

**IN THE SUPREME COURT OF GRENADA
AND WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2018/0219

BETWEEN:

ROSELYN CHARLES

CLAIMANT

AND

GRENADA AIRPORTS AUTHORITY

DEFENDANT

Before:

The Hon. Mr. Justice Raulston L.A. Glasgow

High Court Judge

Appearances:

Mr. Nazim Burke for the Claimant

Mr. Kristopher Ross Fields for the Defendant

2023: March 2nd

June 30th (written submissions)

August 10th (further case management)

August 18th (Written submissions)

September 5th

JUDGMENT

- [1] **GLASGOW, J.:** The claimant, Ms. Roselyn Charles (Ms. Charles) has approached the court seeking various reliefs for alleged breaches of a contract of employment made between herself and the defendant (the Authority). Ms. Charles' complaints are in respect of alleged breaches of her entitlement to certain emoluments.

Background

- [2] On 1st August 1984, Ms. Charles began employment with the Authority in the office of Air Traffic Control (ATC) Officer. Prior to that date, Ms. Charles was employed as a civil servant appointed by the Public Service Commission of Grenada (PSC). Her engagement with the Authority came about after she was seconded to the Authority by the PSC. Ms. Charles continued working with the Authority further to several contracts from the time of her secondment until 5th May 2016 when she retired.
- [3] In her witness statement filed on 15th May 2020, Ms. Charles outlines the various posts which she held with the Authority as follows –
- (1) 1984- Promoted to ATC Supervision (C03)
 - (2) 1995 - Promoted to Senior Air Traffic Controller (C04).
 - (3) 2006 – Promoted to Assistant Manager of Air Traffic Services (Assistant Manager, ATS).
 - (4) 2011 – Promoted to Manager of Air Traffic Services (Manager, ATS).
- [4] It is the latter promotion that has caused contention between the parties which contention has led to these proceedings.

Case for Ms. Charles

- [5] Ms. Charles' claim is that the Airports' Authority failed to follow certain established practices and procedure relating to the process of acting in a higher position. She cites the following practices and procedures that should have been applied by the Authority to her contract as Manager, ATS –
- (1) "When an officer acts in a higher position the officer will be paid an acting allowance of half the difference between their current salaries and the salary of the substantive holder of the higher post while so acting; and
 - (2) The unpaid difference in the salary for the period of acting will be paid to the officer on being confirmed in the position."¹ Ms., Charles refers to this payment as a "back pay".
- [6] At the time that Ms. Charles acted as Manager, ATS the substantive holder of the post held a contract wherein he was paid the sum of \$8684.50 per month. Ms. Charles was paid an acting allowance of \$1515.50 which sum was half the difference between her salary of her substantive post of Assistant Manager, ATS in the sum of \$5635.50 and the salary of \$8684.50 being paid to the substantive holder of the post of Manager, ATS.
- [7] Ms. Charles explains that when she was confirmed in the post of Manager, ATS on 1st April 2011, her appointment was further to a letter dated 10th April 2011 (the agreement) wherein a salary of \$6800.00 was quoted. Instructively for these present purposes, Ms. Charles was asked to sign the letter which stated that it contained all the terms and conditions appertaining to the agreement between the parties and that it superseded all previous such agreements. Ms. Charles acknowledges that she signed the letter as requested by the Authority. However, she stresses that even though she signed the letter, she omitted to tick a box contained in the letter as to whether she agreed to the terms stated therein.

¹ Statement of claim filed on 5th June 2018 at para. 5

- [8] Ms. Charles' first concern is that she anticipated being paid the salary of the previous holder of the post of Manager, ATS. She complains that the Authority discriminated against her by failing to pay her the salary paid to her erstwhile colleague in the office of Manager, ATS. Ms. Charles claims that she legitimately expected to be paid the same salary as the previous holder of her office. By reason of the failure to follow the alleged practices and procedure of paying her the same salary as her predecessor in office, she asserts, she has lost the benefit of this money along with all increases in salary that would have been paid over the years. In her closing submissions she further stated that the discrimination was due to the fact that she is female, and her former colleague is male. This treatment, she says in her closing submissions, was a patent breach of the Employment Act, Cap. 89 of the laws of Grenada (the Employment Act).
- [9] In her witness statement, Ms. Charles refers to Mr. Glen Forsyth who acted in the post of Manager of Maintenance during the same period that she acted as Manager, ATS and who was later confirmed in the post of Manager of Maintenance. Ms. Charles observed that Mr. Forsyth *"was treated in accordance with the established practice and procedure... He got half the difference between his salary and the previous Manager's salary for acting in that position and received the full salary when confirmed in that position."*²
- [10] Ms. Charles references Ms. Alana Paul, Ms. Hernel Panchoo and Mrs. Christina Joseph, who also complained about their salaries. Management thereafter adjusted those salaries. In respect of Ms. Paul and Ms. Panchoo, the union representing that category of workers got involved in the fray and negotiated a settlement with the Authority on the question of their salaries. Those two were paid the same salary as their predecessor in office after negotiations with the union.
- [11] Ms. Charles also asks the court to find that she signed the agreement by mistake since there is no way that she would have properly signed the same with a salary that was less than the salary paid to the previous office holder. In fact, she says, she complained to the Human Resources Department and several of her superiors at the Authority about the matter but to no avail.³ At paragraph 6 of the statement of claim, Ms. Charles sets out a table detailing the sums that she was allegedly deprived of by reason of the Authority's alleged failure to pay her the same salary as the previous office holder and for unpaid salary which amounts to \$142, 821.26.
- [12] Besides her complaint about the salary paid to her, Ms. Charles also pleads that the Authority improperly and/or illegally calculated and paid her retirement benefits.
- [13] She explains at paragraph 7 of the statement of claim that –

“... it was also a term of the Claimant's employment with the Defendant that the Claimant will be paid a Retirement and Pension Benefit comprising a Past Service Benefit effective June 1, 1998 in the sum of \$26,721.00 at 5% per annum compounded; and a contributory Pension Plan Benefit on the basis of an equal monthly contribution by the Claimant and the Defendant of 5% of the Claimant's gross salary with effect from June 1998 until retirement, which was being invested by the Defendant in an interest bearing account with the National Commercial Bank (now Republic Bank (Grenada) Limited) at an interest rate of 4% per annum compounded for the benefit of the Claimant”.

² Ms. Charles' witness statement filed on 15th May 2020 at paragraph 10.

³ Ibid at paragraph 9

[14] Ms. Charles' case is that the Authority erroneously calculated the Past Service Benefit (PSB) due to her. In respect of the pension benefit, she explains that *"this did not take account of the unpaid salary and acting allowance set out above and the invested rate of 4% per annum, which the Claimant has calculated to be \$123,056.58 being employer and employee contribution and accrued interest of \$44,315.01."*⁴

[15] Ms. Charles makes the further charge that her retirement benefits were improperly adjusted for income tax when she was not liable to pay the same. The following reasons are offered for this view—

- (1) Being a public officer on secondment to the Authority, her retirement benefits were in effect a gratuity and as such the same were exempt from the deductions for income tax pursuant to section 25(1) (i) of the Income Tax, Cap 149 of the Laws of Grenada (the Income Tax Act);
- (2) Tax was applied to the interests earned on the PSB and the contributory pensions payments, which were in fact deposits and as such not liable to taxation.
- (3) The salary for the period May 2016 being \$1,026.60 and the payment for her earned vacation leave in the sum of \$3,079.82 were erroneously taxed as her PSB and pension benefits.

[16] Ms. Charles's further claims that even if income tax is to be deducted from her retirement benefits, the Authority is liable to repay her these sums as the Authority failed or refused to register the pension plan with the Comptroller of Inland Revenue as an approved pension plan in accordance with section 48 of the Income Tax Act. Ms. Charles calculates her losses in respect of the alleged breaches of her rights to retirement and pension benefits in the sum of \$77,301.41.

[17] At some point in the exchange of correspondence between the parties about their differences, the Authority acknowledged that it did not properly calculate some of Ms. Charles' salary. It later paid these sums to Ms. Charles. Those sums are referred to in this judgment as retroactive salary. In its submissions before the court at the further case management conference held on 10th August 2023, the Authority explains the retroactive salary as comprising annual salary increases paid over the years to its workers. Ms. Charles does not dispute this characterization of the retroactive salary paid to her but wishes the court to draw certain inferences from those payments. Those inferences will be addressed below. The parties agree that the annual increases in salary over the years 2011 to 2016 when Ms. Charles served as Manager, ATS amounted to about 3% per annum.

[18] In her witness statement filed on 15th May 2020, Ms. Charles explains her concerns about the tax adjustments made to her pension benefits and to the retroactive salary as follows –

- (1) The interest paid on her pension was at a rate that was different to the rate applied to the pension fund account by the banks in which it was invested. Ms. Charles insists that interest at the rate of 4% should have been paid in accordance with advice given to her by Mr. Sean Stewart, an employee of the Authority. She claims that Mr. Stewart informed her that the Authority's Board of Directors disallowed a request to pay her pension at a rate of 4% but

⁴ Supra note 2 at para. 8

instead approved payment at a rate of 3%. Ms. Charles says that this information was confirmed by the Authority's General Manager, Wendy Williams.

- (2) The pension benefits did not take account of the unpaid salary and acting allowances attaching to the post held by her predecessor in office.
- (3) The retroactive salary payments were adjusted for income taxes at the 2016 rates of income tax which did not account for the fact that the 2016 income tax rates were different for the years 2010 to 2016. In that regard, she claims that –

“the income tax rate of 15% for earnings between \$36,000.00 and \$60,000.00 (\$24,000.00) which was not in existence between 2010 and 2013 – this tax came into effect on January 1, 2014 - was illegally applied to my retroactive salary payment; while the sums paid as retroactive salary earned from January 2014 to April 2016 was double taxed at the 15% band rate, because income taxes were already deducted at this tax band rate when the actual salary was paid during the said period”.⁵

- (4) The pension amounts to a gratuity/benefit for the purposes of section 25(1)(i) of the Income Tax Act. The pension replaces the gratuity and pension which were foregone by her secondment to the Authority. If she had not been seconded to the Authority, her benefits would not have been taxed. She was not to lose benefits by being seconded to the Authority and as such those benefits should not have been taxed.
- (5) Even if the pension was to be taxed, she lost the benefit of a better rate of taxes because the Authority failed to register the pension plan with the Comptroller of Inland Revenue. If the plan was registered her pension would have been taxed at a rate of 10% on 25% of the pension instead of the whole of it. 75% of her pension would have been tax free.

Case for the defendant

[19] The Authority accepts that Ms. Charles held a contract as Manager, ATS, at a salary of \$6800.00 per month. However, the defence refutes the assertions that Ms. Charles was –

- (1) paid the wrong salary. On this score, the Authority contends that, having signed the contract, Ms. Charles has not set out on what basis, legal or otherwise, she is entitled to a different salary.
- (2) entitled to a “back pay”. The defence on this score is similar to the defence on the question of the wrong salary.
- (3) paid the incorrect amount as the sum due for her retirement benefits. The defence makes the point that –
 - (a) The Authority is not a taxing authority and as such, it is not liable to defend claims about improper taxation. On this issue, the Authority's position is that the Income Tax Act provides a mechanism for hearing and resolving disputes about taxation and that Ms. Charles has failed to engage those procedures to resolve her complaints about improper taxation.

⁵ Supra note 2 at paragraph 32

- (b) The Authority's matched contributions to the pension plan were taxable and as such there can be no complaint about the deductions made for these purposes.
- (c) The Authority was under no obligation to register the pension plan.

[20] Ms. Wendy Francette Williams, General Manager of the Authority provided a witness statement filed 15th May 2020 in which she articulated the defence's case. Ms. Francette Williams makes the point that the agreement signed by Ms. Charles "*contained the entire understanding between Ms. Charles and the Airports Authority.*"⁶ In this regard, Ms. Francette Williams asserts, there was no "*uncertainty or lack of clarity about the salary that was being proposed by the Authority and what was agreed to and accepted by Ms. Charles, which was a fixed salary of \$6800.00 per month.*"⁷ In fact, Ms. Francette Williams explains, Ms. Charles requested correspondence that was sent to several entities on her behalf in which the agreed salary of \$6800.00 was quoted. These entities included banks, credit unions and the United States Embassy.

[21] Ms. Francette Williams provided a number of other responses to the various complaints made by Ms. Charles –

- (1) When she acted in the post of Manager ATS, from 1st August 2010 to 1st April 2011, Ms. Charles was indeed paid an acting allowance of half the difference between the salary of her post of Assistant Manager, ATS and the salary of the substantive holder of the post of Manager, ATS. Indeed, there were other occasions on which Ms. Charles acted in the office of another person and received an acting allowance accordingly.
- (2) In respect of the claim to a "back pay", Ms. Francette Williams insists that there was no such agreement with Ms. Charles. Ms. Francette Williams refutes the assertion that there is such an established practice. Indeed, she claims, there are myriad considerations that may determine the salary to be paid to an employment, including years of service.
- (3) Ms. Francette Williams refutes the assertion that taxes were improperly deducted from retirement benefits or that the Authority was obliged to register the pension plan with the Inland Revenue Department (IRD). Ms. Francette Williams explains that the contributions made to the pension plan by the Authority were taxable pursuant to section 31(d) of the Income Tax Act.

The trial

[22] At the trial of this matter, after discussion, it appeared to both the parties and the court that the issues in this claim could be disposed of by written submissions on the following matters –

- (1) Whether or not the document signed by Ms. Charles was a concluded agreement with the Airports Authority.
- (2) Even if so, where are there any terms on salary and other emoluments to be implied into the terms agreed and if so, what were those terms?
- (3) The taxation issues.

⁶ Witness Statement, Wendy Francette Williams filed on 15th May 2020 at paragraph 13

⁷ Ibid

[23] The parties were asked to file and exchange written submissions and authorities which they filed on 30th June 2023. Ms. Charles filed further written submissions and authorities on 26th July 2023 and the Airports Authority filed further responses on 10th August 2023. A further case management conference was conducted on 10th August 2023. Ms. Charles filed further submissions on 18th August 2023.

Submissions made by Ms. Charles

Salaries

[24] In her written submission filed on 30th June 2023, Ms. Charles' frontally challenged the payment of a salary of \$6800.00 on the basis that paying her a sum that was less than that received by her erstwhile colleague was illegal in that it contravened sections 3, 26(1) and 27 and 28 of the Employment Act. Sections 3, 26(1), 27 and 28 of that Act read as follows –

“3. Status of Act

(1) Any provision in an agreement shall be void to the extent that it seeks to exclude or in any way limits the operation of any provision of this Act to the detriment of the employee.

(2) Notwithstanding, where an employee has received any specific benefit under an agreement, he or she shall not be entitled to the same benefit under any provision of this Act.

26. Prohibition of discrimination

(1) No person shall discriminate against any employee on the grounds of race, colour, national extraction, social origin, religion, political opinion, sex, marital status, family responsibilities, age or disability, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.

(2) Subsection (1) does not preclude any provision, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals, including those who are disadvantaged on the grounds enumerated in subsection (1).

(3) A person who contravenes this section commits an offence and shall be liable, on summary conviction, to a fine not exceeding ten thousand dollars or to a term of imprisonment not exceeding three years, or to both such fine and imprisonment.

27. Equal pay for equal work

Every employer shall pay male and female employees' equal remuneration for work of equal value.

28. Remedies for infringement of rights

(1) An individual claiming an infringement of his or her rights contained in this Part may seek redress in the Court if that infringement cannot be redressed by way of the industrial relations framework.

(2) For the purposes of subsection (1) the Court may make such orders as may be necessary to ensure compliance with the provisions of this Part, including an order for reinstatement of an employee, if requested, the restoration to him or her of any benefit or advantage, and an order for the payment of compensation.”

[25] Ms. Charles’ position is that consistent with the terms of the Employment Act, the Authority was obliged to pay her the same salary as her predecessor in office. She submits that the –

“provision in the confirming letter seeking to limit the Claimant’s monthly salary to \$6800.00 per month, seeks to exclude or limit the operation of sections 26(1) and 27 of the Employment Act and by virtue of section 3(1) of the Act, the salary provision contained in the confirming letter is void and ought not to be confirmed to the detriment of the Claimant.”⁸

[26] Ms. Charles claims that she should have been paid the sum of \$8,271.50 per month along with all increases in salary based on that figure. She asks the court to find that she is entitled to -

“recover from the Defendant by way of unpaid salaries, the difference between the salary amount she was paid and what she should have been paid between April 1st 2011 and May 5th 2016) (when she was retired from the Public Service) had she been paid the correct starting salary in April 2011.”⁹

[27] Equally, Ms. Charles charges, at paragraph 50 et seq of her written submissions filed on 30th June 2023, that clause 14 of the agreement letter which asserted that it contained the entire agreement between the parties and supersedes all other agreements, should be deemed void. Ms. Charles opines that to hold that clause 14 is valid would render nugatory all previous agreements entered between the parties. These would necessarily include, among other things, other agreements on the Authority’s duty to pay pension and retirement benefits and to pay her the same salary increases paid to other employees. Ms. Charles submits that the court must find that there was, “... *of necessity, some collateral agreement, oral or written, that would have made provisions for other obligations of the Authority to the Defendant [sic], not set out in the April 11th 2011 Agreement.*”¹⁰

[28] Ms. Charles calculates her lost income over the years due to this illegality in the sum of \$126,341.12.

[29] Further on the question of salaries, Ms. Charles addresses the question of her “back pay”. On this score, Ms. Charles asks the court to construe the terms of the agreement to mean that that the parties intended that she would have been paid upon attaining the confirmed post of Manager, ATS in April 2011, a one off payment of a sum equal to one half the difference between the amount that she would have earned in her substantive post of Assistant Manager ATS and what she would have earned acting in the post of Manager, ATS during that period.

[30] In this regard, counsel for Ms. Charles makes the following legal arguments –

⁸ Ms. Charles’ submissions filed on 30th June 2023 at para. 48

⁹ Ibid at para. 38(iii).

¹⁰ Ibid at para.51

- (1) The court is required to consider what the agreement would reasonably have been understood to mean when its commercial purpose along with its background is considered. The case of **Arnold v Britton**¹¹ is presented as support for this submission.
- (2) While the court will not make a contract for the parties, it will imply a term if there arises an implication from the contract itself and the circumstances in which it was made that the parties intended such a term to be implied. **Hamlyn & Co. v Wood and Co**¹² is presented as authority for this view.
- (3) In all cases where a term is to be implied, the *“question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would necessarily be understood to mean.”*¹³

[31] Counsel makes the further point that –

“it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander, “could you please explain that again? Does that matter?”¹⁴

[32] Counsel concludes that the fact that Ms. Charles and other officers benefitted from the claimed practice in the past confirms that such a term was applicable, by implication, to her contract on the question of a “back pay”.

Pensions and other retirement benefits

[33] Ms. Charles’ opening salvo on this issue is that the 5 percent pension contributions from her employer to her pension fund should have been based on the salary of \$8271.50 that she should have been paid and any applicable increases thereto over the years rather than the contracted sum of \$6800.00 paid to her. In addition, the employer paid her a sum for her pension that was calculated at the interest rate of 3 percent per annum when the agreement contemplated that she would be paid at whatever interest rate the pension fund account attracted at the bank. Ms. Charles submits that she should be paid the interest rate of 4.2 percent, which she claims was the average of the various rates applied by the bank to the pension fund.

Taxation of the retirement benefits

[34] Ms. Charles relies on section 8 of the Grenada Airports Authority Act, Cap. 12 of the laws of Grenada (the Airports Authority Act) to argue that she remained, at all times, an employee of the

¹¹ [2015] UKSC 36

¹² [1891] 2 QB 488

¹³ Supra, note 8 at para. 61

¹⁴ Ibid at para. 62

government of Grenada on secondment to the Authority. Section 8 of the Grenada Airports Authority Act provides that –

“The Public Service Commission may, subject to such conditions as it thinks fit and with the consent of the Minister, approve the transfer of any public officer to the service of the Authority and any officer so transferred shall, in relation to pension, gratuity or other allowance, and concerning any rights as a public officer, be treated as continuing in the service of the Government.”

[35] Ms. Charles claims that the Authority had no legal basis to tax her retirement benefits since, by section 25 (1) (i) of the Income Tax Act, her retirement benefits are exempt from taxes. Section 25 (1) (i) of the Income Tax Act reads as follows –

“25. Exemption of income: general

- (1) There shall be exempt from income tax—
 - (i) any gratuity payable to a public officer on his or her retirement from service or to his or her legal personal representative on his or her death...”

[36] Mr. Charles argues that any lump sum payable to her should be considered a gratuity, to which section 25(1) (i) of the Income Tax applies. The argument made is that Ms. Charles would have foregone any gratuity or pension that she may have received if she was not seconded to the Authority. In this regard, the court is asked to note that besides the retirement payments made by the Authority to her, Ms. Charles does not receive a pension from the government of Grenada. Counsel argues that where an employer is found to have wrongfully deducted taxes from an employee’s salary, the employer is required to reimburse the employee those sums illegally deducted and remitted to the taxing officials¹⁵.

[37] Ms. Charles further contends that even if the Airports Authority had a right to deduct taxes from her retirement benefits, *“it ought not to have deducted any more than 10% tax on 25 percent of the Claimant’s benefits and any amounts deducted in excess thereof were improperly deducted and ought to be returned to the Claimant.”*¹⁶ For this argument, Ms. Charles relies on sections 25 (1) (m) and 48 (1) of the Income Tax Act. She states that -

“[B]y Section 48(1) of the said Act, the Comptroller of Inland Revenue may approve a pension fund established for the provision of retirement benefits for employees and their dependents as an approved pension fund in accordance with this section, the primary object of which shall be the provision of benefits by way of a pension to its members upon retirement. Under section 48 (1), an approved pension fund may provide for the computation of pension benefits to the extent of 25% of the pension. It follows that had the Defendant sought and obtained such approval from the Comptroller the Claimant would have been able to commute up to 25% of her retirement benefits without tax consequence. In that event, the Claimant only 75% of her benefits would have been taxable.”¹⁷

¹⁵ Re Ganonoque Light & Power Ltd and International Brotherhood of Electrical Workers, Local 636, the International Brotherhood of Electrical Workers, Local 636 (1996) 54 L.A.C (4th ed); 1996 Can LII 20371 (ON LA)

¹⁶ Supra note 8 at para. 82

¹⁷ Supra note 8 at para. 83

[38] Ms. Charles says that by failing to apply for section 48 approval of a pension fund, the Authority deprived her of the benefit of a section 25 (1) (m) reduction in taxes on her retirement benefits. She is claiming this sum as damages.

[39] In addition, Ms. Charles claims that her former employer had no legal basis to deduct taxes from the interest earned by her on her PSB and pension. Section 25 (1) (aa) of the Income Tax Act is presented as the basis for this claim. Section 25(1)(aa) exempts from income tax *“interest accruing from deposits to an individual who is resident or ordinarily resident in Grenada with effect from 31st March, 1995”*. Having been ordinarily resident in Grenada since 1995, interest earned on the sums deposited to the pension fund should not have been taxed since the income used to make said deposits would have already been taxed as income.

[40] Finally, Ms. Charles claims that incorrect rates of tax were applied to her retroactive salary. She explains that further to an email received from her former employer, she was paid the sum of \$27,199.12 as *“retroactive pay.”* Ms. Charles explains that this sum was taxed at a 2016 tax rate of 30%, *“...being 15% on the first \$24,000.00 and 30% on all income over \$24,000.00.”*¹⁸

[41] The incorrect payment on the retroactive salary occurred because –

- (1) Until December 2013, no taxes were deducted on the first \$60,000.00 of income earned.
- (2) The threshold was lowered to \$36,000.00 in January 2014 and as such, income tax was payable on all income earned above 36,0000.00.
- (3) The retroactive pay made to Ms. Charles covered the period 2010 to 2015 and was taxed as a lump sum earned in 2016.
- (4) The rate of 15% on all income earned in excess of \$60,000 was not in place in the period 2010 to 2013 and thus the rate utilized by the Airports Authority in 2016 was illegally applied.
- (5) The sum paid as retroactive pay for the period 2014 to 2015 was double taxed at 15% as this rate was already deducted when the income was earned during that period.

[42] Under this head of loss, Ms. Charles claims the sum of \$41,681.37.

Submissions made by the Airports Authority

[43] The Authority’s position is that the letter concluded an agreement binding on both sides as to the terms and conditions contained therein. In this context, the Authority points to the final paragraph of the letter which reads –

“The Authority trusts that you find the above in order, and require [sic] that you sign and return to the Human Resources Department the attached copy of this letter within seven (7) days **as your acceptance to the terms and conditions set out therein.**”¹⁹
(Authority’s bold emphasis)

[44] The Authority also adverts to clause 14 of the agreement to make the further point that the agreement set out duties, responsibilities, hours of employment, place of employment, medical benefits, holidays, sick days, requirement for continuing education, remuneration, periods of notice, requirements of confidentiality, and the circumstances under which Ms. Charles could be

¹⁸ Ibid at para. 90

¹⁹ Authority’s submissions filed on 30th June 2023 a para. 12

terminated. These provisions all together, the Authority claims, constituted a complete and enforceable agreement between the parties.

[45] The Authority therefore rejects Ms. Charles' complaint that -

- (1) Her signature on the document only represented her acceptance of the letter and was not meant to signal her acceptance of its contents.
- (2) She would not have signed an agreement to accept a salary that is less than the amount that she received while she was acting in the same position.
- (3) The fact that she was paid several increases in salary over the years means that the salary stated in her agreement with the Authority was not fixed or binding.

[46] The Authority further assails Ms. Charles' position by pointing out that at paragraph 20 of her witness statement, she states that "In the letter of confirmation regarding my promotion to the position of Manager, ATS, **which I accepted...**" (Authority's bold emphasis).²⁰ This statement, the Authority posits, indicates Ms. Charles' understanding that her appointment to the post of Manager, ATS, was subject to the terms and conditions recited in the agreement. The argument is that Ms. Charles cannot at the same time accept that the letter confirmed her appointment in the post of Manager ATS and also reject the terms and conditions set out in the same letter regarding her appointment. **Hyde v Wrench**²¹ is presented as support for the view that the offer was unequivocally accepted by Ms. Charles.

[47] The Authority also rejects the view that Ms. Charles can single out salary from the rest of the agreement and argue for a more favorable term on the issue. The question is, the Authority says, whether Ms. Charles accepted the agreement as signed or whether she rejected it. Once it is concluded that she accepted the express terms on salary, then a term cannot be implied to contradict the express term. **Irish Bank Resolution Corp Ltd (in Special Liquidation) v Camden Market Holdings Corp**²² is presented as support for this submission.

[48] Interestingly, the Authority submits, if Ms. Charles is now saying that she is not bound by the terms of the agreement, then she was never properly appointed to the post of Manager, ATS. She would have continued to hold the post of acting Manager, ATS. Her salary would have been paid at the salary paid to her as acting Manager, ATS and her retirement benefits should have been quantified as such.

[49] All in all, the Authority says, when Ms. Charles placed her signature on the agreement, it was not merely an acknowledgement of the receipt of the same. There were any number of ways in which she could have acknowledged receipt of the agreement. But rather, her signature signaled that she agreed with the contents of the document. It is of no moment that she did not tick a box on or underline a part of the document to say whether she agreed to the terms or otherwise.

[50] The Authority argues that the presumption in law is that one who signs a contract is said to have understood its terms and is therefore bound by its terms. The foregoing is excepted in clearly

²⁰ Ibid at para. 18

²¹ (1840) 49 ER 132

²² [2017] EWCA Civ 7

defined instances in the law, none of which are present in Ms. Charles' case. The authority presents **Lux Locations v Yida Zhang** ²³as support for this argument.

[51] Ms. Charles, the Authority says, was free to contract with the Authority in any manner in which she so chose. Having done so, she is bound by the choices borne of her free will. See **Photo Production Ltd v Securicor Transport Ltd**²⁴ and **Reniston Limited v Nedlands Overseas Inc**²⁵ for the Authority's posture that parties to a contract are free to determine what are the primary obligations of the same. Also, for the view that the court will not easily interfere with the clear terms of an agreement except in limited cases such as where some illegality, incapacity on the part of a party, mistake, duress, misrepresentation and/ or frustration is demonstrated.

Authority's arguments on "back pay"

[52] The Authority's short answer to the claimed "back pay" is that the implied term asserted by Ms. Charles does not exist. The Authority states its position thusly -

"The Defendant's position is that the proper interpretation of the alleged implied term to which the Claimant makes reference, if one does exist, is that the backpay is actually calculated by reference to the new salary of the employee who has just been promoted to the substantive position. It just so happens that in most cases ... the new salary of the freshly promoted employee is the same salary as the salary of the predecessor in the post."²⁶

[53] The Authority notes that the court will normally imply terms into a contract in a number of circumstances. The Authority cites a few examples such as where –

- (1) Where there is a general custom in contracts of that nature to include certain terms.
- (2) Where statute dictates that contracts of a certain nature should include such terms.
- (3) The term is necessary to give business efficacy to the agreement.
- (4) The term is so obvious that an officious bystander would concur that its inclusion goes without saying.

[54] In any event, says the Authority, the claimed implied clause must be capable of precise formulation. See **Shell UK v Lostock Garage Limited** ²⁷for this view. The Authority disputes that the allegedly implied clause is capable of precise formulation. The Authority explains the rationale for paying a "back pay" in some instances. It is said that –

"for all intents and purposes, the employee has held the substantive post which they have now been promoted to in all but name since the commencement of their period of acting in the position, and thus they ought not to be deprived of any moneys they would have been paid if they had simply been conformed in the position from the start instead of having had to act in the position."²⁸

²³[2023] UKPC 3

²⁴ [1980] A.C 827

²⁵ BVIHCMAP 2020/0016

²⁶ Supra note 19 at para. 70

²⁷ [1976] 1 WLR 1187

²⁸ Authority's submissions filed on 30th June at para. 79

[55] It is for this reason, the Authority explains, a person is paid the difference between the salary that they were paid when they were acting and their new salary when they were confirmed, if that new salary is higher than the salary that they were paid when they were acting. If the new salary is less, then they would not have lost anything while acting and as such a “back pay” is not required. The Authority posits that both the formulation that it proposes and the one relied on by Ms. Charles are both reasonable articulations of the clause. In such a case, the court must find that the clause in question is too imprecise to be accepted as one to be implied into the contract.

[56] The Authority relies on dicta in the cases of **Southern Foundries (1926) Ltd v Shirlaw**²⁹ and **AG of Belize v Belize Telecoms Ltd**³⁰ to make the point that the term that Ms. Charles seeks to import into the contract is not one that is necessary to give business efficacy to the agreement and is not one that one can say that is so plainly obvious that it can be said that the parties intended it to be a term of the agreement. The Authority accuses Ms. Charles of seeking to improve the terms of the agreement on the question of salary.

The discrimination point

[57] On the 10th August 2023, the Authority filed further submissions addressing Ms. Charles’ submissions on the Employment Act. In short, the Authority’s position is that Ms. Charles is bound by her pleadings and that nowhere in her pleadings did she raise the question of a breach of the Employment Act. Rather, the issue of the Employment Act seems to have made its first appearance in her submissions filed on 30th June 2023. The Authority insists that the pleaded case was one that focused on a purportedly “established practice”, a legitimate expectation based on that practice, implied terms and signing the contract by mistake. The Authority casts Ms. Charles’ reliance on the Employment Act as an abuse of the court’s process. The Authority presents **George W. Bennett Bryson’s and Co. v George Purcell**³¹ and **Charmaine Bernard v Ramesh Seebalack**³² in support of the argument that Ms. Charles is bound by her pleadings.

[58] In any event, the Authority continues, even if the court permits the late addition of the claimed relief, the arguments on the Employment Act do not assist Ms. Charles for the following reasons

–

- (1) Section 28(1) of the Employment Act requires that a person aggrieved by an alleged breach of the provisions of the Employment Act may seek redress in the courts if the breach cannot be resolved by way of the industrial relations framework. The Authority says that Ms. Charles has not pursued a resolution of her assertion of breach of the Employment Act by way of an industrial relations dispute resolution mechanism. Equally, she has not shown

²⁹ [1939] 2 KB 206

³⁰ [2009] UKPC 10. See also *Kemilia Hazellwood – Bruce v St. Vincent and the Grenadines Public Union* SVGHCv 2017/0098 for the view that Ms. Charles was required to plead and particularize her claims of discrimination.

³¹ [2018] ESSCJ 39

³² (199) E ALL ER 775

why her choice of the court is more suitable than the industrial relations dispute resolution mechanism.

- (2) Ms. Charles is required to show on allegations of discrimination based on sex, that the only relevant or material differences between herself and alleged comparators are that of sex or sex specific characteristics. **Cordell v Foreign and Commonwealth Office** ³³is cited as support for this submission. Indeed, the point is stressed by the Authority that two employees of varying skills, experience, qualifications, tenure, seniority and other factors may be able to negotiate differing salaries with their employers. If it turns out that they are of the same gender, the provisions of the Employment Act do not automatically apply to give them the same salary since different factors besides sex may have informed the basis on which the parties arrived at the salary to be paid to each employee. More fundamentally, having not pleaded or set out a case on the pleadings or in her witness statement to show that the only or only material difference between her and her predecessor in office is gender, the Authority argues that this contention must fail.
- (3) Even the comparators presented by Ms. Charles in her submissions in the persons of Maureen Japal, Hernel Pancho and Alana Paul, all prove that there was no sex-based discrimination in the Authority's practices since these persons, all women, were all paid the same salary as their predecessors in office.

Further submissions made by Ms. Charles on discrimination

[59] On 18th August 2023, Ms. Charles filed further submissions in response to the Authority's submissions on her discrimination claims. In this regard, Ms. Charles' response is that she has sufficiently pleaded her case about discrimination on grounds of sex. For the first time, she makes the point that if the court does not find that she sufficiently canvassed a claim of discrimination on grounds of sex, the court can, in any event, consider whether she was discriminated "against in respect of the **terms and conditions of her employment** or in relation to any **other matter arising out of the employment relationship**."³⁴ (Ms. Charles' emphasis). Ms. Charles says that the latter finding is permissible by the terms of section 26(1) of the Employment Act. On this score, she explains that the evidence shows that she was treated differently than her former colleague in the office of ATC, Manager.

[60] Finally, Ms. Charles says that she was not paid equal pay for equal work.

Analysis and discussion

[61] The myriad contentions back and forth on this claim can be subsumed into the following issues

—

- (1) Was there a concluded contract?
- (2) If there was a concluded contract, was there, in any event, a term or terms to be implied on salaries?

³³ UKEAT 0016/11/SM

³⁴ Further submissions filed on 18th August 2023 at para.

- (3) If there was a concluded contract, whether the provisions on salaries could be set aside on the allegations of discrimination?
- (4) Were rates of interest and taxes properly applied in all the circumstances?

Concluded agreement or not?

[62] The multiple factual and legal arguments presented by the parties on this point have been fulsomely recited above. For my part, I find it difficult to agree with Ms. Charles that there was not a concluded agreement on the terms set out in the 10th April, 2011 letter. As was rightly pointed out by the Authority, the agreement, in detailed fashion, outlined terms for the engagement which included the duties, responsibilities, hours of employment, place of employment, medical benefits, holidays, sick days, requirement for continuing education, remuneration, periods of notice, requirements of confidentiality, and the circumstances under which Ms. Charles could be terminated. By signing these terms and conditions, Ms. Charles is assumed to have understood and agreed to the same. As was explained in **Lux Locations** –

“It is a basic rule of the common law that a person who signs a contractual document is bound by its terms whether he or she has read or understood the document or not. That is so even if the person concerned is a foreigner who cannot read English: *The Luna* [1920] P 22. The justification for the rule is the fundamental importance for the orderly conduct of business of being able to treat a person’s signature as proof of their consent without having to inquire into the person’s state of mind or other circumstances at the time when the document was signed.”³⁵

[63] Without more therefore, it is presumed that when Ms. Charles signed the agreement, she did so with comprehension and with the intention of being bound by it. The terms of the agreement are clearly drafted and there is no claim that there was any obfuscation or confusion about what it says. Clause 5.0 of the agreement on salary (which is in dispute in this claim) reads –

“Remuneration and other Benefits
The remuneration for the Air Services Manager shall be as follow [sic]
Fixed salary \$6800.00
Transportation allowance 350.00
Telephone allowance 53.00”

[64] I do not see any confusion possible with what is said in clause 5.0. Ms. Charles’ claims do not satisfactorily explain why she went ahead and signed an agreement containing this express provision on salary. As was instructively noted by her Ladyship Dame Janice Perreira Chief Justice, in **Reniston Limited v Nedlands Overseas Inc**,

“The general rule is now well-established that the court will not interfere with the clear terms of a contract or relieve a contracting party from the terms of its agreement, save in limited circumstances, such as where there is some element of illegality, incapacity

³⁵ [2023] UKPC3 at para.79

on the part of a party to the contract, mistake, duress, misrepresentation and frustration.”³⁶

[65] In her statement of claim at paragraph 4, Ms. Charles asserts that she mistakenly signed the letter containing the agreement. In respect of this assertion, there are no particulars of the mistake. In her witness statement she explains that there was no way that she would accept a salary that was less than that of her predecessor. Additionally, in her witness statement, several reasons are given for the contention that the clause should not apply, including matters of implied terms and past practices of the Authority. Breach of the Employment Act is canvassed in her closing submissions. But I observe that Ms. Charles does not provide any satisfactory reasons to underpin her claims that she mistakenly signed the agreement.

[66] Where mistake is concerned, it is said that the law recognizes 3 types of mistakes –

“(a) common mistake – where the mistake is shared by both parties, is fundamental and directly affects the basic definition of what the parties are contracting for; (b) mutual mistake – where the parties are at cross- purposes with one another; and (c) unilateral mistake – where one party is mistaken and the other knows or ought to have known of the mistake.”³⁷

[67] Any cursory examination of the contentions in this claim does not expose any mistake of the sort recognized by the law. I think that what is said by former Chief Justice of our court, Adrian Saunders CJ in **Hotel de Health (Caribbean) Inc et al v Webster et al**³⁸, referencing **The Olympic Pride**³⁹ is quite apposite to the facts here –

“The Court is reluctant to allow a party of full capacity who has signed a document with opportunity of inspection, to say afterwards that it is not what he meant. Otherwise, certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre- contractual negotiations. These considerations apply with particular force in the field of commerce, where certainty is so important.”

[68] In this case, the complaint does not relate to pre-contractual deliberations, but the learning recited in **Hotel De Health** is nonetheless more than persuasive. The law will not permit a person who, with legal capacity, signs a contract to come afterwards to lament its terms and obligations except in quite limited instances.

[69] Before departing this issue, I must address Ms. Charles’ claim that there was no concluded agreement because the Authority acknowledged and paid retroactive salary due to her from April 2011 to 2016 when she retired. Ms. Charles has accepted that these retroactive payments were in respect of salary increases paid by the Authority to all its workers over the period in question. It therefore, euphemistically speaking, requires some perambulating in strained logic if one is to deduce, as Ms. Charles asserts, that these payments were an acknowledgment by the

³⁶ BVIHCVMAP 2020/0016 at para.14

³⁷ *Theresa Plummer v Dennis Mangal et al* SLUHCV 2017/0552

³⁸ ANGHCVAP 2003/0008 at para. 24

³⁹ (1980) 2 Lloyd’s Law Reports 68 at 73

Authority that the parties did not have a concluded agreement either generally or specifically on the question of salary. I find that there is nothing in the claim presented by Ms. Charles that urges this court to find that she did not voluntarily enter into this agreement with full comprehension of its terms or that the parties ought not to be bound by the terms of the same.

[70] I will of course address below Ms. Charles' view that implied terms on salaries should be attached to the agreement and that the agreement as a whole or on the issue of salary should be voided for reasons of breach of the Employment Act.

Implied term

[71] Ms. Charles claims that even if there is a concluded agreement with the Authority, the following 2 clauses are, by implication, applicable to the same –

- (1) That it was implied from previous practice that she would be paid the same salary as the previous office holder.
- (2) That when she was confirmed in the post of Manager, ATS, she would be paid retroactive pay or "back pay" comprising the difference between the salary she received while she was acted in the post of Manager, ATS and the salary paid to her predecessor in office.

[72] It is quite a well-accepted legal posture that in addition to the express terms of an agreement, there are specific circumstances in which the law may imply terms into an agreement. Terms may be implied for instance by way of custom of trade or the dealings of the parties, by statute or as a matter of the facts of a particular case. This part of the discourse focuses on Ms. Charles' assertions in respect of the latter form in which terms may be said to be implied in an agreement. In this regard, where implication in fact is concerned, Halsbury Laws of England may be said to have articulated a useful synopsis of the law based on Lord Simon's admonitions in **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** ⁴⁰. The learned authors note that –

"A term may be implied 'in fact' where it is 'necessary' to give effect to the intention of the parties. The courts have developed a number of tests and may take into account a number of factors to determine whether a term of the contract may be implied on this basis. It has been said that: the term in question must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract"⁴¹

[73] Elsewhere the issue has been discussed in this manner –

"In implying terms in fact, the intention of the parties (objectively ascertained) is sought, 'collected from the words of the agreement and the surrounding circumstances'. It is emphasised that the court will not 'improve the contract which the parties have made for themselves' and traditionally the search for the parties' intention has occurred within

⁴⁰ (1978) 52 ALJR 20 at 26

⁴¹ Halsbury's Laws of England (2019), Volume 22, at para. 5

restricted boundaries, through the use of a 'stringent' test or tests (the 'business efficacy test' and the 'officious bystander test'). These tests have confined the search for the parties' intention to its least disputable area and have thus provided some assurance that the courts are not rewriting the parties' bargain."⁴²

[74] The learning indicates several other factors that the courts may consider in determining whether a purported implied term was intended. Halsbury's observes that –

“There is no room for an implied term which is inconsistent with an express term of the contract. The courts are also reluctant to imply a term where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them; or where it is essential that contracts of a particular type should operate in accordance with the terms which appear on their face, for example the financial undertakings used in connection with international commerce; or where the contract is novel or carries particular risk. The term to be implied must not be too vague, and it must be possible to formulate its content with adequate precision. It has been said that it is impossible to imply terms into a unilateral contract on the basis that since such an implied term would impose obligations on both parties, it would destroy the unilateral nature of the contract, but such reasoning does not preclude the implication of a term which imposes an obligation only on the promisor, nor a term which imposes an obligation on the promisee in cases in which an originally unilateral contract becomes bilateral in the course of its performance.”⁴³

[75] The authors of the **Common Law Series on Contracts** offer these thoughts on some of the factors that the court may consider when determining whether an implied term should apply in fact –

“Such factors indicate that a particular version of the term is not so obvious that it goes without saying or necessary to give business efficacy to the contract, and the problems of trying to deal with these objections were noted in *Ashmore v Corp'n of Lloyds* (No 2)⁴⁵:

"In summary, the original way in which the implied [term] was pleaded was too wide to be reasonable, let alone a matter of necessity. This was recognised by the plaintiff's counsel and successive attempts were made to overcome these difficulties. These inevitably became more complex and less likely to satisfy the officious bystander test. There is no possibility of both parties answering the question posed ... with an immediate “yes of course, that is so obvious it goes without saying”."

More simply, and more broadly, there is an obvious problem in trying to argue that a term should be implied on the basis of the parties' intention if the content of the term is not clear. Lord Bingham MR observed in *Philips Electronics Grand Public SA v British Sky Broadcasting Ltd*

"the question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the

⁴² The Law of Contract (Common Law Series), Terms implied in fact, para. 3.19

⁴³ Supra note 40 at para. 171

court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong..."

The existence of detailed express terms, properly construed, will also militate against the implication of a term. In those cases there is no 'obvious lacuna which the court can fill in confidence that it is doing no more than giving effect to what the parties intended'. That is particularly the case if there is a term, or terms, dealing with the area in relation to which it is claimed that there should be an implied term. In contrast, it has been viewed as strongly favouring an implication that the express terms do not provide a complete contract, to the extent that such a factor may seem at times to be referred to as a separate basis of implication. However, in *Society of Lloyd's v Clementson* Steyn LJ made the point that:

"It is not analytically right to say there is an independent ... category [of] incomplete contracts, cases of so-called incomplete contracts are covered by principles governing terms implied by fact or by law."

The situation may also be such that the incompleteness of the contract may not indicate that the parties intended there to be further terms. Where there was a carefully negotiated collective agreement across a broad front, representing a compromise between the objectives of employer and employee it was said:

"should any topic be left uncovered by an agreement of that kind, the natural inference ... is not that there has been an omission so obvious as to require judicial correction, but rather that the topic was omitted advisedly from the terms of the agreement on the ground that it was too controversial or too complicated to justify any variation of the main terms of the agreement to take account of it."

More broadly, the point has been made that:

"If the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur."⁴⁴

[76] In my view the foregoing exposition of law on the issue does not lead to the conclusion that either proposed implied term is present on Ms. Charles' claim.

[77] Regarding the claim that the clause on salary should be read to suggest that she should be paid the same salary as her predecessor, the extensive learning recited above precludes such a finding for the following reasons –

- (1) There is an express clause on the remuneration to be paid to Ms. Charles. Clause 5.0 recited above in this judgment appears to be a complete code on this issue. In **Marks v Spencer**⁴⁵, Lord Neuberger noted that is a "cardinal rule" that no term should be implied in an agreement where that purported implied term contradicts an express term. His Lordship opined that –

"In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has

⁴⁴ Supra, note 41 at para.3.20

⁴⁵ [2015] UKSC 72

decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term... Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied.”⁴⁶

- (2) It does not take much effort to form the view that clause 5.0 is an express term that, on its face, contains no lack of clarity on its intention. But Ms. Charles explains that notwithstanding what clause 5.0 says, based on previous practice, which was in the past applied to her on other appointments, a term should be implied that she should have been paid the same salary as her predecessor in the office of Manager, ATS. In addition to what I have stated above, I find that this argument fails for several reasons –
- (a) The proposed implied term fails the business efficacy and the officious bystander tests. On the first test, Ms. Charles has not shown that clause 5.0 will not work if it is not read in the manner that she suggests. In other words, she has not shown that it would be necessary to read the clause in the manner that she suggests in order to lend business efficacy to the agreement on salary.
 - (b) In this regard, the point was made by the Authority, and I entirely agree with it, that there could be several factors that govern the basis on which parties agree to costs of services or in this case, the salary to be paid for services. I have made the point above that this was a contract freely agreed between the parties. Ms. Charles has not shown that it was not an act of her own free will and understanding. There was nothing preventing Ms. Charles from demanding and insisting on the same salary as her predecessor in office before she entered this agreement. Indeed, she makes the point that several of her colleagues, whether by themselves or through the union argued or fought for and received the salary of their erstwhile colleagues. I find that Ms. Charles has failed to demonstrate that clause 5.0 requires the proposed implied clause to give efficacy to the intention of the parties and therefore the proposed clause is rejected.
 - (c) On the second test, I cannot see how on the facts presented by Ms. Charles, the officious bystander would form the view and that it would go without saying that the parties intended that, notwithstanding what they expressly agreed on salary, that Ms. Charles would be paid the salary of her predecessor in office. I am not saying that where express clauses of this sort are concerned, in some cases an implied term cannot be found to apply. Indeed, the learning extracted and recited above indicates that the process of interpreting what was intended may lead one to revisit the interpretation to be given to an express clause once it is decided to imply a term. See for instance Lord Hoffman in **A-G of Belize v Belize Telecom Ltd**⁴⁷.

⁴⁶ [2015] UKSC 72 at para. 28

⁴⁷ [2009] UKPC 10

- (3) Lord Neuberger makes the point in **Marks and Spencer** that –

“I accept Lord Carnwath’s point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.”⁴⁸

- (4) I do not see any basis in the face of the understanding and interpretation of clause 5.0 to form the view that the officious bystander would say that the implied term proposed in this case was intended.
- (5) Further, in any event, I do not see in the case presented by Ms. Charles the obvious and unassailable evidence that the practice she relies on does exist. In fact, what the evidence presented by Ms. Charles suggests is that the Authority appears to pay its managers or senior officers salaries based on factors that are not present before this court. Indeed, the Authority says in its evidence that a number of factors may impact the amount of the salary that the Authority offers to a manager. The learning recited above suggests that the practice must be one that is capable of precise formulation and articulation for it to be deemed an implied term. Ms. Charles wishes the court to form the view that the Authority’s consistent method of paying salary to its managers or supervisors consisted of a practice that the person ascending to those offices **IS** paid the salary of their predecessor in office. I do not agree that the facts suggest that the practice is one of precise formulation and articulation as stated by Ms. Charles.
- (6) Indeed, her own evidence demonstrates that on several occasions, office holders were only paid the salary of previous office holders after protestations and interventions by their union. See the cases of Ms. Paul and Ms. Panchoo who were only paid the same salary as their predecessors in office after intervention by and negotiations with their unions. It cannot be said that in the face of such evidence that the alleged practice was sufficiently defined and consistently followed for the court to say that it in fact did exist in the manner alleged by Ms. Charles.

[78] On the question of the practice regarding the “back pay” and that a term should thereby be implied, I equally find that, for the reasons set out above, the alleged implied term does not apply. On this issue, it is indeed quite telling that there are 2 bases on which a “back pay” can be said to apply, if at all. I agree with the Authority that it seems quite plausible that the Authority would pay someone who ascends to an office in which they were acting, the difference between the remuneration they received while they were acting therein and the salary they are paid once they were confirmed in the post where that latter salary is more than the salary they received while acting. The logic is that for all intents and purposes, they held that office from the time of

⁴⁸ [2015] UKSC 72 at para. 28

acting therein. If the person agrees to a salary that is less than the sum which they were paid while they were acting, then there is no “back pay” to pay them.

[79] This is precisely what happened in Ms. Charles’ case. She agreed to a salary that was less than the sum that she received while acting (also less than the sum paid to her predecessor in office). There was no difference in salary due to her in such circumstances. It was only in the instance that she was paid a salary that was more than the salary paid to her while she was acting, whether it was based on a salary that was paid to her predecessor in office or otherwise, that a term could be implied, if at all, that the Authority was duty bound to pay her the difference between the salary that she was paid while acting and the salary that she received when confirmed in the post. For these additional reasons, I dismiss the claim for a “back pay”.

Discrimination

[80] Ms. Charles’ case, as set out in her written submissions, is that the term on salaries should be set aside on the grounds of discrimination. Her case on this aspect has been recited fulsomely above. I do not think that the relief sought could be granted for the reasons stated below.

[81] It might assist this part of the discourse to highlight aspects of the journey on the discrimination point being made in this case-

- (1) In her statement of claim at paragraph 6, Ms. Charles pleaded that “...*contrary to the Claimant’s legitimate expectation she was discriminated against as there were persons in other acting positions for the same period as the Claimant who were paid in accordance with the established practice and procedure of the Defendant mentioned above and the Claimant has therefore suffered loss...*”.
- (2) The “established practice and procedure” mentioned at paragraph 6 of the statement of claim is in respect of an alleged practice to pay the person confirmed in a post, the same salary as their predecessor in office along with a “back pay”. The details of both alleged practices were addressed above in this judgment.
- (3) The Authority, responded to paragraph 6 of the statement of claim by stating in its defence that, among other things, Ms. Charles had not made out on her claim, the basis on which she asserted that she was entitled to a “bigger salary”. See paragraph 3(c) of the defence.
- (4) Ms’ Charles’ replied to the Authority’s defence addressed paragraph 3(c) of the defence by reiterating the claim that she held a legitimate expectation to be paid the salary of the previous holder of the office of Manager, ATS.
- (5) Ms. Charles’ witness statement outlined the following facts –
 - (a) At paragraph 5 the witness statement spoke of the established practice to pay the claimed “back pay”.
 - (b) At paragraph 6 the witness statement spoke of an instance where Ms. Charles was paid the claimed back pay.
 - (c) At paragraphs 8 to 9 the witness statement spoke of the Authority’s’ failure to pay the “back pay” and Ms. Charles’ efforts to receive same.
 - (d) At paragraphs 10 to 17 the witness statement spoke of her efforts to be paid the difference in salary, instances where other workers were paid the same salary as

previous office holders and paid the claimed “back pay” and her threats to take the matter to court.

- (e) The rest of the paragraphs of the witness statement spell out her further interactions with the Authority on her above stated claims and matters related to the issues of taxation.
- (6) In her closing submissions filed on 30th June 2023, Ms. Charles argued, for the first time, that her agreement with the Authority was void because it contravened the terms of the Employment Act. This allegation was fleshed out in paragraphs 40 et seq of the submissions where sections 3, 26, 27 and 28 of the Employment Act recited above in this judgment were relied on.
- [82] For my part, I cannot agree with Ms. Charles that our procedural rules on pleadings and the case law expounding the approach to pleadings permit what has transpired on this claim. I start with CPR 8.7 which requires a claimant to “*include in the claim form or statement of claim a statement of all the facts on which the claimant relies.*”
- [83] The case law from our courts and beyond has given salutary admonitions on the manner in which CPR 8.7 and similar rules are to be interpreted and applied. In **Saint Lucia Motor and General Insurance Co. Ltd v Modeste**⁴⁹, her Ladyship Dame Janice Perreira, Chief Justice made the following observation with respect to pleading a claim of illegality –

“Whilst I agree with counsel for the Insurer that illegality is a well-recognized defence, it must nevertheless be properly pleaded. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* Saville LJ said that **the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it.** This was a pre CPR case, but the principle nonetheless essentially remains intact under the current CPR regime. This was recognized and accepted by this court in **East Caribbean Flour Mills**⁵⁰ where Barrow JA cited with approval the dictum of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**⁵¹ which stated the current position thus:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should**

⁴⁹ SLUHCVP 2009/0008 at para. 19

⁵⁰ SVGHCVP 2006/0012

⁵¹ [1993] 3 All ER 775 792-793

make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.

I consider that it must also be remembered that normally a party would not have prior sight of an opposing party's witness statement until he/she has no doubt prepared and filed his/her own. CPR 29.7 speaks to the exchange of witness statements, and for filing witness statements in a sealed envelope where the opposing party is not yet ready to exchange. In my view, it would be grossly unfair and embarrassing to a party to learn of the factual basis on which a mere allegation of fraud or dishonesty is made on the pleading, only at the time when a witness statement is exchanged. I do not consider that the statement of Lord Woolf in *McPhilemy* and referred to by Lord Hope in *Three Rivers* and adopted in *East Caribbean Flour Mills* is to be understood in any other way than to make clear that **the factual basis underpinning the allegation of fraud or dishonesty and the like, must be set out in the pleading; even if the details of those averments may properly be left to be fleshed out in the witness statements.** The instant case is simply devoid of any factual basis for making the averment and cannot in the circumstances be entertained.” (Bold emphasis mine)

[84] In *East Caribbean Flour Mills*⁵² Barrow JA made the point that –

“Lord Hope’s reproduction and approval of the exposition by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships’ views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, **is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The “pleadings should make clear the general nature of the case,”** in Lord Woolf’s words, which again I emphasize. **To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose.** But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive number of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case.” (Bold emphasis mine).

[85] Recently, our Court of Appeal again reemphasized the importance of pleadings. In *The National Lotteries Authority v Jerome De Roche*⁵³, Ward JA, had this to say:--

“The claimant must plead the essential facts that constitute its case, and **those facts must be sufficient to establish a cause of action and to enable the other side to know the case it has to meet in sufficient detail.** CPR 8.7A prohibits reliance on allegations or facts not pleaded unless the judge gives permission, or the parties agree.” (Bold emphasis mine).

[86] At paragraph 6 of her statement of claim, Ms. Charles claims that the Authority discriminated against her when it failed to abide by prior practice that she “legitimately expected” to be

⁵² SVGHCVP 2006/0012

⁵³ GDAHCVAP2021/0025

followed when she was appointed to the post of Manager, ATS. This was the case that was fleshed out in her witness statement. I am of the view that it was an egregious and fatal procedural failure to wait until closing submissions were filed in June 2023 to argue that the agreement is void for violating the Employment Act. The specific contention on that score is that the agreement violated the Employment Act on grounds of discrimination based on sex.

[87] By way of example of the difficulties presented by Ms. Charles' approach, it is noted that section 26 of the Employment Act outlines several instances in which discrimination is prohibited. The section speaks of discrimination on grounds of "*race, colour, national extraction, social origin, religion, political opinion, sex, marital status, family responsibilities, age or disability, in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*"

[88] The Privy Council made the following observation in the case of **Bhagwandeem v Attorney General**⁵⁴ –

"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

[89] Although referencing the constitutional provisions on equality of treatment set out in the Trinidad and Tobago constitution, the guidance is equally of forceful relevance to an enquiry into discrimination under the provisions of the Employment Act. Ellis J. in **Leonard Fahie v Attorney General**⁵⁵, also a constitutional claim alleging discrimination, eloquently offered the following salient observation –

"The Respondents' evidence would therefore have to demonstrate and prove the following: 1. That they were in a similar position to persons of comparable circumstances (the comparator test) - The situations must be comparable, analogous, or broadly similar, but need not be identical. Any differences between them must be material to the difference in treatment; and 2. That they were treated differently from those other person(s)."

[90] On this claim, other than an allegation that (1) her predecessor in office is a male and that she is a female and; (2) that she was paid a lower salary than he was paid, there are no other material particulars to aid an assessment of discrimination on the basis of sex. To be fair to Ms. Charles, she did allude in her evidence to the cases of Maureen Japal, Glen Forsyth, Alana Paul and Hernel Panchoo who were paid the same salaries as their predecessor in office. They are 2 material matters to observe on this score –

⁵⁴ [2004] UKPC 21 at para. 18

⁵⁵ BVIHCV2012/0314 at para. 36

- (1) These persons were presented in support of a claim made by Ms. Charles that she was discriminated against when the Authority failed to follow an alleged practice that Ms. Charles' legitimately expected to be followed in her case. At no point in any of the statements of case were these persons presented in support of claim of discrimination on the grounds of sex. The closing submissions filed on 30th June 2023 and 18th August 2023 clearly demonstrate that, for the first time, an entirely different claim of discrimination on the grounds of sex was being pursued.
- (2) Even if the court is to permit Ms. Charles to pursue the claim of discrimination on the grounds of sex that she now presents in her closing submissions, it is difficult to see how the employees presented could be used as helpful comparators in the sense highlighted in **Bhagwandeem** or **Fahie**. For one thing, since the claim is one of discrimination on grounds of sex, the only comparator appropriate to her case would be Mr. Glen Forsyth who is the only male comparator. The comparison would end there though since Mr. Forsyth and Ms. Charles were appointed to different offices and their appointments may have been subject to different considerations as the Authority has explained. In any event, it is for Ms. Charles, in a case of discrimination, to present the type of evidence that meets the criteria set out in the law as explained in **Bhagwandeem** and **Fahie**. A defendant and by extension, the court ought to be presented with this material on a claim of discrimination to assess that the comparators are similar or are mainly similar and that the only or main distinguishing feature exposed by the comparison is the claimant's sex.

[91] It seems incontrovertible then, that a claimant who wishes to charge that the employer acted in a discriminatory manner would be duty bound to: (1) identify in the claim the ground(s) on which it is said that the employer acted improperly and: (2) present sufficient facts on his or her claim to mark out the basis for such a claim. The employer would then be in a good position to answer the charge in a defence if it so wishes to do. As the courts have ruled consistently, there is no need to give extensive particulars of the assertion of discrimination in the statement of claim. Particulars could be expansively outlined in the witness statement. However, at a most basal level, the claimant should let the defendants know not only that he or she is claiming discrimination but also the grounds on which one is said to be discriminated against and some basic facts on which it is claimed that the cited discrimination occurred. It cannot be the case that the claimant waits until after the claim is filed and witness statements are filed and exchanged to point out the basis on which the discrimination is claimed and then the defendant is constrained to respond.

[92] I must add, and not parenthetically I think, that even if Ms. Charles reflectively reconsidered the basis of her claim after statements of case and witness statement were filed and exchanged, then permission to amend her claim to include the new causes of action would have been the advisable course to pursue. As matters now lie though, the learning presented above elucidates that the approach taken by Ms. Charles is patently impermissible. She did not present a claim for a violation of the Employment Act on the ground of discrimination on the basis of sex in her statement of claim or flesh one out in her witness statement and as such she is precluded from pursuing such a claim. The request for relief on the ground of discrimination must be and is hereby refused for this reason and the reasons stated above.

The taxes issue

[93] Ms. Charles raised several complaints about improper deduction of taxes which were recited above in this judgment. I will address each in turn-

- (1) There is no basis to claim that all the retirement benefits should be recalculated based on the salary that the Authority paid to Ms. Charles' former colleague in the office of Manager, ATS since a claim for payment of that salary has not been granted for the reasons set out above in this judgment.
- (2) The claim that the pension should be paid at 4% was addressed at the further case management held on 10th August 2023. The parties were asked to approach the banks where the pension funds were invested to ascertain the average rate of investments over the years. Ms. Charles filed the further submissions ordered on the issue on 18th August 2023 which show the average rate over the period that Ms. Charles made payments to be 4.2%. No objections were raised by the Authority. As such the Authority is to pay Ms. Charles any difference in the sum paid by way of retirement benefits at the rate of 3% per annum as opposed to 4.2%.
- (3) There is no basis in law for the claim that Ms. Charles' retirement benefits should be treated as gratuity to which section 25 (1)(i) of the Income Tax Act should apply. While it is correct that section 8 of the Airports Authority Act states that a seconded employee should not lose benefits by reason of the transfer to the Authority, there is nothing on the evidence to demonstrate that the pension paid to Ms. Charles should be treated as gratuity. Blacks' Law Dictionary explains the term gratuity or gratuitous as an act "*done or performed without obligation to do so; given without consideration...*". A pension is usually a sum or sums paid as retirement benefit due from the employer to the employee. In this latter context, a pension is usually a sum invested by the employer (often with contributions by the employee) which sum is guaranteed to the employee on retirement. Ms. Charles' case falls within the latter context. The pension disbursements given to Ms. Charles by the Authority were made further to an agreed retirement scheme to which both employer and employee were contractually obligated to make contributions. It was not a gratuitous payment made by the Authority and cannot be rightly construed as gratuity generally or for the purposes of section 25(1) (i) of the Income Tax Act. In fact, section 8 of the Airports Authority Act advises that a civil servant who is transferred or seconded like Ms. Charles should not be affected in their "pension, gratuity or other allowance...". Section 8 itself therefore makes differential reference to these terms and as such precludes the approach requested by Ms. Charles.
- (4) Instructively, section 25(1) of the Income Tax Act on which Ms. Charles also relies makes a distinction between exemptions in cases of gratuity and pension. Even more impactful on this discourse is the fact that it is only in the year 2017 that government exempted from taxation, "*any income accrued to a person as a result of his or her years of employment by way of pension or a lump sum payment.*"⁵⁶ The point is that pensions throughout section 25

⁵⁶ Income Tax (Amendment) Act, No. 1 of 2017

are treated differently from gratuity. It was for Ms. Charles to show that she was in fact paid a gratuity, to which section 25(1) (i) applies. She has failed to do so.

- (5) Improper tax deductions from contributions made by Ms. Charles to the pension fund and interest earned on the PSB and the pension since that money was already taxed as income. The Authority has explained that Ms. Charles' contributions and other interest paid were not taxed as she alleges. Ms. Charles has not shown how the detailed breakdown given by the Authority on this issue highlights that such taxes were indeed deducted.
- (6) There is then the allegation that less in taxes could have been deducted in taxes from Ms. Charles' pension if the Authority had registered the pension plan with the Comptroller of Inland Revenue as an approved plan within the terms of section 48 of the Income Tax Act. This complaint is dismissed as being raised without basis. Ms. Charles has not shown on the provisions of the Income Tax Act or the agreement that the Authority was obliged to take the step of registering the pension plan as an approved plan. That she may have benefited from a more favorable tax rate on her retirement benefits if the pension plan was so registered does not, without more, enlarge that possibility into a right that may be vindicated by seeking redress for alleged breaches thereof.
- (7) Finally, Ms. Charles claims that the wrong tax rates were applied to retroactive salary payments made for the period 2011 to 2016. It is clear that the Authority applied the 2016 tax threshold to these payments. The Authority is to recalculate and remit these payments to Ms. Charles within 30 days of this judgment.

Conclusion

[94] The claims for the relief sought by Ms. Charles are dismissed except to say that –

- (1) The Authority is to pay Ms. Charles any difference in the sum paid to her pension at the rate of 3% per annum as opposed to 4.2%.
- (2) The Authority is to recalculate the retroactive salary payments to take account of the income tax rates existing between 2011 to 2016.
- (3) The Authority must pay Ms. Charles any sums that may be due to her further to the terms of paragraphs (1) and (2) within 30 days of this judgment.

[95] Ms. Charles has been partially successful on her claim. She is awarded costs of \$3000.00.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar