[2011] UKPC 46
Privy Council Appeal No 0108 of 2010

JUDGMENT

Dennis Graham (Appellant) *v* Police Service Commission and the Attorney General of Trinidad & Tobago (Respondents)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hope
Lord Clarke
Lord Dyson
Sir John Laws
Sir Patrick Elias

JUDGMENT DELIVERED BY SIR JOHN LAWS ON

20 December 2011

Heard on 16 November 2011

Appellant
Sir Fenton Ramsahoye SC
Anand Beharrylal

(Instructed by Bankside Commercial Solicitors)

Respondent
Howard Stevens
Ms Rachel Thurab

(Instructed by Charles Russell LLP)

SIR JOHN LAWS :

Introduction

1. The appellant Mr Dennis Graham appeals against the judgment of the Court of Appeal of Trinidad and Tobago (Mendonça, Jamadar and Bereaux JJA), delivered on 26 March 2010, by which the court dismissed his appeal against the amount of damages awarded in the High Court by Deyalsingh J on 10 December 2007 for breach of the appellant's right to equality of treatment guaranteed by section 4(d) of the Constitution of Trinidad and Tobago. Final leave to appeal to the Judicial Committee was granted by the Court of Appeal on 15 October 2010.

2. The appellant was a career police officer. The essence of his complaint was that his promotion from Assistant Superintendent to Superintendent in 1997 should have been backdated so as to take effect on the same date (23 December 1996) as the promotion to Superintendent of other officers who were junior to him. Deyalsingh J upheld the claim and awarded TT$35,000 damages. In the Court of Appeal the appellant submitted that "a sum of $150,000 - $200,000 would have been a more appropriate figure..." (skeleton argument, 9 November 2009, paragraph 22; see also the judgment of Mendonça JA at paragraph 85). The Court of Appeal disagreed. There was a cross-appeal by the Police Service Commission ("PSC") against the judge's grant of permission to the appellant to amend his notice of motion *"de bene esse"*. That too was dismissed, and is not the subject of any further appeal to the Judicial Committee. Their Lordships are not concerned with the merits of the finding of constitutional breach; the appellant's appeal as to damages is the only issue before the Board. On damages, it is notable that the genesis of much of the argument has been the absence, at every stage of the proceedings, of any proper particulars of pecuniary loss.

Provisions of the Constitution

3. Section 4 of the Constitution of Trinidad and Tobago provides in part:

> "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely –

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;..."

Section 14 provides ("for the removal of doubts") that redress may sought in the High Court for violation of any person's constitutional rights. Damages are discretionary; as was stated by Lord Kerr giving the judgment of the Judicial Committee in *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 at paragraph 36, "[t]o treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by section 14 of the Constitution".

The Facts

4. The appellant joined the Police Service on 1 June 1966 and retired in the rank of Assistant Commissioner on 18 November 2007. On 4 April 1991 he was appointed Assistant Superintendent. On 30 August 1993 he was suspended from duty by reason of an accusation of indecent assault relating to an incident said to have taken place two months before. As was later noted by Deyalsingh J he had also faced prosecution in 1970 for offences of assault and battery, but no evidence had been offered. On 12 November 1993 the appellant was "interdicted" from duty on 75% salary. On 12 June 1995 the indecent assault charge was dismissed by the Senior Magistrate after a full hearing on the merits, and the appellant was reinstated on 19 September 1995. On 3 June 1996 he was appointed Acting Superintendent. On 24 January 1997 he was asked by Senior Superintendent Narace to provide the notes of evidence in the indecent assault proceedings for perusal by members of the PSC before a decision was made as to his promotion to the rank of Superintendent. The notes were sent to Superintendent Narace on 31 January 1997 and forwarded to the PSC.

5. On 27 January 1997 notice was posted of the promotion by the PSC of thirteen officers from Assistant Superintendent to Superintendent with effect from 23 December 1996. They did not include the appellant. Eleven of them were junior to him in the rank of Assistant Superintendent. On 24 March 1997 a fourteenth officer, also junior to the appellant, was promoted Superintendent again with effect from 23 December 1996. On 12 May 1997 the appellant's attorneys first wrote to the PSC complaining that he had been bypassed for promotion and asking that he be appointed to the next vacancy for Superintendent with effect from 23 December 1996. They asserted that the denial of his promotion to date was unconstitutional and illegal. There were further letters but no substantive reply. Six more officers, again junior to the appellant, were promoted Superintendent on 18 August 1997. On 27 January 1998 the attorneys provided material to support the appellant's promotion and suggested that the accusation of indecent assault had been concocted. On 22 July 1998 the appellant was promoted Superintendent, but with effect only from 16 July 1998. Despite the appellant's protests, that was confirmed as the effective date by letter of

16 March 2000. On 23 March 2001 he was promoted Senior Superintendent with effect from 8 February 2001. On 7 July 2003 he was appointed Acting Assistant Commissioner with effect from a future date, 15 July 2003. At length on 16 March 2004, though his earlier pleas had been rejected, the PSC backdated the appellant's appointment as Superintendent: not, however, to 23 December 1996 but to 23 July 1997. On 25 May 2004 he was promoted to Assistant Commissioner with effect from 19 September 2003. On 29 June 2004 that appointment was backdated to 15 July 2003.

6. Meantime in further correspondence the appellant maintained or repeated his complaint as to the way he had been treated, and on 21 October 2004 he obtained leave to seek judicial review of the decision of 29 June 2004 to backdate his appointment as Assistant Commissioner no further than 15 July 2003.

The proceedings in the High Court and Court of Appeal

7. The claim as originally formulated sought no relief in relation to the PSC's failure or refusal to backdate the appellant's appointment as Superintendent to 23 December 1996. Nor did it raise any complaint of constitutional violation; it was merely asserted (paragraph 9 of the grounds) that the appellant had been treated "unfairly, contrary to the principles of natural justice". It was moreover stated in terms that the appellant claimed no damages. However leave to amend the judicial review Statement was sought and was granted by Deyalsingh J on 14 November 2006. His order was expressed to be made *"de bene esse"*, but when it was later challenged it was held by the Court of Appeal to have been made unconditionally; the words *"de bene esse"* were treated as surplusage. By the amendment the appellant asserted that the refusal to backdate his appointment as Superintendent to 23 December 1996 violated his right to equality of treatment guaranteed by section 4(d) of the Constitution and sought damages "including aggravated and/or exemplary damages" (amended Statement paragraph 3(d) and (e)). No details of pecuniary loss were pleaded or particularised in any document before the court.

8. The case came on for trial before Deyalsingh J on 20 June 2007. However there was insufficient time that day; and in addition the judge indicated that he would soon be leaving the bench and would be unable to complete the matter. So it was that with the full consent of the lawyers on both sides Deyalsingh J proceeded to determine the case on the documents and the parties' written submissions.

9. Deyalsingh J delivered judgment on 10 December 2007. He concluded (paragraph 33) that but for the indecent assault charge and the earlier proceedings in 1970 the appellant would have been promoted Superintendent with effect from 23 December 1996. He held (paragraph 35) that the PSC had been entitled to consider

the notes of evidence. However (paragraph 36) fairness required that the appellant be given an opportunity to be heard if the PSC proposed to take account of either charge in deciding whether or not to promote him; and in fact he should have been promoted with effect from 23 December 1996. The failure to do so was in the circumstances unjustified and in breach of the appellant's constitutional right to equality of treatment under section 4(d) (paragraph 42).

10. Finally Deyalsingh J turned to the question of relief. He decided to award damages in the sum of $35,000 for breach of the appellant's constitutional rights (paragraphs 51 and 52). He gave no reasons other than to say the award "would go some way towards remedying the injustice". In particular there is nothing to show how the sum is made up. He also directed the PSC to determine what the appellant's present ranking would be had he been promoted Superintendent on 23 December 1996, and to "factor in" that date, and his present ranking, to any future decision concerning the appellant's seniority.

11. A number of issues were raised in the Court of Appeal, but at length only two remained: the appellant's appeal as to the quantum of damages, and the PSC's appeal against the judge's order permitting amendment of the judicial review Statement. Both were dismissed on 26 March 2010. Bereaux JA agreed with the leading judgment delivered by Mendonça JA. Jamadar JA, also concurring, added reasons of his own concerning "what is required to prove a breach of the right to equality of treatment" (paragraph 1).

12. Given that the judge had not explained the basis of his award, Mendonça JA concluded, citing authority, that he should make his own assessment of what would be an appropriate sum (paragraph 86). He referred to authority on the nature of constitutional damages: notably the Judicial Committee's decision in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328, and also *Merson v Cartwright and the Attorney General of The Bahamas* [2005] UKPC 38 and *Takitota v the Attorney General of The Bahamas* [2009] UKPC 11. He observed (paragraph 90) that the failure to promote the appellant to Superintendent with effect from 23 December 1996 may have reduced his chance of earlier promotion to more senior ranks and the scope for his attaining acting appointments, and (paragraph 91) overseas training opportunities. He had accordingly suffered material losses and his "hurt feelings and... distress" had also to be considered. Mendonça JA continued:

> "94. The difficulty however in arriving at a compensatory award in this case is that there is no evidence on which the Court can come to any assessment of what Graham may have lost. There is no evidence of what salary the various ranks attracted so that one could begin to determine what monetary sum he might have lost.

> So too there is no evidence of what acting appointments he might have been appointed to and over what period so that it could be determined what he might have had a chance to earn. Nor is there any evidence of how all this might have impacted, if it did, on Graham's pension. The onus was upon Graham to produce and provide this evidence."

13. Mendonça JA proceeded to discuss whether the court should make an additional award by way of vindicatory damages. His overall conclusions as to the quantum of damages were shortly expressed as follows:

> "97. In my judgment on the facts of this case an additional award was not called for. The circumstances and facts of this case do not demand an award to reflect a sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach or to deter further breaches. What was required was an appropriate compensatory award. However on the evidence it was not possible to arrive at an appropriate figure or to say that the sum awarded by the Judge is not that figure. If consideration is given to distress and hurt feelings I think that the award is more than adequate to compensate for this. Of course no consideration is to be given to a reduction of the award as there is no appeal in this regard. However I see no basis on which the award can be reviewed upwards. In these circumstances the award of the Judge will remain as it is. This however means that Graham's appeal fails and must be dismissed."

The Appellant's Case

14. The appellant contends that the High Court or the Court of Appeal fell into three errors which the Board should correct. It is not however submitted that the Board should itself fix a figure for the damages. Junior counsel Mr Beharrylal made it plain that the relief sought was an order that the case be remitted to a Master to arrive at an appropriate assessment. The errors alleged are that (a) the courts below should have made an additional award by way of vindicatory damages; (b) in contrast to Mendonça JA's approach at the end of paragraph 94 of his judgment (cited above at paragraph 12) the Court of Appeal should have held that the burden of adducing evidence to elucidate the extent of the appellant's pecuniary loss fell on the respondents; and (c) in accordance with what is said to be the prevailing practice in the courts of Trinidad and Tobago, an order should have been made below for the case to be remitted to a Master for the damages to be assessed. It is submitted overall that the appellant is entitled to damages in a significantly higher figure than $35,000, and but for these errors a significantly higher figure would have been arrived at.

Vindicatory Damages

15. The award of vindicatory damages for breach of a constitutional right in the law of Trinidad and Tobago has been considered in a number of authorities of the Judicial Committee. It is to be distinguished both from compensation pure and simple, and from exemplary or punitive damages at common law; and it is by no means required in every case of constitutional violation. So much appears from what was said by Lord Nicholls of Birkenhead in *Ramanoop* (*supra*):

> "18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
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> 19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. 'Redress' in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award."

16. It is helpful also to have in mind the judgment of the Board delivered by Lord Scott of Foscote in *Merson* (*supra*) in which, after citing a passage from *Ramanoop* including the paragraphs set out above, this was said:

> "18. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in *Ramanoop*) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

Plainly the statement that "the nature of the damages... should always be vindicatory" does not imply a rule that a distinct vindicatory award should be made in every case of constitutional violation; as the balance of the passage shows, it merely serves to indicate the overall purpose of any award of damages in constitutional cases.

17. Applying the learning to the present case, their Lordships are satisfied that no additional award of vindicatory damages was called for. The constitutional breach found by Deyalsingh J was in the nature of a want of procedural fairness – a failure to accord a right to be heard. There was no question of bad faith or deliberate wrongdoing. By contrast, as Mendonça JA observed (paragraph 95), the judge's finding suggested no more than administrative error. The PSC, moreover, twice backdated the appellant's seniority, though not to the extent for which he contended. And on 16 March 2004 they indicated that consideration would be given to his "relative seniority when next promotions to the office of Assistant Commissioner of Police are being made". In all these circumstances, the Board finds no error of principle in the response of the Court of Appeal to the claim for an additional award, and rejects the appellant's submission to the contrary.

The burden of adducing evidence as to pecuniary loss

18. It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are

reasonably required for the court to arrive at an accurate decision. In *R v Lancashire CC ex p. Huddleston* [1986] 2 AER 941 (to which Jamadar JA referred at paragraphs 18 – 19 of his judgment in the present case) Lord Donaldson MR stated at 945c that the modern development of judicial review had created

> "a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration".

Mr Beharrylal relied in particular on observations in the cases to the effect that in judicial review litigation the critical facts will often be within the respondent's particular knowledge: *Huddleston* at 945G, *R v Barnsley Metropolitan BC* [1976] 1 WLR 1052 at 1058, and *Lancashire CC v Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668 at paragraph 60. Mr Beharrylal submits that that applies here: rates of pay and pensions in the Police Service and other financial details likely to be relevant to the appellant's claim for compensation would be kept by the PSC. Accordingly he submits that it was the PSC's duty to disclose, unasked, all such materials.

19. In fact the Board understands that mainstream rates of police pay in Trinidad and Tobago are (as one would expect) in the public domain. Moreover some of the relevant detail is to be found in the correspondence appearing in the Record of Proceedings, and so presumably was available in the courts below. (Their Lordships will refer to some of this material in addressing the argument that the damages issue should have been referred to a Master.) Those matters aside, however, the Board is unable to accept the underlying proposition for which the appellant must contend, namely that a public authority's duty of candour to the court imposes on a respondent in judicial review proceedings the burden of adducing the relevant evidence upon a question of compensatory damages. The existence and rationale of the duty are not to be equated with procedural rules and practices concerning the burden of proving facts or leading evidence. Its purpose is to engage the authority's assistance in supervising the legality of its decisions: to uphold those which are lawful, and correct those which are not. That exercise is logically prior to the assessment of compensation, a task which presumes that the pleaded wrong has been (or will be) established. The public authority's duty of candour is the servant of the first, but not the second, of these judicial functions.

20. In *James* (*supra*) Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which their Lordships will turn directly. Kangaloo JA said:

> "28. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of

> damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."

The appellant accepted that this required him to prove some damage, but claimed he had established as much by demonstrating the failure to promote him. Thereafter, he submitted that the onus was on the PSC to produce evidence going to the assessment of damage. In the Board's view this passage tends to contradict that submission which, for the reasons given, the Board regards as erroneous and contrary to the fundamental principle that he who asserts must prove.

Should the assessment of damages be referred to a master?

21. No application was made to Deyalsingh J for an order to refer the issue of damages. As the Board has indicated, the parties were content that the judge should determine the case on the documents and written submissions. No particulars of damage were given. All that was said in the appellant's skeleton argument at first instance was "[the appellant] in any event seeks damages..." (paragraph 23), and the claim for damages in the amended judicial review Statement was repeated. But as Sir Fenton Ramsahoye SC for the appellant pointed out, no point was taken by the respondents as to the want of particulars. The Notice of Appeal (which was very properly produced by the respondent at the hearing before the Board) claimed by way of relief, as an alternative to an order for increased damages at the hands of the Court of Appeal itself, "an assessment of damages before a Master or Judge of the High Court..."; and that is repeated in counsel's skeleton argument before the Court of Appeal. But no reasoning seems to have been deployed in support of an application for such an assessment, the respondents said nothing about it, and the issue gives every sign of having disappeared.

22. In those circumstances Mr Stevens for the respondents submits that the Judicial Committee should not now entertain such an application. The Board has some sympathy with that position. However both sides sat on their hands as regards the procedural and evidential requirements for the assessment of damage, perhaps, in part at least, because of the attorneys' consent to forego a hearing before Deyalsingh J and have the matter resolved on the papers. Moreover the appellant submits that it is settled practice in Trinidad and Tobago to refer the issue of damages for a separate hearing before a Master or Judge, at any rate in constitutional cases. In that context Mr Beharrylal referred to the decision of the Court of Appeal in *James* (Civ. App. No. 154 of 2006) in which Kangaloo JA referred at paragraph 29 to "the practice... for there to be a separate assessment of damages in constitutional matters", and to de la Bastide CJ's disapproval in *Ross v Chattergoon* (Civ. App. No. 8 of 1998) of a like practice in running down actions. Kangaloo JA continued:

> "30. It must be noted however that there has been no similar excoriation as far as constitutional matters are concerned, but it is hoped that if damages are going to be a live issue in a case, this needs to be made explicit at the first opportunity under the new Civil Procedure Rules... so that the problems which arose in this case are not repeated. It is always so tempting to litigants after liability has been determined, whether in running down matters or otherwise, to exaggerate and insist on the highest damages. This is extremely unfair to the State in constitutional matters, especially when its case is tenuous and its representatives do not wish to use the State's resources to defend virtually indefensible positions."

Mr Stevens accepted that damages issues in constitutional cases are frequently, but not invariably, referred for a separate hearing.

23. Their Lordships would not propose to allow the appeal and direct such a hearing solely on the footing that a settled procedural practice was not adhered to. So far as there is such a practice, the citation from Kangaloo JA's judgment in *James* at paragraph 20 above tends to show that it only applies, as one would expect, where the claimant has laid the ground by leading evidence of damage which ought then to be investigated. Translated to the present case, their Lordships will consider whether there is any firm basis on which to conclude that $35,000 represents a substantial undervalue of the appellant's claim.

24. The Board has cited paragraph 97 of Mendonça JA's judgment at paragraph 13 above. The reasoning is with respect somewhat compressed, and it is not entirely clear whether or not Mendonça JA took the view that the figure of $35,000 in fact encompassed the appellant's pecuniary losses. What is clear, however, is his

conclusion that that sum was "more than adequate" to compensate for distress and hurt feelings. Their Lordships do not understand that proposition to be the subject of any challenge. Against that background Mr Stevens referred to correspondence in the Record which shows the salary ranges respectively payable on the appellant's appointment as Assistant Superintendent, Superintendent, Senior Superintendent, and Assistant Commissioner. The monthly salary for Assistant Superintendent taking the figure at the mid-point in the range is $4,567.50, and for Superintendent $5,879. Using those figures, the appellant's loss of salary occasioned by his appointment to Superintendent having been backdated only to 23 July 1997 and not 23 December 1996 would appear to be in the region of $7,869. Mr Stevens moreover submitted that the loss attributable to the appellant's not gaining the rank of Senior Superintendent a year sooner than he did would be in the region of $6,900, and less if the court treated the case as loss of a chance. He also submitted that it was clear that on no view would the appellant have been promoted beyond the rank he in fact achieved, that of Assistant Commissioner.

25. Mr Beharrylal laid emphasis on the fact that the appointments whose salary was given in the letters (save for Assistant Commissioner) were probationary, and the substantive posts might have commanded higher rates of pay. He said that an approach based on loss of a chance would not be appropriate given the appellant's excellent reports and ratings. He contended that there was a high likelihood that the appellant would have been promoted Deputy Commissioner if he had been treated as he should have been.

26. As regards the last point, it is to be noted that Mendonça JA stated (paragraph 92) that "Graham does not seem however to be contending that he could have occupied any higher substantive post had he been promoted with effect from December 1996" and cited the appellant's written evidence to the effect that if he were given "his rightful place on the list" he would have become "the third most, or most, senior Assistant Commissioner". As regards the probationary nature of the appellant's appointments, there is no reason to suppose that confirmed appointments in the same ranks would have attracted lower salary levels.

27. The information before the Board which bears on the appellant's pecuniary loss is meagre and certainly incomplete. So far as it goes, however, it tends to indicate that there is no firm basis on which to conclude that $35,000 represents a substantial undervalue of the appellant's claim, or that that figure does not fairly reflect the damage suffered. Given the Board's earlier conclusions that there should be no additional award for vindicatory damages and that it is for the appellant to lead evidence of loss, the consequence must be that no foundation for a separate assessment of damages before a Master is made out.

Conclusion

28. For all these reasons the Board dismisses the appeal. In the circumstances the appellant must pay the respondents' costs.