THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)

SAINT LUCIA

CLAIM NO.: SLUHCV2017/0028

BETWEEN:

DWAYNE CHIDI TOBIAS

Claimant

and

SAINT LUCIA AIR AND SEA PORTS AUTHORITY

Defendant

Before:

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

Appearances:

Mr. Horace Fraser of Counsel for the Claimant
Mr. Deale Lee of Counsel for the Defendant

2019: January 31;
February 18,19;
October 11;
November 25.

JUDGMENT

[1] **CENAC-PHULGENCE J**: The claimant, Mr. Dwayne Chidi Tobias ("Mr. Tobias") has filed this claim against the defendant Saint Lucia Air and Sea Ports Authority ("SLASPA") seeking damages for breach of his contract of employment, as well as rescission of a Deed of Settlement executed by him on 11th November 2016.

Mr. Tobias' Case

[2] Mr. Tobias' case is that he had entered into a contract of employment with SLASPA under which he held the post of Chief Engineer for a term of three years to run from 17th January 2014 to 16th January 2017. Mr. Tobias had been employed with SLASPA on fixed term contracts from 1997 except for a short hiatus between 1998 and 2000. However, on 11th November 2016, some two months before the term was due to expire, at approximately 4:20 pm, he was summoned to a meeting of which he had been given no prior notice. Present were the General Manger, Mr. Keigan Cox ("Mr. Cox"), Senior Human Resource Manager, Mrs. Sharon Narcisse ("Mrs. Narcisse"), and external counsel for SLASPA, Mr. Thomas Theobalds ("Mr. Theobalds").

[3] Mr. Tobias states that Mr. Theobalds informed him that SLASPA had given consideration to his employment and had decided that it was best to part ways. He says he had to press for a reason for the decision. Eventually, he was shown a letter of termination that indicated that three warning letters concerning his performance had been issued to him and that his performance had been reviewed, consequent upon which his employment was being terminated. Mr. Tobias alleges that he is unaware of any such warning letters. He says while there had been communication between himself and Mr. Cox on a number of issues, none had to do with his performance. Certainly, none raised any issue for which there was not a plausible explanation, or which suggested incompetence on his part that would entitle SLASPA to terminate his contract.

[4] Mr. Tobias says that Mr. Theobalds then presented him with two options: either that he resigns and be given a separation package in the sum of $94,316.37, or that he be dismissed and given a package in the sum of $42,000.00. He was shown two cheques representing the respective sums and informed that if he did not resign, dismissal would be automatic. He says he was denied time to consider the proposal and was given only ten minutes to decide. He was also denied the opportunity to make a phone call to obtain advice or consult his lawyer. In shock

and despair, he signed the pre-written letter of resignation and Deed of Settlement presented to him.

[5] He contends that his contract was terminated in breach of the rules of natural justice as the allegations of wrongdoing cited in the termination letter were never put to him. He also contends that the letter of resignation and Deed of Settlement are defective and therefore null and void, in that they deprive him of his statutory right by providing a lesser benefit than that to which he is entitled under the **Labour Act**, and were procured:

i. by an act which was not voluntary;
ii. by a scheme, an artifice, and fraud, there being no legal basis for his termination, which also amounts to an act of bad faith by SLASPA;
iii. by undue pressure for fear of financial misfortune;
iv. in the absence of an opportunity to obtain independent legal advice, in circumstances where the transaction was disadvantageous to him as he received compensation less than his contractual entitlement; and
v. in the presence of Mr. Theobalds, SLASPA's attorney, which served to instill in his mind that SLASPA was acting on solid legal grounds and that he had no choice but to accede to SLASPA's demand.

[6] Mr. Tobias alleges that as a result, he suffered loss, being salary, gratuity, vacation leave and other benefits for the remainder of the contractual term; and the loss of chance of a further contract for a period of three years and consequently, loss of chance of salary, gratuity, vacation leave and other benefits pursuant to that further contract. After his termination, he says he remained unemployed until 16th January 2018, when he was able to find alternative employment overseas. He therefore claims rescission of the Deed of Settlement, special damages, general damages for distress and inconvenience and loss of chance, exemplary damages, interest and costs.

SLASPA's Case

[7] There is very little factual dispute between the parties. To avoid repetition, I will not set out the entirety of SLASPA's case. Instead, I will highlight the differences which arise.

[8] Mrs. Narcisse stated that the particular concerns regarding Mr. Tobias' performance were communicated to him via several memoranda:

i. memorandum dated 2nd December 2015, raising issues of accuracy of information provided by him and his oversight and resolution of matters affecting the engineering department;

ii. memorandum dated 6th May 2016 identifying breaches of SLASPA's procurement policy and the potential legal, financial and reputational consequences of such breach on SLASPA;

iii. memorandum dated 27th May 2016 regarding his supervision of certain works and his approval of payment of contractors for work which had not been satisfactorily completed; and

iv. memorandum dated 5th October 2016 concerning his failure to provide timely and sound recommendations on tenders.

[9] She says Mr. Tobias was well aware of the shortcomings in his performance in light of these correspondence and meetings held with him. Further, the memoranda warned that unless his performance improved, he would be subject to disciplinary action. She says Mr. Tobias even responded to the memorandum of 5th October 2016 by letter dated 10th November 2016.

[10] With regard to what transpired at the meeting of 11th November 2016, Mrs. Narcisse says that Mr. Tobias was informed that SLASPA, on review of his performance, had sufficient grounds to justify his termination; however, they would offer him the opportunity to voluntarily resign. Different separation packages would apply depending on whether he opted to resign or not. She says that Mr. Tobias asked for the reason for his termination and he was shown a termination

letter which detailed the basis for his dismissal. He was further provided with the Deed of Settlement which contained a break-down of the package he would be given if he chose to resign for review.

[11] Mrs. Narcisse admits that Mr. Tobias requested the opportunity to make a telephone call but was told that he had to make his decision promptly in order to benefit from the separation package. She says, however, that the meeting was not a contentious one; Mr. Tobias remained calm throughout. He took the time to read and review the Deed of Settlement and the letter of termination with their respective separation packages. He put various questions and concerns to Mr. Theobalds who responded to them. She says that Mr. Tobias did not object to Mr. Theobald's presence. Neither did he express feeling disadvantaged by Mr. Theobald's presence nor the timing of the meeting. He also did not put forward a counteroffer to that proposed by SLASPA. Mrs. Narcisse says that Mr. Tobias decided to resign his position and accept the accompanying package voluntarily.

[12] She indicated that the separation package was calculated as follows:

Salary and allowances up to 11th November 2016	$4,227.09
Salary and allowances for 12th – 30th November 2016	$7,301.33
Salary and allowances for 12th November 2016 – 11th February 2017	$34,585.26
Gratuity up to 11th November 2016	$73,451.25
Gratuity for 12th November 2016 – 11th February 2017	$7,324.76
Vacation leave up to 11th November 2016 (20 days)	$8,149.40
Total before tax	$135,039.09
Tax	-$40,511.37
NIC	-$211.35
Total paid	**$94,316.37**

She avers that Mr. Tobias' contract was due to expire on 16th January 2017; therefore, the separation package offered him more than he would have received if his contract had been allowed to expire.

The Issues:

[13] I have distilled the issues for determination as follows:

1. Whether the Court has jurisdiction to hear and determine Mr. Tobias' claim in light of section 455 of the **Labour Act**? If so:
2. Whether SLASPA had cause to terminate the employment contract with Mr. Tobias on the ground that Mr. Tobias had committed a repudiatory breach of contract, in other words whether SLASPA was entitled to dismiss Mr. Tobias summarily?
3. Whether Mr. Tobias was otherwise wrongfully dismissed by SLASPA?
4. Whether Mr. Tobias' resignation and the Deed of Settlement executed by him were procured by scheme, artifice, fraud, undue pressure, or in bad faith, and are therefore void?
5. Whether the claimant is entitled to special damages and/or general damages, in particular for loss of chance, and if so, the quantum?

Discussion

Issue 1: Whether the Court has jurisdiction to hear and determine Mr. Tobias' claim in light of section 455 of the Labour Act?

[14] At case management, Counsel for SLASPA, Mr. Deale Lee ("Mr. Lee") raised as a preliminary issue, whether the High Court had jurisdiction to hear Mr. Tobias' claim. His basis was that Mr. Tobias had filed this claim without first exhausting the remedies provided under the **Labour Act**[1] ("the Act") in contravention of section 455 thereof. That section requires an application for redress for an alleged contravention of the Act to be made to the Court only after a complaint is made to the Labour Commissioner or Tribunal and has been exhausted.

[1] Cap 16.04 of the Revised Laws of Saint Lucia.

[15] Mr. Horace Fraser ("Mr. Fraser"), counsel for Mr. Tobias, took the position that Mr. Tobias' claim was not brought pursuant to the provisions of the Act in respect of breach of any provision of the Act. Mr. Tobias was therefore entitled to bring his claim in the High Court without first making a complaint to the Labour Commissioner or Tribunal, being a claim for breach of contract, which the High Court has the jurisdiction to determine. Consequently, it was agreed on behalf of Mr. Tobias that the relief sought was pursuant to breach of contract at common law and that no alleged breach of the Act would be pursued, and the claim proceeded to trial.

[16] However, after the close of trial, the Court having considered further – the pleadings, the relief sought, the evidence adduced and the closing submissions of the parties, the question of the Court's jurisdiction remained of concern. As a result, the parties were asked to file additional written submissions limited to the issue of the jurisdiction of the High Court to hear the claim, in light of section 3 and section 455 of the Act. Both parties filed the additional submissions requested.

[17] In order to determine the question of jurisdiction, it is first necessary to ascertain the precise nature of the claim the Court is being asked to determine. Mr. Tobias' claim form indicates that his claim is for damages for breach of contract and rescission of the Deed of Settlement. His case, as pleaded in his statement of claim at paragraphs 8-10 thereof, is set out in detail at paragraphs 2-6 above. It is essentially that (1) the reason for and manner of his dismissal were unlawful and in breach of the rules of natural justice and (2) that the letter of resignation and Deed of Settlement are void because they gave Mr. Tobias less than his entitlement under the Act, and were procured by scheme, artifice, fraud, undue pressure and in bad faith contrary to the **Civil Code of Saint Lucia** ("the Civil Code").[2]

[2] Cap. 4.01 of the Revised Laws of Saint Lucia.

That his pleaded claim pertains in part to the reason for and manner of his dismissal is confirmed by the Pre-trial Memorandum filed on Mr. Tobias' behalf, which states:

> **"2.0 The case for the Claimant**
> 2.1 His contract of employment was terminated by the defendant without just cause and was accordingly a repudiatory breach of contract.
> …"

[18] Given the concession made at case management, Mr. Fraser began his submissions by first seeking to make a distinction between damages at common law for wrongful/unlawful dismissal, which he submitted is limited to breach of the relevant notice period, and damages for breach of contract, for which Mr. Tobias would be entitled to any remedy available under general law. He indicated that Mr. Tobias was pursuing the wider cause of action of breach of contract and framed his first issue as *"whether termination of the claimant's contract of employment was a repudiatory breach of contract"*, suggesting a repudiatory breach on SLASPA's part. Though he did not refer to the specific section of the contract alleged to have been breached, the only relevant provision based on the pleadings and tenor of the evidence is clause 11(a) which provides that *"[t]he Employee may be terminated by the Authority upon the happening of any of the following: (a) if he is found guilty of serious misconduct or willful neglect in the discharge of his duties…"*

[19] He went on to say that the resolution of that issue was to be decided on a proper interpretation of the memoranda identified at paragraph 8 above, on which SLASPA relies to prove conduct by Mr. Tobias that is a fundamental breach of his contract. This, he said, involves an assessment of whether the memoranda *"individually or collectively showed a higher degree of moral turpitude inconsistent with the fulfillment of the express or implied condition of service, or […] a willful disregard of the essentials of the contract of service which amounted to a repudiation of the contract by the claimant."* The issue had by then evolved to whether Mr. Tobias committed a repudiatory breach of contract, presumably on

the basis that this would resolve the question of whether SLASPA was entitled to terminate his contract in the manner it did.

[20] I am of the view that the issue as formulated by Mr. Fraser is in fact the test for the cause of action of summary dismissal; certainly, the common law formulation of that test. Mr. Fraser implicitly accepts this, when at paragraph 1.10 of his submissions, he concludes: *"it is submitted that none of the letters/memoranda individually or collectively has/have reached the threshold of the test for summary dismissal as was laid down in the [C]ontinental Biscuit case […] – there was no ground or basis for the quest to terminate the [c]laimant's contract of employment."*

[21] However, in his additional submissions, Mr. Fraser espoused a new stance. He submitted that the claim is for breach of an express condition of the contract of employment; in particular, that SLASPA had breached clause 9 of the contract prior to dismissal when it evinced an intention that it was no longer prepared to abide by the terms of the contract in bad faith. Clause 9 of the contract provides that *"not less than six months prior to the completion of the contract and before proceeding on leave, the employee shall give notice in writing to the Authority whether he desires to remain in its employment and the Authority shall decide whether it will offer him further employment…"* He continues the submission by stating that bad faith can give rise to damages under the Civil Code and damages for loss of chance may be awarded at common law. More importantly, he states that the claim does not seek to litigate the manner of Mr. Tobias' dismissal, which he concedes is within the exclusive domain of the Act.

[22] In support of his submission that the court has jurisdiction to deal with Mr. Tobias' claim for relief at common law and under the **Civil Code**, Mr. Fraser relies upon the case of **Alicia Sardine Browne v RBTT Bank Caribbean Limited**,[3] in particular dicta of Henry J that:

[3] SVGHCV2006/0520 at paragraph 17.

> "An employee's claim for damages for wrongful dismissal is sustainable at common law and existed before the Act was enacted. Nothing short of clear and unambiguous statutory language will limit or abolish such a right. It is established that while a statute may abolish or restrict a common law right of access to the High Court, only an unequivocal indication or necessary implication to that effect will suffice. This action raises the issue whether an employee's common law right to seek damages for wrongful dismissal has been curtailed or abolished by the Act. In the **Burrill case** decided in the British Virgin Islands, the Court of Appeal considered whether the **Labour Code Ordinance** abolished the common law right not to be wrongfully dismissed. It declared that the **Labour Code** did not, but rather "supplemented that right by a statutory right not to be unfairly dismissed". That case also determined that "an employee now has a common law right and a statutory right."

[23] In his additional submissions, Mr. Lee submitted that Mr. Tobias' contract falls within the ambit of the Act pursuant to section 3(1) which states that it applies to all employees; further that Mr. Tobias is not a public servant for the purposes of the Act so as to be exempted by section 3(2). He relied in support on the interpretation of 'public servant' in **Perch, Dennie and Commissiong v AG.**[4] In relation to the effect of section 455, he did not differ from Mr. Fraser as to the applicable principle. Relying on **Burrill and another v Schrader and another**[5] he agreed that: -

> "a statute or statutory provision should not be given an interpretation whereunder the statute or statutory provision effectively abolishes or restricts an existing common law right or remedy unless the language and other components of the statutory context unequivocally or by necessary implication signify a legislative intention to abolish or restrict that right."

[24] Mr. Lee's position is that the mandatory nature of section 455 is clear and unambiguous. A claimant can only seek redress through the court after having referred the matter to the Labour Tribunal. He submits that Mr. Tobias' claim is entirely based on the manner of his termination and his treatment during the process. Even the allegations of breach of contract relate in large part to an implied term of the contract to be treated fairly. He says the claim is in substance one for unfair dismissal or constructive dismissal, which are governed by the Act

[4] (2003) 62 WIR 461.
[5] (1995) 50 WIR 193.

and neither provision permits direct application to the Court. Therefore, failure to comply with section 455 debars Mr. Tobias from pursuing relief or remedies created by the Act. The claim is therefore premature and ought to be struck out.

[25] It is inescapable that the breach of contract alleged concerns the reason for and the manner in which Mr. Tobias was dismissed. Under any lens, the claim for breach of contract is in substance one for summary dismissal. This is Mr. Tobias' pleaded claim and he is bound by it. As strenuous as Mr. Fraser's efforts were, even he could not resile from it. This therefore begs the question whether Mr. Tobias can claim summary dismissal at common law in spite of the provisions of the Act, which in section 133 delimits the circumstances in which an employee may be summarily dismissed for varying degrees of misconduct, and sections 3 and 455 mentioned above.

[26] The principle arising from the cases is as the parties have stated above. In **Burrill v Schrader**, the question was whether the employees' exhaustion of the procedure for conciliation prescribed by the **Labour Code** was a prerequisite to recourse to the court for vindication and enforcement of their rights? The court there stated that the Code did not abolish the common law right not to be wrongfully dismissed.[6] The Code merely supplemented that right with the right not to be unfairly dismissed, with the result that the employee had a common law and statutory right, which co-exist. The common law right of action against wrongful dismissal could only be restricted or abolished by clear and unambiguous language in the statute or by necessary implication. An indication that statutory procedure is mandatory is where it is prescribed for the benefit of both parties.

[27] The Court held that the procedure for conciliation was not mandatory[7], such that it could not be waived and legal proceedings instituted before exhausting the procedure were null and void. The Court considered that the Code provided no

[6] Burrill at page 196.
[7] Burrill at page 200.

remedy by way of compensation for an employer's breach of an employee's statutory right not to be unfairly dismissed; but merely provided for conciliation, which was not a remedy in the true sense. It also found that the Code anticipated failure of conciliation and provided in such an event for remission of the issue of unfair dismissal to the parties to pursue any legal action available to them. Further, there was no statutory duty imposed by the Code on either employer or employee to explore the possibility of conciliation. It merely provided a right or option to the employee to explore that possibility while no such right was given to the employer. Therefore, the proper inference was that the employee was entitled to waive the right to insist upon the statutory procedure. The language and other components of the statutory context did not signify legislative intention to restrict the right of access.

[28] The case of **Alicia Sardine Browne v RBTT** also considered whether a claim for unfair dismissal precluded a claim for wrongful dismissal. Following **Burrill v Schrader**, the Court decided that a claim for unfair dismissal did not preclude one for wrongful dismissal. In that case, another question under consideration was whether a claim of unfair dismissal could be initiated in the High Court. The Court found that it could not, based on the mandatory wording of the provisions setting out the procedure for making a complaint under the **Protection of Employment Act**, which required an employer or employee who alleged any failure to comply with that Act to make a complaint in the first instance to the Labour Commissioner. The Court noted the use of the word 'shall' in the provisions and the fact that the provision extended the requirement to do so to both parties, which is an indication that the provisions were intended to be mandatory.

[29] The difficulty here is that Mr. Tobias' claim has changed its face and make up throughout the life of the claim. However, stripped of all its façade, the claim is essentially a claim for wrongful dismissal at common law. As has been seen from the cases, a claim for wrongful dismissal in the High Court is still possible even in the face of the Act as the provisions of the Act do not oust such a claim. However,

the circumstances in which there exists the right to bring a claim for wrongful dismissal, without first pursuing the remedies provided by the Act, is restricted. This is the apparent intention of the Act on a proper construction of its language and the statutory context.

[30] The authors of **Halsbury's Laws of England**[8] describe wrongful dismissal as dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely: (i) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and (ii) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily. In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to a contractual condition of observing a particular procedure.

[31] From the outset, the pleadings have not alleged any specific provisions of Mr. Tobias' contract which were breached. In fact, Mr. Fraser acknowledged that Mr. Tobias had been paid over and above the notice pay he would have been entitled to and therefore there can be no breach of a notice period in the contract. As the case proceeded, Mr. Fraser suggested breaches of clause 9 and 11, neither of which was pleaded. On the face of it, there has been no proof of any breach of any of the provisions of Mr. Tobias' contract and his claim for breach of contract must fail.

[32] Further, for the reasons explained below, I am of the view that in this case, a claim for summary dismissal could not in any event be brought at common law styled as a mere breach of contract. When one examines clause 11(a) of Mr. Tobias' contract (set out at paragraph 18 above), that term merely repeats the common

[8] Halsbury's Laws of England, volume 38, paragraph 825.

law basis on which an employer may summarily dismiss an employee. Whether breach of that clause may be brought at common law must be considered in the context of the provisions of the Act. The statutory bases for summary dismissal not only codify the common law but have expanded it. The statutory provisions relating to summary dismissal in the Act encompass all the bases upon which an employer is entitled to summarily dismiss an employee at common law and incorporate additional bases. In fact, the legislature went as far as to provide for all other matters which may conceivably touch and concern summary dismissal: section 134 addresses entitlement to remuneration upon summary dismissal; section 135 provides for warnings and termination for misconduct; and section 136 provides for dismissal for unsatisfactory performance. Given the extent of these provisions, which demonstrate the all-encompassing scheme of the Act, it is difficult to see how Mr. Fraser can, in the circumstances alleged, properly bring a claim for breach of contract that would transcend the ambit of the Act.

[33] The crux of the matter is that in order to bypass the Act and bring a claim at common law for breach of an employment contract, the contract must provide, in substance or procedure, terms different from or greater than those provided by the Act. Examples would include, but are not limited to, terms relating to the length of the notice period, the grounds for dismissal or procedure to be followed to effect dismissal. It is the case that clause 11(a) of Mr. Tobias' contract did not go further than to state the common law basis for summary dismissal of an employee which is encompassed in the Act. There is nothing in Mr. Tobias' contract which speaks to a certain procedure having to be employed in dismissing an employee. Essentially, whilst Mr. Fraser has tried to argue that the claim is not seeking to look at the reason for the dismissal, it is inescapable by his own submissions, pre-trial memorandum and cross-examination that the contention is that SLASPA had no good reason for terminating Mr. Tobias' contract. Further that SLASPA did so without adhering to the principles of natural justice by failing to 'make a finding' that Mr. Tobias was guilty of serious misconduct or willful neglect in his duties, which 'finding' must be the outcome of a hearing. He argued that implicit in clause

11(a) is a requirement for a fair hearing. It is to be noted that none of these are requirements at common law where an employee is summarily dismissed. The result is that even at common law, the claim would not be made out, and inevitably we would be obliged to resort to the provisions of the Act, which is where such requirements are stipulated.

[34] In these circumstances, it cannot be said that both a common law right of action and the statutory right of action against summary dismissal coexist. It must be that the statutory right overtakes and supersedes the common law right, subject to the caveat there where the contract provides different or greater terms than the Act, breach of the contract may be pursued at common law. I am of the view that this was the contemplation and intention of the legislature in enacting section 133 of the Act and any interpretation otherwise would make nonsense of the scheme of the legislation and render it redundant. It cannot be that in light of the mandatory nature of the provisions highlighted above, an aggrieved employee can bypass the statutory procedure and opt to bring his claim when and where he pleases as is convenient to him without compliance with section 455. Mr. Fraser suggests that pursuing breach of contract at common law provides Mr. Tobias greater remedies, however, when one looks at the relief the Tribunal may award in section 442, they are broad-ranging.

[35] When looked at, this is a claim alleging breaches of the Act. While I do not agree with Mr. Lee that Mr. Tobias' complaint is that he was unfairly dismissed, I find that his complaint is that he was summarily dismissed. In light of the foregoing, I am of the view that Mr. Tobias would have had to have exhausted the internal remedies under the Act in accordance with section 455 before approaching the court in respect of the alleged breaches. I therefore conclude that the Court does not have jurisdiction to entertain this claim unless Mr. Tobias had complied with section 455 and he has not shown that he has.

Issue 2: Whether SLASPA had cause to terminate the employment contract with Mr. Tobias on the ground that Mr. Tobias had committed a repudiatory

breach of contract, in other words whether SLASPA was entitled to dismiss Mr. Tobias summarily?

[36] In the event that I am wrong in concluding that the Court does not have jurisdiction to hear Mr. Tobias' claim without him first complying with section 455 of the Act, I have proceeded to consider whether there was a repudiatory breach of contract by Mr. Tobias, entitling SLASPA to dismiss him summarily at common law.

[37] In relation to the memorandum dated 2nd December 2015, Mr. Fraser submitted that its emphasis was on improving performance but that there was no suggestion of unacceptable bad performance and was not a warning letter. In relation to the memorandum dated 6th May 2016, he submitted the complaint was about breach of the procurement policy, not by Mr. Tobias personally, but by his department. He acknowledges that the memorandum dated 27th May 2016 complained of lack of professionalism, spoke of a formal warning and stated that further lapses may lead to further disciplinary action, but Mr. Fraser argued that Mr. Tobias, by his letter dated 30th May 2016, 'explained away' the delay in the timelines and apologized for not providing adequate information for the resubmission of the payment certificate. Mr. Fraser submitted that a mere lapse in the execution of duty by Mr. Tobias does not speak to a fundamental breach of contract to justify the warning, which was a hasty conclusion, arrived at without hearing Mr. Tobias' side of the issue. Given Mr. Tobias' plausible explanation, the warning was rendered nugatory. As to the memorandum dated 5th October 2016, it sought an explanation of Mr. Tobias' failure to submit a timely evaluation report; however, was not a warning letter. He then noted that there was no record of whether Mr. Tobias provided an explanation.

[38] At common law, an employer is entitled to dismiss an employee without notice in circumstances where the employee has committed a repudiatory breach of contract such that it evinces disregard for an essential term of the contract;[9] as well as where the employee displays behaviour that is inconsistent with the

[9] Laws v London Chronicle (Indicator) Newspapers [1959] 1 WLR 698.

continuation of confidence in the employment relationship.[10] This has been held to be a question of fact and degree to be determined on a case by case basis. In the case of **Laws v London Chronicle (Indicator Newspapers) Ltd.**,[11] an example of conduct that may justify summary dismissal was specifically noted to include "[m]isconduct, inconsistent with the due and faithful discharge by the servant of the duties for which he was engaged";[12] further that "there is good ground for the dismissal of a servant if he is habitually neglectful in respect of the duties for which he was engaged."[13] The critical issue to be resolved has been identified as what constitutes a reasonable response by the employer to the misconduct under consideration.[14]

[39] With this in mind, I take a different view of the individual and collective effect of the memoranda sent to Mr. Tobias. Each memorandum unequivocally identified some lapse or default by Mr. Tobias in the execution of his duties, and regardless of whether it expressly described itself as a 'warning', amounted to one. That Mr. Tobias failed to appreciate this and to improve his performance does not render the individual and collective effect nugatory as suggested. In so concluding, I place emphasis on the fact that Mr. Tobias was SLASPA's Chief Engineer at the time. His field was a specialized one, and holding such a high position, he would have been expected to have the requisite expertise as well as display a high level of professionalism. As head of the engineering department, he would have been expected to have certain managerial skills and the ability to lead the department. He would also have been expected to bear the responsibility for the failures of the department.

[40] Further, in examining the memoranda themselves, they cannot properly be said to bear the insignificance Mr. Fraser attempts to attribute them. The memorandum

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[10] Sinclair v Neighbour [1967] 2 QB 279.
[11] [1959] 1 WLR 698.
[12] ibid, at page 699.
[13] supra, at page 700.
[14] Henry v Mount Gay Distilleries Limited (Privy Council Appeal No 43 of 1998, 21st July 1999) 1999 UKPC 39.

dated 2nd December 2015 clearly states: *"[t]he accuracy of information directly reflects on you as head of the department and can negatively erode the Council's confidence in you as chief engineer…"* and *"[w]e sincerely believe that the department cannot effectively deliver on its mandate in absentia of the effective resolution of these matters."* It concludes: *"I trust your appreciation of the context of this memo and [you] will ensure going forward that greater diligence is exercised by your office… Further lapses of this nature will necessitate disciplinary action."*

[41] The memorandum dated 6th May 2016 states: *"the abovementioned breaches are cause for serious erosion of confidence in the management and performance of the Engineering Department. Such poor performance has the potential of exposing the Authority to serious legal financial and reputational consequences."* This memorandum further requested an explanation of the reason for the breaches and of the actions taken by Mr. Tobias to hold the responsible persons accountable, as well as an indication of the measures to be taken to ensure such infractions are averted in the future. There is no indication of any response, which to my mind, if not responded to, was a further very serious lapse, given the seriousness of the complaints therein.

[42] The memorandum of 27th May 2016, says: *"Mr. Tobias, I am of the view that the aforementioned comment by you is disappointing and equally reflects poorly on your professionalism and by extension your commitment to the responsibility assigned to you as Chief Engineer… Please note that this memo serves as a formal warning to you as the organization expects a higher standard of professionalism and demonstrated passion by you for the duties which you have been assigned. Any further lapses of this nature may lead to further disciplinary action.*"

[43] The memorandum of 5th October 2019 beings with: *"I wish to place on record the following concerns."* It later states: *"[a]s you would appreciate, your failure/inability*

to have acted within reasonable consideration for the request of the Committee is concerning and by extension unacceptable." It concludes: *"Your failure to demonstrate your understanding and acceptance of this responsibility is concerning and by extension unacceptable. As such, an explanation is being sought from you on this matter. The Council and by extension Management is concerned with these egregious shortcomings and as such eagerly awaits a response from you."*

[44] The four memoranda speak for themselves and little more needs to be said. They patently demonstrate that SLASPA's confidence in Mr. Tobias' ability to perform the job at the required standard had been eroded and warned him of same. The memoranda reprimanded Mr. Tobias of a number of failures. The evidence shows that Mr. Tobias responded to two of the memoranda, and the attitude and approach his responses revealed were equally as cavalier as the conduct which necessitated the warnings in the first place. The repeated neglectful conduct identified in the memoranda would tend to create in the mind of a reasonable employer doubt about the competence, ability and interest of the employee in fulfilling the requirements of the post, which must be held to be an essential term of the contract. It would also diminish the confidence of the employer in the employee and his ability to perform the contract as agreed. In the circumstances, SLASPA's decision to terminate the contract was entirely reasonable. I find support in the case law.

[45] In the **Alicia Sardine Browne case**, RBTT had dismissed Mrs. Browne for failure to protest the non-payment of 6 bills of collection. She was RBTT's Collections Manager and was responsible for carrying out those instructions. She had some 8 years of experience in that area of banking. Although she had been given repeated opportunities to explain why she had not done so, she could not provide any legitimate reason. She insisted that it was a department job and even stated that her supervisor had to sign off on anything she did. The Court described her attitude as laissez-faire and found it mindboggling and unacceptable that she

accepted that she was manager yet, as far as she was concerned, it was everyone else's in the department's responsibility to protest the bills but not hers.

[47] Justice Henry accepted the law is that it is the quality of the breach complained about by the employer in each case that is important. While a single act of misconduct, negligence or other default will generally not amount to reasonable justification for summary dismissal, depending on the consequences which flow from such conduct, a single incident might be sufficient. The learned judge found that Mrs. Browne's repeated delinquencies and lack of explanation therefor was inexcusable and amounted to negligence in the performance of her duties. They were serious enough to warrant terminating her employment for negligence and misconduct, without notice. Therefore, she was not wrongfully dismissed and not entitled to recover damages.

[48] The same reasoning applies in the present case. Here it is not a single act of default that is complained of, but habitual neglect, which was identified as a ground for summary dismissal in the **Laws v London Chronicle case**. It has not been refuted that the complaints that are the subject of the memoranda, were part Mr. Tobias' contractual duty. On review of Mr. Tobias' employment contract in *Annex C – Terms of Reference and Scope of Services*, which at Part 3 outlines his duties, it is apparent that the matters complained of pertain to his contractual duties, which include oversight of projects, including reviewing and approving tenders, contracts and execution of works;[15] and staff supervision including establishing objectives, counselling on deficiencies, coordinating work and resolution of grievances.[16] On each occasion of default, Mr. Tobias was written, notifying him of the default, eliciting an explanation and imploring him to remedy it. However, he could provide no legitimate explanation and merely demonstrated a laisser-faire attitude towards what I consider a serious dereliction of duty.

[15] Annex C – Terms of Reference and Scope of Services, paragraph 3.3.
[16] Annex C – Terms of Reference and Scope of Services, paragraph 3.6

[49] Mr. Fraser submitted that clause 11 of the contract of employment implicitly required the rules of natural justice to be followed in that there must have been a hearing at which Mr. Tobias must have been given the opportunity to defend himself and upon which a finding of fact that he is guilty of misconduct was made. As this procedure was not followed, Mr. Fraser maintains that SLASPA was not entitled to terminate Mr. Tobias' contract. However, this does not accurately reflect the common law position. The common law does not require the employer to follow any particular procedure in summarily dismissing an employee; and neither is there a general requirement at common law that the employee be given a chance to be heard in his own defence, nor that the rules of natural justice be complied with.[17]

[50] The case of **Gunton v Richmond-Upon-Thames London Borough Council**[18] cited by Mr. Fraser in support of his submission is distinguishable, as in that case, subsequent to the plaintiff's employment, regulations that prescribed a procedure for dismissal of employees on disciplinary grounds were adopted by the Council and formed part of the plaintiff's contract. The court held that the effect of the incorporation of the disciplinary regulations into the plaintiff's contract of service was that the plaintiff could not lawfully be dismissed on a disciplinary ground until the prescribed procedure had been carried out and his dismissal was accordingly wrongful. In the circumstances, it cannot be said that this case is authority for any implied requirement of natural justice. It was an expressed, albeit subsequently incorporated term of his contract that a certain procedure be followed. Therefore, I find that SLASPA was entitled to dismiss Mr. Tobias summarily, that is without notice or payment in lieu thereof and he is not entitled to damages.

Issue 3: Whether Mr. Tobias was otherwise wrongfully dismissed by SLASPA?

[17] Commonwealth Caribbean Employment and Labour Law at page 162 citing from Hepple and O'Higgins Employment Law.
[18] [1981] 1Ch 448.

[51] The court in **Alicia Sardine Browne** described wrongful dismissal as involving a breach of the termination clause of an employment contract, where the employee is either dismissed before the expiration period of a fixed contract; without being given the agreed notice; or where there is no notice period, without being given reasonable notice or the statutory minimum notice, whichever is longer; or the employer did not have justifiable reasons for terminating the contract. However, an employee who is dismissed summarily for serious misconduct, disobedience to lawful orders, negligence, or incompetence will not be able to succeed in an action for wrongful dismissal.

[52] As I have decided that SLASPA was entitled to summarily dismiss Mr. Tobias for the repeated and neglectful defaults identified in the memoranda, Mr. Tobias was not therefore entitled to notice or payment in lieu of notice. Nevertheless, SLASPA did in fact pay Mr. Tobias and therefore, there would have been no basis for such a claim in any event. In case I am wrong in my finding that SLASPA was entitled to dismiss Mr. Tobias summarily, and for completeness, I will address this issue briefly anyway.

[53] The law is that either an employer or employee is entitled to terminate the employment relationship without cause.[19] In such circumstances, the common law requires, where there is no notice period stipulated by the contract of employment that reasonable notice be given. Mr. Tobias' contract does not stipulate the period of notice to be given by SLASPA to effect termination. However, it does stipulate the notice period to be given by Mr. Tobias in the event he wished to terminate the contract as three months. In ordinary circumstances therefore, the reasonable notice period which SLASPA would have been required to give would equally have been three months. However, at the time of dismissal, there were less than three months of the contractual term remaining. In these circumstances, the reasonable period could not have exceeded the remainder of the contractual term, being a fixed contract. In any event, Mr. Tobias was paid three months, salary and

[19] Wallace v United Grain Growers Ltd. [1997] 152 DLR (4th) 1, 39.

benefits in lieu of notice and was therefore paid more than he would have been entitled to. No claim for wrongful dismissal could therefore have been sustained.

Issue 4: Whether Mr. Tobias' resignation and the Deed of Settlement executed by him were procured by scheme, artifice, fraud, undue pressure, or in bad faith and are therefore void?

[54] This issue can be dealt with shortly because it is simply unnecessary to make any finding in this regard. The reason is that the law stipulates that in order for resignation to be treated as such, it must be completely voluntary. Therefore, where an employee is given the option of being dismissed or resigning, and the employee decides to resign, such employee will still be treated as being dismissed.[20] This is the precise situation that occurred in Mr. Tobias' case. The consequence is that whether the resignation was obtained voluntarily or otherwise as alleged, Mr. Tobias must be treated as having been dismissed by SLASPA. In the circumstances, the only question which would remain is whether he was given proper notice or payment in lieu of notice. For the reasons elaborated at Issue 3 above, the reasonable notice period would have been the remainder of his contractual term and Mr. Tobias was paid in excess of such period.

Issue 5: Whether the claimant is entitled to special damages and/or general damages, in particular for loss of chance, and if so, the quantum?

[55] Mr. Tobias has failed to make out his claim in respect of any of the issues identified above. First, the Court is unconvinced that it has jurisdiction to determine this claim prior to him exhausting the remedies provided under the **Labour Act** in accordance with section 455 thereof. Second, Mr. Tobias has not shown that SLASPA committed a repudiatory breach of contract in that his conduct did not warrant summary dismissal. To the contrary, the Court is satisfied that the conduct identified by SLASPA amounts to negligence in carrying out his duties and entitled SLASPA to dismiss him summarily. Thirdly and further, regardless of whether his resignation and the Deed of Settlement were voluntary

[20] Robertson v Securicor Transport Limited [1972] IRLR 70; Sheffield v Oxford Controls [1979] IRLR 133.

or not, Mr. Tobias was paid in excess of any entitlement he would have had upon dismissal without cause and therefore he was not wrongfully dismissed. Mr. Tobias is therefore not entitled to special damages, or general damages for loss of chance or otherwise.

[56] Prior to concluding, the Court takes the opportunity to note that it was necessary to set out Mr. Tobias' pleaded case as his witness statement, which was ordered to stand as his evidence in chief, omitted a significant aspect of his case. His witness statement failed to detail the two options for termination that had been presented to him, an essential premise of his claim. It merely alludes to two offers. Fortunately for Mr. Tobias, this came out on the totality of the evidence adduced in the case, including SLASPA's evidence and under cross examination of both witnesses, there being little factual dispute between the parties. I am constrained to note however, that this is a significant oversight. It is also important to appreciate that the claim form and statement of claim are the pleadings, which serve the purpose of letting the other side know the general nature of the case against him sufficient to enable him to prepare to answer it.[21] For this purpose, the **Civil Procedure Rules 2000** ("the CPR") requires the claimant to provide as short a statement as practicable of all the facts on which he relies and identify any documents on which he intends to rely.[22] However, pleadings are not and do not form part of a party's evidence. It is witness statements that are intended to serve the requirement of providing details or particulars of the pleader's case,[23] and logically so, as it is the witness statements filed on behalf on a party which may be ordered to stand as his evidence in chief. This is done in substitution for adducing a party's evidence by oral examination on the day of trial as was formerly the case. It is therefore of utmost importance that the witness statement sets out all the details of the all facts on which a party relies to prove his case.

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[21] Eastern Caribbean Flour Mills v Ormiston Civil Appeal No12/2006 (St Vincent and the Grenadines, delivered 16th July 2007) at paragraph 41.
[22] Rule 8.6.
[23] Eastern Caribbean Flour Mills v Ormiston Civil Appeal No12/2006 (St Vincent and the Grenadines, delivered 16th July 2007) at paragraph 43.

Conclusion

[54] Based on the foregoing, I make the following orders:

1. The claim is dismissed.
2. Prescribed costs to SLASPA in accordance with CPR Part 65.5.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar