TRINIDAD AND TOBAGO:
SPECIAL TRIBUNAL 9 OF 2009

IN THE INDUSTRIAL COURT

BETWEEN

ESTATE POLICE ASSOCIATION OF TRINIDAD AND TOBAGO

- PARTY NO.1

AND

NATIONAL MAINTENANCE TRAINING AND SECURITY COMPANY LIMITED - PARTY NO. 2

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CORAM

H.H Mr. V.E. Ashby	-	Chairman, ESD
H.H. Mrs. Judy Rajkumar-Gualbance	-	Member
H.H. Mr. Dinesh Rambally	-	Member

APPEARANCES:

Mr. Curtis Robertson
1st Vice President) - For Party No. 1

Mr. Bertrand Wilson
Industrial Relations Consultant) - For Party No. 2

Dated this 4th day of August, 2011

JUDGMENT

DELIVERED BY HIS HONOUR MR. DINESH RAMBALLY

1. By Notice dated the 21st day of April, 2009 the Minister of Labour and Small and Micro Enterprise Development referred to this Special Tribunal a dispute involving "**the termination of the services of WEC Theresa Lezama effective September 30, 2005.**" This dispute was brought by the Estate Police Association ("the Association") on behalf of Estate Constable Theresa Lezama ("Constable Lezama") against National Maintenance Training and Security Company Limited ("the Company").

BACKGROUND

2. The facts in this dispute are in large measure undisputed and very straight forward.

Constable Lezama was employed with the Company from on or about the 4th October, 2001. In the course of her employment she was assigned to various locations, the last one being the Curepe Junior Secondary School. On the 17th June, 2004 whilst in the course of her employment she intervened in an altercation involving several students when she suffered personal injuries.

She reported to the Company that she suffered injuries on both her right thumb and left knee. After being absent from work on injury leave for almost a year, the Company by letter dated 11th May, 2005 requested her to furnish it with a comprehensive medical report regarding her condition.

She attended Dr. L. Amow who delivered a written medical report dated 17th August 2005 advising inter alia that "**progress of recovery will continue to be delayed over an indefinite period**" and that "**the permanent and partial disability is to be assessed at twenty percent (20%)**". Dr. Amow's report further recommended that the

worker be medically boarded. His report was considered by the Company's doctor, Dr. Omar Ali, who concurred with the findings and recommendations.

By letter dated 8th September, 2005 the Company advised Constable Lezama inter alia that she would be medically boarded effective 1st October, 2005 and that:-

> **"Compensation for service as per the Collective Agreement with the Estate Police Association is in the sum of Three Thousand, Three Hundred Fifty-Five Dollars and Thirty-Nine Cents ($3,355.39). Additionally, you will also be compensated in the amount of One Thousand, Eight Hundred and Eighty-Four Dollars ($1,848.00) for unutilized vacation leave up to 1st October, 2005. Your total compensation will be in the sum of Five Thousand, Two Hundred and Three Dollars and Thirty-Nine Cents ($5,203.39)...**
>
> **...Please note that as a result of your being medically boarded, the Company no longer has a legal obligation to cover your expenses related to your injury on the job effective 1st October, 2005..."**

There is some dispute over the amount of money which was delivered to her pursuant to the terms of the letter of 8th September, 2005 but what is clear is that she refused to accept a cheque which was delivered to her by the Company.

Constable Lezama subsequently commenced civil proceedings in the High Court of Justice ("High Court") against the Company, the details of which are briefly set out hereunder.

Claim No. CV 2007-02582; Theresa Lezama and National Maintenance Training and Security Company Limited.[1]

08/05/07 - Constable Lezama's Attorney-at-Law issued a Pre-action Protocol Letter to the Company claiming inter alia damages suffered in connection with the incident of 17th June, 2004 which occurred as a result of the negligence and /or breach of Employer's duty.

19/07/09 - Her Attorney-at-Law filed a Claim Form and Statement of Case in the High Court seeking damages for personal injuries and consequential loss and expenses caused by the negligence and/or breach of the Employer's duty at the compound of the Curepe Junior Secondary School on the 17th June, 2004.

22/10/07 - The High Court ordered inter alia that there be judgment in favour of Constable Lezama against the Company as a result of the Company failing to file a defence.

03/10/08 - The High Court delivered Judgment following an assessment of damages *(NOTE: The Company not appearing at the Assessment and being unrepresented)* in the following terms:-

1) **"General damages are assessed in the sum of one hundred and ten thousand dollars**

[1] Filed at the Civil Court Office, Supreme Court, San Fernando

($110,000.00) with interest at twelve percent (12%) per annum from 19th July 2007 to 3rd October 2008.

2) Special Damages are assessed in the sum of ninety-one thousand, four hundred dollars ($91,400.00) with interest at six percent (6%) per annum from 17th June, 2004 to 3rd October, 2008.

3) Loss of earning capacity is assessed in the sum of twenty thousand dollars ($20,000.00) with no interest.

I. The Defendant do pay the Claimant's costs assessed in the sum of twenty-five thousand, three hundred and twenty-six dollars ($25,326.00)."

20/10/08- Constable Lezama's Attorney-at-Law wrote the Company demanding payment of damages and costs awarded by the High Court.

11/02/09 - Constable Lezama's Attorney-at-Law filed a Notice of full and final satisfaction in the High Court.

Having received damages awarded by the High Court, Constable Lezama through the Association now prays[2] to this Tribunal for the relief that the Company cover her future medical expenses for the

[2] Relief stated in the Association's Evidence and Arguments.

remainder of her work life and any other relief which this Honourable Court may deem just.

Procedural Matters

3. At the commencement of hearing of this dispute[3], Mr. Wilson appearing for the Company raised a point ***in limine*** that the Association's claim for further relief before this Tribunal was baseless and/or without merit and/or an abuse of process since there was a determination in civil proceedings regarding Constable Lezama's injuries and compensation was awarded. Mr. Wilson cited the judgment delivered in **Special Tribunal No. 6 of 2009**[4] between the Estate Police Association and National Maintenance Training and Security Co Ltd in support of his arguments.

   Save for the Company mentioning in its Evidence and Arguments that there was previous High Court proceedings, neither party to this dispute had provided any evidence whatsoever in this regard. As a consequence we were placed in the unenviable position of having to deal with the point *in limine* without the benefit of the necessary evidence and/or information relating to the High Court proceedings.

   After consulting with the parties and receiving their undertakings to provide the Court with documentary evidence in their possession relating to the High Court proceedings, we proceeded to hear the viva voce evidence on the substantive dispute leaving the points raised *in limine* to be dealt with in the final judgment.

4. At the close of the Association's case, Mr. Wilson informed the Tribunal that the Company wished to make a submission that there

[3] Hearing of Dispute came on the 5th, 6th and 11th days of July 2011. Judgment was reserved on the 11th July 2011.

[4] Judgment delivered by Her Honour Mrs. Judy Rajkumar-Gulbance on the 18th February, 2011

was no case to answer. This Tribunal put the Company to its election as to whether it was calling evidence but Mr. Wilson submitted that in his experience that was not the practice and refused to elect. The practice with which we are familiar is that a party seeking to make a submission of no case to answer had to elect to call no evidence before making the submission. Whilst we have the power to allow a party to make a submission of no case to answer without putting the party to election, this power is exercised sparingly[5] and with considerable caution.[6] Due to the late disclosure of documentary evidence by the parties and our earlier ruling to deal with the point *in limine* in the final judgment, we refused the Company's application to make a no case submission.

Arguments

5. As stated earlier, the referral to this Tribunal was "**the termination of the services of WEC Theresa Lezama effective September 30, 2005**." The Association in its Evidence and Arguments[7] stated that:

> *"The Company failed to honour its legal obligation by not covering the future medical expenses of Constable Lezama for the remainder of her work life.*
>
> *The Company's "decision to terminate Constable Lezama's services and not adequately compensate her; and place her in the position where future employment is not accessible, goes against good Industrial Relations Principles and Practices."*

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[5] See learning at Paragraph 11-20, Phipson on Evidence, 16th edition
[6] See learning at paragraph 59.44 Blackstone's Civil Practice 2009
[7] Paragraphs "a)" and "b)" under rubric heading "ASSOCIATION CLAIMS"

6. The Association's arguments can be summarized as follows:-

- Dr. Amow's prognosis was that Constable Lezama's recovery will continue to be delayed over an indefinite period. "Indefinite" according to Mr. Robertson means that there is no period of recovery.
- The termination of Constable Lezama's services cannot be proper since she continues to suffer physically and financially through no fault of her own and the Company has not adequately compensated her for her future medical expenses.
- The termination is contrary to good industrial relations practices since the Company failed to genuinely offer alternative employment to Constable Lezama suited to her disability.
- The High Court proceedings are different from the instant proceedings in that the High Court deals with the negligence of the Company and this dispute involves termination of employment which goes against good industrial relations principles and practices.
- The Claim in the High Court did not address the full extent of Constable Lezama's injury and is limited to her loss of earnings and past expenses.
- The Company has a legal obligation under common law principles which dictates that where an employee is injured in the course of employment duty, the employer must remain liable to compensate the employee for the remainder of his/her working life if the injury is as a result of no fault of the employee.

The Duty of the Tribunal

7. This Tribunal is mindful that our first and paramount duty is to adjudicate in a manner that is fair and just. Section 10(3) of the

Industrial Relations Act has been the subject of tremendous case law and the dicta arising therefrom need not be recited in toto. The ***ratio*** from these authorities essentially states that the Tribunal need not follow the common law slavishly. Decisions must be fair and just, not only to the employee or employees involved, but also to the trade union, employers and the community as a whole. Such decisions are not based solely on common law, but have regard to equity, good conscience and the principles and practices of good industrial relations.

In this dispute, the Association neither questioned the findings of the doctors regarding Constable Lezama's prognosis nor did it challenge the manner and/or the decision of the Company to "medically board" her. During cross-examination of Constable Lezama, she accepted that the Company was only able to offer her alternative employment in the office and that she was unable to take up such employment as she did not possess the requisite qualifications. When pressed by the Tribunal about the "legal obligation" of the Company to compensate Constable Lezama for the remainder of her working life, Mr. Robertson vaguely referred to some learning in Selwyn's but produced no learning and/or authority to support this contention. We appreciate what Mr. Robertson is really asking us to determine is whether in the light of Constable Lezama's medical condition and the enquiries and procedures the Company made and used before deciding to medically board, the termination was fair.

8. The evidence when taken as a whole, does not in our view, even remotely suggest that the Company acted unreasonably and in breach of good Industrial Relations Principles and Practice.

We are not unsympathetic to the effects of the injuries which Constable Lezama suffered or is continuing to suffer. We are very well aware of the matters which the Association put forward. But to award the relief which the Association seeks on her behalf would be to go against basic fundamental principles of law where, in our view, there is no reason for so doing.

The effect of the Order/Judgment made the 3rd October, 2008 by the High Court.

9. It is not open to this Tribunal to review the Order of the High Court and we do not propose to do so. However, it is first necessary to consider the principles employed in awarding damages for personal injuries and then to examine the terms of the subject Order to determine its full effect upon the instant proceedings.

10. Damages for personal injuries are usually founded on tort such as negligence, breach of statutory duty, assault and breach of contract for example, the failure of an employer to provide a safe working environment. The common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation.

"The aim of compensatory damages is to restore the plaintiff to the position he or she would have been in if the relevant tort (or breach of contract) had not been committed. In other words, an injured plaintiff is entitled to compensation for the past, present and future losses that are consequent on his or her actionable personal injury..."

[See Damages for Personal Injury: Non-Pecuniary Loss (Law Com No. 140) para 2.1][8]

[8] cited at page 1 of Munkmans on Damages for Personal Injuries and Death, 11th Edition.

"**Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation...**" per Lord Goddard stated in **British Transport Commission –v- Gourley**[9]. Therefore the aim is to compensate and not to punish.

Lord Reid said in **British Transport Commission –v- Gourley** (supra) that "... **damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss.**"

In England, the law was subsequently amended so as to facilitate structured payment of damages[10]. In our jurisdiction the position remains where the Court assesses damages once and for all. In doing so the High Court does not only compensate for loss and injury which already accrued but also loss and injury which might develop at a future date. Future loss of earnings or profits are estimated and risks that a claimant's condition might deteriorate are taken into account.

No doubt there is difficulty or uncertainty in assessing future claims and a claimant (such as Constable Lezama) cannot arithmetically calculate the exact amount of money which he/she would require for future medical care but the Court considers the estimates of parties and provides fair and adequate remedies. See the case of **Seepersad –v- Persad and Capital Insurance**[11]

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[9] (1956) AC 185 at 208, (1955) 3 ALL ER 796 at 805, HL

[10] Sections 100 & 101 of the Courts Act 2003 inserted a new Section 2 into the Damages Act 1996 enabling courts to order that future loss be paid by instalments without any definite end save for the date of the claimant's death.

[11] [2004]UKPC 19; (2004) 64 WIR 378 per Lord Carswell.

11. Paragraph 9.5 of Munkmans 11th Edition states that:

> **"In the case of future financial loss, whether it is future loss of earnings or expenses to be incurred in the future, assessment is not so easy. This prospective loss cannot be claimed as precisely calculated special damages, because it has not yet been sustained at the date of trial. It is therefore awarded as part of the general damages..."** [Emphasis ours]

12. The High Court awarded to Constable Lezama:[12]

> Special damages in the sum of $114,935.00 representing compensation for past losses including loss of earnings. Based on the Statement of Case, Constable Lezama claimed medical expenses, loss of earnings, domestic assistance, transportation costs and she was compensated for as much of her claims as she would have been able to prove;
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> Loss of earning capacity in the sum of $20,000 which takes into account the fact that Constable Lezama may be handicapped in getting new work at all. See **Moeliker -v- A Reyrolle and Co. Ltd**[13]
>
> General damages in the sum of ($123,500.00) being compensation for pain, suffering, loss of amenities and future financial loss.

Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. (See decision of Privy Council in **Charmaine Bernard and Ramesh**

[12] Order dated 3rd October 2008

[13] (1977) 1 ALL ER 9, (1977) 1 WLR 132, CA

Seebalack[14]). Future Medical Care is not specifically stated in the Statement of Case as a head of damage but this fact by itself does not satisfy us that the High Court did not consider such a claim.

13. The sum total is that there is only one assessment. A claimant cannot come a second time seeking compensatory relief for his/her injuries. All damages are assessed at one time. Once and for all! It is not open to the Association to now recover any further damages before this Tribunal. In our view, any award made by us for future medical expenses would offend the fundamental rule against double recovery.

If Constable Lezama did not claim future medical care/expenses in the High Court, can the Association now seek to do so on her behalf?

14. Most of the documentary evidence, which the Association relies upon in the instant proceedings, was either referred to or filed in the High Court for its consideration. There are only four receipts for services rendered by the Chiropractic Rehabilitation Clinic totaling $1,000.00 which would not have been before the High Court since they were obtained after the assessment of damages in the High Court.

    The medical report of Dr. L. Amow (upon which the Association relies heavily) and his prognosis were referred to and detailed in Constable Lezama's Attorney-at-Law's Pre-action Protocol letter which was also referred to in the Statement of Case. Constable Lezama further relied upon medical reports of Dr. David Toby, Dr. Stephen Ramroop and medical reports obtained from the North

[14] Appeal No. 0033 of 2009 [2010] UKPC 15; (2010) 77 WIR 455

Central Regional Health Authority and Surgi-Med Clinic all of which were obtained subsequent to the date of Dr. Amow's Report. These later reports were not put forward before this Tribunal and we are left to wonder whether Constable Lezama's condition improved or deteriorated. Notwithstanding the lack of disclosure, we are certain that Constable Lezama's disability and the continuing effects upon her together with the supporting evidence were considered by the High Court.

By virtue of this information being before the High Court we find no merit whatsoever in the Association's submission that the High Court did not address the full extent of Constable Lezama's injuries.

15. The Association submitted that the cause of action in the High Court proceedings was different from the instant dispute in that the former was grounded in tort whereas the latter involves principles of good and proper industrial relations. It was argued that the High Court and the Special Tribunal are therefore dealing with different considerations and as a consequence there is no bar to this Tribunal granting relief.

This submission in our view is too simplistic and fails to appreciate that the High Court in carrying out an assessment would have analysed facts, made findings of fact and applied the relevant common law principles to those findings. The effect of this was to create a judgment binding as between the parties so as to prevent them from litigating the same issues over again or to put it more precisely the judgment is covered by the doctrine of issue estoppel. In the case of **Blair -v- Curran,** Dixon J stated (as regards issue estoppel):-

> **"A judicial determination directly involving an issue of fact or of law disposes once and for all of the issue, so that it cannot afterwards be raised between the**

> same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion... the distinction between res judicata and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is ... necessarily decided by the prior judgment, decree or order.
>
> Nothing but what is legally indispensable to the conclusion is thus finally ... precluded. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right... Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order... the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous..."[15]

If this Tribunal proceeds to grant relief for future medical care/expenses, we would undoubtedly be delving into the same facts and evidence which the High Court has considered and encroaching on fundamental issues which it already determined.

[15] (1939) 62 CLR 464, 531-533

16. If in fact Constable Lezama did not make the claim for future medical care/expenses she is yet again caught by the "**rule in Henderson v Henderson**" which is now recognized as a separate and distinct form of estoppel (See **Johnson –v- Gore Wood & Co (a firm)**)[16]. The "rule" applies to matters which could have been raised in previous proceedings, but were not.

In the old case of **Henderson –v- Henderson** (1843) 3 Hare 100, Sir James Wigram V-C stated:[17]

> **"...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

Stuart-Smith LJ stated in the case of **Talbot –v- Berkshire County Council**[18] as follows:-

> **"The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but**

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[16] [2001] 2 WLR 72 at 90, per Lord Bingham of Cornhill

[17] Referred to extensively in Spencer Bower and Handley Res Judicata, 4th edition

[18] [1994]QB 290, [1993] 4 All ER 9

were not. The second is not a true case of res judicata but rather is founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation...

In my judgment there is no reason why the rule in Henderson's case should not apply in personal injury actions. Indeed there is every reason why it should. It is a salutary rule. It avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to others, it prevents stale claims being brought long after the event, which is the bane of this type of litigation; it enables the defendant to know the extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct of negotiations, their defence and any question of appeal."

Talbot's case states that an exception to Henderson's rule is where there are special circumstances. The special circumstances must afford an adequate explanation of why the claim now made was not made in the earlier proceedings. In the instant proceedings there are no special circumstances as to why the claim for future medical care/expenses was not made earlier before the High Court. In the circumstances, the Association is estopped from raising such claim now on behalf of Constable Lezama.

17. Mr. Wilson submitted that the instant proceedings was an abuse of process. Although the essence of the abuse of process is the bringing of a claim that was raised or should have been raised in earlier proceedings, Lord Bingham in Johnson -v- Gore Wood[19] supra commented that there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust

[19] supra

harassment of a party[20]. Having regard to our decision above, there is no need for us to rule on this issue.

18. **Notice of full and final satisfaction**

The Rules of Supreme Court 1975 and the Civil Proceedings Rules 1998 (as amended) do not refer anywhere to this document. This Notice has arisen in the course of litigation practice and can be deemed to effectively discontinue a civil action. (**Bajnauth Ramgoolam –v- Caribbean Air Cargo Ltd. and Air Canada)**[21]. Again there is no need for us to consider this issue any further in light of our decision.

19. **The Association's attempt to seek further relief**

During his reply to Mr. Wilson's closing speech, Mr. Robertson submitted that there was outstanding compensation due to Constable Lezama since she did not receive the compensation stipulated in the Company's Letter dated 8th September 2005. This was not part of the Association's case. Mr. Wilson was taken by surprise but retorted that Constable Lezama's refusal of the compensation coupled with her subsequent pursuit of relief in the High Court meant that this compensation was no longer available to her.

20. On the evidence there is no dispute that Constable Lezama refused a cheque from the Company representing some form of payment pursuant to the terms set out in the Letter. Mr. Wilson in cross examination put to Constable Lezama that she was offered a

[20] (2001) 2 WLR 72 at 90
[21] Civil Appeal No. 16 of 1995; 55 WIR 291

cheque in the sum of $3,355.39 because the sum of $1,848.00, which represented her unutilized vacation leave, was deposited to her account. Constable Lezama agreed with this state of events. According to the Company's Letter, the sum of $3,355.39 represented compensation for service as per the Collective Agreement between the parties. There is nothing to suggest that the figures quoted in the letter are incorrect.

21. We therefore find that the Company tendered the sum of $3,355.39 to Constable Lezama which she refused. Whilst the Association claimed in its evidence and arguments, "Any other relief that this honourable Court may deem just", we are not satisfied that we can and/or should order relief under this claim. The issue as to whether Constable Lezama is now entitled to such payment was not properly addressed by the parties. There are legal issues such as delay, limitation, and estoppel by representation to be considered. Had this claim formed part of the Association's Evidence and Arguments, the Company would have been able to defend it properly and this Tribunal would have been better enabled to arrive at a fair and just decision.

We hasten to add that our refusal to grant this particular relief should not in any way restrict the parties from holding discussions with a view to settling this issue. The sum of $3,355.39 was arrived at in accordance with the parties' subsisting Agreement and was not considered by the High Court or reflected in the damages which it awarded. Perhaps the Company can consider paying the sum to the Association as it intended to do almost six years ago.

Conclusion

22. For all of the foregoing reasons we find that the Association is not entitled to any of the relief which it claimed. It is ordered that this dispute be and is hereby dismissed.

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H.H. Mr. V.E. Ashby
Chairman

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H.H. Mrs. Judy Rajkumar-Gualbance
Member

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H.H. Mr. Dinesh Rambally
Member