EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2013/0016

BETWEEN:

FRANCIS JAMES

Appellant

and

NATIONAL INSURANCE BOARD

Respondent

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer	Justice of Appeal [Ag.]
The Hon. Mr. Sydney A. Bennett, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Derick F. Sylvester, with him, Ms, Cathisha Williams for the Appellant
Mr. Ruggles Ferguson, with him, Ms. Anyika Johnson for the Respondent

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2014: October 14;
2015: March 9.

Civil appeal – Employment law – Whether accident occurred in the course of employment – Whether injury was sustained when performing duties or acts reasonably incidental to duties – National Insurance (Employment Injury Benefit) Regulations – National Insurance (Determination of Claims and Questions) Regulations

The appellant, a sergeant in the Police Force, lost control of his motor vehicle while driving from his home to his work office which caused him to sustain serious injuries resulting in the loss of his right arm above the elbow. The appellant, at that time, was assigned to the Grenada Port Authority as the Port Security Officer and as the certified Port Security Facility Officer with an overall responsibility which required that he be available 24 hours per day for performance of his duties. For that reason, he was issued with a cellular telephone and given a desktop computer for use at his home. He was also granted a mileage allowance for use of his private motor vehicle.

The appellant's application for disablement benefits under the National Insurance (Employment Injury Benefit) Regulations was denied by the National Insurance Board ("the Board") on the basis that he was not injured during the course of his employment. The

appellant, being of the view that the accident occurred in the course of his employment, brought a claim for damages against the Board.

The learned judge dismissed the claim holding that at the time of the accident the appellant was not performing one of his duties or any function reasonably incidental to the same; neither was he exposed to any particular risk created by his employment. Further, his home was not one of his operational bases nor was he on 24 hours per day continuous duty. The appellant has appealed the learned judge's findings of fact and law.

Held: dismissing the appeal with costs to the respondent fixed at two-thirds of the costs awarded in the court below, that:

1. An accident whereby a person suffers a personal injury shall be deemed to be an employment accident if it arises out of and in the course of his employment. A person travelling on the highway will be acting in the course of his employment if, and only if, he is at the material time going about his employer's business, that is, if he is doing what he was employed to do or something reasonably incidental thereto. Determining whether or not he was so engaged at the material time requires a fact sensitive approach.

   National Insurance (Determination of Claims and Questions) Regulations SRO 5 of 1983, Laws of Grenada applied; **Smith v Stages** [1989] ICR 272 applied.

2. The starting position is that an employee travelling from his ordinary residence to his regular place of work is not acting in the course of his employment. The evidence in this case did not show otherwise. While the appellant's duties entailed travel to and attendance at other facilities, his main work base was the St. Georges Port. He sustained his injuries while commuting from his home to his main work base along a route that he described as his normal route of travel to get to work. There he intended to participate in a meeting held during normal office hours. There was no evidence presented to the lower court which could justify a finding that the appellant's home was a work base; he was not, at the material time, travelling between work bases.

   Smith v Stages [1989] ICR 272 applied; **Nancollas v Insurance Officer** [1985] 1 All ER 833 distinguished; **Fong Christina v Clever View Group Ltd** [2011] HKEC 1686 distinguished; **Comcare v PVYW** [2013] HCA 41 distinguished.

3. Commuting from his home to his regular work place was not 'reasonably incidental' to the appellant's employment. The act being performed by the employee must be reasonably incidental to the actual work that he is employed to do and not merely to the larger concept of being employed. These relevant findings of fact by the learned trial judge have not been shown to be manifestly wrong so as to permit an appellate court to arrive at different findings. Further, the judge had not erred in her application of the relevant law.

Chief Adjudication Officer v Rhodes [1999] ICR 178 applied; **Faulkner v Chief Adjudication Officer** [1994] PIQR 244 applied.

JUDGMENT

[1] **BENNETT, JA [AG.]**: This is an appeal by Sgt. Francis James of the Royal Grenada Police Force from the decision of Mohammed J given on 29th May 2013 dismissing his claim against the respondent, National Insurance Board ("the Board"), for general damages, special damages in the sum of $58,503.11 and for compensation under the **National Insurance (Employment Injury Benefit) Regulations** ("the National Insurance Regulations")[1] for disablement benefits and medical expenses.

[2] Mr. James' claim against the Board arose in the following circumstances: at the relevant time, he was a sergeant in the Royal Grenada Police Force assigned to the Grenada Port Authority as the Port Security Officer and as the certified Port Security Facility Officer. He was the only person so certified in Grenada. His duties encompassed responsibility for the security of the ports situated at The Carenage, Melville Street, Grenville, Queens Park and Grand Mal, including patrol and security of the entrance and exit gates to those ports. He was also responsible for clearance and security arrangements for ships in excess of 500 gross tons, international and high speed crafts and passenger ships. In the discharge of his duties, he supervised directly or indirectly, some 33 police officers (including 5 corporals) who were rostered by him to work on 8 – 10 hour shifts for periods of 5 consecutive days. His overall responsibilities required that he be available 24 hours per day for performance of those duties. Accordingly, he was issued with a cellular telephone and given a desktop computer for use at his home. He was also granted a mileage allowance for use of his private motor vehicle.

[1] SRO 7 of 1998, Laws of Grenada.

[3] On the morning of 26th July 2006, Mr. James was driving his private vehicle from his home at La Tante, St. David en route to the St. Georges Port, the location of the Melville Street Terminal and of his main office/work base, when, in the vicinity of the Calivigny main road, he lost control of the vehicle which ran off the road. No other vehicle was involved. As a result of the accident, he sustained serious injuries one consequence of which was the loss of his right arm above the elbow.

[4] Mr. James' subsequent application for disablement benefit under regulations 7 et seq. of the National Insurance Regulations and for medical expenses under regulations 12 et seq. of those regulations was denied by the Board. The Board took the view that his injury had not occurred in the course of his employment.

[5] On 1st July 2009, Mr. James commenced the instant action against the Board. His principal contention was that in driving from his home at La Tante to the St. Georges Port at the time of the accident, he was acting in the course of his employment. This was because:

(i) such travel was in performance of his function as the only certified Port Security Facility Officer in Grenada, answerable for all aspects of security activity at all of Grenada port facilities and tasked with overall responsibility for supervision of those facilities on a 24 hour per day basis;

(ii) the issuance to him of a cellular phone and desktop computer for use at his home was indicative of the fact that his home was one of his work bases. Accordingly, in driving to the St. Georges Port he was travelling between different work bases;

(iii) he was paid a mileage allowance covering travel from his home to wherever he was going in connection with his work;

(iv) at the material time he was en route from his home/base to a meeting at St. Georges Port; and

(v) further, and in any event, as a police officer he was on duty 24 hours per day, in or out of uniform.

[6] In dismissing his claim, the judge concluded that, at the time of the accident, Mr. James was not performing one of his duties or any function reasonably incidental to the same. Specifically, the judge found that:

(i) Mr. James' home at La Tante was not one of his operational bases;

(ii) he was not on 24 hours per day continuous duty as he contended, but was merely on call for the greater part of any relevant 24 hour period;

(iii) driving his private vehicle from his home to the Port of St. Georges was not one of his duties nor was it reasonably incidental to his duties; and

(iv) in driving from his house at La Tante to the Port of St. Georges at the material time, Mr. James was not exposed to any particular risk created by his employment.

The issue in this appeal was whether the judge was right to so conclude.

[7] Regulation 8(5) of the **National Insurance (Determination of Claims and Questions) Regulations**[2] provides, relevantly, that:

> "For purposes of this regulation, an accident whereby a person suffers a personal injury shall be deemed in relation to him or her, to be an employment accident if:
> (a) It arises out of and in the course of his or her employment…"

[8] The requirement that an accident must arise 'out of' and 'in the course of' employment imposes two distinct conditions, both of which must be satisfied in order for such an accident to be deemed an 'employment accident'. The requirement that an accident must arise 'out of' the employment speaks to a

[2] SRO 5 of 1983, Laws of Grenada.

causal nexus between the injury and the employment; 'in the course of' relates to the time and place that the injury was sustained and to the activity being carried on by the employee at that time and place. The essential consideration is that the statutory provisions are intended to give effect to a compensation system for injury suffered at or during work and because of it.

[9] In **Chief Adjudication Officer v Rhodes**,[3] Schiemann LJ of the English Court of Appeal paraphrased and adapted the statement of Hoffman LJ in **Faulkner v Chief Adjudication Officer**[4] to the effect that:

> "An office or employment involves a legal relationship: it entails the existence of specific duties on the part of the employee. An act or event happens 'in the course of' employment if [what the employee is doing] constitutes the discharge of one of those duties or is reasonably incidental thereto…"[5]

He went on to observe that one must first ascertain what the employee is employed to do and then consider whether what the employee was doing at the material time constitutes the discharge of one of those duties or something reasonably incidental thereto.

[10] The process of determining whether an employee was in the course of his/her employment at the time of suffering an injury requires a highly fact sensitive approach. In applying previous case law a decision maker should relate the matters taken into account in arriving at those decisions to a contextual analysis of the pertinent facts, assigning appropriate weight to the relevant factors according to the particular circumstances. Ultimately, however, while having regard to the factors which point toward or away from a finding that the employee was in the course of employment, a decision maker must look at the factual picture as a whole to determine whether or not the applicant was at work when the injury was sustained.[6]

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[3] [1999] ICR 178.
[4] [1994] PIQR 244.
[5] At p. 184.
[6] Nancollas v Insurance Officer [1985] 1 All ER 833 per Sir John Donaldson at 836.

[11] In the leading case of **Smith v Stages**[7] Lord Lowry laid down some parameters with regard to the treatment of claims by employees for injuries sustained while travelling. He posited that:

> "[t]he paramount rule is that an employee travelling on the highway will be acting in the course of his employment if, and only if, he is at the material time going about his employer's business. One must not confuse the duty to turn up for one's work with the concept of already being "on duty" while travelling to it."[8]

[12] His Lordship went on to formulate the following 'prima facie propositions' with regard to accidents involving employees travelling on the highway:

> "1 An employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment, but, if he is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so.
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> 2 Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces (as an inspector of gas meters might do), will be in the course of the employment.
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> 3 Receipt of wages (though not receipt of a travelling allowance) will indicate that the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment, and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of his employment.
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> 4 An employee travelling *in the employer's time* from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of an emergency (such as a fire, an accident or a mechanical breakdown of plant) will be acting in the course of his employment.
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> 5 A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment.

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[7] [1989] ICR 272.
[8] At p. 299.

> 6 Return journeys are to be treated on the same footing as outward journeys."[9]

[13] His Lordship was careful to point out that the foregoing propositions were not intended to define the position of a salaried employee, with regard to whom the touchstone of payment made in the employer's time is not generally significant.

[14] That observation is relevant in the instant case. At the material time, Mr. James was a salaried employee earning a fixed salary of EC $3,340.00 per month. Unlike the position which would obtain in the case of an hourly paid worker, no question arises as to the time from which his wages were calculated from which an inference might be drawn as to whether at the material time he was travelling in his employer's time. The essential question is whether on the morning of 26th July 2006 as he drove from his home on his way to attend a meeting to the St. Georges Port, Mr. James was already at work: that is, whether at the material time, the Calivigny main road was his workplace. Was driving from his home to St. Georges Port in the course of and part of Mr. James' work, or was he going from his home to St. Georges Port in order to resume the course of his employment?

[15] Mohammed J found the latter proposition to be the case. She found, based on the evidence led before her, that Mr. James was a very senior officer whose job entailed him being on call 24 hours per day; that the nature of his job and his seniority allowed him to have flexible hours of work and that consequently, he was not required to sign in to any particular port at any time; that it was when he reported to a port, however, that he came to be on active duty; at other times he was on call. Driving from his home each day to his work base at St. Georges Port was not part of his work, nor was it reasonably incidental thereto.

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[9] At pp. 299-300.

[16] Mr. Derick Sylvester, who appeared for Mr. James, submitted on his behalf that the difference between being on active duty and being on call is merely semantic; if Mr. James' trip from his home to St. Georges Port was not in the course of his employment it was reasonably incidental thereto. In this regard, I point to the observation of Hoffmann LJ in the case of **Faulkner v Chief Adjudication Officer**, that:

> "It has often been pointed out that in one sense, getting to work in the morning is reasonably incidental to any kind of employment. Nevertheless, there is no doubt that one is not in the course of one's employment merely because one is on the way to work. The act must be reasonably incidental to the actual work one is employed to do—not merely to the larger concept of being employed. Travelling to work cannot be called an activity incidental to digging coal or operating a word processor and is therefore not in the course of employment."[10]

[17] Commuting from home to his main office for work is not an activity which is necessarily incidental to supervising personnel at the ports, clearing vessels in excess of 500 tons or to the discharge of any of the other duties of a Certified Port Security Facility Officer. I would observe that it is possible for circumstances to arise in which Mr. James could have acted in the course of his employment notwithstanding that he had not reported to a port; the issue is whether on the evidence presented in the instant case such an inference could reasonably have been made.

[18] In this regard, it is useful to compare Mr. James' position with that of the claimant in the case of **Nancollas v Insurance Officer**.[11] Mr. Nancollas was a disablement resettlement officer who had a main office, but whose duties took him to other places of work in his area and to the homes of disabled persons. Like Mr. James, his responsibilities and seniority allowed him to have flexible hours and considerable latitude as to the manner in which his duties were to be performed, and particularly as to when and in what manner to travel in performance of those duties. One morning, while driving from his home to a workplace other than his

[10] At p. 257.
[11] [1985] 1 All ER 833.

main office, he was involved in a vehicular accident and injured. In holding that his injury was sustained in the course of his employment the Court of Appeal, per Sir John Donaldson, MR stated at page 837:

> "Mr Nancollas lived in Worthing. He had his main base office in Worthing. He was sufficiently senior to decide for himself when and in what manner to travel to outstations and, if he had set out for Aldershot from his Worthing office instead of from his home, there can be no doubt that the whole of his journey from that office would have been undertaken in the course of his employment. It cannot, in principle, make any difference that, no doubt for sensible reasons such as that there would be no time to undertake any worthwhile work at the Worthing base office, he drove straight to Aldershot from his home. This was not a case of a man who one day worked at a Guildford office, on another at an Aldershot office and on a third at a Worthing office, travelling by car from home to the relevant 'work place' each day. He was an itinerant officer who, in the course of his employment, had to roam his area calling at appropriate offices and, no doubt, private homes to attend case conferences and to interview disabled people. In driving to Aldershot, Mr. Nancollas was not going to work. That was part of his work."

The position would obviously have been different had Mr. Nancollas sustained his injury while on his way to his main base office in Worthing to commence his duties.

[19] Mr. James' offices were situated at the St. Georges Port and at the Melville Street Cruise Terminal. The personnel under his supervision were assigned to those facilities. His duties entailed travel to and attendance at other facilities for purposes such as clearing vessels in excess of 500 tons, but it is clear that his main base of operations was the St. Georges Port. He commuted from home to his office at that Port daily. His testimony was that he claimed mileage in respect of:

> "…whatever I did for the day from my base, which is my home; if I do nothing from the [St Georges] Port, the main Port to the Cruise Terminal, then I only put from home and back…"[12]

[20] Mr. James' function was supervisory rather than peripatetic, although the extent to which he chose to travel to and between the various port facilities was a matter for his discretion. At the material time however, he was not travelling from his home

[12] See p. 21, lines 1 to 3 of the Transcript of Trial Proceedings.

to a satellite facility or to some workplace other than his regular workplace in order to perform a supervisory or other function, nor was he responding to a call to deal with some emergency: he was travelling from his home to his main office and work base at the St. Georges Port to participate in a meeting scheduled during normal working hours. In his own words, he had:

> "...come from my home at La Tante and was en route to St. Georges Port. This route is my normal route of travel to get to work."[13]

In this regard, he was not exposed to any particular risk by reason of his employment: in driving to his main office he took the same risks as any other member of the public commuting to work along that road.

[21] The case of **Fong Christina v Clever View Group Ltd**[14] also provides a useful point of reference. In that case the applicant, a shipping manager, whose usual place of work was in Hong Kong was asked to travel to her employer's factory in Mainland China for a luncheon appointment on a Sunday. While walking from her home to take public transport for that purpose she was involved in an accident as a result of which she sustained injuries. The evidence showed that the trip was to Mainland China, a location other than her usual place of work; that her employer had set aside time during her normal working hours for her to take the trip and accordingly the trip was undertaken during her work time; and that by arrangement with her employer she was to be reimbursed all expenses incurred by her in respect of the entire trip. The judge found these factors to be decisive. He concluded that:

> "In my view, the reimbursement arrangement, the accepted time arrangement, the unusual place of work all indicates that her whole trip from home in Hong Kong was undertaken for all practical purpose on account of her employment and in her employer's time."

I note by way of comparison that in the instant case, Mr. James sustained his injuries at about 7:00 a.m. on the relevant date, shortly before normal office hours,

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[13] See para. 16 of the appellant's witness statement filed 26th April 2010.
[14] [2011] HKEC 1686.

while on his way to his usual place of work, his principal office at the St. Georges Port.

[22] As to the assertion that he was at the material time travelling between work bases, the judge found on the evidence that Mr. James' house was not one of his work bases. I do not see how this conclusion can be faulted. No evidence was presented to the court which could justify an inference that any, or any substantial part of Mr. James' work was carried out at or from his home. He commuted from home to work every day. The fact that he was enabled, by the issue to him of a desktop computer, to send and receive electronic communications from his home or that by reason of the issue to him of a cellular telephone, he could be contacted at whatever place he happened to be does not, without more, constitute his home or such other place a base of work. These circumstances merely confirm the proposition that he was on call 24 hours per day.

[23] Again, the fact that Mr. James received a mileage allowance is of little consequence. It is the general policy of the police service in Grenada that the mileage allowance paid to eligible officers is computed from their homes.[15] In my view, this fact cannot, without more, justify an inference that a trip involving travel from an officer's home to the place to which he reported for duty was necessarily in the course of employment.[16]

[24] Counsel for Mr. James referred to the decision of the High Court of Australia in the case of **Comcare v PVYW**[17] as authority to support his submission that an injury will have been sustained in the course of employment if at the time and place of its occurrence the employee was where he would not have been but for his employment so long as he was not at the time engaged in any grossly improper activity. That decision was, however, based on a different statutory regime and concerned an application for compensation under the Safety, Compensation and

[15] See the testimony of former Commissioner of Police, James Clarkson, at p. 55 of the Transcript of Trial Proceedings.
[16] See generally Vandyke v Fender and Another Sun Insurance Office Ltd. (Third Party) [1970] 2 QB 292.
[17] [2013] HCA 41.

Rehabilitation Act 1988 of that country. Under that Act, an employee may be eligible for compensation for injury 'arising out of or in the course of, the employee's employment…' Unlike the position with regard to Regulation 8(5) of the **National Insurance (Determination of Claims and Questions) Regulations** of Grenada which requires both conditions to be satisfied, the requirements of the Australian statute may be satisfied by proof of either element. In my view, the proposition for which the **Comcare** case is cited does not represent the law in Grenada and is therefore to be distinguished.

[25] The trial judge's conclusion was one of mixed fact and law. Her findings of fact have not been shown to be manifestly wrong so as to permit an appellate court to arrive at different findings; indeed, in my view her findings cannot be faulted. She has not been shown to have erred in her application of the relevant law: her conclusion necessarily follows from those findings. It seems to me that the accident in which Mr. James sustained his injuries arose out of his employment but did not occur in the course of it.

[26] For the foregoing reasons, I would dismiss this appeal with costs to be paid to the respondent fixed at two-thirds of the costs awarded in the court below.

Sydney A. Bennett, QC
Justice of Appeal [Ag.]

I concur.

Gertel Thom
Justice of Appeal [Ag.]

I concur.

Humphrey Stollmeyer
Justice of Appeal [Ag.]