

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

SAINT LUCIA

SLUHCVAP2017/0006

BETWEEN:

**[1] MINISTRY OF THE PUBLIC SERVICE INFORMATION AND
BROADCASTING
[2] THE ATTORNEY GENERAL OF SAINT LUCIA**

Appellants

and

VINCENT MARCEL

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

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

Appearances:

Ms. Jan Drysdale for the Appellants
Mr. Andie George for the Respondent

2017: December 12;
2019: March 14.

Civil appeal – Employment law – Suspension from duties – Whether an officer in the Royal Saint Lucia Police Force can earn or accrue vacation leave while on suspension – Entitlement to payment for vacation leave earned but not taken – Staff Orders for the Public Service of Saint Lucia 1983 – Prescription – Police Act – Police Regulations – Authority of Commissioner of Police to offer payment in lieu of vacation leave

The Respondent, Mr. Vincent Marcel ("Mr. Marcel"), was employed by the Government of Saint Lucia as a police officer in the Royal Saint Lucia Police Force. He was arrested and charged for certain criminal offences and consequently suspended from duty with half pay on 29th April 2003 pending the determination of the charges. He was convicted on all the charges, but the convictions were quashed by the Court of Appeal on 26th October 2015.

Mr. Marcel retired from the Police Force on 10th February 2012 while still on suspension. In May 2013 his counsel wrote to the Commissioner of Police, Mr. Vernon P. Francis ("the Commissioner"), seeking compensation for the vacation leave that he accrued before his retirement. The Commissioner responded indicating that Mr Marcel had accrued 356 days' vacation leave and that he would be paid \$36,518.11 salary and benefits in lieu of the vacation not taken and invited him to indicate how the

payment should be made. Mr Marcel did not agree with the amount of days being offered. He instituted proceedings against the Appellants claiming payment in lieu of vacation accrued and not taken prior to his suspension for the period 2001-2002, and for the period of suspension from 2003 until his retirement in 2014.

The learned master found that the suspension of Mr Marcel did not rescind the contract of employment, and the employer/employee relationship subsisted pending the final determination of the charges against Mr. Marcel. He therefore remained a worker while on suspension and continued to accrue full salary, vacation leave and other entitlements. The learned master further found that as Mr. Marcel had retired and his convictions were later quashed by the Court of Appeal, he was entitled to payment in lieu for the vacation accrued both before and during his suspension. The learned master also considered the recognition by the Commissioner of Mr. Marcel's entitlement to vacation leave as clear acquiescence of an entitlement to payment in lieu of vacation leave. In relation to whether prescription applies to Mr. Marcel's claim for compensation for leave accumulated prior to suspension., the learned master ruled that any amounts claimed for leave accrued before the suspension fell outside the 3-year limitation period and were not recoverable, and that prescription did not apply to the claim for the period during suspension.

Being dissatisfied with the decision of the learned master, the Appellants appealed. The main issues in this appeal are whether Mr. Marcel earned vacation leave while on suspension; whether he is entitled to monetary compensation for accrued vacation leave not taken; whether prescription has an effect on his claims; and the effect of the Commissioner's offer of payment to Mr. Marcel in lieu of vacation.

Held: allowing the appeal; setting aside the order of the learned master and making no order as to costs, that:

1. The learned master did not err in finding that the Respondent was entitled to accrue vacation while on suspension. Vacation leave is granted in respect of service, and in the absence of a statutory or contractual provision to the contrary, the Respondent's continued employment in the Police Force entitled him to accrue vacation, even while on suspension. If the legislature had intended to deprive a police officer of that benefit during suspension, express provision would have been made for this in the Police Regulations or the Staff Orders.

Staff Order no. 6.12 of the **Staff Orders of the Public Service of Saint Lucia** applied; **Police Act** Cap. 14.01 Revised Laws of Saint Lucia 2014 considered.

2. The Police Regulations permit police officers to accumulate vacation leave up to certain specified maximums and a police officer is only entitled to accumulate and take up to 150 days' vacation leave on retirement.

Regulation 27 of the **Police Regulations** Cap. 14.01 Revised Laws of Saint Lucia 2014 applied; **Ormond Shotte v The Attorney**

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

3. The Respondent is not entitled to damages for breach of contract and the present case is distinguishable from the cases of *Welch v Trinibashment Limited* and *Burrill v Schrader*, both of which involve claims for breach of contract.

Ricardo Welch v Trinibashment Limited TT 2012 HC 13 distinguished; **Burrill and Another v Schrader and Another** (1995) 50 WIR 193 distinguished.

4. 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. There is no need to introduce a fundamentally different position into the Respondent's contract of employment by implying a term that the employee is entitled to monetary compensation for leave not taken. If the Government had intended to allow payment for vacation leave not taken it would have made provision for it in the terms of employment. This Court cannot be called upon to imply such a term.

Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10 applied; **Bank of Nova Scotia v Emile Elias & Co Ltd** (1992) 46 WIR 33 applied.

5. Vacation leave is not money. The respondent 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. In the absence of a contractual or statutory provision, the Government is not required to convert vacation leave not taken into monetary compensation.

Ormond Shotte v The Attorney General MNIHCV2000/0005 (delivered 30th May 2001, unreported) applied.

6. Though the Police Commissioner is vested with the responsibility to manage the finances of the Police Force, he does not possess the authority to make a payment without proper authorisation. The Commissioner is not an entity unto himself and he did not have the authority to make the payment that he promised to the Respondent. In this case, the promise of payment in lieu of vacation was not made by the Respondent's employer, the Government of Saint Lucia, but by the Commissioner, an employee of the State who did not have the authority to make such a decision.

Section 7 of the **Police Act** Cap. 14.01 Revised Laws of Saint Lucia 2014 applied; Section 6 and 26 of the **Finance (Administration) Act** Cap. 15.01 Revised Laws of Saint Lucia 2014 applied; Regulation 5

and 72 of the **Financial Regulations** Cap. 15:01 Revised Laws of Saint Lucia applied; **Vincent Lynch v Public Transport Service Corporation** HC 2123/2011 dated 8th January 2013 distinguished.

JUDGMENT

- [1] **WEBSTER JA [AG.]**: This appeal concerns the right of a member of the Royal Saint Lucia Police Force to accrue vacation leave while on suspension from the Force, awaiting the determination of criminal charges against him, and to be paid for such leave if not taken prior to retirement. By a judgment dated 30th December 2016, the learned master found that the respondent, Mr. Vincent Marcel ("Mr. Marcel"), did accrue vacation leave during his suspension, and that such leave not having been taken, he is entitled to be paid salary in lieu.

Background

- [2] Mr. Marcel was employed by the Government of Saint Lucia as a police officer in the Royal Saint Lucia Police Force. He was arrested and charged for certain criminal offences and consequently suspended from duty with half pay on 29th April 2003 pending the determination of the charges. He was convicted on all the charges, but the convictions were quashed by the Court of Appeal on 26th October 2015.
- [3] Mr. Marcel retired from the Police Force on 10th February 2012 while still on suspension. In May 2013 his counsel wrote to the Commissioner of Police, Mr. Vernon P. Francis ("the Commissioner"), seeking compensation for the vacation leave that he accrued before his retirement. The Commissioner responded indicating that Mr Marcel had accrued 356 days' vacation leave and that he would be paid \$36,518.11 salary and benefits in lieu of the vacation not taken and invited him to indicate how the payment should be made. Mr Marcel did not agree with the amount of days being offered.
- [4] On 17th November 2014, Mr. Marcel instituted proceedings against the appellants claiming payment in lieu of vacation accrued and not taken prior to his suspension for the period 2001-2002, and for the period of suspension from 2003 until his retirement in 2014. It is unclear what transpired after the Commissioner indicated his willingness to compensate Mr. Marcel and the institution of the claim. Based on the judgment of the court below, it appears that in later correspondence between counsel for Mr. Marcel

and the Commissioner, there was disagreement regarding the number of accrued vacation days.

- [5] Following the filing of the claim, the parties entered into negotiations and Mr. Marcel was paid a gratuity, part of which was calculated on a half salary basis. During further negotiations, the outstanding salary payment was determined on the full salary basis, but the parties failed to agree the amount of leave accrued prior to and during suspension.
- [6] When the matter came up for case management the learned master directed the parties to file submissions on the issues of whether Mr. Marcel was entitled to vacation leave during his suspension and to whether he is entitled to compensation for the outstanding accumulated leave. Counsel for the parties also made submissions on the issue of whether prescription applies to Mr. Marcel's claim for compensation for leave accumulated prior to suspension.
- [7] After reviewing the arguments submitted by counsel for the parties, the learned master found that the suspension of Mr Marcel did not rescind the contract of employment, and the employer/employee relationship subsisted pending the final determination of the charges against Mr. Marcel. He therefore remained a worker while on suspension and continued to accrue full salary, vacation leave and other entitlements.
- [8] The learned master further found that as Mr. Marcel had retired and his convictions were later quashed by the Court of Appeal, he was entitled to payment in lieu of vacation accrued both before and during his suspension. The learned master also considered the recognition by the Commissioner of Mr. Marcel's entitlement to vacation leave as clear acquiescence of an entitlement to payment in lieu of vacation leave accrued and not taken.
- [9] In relation to the prescription point, the learned master ruled that any amounts claimed for leave accrued before the suspension fell outside the 3-year limitation period and

were disallowed, and that prescription did not apply to the claim for the period during suspension.¹

- [10] Being dissatisfied with the decision of the learned master, the appellant appealed. The issues that arise on this appeal are:
- i. Whether Mr. Marcel earned vacation leave whilst on suspension.
 - ii. Whether Mr. Marcel is entitled to payment for vacation leave earned but not taken.
 - iii. The effect of the Commissioner's offer of payment to Mr. Marcel in lieu of vacation.
 - iv. Whether prescription has an effect on the claims made by Mr. Marcel.

Whether Mr. Marcel can earn vacation leave while on suspension

- [11] Counsel for the appellants, Ms. Jan Drysdale, submitted that vacation leave is not automatic by virtue of one's employment; it must be earned by the rendering of service continuously for a calendar year. She defined suspension as the stopping of work for a period of time and submitted that while suspended, an employee is incapable of performing his or her duties. She contended that in the circumstances, Mr. Marcel could not accrue vacation leave while on suspension, as leave is calculated on the basis that an employee has worked over a continuous period during the calendar year. In support of this submission, Ms. Drysdale relied on no. 6.12 of the Staff Orders of the Public Service of Saint Lucia which states as follows:

"Leave to be granted in respect of service

6.12 (1) Except as provided by these Orders, leave will be granted in respect of service. Absences on duty, absences on departmental 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."

- [12] Ms. Drysdale argued that as suspension from duty is not listed in subsection (1) of the Staff Orders as an absence that would count as service, and since there is no applicable statutory authority that provides that suspension constitutes service, Mr. Marcel would not be entitled to earn vacation leave while suspended. Ms. Drysdale

¹ See paragraph 42 below.

further argued that Mr. Marcel's suspension rendered him incapable of being in service which is a necessary requirement for the grant of leave under the Staff Orders. She submitted that an employment contract without the actual performance of work cannot vest an employee with a right to accrue vacation, as the employee is unable produce working days upon which vacation leave is calculated.

[13] Counsel for Mr. Marcel, Mr. Andie George, submitted that vacation leave is granted in respect of service and service does not necessarily mean being at work. Further, service is the status of being in the employment of the Crown, while being "at work" or "on duty" means performing tasks associated with one's employment or service. Mr. George argued that although Mr. Marcel was suspended from duty, he was still in the Crown's service and thus had accumulated leave during his period of suspension which he was unable to use prior to his retirement.

[14] Mr. George pointed out that there is nothing in the Staff Orders that prohibits an employee accruing vacation leave while on suspension. He referred to section 32 of the **Police Act**² which deals with disciplinary measures that apply to an officer on suspension, including payment of salary while on suspension. This section empowers the Commissioner to suspend, from duty, an officer charged with a criminal offence, and place him or her on half pay pending the outcome of the charges. Mr. George argued that the effect of suspension is to remove the officer from duty (work) but not to terminate his employment (service). He argued that absence from duty is therefore not inconsistent with service. The section also provides that if the officer charged obtains a favourable decision, he is entitled to receive all the pay which was withheld. Mr. George submitted that having been exonerated, Mr. Marcel is entitled to all benefits and remuneration during his suspension, including his vacation leave.

[15] I agree with Mr. George that service is the status of being within the Crown's employment and that it does not necessarily require an employee to be on duty. Mr. Marcel was suspended from work pending the outcome of criminal charges brought against him. There is no dispute that the suspension did not terminate the employer-employee relationship between him and the Government of Saint Lucia. The fact that

² Cap 14.01, Revised Laws of Saint Lucia 2014.

the **Police Act** makes provision for his remuneration during his suspension, albeit on a half-pay basis, supports the conclusion that he remained in the service of the Crown. Further support for the conclusion is found in Staff Order no. 6.12, referred to above,³ which states that vacation leave will be granted in respect of service even in circumstances where the police officer is absent from duty.

[16] Having decided that vacation leave is granted in respect of service, and in the absence of a statutory or contractual provision to the contrary, I am satisfied that Mr. Marcel's continued employment in the Police Force entitled him to accrue vacation, even whilst on suspension. If the legislature had intended to deprive a police officer of that benefit during suspension, express provision would have been made for this in the Regulations and/or the Staff Orders. Furthermore, Mr. Marcel was fully exonerated when the Court of Appeal quashed his convictions on 26th October 2015. The decision operated retroactively, entitling him to receive all the emoluments for the period that he remained under suspension, including the vacation leave that he would have earned as per Staff Order no. 6.12 had he not been suspended.

[17] Ms Drysdale also submitted that Staff Order no. 6.10 forbids the carrying forward of leave. However, this prohibition is limited to departmental leave. In any event, it is only where the **Police Regulations**⁴ are silent on an issue should one look to the appropriate Staff Order for guidance, as the Staff Orders cannot supersede the **Police Regulations**.⁵ Part 4 of the **Police Regulations** speak to leave. Regulation 27 permits police officers to accumulate vacation leave up to certain specified maximums.

Regulation 27(c) provides that:

“... a member of the Force shall not be granted more than 75 working days leave in any one year, except where such leave is granted on final termination of service when he or she may be granted up to 150 working days leave”.

³ At para. 11.

⁴ Cap 14.01, Revised Laws of Saint Lucia 2014.

⁵ *Ormond Shotte v the Attorney General* MNIHCV2000/0005 (delivered 30th May 2001, unreported). Per Saunders J at para. 14.

Under this provision Mr. Marcel could accumulate leave during his suspension, but he would only be entitled to take up to 150 days on retirement, and not the over 300 days which he claimed.

- [18] Based on the foregoing, the learned master did not err in her finding that Mr. Marcel was entitled to accrue vacation whilst on suspension since he remained within the employ of the Crown. Having concluded that Mr. Marcel can earn vacation leave whilst on suspension, I will now deal with the more controversial issue of whether he is entitled to be paid for vacation leave earned but not taken.

Whether Mr. Marcel is entitled to payment for vacation earned but not taken

- [19] Ms. Drysdale submitted that if Mr. Marcel is in fact entitled to earn vacation leave, he is to be given the vacation leave and not payment for it. She argued that the Staff Orders which are the terms of employment between Mr. Marcel and the Crown are clear and only provide for vacation. Ms. Drysdale referred the Court to the sections 26 and 27 of the **Police Regulations** which stipulate the terms of vacation leave and submitted that there are no provisions therein that allow for payment in lieu of vacation. Learned Counsel argued that as the employment contract and relevant statutory provisions are clear and do not provide that the failure of an employee to take vacation would entitle him to be paid in lieu of same, such a term should not be implied.

- [20] Ms. Drysdale referred the Court to the case of **Morley v Heritage PLC**⁶ which concerned the entitlement of an employee to payment in respect of holiday accrued but untaken at the date of termination of employment in the absence of an express contractual provision to that effect. In this case, the employee's contract provided that he had an annual holiday entitlement of 20 days, but it did not speak to his rights on termination of employment if he has leave not taken. After his resignation, his claim to payment for 13 untaken vacation days was rejected by the Court of Appeal in England. The Court of Appeal held that where there is no such contractual term, an employee is not entitled on termination to payment for holiday not taken during the period of employment. The Court regarded implying a term entitling him to payment

⁶ [1993] IRLR 400.

as “impossible” and found that the “business efficacy of the contract does not require the implication of any such term”.⁷

[21] Mr. George distinguished **Morley** from the present case on the basis that in **Morley** there was specific clause that precluded the employee from receiving any payment in lieu of vacation. While he admitted that there are no provisions in the Staff Orders or the **Police Act** that expressly provide for payment in lieu of leave, he argued that as such a provision is not expressly excluded it may therefore be implied.

[22] Mr. George also relied on the case of **Ricardo Welch v Trinibashment Limited**,⁸ a decision of the High Court of Trinidad and Tobago. The claimant’s two-year contract of employment was wrongfully terminated by his employer and the issue before the court was the assessment of damages for the wrongful termination. The Court found, rightly in my opinion, that:

“As a rule, the measure of damages recoverable in cases of wrongful dismissal is the amount that the claimant would have earned had the employment continued according to contract, subject to any deductions in respect of sums earned in mitigating damages.”⁹

The learned judge found that the claim for 21 days accrued but untaken vacation was reasonable and awarded the \$21,000 claimed. Mr. George submitted that, similarly, payment in lieu of vacation is reasonable in Mr. Marcel’s case because he was prevented from taking vacation due to his long suspension, and he later became entitled to his full benefits under the **Police Act** when his convictions were quashed.

[23] **Welch v Trinibashment Limited** applied the decision of this Court in **Burrill and Another v Schrader and Another**,¹⁰ another wrongful dismissal case, in which the claimants sought, among other things, damages for commissions, accommodation and vacation pay which they would have earned and enjoyed during the unexpired period of the employment contract. In **Burrill**, the employers admitted that the appellants were entitled to four weeks’ vacation pay for each year’s service. The unanimous decision of the Court was delivered by Sir Vincent Floissac CJ. His award for the

⁷ Per Rose LJ at para. 33.

⁸ TT 2012 HC 13.

⁹ *ibid* at para. 6.

¹⁰ (1995) 50 WIR 193.

wrongful dismissal of the appellants included a sum representing one month's vacation leave, instead of the two months claimed, holding that this would not be unreasonable "having regard to the contingencies and vicissitudes of life (including the possibility of lawful pre-determination of the contract of employment for one reason or another)".¹¹

[24] I find that the circumstances of the present case are distinguishable from **Welch v Trinibashment Limited** and **Burrill v Schrader**. In this case there is no allegation of breach of contract by the employer as in the cases relied on by counsel. Mr. Marcel was charged with serious criminal offences and was convicted. There is no challenge to the propriety of his suspension and there could be none on the facts. He appealed and before his convictions were quashed by the Court of Appeal, he resigned from his employment. He is not entitled to damages for breach of contract, only to such amounts as would put him in the position had he continued in his employment up to retirement. The cases cited by counsel are therefore of no assistance to Mr. Marcel on this issue.

[25] I found above that Mr Marcel is entitled to accrued vacation leave during the period of his suspension. But the real claim, and the main issue in this case, is whether he is entitled to monetary compensation for accrued vacation leave not taken. He is not so entitled on the basis of an express term of the employment contract, nor for breach of contract as in the **Welch v Trinibashment Limited** and **Burrill v Schrader** cases. Mr. George submitted that the Court should imply into the employment contract a term to the effect that Mr. Marcel is entitled to compensation for leave not taken. I will now deal with that submission.

Implied Term

[26] There is a general presumption against implying terms into written contracts. In the Privy Council decision of **Attorney General of Belize and Others v Belize Telecom Ltd and Another**,¹² the Board set out the law with respect to implying contractual terms. Lord Hoffman stated at paragraph 17 that:

"The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had

¹¹ *ibid* at p. 202.

¹² [2009] UKPC 10.

intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.”

[27] The test of implication is also one of necessity.¹³ I am not of the view that it would be necessary or appropriate to imply into the contractual relationship between Mr. Marcel and the Government of Saint Lucia, a term to the effect that vacation leave accrued but not taken should be compensated by a money payment when the employee retires. The usual practice is that such leave is taken in a form agreed between the parties and this is entirely consistent with the terms of the contract subject, to the limit of 150 days mentioned above. There is no need to introduce a fundamentally different position into the contract by implying a term that the employee is entitled to monetary compensation for the leave not taken. If the parties had intended that the employee should have this right, it would have been the simplest thing to include it in the Staff Orders or the Police Regulations. Lord Hoffman was quite clear that the court does not possess the power to improve upon the contract which it is called upon to interpret, nor can it introduce into the contract terms which are fairer or more reasonable.¹⁴ If the Government had intended to allow payment for vacation leave not taken it would have made provision for it in the terms of employment. This Court cannot be called upon to imply such a term simply because Mr. Marcel finds it to be a more reasonable arrangement.

[28] Mr. George also submitted that Mr. Marcel's vacation leave accrued from 2003, when he was suspended, to 2012, when he retired. During this period, he did not have an opportunity to take his vacation leave because he was on suspension. As such he should be paid for it. The difficulties that I have with this submission are that it is just another way of positing the implied term argument (which I have rejected), and it proceeds on the basis that the granting of payment in lieu of outstanding vacation leave naturally flows from the act of retirement.

¹³ Per Sir Denys Williams CJ, *Bank of Nova Scotia v Emile Elias & Co Ltd*, (1992) 46 WIR 33 at p. 40 quoting with approval Lord Scarman's judgment in the Privy Council decision of *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] AC 80.

¹⁴ *Attorney General of Belize v Belize Telecom Ltd* (n 12) at para. 16.

[29] The case of **Ormond Shotte v the Attorney General**¹⁵ is instructive on both sides of this issue. Mr. Shotte, a former police inspector, was repeatedly found guilty of serious breaches of discipline and the Commissioner of Police recommended his dismissal from the Royal Montserrat Police Force. The applicant appealed to the Governor of Montserrat who gave him three days to consider resigning from the Force. Mr. Shotte choose to resign as this option guaranteed his gratuity and pension. At the date of his resignation, Mr. Shotte was apparently eligible for 276 days leave. However, when he elected to resign, the Governor directed that he should be paid for three months (or 75 days) of that leave. Mr. Shotte subsequently brought an action against the State claiming that he was entitled to be paid for the remaining 201 days. Although **Shotte** can be distinguished from this case on the facts, I adopt the following the dicta of Saunders J (as he then was) as being quite applicable to Mr Marcel's position:

“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 that 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.”¹⁶

[30] This passage by the learned judge sums up in clear and concise terms the position in which Mr. Marcel finds himself, and it is unfortunate that the case was not brought to the attention of the Court by the parties. Mr. Marcel, during the period of his suspension, opted for early retirement. This is significant as it means that he had a number of years of service remaining before he would be obliged to retire. There was nothing preventing him from putting his affairs in order by applying for his vacation leave during his 9-year period of suspension between 2003 and 2012. As a matter of

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

¹⁶ Ormond Shotte v the Attorney General (n 15) para. 11.

fact, even during 2012 it was still conceptually possible for him to have applied for vacation before he applied for early retirement. On the special facts of this case he could also have awaited the outcome of his appeal, and with the convictions being quashed, retire from the Force with proper arrangements being made for his accumulated vacation leave. What he could not do was to 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 proper arrangements while he was in the employ of the Government of Saint Lucia, effectively resulted in the extinguishing of any leave entitlement that he accrued. Furthermore, as stated above by Saunders J, leave is not money. It is an opportunity for rejuvenation from the rigours of work. The proposition that the Government is required, in the absence of any contractual or statutory provision, to convert untaken vacation leave into monetary compensation is untenable.

- [31] I therefore find that the learned master erred in holding that upon Mr. Marcel's resignation he was entitled to payment in lieu of untaken vacation leave.

The effect of the Commissioner of Police's offer of payment to Mr. Marcel in lieu of vacation leave

- [32] Mr. George submitted that there is a contractual arrangement between a police officer and the Commissioner of Police upon the officer being hired. He pointed out that the Constitution vests in the Commissioner the authority to hire, as well as take disciplinary measures such as suspension and termination. The Commissioner, as the head of the department, is empowered to administer leave and that his office is generally charged with the task of calculating an officers' remuneration entitlements for onward transmission to the Treasury Department.
- [33] Mr. George argued that the actions of the Commissioner in suspending Mr. Marcel from duty indirectly prevented him from taking vacation leave. Learned Counsel referred to correspondence from the Commissioner dated 11th June and 24th July 2013 in which he promised to pay Mr. Marcel a certain sum in lieu of untaken vacation days. He submitted that the Commissioner's actions of accepting Mr. Marcel's retirement without first requiring him to take vacation leave and promising to pay him for his outstanding vacation days effectively binds the Government of Saint Lucia to this

promise and Mr. Marcel was quite reasonable to proceed on this basis. He submitted that the learned master therefore did not err when she held that the Commissioner's correspondence indicating his willingness to compensate Mr. Marcel was a clear recognition on his part of Mr. Marcel's entitlement to payment in lieu of vacation leave.

[34] In order to determine whether the Commissioner was authorized to agree to pay salary in lieu of vacation to Mr. Marcel, one has to look at the authority vested in him by the **Police Act**,¹⁷ in conjunction with the limitations on that authority as provided in the **Finance (Administration) Act**¹⁸ and the **Financial Regulations**.¹⁹

[35] Section 7 of the **Police Act** states:

“There shall be a Commissioner of Police who shall have command and superintendence of the Force and shall be responsible to the Governor General for the efficient administration and government of the Force and for the proper expenditure of all public monies appropriated for the service thereof.”

While this section appears to give the Commissioner responsibility for the expenditure of monies appropriated to the Police Force, he is not an entity unto himself. As the head of the Police Force, the Commissioner is also an accounting officer²⁰ and section 6(2) of the **Finance (Administration) Act** states that “an accounting officer is answerable to the Public Accounts Committee of Parliament for the efficient management of and accounting for public funds entrusted to him or her as accounting officer.”

[36] The responsibilities of an accounting officer are outlined in regulation 5(1) of the **Financial Regulations**. These responsibilities include ensuring that:

“(a) the financial business of Government for which he or she is responsible is properly conducted;
(b) the public funds entrusted to his or her care are properly safeguarded and are applied only to the purposes approved by Parliament;
(c) **all payments from the votes or funds under his or her control are properly authorised**” (My emphasis).

¹⁷ Cap. 14.01, Revised Laws of Saint Lucia 2014.

¹⁸ Cap. 15.01, Revised Laws of Saint Lucia 2014.

¹⁹ Cap. 15.01, Revised Laws of Saint Lucia 2014.

²⁰ Section 6(1) Finance (Administration) Act, Cap 15.01, Revised Laws of Saint Lucia 2014.

[37] Regulation 72 of the **Financial Regulations** equally emphasises the need for payments to be properly authorised:

“An Accounting officer or an officer duly authorised by him or her who signs or authorises a payment instrument certifies to the accuracy of every detail set out in the instrument and is responsible for ensuring—

...

(c) that proper authority has been obtained for the expenditure in respect of which payment is made”.

[38] In relation to authority for payment, section 26 of the **Finance (Administration) Act** provides that “... any payment made from the Consolidated Fund shall be authorised by warrant under the hand of the Minister.” Therefore, although the Commissioner is vested with the responsibility to manage the finances of the Police Force, he does not possess the authority to make a payment of the nature that was requested by Mr. Marcel.

[39] Furthermore, it is of grave concern that in these letters, that were penned after Mr. Marcel’s effective retirement date, he was still a convicted man under suspension and therefore not entitled to his full salary and other benefits.²¹ The Commissioner also attempted to calculate the amount due to Mr Marcel, but, did not reach agreement with Mr. Marcel on the amount of vacation days to be compensated and the purported agreement remained incomplete. These actions were arguably ultra vires the **Police Act** as well as in breach of regulation 70 of the **Financial Regulations** which provides that “making, allowing or directing any unauthorised payment” would render the Commissioner “personally responsible for the amount of the payment”.

[40] Mr. George in his submissions referred the Court to the Trinidadian decision of **Vincent Lynch v Public Transport Service Corporation**²² in support of his contention that compensation may be awarded for vacation not taken during the term of employment even where there is no express entitlement. However, I agree with counsel for the appellants, Ms. Drysdale, that **Lynch** is distinguishable from this case on the basis that it concerned an agreement between the parties in which the employer admitted that a sum was owed to Mr. Lynch in lieu of outstanding vacation leave. In the present case,

²¹ Section 32 of the Police Act, Cap 14.01, Revised Laws of Saint Lucia 2014.

²² HC 2123/2011 dated 8th January 2013.

the promise of payment in lieu of vacation was not made by Mr. Marcel's employer, the Government of Saint Lucia, but by the Commissioner, an employee of the State who did not possess the authority to make such a decision.

- [41] Based on the foregoing reasons, I find that the learned master erred in arriving at her overall conclusion that the Commissioner could grant payment in lieu of vacation leave accrued but not taken. Given that the Commissioner does not possess either statutory or inherent authority to do so, I would hold that the directives for payment that he made in his correspondence dated 11th June and 24th July 2013 are void, of no effect and non-binding on the Government of Saint Lucia.

Whether prescription has an effect on the claims made by Mr. Marcel

- [42] Having found that that Mr. Marcel's claim for compensation for leave not taken fails, the issue of prescription becomes otiose. However, if I am wrong and Mr. Marcel is entitled to monetary compensation, I agree with the learned master's conclusions that (1) any claim for compensation for vacation not taken before Mr. Marcel was suspended in 2003 would be statute barred, such claim having accrued at (or before) the time of suspension in 2003²³; and (2) the claim for compensation during suspension would have accrued in 2015 when the convictions were quashed and Mr. Marcel could have demanded payment, and therefore no issue of limitation arises in respect of that part of the claim²⁴ (filed in 2014).

Conclusion

- [43] The answers to the two issues that the master directed to be heard as preliminary points are that the respondent accumulated vacation leave during his suspension, but he is not entitled to be paid salary in lieu of the leave not taken. As I disagree with the master on the second point, which is central to the outcome of the appeal, I would allow the appeal and set aside the master's order.

²³ Paragraph 36 of the judgment.

²⁴ Paragraph 34 of the judgment.

[44] **Order**

1. The appeal is allowed.
2. The order of the learned master is set aside.
3. There is no order as to costs.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar