

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2009/0279

BETWEEN:

FRANCIS JAMES

Claimant

and

NATIONAL INSURANCE BOARD

Defendant

Appearances:

Mr. Derick F Sylvester for the Claimant

Mr. Ruggles Ferguson and Ms. Anyika Johnson for the Defendant

2013: April 4; May 29.

JUDGMENT

[1] MOHAMMED, J.: On 26th July 2006 the Claimant lost control of his motor vehicle while driving along the Calivigny Main Road, St George, causing him to lose his right hand above the elbow. At the time of the accident the Claimant was a Sergeant in the Royal Grenada Police Force ("the RGPF") assigned to the Grenada Port Authority as the Port Security Officer ("the PSO") and as the certified Port Security Facility Officer ("the PSFO"). His application for disablement benefits pursuant to the National Insurance (Employment Injury Benefit) Regulation¹ was refused by the Defendant on the basis that he was not injured during the course of

¹ SRO #7 of 1998. Sections 7-10 of the second schedule of the National Insurance Act provides that in amputation cases where there is a loss of arm between the elbow and the shoulder the insured is entitled to 80% disablement benefit.

his employment². The Claimant was of the view that the accident which caused his injuries was closely and directly connected with his employment and therefore he was entitled to his National Insurance Benefit. He instituted this claim against the Defendant for general damages under the provisions of the National Insurance Act ("the Act"), special damages in the sum of \$58,503.11, compensation for disablement benefit and medical expenses under the Act.

[2] The parties agreed that the broad issue for determination by the Court is whether at the time of the accident the Claimant, who was in insurable employment, was acting in the course of his employment within the meaning of the Act. The Defendant has acknowledged that if the Court determines this issue in the Claimant's favour, he would be entitled to disablement and other benefits under the Act. However there are three narrow issues which separate the parties in determining the broad issue. They are: (a) Was the Claimant performing one of his duties or an act reasonably incidental to his duties when he was driving his vehicle at the time of the accident; (b) Was the Claimant on continuous duty for 24 hours; and (c) Was the Claimant exposed to any particular risk by his employer at the time of the accident .

[3] For the reasons set out hereafter, I find that the Claimant was not performing one of his duties or a function reasonably incidental to his duties at the time of the accident; he was not on 24 hours continuous duty; and he was not exposed to any particular risk of injury by his employer at the time of the accident. Therefore, I find that at the time of the accident the Claimant was not acting "in the course of his employment" and as such he is not entitled to disablement and other benefits under the Act. The Claimant's action is dismissed with costs to be assessed if not agreed.

² Regulation 8(5) of the National Insurance (Determination of Claims and Questions) Regulation A 37 SRO 5 states that " For purposes of this regulation, an accident whereby a person suffers personal injury shall be deemed in relation to him to be an employment accident if :

a. It arises out of and in the course of employment...."

Was the Claimant performing one of his duties or a function reasonably incidental to his duties at the time of the accident?

- [4] The Claimant contends that he was performing one of his duties as the PSO and or a function reasonably incidental to his duties as PSO when he was driving his private motor vehicle at the time of the accident. The Defendant did not share this position and instead submitted that at the time of the accident the Claimant was on his way to work at the Melville Street Terminal.
- [5] The Claimant's duties as PSO included but were not limited to "24 hours supervision to Personnel attached to the Grenada Port Authority security³" and "Clearance and security agreements for ships in excess of 500 gross tons on international and high speed crafts and passenger ships⁴. Some of his non- ship duties included patrol and security of the entrance and exit gates. He was responsible for the ports situate at the Carenage, Meville Street, Grenville, Queens Park and Grand Mal. To meet his responsibilities the Claimant supervised about 33 persons (including 5 corporals). The 33 persons were attached to the Port Authority at St George's Port and the Melville Street Terminal since there were no other security personnel based elsewhere. They were rostered by the Claimant to work 8-10 hours shifts for 5 consecutive days. The corporals were responsible for the direct supervision of the security personnel but the Claimant remained with the overall responsibility. While the corporals and other officers had specific hours of work based on how they were rostered, the Claimant was not required to report to any of the ports for any specific hours and as such his hours were flexible.
- [6] In support of the Claimant's contention that the driving of his private motor vehicle from his home to the Grenada Port Authority was one of his duties and/or reasonably incidental to his duties as PSO, he relied on his payment of a mileage allowance. The Claimant was paid a mileage allowance of \$1.75 per mile for the use of his private motor vehicle for commuting from his home to the various ports

³ Paragraph 6 i. of witness statement of Francis James filed 26th April 2010.

⁴ Paragraph 6 ii. of witness statement of Francis James filed 26th April 2010

for which he was responsible. This sum which was approximately 400 to 500 miles per month and was in addition to the Claimant's salary of \$3,340.00 per month as a Sergeant in the RGPF. The Commissioner of Police was responsible for checking, verifying and paying the mileage allowance.

- [7] The Claimant's witness, Mr. James Clarkson, former Commissioner of Police confirmed the payment of a mileage allowance to the Claimant at that time. He stated in his witness statement "I am aware that he was being paid a travelling allowance of EC \$1.75 per mile for travelling to and from work and any other duties assigned to him wherein he has to use his personal transport⁵". Under cross-examination he stated that the payment of mileage allowance was based on the responsibility of the police officer and not on rank and that mileage allowance was calculated from the officer's base at home to his operational base at the port.
- [8] In *R v National Insurance Commissioner, ex parte Michael* ⁶ the issue was whether or not a police officer who was injured while playing a football match when he was off duty had been acting within the course of his employment. The test applied to determine the issue was, whether the injury had been suffered in the actual course of work the police officer had been employed to do or by some other activity incidental to that work. The court held that an accident during the match did not arise out of and in the course of his employment.
- [9] In *Faulkner v Chief Adjudication Officer* ⁷ the appellant, a police officer was also injured while playing football for the Staffordshire Police Football Club. His claim for disablement benefit was rejected by the adjudication officer who said that the accident did not arise out of and in the course of his employment, which was one of the requirements for such a claim under section 50 (1) of the Social Security Act of 1975. He appealed to the Social Security Appeal Tribunal on the basis that a memorandum outlined that his presence was needed on that day in particular

⁵ Paragraph 5 of witness statement of James Clarkson filed 26th April 2010

⁶ 1977 2 All ER 420

⁷ The Times April 8, 1994 C.A.

when he was off duty and as such he was acting out of and in the course of his employment when he was injured. The appeal was dismissed on the ground that although he owed a moral duty to the police force and his teammates to take part in football matches, *there was no evidence suggesting that the requirement to play football was incidental to his contractual obligation to the force*. The duty of the appellant was to carry out these responsibilities as a member of the drug squad of his police force, which had nothing to do with him being a member of the police football club.

[10] In *Alderman v Great Western Railway*⁸, the appellant, the railway ticket collector who lived at Oxford, was injured when he fell on his way to catch the train to London which was to connect him to the Swansea station. As a result of his injury, he was incapacitated for twenty-two (22) weeks and claimed compensation for the injury on the grounds that it had occurred out of and in the course of his employment. The question was whether or not the employee was acting within the course of his employment since there might have been an interruption in his employment by him leaving his employer's premises. It was held that *the mere fact that the accident happened while the appellant was on his way to work was not sufficient to establish that he had been injured in the course of his employment*. Lord Russell of Killowen noted that in order for the appellant to claim compensation, some other element must be present such as that involving the discharge of some contractual duty to the employer which extends the course of employment to the time the accident took place⁹.

[11] When I examine the Claimant's duties, there is no evidence that travelling from his home to any port was included as one of his duties. Further, there is no basis for me to infer that the Claimant driving his car from his home to the port was reasonably incidental to the performance of his duties. Clearly Mr. Clarkson's reference to the Claimant's home in La Tante was in the context of where the

⁸ 1937 All ER 408

⁹ 1937 All ER 412

Claimant lived and not where he worked as one of his operational bases. I agree with the Defendant that a distinction must be made between being paid mileage allowance for the use of a private vehicle and performing a duty during the course of the employment. Mileage relates to a special arrangement for the use of one's private motor vehicle and work relates to duties done in the furtherance of one's employment. Driving from home to attend a meeting held during regular hours of work cannot constitute a duty or reasonably incidental to a duty of the Claimant. In my view, the Claimant was being paid a mileage allowance to compensate him for using his motor vehicle to arrive at his various places of work.

- [12] I find that the act by the Claimant of driving his private vehicle from his home to the Port of St. Georges was not one of his duties neither was it reasonably incidental to his duties.

Was the Claimant on 24 hours continuous duty at the time of the accident?

- [13] The Claimant contends that as the PSO he was on 24 hours continuous duty. The Defendant disagreed with this position and submitted that the Claimant was on call for 24 hours and not on 24 hours continuous duty.
- [14] At paragraph 6 of the Claimant's witness statement, the Claimant stated that "I was deemed to be on continuous 24 hours duty¹⁰". Under cross-examination the Claimant stated that, "Generally I have no day or night time hours. I am employed on a 24-hour basis as the person in charge of security. Yes, I do sleep. I sleep on an average 8 hours. Yes, I get paid even while I am asleep. Even when I home I receive calls at home from my work place, from the Commissioner of Police so I am working even while I am sleeping. As Supervisor I was paid the salary of Sergeant of Police. That was a fixed salary. I was paid EC \$3,340.00. That was the same salary I was paid as Sergeant before I became supervisor. Before supervisor I was assigned to the St. David Police Station. I was a desk Sergeant

¹⁰ Witness statement of Francis James filed 26th April 2010

at the St. David's police Station. While I was there I was on 24 hours duty. I consider all corporals to be on 24 hours duty". He admitted that the corporals were responsible for direct supervision of security personnel but as the person with overall responsibility he would be called out to duty when the need arose. Under cross-examination the Claimant stated that his home in La Tante was one of his bases and that he was provided with a cellular phone and a desktop computer which allowed him to work at home.

[15] However, the Claimant's position was not supported by the evidence of the Claimant's witnesses Lazarus Joseph and James Clarkson. Lazarus Joseph, who was the Supervisor of the Melville Street Cruise Terminal/ Senior Marine Pilot and Ship Inspector at the time of the accident and whose duties included liaising with the Claimant on security matters, confirmed that he contacted the Claimant late at nights "when alarms would have gone off at the Cruise Terminal¹¹" and "to inform him of arriving ships that required Declaration of Security to be signed¹². He also stated that he "had on numerous occasions in the year 2006 to call the Claimant at his home via his cellular number 473-405-3195 which said phone was issued to the Claimant¹³". He confirmed that "on every occasion when I tried to contact the Claimant, irrespective as to the time of the day, I was able to reach him¹⁴.

[16] Mr. Joseph admitted that since the Claimant was also a PSFO it was mandatory based on the International Ship and Port Facility Security Code that the Claimant "make himself available 24 hours a day, hence the provision of a cellular phone¹⁵. Under cross-examination he confirmed that he was unaware where the Claimant lived, and that he could not say when he contacted the Claimant via the cellular phone if the Claimant was at home. Mr. Joseph never stated that he attended at the Claimant's home for any work related business. It is clear to me from Mr. Lazarus Joseph's evidence that he understood that the Claimant had flexible

¹¹ Paragraph 8 i. of witness statement of Lazarus Joseph filed 26th April 2010

¹² Paragraph 8 ii. of witness statement of Lazarus Joseph filed 26th April 2010

¹³ Paragraph 6 of witness statement of Lazarus Joseph filed 26th April 2010

¹⁴ Paragraph 11 of witness statement of Lazarus Joseph filed 26th April 2010

¹⁵ Paragraph 10 of witness statement of Lazarus Joseph filed 26th April 2010

hours of work, and he did not expect the Claimant to be on 24 hours continuous duty but rather on call for 24 hours.

[17] Mr. James Clarkson, who was the Commissioner of Police at the time of the accident, stated that the PSO was on call for 24 hours and not on 24 continuous duty. James Clarkson contradicted the Claimant's assertion of being on 24 hours continuous duty when he stated under cross-examination, "How can any police officer be paid to sleep? No, they get paid to work". Mr. Clarkson made no distinction between the Claimant and a regular police officer who was on call for 24 hours. I have attached considerable weight to Mr. Clarkson's distinction since he was the Claimant's ultimate superior and that as the Commissioner of Police he was well placed to have a proper appreciation when an officer is on call and when he is on duty.

[18] Having regard to the evidence from all the Claimant's witnesses, including the Claimant, I accept that the Claimant was a very senior officer assigned to the Port with very important responsibilities to ensure the smooth functioning of the Port Authority's operations. It is precisely because of his seniority that he was allowed to have flexible hours of work and he was not required to sign in. However, in my view, all flexible hours of work meant is he was not required to report to a specific port for a specific time. In my view it did not mean that the Claimant's home was one of his operational bases as he contends. The provision of a cellular phone is evidence to me that he was on call for 24 hours and that he can be reached at short notice to indicate to him that he was required for active duty. The provision of the desktop computer, was also consistent with his flexible hours. In my view, whenever he reported to a port, that is when he became on active duty. Outside of this time he was simply on-call. It appeared to me that it was the Claimant who deemed himself to be on continuous 24 hours duty and not his senior, the Commissioner of Police or even Mr Lazarus Joseph.

[19] I therefore find that the Claimant was on call for 24 hours and not on 24 hours continuous active duty. Therefore at the time of the accident the Claimant was on call and he was not on active duty when he was injured.

Was the Claimant exposed to any particular risk by his employer at the time of the accident?

[20] In examining whether a person who is travelling on a public road is /is not acting within the course of his employment Halsbury's Laws of England¹⁶ described the test which the Court must apply as "whether the employee was exposed to the particular risk by reason of his employment or whether he took the same risks as those incurred by any member of the public using the road."

[21] In *Smith v Stages*¹⁷ the primary issue to be decided was whether or not an employee involved in an accident was acting within the course of his employment when he was injured. In that case, two employees who were on their way back from installing insulation at a power station were involved in an accident. The car which was driven by the first defendant crashed through a brick wall, injuring one (1) employee. The injured employee brought an action against the first defendant and the employers alleging that they were vicariously liable for the first defendant's negligence since he had been acting, "in the course of his employment" whilst driving the two (2) employees back from the power station. The court held that an employee travelling on the highway is acting within the course of his employment only if at the material time he is carrying out his employer's business. The court made a distinction between the duty to turn up for work and the concept of already being on duty whilst travelling to the workplace. In this case the employees were already on duty.

¹⁶ 4th ed Vol 33 paragraph 490

¹⁷ 1989 1 All ER 833

[22] The Claimant stated "On the 26th July 2006, I came from my home at La Tante and was en route to the St George's Port. This is my normal route of travel to get to work¹⁸". One of his witnesses James Clarkson stated "At the time of the accident, the Claimant was en route to the St George's Port Authority from his home in La Tante, St David's¹⁹".

[23] I agree with the Defendant that in the instant case the Claimant was not exposed to any risk created by his employer the RGPF or even by extension the Grenada Port Authority since the accident took place on a public road, the Calivigny Main Road which was used by persons at large and the Claimant was the author of his own accident. The Claimant was merely using the public road to get from his home to his place of work at the Melville Street Terminal to attend a meeting, where he would have taken up his duties.

[24] I therefore find that the Claimant was not exposed to any particular risk by the RGPF or even the Grenada Port Authority by driving his private motor vehicle along the Calivigny Main Road at the time of the accident.

Order

[1] The Claimant's action is dismissed. The Claimant to pay the Defendant's cost of the action to be assessed if not agreed.

Margaret Y. Mohammed
High Court Judge

¹⁸ Paragraph 16 of the witness statement of Francis James filed 26th April 2010

¹⁹ Paragraph 4 of witness statement of James Clarkson filed 26th April 2010