THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S033 of 2015
High Court Action No. S-1855 of 2004

IN THE MATTER OF AN APPLICATION BY
HOLLIS ROMEO FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION AND/OR ACTION
OF THE COMMISSIONER OF POLICE TO DEDUCT FROM THE
APPELLANT'S GRATUITY PAID TO HIM ON OR ABOUT THE 27 DAY OF SEPTEMBER, 2004
THE SUM OF $11,216.65 ON THE GROUND OF OVERPAYMENT OF SALARY
DUE TO INCREMENTAL SETBACK DUE
BETWEEN THE PERIOD OF
15 JANUARY, 1987 TO 12 NOVEMBER, 1996

AND

IN THE MATTER OF THE FAILURE AND/OR OMISSION OF
THE COMMISSIONER OF POLICE TO PAY THE APPLICANT THE SUM OF $179,282.81
BEING HIS FULL ENTITLEMENT OF GRATUITY PAYMENT DUE TO HIM
AS APPROVED BY THE COMPTROLLER OF ACCOUNTS

BETWEEN

HOLLIS ROMEO

Appellant/Applicant

And

THE COMMISSIONER OF POLICE

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondents/Respondents

PANEL:

A. MENDONÇA J.A.
G. SMITH J.A.
A. DES VIGNES J.A.

Date of Delivery: 17 October, 2019

APPEARANCES:

Mr. S. Gopaul-Gosine for the Appellant
Mr. S. Lalla for the Respondents

I have read the judgment of Smith J.A. I agree with it and have nothing to add.

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A. Mendonça

Justice of Appeal

I too, agree.

……..

A. des Vignes

Justice of Appeal

JUDGMENT

Delivered by G. Smith J.A.

INTRODUCTION

1. This action arose because the Respondents deducted the sum of $11,216.65 from the Appellant's retirement benefits. The Respondents allege that this deduction was made to set off an overpayment of salary and allowances during the period 1987 to 1996.

2. In his judicial review application, the Appellant challenged the legality of this deduction.

3. While the sum of money involved is relatively minor, the case produced intensive argument before the Court of Appeal. This was because there were other similar cases which decided similar issues in favour of the Respondents in the High Court but no written decisions were given. Also, the Respondents and other persons who may be similarly circumstanced want an authoritative written decision from the Court on the issues that arise from this and similar type deductions from salaries or other benefits.

4. The central issue in this matter is whether the Respondents were entitled to change the date from which incremental allowances may accrue to the Appellant (the incremental date) so as to take into account periods of no pay sick leave.

5. The trial judge, in a very short decision, held that the Respondents were entitled to change the Appellant's incremental date to take into account periods of no pay sick leave which the Appellant had been granted. She accordingly dismissed his application for judicial review but made no order for costs.

6. The arguments before the Court of Appeal had significantly changed from those before the trial judge. Also, even in the course of appeal, new arguments were raised which

required further written submissions. No doubt, the parties had grasped the importance of the matter to other pending cases and wanted further consideration of the issues before a decision was made on this appeal.

7. After considering the matter, we too find that the Respondents were entitled to change the Appellant's incremental date to take into account periods of no pay sick leave and I would dismiss this appeal for the reasons that follow.

FACTS

8. The Appellant joined the Trinidad and Tobago Police Service on 15 January 1976 and was due to retire on 24 July 2004.

9. Upon processing the Appellant's pension and gratuity benefits, the Respondents discovered that he had been overpaid in salary. According to the Respondents' evidence, incremental increases in salary were paid to police officers after one year of continuous service and satisfactory performance. However, the Appellant had taken nine days no pay leave and the Respondents contend that the date from which his incremental increases were to be paid ought to have changed as well. In error, this was not done. When the adjustment was made to his incremental date, the Respondents realised that the Appellant had been overpaid salary by $11,216.65.

10. The Appellant was duly informed of this overpayment and the same was deducted from his gratuity payment.

11. The Appellant queried the deduction as soon as it was brought to his notice. He eventually accepted his reduced gratuity payment without prejudice to his right to challenge the deduction.

12. While there is no challenge to the details of the deduction, I will set this out to give a further picture of the issue.

13. The Appellant was entitled to fourteen days of sick leave a year. However, he had taken more than the authorised fourteen days of sick leave on two occasions. This extended sick leave was duly classified as no pay leave.

14. The Appellant was entitled to incremental increases in his pay after one year of continuous service and satisfactory performance. The date from which incremental increases had been calculated was the date from which he commenced duty in the Police Service (the incremental date).

15. The Respondents contend that the effect of the leave being classified as no pay leave was to cause the incremental date to be adjusted.
    In the present case this would have meant that the Appellant's incremental date changed from 15 January in each year to 24 January with effect from 1980.

16. In 1987, all increments to Police Officers ceased with effect from 23 January 1987, and the Respondents alleged that the Appellant's incremental date was supposed to be 24 January. However, the Appellant's salary in error continued to be paid as if he were entitled to an increment in 1987. This resulted in an overpayment in salary of $11,216.65 between the period 15 January 1987 to 12 November 1996.
    This is the sum that was eventually deducted from the Appellant's gratuity payment on 27 September 2004.

17. Both in the High Court and on appeal, several arguments were advanced which were no longer pursued, such as abuse of process and limitation.
    Also, while argument originally focused on Regulations 83 to 85 of the **Exchequer and Audit Act, Chapter 69:01**, the same was not pursued before us since these regulations

were only relevant to deductions from a regular salary as opposed to deductions from retirement benefits like gratuity payments.

The core argument now focused on the right to change the incremental date of the Appellant.

ANALYSIS

Summary of arguments

18. The Respondents eventually contended that the relevant statutory provision which governed the payment of increments at the time was section 8 of the **Police Service Act, Chapter 15:01 (the Act).**

    According to this section, no increases by way of increment could be paid unless the officer had completed a period of twelve months' continuous duty in the office which he holds.

    Section 8 of the Act provides:

> **"Increments.** **8. Except where the contrary is otherwise provided in a Remuneration Order, increases of pay that may be granted in respect of an office in a grade in accordance with the Remuneration Order shall be annual, so however that no increase of pay shall be made in respect of an office in a grade in which the police officer performing the duties of the office has not <u>completed a period of twelve months continuous duty in that office</u>.**" (my emphasis)

19. The Respondents contend upon a purposive construction of section 8 of the Act, that no pay leave, which is not part of an officer's service or duty entitlement, breaks the chain of continuous duty in an office. Therefore, once an officer takes no pay leave in any given

year of service, he cannot have a year of continuous duty and would not be entitled to be paid an incremental increase for that year of service.

Instead of forfeiting the entitlement to an increment upon the anniversary date of employment in the office, the Respondents have adopted a position that restores equity by deducting periods of no pay leave in calculating a year's continuous duty and adjusting the incremental date accordingly.

Therefore, the Respondents, as they were entitled to do, acted within the law when they adjusted the Appellant's incremental date to the 24 January to take into account the no pay leave that he had been granted.

20. The Appellant contends that the Respondents cannot adjust the incremental date as a matter of law. This is because Regulation 19(3) of the Police Service Regulations (the Regulations) which defines the incremental date, makes no allowance for any adjustment to the same.

    Regulation 19(3) provides:

    > "**Upon confirmation whether or not after extension of a probationary period the officer's incremental date shall, subject to subregulation (4), be the anniversary of the date of appointment or in the case of promotion, in accordance with regulation 15(2)**." (my emphasis)

21. Second, the Appellant contends that Regulation 17(1) of the Regulations has modified section 8 of the Act. The effect of this is that once an officer has been certified as having completed a year of satisfactory service he would have earned the right to be paid his incremental allowance. The "requirement" of continuous duty is satisfied and subsumed by the performance of satisfactory service.

    Regulation 17(1) provides that:

    > "**Subject to subregulation (2), where a police officer holds an office that has a salary range, increments shall be paid to such police officer, on the completion of each year of satisfactory service until he has**

reached the maximum of the salary range. The increments paid shall be in the amounts prescribed for the particular office." (my emphasis)

22. The Appellant argues that on the 15 January 1987, he had completed a year of service which by necessary implication had been certified as satisfactory since there was no issue taken with the actual performance of his duties. He had earned his incremental allowance. Further, since there was no authority to adjust his incremental date from the 15 January 1987 and given the fact that he had performed satisfactorily for the prior year, he was entitled to the increment in 1987 and to have his salary calculated accordingly. Therefore, the deduction that was made to his gratuity as a result of the adjustment to his incremental date was wrongful and it had to be repaid to him.

23. I accept the correctness of the Respondents' interpretation of the relevant statutory provisions namely, that in keeping with section 8 of the Act, an officer is entitled to an incremental increase only upon completion of one year of continuous duty in his office. Further, when the officer is granted no pay leave, it breaks the chain of continuous duty in the office.

    The Respondents may then adjust an officer's incremental date to take into account periods of no pay leave.

24. Assuming for the moment (and as is demonstrated at paragraphs 38 to 41 of this judgment) that an officer has to be both in continuous and also satisfactory performance of his duties to earn an incremental allowance, the Respondents' interpretation of the Act illustrates a purposive construction of the legislation that is:

    i. consistent with the rationale of the scheme of incremental allowances; and
    ii. a fair, rational and proportional interpretation of the relevant laws governing the payment of increments.

(i) Consistency with the rationale of incremental allowances

25. As part of his terms of service, a police officer has an entitlement to certain periods of leave, for example, sick leave, vacation leave and maternity leave (where applicable). This type of leave is the entitlement of an officer and if utilised, one cannot say that such an officer is not in continuous performance of his duties since the officer is entitled to such leave in the performance of his duties.

    On the other hand, leave in excess of an officer's entitlement is at the discretion of the Respondents. It is not an entitlement of service. During such discretionary leave, an officer is not in continuous performance of his duties and as such should not be able to claim the same. Therefore, it is only proper and in keeping with such discretionary leave that one's incremental date ought to be adjusted to make allowance for the break in continuous duty which is the result of such discretionary periods of absence from continuous duty.

    Further, an incremental allowance is intended to be a reward for service. Regulation 17(2) allows for increments to be paid to an officer who has during the preceding year "**performed his duties with efficiency, diligence and fidelity and that his conduct during the period has been satisfactory.**"

    It would be contrary to this principle of rewarding an officer for the performance of efficient, diligent and faithful service to "reward" an officer for periods when he was not on duty and performing such service.

    The adjustment of the incremental date as suggested by the Respondents gives recognition to the principle of increments as a reward for service as opposed to being a "right" or "entitlement" of service.

(ii) A fair, rational and proportional application of the law

26. The right to adjust the incremental date of an officer for such discretionary leave is also a fair, rational and proportional application of the relevant law.

    Two examples will best illustrate the point.

27. First, take the very case of this Appellant and again, assuming that both continuous duty and satisfactory performance are requirements for earning an increment, the Appellant will only have earned an increment after he had "completed" a full period of twelve months of continuous duty with satisfactory performance in his office. If the Respondents could not adjust his incremental date (as the Appellant suggests), he would not earn any increments for any of the two years he had taken no pay leave. This would be unfair to the Appellant.

    By adjusting the incremental date, the Appellant would be able to earn compensation by way of increment in proportion to the time taken by way of such discretionary leave instead of earning nothing by way of increment for two years.

    As applied to the Appellant, the adjustment of the incremental date was a fair, rational and proportional application of the law.

28. Second, take the case of an officer who could get maximum no pay leave, (which only for argument's sake I assume to be 364 days in a year); assuming that the Appellant's interpretation of the law is correct and that continuous duty is irrelevant, if such an officer performs satisfactorily for one day in the year, then he would "earn" an increment for that year.

    Contrast his position with an officer who takes no such leave and also earns the same increment for the year. This latter officer must be aggrieved by someone else who has been given maximum no pay leave and also "earned" the same increment as himself.

    All things being equal, the ability to adjust the incremental date as suggested by the Respondents would bring equality, fairness and proportionality as between police officers who may or may not avail themselves of discretionary no pay leave.

The Appellant's arguments

29. As stated at paragraphs 20 and 21 above, the Appellant raises two arguments which he contends, validate his interpretation of the law, namely: (i) that the incremental date cannot be changed as a matter of law; and (ii) the Regulations have modified and

subsumed the requirement of continuous duty into the requirement of satisfactory performance. We will now examine these two arguments.

(i) Is the incremental date fixed as a matter of law?

30. The Appellant argues that Regulation 19(3) so far as it is relevant, provides that the anniversary date shall be the anniversary date of an officer's appointment. There is no provision in the Regulation to change or adjust this date.

    Further, according to the Appellant, the case of **Lovell Romain v The Public Service Commission [2014] UKPC 32** decided that the Regulations are a comprehensive code and do not allow for departure or interpretations beyond its provisions.

    The Appellant argues that in these circumstances, the Respondents could not adjust his incremental date to 24 January so as to deprive him of his increment for 1987.

    Although this is an attractive argument, it does not nullify the Respondents' case with respect to the ability to adjust the incremental date.

31. In the first place, the **Lovell Romain** case is readily distinguishable from the present case. In the **Lovell Romain** case, the applicant was a constable in the Police Service who sat and passed an exam for promotion to the rank of sergeant but he was not promoted to this rank. He alleged that having passed this exam he should be exempted from having to sit an exam for promotion to the lower rank of corporal. His request for the exemption had been twice refused. Further, there was a provision in the same Regulations which mandated that a successful candidate in an exam who had not been promoted after three years had to re-sit and pass the promotions exam. The applicant had been caught by this provision. Additionally, there were other regulations which would also have made him ineligible for an exemption. The Privy Council decided that the Regulations contained "**a comprehensive code governing promotions within the service**."[1] Further, to permit the

[1] **Lovell Roman v The Public Service Commission [2014] UKPC 32,** at paragraph 29

Police Service Commission "**to waive parts of the process when it thinks it appropriate would have the potential to create an uncertain and unequal playing field**."[2]

32. Unlike in the **Lovell Romain** case, the present matter was not one which dealt with the self-contained comprehensive code for promotions within the service. It dealt with an entirely different regime of incremental allowances.

    Within this system of incremental allowances many discretionary factors requiring interpretation were built in to the legislation. For instance, there were the already mentioned considerations of efficient, diligent and satisfactory performance, and fidelity. There were also other provisions which entitled the Police Service Commission to consider periods when an officer is not on duty as full pay leave. No doubt this was to give effect to the fact that an incremental allowance was a discretionary payment and not a right.

    Given such multi-faceted, discretionary factors, it is very unlikely that the Regulations and the Act were intended to be a self-contained, comprehensive code for earning an incremental allowance.

33. Further, in the **Lovell Romain** case the Privy Council recognised that a deviation in the practice of promotions from what was provided for in the Regulations would create unfairness or an "**uncertain and unequal playing field**."

    In the present matter, as indicated at paragraphs 25 to 27 above, the interpretation of these Regulations dealing with discretionary incremental allowances in such an immutable fashion would produce unfairness, and an unequal and disproportional playing field.

34. Also, in the **Lovell Romain** case, there were specific statutory provisions which disentitled the applicant to a promotion. In the present matter, there is no specific statutory provision which disentitles the Respondents from adjusting the incremental date. The

[2] *Supra* at paragraph 28

Regulations and the Act are silent on this issue. Further, as indicated before, the statutory requirement of continuous duty in section 8 of the Act would be consonant with a discretion to adjust the incremental date.

35. In all the circumstances, we are of the view that neither Regulation 19(3) nor the application of the principles in the **Lovell Romain** case lead to the conclusion that an officer's incremental date remains fixed at his anniversary date. A purposive construction of the statutory provision leads to the interpretation that the Respondents were entitled to adjust the Appellant's incremental date to take into account periods of no pay leave in a manner that was fair, rational and proportional.

(ii) Is continuous duty modified by or subsumed in satisfactory performance?

36. I repeat the Appellant's argument which was set out at paragraphs 21 and 22 above so as to refocus on the argument.

37. According to the Appellant, Regulation 17(2) provides that an officer's incremental allowance is earned for satisfactory performance of his duties during the preceding year. The argument continues that this Appellant had been paid his increment-based salary between 1987 and 1996 so there can be no issue in respect of certifying or earning his increment during the first year. Any requirement of continuous duty as a condition for earning an increment was now modified or subsumed into certification of satisfactory performance.

38. This argument is misconceived.

    The requirement of continuous duty in section 8 of the Act is a distinct and separate requirement from satisfactory performance in the Regulations. What this means is that for an increment to be properly earned, an officer must have <u>both</u> continuous duty and satisfactory performance.

    So for instance, an officer may have performed his duty continuously, without any break in service for a year, but his performance during that year may have been totally

unsatisfactory, or may not have met the dictates of efficiency, diligence and fidelity as Regulation 17 requires. Continuity does not equate with satisfactory performance in the statutory scheme.

In a similar vein, an officer may have performed his duties satisfactorily during a year but with many and prolonged breaks for matters like study leave, extra casual leave or paternity or maternity leave. Satisfactory service does not equate to continuous service.

39. Therefore, the basis of the argument that continuous duty is subsumed in or modified by periods of satisfactory performance is ill-conceived.

40. Further, the requirement for continuous duty is contained in the governing Act, whereas the requirement for satisfactory service is contained in the Regulations. If there was to be a subsuming or modification between the Act and the Regulations, it would be the Regulations which would have to conform to the governing Act and not the other way around. Without more, the provisions of continuous duty in the Act cannot be altered by or subsumed in the Regulations.

41. Therefore, to have properly earned an increment the Appellant would have had to have served in his office continuously and satisfactorily for the preceding year. Since we have shown before that he had taken no pay leave, this was properly discounted to determine his incremental date.

Some New Arguments

42. After the hearing before us, the parties submitted further written submissions with respect to the issue of "continuous duty" and "satisfactory service".

In these submissions the Appellant also sought to raise issues of (i) natural justice; and (ii) whether the decision to adjust the increment was made by the proper office.

43. With respect to the argument (i) that the Appellant should have been given the opportunity to be heard before his incremental date was adjusted (the natural justice argument), this would be an exercise in futility since whether he was heard or not, the Respondents' decision to adjust the Appellant's incremental date for no pay leave was legal and correct and would have been made by the Respondents in any event.
    Also, to require an administrator to consult with each employee before making such legal, administrative decisions would be very impractical and would arguably cause the Police Service or Public Service to grind to a halt.

44. With respect to the issue (ii) that it was the Police Service Commission and/or the Permanent Secretary and not the Respondents who should have given directions to make the deductions, we find as follows:(a) we are not aware whether the Police Service Commission and/or the Permanent Secretary did or did not give these directions. They may have very well done so. It was never raised as an issue and was not addressed by the parties in their affidavits. It would not be fair to raise this issue at this stage. Therefore, it is not an issue that we should consider. (b) Neither the Commission nor the Permanent Secretary were named in nor represented in this matter. They may have valid input into the same. It would be manifestly unfair to delve into this issue without their input. (c) Even if the Commission and/or the Permanent Secretary did not give the directions, it would not change the position of the Appellant since the current Respondents would still legally be bound to make the same decision.

CONCLUSION

45. This appeal is dismissed. The Respondents were legally entitled to deduct the sum of $11,216.65 from the Appellant's gratuity.

46. We will hear the parties on the question of costs.

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G. Smith
Justice of Appeal