the strength of the claim before the conclusion of the sale process. The Court of Appeal therefore held that the appellants were:

> *"… entitled to have the potential consequences of the relief they were seeking weighed against the relative strength of their case for disclosure and not simply by reference to what course would do the least harm".*

[80] Having heard the evidence in the case at bar, an attempt was made by me to evenly balance the advantages and disadvantages of the respective parties while at the same time trying to control the extent of the evidential assessment**. I have considered the strength of the case in terms of the harm to the parties if the injunction is granted and if it is refused. In balancing the risk of doing an injustice, the Applicant, stands to lose more, if the Injunction is not granted, as her designated term as chairman will be completed soon. I have considered that in these circumstances, it is vital that the relief be given now. No doubt at the trial there will also be a chance for a more detailed and leisurely consideration of the serious issue to be tried and the underlying principles to be established.**

[81] Whether prohibitory or mandatory in character, the granting of an injunction represents a dramatic intervention at an early stage in proceedings. The fact that

whatever decision a court makes carries with it the risk of injustice has been explicitly acknowledged by me. Indeed, it has been suggested that minimising the risk of injustice should be the underlying principle to guide the court in determining an interlocutory application for injunctive relief, regardless of what the order sought.

[82] For the reasons I have outlined and in my judgement, there is indeed a serious issue to be tried.

[83] The balance of convenience is in favour of the granting of the Injunction as an award in damages would not be adequate to take care of the issues involved if the Application for the injunction is not granted. The risk of injustice to the Applicant is also more pressing than to the Respondents. the court also acknowledges and has regard to the special and exceptional circumstances relevant to the outstanding issues herein.

[84] I am also of the view that there are matters in issue which may be material to the determination of how the Police Federation will progress procedurally.

[85] It is therefore ordered as follows-:

1. A Mandatory Injunction is granted, to the effect that the Applicant be reinstated to the post of Chairman of the Police Federation in keeping with the period for which, she was elected to serve.

2. First hearing of the Fixed Date Claim Form is scheduled for the 1st of May 2019 at 11:00 AM for one (1) hour.

3. Costs to the Applicant against the 1st and 2nd Respondents to be agreed or taxed.