



[2023] JMSC Civ. 169

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2022CV00196**

<b>BETWEEN</b>	<b>THE ASSOCIATION OF GOVERNMENT MEDICAL CONSULTANTS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SOUTHERN REGIONAL HEALTH AUTHORITY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>SOUTH EAST REGIONAL HEALTH AUTHORITY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>WESTERN REGIONAL HEALTH AUTHORITY</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>NORTH EAST REGIONAL HEALTH AUTHORITY</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>THE MINISTRY OF HEALTH AND WELLNESS</b>	<b>5<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>THE MINISTRY OF FINANCE AND THE PUBLIC SERVICE</b>	<b>6<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>7<sup>TH</sup> DEFENDANT</b>

**Mr. Patrick Foster K.C. and Ms. Ayana Thomas instructed by Nunes, Scholefield DeLeon & Co. for the Claimant**

**Mr. Stuart Stimpson and Ms. Jevaughnia Clarke instructed by the Director of State Proceedings for the Defendants**

**Heard: June 14, 2023 and September 29, 2023**

**Legitimate Expectation – Legitimate Expectation giving rise to a substantive right – What are the Claimants required to prove to establish a substantive Legitimate Expectation**

**CARR, J**

## Introduction

- [1] The Claimant is an association and legal entity registered under the Trade Union Act. The association represents the interest of all Medical Consultants (**Consultants**) classified as HPC/ MO 4-8 employed to all governmental ministries and health agencies.
- [2] The Consultants are required to be on call twenty-four hours a day. For the last thirty years they have received an Emergency Duty/ On Call allowance (**EDA**) as compensation. This sum is paid regardless of the hours worked and is a significant portion of their take home salary. It is a flat or fixed sum which is subject to tax.
- [3] In a Heads of Agreement (**HOA**) which was concluded between the Government of Jamaica and the Consultants on November 6, 1997, it was agreed as follows:
- a. *“Majority allowances to be incorporated into salary. The flat rate of the On-Call/ Emergency Duty Allowance is included in basic salary with effect from April 1, 1996.*
  - b. *On Call/Emergency Duty Allowance – To be paid to all Medical Consultants. On Call/Emergency Duty Rates are as follows: Year I - \$827,064 Year II - \$926,316. To be incorporated into Basic Salary and made Pensionable.”*
- [4] Up to the date of the filing of this claim the provisions of that agreement have not been met. The Consultants contend that the EDA forms part of their pensionable salary and, that they have a legitimate expectation that it will be incorporated into their basic salary and treated as pensionable. It is also their assertion that pursuant to an award from the Industrial Disputes Tribunal (**IDT**) made on July 22, 2016, the EDA forms a part of their salary. They filed a claim which they sought leave to amend at the hearing of the matter. Leave was granted and they now seek the following relief:

1. A declaration that the emergency duty allowance paid to the Government Medical Consultants is a part of the salary/ remuneration for government Medical Consultants pursuant to IDT Award 37/2012 and is to be treated as part of their pensionable salary/ emoluments with effect from April 1, 1996.
2. A declaration that the emergency duty/on call allowance paid to the Government Medical Consultants is to be used to compute gratuity payments for consultant doctors on fixed term contracts.
3. Orders 1 and 2 are to be implemented by the Defendants on or before the 30<sup>th</sup> of September 2023.
4. Such further orders as this Honourable Court may deem just.

## **Issues**

[5] I have distilled the issues as follows:

1. Did the Consultants have a legitimate expectation that the EDA would be incorporated into salary and made pensionable?
2. Should the EDA be used to compute gratuity payments for Consultant Doctors on fixed term contracts?
3. What is the effect of the IDT Award in determining the issue of legitimate expectation?
4. Are the Defendants estopped from refusing to honour the promise made in the 1997 Heads of Agreement?
5. If so, are the Defendants justified in departing from what was previously promised?

## **The case for the Claimant**

[6] After the 1997 HOA in which it was agreed that the EDA would be incorporated into basic salary and made pensionable, the Government in 2012, took the decision to withdraw the payment of the EDA from Consultants who were on leave for more than 20 days. The matter was referred to the IDT and on July

22, 2016, an award was made concluding that the EDA formed part of the Consultant's remuneration and therefore, it was unfair and unreasonable to withdraw the payment while they were on leave. The Government thereafter continued the payment of the EDA without incorporating it into basic salary and making it pensionable as per the 1997 HOA.

- [7] The group continued negotiations over the years resulting in the signing of the 2000, 2016 and 2023 HOA. They contend that they have a legitimate expectation that the HOA implemented in 1997 would be fulfilled. They rely on the IDT award as well as the posture of the Government during the protracted negotiations to say that this expectation ought to be realized. It is further posited that in reliance on the promise as set out in the 1997 HOA they have been faced with undue hardship as the value of the EDA is more than a half of their salary. The failure to make it pensionable means that this portion of their salary is excluded upon retirement, and they are unable to make ends meet on the basic pension which they have received.

#### **The case for the Defendants**

- [8] The Defendants submitted that since the HOA signed on November 6, 1997, there have been several rounds of negotiations with the Consultants where it was requested that the EDA be incorporated into pensionable salary, and they see these requests as an acknowledgment by them that it was never pensionable. The Defendants also submitted that the Government is under certain fiscal constraints and therefore cannot accede to their requests.
- [9] It was further submitted that the 1997 HOA did not state that the EDA would be incorporated into basic salary and made pensionable but instead stated that it would be included in basic salary from April 1, 1996. It is maintained that this action was taken with reference to the flat rate being rolled into the salary for Junior Doctors. It had the consequential effect on the salaries of the Consultants who had 75% of the midpoint of their respective salaries rolled into their salaries and such amount was used in the calculation of their pensions.

- [10] With regards to the award of the IDT it was submitted that the issue for determination there had nothing to do with the question of the computation of the salary as pensionable. The issue before the IDT was with respect to whether the medical consultants were entitled to the EDA when on leave. It is their submission that they have followed the award of the IDT to the letter.
- [11] It was further argued that the fact that the 1997 HOA terms were not met is an issue of contract. The Consultants having failed to address this issue in Court following the breach of the contractual terms, cannot now seek to rely on it. Following the 1997 HOA there has been no promise made on the part of the Government which would intimate that the intention was to make the EDA a part of basic salary or to make it pensionable. The claim they argue is without merit.

**Did the Consultants have a legitimate expectation that the EDA would be incorporated into their basic salary and made pensionable?**

**Declaratory Relief**

- [12] Before addressing the law of legitimate expectation, it is important to state that the Court's power to make declaratory orders is a discretionary one and can only be made on an application in circumstances where a party is the state, a court, a tribunal, or any other public body. In the Court of Appeal decision of **Norman Washington Manley Bowen v. Shahine Robinson and Neville Williams**<sup>1</sup> Morrison J.A. as he then was in referring to the text **The Declaratory Judgment**<sup>2</sup> highlighted the following passage:

*“A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is*

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<sup>1</sup> [2010] JMCA App. 27

<sup>2</sup> Declaratory Judgment 2<sup>nd</sup> Ed. by Zamir and Woolfe paragraph 1.02

*disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus, the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."*

- [13] In summary a declaratory order is a statement of the legal position between the parties and a Court in exercising the power to make such an order must be mindful that it is not to be made in vain and is dependent on all the circumstances of the case.

### **Legitimate Expectation – The Law**

- [14] The doctrine of legitimate expectation has developed over the years and has its origins in the concept of natural justice. It was the determination of the courts that non rights ought to be given protection in the same way as the rights which a citizen was entitled to. Before such non rights could be removed or taken away, a party should have the opportunity to be heard. Since then, the law has expanded and transcended the concept of the need for a fair hearing. It has now been established that a legitimate expectation can give rise to an entitlement to a substantive benefit.

- [15] Professor Albert Fiadjoe in his text **Commonwealth Caribbean Public Law** explained it in this way, "*...there can be a 'substantive' legitimate expectation, that is, an expectation capable of giving rise to an entitlement to a substantive*

*benefit that the claimant asserts cannot be denied to him, and not merely to be consulted or heard.”<sup>3</sup> .*

[16] Eddy Ventose in his text **Commonwealth Caribbean Administrative Law** expounded upon the principle when he stated:

*“The question of substantive legitimate expectation is a more exacting one, because unlike the case of procedural legitimate expectations where the applicant claims a right to be heard before a benefit is taken away or a public authority resiles from a promise, the applicant in such cases argues that he is entitled to the actual benefit and that the public authority is bound by that promise or cannot change a policy. Substantive legitimate expectations are in a sense more important because they constrain, in a more intimate way the actions of public authorities. Here, the courts could direct the public authority to give effect to a promise or representation made to a person or direct them to continue to apply an old policy in the face of their attempt to introduce a new one.”<sup>4</sup>*

[17] It is therefore now an accepted principle of law that a legitimate expectation can give rise to a substantive right which must be protected unless the administrative authority can give reasons for its refusal to do so. The role of the court in these types of cases was aptly summarized by Robert Thomas in his text **Legitimate Expectations and Proportionality in Administrative Law**. It was stated:

*“The principle of legitimate expectations concerns the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual’s confidence in expectations raised by administrative conduct and the need for administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may*

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<sup>3</sup> Commonwealth Caribbean Law Series, Commonwealth Caribbean Public Law, 2<sup>nd</sup> Ed. pg. 262.

<sup>4</sup> Commonwealth Caribbean Administrative Law by Eddy Ventose page 210

*have legal consequences. Either the administration must respect these expectations or provide compelling reasons why the public interest must take priority. The principle therefore concerns the degree to which an individual's expectations may be safe guarded in the face of a change of policy which tends to undermine them. The role of the administrative court is to determine the extent to which the individual's expectation can be accommodated within changing policy objectives.”*<sup>5</sup>

[18] The Consultants in establishing their claim for legitimate expectation must prove on a balance of probabilities that there was a clear and unambiguous representation made by a public authority or body upon which it was reasonable for them to rely.<sup>6</sup>

[19] In the English authority of **R. v. North and East Devon Health Authorities ex p Coughlan**<sup>7</sup> Lord Woolf described the method of assessment when treating with the evidence in these types of cases.

*“Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in Re Findlay [1985] 1 AC 318 at p338, “But what was their legitimate expectation? Where there is a dispute as to this, the dispute has to be determined by the court...This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.”*

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<sup>5</sup> Legitimate Expectations and Proportionality in Administrative Law by Robert Thomas Chapter 3 page 41

<sup>6</sup> Trinidad and Tobago Civil Rights Association v Manning (TT 2007 HC 253)

<sup>7</sup> [2001] Q.B. 213. Paragraph 56-58



[20] In the recent Privy Council decision of **Paponette and others v Attorney General of Trinidad and Tobago**<sup>8</sup> Sir John Dyson SC in delivering the judgment examined the shifting burden of proof. He stated:

*“The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.”*

[21] In summary the initial burden of proof rests with the Consultants to establish that the government has promised or carried out a course of conduct which led them to believe that the EDA would form a part of their salary and be made pensionable.

[22] The evidence to support their contention was contained in the affidavits of Dr. Konrad Lawson, Dr. Myrton Smith, and Dr. Cecil Bachelor. They were consistent in their averments as such the Affidavit of Dr. Lawson will guide the analysis.

*“It has been the practice for decades for the Association of Government Medical Consultants to negotiate changes in salary for government medical consultants with the Ministries of Finance and Planning and Ministry of Health. The agreement arrived at through negotiation was normally reduced to writing in a Heads of Agreement.*

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<sup>8</sup> [2010] UKPC 32

*In the Heads of Agreement between the Association of Government Medical Consultants and the Ministries of Finance and Planning and Health and the University of the West Indies signed on November 6, 1997, the Government of Jamaica agreed that the on-call Emergency Duty Allowance (EDA) would be incorporated into Basic Salary and made pensionable.*

*The association of Government Medical Consultants relied on this agreement/ representation made by the Ministry of Health and Ministry of Planning that the EDA would be incorporated into basic salary and made pensionable in reliance on this agreement/representations the Government Medical Consultants continued to allow the EDA to be treated as a vehicle to increase their take home salaries with the legitimate or reasonable expectation that the EDA would be incorporated into these basic salaries and made pensionable.”*

[23] Exhibited to the affidavit of Dr. Lawson were the HOA’S signed in 1997, 2000, 2016 and 2023. For ease of reference, they are set out below.

***HEADS OF AGREEMENT SIGNED NOVEMBER 6, 1997***

***1. Majority of allowances to be Incorporated into salary***

*The flat rate of the On- Call/ Emergency Duty Allowance is included in basic salary with effect from April 1, 1996*

***2. On Call/ Emergency Duty Allowance***

*To be paid to all Medical Consultants*

*On Call/ Emergency Duty Rates are as follows:*

*Year I- \$827,064*

*Year II- \$926, 316*

***To be Incorporated into Basic Salary & Made Pensionable***

## **18. Pension**

**Government Policy to apply.**

**HEADS OF AGREEMENT SIGNED JUNE 26, 2000,**

### **Period of Agreement**

**April 1, 1998, to March 31, 2000**

### **Emergency Duty Allowance**

3. On call/ Emergency Duty will be increased from \$926, 326 per annum to \$1,101,035 per annum with effect from April 1, 1998 and be further increased to \$1,171,60.00 per annum with effect from April 1, 1999

PENSION

### **That all taxable allowances be made pensionable**

*Not supported, however, Government will continue the process of rolling allowances into basic salary.*

**HEADS OF AGREEMENT SIGNED ON SEPTEMBER 2, 2016**

### **1. Contract Period**

*April 1, 2015, to March 31, 2017*

### **2. Implementation of signed heads of agreement April 1, 2008- March 31, 2010**

- i. *Payment of the new rates for the Emergency Duty Allowance, allowance in lieu of Private Practise and Meal Allowance commenced October 2015.*
- ii. *Retroactive payments for the period April 1, 2008, to March 31, 2015, are programmed to be paid over the next three (3) financial years. The payments will be made in the first quarter of each financial year.*

#### **a. Emergency Duty/ On Call Allowance**

- i. *Item 2 refers.*

*The existing formula to continue to apply as outlined in the attached Ministry of Finance and Planning Memorandum Ref. No. C18 states October 30, 2014.*

***ii. The agreement in 1996 Heads of Agreement be implemented and be made pensionable.***

*Based on the AGMC's request the discussions will continue on this matter.*

***iii. The request that Emergency Duty/ On call Allowance to be paid for the full duration of all and any leave and not just for twenty (20) days.***

*As per IDT Ruling 37/2012 dated July 22, 2016, that is "That the Emergency Duty Allowance be paid to the Medical Consultants for the full duration of leave."*

#### **HEADS OF AGREEMENT SIGNED ON MARCH 24, 2023**

##### **1. Contract Period**

*The contract period is for four years, April 1, 2017, to March 31, 2021*

##### **Emergency Duty/ On Call Allowance (EDA)**

***iii. Implementation of agreement in the 1996 HOA that the Allowance be rolled into basic salary and made pensionable.***

*The matter is subject to the resolution in the Supreme Court.*

#### **HEADS OF AGREEMENT SIGNED ON MARCH 24, 2023**

##### **1. Contract Period**

*The contract period is for one (1) year, April 1, 2021 to March 31, 2022*

##### **Emergency Duty/ On Call Allowance**

**iv. Request to be rolled into salary and be made pensionable with Implementation Date as of the agreement in the 1996 HOA.**

*This matter is subject to the decision of the Courts.*

- [24] Dr. Lawson expressed that during the 2017- 2021 wage contract negotiations, the Government proposed a resolution to correct the breach of the 1996-1998 Heads of Agreement as it related to formally rolling the EDA into basic salary. It is his averment that the Government recognized that the allowance was classified as salary and therefore formed part of pensionable emoluments.
- [25] In 2016, on the signing of the HOA he accepted the assurance by the Ministry of Finance that discussions would continue in respect of making the EDA pensionable. He stated that he expected a resolution prior to 2021.
- [26] In 2019, their Attorneys-at-Law Nunes, Scholefield DeLeon & Co wrote to the Minister of Finance requesting that the Ministry classify the EDA as salary based on the IDT award. The Minister responded requesting that the consultants await the Compensation Review for Public Sector workers.
- [27] On April 24, 2020, he was invited to a teleconference meeting with the Ministry of Finance and Public Service and the Chairperson of the Compensation Review where he expressed the reasons the EDA should not be part of the compensation review process considering the IDT award. Shortly after, on May 12, 2020, he received an email from the Ministry of Finance which indicated that the matter of the EDA was being reviewed by the compensation review team. On May 21, 2020, he received email correspondence with an attached HOA which had an offer to make the EDA pensionable. The Consultants countered requesting a change to the implementation date.
- [28] He deposed that after the cessation of negotiations on the date for which the EDA was to be treated as pensionable, he wrote to the Ministry of Finance requesting that the EDA be formally incorporated into basic salary and made pensionable, however, the Government's letter in response stated that the offer

was withdrawn and that the Consultants should await the pending compensation review.

[29] The letter in response to the Government's decision to withdraw the offer is set out below:

*“For this current 2017-2021 negotiation, an offer was made by the MoF&PS to resolve this matter and treat this allowance as pensionable salary. A proposal was suggested by the MoF&PS to reference this position through a side letter. In good faith, we accepted the offer. Negotiations, however continued with regards to the effective implementation date. The MoF&PS offered April 1, 2020 and the AGMC countered April 1, 2012 (The year of the IDT Implementation). The AGMC was simply awaiting a response regarding the effective implementation date. It was to the Associations astonishment when the offer resolving this critical matter was completely withdrawn. In all the years of negotiations, this is the first in our history that the Association has experienced such an egregious breach of the principles of negotiating in good faith.”*

[30] Finally, on May 18, 2021, their attorneys wrote to the Attorney General Chambers requesting that the IDT award be considered in the compensation review for the health sector. There has been no response to the issue to date.

[31] The evidence on behalf of the Defendants was contained in affidavits filed by Ms. Fay Case and Ms. Janice Stewart. Ms. Case in outlining the role of the 6<sup>th</sup> Defendant averred: *“...through the Strategic Human Resource Management Division (the 6<sup>th</sup> Defendant) has direct responsibility for negotiating wage and fringe benefits contracts of Staff Associations and Trade Unions representing public sector workers”*<sup>9</sup>.

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<sup>9</sup> Affidavit of Fay Case in answer to Affidavit in support of Fixed Date Claim Form filed on April 14, 2022, para. 5.

- [32] It is her evidence that the EDA has never been treated as salary, or salary for which pension is computed. The payment was made based on the conditions of the job which required the consultants to perform emergency duty and be on call. It is admitted that the EDA forms a substantial part of the Consultants salary however it is a fixed and not a flat rate that is in fact taxed. She stated that the application of income tax to the EDA does not convert it to salary, as income tax is paid on all allowances except reimbursable allowances.
- [33] It was reiterated that Government's response to the request to incorporate most of the allowances into salary in the 1996-1998 negotiations was to state that the flat rate of the EDA was rolled into salary this she said was with reference to the Junior Doctors. The result was an unintended benefit for the Consultants, as the increased salaries were used in the computation of their pensions. Since then, there have been several rounds of negotiations and at every turn the Consultants were advised of the Government's fiscal constraints.

### **Discussion and Analysis**

- [34] The HOA's are contractual agreements between the Government and the Consultants. Within the HOA signed in 1997 was a contractual provision to incorporate the flat rate of the EDA into basic salary which would be made pensionable. This was not done. The 1997 agreement was therefore breached. The Consultants did nothing to enforce the terms of that agreement and at this stage can no longer do so.
- [35] What then is the promise? The terms of the agreement were clear it was the flat rate of the EDA which was to be rolled into basic salary. It is fair to say that on the evidence of Ms. Case the intention was to roll the flat rate given to the Junior Doctors into basic salary. By default, the Consultants benefitted from this decision.
- [36] It is interesting to note that in her Affidavit Ms. Case denied that the rate is flat, she agreed however that it is fixed. It would appear that her focus was on the Junior Doctors. I cannot accept that any decision in relation to the Junior Doctors could be imported and utilized to deny a claim for legitimate expectation

based on the 1997 agreement. The HOA made no reference either in the heading or in the body of the document to the Junior Doctors. The agreement was between the Ministries of Finance and Planning, Health, and the University of the West Indies on the one hand and the Consultants on the other. It is accepted that the reference to the EDA is only in respect of the flat rate. However, the agreement was that it was to be incorporated into basic salary and made pensionable. The Defendants have therefore failed to deliver on the 1997 agreement.

[37] The Consultants despite this failure entered new negotiations over several contractual periods. None of these agreements reiterated what was stated in the 1997 HOA as it relates to making the EDA pensionable. In the HOA for the contractual period 1998 – 2000 the EDA was not mentioned under the heading of basic salary and there was an increase in the sum to be paid to the Consultants. On the issue of making all taxable allowances pensionable the statement was that this was not supported however the Government would continue the process of rolling allowances into basic salary.

[38] The HOA for the period 2015 – 2017 indicates that on the issue of the 1996 agreement being implemented based on the request of the Consultants the discussions on this matter will continue. Subsequently the HOA for the period 2017 – 2021 and 2021 – 2022 provides that they are awaiting the decision of the Court. Despite the non-implementation of the initial terms of the 1997 agreement the Government over the ensuing years promised to continue the process of rolling allowances into salary, the remaining issue of the allowance being made pensionable was left to be determined. I have come to that conclusion because the vexed issue of the EDA being made pensionable was never mentioned after the 1997 HOA. However, the issue of rolling the allowances into salary was a part of the 2000 agreement.

[39] I accept the argument on behalf of the Defendants that the protracted negotiation on the issue of making the EDA pensionable substantiates the point that there was no promise or agreement after 1997 in respect of this. What was indicated however, and the intentions set out in the 2000 HOA is that the



Government would continue the process of rolling allowances into basic salary and that allowances which have been absorbed into basic salary will not be reintroduced<sup>10</sup>. It is undisputed that the EDA is an allowance. The evidence of Dr. Lawson also confirms that the Government failed to honour this obligation as other allowances were rolled into salary but not the EDA.

[40] Counsel for the Claimant in their written submissions raised the interpretation of the **Pensions Act (The Act)**, I wish to address this point as there may be a view that once the EDA forms a part of salary that it is pensionable. Under The Act the term *“pensionable emoluments” is defined as “in respect of service in this Island, includes salary, personal allowance and house allowance but does not include duty allowance or any other emoluments whatever.”*

[41] The EDA is a duty allowance and therefore would not be included in this definition. This is the reason that the HOA specifically states that the EDA is to be incorporated into salary **and (my emphasis)** made pensionable.

[42] The Act defines *“salary” as “the salary attached to a pensionable office or where provision is made for taking service in a non-pensionable office into account as pensionable service, the salary attached to that office.”* If the EDA is included in salary, it would only become pensionable emoluments pursuant to the Pensions Act.

[43] In the circumstances therefore, I do not find that the evidence presented by the Consultants establish a promise or course of conduct which gives rise to a legitimate expectation by them that the EDA would be made pensionable. The clear and unambiguous representation after 1997 is that the Government would continue negotiations on this matter. Apart from the initial computation of the EDA as a part of their pensions in the 1997 agreement period there was no other contractual period where this was done.

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<sup>10</sup> Heads of Agreement Concluded Between The Government of Jamaica, University Hospital of the West Indies and the Association of Government Medical Consultants on behalf of Medical and Dental Consultants p. 6.

[44] Further, the Consultants cannot claim that they were not given an opportunity to be heard or that they were not a party to any discussions, as the evidence of Dr. Lawson is that at every turn they were in negotiations with the Government.

**Should the EDA be used to compute gratuity payments for Consultant Doctors on fixed term contracts.**

[45] The payment of gratuity did not form a part of the 1997 HOA. There was no evidence that it formed a part of the HOA which followed in 2000, 2016 or 2023. I have accepted the evidence of Janice Stewart on the classification of gratuity payments. In her affidavit filed on February 15, 2023, she outlined that the gratuity is a payment made in lieu of pension as contract workers do not form part of the Government's pension scheme. She averred that the computation of gratuity has never included allowances such as the EDA, since allowances are generally given to compensate for specific circumstances and are not the same as salary. It was also her evidence that gratuity payments are performance based and as such are not automatic. I am satisfied on the evidence of Ms. Stewart that the gratuity payments should not include the EDA. By extension, the Consultants have failed to prove that they had a legitimate expectation that the EDA would be used to compute gratuity payments made to their colleagues on fixed term contracts.

**What is the effect of the IDT award in determining the issue of legitimate expectation?**

[46] The terms of reference sent to the IDT were as follows,

*“To determine and settle the dispute between the Ministry of Health and the Ministry of Finance and Planning on the one hand, and the Association of Government Medical Consultants employed to the Ministry of Health on the other hand over the Association's claim for payment of Emergency Duty Allowance and Incentive Allowance for the full duration of Leave.”*

The award of the IDT is set out below:

*“That the Emergency Duty Allowance be paid to the Medical Consultants for the full duration of leave.”*

[47] The IDT was never asked to determine whether the EDA was to form a part of the Consultants basic salary neither was there an issue as to whether it should be made pensionable. The focus was squarely on the question of the EDA being paid to the Consultants for the full duration of their leave. At paragraph 34 of the Award in adopting the reasoning employed in a similar case, the Chairman stated,

*“the emergency duty allowance paid to the Consultants constitutes a substantial and integral part of their remuneration and it would be unfair and unreasonable to withdraw it whilst they are on leave.”*

[48] The fact that the EDA forms a part of their remuneration is therefore not in dispute. The question to be resolved in this case is whether it ought to be considered as a part of their salary and made pensionable. The ruling of the IDT did not address this issue because it was never raised at that level.

[49] The findings of the IDT were specific to the fact that the EDA was a substantial part of their remuneration and that it was “in the nature of” salary and as such could not be treated in an ad hoc manner. This finding in my view was relative to the position of the Government in deducting the sums when the Consultants were on leave. The finding did not address the issue as to whether the EDA is to be made pensionable. It is for this reason that I do not find that the decision of the IDT can be used to substantiate the claim for legitimate expectation.

**Are the Defendants estopped from refusing to honour the promise made in the 1997 Heads of Agreement and if so, are they justified in departing from what was previously promised.**

[50] I have decided to treat with issues 4 and 5 together. Having found that the Consultants did not have a legitimate expectation that the EDA would be made pensionable the issues of estoppel and justification do not arise.

## **Costs**

[51] I will not depart from the usual practice in respect of Costs. It is noted that there was a provision in the 2000 HOA that all allowances will be rolled into salary and those allowances rolled into salary would not be reintroduced. The Consultants due to the lengthy negotiations on this issue could do no more than seek the intervention of the Court.

## **Conclusion**

[52] The Consultants have failed to establish that they had a legitimate expectation that the EDA would be made pensionable.

## **Orders:**

1. The declaration sought that the emergency duty allowance paid to the Government Medical Consultants is a part of the salary/ remuneration for government Medical Consultants pursuant to IDT Award 37/2012 and is to be treated as part of their pensionable salary/ emoluments with effect from April 1, 1996, is refused.
2. The declaration that the emergency duty/on call allowance paid to the Government Medical Consultants is to be used to compute gratuity payments for consultant doctors on fixed term contracts is refused.
3. Each party is to bear their own costs.