

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2019/0008

BETWEEN:

THE ATTORNEY GENERAL

Appellant

and

SIMON RILEY

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Sheree Jemmotte-Rodney, Attorney General, for the Appellant
Mr. Sylvester Carrott for the Respondent

2022: February 9;
October 17.

Civil appeal – Breach of contract of employment – Underpayment of salary – Whether judge erred in finding that respondent is entitled to underpayment of salary – Claim for overtime pay – Whether judge erred in finding that respondent was not entitled to overtime pay

In the aftermath of the volcano eruption in 1996 in Montserrat, the respondent, Mr. Simon Riley ("Mr. Riley"), who was employed by the Government as a security officer in the Department of Administration, was given special duties and was made responsible for the security of the Government's offices. He had to work longer hours to carry out his new responsibilities. In recognition of his increased responsibilities and longer working hours, Mr. Riley was awarded a special allowance of one-half of his monthly salary. In February 2007, Mr. Riley's post as a security officer was upgraded to buildings and security officer in recognition of the broader range of responsibilities that he had undertaken. As a result of the promotion, Mr. Riley received a revised salary package. However, the new package was less than what Mr. Riley was earning before his promotion and did not include an entitlement to overtime pay. He raised these issues with his employers, but they were not resolved to

his satisfaction. Consequently, he instituted proceedings against the Attorney General of Montserrat ("the Appellant") for breach of his contract of employment, claiming, among other things, damages for underpayment of salary, overtime pay and/or time off in lieu of overtime pay. The Appellant disputed the claim and argued that, in all the circumstances, Mr. Riley was not underpaid and he was not entitled to overtime pay.

At the trial, Mr. Riley gave evidence and did not call witnesses. Three Government officers, including the permanent secretary in the Department of Administration, testified for the Appellant. The learned judge ("the Judge") allowed the claim and awarded Mr. Riley \$72,600.00 for underpayment of salary, dismissed the claim for overtime pay, and awarded prescribed costs to Mr. Riley. The judge rejected the claim for overtime pay on the basis that granting such an award would result in a form of double payment. Notwithstanding the rejection of the overtime claim, the judge went on to say that if he were wrong, he would assess Mr. Riley's overtime losses to be about \$100,000.00.

Being dissatisfied with the decision of the Judge, the Appellant appealed to this Court. Mr. Riley counter appealed and sought orders setting aside the decision of the judge dismissing the claim for overtime pay, and an order that Mr. Riley be awarded the \$1000,000.00 found by the judge as compensation for overtime pay. Two main issues arose for determination on appeal, namely: (i) whether the judge erred in finding that Mr. Riley was entitled to underpayment of salary; and (ii) whether the judge erred in finding that Mr. Riley was not entitled to overtime pay.

Held: allowing the appeal, dismissing the counter-notice of appeal, setting aside the order of the judge; and ordering each party to bear his/her own costs in this Court and in the court below, that:

1. The general approach of an appellate court to challenges to findings of fact, the evaluation of those facts and the inferences drawn from them by the trial judge is well known and the principles are settled. The appellate court should not interfere with the findings of primary fact or the inferences drawn from those facts by a trial judge unless it is satisfied that the judge did not take proper advantage of having seen and heard the witnesses give their evidence and/or he did not consider, or consider sufficiently, the evidence, and/or that he was plainly wrong in his evaluation of the evidence.

Watt (or Thomas) v Thomas [1947] 1 All ER 582 applied; **Yates Associates Construction Company Ltd v Blue Sands Investments Limited** BVIHCVAP2012/0028 (delivered 20th April 2016) applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied.

2. Contemporaneous documentary evidence is generally more reliable than the oral evidence of witnesses. Contemporaneous documents reflect the views of the witnesses while the material events were unfolding. It does not change with the passage of time and it is unaffected by the changing emotions and views of the maker. It should always be considered when evaluating the oral evidence and generally should prevail in the event of a conflict. In this case, the

contemporaneous evidence included the correspondence between the parties and the appointment forms issued by the Government to Mr. Riley, considered in conjunction with the provisions of the General Orders of the Public Service of Montserrat (“General Orders”). The judge did not have any or any sufficient regard to the contemporaneous evidence in finding that there was an underpayment of salary to Mr. Riley. Had the judge reviewed this evidence the inevitable conclusion would have been that the shortfall in Mr. Riley’s salary was paid in full and he suffered no pecuniary loss because of his promotion. It follows that the judge’s conclusion that there was an underpayment of salary is not justified by the evidence and was plainly wrong.

Simetra Global Assets Ltd and another v Ikon Finance Ltd and others [2019] EWCA 1413 applied; **Armagas Ltd v Mundogas SA, The Ocean Frost** [1985] 3 WLR 640 applied.

3. The counter-notice of appeal for overtime pay is dismissed because the evidence does not support the claim and the claim is inconsistent with the rules for overtime pay in the General Orders.

JUDGMENT

- [1] **WEBSTER JA [AG.]**: This is an appeal against the judgment of the learned trial judge (“the Judge”) dated 1st July 2019 by which he allowed the respondent’s claim to the extent of awarding \$72,600.00 for underpayment of salary, dismissed the claim for overtime pay, and awarded prescribed costs to the respondent.

Background

- [2] The respondent, Mr. Simon Riley (“Mr. Riley”), was employed by the Government of Montserrat in 1995 as a security officer in the Department of Administration. As a public officer, he was on the permanent and pensionable establishment and he received a basic salary based on the point in the public service salary scales attached to his position. The terms of his employment were governed by the General Orders of the Public Service of Montserrat (“General Orders”) and appointment forms issued from time to time whenever there was a change in the terms of his employment.

- [3] The appellant is sued in her capacity as the representative of the Crown (“the Appellant”).
- [4] In the aftermath of the volcano eruption in 1996 the Government transferred its offices from Plymouth to Olveston. Mr. Riley was given special duties of transferring files from Plymouth to Olveston and being responsible for the security of the Government’s offices. He had to work longer hours to carry out his new responsibilities. In recognition of his increased responsibilities and longer working hours Mr. Riley was awarded a special allowance of one-half of his monthly salary.
- [5] In February 2007, as part of a restructuring of the Department of Administration, Mr. Riley’s post as a security officer was upgraded to buildings and security officer in recognition of the broader range of responsibilities that he had undertaken.¹ At the time, he was being paid a monthly salary of \$2,901.00, a half salary of \$1,332.00, and a travel allowance of \$800.00, for a total take-home pay of \$5,023.00. In his new position as buildings and security officer, he was placed at point R 28 on the salary scale with a new basic salary of \$3,354.00 per month, plus benefits of \$800.00 per month for travel allowance and \$60.00 per month for telephone allowance. The total package was therefore \$4,214.00 per month. The terms of the revised salary package are reflected in the appointment form dated 22nd February 2007.²
- [6] It soon became apparent that the new package was less than what Mr. Riley was earning before February 2007. His take-home pay had been reduced by \$809.00 per month. By letter dated 21st May 2007,³ he brought the shortfall in salary, as well as his discontent with the increased amount of work that he was doing, to the attention of the permanent secretary in the Department of Administration. The shortfall in salary was acknowledged by the permanent secretary in her letter dated

¹ Record of Appeal, Volume 2, e-page 582.

² Record of Appeal, Volume 2, e-page 385.

³ Record of Appeal, Volume 2, e-page 386.

26th September 2007.⁴ She calculated the shortfall at \$809.00 per month. Mr. Riley did not agree with this calculation and stated in his letter of 3rd October 2007⁵ that the shortfall was \$997.00. He also said in the letter that the amount of the shortfall should not be treated as a tax-free allowance but as a part of his salary (which would give him an enhanced pension upon retirement). This was followed by a meeting with officers of the Department of Administration on 15th October 2007.⁶ Following the meeting the new permanent secretary, Mrs. Daphne S. Cassell, wrote to Mr. Riley on 19th October 2007 stating:

“As advised by the Honourable Attorney General, you should not suffer any pecuniary disadvantage as a result of the restructuring of the Department. In this regard, your remuneration package will be adjusted accordingly with effect from 1 January, 2007 and assigned personal to holder.

Kindly note that this agreement nullifies any claims for overtime as of January 1, 2007 to include the request submitted on August 28, 2007 for the period April 6 to August 26. The retroactive payments on base salary will [be] effected at the earliest.”⁷

[7] In paragraph 17 of his witness statement, filed on 19th May 2017, Mr. Riley stated: “I then had a meeting with Mrs Cassell and Mrs Katrina Ryan on 15 October 2007 in Mrs. Cassell's Office. As a result of the discussion I then received a new offer of employment which I accepted.”⁸ (emphasis added)

[8] Although the agreement to adjust Mr. Riley's salary appears to have brought about some calm to the issue of salary, he continued to complain about the amount of time that he had to work and the fact that he was not being paid overtime. On 25th November 2010, Ms. Clemence E. Fergus wrote to Mr. Riley confirming that:

“This also seeks to confirm that the correspondence addressed to you dated October 19, 2007, advised no further requests for overtime claims will be considered on your behalf. Therefore all claims for overtime, (which in this instance includes your request for lieu days), are factored into your

⁴ Record of Appeal, Volume 2, e-page 393-394.

⁵ Record of Appeal, Volume 2, e-page 395-396.

⁶ Record of Appeal, Volume 2, e-page 400.

⁷ Record of Appeal, Volume 2, e-page 400.

⁸ Record of Appeal, Volume 2, e-page 131.

remuneration which places you at R20 with allowances totaling \$10,320 per annum.”⁹

[9] On 4th July 2008, the Department issued another appointment form setting out the new terms of Mr. Riley’s appointment.¹⁰ The form states that the new salary “[w]ith effect from 1 January 2007” is \$4,380.00 per month plus a travel allowance of \$800.00 per month and a telephone allowance of \$60.00 per month, for a total of \$5,240.00 per month. This amount is \$217.00 per month more than his take-home pay before he was appointed building and security officer in February 2007. Thus, the shortfall in Mr. Riley’s salary was made up with effect from 1st January 2007 and he did not lose anything by way of underpayment of salary.

[10] The issue of payment for overtime work remained disputed.

[11] On 19th December 2013, the Deputy Governor advised Mr. Riley’s attorney, Mr. David Brandt, that the Cabinet, while maintaining that Mr. Riley was entitled to overtime pay, recommended a payment of \$36,135.00 for the additional time that he had worked. Mr. Riley, through his attorney, disputed the Deputy Governor’s calculation of the amount offered and there is no evidence that another amount was offered or agreed. The \$36,135.00 offer was not withdrawn.

The Claim

[12] On 27th April 2016, Mr. Riley filed a claim against the Government claiming unparticularised damages exceeding \$329,278.67, plus legal costs of \$7,500.00. In paragraph 10 of the amended statement of claim, Mr. Riley alleges that he was underpaid by \$660.00 per month for a total of 125 months, or \$82,500.00, on the basis that the permanent secretary had unlawfully reduced his salary and allowances in breach of his contract of employment. I assume, though it is not clear from the pleadings, that the \$82,500.00 is a part of his claim for \$329,278.67.

⁹ Record of Appeal, Volume 2, e-page 176.

¹⁰ Record of Appeal, Volume 2, e-page 406.

[13] He also claimed overtime pay and/or time off in lieu of overtime pay, the \$36,135.00 recommended by the Deputy Governor, and \$5,000.00 in legal fees due to his former attorney, Mr. David Brandt.

[14] The Appellant disputed the claim. The essence of its pleaded case is that Mr. Riley was not underpaid and he was not entitled to overtime pay.

The Trial

[15] At the trial, Mr. Riley gave evidence and did not call witnesses. Mrs. Cassell and two other Government officers testified for the Appellant. The Judge found Mr. Riley to be a helpful witness but prone to exaggeration. He found Mrs. Cassell to be unhelpful, obstructive, and would not answer simple questions. As a result, he would prefer Mr. Riley's evidence where there is a conflict unless Mrs. Cassell's evidence was supported or corroborated by agreed documentation.

[16] The Judge found that the Government failed to provide Mr. Riley with support staff as promised in the terms of his offer when he was appointed as buildings and security officer in 2007 and that "...the failure to appoint any help for the claimant over the last 11 plus years to be the best evidence to support my suspicion that the upgrading to a managerial post was as Mr. Carrott says nothing but a device."¹¹

[17] The Judge awarded Mr. Riley \$72,600.00 on his claim for underpaid salary. He rejected the claim for continuing overtime payments "because to accede to it would result in a form of double payment."¹² Notwithstanding the rejection of this claim, he went on to say, obiter, that if he were wrong, he would assess Mr. Riley's overtime losses to be about \$100,000.00.¹³

[18] The Judge also confirmed the decision by the Cabinet, approving a payment of \$36,135.00 to Mr. Riley as compensation for additional hours worked during the

¹¹ At paragraph 17 of the judgment.

¹² Paragraph 44 of the judgment.

¹³ Paragraphs 52 and 57 (iii) of the judgment.

period 2007 to 2009. The Judge confirmed that this payment was due to Mr. Riley. There is no appeal against this part of his decision.

The Appeal

- [19] The Appellant appealed against the award of \$72,600.00.00 for underpayment of salary and the Judge's assessment of overtime losses of \$100,000.00 (if overtime was payable). The notice of appeal lists five grounds of appeal, which I group into categories.
- [20] The first three grounds of appeal allege that the Judge erred in his calculation of Mr. Riley's upgraded salary and found that there was a shortfall of \$660.00 per month in the payment of a salary. Further, he came to this conclusion without having due or any regard to the documentary evidence in the case and the fact that Mr. Riley was appointed to a permanent and pensionable post within the public service and was therefore subject to the salary structure of the civil service and the General Orders.
- [21] Grounds 4 and 5 deal with the issue of non-payment for overtime work. Ground 4 alleges that the Judge erred in finding that the only circumstance in which Mr. Riley would not have been entitled to claim overtime would be if he was still being paid a salary and a half as compensation for overtime work. Ground 5 alleges that the Judge erred in finding that the overtime losses would have amounted to \$100,000.00 without outlining the legal or factual basis for quantifying this amount.
- [22] The three grounds of the counter-notice of appeal are:
- (i) The Judge erred in not awarding compensation for overtime payments because such an award would give Mr. Riley an element of double compensation.
 - (ii) The Judge, having found that there was no double compensation for the years 2007 to 2009, and that the limitation defence did not apply to this period, he should have awarded overtime compensation for at

least this period. Further, the Judge erred in finding that the \$36,135.00 that the Cabinet approved as payment for additional hours worked was not in respect of overtime.

- (iii) The Judge having found that Mr. Riley was not entitled to compensation for underpayment of salary and that his upgrading to a managerial post was nothing but a device, he is entitled to the overtime payments as found by the Judge.

- [23] The counter-notice of appeal seeks orders setting aside the decision dismissing the claim for overtime payments and an order that Mr. Riley be awarded the \$100,000.00 compensation for overtime payments as found by the Judge.

Appellate approach to findings of fact

- [24] The grounds of appeal in the notice of appeal and the counter-notice of appeal raise challenges to the findings of fact by the Judge. The general approach of an appellate court to challenges to findings of fact by a trial judge is well known and has been applied repeatedly by this Court. The starting point is the judgment of Lord Thankerton in **Watt (or Thomas) v Thomas**:

'I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion;
II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'¹⁴

¹⁴ [1947] 1 All ER 582 at 587.

[25] Appellate courts adopt a similar, though less stringent, approach when dealing with inferences drawn by the trial judge from the evidence. This is illustrated by the speech of Lord Hodge in **Beacon Insurance v Maharaj Bookstores Ltd**,¹⁵ a decision of the Privy Council from the Court of Appeal of Trinidad and Tobago. Lord Hodge summed up the evaluation process as follows:

“Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In *Re B (a child)* (above) Lord Neuberger (at [60]) acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269–270:

‘[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.’¹⁶

[26] To the same effect, Blenman JA said in **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**:

“The Court of Appeal should apply restraint not only to the judge’s findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.”¹⁷

¹⁵ [2014] UKPC 21.

¹⁶ *Ibid* at paragraph 17.

¹⁷ BVIHC VAP2012/0028 (delivered 20th April 2016), at paragraph 46.

[27] Another principle, which is common to both trial and appellate courts, is that as a general rule contemporaneous documentary evidence is more reliable than the oral evidence of the witnesses. Contemporaneous documents reflect the views of the witnesses while the material events were unfolding. It does not change with the passage of time, and it is unaffected by the changing emotions and views of the maker. It should always be considered when evaluating the oral evidence and generally should prevail in the event of a conflict. A failure by the trial judge to properly consider and evaluate the contemporaneous documentary evidence can result in a reversal of his or her factual findings by an appellate court.

[28] In **Simetra Global Assets Ltd and another v Ikon Finance Ltd and others**¹⁸ Males LJ referred to the importance of contemporaneous documentary evidence in the following terms:

‘...I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. ... Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.’¹⁹

[29] The importance of contemporaneous documentary evidence was emphasised by Goff LJ in **Armagas Ltd v Mundogas SA, The Ocean Frost**:

“Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case.”²⁰

¹⁸ [2019] EWCA 1413.

¹⁹ Ibid at paragraph 48.

²⁰ [1985] 3 WLR 640 at 676.

This passage by Goff LJ has been cited with approval by this Court on at least three occasions.²¹

- [30] In applying these principles, I would not interfere with the findings of primary fact or the inferences drawn from those facts by the Judge unless I am satisfied that he did not take proper advantage of having seen and heard the witnesses give their evidence and/or he did not consider or consider sufficiently the contemporaneous documentary evidence, and/or that he was plainly wrong in his evaluation of the evidence.

Issues on appeal

- [31] The issues that arise for consideration on this appeal are:
- (a) On the notice of appeal, whether the Judge was correct to find that Mr. Riley is entitled to underpayment of salary of \$72,600.00.
 - (b) On the counter-notice of appeal, whether the Judge was correct to find that Mr. Riley was not entitled to overtime pay. If he is entitled to overtime pay, the quantum of such pay.

Underpayment of salary

- [32] Mr. Riley's case is that he was underpaid by \$660.00 per month for 125 months. The Judge found in paragraph 42 of his judgment that the **Limitation Act**²² barred the claim for underpayment losses that occurred before 27th April 2010 but allowed losses occurring after that date. He continued at paragraph 43: "Accordingly I award the Claimant \$660 pcm from 27/4/10 to today's date. I calculate that to be 110 months and awarded Claimant \$72,600.00 in respect of those losses." There is no further explanation in the judgment that explains how the Judge approved the claim for underpayment of salary.

²¹ East Pine Management Limited v Tawney Assets Limited et al BVIHCVAP2012/0035 (delivered 24th March 2014, unreported); Tyrone Burke v Otto Sam SVGHCVAP2014/0002 (delivered 15th September 2015, unreported); and Mark Byers and others v Chen Ningning BVIHCVAP2015/0011 (delivered 12th June 2018, unreported).

²² Cap. 2.12 of the Revised Laws of Montserrat, 2002.

- [33] An important feature of this case is that the best evidence of the underpayment of salary is to be found in the contemporaneous documents. I outlined the key aspects of these documents in paragraphs 4-11 above. Briefly, the correspondence and the appointment forms show that Mr. Riley was underpaid for a few months after he was promoted to his new position as buildings and security officer in February 2007. He pointed out the underpayment to the Administrative Department and, although it took some time, the situation was rectified by July 2008 and he was paid at a rate slightly higher than he was receiving at the time of his appointment as buildings and security officer in February 2007. Importantly, the payments were made retroactive to January 2007. Therefore, Mr. Riley did not suffer any losses by way of underpayment of salary.
- [34] Learned counsel for Mr. Riley, Mr. Sylvester Carrott, submitted that the Judge was right to find that there was an underpayment of salary based on his findings that Mrs. Cassell was an unreliable witness and that the promotion of Mr. Riley, without providing support staff, was a device. The Appellant did not challenge these findings. This may be because they do not affect the issue of the underpaid salary directly. The issue of the underpaid salary was admitted and remedied, and the fact that it may have been a device was also not disputed. The Appellant's case is that, having promoted Mr. Riley to a higher point on the salary scale, it was necessary to adjust the form of his salary so that he would fit into his new position on the scale. This was done transparently and is supported by the correspondence and the new appointment forms.
- [35] Mr. Riley suggested that the half salary that had been paid to him from 1996 to January 2007 was an entitlement that could not be withdrawn by the Administrative Department. The Appellant responded to this suggestion by reference to the contemporaneous documents:
- (i) The allowance of an additional half salary was a temporary measure granted to Mr. Riley for the additional responsibilities that had been given to him after the volcano. This is confirmed by a memorandum dated 27th

June 1996 from the Financial Secretary to the Permanent Secretary in the Department of Administration which states that: “[a]pproval is sought to pay an allowance equal to half salary for the period during which the services are required for extra duties.”

- (ii) The allowance was to compensate Mr. Riley for taking on additional duties and working long hours after the volcano. When Mr. Riley was appointed buildings and security officer in February 2007 the half salary allowance was, at his request,²³ treated as a part of his salary and no longer as an allowance for overtime work. Mr. Riley acknowledged this in his letter of 1st November 2010 to the Director of the Human Resource Management Unit where he said: “I am fully aware that with the present appointment I have nullifies (sic) any claim for overtime.”²⁴

[36] The contemporaneous documents show that Mr. Riley knew that the half salary allowance was temporary, and even if it was an entitlement, that it had been rolled into his salary at his request to secure a better pension. It could not thereafter be treated as an addition or allowance on top of his new salary.

[37] The contemporaneous documents also show that Mr. Riley knew what was being done, he agreed to the new salary package, and after July 2008 his complaints were limited to the Government’s failure to provide support staff and/or to pay for overtime work.

[38] I find that this is an appropriate case for the Court of Appeal to review the trial judge’s findings of fact. The Judge did not have any or any sufficient regard for the contemporaneous documents in finding that there was an underpayment of salary. Instead, he seems to have focused on the credibility of Mrs. Cassell and the device to formulate a new salary package for Mr. Riley, and accepted the allegation in

²³ See paragraph 6 above.

²⁴ Record of Appeal, volume 2, e-page 407.

paragraph 10 of the amended statement of claim that Mr. Riley was underpaid by \$660.00 per month for 125 months. He then reduced the period of the alleged underpayment to 110 months and awarded \$72,600.00. This approach would be acceptable if the case involved the interpretation of an oral contract and there was no, or no reliable contemporaneous documentary evidence. However, in this case the history of the dealings between the parties and the terms of Mr. Riley's employment are set out in the correspondence and the appointment forms, and is backed up by General Orders. Had the Judge reviewed the contemporaneous documents properly against the background of the General Orders, the inevitable conclusion would have been that the shortfall in Mr. Riley's salary was paid in full and he suffered no pecuniary loss because of his promotion. Like the trial judge in **The Ocean Frost**,²⁵ the Judge in this case "did not pay sufficient regard to these matters (the documentary evidence) in making his findings of fact..."

- [39] I find that the Judge's conclusion on the underpayment of salary is not justified by the evidence and was plainly wrong. I would allow the appeal and set aside the order that the Appellant pays Mr. Riley \$72,600.00 or any other sum for underpayment of salary.

Overtime pay

- [40] The appeal also challenged the Judge's finding that if Mr. Riley was entitled to overtime pay, he would have been awarded the sum of \$100,000.00. The Appellant asserts that the Judge came to this conclusion without regard to the rules for calculating overtime pay in the General Orders and in any event he did not set out the basis on which he made his calculation. I agree with this observation by the Appellant, but having regard to my finding on the counter-notice of appeal that Mr. Riley is not entitled to overtime pay, I will not comment further on this aspect of the appeal.

²⁵ Supra note 20.

[41] The counter-notice of appeal seeks an order setting aside the Judge's dismissal of Mr. Riley's claim for overtime payments and awarding the sum of \$100,000.00 as compensation for overtime work.

[42] The starting point for this issue is that Mr. Riley was a permanent and pensionable officer in the Civil Service of Montserrat and the terms of his employment are found in:

- (i) the appointment forms, two of which were before the Judge and this court,
- (ii) which outlined Mr. Riley's post, department remuneration, salary scale and actual salary;
- (iii) the General Orders of the Public Service of Montserrat;
- (iv) the Public Service Act and Regulations; and
- (v) any job description for the post.

[43] General Orders 415 provides that only persons appointed to posts above R 22 are eligible to receive overtime pay. Mr. Riley was promoted to a position that placed him at R 20 on the salary scale and the allowance for overtime that he was receiving before 2007 was built into his remuneration package.²⁶ He received his full salary even if he did not work overtime. Therefore, as a matter of contract, he was not entitled to overtime pay after July 2008 when he was placed at R 20 on the salary scale, and his remuneration package for his new post with overtime built in was retroactive to January 2007. The lack of entitlement to overtime pay for a person in Mr. Riley's new position is confirmed by Mr. Brandt in a letter dated 3rd June 2011 to Ms. Jean Blackstock, human resource officer, where Mr. Brandt said:

"Because of my client's rank, a Supervisor, he cannot be paid overtime but that is compensated for by him being given time off in lieu. This he has

²⁶ See paragraph 6 and 8 above.

never been given and I hereby apply for him to be given the time that was due to him in accordance with his claim.”²⁷

Mr. Brandt did not assert a claim for overtime pay. A claim for time off in lieu of monetary compensation is very different from a claim for overtime pay and a claim for the latter did not form part of Mr. Riley’s claim before the court.

[44] The real basis of Mr. Riley’s claim for overtime pay, as disclosed by the contemporaneous documents and the pleadings, is that when he was promoted to the position of buildings and security officer, he was promised support staff which he never received. Had he been given support staff he would not have had to work overtime and so in fairness he ought to be compensated by being paid for such overtime work. This way of putting the claim is entirely inconsistent with the provisions of the General Orders and there is no proper basis for it to be awarded by the Government. If Mr. Riley was dissatisfied with not being provided with support staff, his remedy was not to unilaterally convert that grievance into a claim for overtime pay.

[45] I would dismiss the first ground of the counter-notice of appeal.

[46] Having found that Mr. Riley was not underpaid, and that his pay package since February 2007 included overtime pay regardless of the amount of work done, I would also dismiss grounds 2 and 3 of the counter-notice of appeal which seem to hinge on a finding by this Court that Mr. Riley is entitled overtime pay in some form. I have made no such finding.

Disposal

[47] I would allow the appeal, dismiss the counter-notice of appeal and set aside the order of the Judge. The Appellant has been successful and prima facie is entitled

²⁷ Record of Appeal volume 2 e-page 424.

to the costs of the appeal and the costs in the court below. However, Mr. Riley's claim, though not a claim in administrative law, is a claim where an employee of the Government thought that the terms of his employment were not being applied correctly and sought the Court's intervention. His claim was unsuccessful, but having regard to the peculiar circumstances of this case, I am satisfied that a departure from the general rule in respect of entitlement to costs is justified and, in the exercise of my wide discretion, I would order the parties to bear their own costs of the appeal and in the court below.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar