

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2017/0036

BETWEEN:

SONIA JOHNNY

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Vicki-Ann Ellis

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Cynthia Hinkson-Ouhla with her Ms. Nathalie Dabreo for the Appellant
Mr. Dexter Theodore, QC with him Ms. Sueanna Frederick for the Respondent

2019: April 9,
December 13.

Civil appeal – Employment law – Entitlement to payment in lieu of vacation leave accumulated over successive contracts – Contracts silent on forfeiture of leave not taken during contractual term or payment in lieu thereof – Implied terms – Whether term of good faith should be implied into the contract – Nature of contract – Performance of contract – Should untaken vacation leave be converted to money absent a contractual or statutory provision

Ms. Sonia Johnny ("Ms. Johnny") was employed as Saint Lucia's permanent representative to the Organisation of American States and Ambassador Extraordinary and Plenipotentiary to the United States of America. Her first contract of employment entitled her to 33 working days' vacation leave annually to be normally taken at the completion of the tour of duty. Her two subsequent contracts maintained her entitlement to 33 working days leave but required that the leave be taken during the tour of service.

On 9th January 2007, ten months before the expiration of her last contract, Ms. Johnny wrote to the Permanent Secretary, for permission to take a portion of her accumulated leave but was not favoured with a response. This was followed by several unanswered enquiries. By letter dated 30th June 2010, Ms. Johnny was advised that her application for payment in lieu of leave had been denied. No reason was furnished for the decision.

Ms. Johnny issued a claim for breach of contract against the Government of Saint Lucia claiming payment in lieu of 7 ½ months leave, interest and costs. She stated that at the end of each contract, her leave form included a statement that her leave was rolled over to the next contractual period and that the practice of rolling over accumulated leave from contract to contract implied a term into the contract that if she were unable to take her leave, it would not be forfeited; hence, she was entitled to be paid for it. She further stated that she was unable to take her stipulated leave due to the exigencies of the post.

The respondent, asserted in the defence, that there is no right to receive payment in lieu of leave and receipt of any payment in lieu thereof is at the sole discretion of the Crown. Any accumulation of leave outside the scope of a contract must be with the expressed approval of the relevant department head and in accordance with the established procedure. Ms. Johnny was obligated to take leave during the currency of the contract and her failure to do so rendered the leave liable to forfeiture.

The learned judge dismissed the claim, holding that Ms. Johnny did not establish a right to accumulate leave based on the express terms of the contract and that there was no contractual right to payment in lieu of leave, either on the express terms of the contract or by implication, based on the practice identified by Ms. Johnny of rolling over leave, which, on the evidence had not been proven.

The appellant, being dissatisfied with the decision, appealed on several grounds including that the judge erred in the approach with respect to implying terms; the judge erred in not considering issues of good faith, reasonableness and abuse of contractual rights and the judge erred in not having a holistic appreciation of performance of the contract and that the nature of the contract.

Held: Allowing the appeal; awarding to the appellant payment in lieu of vacation leave in the sum of \$220,395.60 together with pre-judgment interest thereon at the rate of 6% per annum and awarding to the appellant prescribed costs in the sum of \$30,049.45 in the court below and 2/3 of that amount on appeal, that:

1. The term to be implied into a contract depends upon the context of the particular contract involved. The context of this contract is an employment contract which is of a different character than an ordinary commercial contract. In an employment contract there is often a significant imbalance of power between the contracting parties. In this case, a conflict existed between the State and Ms. Johnny with respect to the payment 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. Accordingly, in deciding whether Ms. Johnny should be paid in lieu of vacation leave, the learned judge failed to appreciate that the State had an implied duty to act in good faith. The judge ought to have implied a term that the decision should be exercised in a reasonable

manner, in good faith and in a manner that would not lead to an abuse of contractual rights.

Braganza v BP Shipping Limited [2015] UKSC 17 applied; **Johnson v Unisys Limited** [2003] 1 AC 518 applied.

2. Ms. Johnny's contracts contained no provision for forfeiting leave not taken during their currency. Forfeiture is penal in nature and ought to be expressly provided for. It should not arise by implication or intendment. Given the imbalance of power between the State and Ms. Johnny, if it were the intention of the respondent that leave not taken during the contractual period would be liable to forfeiture, this ought to have been expressed.

Young v Bess (1995) 46 WIR 165 considered.

3. Ms. Johnny was contractually entitled to 33 working days annual paid leave. The Government of Saint Lucia, as the employer, was liable to make payment in respect of the annual leave. This is the ordinary liability to pay wages to an employee in respect of the period of employment. Not only was it pleaded that payment in lieu of leave is a discretionary matter for the Crown, the judge found that the evidence clearly supports the fact that payment in lieu of leave was an exercise of discretion by an employer. The evidence established that Ms. Johnny was the beneficiary of the favourable exercise of that discretion in 2000. Based on the factual circumstances and the pleaded defence, Ms. Johnny is entitled to payment for leave not taken.
4. The respondent's pleading that the untaken leave was "liable to forfeiture" denotes that forfeiture is not automatic and is a matter of discretion. A discretion must not be exercised arbitrarily, capriciously or unreasonably. There is nothing to show what factors informed the exercise of that discretion against Ms. Johnny. What transpired in effect was an automatic forfeiture of Ms. Johnny's leave, not taken during the term of the contract, in circumstances where the contract contained no provision for forfeiture. Accordingly, there was a wrongful exercise of discretion. Further, there was no proper basis for the forfeiture.

Ministry of The Public Service Information and Broadcasting et al v Vincent Marcel SLUHCVP2017/0006 (delivered 14th March 2019, unreported) distinguished; **Ormond Shotte v The Attorney General** MNIHCV2000/0005 (delivered 30th May 2001, unreported) distinguished.

JUDGMENT

- [1] **BAPTISTE JA:** This appeal arises out of the dismissal of Ms. Sonia Johnny's ("Ms. Johnny") claim for payment in lieu of vacation leave accumulated over successive

contracts with the Government of Saint Lucia, in circumstances where the contracts did not address the issues of forfeiture of leave not taken during the contractual term or payment in lieu thereof.

Background

- [2] Ms. Johnny held the diplomatic posts of Saint Lucia's permanent representative to the Organisation of American States and Ambassador Extraordinary and Plenipotentiary to the United States of America. The appointment was contractual. Ms. Johnny's three contracts spanned the period 17th November 1997 to 7th March 2007. Clause 8 of the first contract provided an entitlement to 33 working days leave per annum to be normally taken at the completion of the tour of duty. The subsequent contracts maintained Ms. Johnny's entitlement to 33 working days leave but were modified to the extent that the leave must be taken during the tour of service.
- [3] Ms. Johnny stated that at the end of each contract, her leave form included a statement that her leave was rolled over to the next contractual period. Ms. Johnny claimed that the practice of rolling over accumulated leave from contract to contract implied a term into the contract that if she were unable to take her leave, it would not be forfeited; hence, she was entitled to be paid for it. She deposed that on 9th January 2007, ten months before the expiration of her contract, she wrote to the Permanent Secretary in the Ministry of Foreign Affairs, Mr. Cosmos Richardson, for permission to take a portion of her accumulated leave but was not favoured with a response. Further, she made several enquiries of the Minister and Permanent Secretary of the Ministry of Foreign Affairs to follow up on her request. In December 2009, the then Permanent Secretary indicated that the matter had been sent to the Ministry of the Public Service for submission to Cabinet. By letter dated 30th June 2010, Ms. Johnny was advised that her application for payment in lieu of leave had been denied. No reason was furnished for the decision. Ms. Johnny issued a claim for breach of contract against the Government of Saint Lucia

claiming payment in lieu of 7 ½ months leave, interest pursuant to article 1009A of the **Civil Code of Saint Lucia**¹ and costs.

- [4] In its defence to the claim, the respondent pleaded in paragraphs 8, 9 and 10 that there is no right to receive payment in lieu of leave and that receipt of any payment in lieu thereof, is at the sole discretion of the Crown. Any accumulation of leave outside the scope of a contract must be with the express approval of the relevant department head and in accordance with the established procedure. Leave accumulation is not automatic and is contrary to the expressed provisions of the contract of employment. Ms. Johnny was obligated to take leave during the currency of the contract and her failure to so do rendered the leave liable to forfeiture.
- [5] In dismissing the claim, the learned judge stated that Ms. Johnny's contracts made no reference to accumulation of leave from contract to contract, and leave must be taken during the tour of service. There is no provision on the express terms of the contract that vacation leave not taken during its term would be preserved. In the premises, Ms. Johnny did not establish a right to accumulate leave based on the express terms of the contract. There was no contractual right to payment in lieu of leave, either on the express terms of the contract or by implication based on the practice identified by Ms. Johnny of rolling over leave, which, on the evidence had not been proven. Ms. Johnny did not prove that there was any practice or custom in place of such notoriety and so well established that it required a term to be implied into the contract that where an officer is unable to take leave, he or she should be paid in lieu of leave. The contract has no express term that speaks of payment in lieu of vacation leave.
- [6] On the question of implying terms, counsel for Ms. Johnny, Ms. Hinkson-Ouhla, argued before the learned judge that a term of good faith should be implied in the contract. Ms. Hinkson-Ouhla relied on article 956 of the **Civil Code of Saint Lucia**

¹ Cap 4.01, Revised Laws of Saint Lucia, 2013.

which states that ‘the obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature’. Ms. Hinkson-Ouhla pointed out that in the case of **Houle v Canadian National Bank**,² an identical provision to article 956 was considered by the Supreme Court of Canada which stated that: ‘[t]he extent of those implicit obligations has been assessed in both doctrine and jurisprudence. Good faith has been regarded as one such implicit, necessary obligation in all contractual relationships.’ The court also stated that it appears indisputable that the doctrine of abuse of contractual rights is now part of Quebec law and the standard with which to measure such abuse now includes reasonableness.

- [7] In dealing with Ms. Hinkson-Ouhla’s reliance on article 956, the learned judge stated that that article must be read subject to article 917A, which states:

“Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to Saint Lucia, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the “Coutume de Paris”.”

- [8] The learned judge stated that the law of England is the relevant law with respect to implying terms in a contract and in applying and interpreting article 956 of the **Civil Code of Saint Lucia** regard must be had to English case law on the subject. In that regard, the judge stated that the law as to implication of terms in a contract is expressed in the Privy Council case of **Attorney General of Belize and others v Belize Telecom Limited and another**³ and referred to Lord Hoffman’s statement at paragraph 21:

“... in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument, read

² [1990] 3 SCR 122.

³ [2009] UKPC 10.

against the relevant background, would reasonably be understood to mean.”

- [9] At paragraph 39 of her judgment, the judge also adopted Lord Hoffman’s statement that the usual inference to be drawn from silence was that the parties did not intend anything to happen because if they had, they would have made express provision for it in the contract. Further, the court has no power to improve upon the contract which it is called upon to interpret nor can it introduce to the contract terms which are fairer or more reasonable.

The Appeal

- [10] Ms. Hinkson-Ouhla advanced several grounds of appeal, some of which overlap. They are not listed here sequentially. The major grounds are:

- (i) The judge erred in law when she assumed that the application of article 917A(1) of the **Civil Code of Saint Lucia** automatically allows the importation of English Common Law to construe the meaning of article 956 despite the language of article 956 being clear and unambiguous and conflicting with the English Common law.
- (ii) The judge erred in law and misdirected herself when she failed to consider the concept of abuse of contractual rights explained in **Houle v Canadian National Bank** which examined and explained the equivalent of article 956 of the **Civil Code of Saint Lucia**.
- (iii) Having regard to the circumstances of the case, the judge erred in failing to appreciate the fact that the contract was not negotiated by the appellant but was a standard contract prepared by the respondent.
- (iv) The judge failed to understand the nature of Ms. Johnny’s case because she focussed mainly on the express words of the contract

and failed to consider the actual performance of the contract and the case of **Houle v National Commercial Bank**, to determine whether there was a breach of contract.

- (v) The judge failed to appreciate that the performance of the contract had to be examined as a whole and not in isolated portions and consequently failed to appreciate the claim in its entirety.
- (vi) The judge misdirected herself when she made findings on issues which were not in dispute or raised in cross-examination and which she failed to give the parties an opportunity to address.
- (vii) The judge failed to appreciate the rule of procedural fairness that a party who fails to cross-examine on a particular issue is deemed to have accepted the facts and such unchallenged facts are treated as established before the courts.
- (viii) In dismissing Ms. Johnny's claim, the judge failed to appreciate that the respondent provided no evidence contradicting that of Mr. Earl Huntley and therefore Mr. Huntley's evidence of the rolling over of accumulated leave and compensation for the leave thus accumulated ought to have been accepted.
- (ix) The judge erred in law when she concluded that Ms. Johnny had to prove that the rolling over of leave was a general practice within the public service and not only applicable to her contract.
- (x) The judge erred and misdirected herself when she concluded that the testimony of Ms. Johnny, that she had been advised that her request for payment in lieu had been forwarded to the Public Service for submission to Cabinet, settled the issue that there is no practice of payment in lieu of leave.

Issues

- [11] The grounds of appeal are best addressed in the context of the issues that they raise. Broadly, the first issue is: whether the judge erred in her approach with respect to implied terms. This covers matters such as whether the English common law should have been employed by the judge as opposed to the codal provision relied on by Ms. Hinkson-Ouhla.
- [12] The remaining issues are derived from grounds (i) (ii), (iii) and (v), namely: whether the judge erred in not considering issues of good faith, reasonableness and abuse of contractual rights; whether the judge erred in not having a holistic appreciation of the performance of the contract; and whether the judge erred in failing to consider the nature of the contract.

Implying terms in the contract

- [13] A matter of contention between the parties relates to the judge's approach with respect to implying terms. Ms. Hinkson-Ouhla contends that the judge erred in relying on the common law, to determine what terms should be implied into the contract, in the face of the clear words of article 956 of the **Civil Code of Saint Lucia**. Ms. Hinkson-Ouhla argues that there is a conflict as to the circumstances when a term should be implied under article 956 and the Privy Council decision in **Belize Telecom Limited**. Ms. Hinkson-Ouhla submits that in view of that conflict, English law cannot be applied to interpret the relevant provision. Ms. Hinkson-Ouhla points out that article 917A(3) prohibits reliance on English law when the express words of article 956 conflict with English law.
- [14] Mr. Theodore, QC contends in favour of the rectitude of the judge's approach and submits that the judge properly applied the law. In the premises, Mr. Theodore, QC rejects the criticisms levelled at the judge. Mr. Theodore, QC submits that the learned judge, having regard to the requirements set out in article 917A, applied the law which was necessary to resolve the issues raised and that there was no automatic importation of the common law.

[15] Paying regard to the requisite codal provisions and the arguments of the parties, I am of the opinion that the judge correctly concluded that the law relating to the implication of terms in the contract is the law of England and that in applying and interpreting article 956, regard must be had to English case law on the subject. In that sense, the learned judge did not err in applying the common law of England, nor was there an automatic importation of the common law. The judge appreciated that article 917A(1) was subject to the provisions of the article itself, in particular 917A(3). Further, I do not accept Ms. Hinkson-Ouhla's argument that the law of England conflicted with the express provision of article 956. As will be demonstrated, implication of terms regarding issues such as good faith, reasonableness and abuse of contractual rights, as advanced by Ms. Hinkson-Ouhla, relying on article 956 and the case of **Houle v Canada National Bank**, all find expression under common law. This is particularly seen in the evolving jurisprudence with respect to contracts of employment.

[16] Ms. Hinkson-Ouhla criticises the judge for not mentioning the case of **Houle v Canada National Bank** and submits that that failure caused the learned judge to err in consideration of the relevant law. Ms. Hinkson-Ouhla relies on **Houle** as authority for the proposition that good faith is implied at every stage of a contract and that an abuse of rights is established whenever the contractual right is not exercised in a reasonable manner, that is, in accordance with equity and fair play. Ms. Hinkson-Ouhla submits that in view of the nature of Ms. Johnny's case, the refusal to grant payment in lieu was not in accordance with equity and fair play. She posits that the question is whether a term of payment in lieu should be implied in the contract when the circumstances were such that Ms. Johnny was unable to take her stipulated leave due to the exigencies of the post. Ms. Johnny's case was that in view of the factual circumstances of the manner in which the contract was performed, the application of article 956 of the **Civil Code of Saint Lucia** implies a term that she should be paid for her leave.

[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.⁴ In **Johnson v Unisys Ltd**,⁵ 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**,⁶ 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.

[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

⁴ Lord Hodge in *Braganza v BP Shipping Limited* [2015] UKSC 17 at para. 54.

⁵ [2003] 1 AC 518.

⁶ [2015] UKSC 17.

to an empty and irrational, exercise of discretion'.⁷ In **Braganza v BP Shipping Limited and another**,⁸ 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.”

[19] This discussion of and conclusion on the law supports the point that the judge erred in failing to appreciate the fact that the contract was not negotiated by Ms. Johnny but was a standard form contract prepared by the Government. Thus, Mr. Theodore’s reliance on the case of **L’Estrange v F. Graucob Limited**,⁹ is unhelpful. Mr. Theodore, QC relied on that case for the proposition that in the absence of misrepresentation, a party who signs a contract is bound by its terms and it is wholly immaterial that the party had not read it and did not know of its contents. Mr. Theodore, QC argued that Ms. Johnny executed three contracts and did not plead that the terms of the contract were unfair or that there was misrepresentation on the part of the Government. In the circumstances, he submits that it was not necessary for the judge to give “due attention” to whether or not the contractual terms were negotiated or otherwise. Having regard to the law, the submission is, respectfully misplaced.

[20] Given the circumstances of the case and the nature of the contract under consideration - an employment contract, the error of the judge lay, not in applying the common law, but rather, in circumscribing the amplitude of the common law, by

⁷ Horkulak v Cantor Fitzgerald International [2003] EWCA Civ 1756.

⁸ 33

n. 6.

⁹ [1934] 2 KB 394.

adopting too restrictive of an approach, thereby disabling herself from considering issues such as good faith, reasonableness and abuse of contractual rights; issues which were pertinent to the case. As has been seen, these issues were vigorously advanced by Ms. Hinkson-Ouhla, albeit erroneously, relying on **Houle** and the **Civil Code of Saint Lucia**. As indicated earlier, and demonstrated by the case law, the common law also engages these issues. In deciding whether or not Ms. Johnny should be paid in lieu of vacation leave, the learned judge failed to appreciate that the State had an implied duty to act in good faith. The learned judge ought to have implied a term that the decision should be exercised in a reasonable manner, in good faith and in a manner that would not lead to an abuse of contractual rights. The learned judge erred in not so doing.

Performance of the contract

[21] Ground (iv) raises the issue of whether the judge failed to understand the nature of Ms. Johnny's case by focussing mainly on the express words of the contract and by failing to consider its actual performance in determining whether there was a breach of contract. I find that there is much force in this ground. The judge found that Ms. Johnny had not established the right to accumulate leave based on the express terms of the contract. The express terms are clear that leave must be taken during the time of service. There was no provision on the express terms of the contract that vacation leave not taken during the currency would be preserved. Even if a practice of rolling over leave had been proved to exist, that does not give rise to an implied term that Ms. Johnny would be paid for her accumulated leave in the face of the express terms of the contract.

[22] In brief, Ms. Johnny's case was that a term of payment in lieu should be implied in the contract when the exigencies of the post precluded her from taking her stipulated leave. The practice of rolling over her leave implied a term that her leave would not be forfeited if she were unable to take it. Ms. Johnny's evidence is that she was unable to take advantage of her leave entitlement because of regional political and diplomatic obligations and events requiring her constant presence and

availability in Washington. Ms. Johnny referred to the primary events which precluded her from taking her prescribed leave. This was very important evidence, which was untraversed. Clearly, if the contract addressed these issues, there would have been no need for seeking to imply those terms. It is precisely because the contract did not address such issues that, given the circumstances of the case, Ms. Johnny was seeking to imply the terms. In my judgment, the learned judge was obliged to have a holistic appreciation of Ms. Johnny's performance of the contract. Ms. Hinkson-Ouhla's complaint that the judge focused mainly on the express words of the contract and failed to consider Ms. Johnny's performance of the contract as a whole is well made out.

Leave liable to forfeiture

- [23] It would be appropriate at this stage to consider the issues of forfeiture of leave and the exercise of discretion not to pay the accumulated leave. These issues were raised with counsel during the oral submissions. Clause 8 of the contract entitled Ms. Johnny to 33 days annual leave. Such leave must be taken during the tour of duty. The respondent pleaded that leave not taken is liable to forfeiture and that payment in lieu of leave not taken is a matter of discretion.
- [24] The contracts contained no provision for forfeiting leave not taken during their currency. Forfeiture is a penal provision which ought to be expressly provided for and should not arise by implication or intendment. Earlier, I referred to the imbalance of power between the State and Ms. Johnny. If it were the intention of the respondent that leave not taken during the contractual period would be liable to forfeiture, this ought to have been expressed. Even in statutes which expressly provide for forfeiture, the courts are likely to treat the provision as "liable to forfeiture." As was illustrated in **Young and another v Bess**,¹⁰ even where the words in the Aliens (Land Holding Regulation) Act seemingly provided for automatic forfeiture for breach of the Act, the Board considered the context in which

¹⁰ (1995) 46 WIR 165.

applicable words prescribing forfeiture were expressed and concluded that forfeiture was not automatic.

- [25] Apart from the fact that the contract contained no provision for forfeiture, the respondent's pleading that the untaken leave was "liable to forfeiture" denotes that forfeiture is not automatic and is a matter of discretion. The difficulty the respondent faces is that there is nothing to show what factors informed the exercise of that discretion against Ms. Johnny. When pressed on that issue, Mr. Theodore, QC could not provide a plausible answer. What transpired, in effect, was an automatic forfeiture of Ms. Johnny's leave, not taken during the term of the contract, in circumstances where the contract contained no provision for forfeiture. Accordingly, there was no proper basis for the forfeiture.

Discretion to pay for accumulated leave

- [26] It is recognised that the contracts contained no provision for the accumulation of leave or for payment in lieu of annual leave. It is also the case that the latter contracts provided that leave must be taken during the period of service. In the absence of a provision to forfeit leave not taken during the term of the contract, the issue of discretion to pay in lieu of vacation arises. It is noteworthy that the respondent pleaded that the question of payment in lieu of annual leave was a matter of discretion for the Crown. Implicit in that defence is the recognition that there may be circumstances precluding the taking of annual leave during the currency of the contract which can lead to the accumulation of leave. In that regard, I have referred to Ms. Johnny's evidence. Payment in lieu then becomes a matter of discretion.
- [27] The law pertaining to the exercise of discretion is well settled. A discretion must not be exercised arbitrarily, capriciously or unreasonably.¹¹ A decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of

¹¹ Per Leggatt LJ in *Abu Dhabi Tanker Company v Product Star Shipping Ltd (No. 2)* (Product Star) [1993] 1 Lloyd's Rep 397 at p. 404.

honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused.¹²

- [28] Given the circumstances and the principles pertaining to the exercise of discretion, there does not appear to be any logical connection between the evidence and the denial of payment. The requirements of good faith and reasonableness were not adhered to. The respondent gave no reason for the decision not to pay Ms. Johnny even if it was pleaded that whether or not payment was made was a matter of discretion. In the circumstances, the respondent did not act in good faith and there was an abuse of power. There was a wrongful exercise of discretion.

Conversion of unused vacation leave to money

- [29] Another issue arising on the appeal concerned whether the Government was required to convert unused vacation leave into money. The respondent sought to disavow liability to pay on the basis that vacation leave is not money and the Government is not required to convert untaken vacation leave into monetary compensation, absent a contractual or statutory provision. In that regard, Mr. Theodore, QC relied heavily on the recent decision of this Court in **Ministry of The Public Service Information and Broadcasting et al v Vincent Marcel**,¹³ which cited with approval the judgment of the High Court of Montserrat in **Ormond Shotte v The Attorney General**.¹⁴

- [30] In **Ormond Shotte**, a police inspector in Montserrat, with a leave eligibility of 276 days, was repeatedly found guilty of serious disciplinary breaches leading to his resignation. The Governor instructed that he be paid for three months or 75 days. Shotte instituted certiorari proceedings to quash the Governor's directive that he be

¹² Per Rix LJ in *Socimer International Bank Ltd (in Liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 at para. 66.

¹³ SLUHCVP2017/0006 (delivered 14th March 2019, unreported).

¹⁴ MNIHCV2000/0005 (delivered 30th May 2001, unreported).

paid for only three months leave, claiming that he was entitled to be paid for the remaining 201 days. Saunders J held:

“... Accumulated leave is an eligibility to the enjoyment of a future benefit from your employer provided of course you are still employed at that future date. Upon his resignation the applicant severed his links with his employers. Barring any statutory or contractual provision to the contrary, the applicant’s act of resignation, with no prior arrangement or agreement as to how his accumulated leave should be disposed of, put an end to the possibility of the taking of leave. It must be stressed that leave is not money. It is absence from duty with permission. Upon his severance from the Force, the accumulated periods of absence from duty to which the applicant may have been entitled, had he remained in the Force, were now rendered superfluous. They could no longer be granted to him. He had no employer from whom to request or demand the same. I am not persuaded that there arises any onus on the State, in such circumstances, to convert leave into money. This is why, upon retirement, a person takes any leave due prior to the date of retirement. Similarly, a person who is resigning but who desires not to lose his accumulated leave ought, where possible, to arrange his affairs so that the leave due is taken prior to the effective date of resignation.”¹⁵

[31] In **Marcel**, a police officer was arrested, charged and consequently suspended from duty on half pay on 29th April 2003 pending the determination of criminal charges. While on suspension, he retired from the Police Force in February 2012. His conviction on all charges was quashed by the Court of Appeal in October 2015. Marcel instituted proceedings claiming payment in lieu of vacation leave accrued and not taken prior to his suspension for the period 2001 to 2002, and for the period of suspension from 2003 until his retirement in 2014. The master found that he was entitled to payment in lieu of vacation accrued both before and during his suspension.

[32] On appeal from the master, the Court of Appeal applied **Shotte** and held that Marcel could not retire when he did and then several years later seek monetary compensation for his own failure to make proper arrangements for taking his accumulated leave. His failure to make such arrangements while in the employ of the Government effectively resulted in the extinguishing of any leave entitlement

¹⁵ MNIHCV2000/0005 (delivered 30th May 2001, unreported), at para. 11.

that he accrued. In the absence of a contractual or statutory provision, the Government is not required to convert vacation leave not taken into monetary compensation. Further, leave is not money.

[33] In **Shotte**, it was stated that 'leave is not money. It is the absence from duty with permission.' In my judgment, leave is certainly an entitlement to which a monetary value can be ascribed. The ascription of that value derives from the ordinary liability of an employer to pay wages notwithstanding the employee is on leave. Naturally, upon the termination of the employment relationship, the issue of the employee taking leave cannot arise.

[34] In my judgment, Ms. Johnny was contractually entitled to 33 working days annual leave, that is, paid leave. The Government of Saint Lucia, as the employer, was liable to make payment in respect of the annual leave. This is the ordinary liability to pay wages to an employee in respect of the period of employment, notwithstanding that the employee's entitlement to leave excuses him from attending work during the period. Ms. Johnny explained that the exigencies of the service precluded her from taking all her vacation leave. Ms. Johnny claimed payment in lieu of leave. Although the judge did not find that there was a practice of payment in lieu of leave, it is not disputed, and the judge found, that Ms. Johnny was paid in lieu of vacation leave in 2000. The judge remarked that this was the only time apart from when Ms. Johnny was resigning in 2007 that she made such application and was paid. To my mind, what is of moment is the fact that the evidence established an instance where Ms. Johnny received payment in lieu of leave.

[35] Not only was it pleaded that payment in lieu of leave is a discretionary matter for the Crown, the judge found that the evidence clearly supports the fact that payment in lieu of leave was an exercise of discretion by an employer. The evidence established that Ms. Johnny was the beneficiary of the favourable exercise of that discretion in 2000. So on the pleaded defence, the evidence and the judge's

finding, the issue of payment in lieu of leave was seen as a discretionary matter. These factors clearly distinguish this case from **Shotte** and **Marcel**. Although the question in **Shotte** and **Marcel** was whether there was an entitlement to be paid in lieu of leave, the factual circumstances and pleading in the present case, which informed the question of whether payment should be made for leave not taken, are different. Given the circumstances and for the reasons indicated, reliance on the cases of **Shotte** and **Marcel** do not avail the respondent.

Procedural unfairness

- [36] Ms. Hinkson-Ouhla also complains of procedural unfairness and the judge's treatment of the evidence. The first issue is whether the judge acted in a procedurally unfair manner towards Ms. Johnny. This issue finds expression in grounds (vi) and (vii). Ms. Hinkson-Ouhla complains that the judge raised issues in the judgment which were never raised in the trial or in submissions and on which she based adverse findings against Ms. Johnny. Ms. Hinkson-Ouhla asserts that this was procedurally unfair to Ms. Johnny and breached the rule in **Browne v Dunn**.¹⁶ Further, the judge failed to appreciate the rule that a party who failed to cross-examine on a particular issue is deemed to have accepted the facts. Ms. Hinkson-Ouhla contends that the judge breached the rule in **Browne v Dunn** when, in respect of Ms. Johnny's evidence relating to the leave record, she stated:

"Ms. Johnny's evidence is that at the end of each contract, her leave form included a statement that leave was rotated to the next contractual period. In support of this, she provided copies of documents exhibited as SJ2. These exhibits are uncertified. Their origin is unknown and bears no identification marks as to whose leave is recorded."¹⁷

- [37] In further emphasising the point, the judge stated at paragraph 29 that:

"[T]hese records were uncertified and bore no evidence to support that these records belonged to Ms. Johnny. Their origin was not stated. Therefore, the Court attaches very little weight to them as supporting Ms. Johnny's contention that her leave was accumulated from contract to contract."

¹⁶ (1893) 6 R 67.

¹⁷ Para. 19 of the judgment below.

The judge commented, at paragraph 29 of the judgment, that Ms. Johnny did not seek:

“... to point the Court to where the indications of accumulation of leave are contained in the said documents. The Court cannot be expected to surmise or speculate as to the entries on the leave record, yet alone interpret them. Some of the entries are illegible.”

[38] Ms. Hinkson-Ouhla submits that there was no legal basis on which the judge could have applied little weight to the evidence of the leave record and it was inappropriate and procedurally unfair for the judge to do so. The leave record was accepted and was unchallenged.

[39] I will consider the rule in **Browne v Dunn**, the law relating to acceptance of facts not challenged in cross-examination, and the law relating to the weight of evidence. First, the rule in **Browne v Dunn**. The relevant law was succinctly set out by the Board in **Chen v Ng (British Virgin Islands)**,¹⁸ at paragraph 53. The gravamen of the general principle in **Browne v Dunn** is fairness. If a party proposes to invite the judge, as the trier of fact, to disbelieve the evidence of a witness on a particular point, that ought, except in exceptional circumstances be made clear to the witness so that he has the opportunity to offer any explanation for what he says, and to show, if he can, that his evidence is reliable. A failure to put a point should normally disentitle the point to be taken against a witness in closing speech. It will not do, to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation, by reason of there having been no suggestion whatsoever, in the course of the case, that his story is not accepted. Where it is not made clear during a trial that the evidence or a significant aspect thereof is challenged as inaccurate, it is inappropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment.

¹⁸ [2017] UKPC 27.

- [40] Secondly, with respect to the admission of facts not challenged in cross-examination, it is not the law that every fact asserted in evidence by a witness is deemed to be admitted unless it is challenged in cross-examination. But if on an important disputed factual issue in the proceedings, a witness called by one party gives first hand evidence which contradicts a case, which the opposing party wishes to invite the judge to accept, procedural fairness requires that this case should be put in cross-examination to the witness, so that he has an opportunity to answer it.¹⁹
- [41] Thirdly, the weight of evidence is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses. It is inappropriate for this Court to interfere with that evaluation unless it is perverse.²⁰ As Langstaff J explained in **The Queen (on the application of Johnson) v Bristol Crown Court**²¹ at paragraphs 40 to 41: ‘Perversity is a high hurdle. It is reaching a decision which flies in the face of reason...Weight of evidence is always a matter of judgment. Judgment, unless it is perverse, is very difficult to appeal successfully’.
- [42] The judge stated that Ms. Johnny was relying on the practice of rolling over leave from contract to contract but apart from the uncertified records of leave produced, gave no evidence of such a practice. It is difficult to rationalise this with paragraph 20 of Ms. Johnny’s witness statement. At paragraph 27 of her witness statement, Ms. Johnny stated that: “On November 2000 the balance of my leave was carried over to my next contract, a process which continued without objection from anyone during my tenure”. The leave record was submitted as documentary evidence in support of Ms. Johnny’s evidence that at the end of each contract her leave form included a statement that leave was carried over to the next contract. The evidence given by Ms. Johnny was unchallenged. I take it that in the normal course of things the relevant department of the public service would be the custodian of the

¹⁹ Per Leggatt LJ in *W Nagel (A Firm) v Pluczenik Diamond Company NV* [2018] EWCA Civ 2640 at para. 21.

²⁰ *Manzi v King’s College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882.

²¹ [2017] EWHC 2528 (Admin.)

record and thus be in a position to verify its authenticity or establish its falsity. In fact, Ms. Johnny's evidence was that her leave record was always in the possession of the Ministry of Foreign Affairs and the Embassy of Saint Lucia in Washington.

[43] The leave form "SJ2" contains two pages; all the entries are hand-written. On the first page, among other things, is a hand-written inscription relating to payment of leave, below which is written "Carried to next contract". The judge's statement that Ms. Johnny did not seek to point the court to where the indications of accumulated leave are contained in the documents seems to be rather puzzling. The question is whether it was perverse for the learned judge to attach very little weight to the leave record for the reasons that she stated. Paying regard to the high hurdle to be crossed for establishing perversity, I am not satisfied that perversity has been established.

[44] The judge was entitled to make up her own mind about the evidence before her, but she was not entitled, not without explicit warning, to attach very little weight to Ms. Johnny's evidence; evidence which had not been challenged by cross-examination. Although the hurdle of perversity was not satisfied, it was simply unfair for Ms. Johnny's evidence to have been found wanting in such respects unless the relevant challenges had been put to her and she was given an opportunity to respond. I agree with Ms. Hinkson-Ouhla that it was procedurally unfair and offended the principle in **Browne v Dunn**.

[45] Ms. Johnny also relied on the evidence of Mr. Earl Huntley, with respect to the rolling over of leave. Mr. Huntley was a former Permanent Secretary in the Ministry of External Affairs and had served in the public service of Saint Lucia for twenty-five years, holding very senior positions including Ambassador to the United Nations from 2001 to 2004. His evidence was that during that period it was normal for civil servants, particularly at the senior management levels, to roll over their vacation leave if heavy work commitments rendered it difficult to take such leave at the time

that it was due. The judge held that Mr. Huntley's evidence was not tested in cross-examination and the court is not certain whether his evidence related to contract public officers/civil servants or permanent establishment public officer/civil servants. It is clear then, that the judge placed no reliance on Mr. Huntley's evidence or impliedly rejected it.

[46] Ms. Hinkson-Ouhla lamented the judge's failure to accept Mr. Huntley's evidence regarding the practice of rolling over leave of senior public officers for the reasons advanced. I agree with Ms. Hinkson-Ouhla that since the issue was not raised at any time by the respondent, it was not open to the learned judge to rule, without more, that she was uncertain whether the practice applied to public servants generally and disregard the evidence. Clarification could have been sought by questioning the witness. I agree with Ms. Hinkson-Ouhla's submission that, 'it was procedurally unfair to admit the evidence, raise the issue after the proceedings and then rule against the appellant.'

[47] Grounds (viii) (ix) and (x) allege certain errors and misdirection by the judge relating to the treatment of evidence. These grounds do not affect the outcome of the appeal in view of my findings regarding errors of the learned judge. Ms. Hinkson-Ouhla complains that in dismissing Ms. Johnny's claim, the judge failed to appreciate that the respondent provided no evidence contradicting that of Mr. Huntley and therefore Mr. Huntley's evidence, of the rolling over of accumulated leave and compensation for the leave thus accumulated, ought to have been accepted. Mr. Huntley's evidence was that as Permanent Secretary he was aware of the 'standard practice' to pay civil servants in lieu of leave in cases where it was not feasible for the officer to take leave. He stated that there were occasions when he had to defer his leave and he was paid for it. The judge did not seem to have been impressed by that evidence, stating that Mr. Huntley provided no evidence to support this and the Court does not know on how many occasions this actually happened. While I do not think that these are necessarily proper bases for

rejecting the evidence, the fact is that Ms. Hinkson-Ouhla's argument does not assist Ms. Johnny as Mr. Huntley could only speak to the period up to 2001.

[48] Ms. Hinkson-Ouhla alleged that the judge misdirected herself when she concluded that based on the testimony of Ms. Johnny, that she had been advised that her request for payment in lieu had been forwarded to the Public Service for submission to Cabinet, settled the issue that there is no practice of payment in lieu. I do not believe that Ms. Johnny's evidence necessarily supports the conclusion the judge arrived at. In any event, whatever the practice may have been, there was no right to forfeiture of the leave.

[49] I am of the view that there is force in the complaint that the judge erred in law when she concluded that Ms. Johnny had to prove that the rolling over was a general practice within the public service and not only applicable to her contract. It seems to me that the relevant inquiry would pertain to what was obtained with respect to Ms. Johnny's performance of her contract.

Conclusion

[50] In conclusion, for the reasons given, I would allow the appeal and set aside the orders of the learned judge dismissing the claim and awarding costs to the respondent/Attorney General. I would award the appellant payment in lieu of vacation leave in the sum of \$220,395.60; pre-judgment interest thereon at the rate of 6% per annum pursuant to article 1009A of the **Civil Code of Saint Lucia** and prescribed costs in the sum of \$30,049.45 in the court below and 2/3 of that amount on appeal.

Order

[51] It is ordered that:
(i) The appeal is allowed.

- (ii) The appellant is awarded payment in lieu of vacation leave in the sum of \$220,395.60, together with prejudgment interest thereon at the rate of 6% per annum, pursuant to article 1009A of the **Civil Code of Saint Lucia**.
- (iii) The appellant is awarded prescribed costs in the sum of \$30,049.45 in the court below and 2/3 of that amount on appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Vicki Ann Ellis
Justice of Appeal [Ag.]

By the Court

Chief Registrar