

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE  
(Sub-Registry)

H.C.A. S- 92 OF 2001

BETWEEN

ROOPNARINE BHAGWANSINGH

APPLICANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE TIWARY-REDDY**

Appearances:

Mr. Ronnie Bissessar for the Applicant

Mr. Thorne and Mr. Lalla for the Respondent

**JUDGMENT:**

By Notice of Motion filed on 19.1.01 the Applicant sought redress pursuant to section 14 of the Constitution for breach of his right to property under section 4 (a) of the Constitution. In particular the Applicant sought declarations that the State had incorrectly computed his gratuity and pension benefits and had also withheld an injury allowance thereby depriving him of the right to the enjoyment of his property without due process of law. The Applicant also sought consequential orders for, inter alia, the payment of all outstanding monies.

The Applicant swore three affidavits while Frankie Lewis (Lewis), a Police Corporal attached to the Pension Division, Finance Branch, Police Headquarters swore two affidavits on behalf of the Respondent. Both deponents were cross-examined.

### **Facts**

On 1.8.78 the Applicant enlisted in the Police Service as a constable and was retired therefrom on the grounds of ill health on 8.5.95, by which date the Applicant maintained that he had served for a continuous period of 199 months.

On 2.9.99 the Senior Superintendent, Finance Branch advised the Applicant that he was entitled to a gratuity of \$30,833.75 and a reduced annual pension of \$7,400.10 (\$616.17 monthly). By letter dated 1.11.99 the Applicant's attorney challenged this computation and advised the Commissioner of Police that the Applicant's gratuity should be \$64,161.95 and his reduced annual pension \$20,532.82 (\$1,710.99 monthly). The Applicant's attorney further advised that the Applicant was also entitled to an injury allowance of \$1,375.66 monthly.

In the interim on 26.10.79, in the course of his duties, the Applicant had been conducting a Road Block exercise when he was struck by a motor vehicle and sustained severe personal injuries. The Respondent contended that since the Applicant was absent from full time service for 2,035 days of which 1,905 days were no-pay leave and 130 days were half pay leave, the Applicant's full time service was 136 months and not 199 months as the computation of pension and gratuity is calculated on the officer's full-time service. The Applicant did not dispute these periods of no-pay and half-pay leave but maintained that these periods should be included for pension purposes.

The Respondent denied that the Applicant was entitled to an injury allowance. Further the Applicant had not made a formal application to the Commissioner

of Police for such an allowance neither did he submit the requisite documents in support, in particular, a medical report from a Medical Board classifying the type of injury. The Respondent also alleged that the Applicant had not only over-stated his length of service but also his actual salary.

In paragraph 6 of his second affidavit filed on 15.5.01 the Applicant agreed that his pension and gratuity are to be calculated on his full time service which meant service for which he received full pay.

### **Issues**

1. Period of service for pension purposes
2. Monthly pay
3. Formula for calculating reduced pension and gratuity
4. Procedure re injury allowance

### **Period of Service for Pension Purposes**

The Applicant's Attorney contended that since the Applicant had been employed in the Police Service for a period of 199 months, the Applicant's pensionable service was the said period of 199 months. This argument flies in the face of the Applicant's admission that pension and gratuity are calculated on his full time service i.e. service for which he received full pay. On the other hand Lewis maintained that the Applicant's pensionable service was 136 months.

### **Monthly Pay**

The Applicant maintained that at the date of his retirement (8.5.95) his monthly salary inclusive of allowances was \$4,127.00 but provided no documentary evidence in support. In cross-examination the Applicant

admitted that he never received the sum of \$4127.00 monthly but should have received this sum from the latter part of 1994.

According to the Applicant, his brother, Deonarine Bhagwansingh had joined the Police Service approximately six months after the Applicant and the said brother's monthly salary at the time of the Applicant's retirement, was \$4,127. The Applicant deposed that he had arrived at his own monthly salary being \$4,127 based on his said brother's salary, but once more failed to provide any documentary evidence in support. The Applicant also admitted that the sum of \$4127 included allowances. He was not sure of the total of all his allowances and gave evidence of a meal allowance of \$100 and a house allowance of \$100.

Lewis, a police officer for 27 years and attached to the Pension Division, Finance Branch, Police Headquarters since 1986, deposed that he had access to all the files and records pertaining to the calculation of pensions and gratuities payable to police officers pursuant to the Pensions Act Ch. 23:52 and the Sixth Schedule to the Police Service Act Ch. 15:01. He was also aware of all the procedures and policies of the Division, particularly those pertaining to the calculation of pensions and gratuities payable under the aforesaid Acts. Lewis deposed that from an examination of the records the Applicant's monthly pensionable salary prior to retirement was \$2,902 and not \$4,127.

In paragraph 8 of his second affidavit filed on 15.5.01 the Applicant had deposed, inter alia:

**“ ... the salary of \$2902.00 was my salary in 1988 with allowances. I put the Respondents to strict proof of their contention as to what my pensionable salary was.”**

**Formula for Calculating Reduced Pension and Gratuity**

Lewis was cross-examined at length. Save that he had worked in the Pensions Division for 15 years no evidence was forth coming as to his actual professional qualifications. He maintained that pension is not paid for sick leave classified as no-pay or half pay leave, based on instructions from the Administrative Branch of the Police Service.

Lewis accepted that **Rule 4 (1) of the Sixth Schedule** provided that a police officer who is disabled by infirmity of mind or body may be retired after ten years of satisfactory service and may thereupon be granted a monthly pension not exceeding 1/80ths of a month's pay for each completed month of service. However Lewis testified that he used the fraction in Rule 4 (4) i.e. 1/480ths to calculate the Applicant's pension and not the fraction 1/80ths as provided in Rule 4 (1). At first Lewis admitted that Rule 4 (4) applied to the Applicant. When shown the memorandum from the Commissioner of Police to the Auditor General dated 2.9.99 he replied:

“I do not accept that pension and gratuity paid to the Applicant was in accordance with **Rule 4(4) a** - according to this document. I confirm that the only part of Rule 4 (4) which I used was the computation i.e. 1/480ths of a month's pay for each completed month of service.”

#### **Procedure re Injury Allowance**

The Applicant maintained that in addition to his gratuity and reduced monthly pension he was entitled to be paid an injury allowance by virtue of Rule 9 (1) of the Sixth Schedule to the Police Service Act.

**Rule 9 (1) provides:**

**“Subject to subrule (2), when the President is satisfied that a police officer has been permanently injured –**

**(a) in the actual discharge of his duty; and**

**(b) without his own default; and**

**(c) by some injury specifically attributable to the nature of his duty,**

**and his retirement is thereby necessitated or accelerated, such police officer may be granted in respect of such injury, in addition to any pension or gratuity granted to him an allowance in proportion to his injury of such monthly amount as the President may direct, not exceeding the following:**

**When his capacity to contribute to his support is –**

**slightly impaired                      40/480ths of a month’s pay;**

**impaired                                      80/480ths of a month’ pay;**

**materially impaired                      120/480ths of a month’s pay;**

**totally destroyed                      160/480ths of a month’s pay.**

**And Rule 9 (4) provides:**

**“Before granting an allowance under subrule (1) the President shall be furnished with the report of a medical board (so far as may be possible) on the matters relevant to his decision, and shall be guided by such report.”**

The Applicant’s attorney wrote to the Chief Personnel Officer on 11.4.00 claiming an injury allowance at the rate of 160/480ths of his gross monthly pay with effect from the date of the Applicant’s retirement.

At paragraph 14 of his first affidavit filed on 30.4.01 Lewis stated:

**“ ... In order for an officer to be entitled to an injury allowance, he must make a formal application to the Commissioner of Police.**

**Furthermore in order to invoke regulation 9 of the 6<sup>th</sup> schedule of the Police Service Act, Chapter 15:01, a medical report must be submitted by the officer together with his application for injury allowance classifying the type of injury suffered by the officer in accordance with the regulation. From an examination of our records, the Applicant never made a formal application under the said regulation nor did he submit a Medical Report from a Medical Board established under the Ministry of Health classifying his injury in accordance with the regulation. The Pension Division of the Police Service is not in a position to classify injuries suffered by officers for the purpose of this section. This classification must come from a Medical Board under the Ministry of Health, and this was not done by the Applicant. Furthermore payment of injury allowance is not automatic if an officer retires on medical grounds. The officer must go further and have his injuries classified pursuant to the regulation.”**

At paragraph 4 (a) of the Applicant’s third affidavit filed on 5.11.01 the Applicant deposed:

**“As a serving officer for over 17 years I was extremely familiar and had personal knowledge of the procedures for obtaining injury allowance. I therefore say that there is no need for a formal application for injury allowance as alleged by Mr. Lewis at paragraph 10 of his affidavit filed on 30<sup>th</sup> April, 2001. It is within my personal knowledge that the Medical Reports which I have exhibited herein as “X” and “Y” were before the Medical Board when I appeared before it on 13<sup>th</sup> October, 1994 since I recall being asked questions as to the findings of both reports by the Medical Board. I also say that the Reports “X” and “Y” are also in my personal file as well as my file kept at the Chief Personnel Officer and a file kept at the Commissioner of Police’s office. I**

**say these things because, based on my personal knowledge, having over 17 years' experience as a Police Officer, that once the Reports are submitted to the Police Administration, copies are prepared and sent to the Chief Personnel Officer's office, the Commissioner of Police's office and my personal file. This has been the case with all documents that I have submitted to Police Administration."**

The Applicant had exhibited three medical reports namely:

- (a) Report dated 10.5.2000 from Mr. Stephen Ramroop, Specialist Orthopaedic and Trauma Surgeon.
- (b) Report dated 2.2.1993 from Dr. Jalal Thwainey MD of Michigan, USA
- (c) Report dated 17.7.1992 from Dr. Miguel Hernandez MD of Dearborn Orthopaedic Associates of Dearborn, Michigan.

The reports at (b) and (c) above are referred to as "X" and "Y" respectively in paragraph 4 (a) above.

Thus the Applicant was contending that save for the report at (a) above he had appeared before a Medical Board which had before it the reports at (b) and (c) above. The Applicant gave no explanation as to whether the report at (a) above had since been submitted to the Chief Personnel Officer or to the Commissioner of Police. Further there was no cross-examination of either of the deponents on any aspect of the claim for an injury allowance.

By a memorandum dated 24.4.95 from the Director of Personnel Administration to the Commissioner of Police it is clear that the Applicant had appeared before a Medical Board which examined him on 13.10.94 and found him to be unfit for further service on a permanent basis and that the Police Service Commission had accepted the Board's said finding. At paragraph 10

of the Applicant's second affidavit filed on 15.5.01 the Applicant had deposed:

**“ ... documents prepared by the Medical Board are usually submitted directly to the Commissioner of Police and do not come into the custody of the Applicant ...”**

### **Abuse of Process**

In his initial submissions the Respondent's attorney took a preliminary point contending that proceedings under section 14 of the Constitution were not appropriate in the instant case where the Applicant was alleging that the Respondent had made an error in calculating and paying his pension benefits. The Respondent's position, was that the appropriate proceedings should have been a writ action seeking damages for breach of his contract of employment.

The Applicant's submissions were filed before the Respondent's and did not address this issue. Thereafter the court invited the attorneys to make further submissions in light of the Privy Council decision in **PCA No. 54 of 2000 Thakur Persad Jaroo v The Attorney General (Jaroo)**.

Attorney for the Applicant submitted that the Jaroo decision was not relevant since the facts were not in issue but several matters of law had to be determined. In support of this proposition he cited the decision of the Hon Madam Justice Dean-Amorer in **HCA No. 1717 of 2001 Jennelyn Guerra v A.G (Guerra)** wherein it was held that the proceedings under section 14 of the Constitution were an abuse of process. However, the learned Judge proceeded to amend the motion pursuant to Order 2 Rule 1(3) to enable the proceedings to be treated as if begun by writ.

The Applicant's attorney further submitted that it would **“constitute a travesty of justice if this matter is not determined because of what remains a fairly esoteric decision of the Privy Council”**. Further, since all the evidence had been led and submissions made, a multiplicity of

proceedings, increased legal costs and wasted judicial time will result if no decision is made. These were the very ills to which the Privy Council had adverted in **Jaroo**. Finally since **Jaroo** was determined after this matter had been heard the Applicant will be penalized in time and costs through no fault of his or his legal advisers.

The Respondent's attorney submitted that the **Jaroo** decision amply fortified his earlier submissions that constitutional proceedings in the instant case were an abuse of process.

In **Jaroo** their Lordships re-iterated that they had made it clear more than once that the right to apply to the High Court for redress under **section 14 (1) of the Constitution** should be exercised only in exceptional circumstances where there is a parallel remedy – paragraph 29 and referred to Lord Diplock's observations in **Harrikissoon v The Attorney General 1980 AC 265 at 268** that the value of this procedure (Constitutional Motion) will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

Their Lordships further noted that the originating motion procedure is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. The originating motion procedure under section 14(1) was wholly unsuitable in cases which depend for their decisions on the resolution of disputes as to fact. Disputes of that kind were to be resolved by using the procedures which were available in the ordinary courts under the common law – paragraph 36.

Their Lordships gave this advice at paragraph 39:

**“Their Lordships respectfully agree with the Court of Appeal that before he resorts to this procedure the Applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the**

**case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of process to resort to it.”**

In **Guerra** above the Applicant had alleged that her right to liberty, to be informed of her right to Counsel, the right to be brought promptly before a judicial authority and the right to be informed of the reason for her arrest had been infringed. The Hon. Madam Justice Dean-Armorer dismissed the preliminary objection made by the Attorney for the Respondent on the authority of **Jaroo** that the Constitutional Motion was an abuse of process. The learned judge noted that no affidavit had been filed on behalf of the Respondent, the facts were not in dispute and there was no parallel remedy in respect of all of the alleged breaches.

In HCA No. 2667 of 2001 **Fitzgerald Alexander v The Attorney General (Alexander)** the Applicant alleged he had been arrested summarily and that in so doing the arresting police officer had handcuffed him and failed to inform him of his rights and of the reason for the arrest. The Applicant filed a Constitutional Motion seeking redress for breaches of the aforementioned rights. One affidavit had been filed on behalf of the Applicant and four on behalf of the Respondent.

The said judge upheld the Respondent’s objection that the Constitutional Motion was an abuse of process and sought to distinguish the facts in **Guerra** from those in **Alexander** and referred to the intervening decision of the Court of Appeal in the consolidated appeals of **George and Durham v The A.G. (George and Durham) – Civil Appeals Nos. 63 and 74 of 2002.** There the Court of Appeal considered whether it was correct to permit a Notice of Motion filed under section 14 of the Constitution to be treated as if begun by

writ after it was conceded that the Motion was an abuse of the Court's process.

At paragraph 13 the Hon. Justice of Appeal Hamel-Smith referred to the need for a prospective litigant to conduct a balancing exercise before resorting to the procedure under section 14 (1) of the Constitution:

**“ ... The Applicant had to consider the true nature of the right allegedly contravened. He also had to consider whether having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently (be) invoked.”**

With respect to the Respondent's submissions that they were deprived of declarations sought in respect of alleged breaches of the Constitution the learned Justice of Appeal stated at paragraph 17:

**“ ... no useful purpose would have been served because, as already explained, neither respondent had carried out the requisite exercise which would have indicated to both that it was plainly weighted against them and their remedy was strictly under the common law. Declaratory relief under the Constitution was therefore un-necessary.”**

The principle which can be gleaned from the foregoing pronouncements by the Court of Appeal is that before filing proceedings under section 14 of the Constitution, a litigant is required to conduct a balancing exercise between a prospective common law action and a Constitutional Motion. The litigant must consider whether the true nature of his cause requires him to file a Constitutional Motion or to proceed under the common law.

## **Findings**

I am unable to accept the submissions of the Applicant's attorney that there are no disputes of fact in this matter. It is my view that all the aforementioned issues involve disputes of mixed fact and law.

The period of service for pension purposes depended upon the legal interpretation of "satisfactory service" in **Rule 4 of the Sixth Schedule** as well as upon a determination of the actual period of such service. There is a clear dispute of fact as to the Applicant's "monthly pay" at the date of his retirement and a dispute of law as to whether "monthly pay" included any and if so, which allowances.

There are similar disputes of fact as to the formula to be applied in calculating the reduced pension and gratuity. The Respondent's attorney made lengthy submissions on the correct fraction to be applied in calculating the Applicant's pension. In particular he contended that the fraction contained in **Rule 4 (4)1 of the Sixth Schedule** "1/80ths" was a printing error and should actually be "1/480ths". The Applicant's attorney did not respond to these matters. It is my view that expert evidence was needed regarding the computation of pension and gratuity. This calculation also depended upon the determination of the Applicant's monthly pay, which also required further and perhaps expert evidence.

On the procedure to be followed in applying for an injury allowance there is clear dispute both on the facts and on the law. Further there has been no cross-examination on this issue to date. The Respondent's attorney has maintained that it is still open to the Applicant to apply for an injury allowance. In all the circumstances attorney for the Applicant may wish to pursue his application for an injury allowance even at his stage.

### **Parallel Remedy**

I accept the Respondent's submission that a contract of employment exists between the Applicant and the State being the employer. The contractual terms are provided for, in the case of pension, in **Rule 4 of the Sixth Schedule**. Further proceedings for denial of termination benefits are to be founded in a writ action seeking damages for breach of contract. I hold that this is a parallel remedy available to the Applicant.

If the Applicant had carried out the balancing exercise referred to by the Court of Appeal in *George and Durham* it would have been obvious that the matters complained of, the failure to correctly compute and pay the Applicant his correct gratuity and pension benefits as well as an injury allowance, amounted to a classic case of breach of a contract of employment at common law.

Since there is a parallel remedy and there are no exceptional circumstances, applying the decision in **Jaroo**, proceedings by way of constitutional motion are clearly inappropriate.

Applying the decision of the Court of Appeal in **George and Durham** above, which is binding on this court I am unable to accept the submission of the Applicant's attorney that **Jaroo** is a "**fairly esoteric decision**" or that the Notice of Motion should be treated as a Writ.

In **Jaroo** the Appellant's motor car had been detained by the police in October 1987 and his Originating Motion to the High Court for constitutional relief was filed in May, 1988. The Privy Council delivered its judgment in February, 2002, some 14 years after the proceedings had been first instituted and held that the procedure by way of constitutional motion constituted an abuse of process.

**Conclusion**

Notwithstanding the passage of time, I hold that the Applicant's originating motion constitutes an abuse of process.

I am grateful to attorneys on both sides for their submissions on the several other areas of law. Having regard to my decision on the abuse of process, there is no need for me to deal with these aspects.

**ORDER**

1. The Applicant's Notice of Motion filed on 19.1.01 is dismissed.
2. The Applicant will pay the Respondent's costs of this motion certified fit for Advocate Attorney-at law.

Dated this 17<sup>th</sup> day of December, 2004.

.....  
Amrika Tiwary-Reddy  
Judge