

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2014/0850

BETWEEN:

VINCENT MARCEL

Claimant

and

**(1) MINISTRY OF THE PUBLIC SERVICE INFORMATION AND
BROADCASTING**

(2) ATTORNEY GENERAL OF SAINT LUCIA

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Mr. Andie George for the Claimant

Mrs. Karen Barnard for the Defendant

2016: October 5
December 30

JUDGMENT

[1] **ACTIE M.:** The matter before this court to determine a preliminary point as to whether the claimant had accumulated leave during his period on suspension and if so, whether he is entitled to compensation in lieu of leave.

Background

[2] The claimant was a public officer employed as a police officer with the Royal Saint Lucia Police Force. He was arrested and charged for certain criminal offences. He was suspended with half pay pending the determination of the charges. The

claimant, during the period of suspension, proceeded on retirement. The claimant was at the first instance convicted on all the charges. On appeal, all the charges were quashed by the Court of Appeal.

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- [3] The claimant had accumulated vacation leave prior to his suspension from the Police Force. On 17th April 2014, the claimant filed a statement of case seeking compensation for accumulated leave prior to his suspension and for payment of leave accrued during the period on suspension.
- [4] The parties went into negotiations and the claimant was paid a gratuity. Part of the gratuity was calculated on the half pay and not on the full salary entitlement.
- [5] The matter came on for case management conference and the parties were given an opportunity to pursue discussions for possible out of court settlement. The parties settled on part of the claim for the payment of the outstanding salary on full salary but failed to reach a consensus on the accrued leave prior to suspension and leave entitlement on suspension.
- [6] The parties were directed to file submissions on the narrow issues which may dispose the claim namely:
 - (1) whether the claimant is entitled to compensation for the outstanding accumulated leave and
 - (2) Whether the claimant is entitled to vacation leave during his period on suspension.

The claimant's submissions

- [7] Counsel for the claimant avers that the claimant was suspended from duty on 29th April 2003 and had accumulated vacation leave for which he was unable to utilise prior to his retirement. Counsel contends that the claimant is also entitled to leave during his period of suspension.

[8] Counsel contends that vacation leave is granted in respect of service and service does mean being “at Work”. Counsel in support relies on Rule 6.12 of the Staff Orders which reads as follows;

(1) Except as provided by these orders leave will be granted in respect of service. Absence on duty, absences on departmental leave and sick leave on full salary will count as service.

(2) Leave eligibility will be calculated on the basis of completed months of service in a year. One twelfth of the annual rate of leave to each completed month of service.

[9] Counsel accepts that the Staff Orders do not expressly except payment of leave in respect of a period on suspension but states that this is to be expected given that suspension is a disciplinary measure. The claimant states that such a provision is to be expressly made by law and not in an administrative order. Counsel also relies on Section 32 of the **Police Act**.

[10] Section 32 of the **Police Act** provides for the payment during suspension and reads as follows:

[1] An inspector, subordinate officer or constable against whom any complaint or information for an offence punishable on summary conviction or on indictment is laid, or against whom a charge is made for breach of any disciplinary regulation made under this Act, may, pending, and until final determination of such complaint, information or charge-

(a) be suspended from duty and placed on half pay by the commissioner of Police or

(b) if admitted to bail and not so suspended, be employed on full time duty, in which case he or she shall receive full pay, or if employed on part time duty he or she shall receive a rate of

pay (not being less than half pay) as the commissioner of police thinks fit.

[2] If an inspector or a subordinate officer or constable is acquitted on any complaint or information, or obtains a decision in his or her favour on any charge, he or she shall be entitled to receive all pay which has been withheld from him or her; if he or she is convicted on such complaint or information or does not obtain a decision or information or does not obtain a decision in his or her favour on such charge and is subsequently dismissed, he or she shall not be entitled to receive any pay so withheld.

[3] In the application of subsection (1) an inspector, subordinate officer or constable shall not be deprived of any part of the house and lodging allowance or the use of any free quarters to which he or she may be entitled.

[11] Counsel avers that the combined effect of the Staff Orders and the Police Act is that leave is payable to the claimant for the period of suspension.

The Defendants' submissions

[12] Counsel for the defendants in reply states as follows :

- (1) Leave could only be granted to the claimant in respect of service.
- (2) As a matter of law the claimant was not entitled to be granted leave while he was on suspension and therefore he could not have earned leave during that time while his criminal charges were still pending.
- (3) In the absence of any express contractual provision the claimant is not entitled to payment for vacation not taken during the period of employment and

(4) Any cause of action against the defendants for unpaid leave that allegedly accrued prior to the 16th day of November 2011, was prescribed by the time the claim herein was commenced.

[13] Counsel avers that as long as the suspension of the claimant continued, he was effectively unable to perform his services as a police officer and as a result he was illegible for leave. Counsel made reference to Section 26 of the **Police Regulations Act** which makes provisions for leave entitlement. Counsel like the claimant relies on the provisions of Section 6.12 of the **Staff Orders** of the Public Service.

Law and Analysis

[14] The appointment and discipline of Inspectors and all other subordinates officers is vested in the Commissioner of Police pursuant to the **Constitution** and Section 32 of the **Police Act**. Section 32 of the **Police Act** grants the Commissioner of Police the discretion to suspend an officer or constable against whom any complaint or charge is made for breach of any disciplinary regulation, on half pay pending the outcome of the investigation or charge.

[15] Suspension is implemented to enable the carrying out of an investigation and /or pending the outcome of a disciplinary action or criminal charge.

[16] When the commissioner of Police suspends an officer, the contract of employment is not rescinded and the relationship of employer and employee still subsist pending final determination of the disciplinary action or charge.

[17] The employee remains a worker while under suspension and continues to accrue his salary and leave entitlement and other benefits until the final determination of the investigations or charges. The officer during the period of suspension, while not required to work, is still available to assist in the disciplinary charge or criminal trial. If the suspension is lifted, then the employee would be required to return to work.

- [18] Section 32 (3) of the **Police Act**, provides that if the officer is acquitted or obtains a decision in his or her favour on any charge, he or she shall be entitled to receive **all** (emphasis added) pay which has been withheld from him or her and reinstatement.
- [19] The suspension of an officer does not deprive him of the accrual of rights of his full salary or other entitlements during the period of suspension. Section 26 clearly makes reference to all payments withheld during the suspension period. Payments withheld would be the half pay and other allowances that the claimant would have been entitled to, but for the suspension.
- [20] Suspension is not to be confused with vacation leave. An employee who has been suspended may be able to access to his/her accrued vacation leave. The claimant's entitlement to the vacation leave accrued prior to the suspension is unqualified. The suspension from office did not prevent the claimant, subject to the approval of the Commissioner of Police, from proceeding on the vacation leave earned prior to the suspension.
- [21] Vacation leave is based on the amount of time that an employee is in paid status during the pay period. The number of vacation days entitled is based on years of service and the rates as prescribed by Section 26 of the **Police Act Regulations**. Neither the **Staff Rules** nor the **Police Act** made provision for the automatic lapse of vacation leave upon suspension. The absence of a stated provision against the accumulation of leave when applied to the facts ineluctable leads to the conclusion that the claimant is not to be deprived of his leave entitlement.
- [22] Vacation leave is a benefit to the claimant as a public officer pursuant to his contractual right with the Public Service. If it was Parliament's intention to deprive an officer of such a right during suspension then this would have been expressly stated.

- [23] I am of the opinion that the claimant having had his convictions quashed by the Court of Appeal is deemed to have been reinstated into the Police force. The claimant's period of employment is deemed to have continued without interruption and his leave entitlement during the suspension is to be computed in accordance with Section 26 of the **Police Act Regulations**. The claimant having since retired from the police force is entitled to payment in lieu of vacation leave earned during the period on suspension.
- [24] The claimant also claims for payment of outstanding leave accrued prior to his suspension. Counsel for the defendants opposes the request on the ground that the claimant has not provided the existence of an express contractual provision giving a right to such payment.
- [25] I am of the opinion that the appointment of the claimant as a police officer by an extension a public officer, created a contract of employment as governed by the **Police Act** and the **Staff Orders**.
- [26] Vacation leave to police officers is approved by the Commissioner of Police where the exigencies of the service permit in accordance with Section 26 of **the Police Act Regulations**. It is the evidence that that the claimant through counsel, wrote to the Commissioner seeking compensation for the accrued vacation leave prior to his retirement. Mr. Vernon P. Francois, Commissioner of Police, responded informing of his willingness to compensate the claimant in lieu of three hundred and fifty Six (356) days' vacation leave. The claimant was invited through counsel, to indicate his choice of payment of the accrued vacation leave. This is clear acquiescence on the part of the Commissioner of Police in recognizing the claimant's entitlement to the accrued vacation leave.
- [27] It is noted however, that the claimant, in a subsequent letter dated 17th November 2012 addressed to the Commissioner of Police requested payment of a balance of three Hundred and Seventy Seven (377 days). By letter dated 24th July 2013, the Commissioner of Police responded stating that the claimant was entitled to

payment of Three Hundred and Fifty Six (356 days). A further letter from counsel for the claimant dated 16th January 2014 made a request for payment of Three Hundred and Sixty Five (365) days.

- [28] It is undisputed evidence that the claimant had an accrual of vacation leave prior to his suspension. The suspension from work did not deprive his entitlement for vacation leave. The claimant having been vindicated of the charges and has since proceeded on retirement is entitled to payment in lieu of the vacation leave. However, it appears that there are obvious discrepancies in the number of accrued vacation leave due to the claimant. The various exchanges between counsel and the Commissioner of Police are at variance in relation to the number of accumulated vacation days. There is a definite need for proper computation and reconciling of the accrued leave entitlement due to the claimant in accordance with Section 26 of the **Police Act Regulations**.

Prescription

- [29] Counsel for the defendants avers that if it is determined that the claimant is entitled to compensation for the accrued vacation leave prior to retirement, then the amount due and owing for vacation accrued prior to 16th November 2011 is prescribed as the claimant filed the claim on 17th November 2011. Counsel for the defendant relies on **Article 2122 of the Civil Code** which prescribes matters of this nature after three years.
- [30] Counsel for the claimant is of the contrary view. Counsel avers that the claimant's suspension from duty deferred all rights and entitlements pending the determination of the criminal matter as the claimant could not have claimed leave any more than he could have claimed full salary during the period on suspension. Counsel further avers that the leave entitlement arose when the Court of Appeal quashed the convictions on the 26th October 2015.

Analysis

- [31] It is necessary to take all the necessary circumstances into consideration in determining whether the amounts claimed are statute barred. Vacation leave is distinguishable from salary. It is the evidence that the claimant had accumulated leave prior to the suspension. The Commissioner of Police acknowledging the accrued leave agreed to the payment in lieu of leave. The payment was not forthcoming as expected resulting in the claimant filing the extant statement of claim on 17th November 2014 seeking payment of the outstanding leave.
- [32] The Court of Appeal decision quashing the criminal charges against the claimant was handed down on the 26th October 2015 subsequent to the filing of the claim form. The claimant's argument that the prescription period in relation to the outstanding leave commenced from the date of the Court of Appeal decision is therefore fallacious.
- [33] Section 32 (3) of the **Police Act** provides that if the officer is acquitted or obtains a decision in his or her favour on any charge, he or she shall be entitled to receive **all** (emphasis added) pay which has been withheld from him or her and reinstatement.
- [34] Any entitlement for the period during his suspension would have been withheld until final determination of the charges. It is accepted that the half pay in salary and payment in lieu of leave during the period of suspension only became due on the date of the Court of Appeal decision quashing the charges and the limitation period would not apply.
- [35] The claimant's resignation would have made him entitled to all outstanding payments of in lieu of leave prior to his suspension. However any entitlement prior to the suspension would be subject to the limitation period and cannot be allowed.

[36] **Article 2122 of the Civil Code** prescribes claims of this nature by three years. As I indicated above, the claimant's suspension from duty did not preclude him from proceeding on the vacation leave already accrued prior to the suspension.

[37] I have already highlighted the inconsistencies in the number of days claimed by the claimant. The parties had already been in discussions and had settled part of the claim.

[38] Accordingly the parties are recommended to further the discussions, to first reconcile the number of outstanding accrued vacation leave prior to suspension. Any amount due and falling outside of the limitation period is to be discounted as being statute barred.

ORDER

[39] In summary and for the foregoing reasons, it is declared that as follows:

- (1) The claimant is entitled to compensation for vacation leave accrued during the period on suspension.
- (2) The claimant is entitled to compensation for leave accrued prior to his retirement and the period on suspension
- (3) Any amount claimed for accrued leave prior to the suspension that is falling outside of the limitation period is statute barred and accordingly disallowed.
- (4) Both parties having had some measure of success, accordingly there is no order as to costs.
- (5) Unless the parties agreement on quantum within thirty (30) days of today's date, the parties are to file and exchange submissions for the assessment of damages.

- (6) The matter shall be listed for report or further case management directions during the month of February 2017.

Agnes Actie

Master