THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV201/01276

BETWEEN:

SONIA M. JOHNNY

Claimant

and

THE ATTORNEY GENERAL

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Ms. Cynthia Hinkson-Ouhla with Ms. Natalie Da Breo for the Claimant
Ms. Jan Drysdale, Senior Crown Counsel for the Defendant

Claimant present

2017: March 15;
April 19;
June 6, 7;
July 6.

JUDGMENT

[1] **CENAC-PHULGENCE, J**: This is a claim for breach of contract against the Government of Saint Lucia as her employer in which the claimant, Ms. Sonia M. Johnny ("Ms. Johnny") claims an entitlement to be paid in lieu of vacation leave.

Background Facts

[2] The brief facts are that Ms. Johnny was employed with the Government of Saint Lucia ('the Government") from 17th November 1997 until her resignation effective 7th March 2007.

[3] On 17th November 1997, Ms. Johnny executed a contract of employment with the Government for a period of 3 years commencing on 17th November 1997 wherein she was appointed as Ambassador for Saint Lucia to the United States of America and the Organization of American States (OAS). Clause 8 of this contract which is headed Leave of Absence stated that Ms. Johnny was entitled to 33 working days per annum. The clause also stated that:

> "Leave due during the tour of service **shall normally be taken on completion on [sic] the tour of service**."

[4] On 16th August 2001, Ms. Johnny executed a second contract for a period of 3 years commencing 17th November 2000. That contract again provided for 33 working days leave entitlement per annum. There was however a change at clause 8 which now stated that:

> '**Leave entitlement must be taken during the tour of service**."

[5] On 21st March 2005, a third contract was executed commencing 17th November 2003 for a period of two years. Clause 8 was in the same terms as the second contract that '**leave entitlement must be taken during the tour of service**'.

[6] All three contracts also provided as follows:

> "The person engaged undertakes that he will, while in Saint Lucia (hereinafter called "the State") diligently and faithfully perform the duties of AMBASSADOR FOR ST. LUCIA TO THE UNITED STATES OF AMERICA AND THE OAS for the term of his engagement, and will act in all respects according to instructions and directions given to him by the Government through the PERMANENT SECRETARY, MINISTRY OF

FOREIGN AFFAIRS AND INTERNATIONAL TRADE or other duly authorised officers."

[7] The claimant did not provide the Court with evidence of the renewal of contract for the period 2005 to 2007. However, it appears that it is not disputed that Ms. Johnny remained in the employment of the Government on the same terms and conditions as the third contract and so the term of the contract that 'leave entitlement must be taken during the tour of service' was applicable.

[8] Ms. Johnny claims that clause 6.9 of the **Civil Staff Orders** made it a further term of her contract that the Permanent Secretary of the Ministry of External Affairs would make arrangements for her to take her leave subject to the exigencies of the Service.

[9] Ms. Johnny further claims that the Government paid her US$21,000.00 in lieu of leave in about September 2000 and in November rolled over the balance of her leave to her new contract. She claims that the practice of rolling over her accumulated leave continued from contract to contract and has sought to exhibit copies of a leave record in support of this claim. I will deal with the leave record later on.

[10] Ms. Johnny claims that in reliance on the practice of rolling over her leave from contract to contract she reasonably expected that she would receive payment in lieu of leave when the exigencies of her post precluded her from taking leave. Ms. Johnny claims that no arrangements were made by the Permanent Secretary for her to take her leave and that to her detriment and in order to carry out her duties and to ensure the efficient running of her office, she was unable to take leave.

[11] Ms. Johnny claims that despite numerous requests, the Government has failed to pay the amounts due to her as payment in lieu of notice.

[12] The Attorney General in his defence admits that Ms. Johnny was paid in lieu of notice sometime in September 2000 but avers that there is no right to receive payment in lieu of notice and that this is in the sole discretion of the Crown. The defendant further states in its defence that accumulation of leave is not automatic and is contrary to the expressed provisions of Ms. Johnny's contract of employment which existed. Ms. Johnny was obligated by the terms of her contracts to take her leave during the currency of the contract and if she did not, the same was liable to forfeiture. The Attorney General denies that Ms. Johnny is entitled to the relief which she seeks.

[13] In her reply, Ms. Johnny states that she has a right to be compensated for leave which has not been used during the period of her employment and that the practice of not making arrangements and rolling over the accumulated leave from contract to contract implied a term into the contract that if she was unable to take her leave, it would not be forfeited and she was therefore entitled to be paid for it.

Preliminary Issues

[14] The Court noted from the statements of both counsel that the issue of prescription had been raised at the case management stage and Belle J deemed the matter imprescriptible. Although this was confirmed by both counsel, I could not find any record of this on the file. The Court also noted that the witness statement of Mr. Earl Huntley had not been filed and seemed to have been attached to the witness statement of Ms. Johnny and was inadvertently not stamped filed. The Attorney General admitted that he did not realise that this was the case. The Court therefore ruled that Mr. Huntley would be allowed to give evidence as there was no prejudice to the Attorney General as they were aware of the contents of the statement from 2013 when the witness statement would have been served on them.

Issues

[15] The issues for the Court's consideration to my mind are:

(a) Whether Ms. Johnny has established a contractual right to accumulate vacation leave from contract to contract.

(b) Was there an implied term of the contract that Ms. Johnny would be paid for her leave if she was unable to take it?

(c) Whether Ms. Johnny has established a contractual right to be paid in lieu of vacation.

Evidence of Ms. Sonia Johnny

[16] Ms. Johnny in her witness statement filed on 30th April 2013 gave evidence that during the years of her appointment as Ambassador, she was unable to take the full quota of her vacation leave as per her contracts as her duties as Ambassador were such that in order to perform them effectively, she was required to serve her country on a 24-hour basis and that at no time were arrangements put in place to facilitate her leave.

[17] Ms. Johnny provided a very detailed account of her duties which I summarise below. According to her evidence, the matters which engaged Ms. Johnny during her tenure as Ambassador were:

(i) The "Banana Wars" between 1998 to 2000 and during that time because Saint Lucia was Chair of CARICOM she had to assume the Chair of Caucus of the Caribbean Diplomatic Corps. That position dictated that she lead the Caucus in all its activities and be its spokesperson in all meetings and leading the lobbying efforts on Capitol Hill. Ms. Johnny said that she 'was precluded from taking her leave by the socio-economic importance of her activities to the development of the country';

(ii) From 1998 to 2005, Ms. Johnny held the post of Chair of the Leo Rowe Student Fund and according to her 'for many years long vacations were out of the question'.

(iii) From 2002-2004, Ms. Johnny on the instructions of the Prime Minister accompanied the Minister of Foreign Affairs on fact-finding missions to Haiti. These missions she said were conducted almost every three months and because of the volatility of the situation, she was once again precluded from taking her vacation leave.;

(iv) Between 2000 and 2001, she acted as the Caribbean's representative in the negotiations of the Democratic Charter. Ms. Johnny states that she was precluded from taking extended leave and no one was ever appointed to act in her position to facilitate her going on vacation.

(v) Ms. Johnny was the Caribbean's representative in the negotiations of the Social Charter. She gave evidence that she declined the position of Chair after discussions with the Minister and Permanent Secretary and assumed the role of vice-chair. She said the exigencies of her post precluded her from taking her vacation leave.

(vi) In 2006, Ms. Johnny was appointed as the Chair of the Permanent Council with the endorsement of the Minister of Foreign Affairs and the Permanent Secretary. Ms. Johnny at paragraph 16 of her witness statement in relation to this position, said that 'the responsibilities attendant on carrying out the position required me to familiarize myself with the volumes of documentation issued by the many organs of the organization for which I was responsible during my tenure of chair. Again, I could not take vacation leave.'

(vii) In August 2005, Ms. Johnny acted as liaison between Saint Lucian students studying in Mexico and the Mexican Government.

(viii) In summer of 2004, Ms. Johnny acted as liaison for the Caribbean Labour Board for Saint Lucian students from the Sir Arthur Lewis Community College Hospitality Division who were to participate in a practical training program at the

Breakers Resort, Florida. She said that since she had no one who could substitute for her she was unable to take extended vacation.

[18] Ms. Johnny's evidence is that all the activities which she undertook were endorsed and sanctioned by the Prime Minister and the Permanent Secretary.

[19] Ms. Johnny's evidence is that at the end of each contract, her leave form included a statement that her 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.

[20] Ms. Johnny states in her evidence that on 9th January 2007 she wrote to the then Permanent Secretary, Mr. Cosmos Richardson for permission to take portion of her leave which had accumulated and to be paid for the balance but never received a response. That letter was not exhibited.

[21] In February 2007, Ms. Johnny says she again raised the letter with Mr. Richardson and he assured her that the payment of leave would be favourably considered but he never put this in writing. Mr. Richardson in his testimony has vehemently denied that he ever gave Ms. Johnny such an assurance.

[22] Ms. Johnny says she made several enquiries of the Minister and Permanent Secretary in the Ministry of Foreign Affairs to follow up on her request and was given the assurances that it was being worked on. She testified that in December 2009, the then Permanent Secretary in the Ministry had indicated that the matter had been submitted to the Ministry of the Public Service for submission to Cabinet.

[23] By letter of 30th June 2010, Ms. Johnny was advised that her application for payment in lieu of leave had been denied.

Analysis

[24] This case is a simple case for breach of contract. Counsel for Ms. Johnny, Mrs. Cynthia Hinkson-Ouhla argued that whilst Ms. Johnny is expressly entitled to leave as per her contracts, there never existed any employer employee relationship between the parties. Mrs. Ouhla further submitted that Ms. Johnny was appointed as Ambassador Extraordinary and Plenipotentiary and as such fulfilled the role of the Government in Washington which no one can exercise. She cited the case of **Carrol v The King**[1] in support for her submission. I am at pains to understand this submission especially in light of the fact that all three contracts are stated on their face to be an agreement for employment. The contracts all state the position in which Ms. Johnny is employed. There was clearly a contract of employment and an established employer/employee relationship governed by the terms of the contract and the laws of Saint Lucia.

[25] Interestingly, the claimant in this case did not produce any documentation to show that her employment was not based on an employer/employee relationship with the Government. In the **Carroll** case, the Supreme Court of Canada considered that status of the Lieutenant-Governor. It came to the conclusion that 'the Lieutenant-Governor did not fulfil federal functions, but that his office was exclusively of a provincial character; that he was for provincial purposes as much the direct representative of His Majesty as the Governor General is for federal purposes; and that it was the functions performed, that had to be examined in order to determine the real nature of the services rendered.'

[1] [1950] SCR 73.

[26] The Court went onto say that:

> "It was true that the appointment of a Lieutenant-Governor is made by the Governor General in Council and that the remuneration is paid by the Federal Government, but these are merely constitutional obligations imposed upon the Dominion, which when fulfilled do not alter the provincial character of the office of a Lieutenant-Governor. The procedure through which the appointment is made does not create any relationship of *employer* and *employee,* of *master* and *servant,* of *lessee* and lessor of services. It is the constitutional machinery used to determine who will in a given province represent the Sovereign.
>
> By a fiction of the law, the Lieutenant-Governor stands in a unique position, fulfilling in the Province, for which he is appointed the duties fulfilled by the King himself in England, and which no one else can exercise. (Todd-Parliamentary Government, 2nd Ed., p. 584). And in acting in that capacity, he is not an employee of His Majesty in the right of the Dominion."

[27] The case of **Carroll** is to my mind different to the case at bar as the Lieutenant Governor stood in the shoes of the King as it related to the Province of Quebec. In this case, Ms. Johnny's contract states clearly that she was to "diligently and faithfully perform the duties of **AMBASSADOR FOR ST. LUCIA** TO THE UNITED STATES OF AMERICA AND THE OAS for the term of his engagement, and **to act in all respects according to instructions and directions given to him by the Government through the PERMANENT SECRETARY, MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE or other duly authorised officers**."

[28] I find that it is clear that there was a contract of employment between the Government and Ms. Johnny. The fact that she was appointed by the Governor General acting on the advice of the Prime Minister and that her credentials may have been presented by the Governor General of Saint Lucia to the President of the United States does not take away from the fact that she was an employee of the Government. In cross-examination, Ms. Johnny herself testified that her contracts were between herself and the Government of Saint Lucia.

Whether Ms. Johnny has established a contractual right to accumulate vacation leave from contract to contract.

[29] In support of her claim that her vacation leave accumulated from contract to contract Ms. Johnny exhibited the copies of what she says are her leave record over the contract periods. The Court has already noted that these 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. In addition, Ms. Johnny simply makes a statement in her witness statement and supports it with the copies of the leave record but does 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.

[30] The contracts for the periods of Ms. Johnny's employment as Ambassador are clear and unambiguous and make no reference to accumulation of leave from contract to contract. I have set out the relevant clause at paragraph 4 hereof and it is clear from this clause that vacation leave must be taken during the tour of service. The provision is clear. There is no indication that vacation leave is to accumulate from contract to contract. I accept the defendant's submission that there is no provision on the express terms of the contracts that vacation leave not taken during the currency of a contract would be preserved.

[31] The **Staff Orders** for the Public Service of Saint Lucia on which the claimant relies states at clause 1.4 that the 'Orders shall apply to all public offices provided that where special regulations, consequent upon Collective Agreements, are made in regard to a particular category or class of officers, such special regulations shall have precedence over related provisions in the Orders'. A perusal of the **Staff**

Orders reveals that it contains no provision in relation to accumulation or rolling over of leave from one contract to another. I find that the claimant has not established a right to accumulation of leave based on the express terms of her contract.

Was there an implied term of the contract that Ms. Johnny would be paid for her leave if she was unable to take it?

A. The Law relating to Interpretation of Contracts

[32] The starting point in the construction of any contract term is that the words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the words, but that in which it is usually understood. Therefore, terms are to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special and peculiar sense.[2]

[33] The principle that words must be construed in their ordinary sense is liable to be departed from where that meaning would involve an absurdity or would create some inconsistency with the rest of the document or where there has been an obvious linguistic mistake or where if the words were to be construed in their ordinary sense, it would lead to a very unreasonable result[3]. The claimant has not questioned the express terms of the contract and has acknowledged the terms of clause 8 as has been set out. There is no allegation that the terms are ambiguous or that a strict interpretation would lead to an absurdity.

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[2] Robertson v French (1803) 4 East 130 at 135.

[3] Chitty on Contracts, Volume 1, General Principles, paragraph 13-056 (32nd ed.), Sweet and Maxwell.

Implied Terms

B. The Law

[34] The claimant alleges that there was implied into the contract a term that if she could not take her leave she would be paid for it. This Counsel argues is based on the practice which she says existed of rolling over leave not taken to her next contract and of not making arrangements for Ms. Johnny to take her leave.

[35] Counsel, Mrs. Ouhla submitted that the law regarding contracts is contained in the **Civil Code of Saint Lucia**[4] ("the Code") and refers to Article 956 which states:

> "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."

[36] This provision must however be read in conjunction with Article 917A of the Code which counsel does not reference. This Article states as follows:

> "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":**"

[37] As I understand it, the law relating to when terms will be implied into a contract is that of England so that in applying and interpreting Article 956 of the Code, regard must be had to the English case law on the subject area.

[38] I have already outlined the general rule as regards interpretation of contracts. The law in relation to implication of terms in a contract is expressed in the Privy Council

[4] Cap. 4.01, Revised Laws of Saint Lucia, 201

case of **Attorney General of Belize v Belize Telecom Ltd**.[5] In that case, Lord Hoffman stated as follows:

> "…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 against the relevant background, would reasonably be understood to mean."

[39] Lord Hoffman was very clear 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. He also made it clear that 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.[6]

[40] The claimant relies on practice which she claims operated but has not established that this practice of rolling over leave is one which has acquired such notoriety, has been so well established and has become universal in relation to contracts of employment with the Government that it must be taken to be incorporated.

[41] A term may be implied from the circumstances of the parties having consistently on former and similar occasions adopted a particular course of dealing. However, a custom or usage or practice can only be incorporated into a contract if there is nothing in the express terms of the contract to prevent its inclusion and can only be included if it is not inconsistent with the tenor of the contract as a whole. In other words, a term cannot be implied to oust an express term of a contract.

C. Practice of rolling over leave from contract to contract

[42] The claimant is relying on a practice of rolling over leave from contract to contract. Apart from the uncertified records of leave produced, Ms. Johnny gave no

[5] [2009] UKPC 10 at para 21.
[6] ibid, paras 16 and 17.

evidence of such a practice. In fact she admitted in cross-examination that the terms of her contracts were never amended in writing but suggested that they had been impliedly amended. She also admitted to not raising any issue with clause 8 of her contract in writing or otherwise.

[43] Ms. Johnny sought to rely on the testimony of Mr. Earl Huntley who was a former Permanent Secretary in the Ministry of External Affairs. Mr. Huntley gave evidence that he had served in the Public Service of Saint Lucia for 25 years and served in the capacities of Assistant Secretary in the Ministry of Foreign Affairs, then Permanent Secretary of that Ministry from 1981-1989 and 1997-2001 and then as Ambassador to the United Nations and Ambassador to the Caribbean Community from 2001-2004. In his evidence in chief, he stated that 'during that period it was normal for civil servants, particularly at 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'. Mr. Huntley's evidence was not tested in cross-examination and the Court is not certain whether his evidence relates to contract public officers/civil servants or permanent establishment public officer/civil servants.

[44] The **Staff Orders** speak to leave and I was not able to find any provision contained therein which speaks to accumulation of leave. Any accumulation of leave must therefore be an administrative arrangement and not an obligation.

[45] I have already determined that the claimant has failed to establish on the evidence that there was any such practice of rolling over her leave from contract to contract. The Court is not about to embark on a fishing expedition to discover this practice of rolling over leave as suggested by the claimant, from the copies of the records exhibited. It is for the claimant to prove that such a practice exists not just in

relation to herself but as a general practice in relation to other public officers and she has failed on the evidence to do so.

[46] Even if a practice of rolling over leave had been proven to exist does this give rise to an implied term that the claimant would be paid for the accumulated leave in the face of the express terms of the contract? All that it would mean in my opinion is that an officer would be entitled to apply for the full balance of whatever leave has been accumulated before the end of the contract should he/she so desire.

C. Practice of not making arrangements for claimant to take her leave

[47] Ms. Johnny in her evidence suggested that the Permanent Secretary was obligated to make arrangements for her to take her leave and had failed to do so. She relied on the **Staff Orders** in support of this contention.

Staff Orders

[48] Clause 6.1 of the **Staff Orders** states that all leave is granted subject to the exigencies of the public service. Clause 6.2 states the limits of the various kinds of leave which may be granted by Permanent Secretaries and Heads of Departments. Outside of these limits it provides that the Permanent Secretary, Personnel is to approve. Applications for leave must be submitted on the prescribed forms. Clause 6.3 provides that as a general rule, Permanent Secretaries and Heads of Departments are expected to reallocate an officer's duties while he is on vacation leave without extra staff. It provides that temporary leave reliefs may be employed only in cases where the officer is on leave for more than 28 days. It however allows for leave reliefs for shorter periods if the exigencies of the service so require.

[49] These provisions in the **Staff Orders** clearly suggest that if Ms. Johnny wished to take vacation leave that the Permanent Secretary could have a temporary appointment of an officer made.

[50] Ms. Johnny relies on clause 6.9 to ground her case that the Permanent Secretary had an obligation to make arrangements for her to take her leave and he never did and by extension her submission that this should lead to an implied term that she must now be paid for leave that she accumulated but did not take during her contract period due to the exigencies of her duties.

[51] Clause 6.9 states:

> "Subjects [sic] to the exigencies of the Service, Permanent Secretaries and Heads of Department shall arrange that officers take departmental leave in the year in which it accrues."

[52] I am at pains to see how this clause is applicable to the claimant's case. Firstly, the leave being referred to here is departmental leave which is different from vacation leave which the contracts provide for. Counsel, Mrs. Ouhla in closing submissions argued that clause 6.9 of the **Staff Orders** mandates Permanent Secretaries to make arrangements for officers to take leave subject to the exigencies of the service. However, this is not what clause 6.9 says. Clause 6.9 refers to departmental leave which the contract does not speak to.

[53] Ms. Johnny provided no evidence that there is a practice of Permanent Secretaries having to make arrangements for officers to take leave and that in relation to her there was a practice of not making such arrangements. Ms. Johnny admitted in cross-examination that she was aware that an application for leave must be made before one can proceed on leave. She also in her witness statement stated that she had in January 2007, 10 months prior to the expiration of her contract written a letter to the then Permanent Secretary for permission to

take her leave which she had accumulated but got no response. That letter was not exhibited and little weight is given to this evidence.

[54] Ms. Johnny presented no evidence to this Court that she had applied for leave and was either denied or appropriate arrangements were not put in place by the Permanent Secretary and that this was a practice. It would appear that what Ms. Johnny was suggesting is that the Permanent Secretary was to put arrangements in place for her to proceed on vacation leave and then so inform her. In fact, in her testimony she said that she was not the best person to determine when was the best time for her to proceed on leave.

[55] Ms. Johnny also testified in cross-examination that she had not given any evidence in her witness statement that she had ever asked for someone to deputize for her so that she could take her leave as she did not perceive that this was her duty to do so.

[56] I find it unbelievable that Ms. Johnny being a well-seasoned public servant would hold the position that a Permanent Secretary must make arrangements before she can take vacation or that he must indicate to her when she should take her leave. The Permanent Secretary is mandated by clause 6.3 to put measures in place to deal with the absence of an officer who proceeds on vacation leave.[7] Ms. Johnny was free to apply for vacation leave and allow for the Permanent Secretary to then make a determination as to whether such would be approved given the exigencies of the service and if he approved to make appropriate arrangements in keeping with the **Staff Orders**.

[57] Mr. Cosmos Richardson who served as Permanent Secretary in the Ministry of Foreign Affairs from 2002-2007 gave evidence that during Ms. Johnny's tenure as

[7] See paragraph 48 above.

Ambassador, he did not receive any communication from her concerning her desire to take extended vacation Mr. Richardson's evidence was taken via Skype. He further stated that it was Ms. Johnny's responsibility to indicate when she desired to take leave. He continued that once an Ambassador so indicated, the Ministry of Foreign Affairs would make appropriate arrangements to ensure the efficient and continued running of the Embassy in his/her absence.

[58] Mr. Richardson also gave evidence that during his tenure as Permanent Secretary he had supervised 2 other Ambassadors and 3 Consuls General and so the issue of making arrangements for an Ambassador to be able to proceed on leave when so requested by the Ambassador/Consul General or in the absence of an Ambassador/Consul General from office was not a novel one. In cross-examination, Mr. Richardson emphatically stated that he did not agree that he always had the authority to instruct Ms. Johnny to take her leave.

[59] Ms. Johnny has failed to show on the evidence that there was any practice of the Permanent Secretary not making arrangements for her to take her leave. It would appear from the evidence that Ms. Johnny based on her knowledge of her workload and the nature of her post came to the conclusion that she could not take her leave for an extended period. She has failed to show that she had made attempts to take her leave and those efforts were thwarted because of the Permanent Secretary's failure to make the necessary arrangements.

[60] In the case **Ali v Christian Salvesen Food Services Ltd**.,[8] the Court did not imply a term into a contract of employment that an employee was to be paid overtime for excess hours worked. The Court held that where a collective agreement had been freely and carefully negotiated with trade unions representing a substantial labour force, it was in the nature of the agreement that it should be

[8] [1997] 1 All E R 721.

concise and clear. **Accordingly, if any topic had been left uncovered by such an agreement, the natural inference was not that there had been an omission so obvious as to require judicial correction, but rather that the topic had been omitted advisedly from the terms of the agreement on the ground that it was seen as too controversial or too complicated to justify any variation of the main terms of the agreement to take account of it**. It followed that the respondent employee was not entitled to be paid for the alleged excess, **since the agreement itself did not specify what was to happen in such an eventuality and there was no justification for an implied term covering the contingency of a premature termination of contracts of employment.**

[61] Counsel for the defendant, Ms. Drysdale relied on the case of **Morley v Heritage Plc**.[9] **Morley** was concerned with whether an employee who had been terminated was entitled to holiday pay in the absence of a contractual term to that effect. The employee's service contract in this case expressly provided that he was entitled to 20 days holiday a year but it was silent on his rights on termination of employment if he has leave not taken, Following his resignation, his claim to payment for 13 days untaken holiday was rejected by the Court of Appeal. The Court regarded it as impossible that a term entitling him to payment should be implied into the contract.

[62] The case of **Osmond Shotte v The Attorney General**[10] is also instructive. Counsel, Mrs. Ouhla submitted that this case is not applicable as there was no relationship of employer/employee between Ms. Johnny and the Government of Saint Lucia but I have already dealt with this. In **Shotte**, Saunders J said the following which I adopt:

> ":…Accumulated leave is an eligibility to the enjoyment of a future benefit from your employer provided of course you are still employed at that

[9] [1993] IRLR 400.
[10] MNIHCV2000/0005 delivered 30th May 2001, unreported.

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 can be taken prior to the effective date of resignation." (My emphasis)

Whether Ms. Johnny has established a contractual right to be paid in lieu of vacation.

[63] Based on the discussion above, Ms. Johnny has not proven that there was any practice or custom in place which is of such notoriety and is so well-established that it requires a term to implied into the contract that where an officer is unable to take leave that he/she should be paid for same. The basis on which the implication of the term is premised is flawed and has not been proven.

[64] There is no express term in the contract which speaks to payment in lieu of leave. In fact, the claimant appears to be suggesting that this term should be implied by virtue also of practice. The claimant's case has been difficult to unravel because it would appear that on the one hand she is relying on the practice of rolling over leave and of not making arrangements for her to take her leave to imply a term for payment in lieu of leave into the contract and on the other hand, she appears to be saying that the term is implied by virtue of the fact that Ms. Johnny was paid in lieu of leave in 2000. It is not disputed that Ms. Johnny was paid in lieu of vacation leave in 2000. However, this is the only time apart from when she was resigning

in 2007 that she made such application and was paid. This can hardly be said to be a practice so well-known and established in the civil service.

[65] Mr. Huntley in his witness statement gave evidence 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 had to defer his leave and he was paid for it but he provided no evidence to support this and the Court does not know on how many occasions this actually happened. In cross-examination Mr. Huntley could not recall whether the **Staff Orders** dealt with payment in lieu of leave but said he knew of the practice. He also said that he would be surprised if the **Staff Orders** did not deal with that issue.

[66] Mr. Huntley in cross-examination gave evidence that the decision to award payment in lieu of vacation was made by the Permanent Secretary in the case of all officers (except the Permanent Secretary and the Minister) and not by Cabinet. He said that this is what obtained during his tenure. Mr. Huntley also agreed with senior crown counsel, Ms. Jan Drysdale that it was conceivable that the practice which he spoke of could have changed as he was only Permanent Secretary up to 2001. Mr. Huntley in evidence in chief testified that during his civil service career, there was only one occasion that he could recall when the practice of pay in lieu of leave was suspended by Cabinet of Ministers across the civil service due to budgetary constraints but in cross-examination, he was unable to say when that was.

[67] Mr. Richardson in his witness statement said that prior to his appointment as Permanent Secretary of External Affairs he was informed of a Cabinet decision regarding accumulation of leave and the fact that officers who failed to take their leave would not be paid for it. No evidence of this Cabinet decision was provided

by Mr. Richardson neither did he indicate how he came by this information. The Court therefore attaches no weight to this aspect of Mr. Richardson's testimony as it is hearsay. Mr. Richardson also testified that he recalled that a memorandum was circulated which denounced the accumulation of leave and stated that officers who failed to take their leave would not be paid for it. Again he did not provide any evidence to support his testimony or the source of this memorandum.

[68] Ms. Johnny in cross-examination hesitatingly agreed with counsel, Ms. Drysdale that payment in lieu of vacation not being a term of her contract was discretionary and not an entitlement. Ms. Johnny by her own testimony indicated that she had been advised that her request for payment in lieu of leave had been forwarded to the Ministry of the Public Service for submission to Cabinet. That I think settles the issue as it is clear that there is no practice of payment in lieu of leave. The evidence clearly supports the fact that payment in lieu of leave is an exercise of discretion by an employer.

Promissory Estoppel?

[69] It appears that Ms. Johnny by her pleadings at paragraphs 6 and 7 of her statement of claim is seeking to raise promissory estoppel as she indicates that in reliance on the practice of rolling over leave she reasonably expected that she would receive payment in lieu of leave when the exigencies of her post precluded her from taking leave and no arrangements were made by the Permanent Secretary for her to take her leave. She claims that to her detriment and in order to carry out her duties and ensure the efficient running of the office, she was unable to take her leave.

[70] I raise this for completeness of addressing the matters raised by the claimant. However, there are no pleadings which give rise to promissory estoppel on the facts of this case. There is no claim that a promise was made by anyone

regarding rolling over of leave or arrangements to be put in place by the Permanent Secretary. There is also no evidence of the detriment suffered by the claimant. Any attempt to claim by way of promissory estoppel cannot be sustained.

Conclusion

[71] It is clear that there is no contractual right to payment in lieu of leave either on the express terms of the contract or by implication based on the practices identified by Ms. Johnny which on the evidence have not been proven.

[72] The claim is therefore dismissed. Prescribed costs on $220,395.60 are awarded to the defendant in the sum of $30,049.45.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar