

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 7/2014**

**APPLICATION NO COA2020APP00169**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MR JUSTICE BROOKS JA  
THE HON MRS JUSTICE MCDONALD-BISHOP JA**

<b>BETWEEN</b>	<b>MARILYN HAMILTON</b>	<b>APPLICANT</b>
<b>AND</b>	<b>ADVANTAGE GENERAL INSURANCE COMPANY LIMITED</b>	<b>RESPONDENT</b>

**Captain Paul Beswick, Ms Terri-Ann Guyah and Ms Gina Chang instructed by Ballantyne Beswick and Co for the applicant**

**Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the respondent**

**1 October and 18 December 2020**

**PHILLIPS JA**

[1] I have read, in draft, the judgment written by my brother Brooks JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

**BROOKS JA**

[2] If ever there was a case that has gobbled up much more than its fair share of the scarce resources of this country's judicial system, it is this case. The failures, attitude and approach of the instructing attorneys-at-law appearing for both sides has resulted in a significant use of judicial time, not to mention the cost to the parties.

Further, there has been no attempt to heed the provisions of rule 1.3 of the Civil Procedure Rules (CPR), which require the parties (including, undoubtedly, their legal representatives, who are officers of the court), to help the court to further the overriding objective. Among the principles that comprise the overriding objective are, saving expense and taking into account the need to allot the court's resources to other cases.

[3] As a result of that situation, there have been no less than 11 written judgments from this court, thus far, concerning the dispute between these parties. Those judgments are in addition to decisions on other issues between the parties, in which oral judgments have been handed down. And, of course, there have been at least four written judgments and other decisions in the Supreme Court.

[4] On 3 July 2020, this court handed down its decision allowing, in part, an appeal by United General Insurance Company Limited, now named Advantage General Insurance Company Limited (AGI). At that time, the court made orders adjusting the award of damages that had been made in favour of Mrs Hamilton against AGI, in the court below. The parties have stated that they are unable to agree on the meaning of the judgment in this regard and, therefore, they wish the court to clarify those points.

[5] In order to appreciate the analysis which follows, it is necessary to set out the relevant orders that were made in the Supreme Court and in this court. The relevant orders made on 13 December 2013 by the learned trial judge are:

“...damages awarded as follows:

- (1) For wrongful termination of her employment and loss as a result of handicap/loss of advantage on the labour market in the sum equivalent to three (3)

years['] net earnings including payment for breach from 29<sup>th</sup> July 2006 with an increase of 8.25% annually. Deduction to be made for the period she was employed[.]

- (2) Non-taxable motor vehicle allowance for two (2) months in the amount of Forty Thousand Dollars (\$40,000).
- (3) An account of:
  - (a) all employees' benefits including [AGI's] [pension] contributions for a period of three (3) years at the rates at which the same would have been obtained by [Mrs Hamilton] were it not for [AGI's] breach;
  - (b) the contributions [AGI] should have made between 10<sup>th</sup> January 2000 to the 29<sup>th</sup> July 2006 and payment of the amount due to [Mrs Hamilton].
- (4) Interest due to [Mrs Hamilton] at the commercial rate from the 29<sup>th</sup> July 2006 to [the date of the judgment]. (Regarding [sic] [Mrs Hamilton's] pension entitlement from the point of her retirement had [AGI] not breached the contract).
- (5) ...
- (6) ..."

This court, in allowing AGI's appeal, in part, adjusted the learned trial judge's orders and ordered, in part, as follows:

- "(c) The orders made by the learned trial judge are adjusted as follows:
1. Order 1 is set aside and in its place it is ordered that [AGI] shall pay to Mrs Hamilton 12 months' salary and perquisites. Deduction is to be made for the payment made at the time of dismissal.
  2. Order 2 shall stand.
  3. Order 3 is set aside.

4. Order 4 is set aside and in its place it is ordered that interest shall be paid on all sums due to Mrs Hamilton at commercial rates from 28 July 2006 to the 13 December 2013.
5. ...
6. ..."

The learned judge who conducted the assessment of damages in the court below (the learned assessment judge), made the following orders on 9 March 2018:

- "1. For damages for wrongful termination – Salary and emoluments for 12 months from July 2006 to June 2007, inclusive of employer's contribution to pension, motor vehicle upkeep, gas allowance and lunch subsidy with an increase of 8.25% from January 2007 to June 2007 of \$3,567,836.88 with interest at 19.52% from the 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013 the day of judgment. Thereafter at 6% until payment;
2. For damages for handicap on the labour market, 2 years[ ] salary and emoluments, inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, reflecting an increase of 8.25% per year as follows:-
  - a. From July 2007 to June 2008 the sum of \$3,779,449.49;
  - b. From July 2008 to June 2009 the sum of \$4,116,211.49;Total Salary and emoluments awarded for the three (3) years being \$11,463,497.86 with interest at 19.52% from the 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013 the day of judgment. Thereafter at 6% until payment;
3. Employer's contribution to pension to be refunded from January 2000 to June 2006 being \$740,000.700 [sic] with interest at 19.52% from the 30<sup>th</sup> November, 2009 to the 13<sup>th</sup> December, 2013 the date of Judgment. Thereafter at the rate of 6% until payment;

4. Motor vehicle allowance of \$40,000 with interest at 19.52% from 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013 the date of judgment. Thereafter at 6% until payment;
5. Health and Life insurance of \$1,785,355.56 with interest at 19.52% from 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013 the date of judgment. Thereafter at 6% until payment;
6. The payment for one month[’s] notice already paid to [Mrs Hamilton] is to be deducted from the judgment sum;
7. ...
8. ...
9. ...
10. ...”

This court adjusted the damages, as assessed, and ordered as follows:

- “1. Order 1 is modified to allow damages for wrongful termination only for the period of 12 months inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, less the payment made at the time of dismissal, with interest thereon at 19.52% from 28 July 2006 to 13 December 2013, which is the date of judgment. Thereafter at 6% until payment.
2. Orders 2-4 and 6 are set aside.
3. Order 5 is modified to limit the payment in respect of health and life insurance to 12 months only.
4. ...
5. ...”

[6] A consolidation of the two sets of orders made by this court, on a fair interpretation, would read as follows:

1. [AGI] shall pay to Mrs Hamilton damages for wrongful termination only for the period of 12 months inclusive of motor vehicle upkeep, gas allowance and lunch subsidy, less the payment made at the time of dismissal, with interest thereon at 19.52% from 28 July 2006 to 13 December 2013, which is the date of judgment. Thereafter at 6% until payment.
2. [AGI] shall pay to Mrs Hamilton non-taxable motor vehicle allowance for two (2) months in the amount of Forty Thousand Dollars (\$40,000) with interest at 19.52% from 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013, the date of judgment. Thereafter at 6% until payment.
3. Health and Life insurance of \$1,785,355.56 with interest at 19.52% from 28<sup>th</sup> July, 2006 to the 13<sup>th</sup> December, 2013, the date of judgment. Thereafter at 6% until payment.

[7] Before the appeal was heard, this court ordered AGI to pay \$3,500,000.00 to Mrs Hamilton. AGI did so on 18 April 2018.

[8] After the judgment on the appeal was handed down, Mrs Hamilton's attorneys-at-law filed a notice of application seeking the following guidance from this court:

- "1 Directions as to which judicial officer and of [sic] which Court should compute the final judgment sum;

2. Directions as to how the interest as awarded is to be calculated;
3. Directions as to whether clothing allowance as set out in the list of benefits provided at the assessment of damages and included in that calculation is to be calculated in the award;
4. Directions as to whether the undisturbed order of the Supreme Court awarding an annual increase of 8.25% should be calculated as at the 1<sup>st</sup> January 2007 period of the award;
5. Such further and other directions as this Honourable Court may deem fit:"

[9] The application was said to be necessary because:

1. Mrs Hamilton had had no success in getting either the registrar of this court or the registrar of the Supreme Court to calculate and certify the judgment sum resulting from this court's orders;
2. a judge of the Supreme Court also declined to carry out that exercise on the basis "that [this court's] orders lacked directions which would permit a Judge of the lower Court to make any calculations based on its orders" (paragraph 7 of the application);
3. the judgment of this court is unenforceable "without the further directions...as to how and by whom the judgment sum is to be determined" (paragraph 9 of the application), "which goes against the core of the

Court and administration of justice” (paragraph 10 of the application).

[10] This court heard the application on 1 October 2020. At that time, after hearing the submissions of counsel for both parties, the court informed them that, in order to save further judicial time in this matter, it would make an order calculating the damages. It requested counsel to file written submissions setting out their respective calculations as to damages, which submissions should specifically address:

- a. the issue of the clothing allowance; and
- b. whether an increase of 8.25% of salary and perquisites is applicable for the period of January 2007 to July 2007.

The court also informed counsel, at the hearing of the application, that the interest awarded on the damages is to be calculated on the basis of simple, and not compound interest.

### **The basis for applying interest**

#### The submissions

[11] Captain Beswick, for Mrs Hamilton, argued that compound interest should be applied to the award of damages, as she had claimed. He submitted that that method of applying interest is the modern and realistic approach that would truly compensate Mrs Hamilton for the loss that she has suffered by AGI’s actions, especially in view of the delay in bringing the matter to an end. Learned counsel relied on **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners and**



**another** [2008] 1 AC 561 and **Bank of America Canada v Clarica Trust Company** [2002] 2 SCR 601 in support of these submissions.

[12] Mr George, on behalf of AGI, argued, correctly, that the learned judge in the court below did not stipulate that interest should be compounded, and that this court did not adjust that aspect of her order.

#### The analysis

[13] As was previously indicated to counsel, simple interest will be applied in the calculations that will appear below. It is to be noted that section 3 of the Law Reform (Miscellaneous Provisions) Act, which allows the court to include interest on an award of damages, specifically states that it does not “authorize the giving of interest upon interest”. Whereas the section does not prevent the court from awarding compound interest, it is expected that the court will expressly so state if that is its intention. The judges in the court below did not so state and there is no challenge to the orders in respect of interest.

#### **The issue of the clothing allowance**

##### The submissions

[14] Captain Beswick argued that there is no contest that Mrs Hamilton was entitled to a clothing allowance as one of her perquisites. He accepted that that allowance was not specified in the assessment judge’s order, but contended that it must be included in the calculation of what is due to Mrs Hamilton. He pointed to the fact that the order in that regard was not restrictive as to the perquisites contemplated, but used the word “include”, in reference to perquisites. Learned counsel submitted that the clothing allowance was included in the calculation that was placed before the assessment judge.

[15] Mr George contended that the clothing allowance was not mentioned in any written form in the litigation. Further, he argued, an award should not be granted for clothing allowance because that item was intended to be a reimbursement for an expenditure and that since there was no expenditure, there should be no payment.

The analysis

[16] Although the parties do not contest that Mrs Hamilton received a clothing allowance, that allowance was not included in her further amended particulars of claim or in her witness statement. Accordingly, the trial judge did not mention it when she addressed the issue of the salary and perquisites. She said at paragraph [155] of her judgment:

“At paragraph 7 of her further amended particulars of claim, [Mrs Hamilton] avers that:

‘7. At the time of the wrongful termination of her employment, [Mrs Hamilton’s] annual emoluments were as follows:

Basic salary	:	\$ 3, 501,000.00
Motor Vehicle Allowance	:	\$ 492,000.00
Gas Allowance	:	\$ 67,320.00
Lunch Subsidy	:	\$ <u>81, 840.00</u>
Total Annual [Emoluments]:		\$ 4, 142,160.00

Furthermore, [Mrs Hamilton] was entitled to the following benefits:

- i. Blue Cross medical scheme up to a maximum value per annum;
- ii. ...

- iii. Paid life insurance up to a maximum value per annum. The claimant will before the trial hereof request discovery from [AGI] to determine the value of this benefit.
- iv. Entitlement to 4 weeks['] paid vacation per annum by virtue of [Mrs Hamilton's] length of service with [AGI]."

[17] It is true, however, that at paragraph 5 of the prayer in her further amended particulars of claim, Mrs Hamilton claimed "[a]n account of and payment equivalent to the value of all employee benefits". In the absence of the clothing allowance being expressly mentioned in the claim, it could not have been in the contemplation of either the trial judge or the assessment judge. Accordingly, in the absence of a counter-notice of appeal addressing that item, there can be no award for it in this court. It will be omitted from the calculations.

**The application of an increase of 8.25%**

[18] This issue arose as a result of this court's adjustment of the trial judge's order as to the period for which damages were to be calculated. This court's order reduced the period from three years to one year. The trial judge did accept, however, that Mrs Hamilton would normally have received an annual increase of 8.25% on her emoluments. That annual increase was applied by the assessment judge.

[19] The order made by this court, because it awarded damages for only one year, did not take into account the annual increase of 8.25% that the trial judge had ordered to be applied. The order did not contemplate that the annual increase would have been applied in January of each year, and therefore, approximately in the middle of the year for which damages were awarded (July 2006-July 2007).

### The submissions

[20] Captain Beswick pointed out that since the annual increase was normally granted at the beginning of each calendar year, it was appropriate to award Mrs Hamilton an increase of 8.25% for the period January 2007 to July 2007, as that would more accurately compensate her for her loss. The increase, he submitted, would apply to the basic salary as well as the perquisites.

[21] Mr George argued that Mrs Hamilton's claim, in this regard, is unfounded. He contended that the order of this court eliminated the concept of an annual increase and therefore the court was not entitled to award the increase that she has claimed.

### The analysis

[22] It is accepted that Mrs Hamilton should be compensated for the loss that she suffered as a result of being wrongfully dismissed. There was no dispute that she traditionally received an annual increase. The order, because it did not contemplate that increase, improperly deprives her of that benefit. The issue, as raised by Mr George, is whether this court is permitted to adjust its order to satisfy the principle asserted by Captain Beswick.

[23] In assessing this point, it must also be noted that this court's order on the appeal, has been certified by the registrar. Ordinarily, that would disable the court from making any order so as to award an increase in the damages. The court does have the authority, however, to alter its order so as to "correct a clerical error, or an error arising from an accidental slip or omission...in its judgment or order" (see paragraph [11] of the judgment of Harris JA in **Brown v Chambers** [2011] JMCA App 16).

[24] The entitlement to make use of what is called the “slip rule” is quite restricted. This was assessed and stressed by Morrison JA, as he then was, in **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16. In that case this court found that there was a clear inconsistency between the reasoning of the court and the order that was drawn up. It therefore acceded to an application to “clarify and/or correct the order” (see paragraph [1] of the judgment).

[25] In the present case, it is apparent that the court overlooked the fact that the 8.25% increase was traditionally awarded in January of each year. Had it appreciated that fact it would have included that aspect in the order. This court’s intention was to compensate Mrs Hamilton for that which she lost, bearing in mind and based on her claim and that which the trial judge intended to order. The order should be adjusted to reflect the intention of both the trial judge and of this court.

[26] There has been no intervening event which could cause prejudice if the order were adjusted.

### **The calculation**

[27] The calculation of the award is based on the remuneration package that Mrs Hamilton received as outlined in the extract from the trial judge’s judgment. The parties are agreed that the salary and benefits for the period July 2006 to July 2007, which includes the 8.25% for the period January 2007 to July 2007, is \$4,525,023.20. The net figure for those items, as calculated by Mrs Hamilton’s attorneys-at-law is \$3,062,804.09. That figure is accepted and will be the starting point for the calculation.

[28] There has to be added to that figure, however, an agreed sum for health and life insurance. The calculation is set out below:

Net salary and benefits for 2006-2007 inclusive of 8.25% increase for January 2007-July 2007	\$3,062,804.09
Health and life insurance	<u>\$ 595,118.52</u>
Total Entitlement	\$3,657,922.61
Less payment made on dismissal	<u>\$ 494,229.02<sup>1</sup></u>
Net award of damages	\$3,163,693.59
Add interest at 19.52% p a for period 28 July 2006 to 13 December 2013 (2,696 days) at \$1,668.52 per day	<u>\$4,498,329.92</u>
Total award of damages	\$7,662,023.51
Add interest at 6% p a for period 14 December 2013 to 18 April 2018 (1,587 days) at \$1,259.51 per day	<u>\$1,998,842.37</u>
Subtotal	\$9,660,865.88
Less payment made on 18 April 2018	<u>\$3,500,000.00</u>
Total	\$6,160,865.88

[29] When the payment made on 18 April 2018 is accounted for, interest is to be calculated on the total of \$4,162,023.51 (\$7,662,023.51 - \$3,500,000.00) at the rate of 6% per annum from 19 April 2018 to the date of payment. Mr George's submissions suggested that the 6% awarded to the date of payment was on the net award of damages, which has been calculated above as \$3,163,693.59. This is not correct. It is apparent that the assessment judge intended that aspect of the interest to be the interest payable on a judgment debt. The interest must be calculated on the final total in accordance with section 51 of the Judicature (Supreme Court) Act. The section

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<sup>1</sup> See paragraph 8 of the further amended particulars of claim.

stipulates that the court may award interest on a judgment debt “until the same shall be satisfied”. The rate that has been applicable to judgment debts since 2006 is the rate of 6% per annum (see the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006). That interest accrues until payment of the judgment sum.

### **Costs of the application**

#### The submissions

[30] Captain Beswick submitted that Mrs Hamilton was entitled to make the application in pursuance of settling the judgment and therefore was entitled to the costs of doing so. He also relied on rule 64.6 of the CPR, which speaks, in part, to the general rule that an unsuccessful party should pay the costs of a successful party.

[31] Mr George argued that the court should not award Mrs Hamilton costs of this application as her attorneys-at-law made no attempt to settle the damages with the attorneys-at-law representing AGI. He submitted that the court should consider that conduct in the context of part 64 of the CPR and award the costs to AGI.

#### The analysis

[32] Although rule 64.6(4) of the CPR does allow this court to consider the conduct of parties in settling awards of costs, the court also has to consider whether the imperfection in the order required the parties to seek clarification. In this case it was reasonable to have the order clarified. That is neither party’s fault. As a result there should be no order as to the costs of this application.

## **Conclusion**

[33] For the reasons stated above, the award of damages should be assessed at \$3,163,693.59, which, after the addition of interest and the deduction of a post-judgment payment, amounts to \$6,160,865.88. The sum of \$4,162,023.51 should attract interest at the rate of 6% per annum from 19 April 2018 until the date of payment.

## **MCDONALD-BISHOP JA**

[34] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

## **PHILLIPS JA**

### **ORDER**

- (a) The sum to be paid by Advantage General Insurance Company Limited is calculated to be \$4,162,023.51 with interest thereon at 6% per annum from 19 April 2018 until the date of payment.
- (b) Advantage General Insurance Company Limited must also pay the interest accumulated to 18 April 2018 being \$1,998,842.37.
- (c) No order as to costs of the application.