

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

COMMONWEALTH OF DOMINICA

DOMHCVAP2017/0003

BETWEEN:

LEVI MAXIMEA

Appellant

and

**[1] THE CHIEF OF POLICE
[2] THE POLICE SERVICE COMMISSION
[3] THE ATTORNEY GENERAL**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Mario Michel

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

The Appellant in person
Ms. Tameka Burton for the Respondents

2019: February 12;
May 7.

Civil appeal — Approach of appellate court to trial judge's findings of fact — Entitlement to damages for breach of Police Service Regulations — Loss of chance of promotion — Whether breach was sole cause of appellant's loss of chance of promotion through the ranks to Chief of Police — Whether learned judge erred in finding that there was insufficient evidence to demonstrate causal link between breach and loss of chance of promotion — Quantum of damages awarded — Whether damages inordinately low

On 14th November 2014, the Court of Appeal granted a declaration that the first named respondent (the "Chief of Police") was in breach of regulation 31 of the Police Service Regulations insofar as he failed to forward to the Secretary of the Police Service Commission and the Permanent Secretary responsible for the Police Service an annual report in relation to the appellant, Mr. Levi Maximea ("Mr. Maximea"). The Court remitted the matter to the lower court to determine two issues: whether the appellant is entitled to damages resulting from the breach of regulation 31 and if so, in what quantum. The learned judge found that there was no evidence before the court that the Chief of Police's

failure to comply with regulation 31 was the sole, direct and effective cause of Mr. Maximea's loss of prospects of promotion but awarded him vindictory damages in the sum of \$20,000.00.

Mr. Maximea, being dissatisfied with the decision of the learned judge, appealed. The issues for this Court's determination are: (i) whether the judge erred in finding that there was insufficient evidence that the failure of the Chief of Police to submit an annual report on his behalf caused him to lose his chance of promotion through the ranks of the Police force up to Chief of Police; and (ii) whether the damages awarded for the breach was inordinately low.

Held: dismissing the appeal; awarding costs to the respondents of two-thirds of the assessed costs in the court below, that:

1. Regulation 20 refers to eleven factors to be considered in determining an officer's eligibility for promotion including his annual report of a police officer. The factors must all be considered in determining eligibility and eligibility cannot be restricted to only one of the factors. Critically, regulations 20 and regulation 33(1) refer only to an officer's eligibility for promotion. It does not make promotion automatic or certain. Therefore, it was for Mr. Maximea to put forward cogent evidence to establish that the failure to submit the annual report was the sole cause of his loss of a chance of promotion. The appellant has failed to furnish evidence to so establish. The learned judge came to her conclusion, as she was entitled to, based on the paucity of evidence before her and there is no basis for this Court to disturb her factual findings.

Watt (or Thomas) v Thomas [1947] AC 484 applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied; **Yates Associates Construction Company Ltd v Blue Sands Investments Limited** BVIHCVAP2015/0004 (delivered 5th October 2018, unreported) applied; **Dougath Rajkumar v Kenneth Lalla and Others** [2001] UKPC 53 applied.

2. An appellate court may interfere with an award of damages if, having regard to all the circumstances of the case, there is no reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. The breach of regulation 31 is grave enough to justify recognition by way of an award of vindictory damages in addition to a declaration to mark judicial disfavour of breach of rules and regulations. Having found that the breach of the regulation did not cause the loss of the prospect of Mr. Maximea being promoted, he cannot recover damages for loss of earnings. Mr. Maximea has not shown any aggravating features or that the Chief of Police has behaved in a high-handed, insulting and oppressive manner in failing to submit his annual report to justify an award of aggravated and exemplary damages. Therefore, the damages awarded by the learned judge are not out of all proportion to the circumstances of the case and there is no basis for interference by this Court.

Alphonso and Others v Deodat Ramnath (1997) 56 WIR 183 followed; **Elwardo Lynch v Ralph Gonsalves** SVGHCVAP2009/0002 consolidated with SVGHCVAP2009/0004 (delivered 21st June 2011, unreported) followed; **Wadadli Cats Limited v Frances Chapman** ANUHCVP2004/0016 (delivered 25th April 2005, unreported) followed.

JUDGMENT

- [1] **PEREIRA CJ:** This matter has rebounded to the Court of Appeal having been remitted to the lower court for a determination as to the appellant's entitlement to damages, if any, and the quantum to be awarded. The appeal arises from the decision of the learned judge made on 21st November 2016 in which she awarded vindictory damages to the appellant in the sum of \$20,000.00 together with post judgment interest.

Background

- [2] The relevant background to the appeal may be shortly stated. On 14th November 2014, the Court of Appeal granted a declaration that the Chief of Police was in breach of the Police Service Regulations (regulation 31) insofar as he failed to forward to the Secretary of the Police Service Commission and the Permanent Secretary responsible for the Police Service an annual report in relation to the appellant. The Court remitted the matter to the lower court to determine two issues: whether the appellant is entitled to damages resulting from the breach of regulation 31 and if so, in what quantum.
- [3] Before the learned judge, the appellant, Mr. Maximea, asserted that as a result of the Chief of Police's failure to submit his annual staff/performance report ("annual report"), he was denied the opportunity from 1985 to be promoted through the ranks of the Dominica Police Force to the highest possible rank of Chief of Police. This, he said, affected his prospects of employment with the Bermuda Police

Service.¹ Mr. Maximea claimed a total of 48 million Eastern Caribbean dollars for:

- (i) Loss of earnings from 1985 to the compulsory retirement/pension age.
- (ii) Accumulated leave
- (iii) Gratuity and pension benefits.
- (iv) Damages for injuries sustained.
- (v) Aggravated and exemplary damages for the high handed, flagrant and outrageous conduct on the part of the respondents; and
- (vi) Damages for the breaches of his constitutional rights.

[4] The learned judge, at paragraph 53 of her judgment, identified the first question to be considered was whether or not the failure by the Chief of Police to submit Mr. Maximea's annual report accounted for him not being promoted through the ranks of the Dominica Police Service. She stated:

"immediately the answer would be "no" as a review of section 20 of the said Police Service Commission Regulations reveals that the evaluation of the officer's performance as reflected in the annual staff reports by the Permanent Secretary is only but one of the factors to be considered by the Chief of Police regarding promotion within the ranks of the force."

[5] The learned judge went on to consider whether there was evidence before the court that the Chief of Police's failure to comply with regulation 31 was the sole, direct and effective cause of Mr. Maximea's loss of prospects of promotion. At paragraph 55 of the judgment, she found that the appellant had failed to adduce any evidence before the court in that regard.

[6] On the first issue, the learned judge concluded that:

"87. The claimant submits that the failure of the Chief of Police to submit his annual reports to the Police Service Commissions and the Permanent Secretary caused him not to be promoted through the ranks of the Police

¹ Mr. Maximea, in his affidavit filed on 30th March 2015, deposed that he sought employment with the Bermuda Police Force. However, his lack of promotion, for almost 22 years, negatively affected his chance of gaining employment with the Bermuda Police Force.

Force he has failed however to show that because the reports were not submitted that this caused him not to be promoted. He also failed to show that even if he was promoted, he would have made it to the gazette high ranks of the force.

“88. This Court is satisfied that there are other factors to be considered separate and apart from annual reports for the promotion of a police officer. Further, the claimant has failed to establish by the evidence that these factors were in fact taken into consideration and the failure to submit the annual report were (sic) the sole cause of him not being promoted.

“89. In his claim and witness statement the claimant spoke to his qualifications, what he considered to be his superior skill, ability and eligibility for promotion. He also spoke of his hurt feelings and feelings of humiliation. However, there is nothing in his evidence that spoke to his pecuniary losses for which he seeks compensation.”

- [7] In respect of the quantum of damages to be awarded, the learned judge awarded vindictory damages in the sum of \$20,000.00 and stated at paragraph 106 of the judgment that:

“... there is no evidence before the court that the claimant was deliberately besieged or the subject matter of any malicious conduct and by his own admission, he agreed that his prospects for promotion and his reputation was his own opinion. While the failure by the Chiefs of Police is to be frowned on and some element of warning and deterrent is to be included in the quantum of any award, this court may make. In the circumstances of this case I see no basis to make the substantial award of damages to vindicate the claimant, I therefore consider that the sum of EC\$20,000.00 as offered by the defendants to be a sufficient lump sum to award as redress to the claimant...”

The Appeal

- [8] Mr. Maximea, dissatisfied with the quantum of damages awarded, has raised some six grounds of appeal against the learned judge's findings. They may conveniently be considered as raising the following two issues:

- (i) Whether the learned judge erred in finding that there was insufficient evidence that the failure of the Chief of Police to submit an annual

report on his behalf caused him to lose his chance of promotion through the ranks of the Police force up to Chief of Police.

(ii) Whether the damages awarded for the breach was inordinately low.

[9] The gravamen of Mr. Maximea's complaint is simply that, had it not been for the failure of successive Chiefs of Police to submit the annual report, he would have been promoted through the ranks of the police service to Chief of Police and earn the salaries, allowances and other benefits attached thereto. His claim is grounded on section 92 of the **Constitution of the Commonwealth of Dominica**.² Mr. Maximea says that section 92 confers on him the right to hold the office of police constable in the police service as well as the right to be promoted through the ranks to hold the office of Chief of Police and that, as a result of the breach of regulation 31, his rights to promotion in accordance with section 92 of the Constitution were infringed. Mr. Maximea has also raised the issue of misfeasance in public office. However, given the Court of Appeal's narrow direction to the learned judge, he accepted that this issue was not within the remit of the learned judge and as such will not be addressed.

[10] The respondents argue that Mr. Maximea failed to show a direct correlation between the breach of regulation 31 and the loss of opportunity for promotion. They contend that the learned judge was correct in her conclusion and that her findings should not be disturbed.

Discussion - Did the breach of regulation 31 cause the appellant to lose his chance of promotion?

[11] It is worthwhile being reminded that, ultimately, this is an appeal from the trial judge's findings of fact. The bases on which an appellate court will disturb findings of fact made by a judge are well established. Authorities beginning with the vintage 1947 decision of **Watt (or Thomas) v Thomas**³ emphasise that caution must be

² Cap 1:01, Laws of the Commonwealth of Dominica 1990.

³ [1947] AC 484.

exercised by an appellate court when asked to reverse the trial judge's factual findings; it is only on the rarest occasions that it will contemplate doing so. This rule was explained by Lord Neuberger in **Re B (A Child) (Care Proceedings)**⁴ where he stated:

"This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

- [12] This warning has been repeated by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**⁵ and applied in a legion of cases.⁶ If additional authority for the principle is needed from our Court, it can be found in **Yates Associates Construction Company Ltd v Blue Sands Investments Limited**,⁷ though formulated differently by Blenman JA:

"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."

Of similar effect is the decision of Baptiste JA in **Margaret Blackburn v James A.L. Bristol**.⁸

- [13] The question to be asked, therefore, is whether the decision of the learned judge was plainly wrong. The specific direction from the Court of Appeal, in its order dated 14th November 2014 was for the lower court to determine whether the appellant was entitled to damages for the breach of regulation 31. The order hinges on that

⁴ [2013] UKSC 33 at para. 53.

⁵ [2014] UKPC 21.

⁶ See *Biogen Inc v Medeva PLC* [1996] UKHL 18; *Fage UK Ltd v Chobani UK* [2014] EWCA Civ 5.

⁷ *BVIHCVAP2015/0004* (delivered 5th October 2018, unreported).

⁸ *GDAHCVAP2012/0019* (delivered 12th October 2015, unreported).

singular event, that is, the failure to submit the annual report or the breach of regulation 31. Accordingly, it becomes clear that it behoved the appellant to put forward cogent evidence to establish that the failure to submit the annual report caused him the loss of a promotion for which he suffered the loss and damage claimed.

[14] Regulation 20 outlines the principles of selection for promotion. Regulation 20(1) provides: 'in considering the eligibility of police officers for promotion, the Commission shall take into account the seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such police officers'. Regulation 20(2) provides some eleven factors that the Commission shall take into account in considering the eligibility of police officers for promotion, one of which is the evaluation of the officer's overall performance as reflected in his annual staff reports. There are therefore ten other factors, in addition to the report, that must be taken into account including, for instance, the officer's general fitness, special qualifications, devotion to duty and special reports for which the Commissioner may call. The factors listed in this regulation must all be considered in determining eligibility for promotion and the officer's consideration for promotion cannot be restricted to only one of the factors.

[15] In the Privy Council decision of **Dougnath Rajkumar v Kenneth Lalla and Others**,⁹ the Public Service Commission in Trinidad and Tobago, in breach of the Public Service Commission Regulations 1966, failed to provide staff reports to the respondent. The respondent had worked as prison officer I for 12 years and had acted as prison officer II for some 14 years. The respondent successfully completed the promotion examination for the position of prison officer II and supervisor of prisons and was subsequently interviewed for the position in 1984, 1985, 1989, and 1994. However, he was never promoted. The Commission was satisfied that the respondent had secured a place in the 1995 order of merit list and consideration would be given to his claim in the next promotions made. In 1998, when the

⁹ [2001] UKPC 53.

respondent again failed to be promoted, he applied for judicial review. He sought to rely on regulation 172, and in particular regulation 172(2)(e), which provided that, in the performance of its functions, the commission was required to take into account 'an evaluation of the officer's overall performance as reflected in the annual staff reports'. He contended that there had been considerable prejudice to him by reason of the failure to provide staff reports.

- [16] The Court of Appeal found that there was substantial compliance with the regulations since consideration of annual staff reports was only one of the factors to be taken into account in an officer's entitlement to promotion. In reversing this decision, Lord Mackay held:

“...that in restricting consideration of the appellant's promotion to the order of merit list of 1995 – already three years old – and disregarding the other matters referred to in regulation 172, in particular (e) an evaluation of the officer's overall performance as reflected in the annual staff reports, the approach taken to the decision on the appellant's promotion was fundamentally flawed.”

- [17] Therefore, it was for Mr. Maximea to demonstrate that his alleged loss of a chance of promotion was solely as a result of the failure to submit the report and not because of a failure to satisfy the other matters referred to in the regulation. Mr. Maximea relies on regulation 33(1) to state that the annual report made under regulation 31 is the basis for determining the eligibility of an officer for promotion. However, this regulation when read with regulation 20 refers only to an officer's eligibility for promotion. It does not make promotion automatic.

- [18] Unfortunately, the material Mr. Maximea placed before the learned judge was simply too scant. The learned judge noted that under cross examination, Mr. Maximea admitted that he had no evidence before the court to show that he should have been promoted or indeed would definitely have been promoted and that his prospects for promotion and his reputation were his own opinions. Even before this Court, save for some recommendations made on Mr. Maximea's behalf for promotion, the record of appeal is bereft of any evidence which demonstrates the causal link required to

establish that, as a result of the breach, he suffered the damage which he alleges. The bare and blanket assertions that he was well qualified for the position and that his qualifications and years of experience were far superior to the other Chiefs of Police contained in his affidavit and submissions, without more, are of little assistance to the Court. Accordingly, the challenge the court faced in finding the causal link urged by Mr. Maximea that the failure to furnish the annual report resulted in his loss of promotion opportunities up to the highest ranks of the police force becomes patently obvious.

- [19] By the plainest of considerations, the Court is unconvinced that it would be justified in finding that the judge was plainly wrong in arriving at the conclusion she did. The learned judge came to her conclusion, as she was entitled to, based on the paucity of evidence before her. The onus was on Mr. Maximea to place all relevant material available to him to demonstrate to the Court that, but for the failure to submit the report, he would have been promoted. I am afraid that the appellant has failed to adequately demonstrate this and there is no basis for this Court to disturb the findings of the learned judge. The Court cannot be left to speculate that Mr. Maximea would have certainly been promoted had the report been submitted.

Whether damages awarded inordinately low

- [20] This brings me to the second issue. The learned judge awarded \$20,000.00 as vindictory damages to Mr. Maximea in recognition of a breach of his constitutional right. The judge reasoned that:

“there was no evidence before the court that [Mr. Maximea] was deliberately besieged or the subject of any malicious conduct. While the failure by the Chiefs of Police is to be frowned on and some element of warning and deterrent is to be included in the quantum of any award the court makes, there is no basis to make the substantial award of damages to vindicate [Mr. Maximea]”.¹⁰

¹⁰ See para. 106 of the lower court judgment.

[21] The learned judge, applying the cases of **The Attorney General of Saint Christopher and Nevis v Angela Inniss**¹¹ and **Judicial and Legal Services Commission v Horace Fraser and Attorney General of Saint Lucia**,¹² considered that the sum of \$20,000.00 was a sufficient lump sum to award as redress to Mr. Maximea. There is no cross appeal against that finding by the respondent. Mr. Maximea simply complains that this award was inordinately low and that he should be awarded the following:

- (i) Loss of salary benefits, including gratuity in the sum of \$12 million;
- (ii) Aggravated damages for the injuries sustained in the sum of \$12 million;
- (iii) Exemplary damages in the sum of \$12 million; and
- (iv) Damages for breach of his constitutional rights in the sum of \$12 million.

The respondents submit that the award made by the learned judge is not inordinately low or high, or wrong in principle and there is no basis for interference by the Court.

[22] As Mr. Maximea invites the Court to review the quantum of damages awarded, it is important to note the principles guiding the latitude of the appellate court in reviewing an award of damages made by a lower court. Greer LJ in the leading case **Flint v Lovell**¹³ stated:

“I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court and entirely erroneous estimate of the damage to which the plaintiff is entitled.”

¹¹ SKBHC VAP2000/0068 (delivered 14th January 2002, unreported).

¹² SLUHC VAP2005/0024 (delivered 28th November 2005, unreported).

¹³ [1935] 1 KB 354 recently applied in *Cadet Car Rentals and another v Pinder* [2019] UKPC 4 at para. 7.

[23] The principle was restated by Satrohan Singh JA in **Alphonso and Others v Deodat Ramnath**¹⁴ and applied by Edwards JA in **Elwardo Lynch v Ralph Gonsalves**.¹⁵ Numerous authorities support the proposition that an appellant who seeks to challenge the findings of a judge as to the amount of damages has a formidable task. As Satrohan Singh JA puts it:

“it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses, especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award.

But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration, or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge's judicial discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere.”¹⁶

This principle has been applied by Gordon JA in **Wadadli Cats Limited v Frances Chapman**.¹⁷

[24] Was \$20,000.00 inordinately low or unwarrantably high that it represents an entirely erroneous estimate of the damages to which Mr. Maximea was entitled?

¹⁴ (1997) 56 WIR 183.

¹⁵ SVGHCVAP2009/0002 consolidated with SVGHCVAP2009/0004 (delivered 21st June 2011, unreported).

¹⁶ At p. 191.

¹⁷ ANUHCVP2004/0016 (delivered 25th April 2005, unreported).

Could this award be said to be so disproportionate that it warrants interference by this Court? By way of comment only, I note that there is no breach of a constitutional provision or infringement of a constitutional right. There is no constitutional right to promotion enshrined in section 92 as Mr. Maximea asserts. Section 92 of the **Constitution** deals with appointment of police officers. As the Court of Appeal declared, there is simply a breach of a statutory regulation.

[25] Having found that the breach of the regulation did not cause the loss of the prospect of Mr. Maximea being promoted, he cannot recover damages for loss of earnings. In relation to aggravated and exemplary damages, I agree with the learned judge that Mr. Maximea has not shown any aggravating features or that the Chief of Police has behaved in a high-handed, insulting and oppressive manner in failing to submit his annual report. The lack of evidential material before the Court makes it difficult to make an award of this nature.

[26] However, I agree that the breach of regulation 31 is grave enough to justify recognition by way of an award of vindictory damages in addition to a declaration to mark judicial disfavour of breach of rules and regulations. There is a public interest in ensuring the lawful administration of and adherence to rules and regulations. The State should be an exemplar and cannot demand citizens to comply with rules and regulations if it is seen to be disregarding its statutory obligations. It is indeed lamentable that the Chief of Police has failed to submit Mr. Maximea's annual report and this failure has hampered his eligibility for promotion.

[27] Having regard to all of the circumstances of the case, I am not of the opinion that the damages awarded are out of all proportion to the circumstances of the case.

[28] For the reasons set out above, I would dismiss the appeal and order costs to the respondents to be two-thirds of the assessed costs in the court below.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar