

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: SLUHCV2014/0623

BETWEEN:

LUCRECIA WILKINSON

Claimant

And

THE ATTORNEY GENERAL

Defendant

APPEARANCES:

Mrs Cynthia Hinkson-Ouhla of Counsel for the Claimant
Ms Kozel Creese of Counsel for the Defendant

2020: June 18;
2023: August 24.

JUDGMENT

- [1] **PHILLIP, J:** This is a case against the State by the claimant, a retired public officer, concerning her entitlement to a pension under the Pension Act¹ ("the Act"). A claim and statement of claim filed on 12th September 2014 and amended on 4th February 2015 sought a declaration that the claimant was entitled to a pension; arrears of pension from 1st October 2012 - 30th September 2014, 23 months at \$750.00 = \$17,250.00; interests under Article 1009A of the Civil Code; damages; and costs. By a defence filed on 28th May 2018, the defendant opposed the claim, denying that the claimant was entitled to a pension and or damages.
- [2] The facts in the case were not disputed. The parties agreed to dispense with a formal trial and have the matter determined on paper through written submissions. They filed a statement of agreed facts and issues on 31st July 2020 and exchanged written submissions on 30th September 2020. The defendant filed written reply submissions on 16th October 2020.

¹ Cap. 15:26 of the Revised Laws of Saint Lucia

Agreed Facts

- [3] The claimant was appointed to a pensionable post of Social Worker attached to the Ministry of Justice, effective 29th July 2002, earning a monthly salary of \$5,165.59. The government pension scheme at the time required no deductions for National Insurance Contributions (NIC) from government employees. Therefore, no deductions were taken for NIC from the claimant's wages during her tenure in the pensionable position.
- [4] On 12th March 2012, the claimant attained the age of 55 and proceeded on retirement. According to the Pension Act, the claimant was paid a gratuity of \$74,255.36 in July 2012, as she was four months short of the minimum qualifying period of 10 years to receive a pension.
- [5] The claimant was subsequently appointed temporarily to the post of Social Worker at the Ministry of Legal Affairs (Family Court) for April to October 2012 under new terms and conditions. During this period, the State made NIC deductions from the claimant's salary in the following manner: April - \$209.77, May - \$217.00, June - \$94.03, July - \$217.00, August - \$140.00, September - \$151.90, and October - \$35.00.

Agreed Issues

- [6] The parties agreed on the following issues for the court's determination:
1. Whether the claimant was entitled to a pension, having attained the age of 55 and retired four months short of the minimum qualifying period to receive a pension.
 2. Whether the claimant's employment as a Social Worker for April to October 2012 can be counted towards the claimant's meeting the required qualifying period under the Pension Act.

Legal Framework

- [7] The relevant provisions of the Act and Regulations are set out below for ease of reference. Section 5 states there is no absolute right to a pension:

"5. Pensions not of right

(1) An officer shall not have an absolute right to compensation for past services or to pension, gratuity or other allowance; nor shall anything in this Act affect the right of the Crown to dismiss any officer at any time and without compensation.

(2) ...

[8] Section 6 specifies the circumstances or conditions under which a pension may be paid:

“6. Circumstances in which pension may be granted

(1) Pension, gratuity or other allowance shall not be granted under this Act to any officer except on his or her retirement from the public service in one of the following cases—

- (a) if he or she retires from public service under the Government of Saint Lucia—
 - (i) on or after he or she attains the age of 55 years ...

(2) *(Repealed by Act 19 of 2003)*

(3) An officer not otherwise qualified for a pension gratuity or other allowance under this Act, other than a pension under regulation 23(4) of the Pensions Regulations contained in Schedule 1 to this Act or otherwise may, on his or her retirement or resignation from public service under the Government of Saint Lucia after he or she has served in such public service for not less than 5 years, be granted a gratuity in accordance with the provisions of regulation 26 of the Pensions Regulations contained in Schedule 1 to this Act.”

[9] Section 8 prescribes the events regarding the age of compulsory retirement:

“8. Compulsory retirement

(1) The Governor General may require an officer to retire from the public service under the Government of Saint Lucia—

- (a) at any time after he or she attains the age of 55 years; or
- (b) in special cases, with the approval of the appropriate service commission, at any time after he or she attains the age of 50 years.

(2) Every teacher shall, unless the Governor General otherwise determines, retire at the age of 60 years.

However, in special cases, the Governor General may permit or require a teacher to retire at any time after the teacher has attained the age of 50 years.”

[10] Section 20 empowers the Governor General to remove any difficulty arising in applying the Act in exceptional cases:

“20. Application of Act to exceptional cases

(1) If any difficulty arises in connection with the application of this Act to any exceptional case, the Governor General may make such order for removing the difficulty as he or she may judge to be necessary for that purpose, and any such order may modify the provisions of this Act and regulations as far as may appear to the Governor General necessary for carrying the order into effect.

(2) Every order made under this section shall come or shall be deemed to have come into operation upon the date specified therein in that behalf.

(3) For the purposes of this section, any case where the rights of an officer under the Acts repealed by this Act are or may be prejudiced or in any way affected by this Act shall be deemed to be an exceptional case, and the prejudicial or other effect shall be deemed to be a difficulty.”

[11] On the other hand, the Regulation 2 define pensionable and qualifying service:

“2. Interpretation

In these Regulations, unless the context otherwise requires—

“**Act**” means the Pensions Act;

“**qualifying service**” means service which may be taken into account in determining whether an officer is eligible by length of service for pension, gratuity, or other allowance;

“**pensionable service**” means service which may be taken into account in computing pension under these Regulations.”

[12] Regulation 4 prescribes the qualifying service period for a pension:

“4. Pension to whom and at what rates to be granted

(1) Subject to the provisions of the Act and of these Regulations, every public officer holding a pensionable office under the Government of Saint Lucia who has been in public service under the Government of Saint Lucia for 10 years or more may be granted on his or her retirement a pension at the annual rate of one four-hundred eightieth of his or her pensionable emoluments in respect of each completed month of his or her pensionable service.

(2)”

[13] Regulation 5 provides for cases where one does not qualify for a pension under Regulation 4:

“5. Gratuities where length of service does not qualify for pension

Every officer, otherwise qualified for a pension who has not completed the minimum period of service qualifying for a pension, may be granted on retirement a gratuity not exceeding 5 times the annual amount of the pension which, if there had been no qualifying period, might have been granted to the officer under regulation 4(1).”

[14] Regulations 14 and 15 speak to the effects of leave of absence and temporary breaks in the service:

“14. General rules as to qualifying service and pensionable service

(1) Subject to the provisions of these Regulations, qualifying service shall be the inclusive period between the date on which an officer begins to draw salary in respect of public service and the date of his or her leaving the public service without deduction of any period during which he or she has been absent on leave.

(2) A period which is not qualifying service by virtue of the foregoing paragraph shall not be taken into account as pensionable service.

(3) A period during which the officer was not in public service shall not be taken into account as qualifying service or as pensionable service.”

“15. Continuity of service

(1) Except as otherwise provided in these Regulations, only continuous public service shall be taken into account as qualifying service or as pensionable service.

However, any break in service caused by temporary suspension of employment in the public service not arising from misconduct or voluntary resignation shall be disregarded for the purposes of this subregulation.

...”

Claimant's Case

- [15] The claimant submitted that she is entitled to a pension on or after she attains the age of 55. The rule dealing with qualifying service states that it shall be the inclusive period on which she begins to draw salary regarding public service and the date of her leaving the public service. The claimant effectively left the public service in October 2012, more than 10 years after she joined on 29th July 2012. The claimant has therefore met the criteria qualifying her for a pension.
- [16] The claimant states that the defendant relies on a narrow and restrictive interpretation of the law; however, statutory instruments regarding pensions are to be broadly interpreted. The defendant relies on the fact that the claimant attained age 55 before she could meet the 10 years qualifying service period. She contends that this approach is unreasonable and in bad faith. It does not consider the doctrine of good faith implied in the performance of employment contracts and that there is no requirement in the applicable laws that the qualifying 10 years must be before age 55.
- [17] To support her case, the claimant referred the court to Articles 917A and 956 of the Saint Lucia Civil Code and **Houle v Canadian National Bank**² concerning the applicability of the principle of good faith under the English Common Law when considering whether parties abused or exercised their contractual rights in a reasonable manner, following the rules of equity and fair play. She also referred to **Braganza v BP Shipping Limited and another**³. The claimant submitted that the State is seeking to exercise its discretion unreasonably, not in the principle of good faith and should not be permitted to deny the claimant a pension in the situation that has arisen. The claimant is therefore entitled to the reliefs which she seeks.

Defendant's Case

- [18] The defendant countered that the claimant was not entitled to a pension. Citing **Gordon St. Bernard v The Attorney General**⁴ and **Barrow v Attorney General of Saint Lucia**⁵, they submitted that the claimant had not satisfied the minimum qualifying period requirement under section 6 (1) and regulation 4 (1) of the Act and Regulations of 10 years serve on retirement at age 55. The claimant retired at age 55, four months short of the minimum qualifying period.

² [1990] 3 SCR 122

³ [2015] UKSC 17, paras 18 et seq

⁴ Grenada Civil Appeal No. 1 of 2004 (15th July 2005)

⁵ [2016] UKPC 38 (19th December 2016)

[19] The defendant does not dispute that the claimant was employed as a Social Worker under a series of contracts from April to October 2012 but states it was new and different terms and conditions between April to October 2012, which by regulations 2, 14 (1) and (2) and 15 (1) cannot count towards satisfying the qualifying period. Further, in July 2012, the State paid the claimant a gratuity as per regulation 5, which she accepted without any request under regulation 19 (a) for the non-pensionable period of service (April to October 2012) to be taken into account with her pensionable service to qualify for a pension.

[20] Regarding the claimant's submission of good faith and abuse of contractual rights, the defendant, in their reply submissions, states that Article 956 of the Civil Code does not imply terms into a contract but provides that if the criteria are satisfied, a term may be implied. Thus, the onus is on the claimant to show the term to be implied has arisen by equity, usage or law. They submitted, in **Ministry of Public Service Information and Broadcasting, the Attorney General of Saint Lucia v Vincent Marcel**⁶, the Eastern Caribbean Court of Appeal, held:

“There is a general presumption against implying terms into written contracts. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The test of implication is also one of necessity.”

Therefore, in the absence of evidence satisfying the criteria of Article 945 of the Civil Code, the claimant cannot imply a term to pay her a pension without meeting the requirements of the Act.

[21] The defendant submitted that the claimant has failed to specifically plead and particularize or adduced any evidence of bad faith by the employer (the State). Also, Article 2066 provides that good faith is always presumed. Those who allege bad faith must prove it. The defendant referred to **Jewel Thornhill v The Attorney General**⁷ and **Three Rivers District Council v Bank of England (No. 3)**⁸ for the test the court must use to determine whether the claimant has established bad faith and submitted that the claimant has failed to plead bad faith properly and to adduce cogent evidence to substantiate her unparticularized allegations of bad faith by the State.

⁶ SLUHCVP2017/0006 (14th March 2019), para 4

⁷ SLUHCVP2012/0035 (16th April 2015), para [37]

⁸ [2000] 3 All. E.R. 1; [2001] UKHL 16, para 51

[22] On the contrary, the contract between the parties is clear and unambiguous; and the contractual arrangements before and after 12th March 2012 are separate. The action of the State is not tantamount to bad faith, nor has it been specifically pleaded. The court should not imply any term into the claimant's second contract arrangements to the effect that the period would be joined with the first contract because, from the parties' conduct, their intention was clear. The concepts of implied terms and the lack of good faith do not apply.

[23] The defendant avers that the court should dismiss the claim with costs to them the defendant.

Discussion

[24] I accept at the outset the defendant's submissions that following **Gordon St. Bernard** and **Barrow**, the coincidence of the minimum qualifications prescribed in section 6 (1) and regulation 4 (1) of the Act and Regulations is mandatory to be eligible for a pension.

[25] However, the language of sections 6 (1) (a) (i) and 8 (1) (a) of the Act that "... **on or after** he or she attains the age of 55 years" and "... **at any time after** he or she attains the age of 55 years", respectively, does not preclude an officer from continuing in employment in the public service beyond age 55. This is in contrast, for example, to the language of section 8 (1) (b), which states, "... retire **at the age** of 60 years". [emphasis added] Also, section 20 of the Act empowers the Governor General to remove any difficulty arising in applying the Act in exceptional cases.

[26] Indeed, in its defence (paras 5 (b) and (e)), the State confirms that under the Staff Orders for the Public Service⁹, an officer shall retire on attaining the age of 55 years, provided that in exceptional circumstances in the public interest, the appropriate Service Commission may permit an officer to remain in the service beyond 55 years but in no case beyond the age of 60 years. Further, due to the situation at the Ministry of Legal Affairs, they recommended to the Public Service Commission that approved the claimant's temporary employment as a Social Worker to facilitate a seamless flow to the Ministry's work programme and minimise disruption to the Family Court for the period April to October 2012. The terms and conditions of employment, as stated in the appointment letters, indicated that this appointment is subject to the Rules and Regulations governing the Saint Lucia Public Service.

⁹ With effect from 25th August 1983, Order 9.3

[27] In my view, while a pension is not an absolute right, the court cannot ignore its significance (object and purpose), which I believe is to provide the public officer with a source of income to support them and their dependents after normal retirement age in their sunset years, having contributed to the State in their earlier working years. Further, for this reason, I believe that the law regarding pension benefits was expressly acknowledged and protected under special entrenched provisions of the Constitution¹⁰.

[28] Although the claimant provided no authority for the proposition that statutory instruments regarding pensions are to be broadly interpreted, I agree that the non-payment of a pension to the claimant was inequitable and unjust in the circumstances of the case. It was an appropriate case that the Governor General could have exercised the powers under section 20 of the Act to grant the claimant a pension after the claimant raised the matter through her Attorney-at-Law. However, from the material before me, it does not appear that they referred the claimant's case to the Governor General, or if it was, what were the reasons for the Governor General not exercising the discretion to grant the claimant a pension?

[29] This introduces the issue of good faith and abuse of contractual rights. However, I can do no better than the reasoning of our Court of Appeal in **Sonia Johnny v The Attorney General**¹¹ that applied **Braganza**, which is very apt to the circumstances of this case. Hence, I set out the relevant portion of the analysis of Baptiste, JA delivering the decision of the Court of Appeal as follows:

“[17] In my view, whatever term will be implied into a contract depends upon the terms and the context of the particular contract involved. The particular context of this contract is an employment contract. An employment contract is of a different character than an ordinary commercial contract; it has dynamics which are markedly different and specialities that do not normally exist in commercial contracts. In **Johnson v Unisys Ltd**, Lord Steyn stated at paragraph 20 that, ‘[i]t is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract.’ At paragraphs 55 to 56 in **Braganza v BP Shipping Limited and another**, Lord Hodge stated:

“[55] The personal relationship which employment involves may justify a more intense scrutiny of the employer's decision-making process than would be appropriate in some commercial contracts.

¹⁰ Sections 97 and 98

¹¹ SLUHCVP2017/0036 (13th December 2019)

[56] The scope for such scrutiny differs according to the nature of the decision which an employer makes...”.

[18] In an employment contract, like the present one, there is often a significant imbalance of power between the contracting parties. A conflict existed between the State and Ms. Johnny with respect to the payment of accumulated annual leave. The State was charged with making a decision as to whether or not Ms. Johnny should be paid in lieu of accumulated annual leave. The resolution of that conflict was in the hands of the State. As pleaded by the State, it was a matter of discretion. As the party exercising the discretion, the State has a clear conflict of interest, heightened by the significant power imbalance between Ms. Johnny and itself. In seeking to ensure that power is not abused, the Court will imply a term of good faith as to how it should be exercised. It is presumed to be the reasonable expectation of the parties that ‘there should be a genuine and rational, as opposed to an empty and irrational, exercise of discretion’. In **Braganza v BP Shipping Limited and another**, Lady Hale stated the position at paragraph 18:

“Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.” [Footnotes omitted]

[30] The quoted passage, I believe, answers the defendant’s arguments at paras [20] to [22] above on implied terms and good faith. Also, Baptiste, JA observed (paras [15] and [20]) that the claimant’s reliance on Articles 917A and 956 of the Saint Lucia Civil Code and **Houle** concerning the applicability of the principle of good faith and abuse of contractual rights would be misconceived. Further, I understand Lady Hale’s observations not to suggest implying a good faith provision into the contract but rather more akin to a presumption or principle of interpreting and construing the contractual arrangement.

[31] In this case, like **Sonia Johnny**, a dispute arose between the State and the claimant regarding her eligibility for a pension. The claimant was appointed to a pensionable post in which the State made no NIC deductions for her. Upon her compulsory retirement four months short of 10 years at age 55 on 12th March 2012, she was, on 1st April 2012, temporarily reemployed, no doubt in the public

interest, to facilitate a seamless flow to the Ministry's work programme and minimise disruption to the Family Court from April to October 2012 as other personnel proceeded on vacation leave. Yet, despite the exceptional circumstances of the case, the State adopted a position of only paying the claimant a gratuity in July 2012 and denying her a pension.

[32] I believe, given the nature of the claimant's employment arrangements, with the obvious imbalance of power in the State and its clear conflict of interest to pay out the least sum possible, the court must require that the parties act in good faith in exercising their contractual rights and not abuse them, there should be a genuine and rational, as opposed to an empty and irrational, exercise of discretion by the State. This is more so in the context of the object and purpose of a pension and the State's duty to protect and safeguard the interest of the citizens. The State should not act unreasonably to deprive its citizens of their just due.

[33] Regarding the defendant's submission that the claimant has not pleaded and particularised bad faith, the claimant's reply to the defence filed on 31st July 2018 sets out the case of bad faith and abuse of contractual rights in detail¹², which the defendant has not challenged. Accordingly, the

¹² "2. The nature of the Defence shows an abuse of contractual right which is a breach of contract and an indication of bad faith. The Claimant relies on the following particulars of bad faith to show the Defendant's breach of contract:

Particulars of bad faith

- a) appointing the Claimant to a pensionable post, failing to make any NIC payments on the Claimant's behalf and yet denying her a pension;
- b) failing to make any NIC payments on behalf of the Claimant thus leading her to believe that she would be entitled to a pension
- c) despite recognising the Claimant was 4 months short of the qualifying period deliberately failing to take steps to rectify the situation when the circumstances presented an opportunity so to do
- d) failing to pay the Claimant a pension on the basis that the Claimant had reached retirement age before meeting the 10 year qualifying criteria despite the fact that the Claimant had in fact worked for more than 10 years in the position;
- e) utilising the Claimant's services post her retirement in a situation which could be deemed 'special circumstances' yet refusing to include those additional months to the Claimant's qualifying years in order to for her to meet the criteria;
- f) Being aware that the Claimant had not received her pension in circumstances which denied her a state pension but doing nothing to alleviate the hardship caused to the Claimant as a result of the Defendant's error
- g) Refusing to acknowledge that in all the circumstances good faith in the Defendant's dealing with the Claimant would permit the Claimant to be paid a pension;
- h) benefitting from the Claimant's services post her retirement, in circumstances which would have assisted in qualifying her to receive a pension and unreasonably failing to acknowledge the benefit by refusing to pay a pension;
- i) knowing that the Claimant had been denied both a state pension and a work pension in circumstances where no NIC payments were made on her behalf by the Defendant, yet failing to rectify the situation when circumstances arose which presented an opportunity to do so ;
- j) narrowly construing the relevant legal provisions and abusively applying the same to the Claimant's performance of the contract so as to avoid paying the Claimant a pension;
- k) failing to take into account the actual performance of the contract and abusing its contractual rights for the purpose of denying the Claimant a pension;

defendant cannot suggest that they were unaware of this being the claimant's case, which is the purpose of the pleadings - to inform the other party(ies) of the case they were to meet.

Conclusion

[34] The claimant has prevailed on the issue of the payment to her of a pension. However, the State paid the claimant a gratuity in July 2012. Therefore the defendant shall immediately compute the claimant's entitlement concerning her pension (and gratuity, if any) and set off the sum of \$74,255.36 previously paid to her in July 2012. The claimant also claimed pension arrears from 1st October 2012 to 30th September 2014 of 23 months at \$750.00 totalling \$17,250.00; interests under Article 1009A of the Civil Code; and damages. However, having regard to my decision to compute the claimant's pension accurately and set off the money previously paid to her, I do not propose to make an order for the specific sums claimed nor exercise my discretion to grant an award of interest on any outstanding arrears, considering that the claimant was paid a lump sum as a gratuity in July 2012, instead of a monthly pension as she would have been due.

[35] Therefore, I will enter judgment for the claimant and make the following orders:

1. The claimant was entitled to a pension computed under section 6 (1) and regulation 4 (1) of the Act and Regulations.
2. The defendant shall pay the claimant any outstanding arrears of pension, with interest under Article 1009A of the Civil Code of 6% per annum from the date of judgment.
3. The defendant shall pay the claimant prescribed costs of \$7,500.00 based on a claim with an unquantified value.

**Justice Rohan A Phillip
High Court Judge**

By the Court



Dp. Registrar

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2. The Defendant's stance is unreasonable and an unconscionable abuse of the exercise of its contractual rights. The Defendant has therefore failed to show good faith a condition which is implicit in every contract.
 3. Absence of good faith is an abuse of contractual right and constitutes a breach of contract. The Claimant is therefore entitled to the relief being sought."