COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
No. 2019/CLE/gen/00665

IN THE MATTER of The Employment Act

B E T W E E N:

JOHN PINDER

Plaintiff

AND

PETER OUTTEN
THEOPHILUS DEAN
TERRANCE DORSETT
(In their capacity as Trustees of)
THE BAHAMAS PUBLIC SERVICES UNION

Defendants

Before: The Honourable Mr. Justice Loren Klein

Hearing Date: 2 May 2022

Appearances: J. Michael Saunders for the Plaintiff

Khalil Parker K.C, Roberta Quant and Krystian Butler for the Defendants

RULING

KLEIN J.

Labour Union—Bahamas Public Services Union (BPSU)—Employment Law—Accrued vacation leave entitlement—Delay in claiming entitlements—Statute of Limitations Act, Ch. 83—Six years limitation for contractual claims—Consecutive but separate contracts—Equitable Defences—Laches—Estoppel by Acquiescence—Waiver—Prejudice to Defendants' case—Pleadings—Failure to particularize claim—Contractual terms implied by custom or usage—Evidence—Hearsay—Admissibility of document by person other than the maker

INTRODUCTION AND BACKGROUND

[1] Few names have been more prominent in the fight for public workers' rights in recent times than that of the plaintiff John Pinder, who is one of the longest-serving Presidents of the Bahamas Public Services Union ("BPSU"). In this claim, however, the tables are turned and it is the former Union leader himself who is seeking to vindicate employment rights against the Union he led for many years.

The parties and the claim summarized

[2] John Pinder served as president of the BPSU for five consecutive three-year terms between 2002 to 2017. He commenced this action against the Union with a specially indorsed writ of summons filed 10 May 2019 claiming accrued vacation entitlement in the amount of $71,916.40, along with interest and costs. An amended Writ was filed 30 March 2021. The Statement of Claim ("SOC") is remarkably succinct (perhaps to its detriment) and it is convenient to set it out in its entirety:

> "1. The Plaintiff was employed by the Defendant as President for the period of September 2002 to September 2017, a total of fifteen (15) years.
> 2. The Defendants are the Trustees at Bahamas Public Services (BPSU), a trade union established in accordance with the Laws of the Commonwealth of The Bahamas.
> 3. The Plaintiff was entitled to 5 weeks per year annual vacation leave, however, due to organizational obligations, the Plaintiff only exhausted one year's entitlement.
> 4. Both parties have agreed that Plaintiff (*sic*) is entitled to vacation pay of approximately $71,000.
> 5. The Plaintiff has requested to be paid his outstanding entitlements and the Defendant has refused and continues to refuse to pay the same."

[3] The BPSU is one of the largest unions in The Bahamas. It is an unincorporated association registered under the Industrial Relations Act and is recognized by the Government as the bargaining agent for civil servants employed by the Government and various government agencies. As an unincorporated association it is appropriately sued through its trustees, although (as will be seen) the action was initially brought against the Union *eo nomine*.

[4] The defendants filed an Amended Defence on 8 March 2022. They denied the plaintiff's claim and 'pleaded' several equitable defences, which were said to arise out of the plaintiff's conduct and his delay in pursuing the claim. Firstly, it is said that the plaintiff is estopped by his own conduct from seeking payment for accrued vacation time after demitting office as he failed to do so during his tenure as president, hence waiving any lawful claim that he might have had. Secondly, they rely on the significant delay and what is said to be the plaintiff's acquiescence in the non-payment. It is pleaded (at para 5 of the Amended Defence) that the plaintiff is estopped from maintaining the claim "*due to his own delay, laches, inaction and acquiescence to the prejudice of the Defendant, which has relied on the same, and arranged its financial affairs accordingly*." Thirdly, they rely on the Limitation Act, asserting that in any event, any vacation pay that accrued before 10 May 2013 is statute-barred by virtue of section 5, as not having accrued within 6 years before the action.

[5] In his reply to the amended Defence, the plaintiff claimed that he deferred his vacation entitlement due to travel commitments on behalf of the BPSU and ongoing negotiations with numerous government entities. However, he maintained that he never waived his

outstanding vacation entitlements and always held the "legitimate expectation" to be paid. With respect to the limitation period, his answer was that the claim was an ongoing one in respect of a continuing breach, and therefore section 5 of the Limitation Act did not apply.

Procedural history

[6] These proceedings got off to a somewhat untidy start, resulting in several interlocutory skirmishes. Firstly, on 17 June 2019, the Plaintiff entered a judgment in default of appearance against the defendant, then named as the "BPSU". The plaintiff also made an application, by way of summons filed 18 September 2019, to attempt to enforce the default judgment by way of a garnishee order under Order 49, rule 1 of the *Rules of the Supreme Court 1978* ("R.S.C. 1978"), apparently unaware that the defendant had filed a summons on 15 July 2019 to set aside the default judgment.

[7] The defendant was given leave to file a conditional appearance on 9 February 2021, on the basis that it intended to object to the naming of the Union as the defendant. This later crystallized into an unconditional appearance. The defendant applied by summons filed 26 February 2021 to strike out the Writ under Order 15, rule 6(2)(a) and Order 19, rule 19(a) and (b) of the RSC 1978, on the grounds that the named defendant was improperly named as a party, as the Union had no legal capacity to sue or be sued. The plaintiff, now alive to the objection, filed an Amended Writ on 30 March 2021, without the leave of the court, the effect of which was mainly to add the Union trustees as the defendants, although other amendments were made to the claim, including an adjustment to the overall amount claimed. The defendant filed an amended Defence in response on 8 March 2022. The defendant also complained that the Writ was amended contrary to Ord. 20, r. 1(3)(a), which requires the leave of the Court to add or substitute a party or alter the capacity in which a party sues.

[8] I convened a hearing on 19 March 2021 to deal with the interlocutory applications and heard submissions from the parties. It is trite that an unincorporated association has no capacity to sue or be sued in its own name and must sue through its trustees (see, *The Bahamas Communications and Public Officers Union (Suing by its Trustees Avrill Clarke, Shazard Pickstock and Edley Swain) and Anor. v The Bahamas Telecommunications Corporation and others* [2011] 1 BHS J. No. 22 (per Adderley, J) and the authorities discussed therein). In fact, s. 27(1) of the Industrial Relations Act makes it clear that it is the trustees who are competent to sue or be sued with respect to claims to the real or personal property of a Union. I therefore accepted that the Union by itself was not a proper party to the claim. It is also beyond dispute that an amendment which consists of either the addition, omission or substitution of a party requires leave of the court (*Davies v Elsby Brothers Ltd.* [1961] 1 W.L.R. 170) and consequently the amendment was improperly made.

[9] Having heard the parties, I set aside the default judgment, refused the application to strike out the summons and granted leave for the amendment to substitute the Union trustees as defendants. I also ordered that the Writ be re-filed and served on the defendants. In my view, the misnaming of the defendant did not justify striking out the claim, as this was a classic case of an error of procedure that could be cured by simple amendment. It would not have served the ends of justice or accord with the remedial powers of the court to deny the plaintiff a hearing on the merits of his claim because of minor technical deficiencies (see *Texan Management Ltd. and Ors. v Pacific Electric Wire & Cable Company Ltd.* 2009] UKPC 46, per Lord Collins [at para. 1, 87].

Evidence

[10] I will come to unpack the evidence relied on by the parties in support of their respective cases in due course, but it is useful to make a few general observations in advance. A total of 5 witnesses were called during the one-day trial: four on behalf of the plaintiff (including himself), and Mr. Kingsley Ferguson, the Union President, as the sole witness for the Defendants. The thrust of the plaintiff's written and oral evidence was to attempt to establish that the BPSU was aware of the plaintiff's outstanding vacation entitlements (Mr. Ferguson having served as Vice-President under Mr. Pinder for two terms) and that the Board had agreed to defer these for payment at a later date when the Union was in a better financial standing. The defendant's evidence was to deny any agreement of the Board to defer and pay the outstanding vacation leave, and to assert that in any event the conduct of the plaintiff was such as to raise equitable defences.

The issues

[11] The principal issues to be determined are as follows:

(i) whether the plaintiff has established a claim to outstanding vacation pay arising from any breach of his employment contracts with the BPSU from 2002 to 2017;
(ii) whether there was an agreement between the plaintiff and the Union to pay him for his accrued vacation leave;
(iii) whether there is any basis for the court to imply a term into the employment contract that the plaintiff would be paid for accumulated leave based on the Union's practice or custom in dealing with such issues; and
(iv) whether there are any equitable or statutory defences (e.g., limitation) that would bar or limit the plaintiff's claim.

[12] I will say at once (and it is a matter to which I shall return), that the pleadings in this matter were deficient in many respects. In truth, issues (i) and (iii) do not arise strictly on the pleadings, but the court only addresses them to the extent that they arise inferentially and out of deference to the parties' arguments.

The Evidence

<u>Documentary evidence</u>

[13] The agreed bundle included copies of several letters exchanged between the plaintiff and the defendant before action, copies of a number of cheques of various dates during the 2005-2017 period (representing roughly 11 weeks of cashed-in leave), as well as leave stubs for some three weeks of leave taken.

[14] Material in this regard is a letter dated 25 October 2017 from the plaintiff to the current President of the Union, Mr. Kimsley Ferguson, in the following terms:

> "**<u>Re Gratuity and Vacation Pay</u>**
>
> As you are aware, as former President of the Bahamas Public Services Union (BPSU) my contract of employment spoke (*sic*) a fifteen percent (15%) gratuity payment end of my contract and any accrued vacation.
>
> To this end, I am requesting payment of the above-mentioned as soon as possible."

[15] There is also a letter from the Secretary General, dated 24 January 2019, to Mr. Pinder in the following terms:

> "**<u>Re: Outstanding Vacation Pay</u>**
>
> The Executive Board of the Bahamas Public Service Union held its monthly meeting on Friday, November 2, 2018.
>
> As a result of that meeting, I have been directed to advise you to please provide any supporting documents to substantiate your claim of outstanding vacation pay that was owed to you during your tenure as President of the Bahamas Public Services Union, before any payment is made in this regard.
>
> Grateful for your urgent attention, so that this matter can be brought to an amicable conclusion."

[16] On 11 March 2019, in response to the letter from the Union, Counsel for the plaintiff wrote a letter-before-action which was said to have attached to it "*...the vacation schedule in respect of our client John Pinder for the period December 2005 through December 2017*". The letter further stated that total accrued vacation pay was $71,916.40, and that if there was no response within 14 days counsel was instructed to "*initiate proceedings under the provisions of the Employment Act*". The schedule referred to was not attached to the letter submitted in the agreed documents. However, what purported to be a schedule was included in the plaintiff's un-agreed bundle of documents. Counsel for the defendants objected to this document and I ruled it inadmissible for reasons which are set out a little later in this judgment in the section dealing with the witnesses' evidence.

The Plaintiff's evidence

[17] The plaintiff filed four witness statements (21 March 2021) in support of his case, namely from himself and three former executives of the Union: Stephen Miller (former Secretary-General), and Stephanie Braynen and Prescott Cox (former trustees).

The plaintiff

[18] According to his witness statement, the plaintiff was first elected President of the BPSU in 2002, at a starting salary of $55,000.00 per annum, with an annual increment of $1,000.00. Additionally, under the contract he received 5 weeks' vacation leave, 20 sick days' leave with pay, 6 call-in days, 4 sick days with a sick note and a 15% gratuity at the end of the contract. He was subsequently re-elected president for four consecutive terms. His salary increased to $60,000 in 2005, $65,000 in 2008, $68,000 in 2011 and $72,000 in 2014, with the additional benefits outlined under the first contract applying to the subsequent contracts. As may be discerned from his witness statement, the contractual periods were as follows: 2002-2005, 2005-2008, 2008-2011, 2011-2014, 2014-2017.

[19] He averred that it was the practice within the BPSU that vacation time was either taken, cashed in, or paid as directed by the Board. He stated that "[…] *my vacation entitlements were on many occasions deferred, with the full knowledge and approval of the Board*." Further, he said that it was difficult to take his vacation time because of requirements to travel and participate in negotiations on behalf of the BPSU. Another reason proffered for not cashing in all his unused vacation leave was that "*…Due to financial constraints, sometimes it was difficult to cash in my vacation entitlements in a timely manner…*". His evidence was also that it was a common practice for the BPSU to treat its senior staff with respect to accrued leave in a similar fashion to the leave policy employed in the civil service, which he alleges was to encourage them to take vacation leave to reduce accrued vacation entitlements, but to pay them for accrued vacation leave.

[20] Mr. Pinder further indicated that just before demitting office in 2017, he requested the General Secretary of the BPSU to ascertain the amount owing to him, and that instructions were given for the office accountant to prepare a detailed report of his accrued vacation entitlement (apparently the schedule referred to). Further, he said that he spoke with Mr. Ferguson several times about the issue, who indicated that he was "*having problems with the office records*" in the Union's attempt to verify the claim. He requested Mr. Ferguson to speak with Mr. Stephen Miller (then the Secretary General) for assistance with the records. He also indicated that he offered to reduce his claim (and apparently did do so) by a number of weeks (4-6), in response to Mr. Ferguson's concerns about the accounting for those weeks. He said further that he "*…approached Mr. Ferguson on numerous occasions and he eventually told me that he was not minded to authorize any payment in*

settlement of my outstanding vacation entitlements, in spite of the fact that during the tenure of my last 2 contracts, he served as my Executive Vice President."

[21] Mr. Pinder was vigorously cross-examined by Mr. Parker QC (as he then was). He confirmed that each of his 3-year contracts were separate contracts and that he claimed and was paid his gratuity pursuant to those contracts. However, he admittedly did not claim any accrued vacation entitlement before demitting office. Under questioning, Mr. Pinder conceded that he should have raised his entitlement concerns at the end of each contractual period and before demitting office. In support of his claim that it was the practice of the Union to pay such claims in arrear, he referred to a "precedent" that had been set within the Board of the BPSU in the case of the Union president who preceded him, whom he alleged was paid his accrued vacation entitlements gained over 12 years of service.

[22] His evidence with respect to whether or not he had waived any entitlement to those payments is less clear, as illustrated by the following extracts from the transcript (quoted elliptically, with unnecessary material omitted) [pp. 12-13 of transcript]:

> "**Q**: And I put it to you, Mr. Pinder, that you determined to and did waive your entitlement to take and cash in your vacation over the years?
> **A**: Sometimes […] it is in the best interest of the organization for you to lay (*sic*) [wait] until the organization is in a financial position to pay, sir. So, I answer yes.
> […]
>
> **Q**: […] I am trying to clarify for the record is that you waived your entitlement to claim for the periods in question, that you could have waived your entitlement?
> **A**: Yes, I could have.
> **Q**: And I am putting it to you that you did do so.
> **A**: In a few cases, yes, I did.
> […]
> **Q**: Now, when you determined to waive your entitlement for any given period, when you made your decision to waive a claim for vacation entitlement, the Union would have benefitted from that, correct? It would have been to the benefit of the Union based on what you perceived as its financial circumstances at the time?
> **A**: Yes.
> **Q**: And the Union itself would have been in a better position to assist members because of the decision you would have made?
> **A**: To some extent, yes.

[23] He was challenged by Mr. Parker as to whether his employment on a contractual basis was analogous to that of persons employed in the public service on a permanent and pensionable basis ("P&P") with respect to the accumulation of leave. He acknowledged that his engagement by the Union on a contractual basis was different from the position that obtained with P&P employees in the public service, and that his service "*ends when [the] contract is terminated*". Thus, when asked whether this required him to raise and address his entitlements at the end of each contract period, he conceded that he should have claimed at the end of each contract period [p.15 of transcript].

Stephen Miller

[24] Mr. Stephen Miller served as Secretary-General of the Board from 2005 to 2017. In that capacity, he was responsible for the day-to-day operations of the Union and dealt with administrative and personnel matters. His witness statement confirmed that the plaintiff travelled extensively to attend conferences and other public service-related matters, and therefore was rarely able to enjoy his annual vacation entitlements. He stated [at para. 4 of his witness statement]: "*I attest to the fact that Mr. Pinder took no more than 15 weeks' vacation inclusive of the actual time taken and the time cashed in during his 15-year tenure with the Union.*" Mr. Miller stated that it was a practice of the Board to allow unused vacation time to be either cashed-in or accumulated, which replicated the practice of the public service at the time.

[25] It was Mr. Miller's evidence that he regularly attended Board meetings and there was no objection by the Board to the vacation entitlements allegedly owed to the plaintiff or the obligation to pay him. Mr. Miller recounted that Mr. Ferguson served on the Board under the tenure of the plaintiff and himself took no issue with the arrears that were owed the plaintiff.

[26] Mr. Miller stated that the plaintiff requested him to reconcile his outstanding vacation payments in 2017, and that he instructed the inhouse accountant to "*produce a report from the Union's records detailing the outstanding vacation entitlements due and owing to Mr. Pinder*." What purported to be such a schedule was included in the plaintiff's bundle of documents, but was not agreed, and it was also attached to the witness statement of Mr. Miller. The admissibility of this document was challenged by Mr. Parker on the grounds, *inter alia*, that Mr. Miller was not the maker of this document and was not competent to speak to its contents for the purpose of admitting it into evidence.

[27] I upheld the objection and ruled the document inadmissible. Essentially, the challenge was that the document constituted hearsay evidence, as being made by a person not called to given oral evidence in the proceedings (see ss. 37-39 of the Evidence Act). Further, to the extent that it might otherwise have been admissible under the exceptions to the hearsay rule as a record compiled by a person acting under a duty, no notice was given for its admission pursuant to s. 60 of the Evidence Act and Ord. 38, r. 22. In any event, there was no explanation as to why the maker of the document was not called. Furthermore, and although the point was not taken by defendant, it was also a statement produced by a computer, and there was no notice or witness statement containing the requisite particulars required by the rules (Ord. 38, r. 23).

[28] Even if I had ruled it admissible, I am of the view that the 'schedule' would have been of little (if any) probative value. This is because it basically only set out the plaintiff's annual and monthly salaries for the periods of his employment and did not set out what was alleged to be owed and how it was calculated. In fact, it is still a matter of some conjecture as to how either the $71,916.40 claimed in the original writ or the $71,000.00 claimed in the amended writ were calculated.

[29] Returning to Mr. Miller's evidence, when cross-examined as to whether there was a convention or policy followed by the Board (as averred in his witness statement) that vacation leave not taken was to be cashed in or paid in arrear, he said "*no*". He clarified that the policy he was referring to in his witness statement of paying out employees for unused vacation was that which pertained with respect to pensionable employees in the civil service. He however maintained that there was an "employee handbook" which he said reflected the policy of cashing-in or being compensated for leave among Union employees. No such document was produced to the court. Further, the transcript records that when he was asked whether or not he was aware of an agreement to pay the plaintiff the claimed $71,000, his answer was "*no*".

Braynen & Cox

[30] The remaining two witnesses for the plaintiff, Stephanie Braynen and Prescott Cox, are former trustees of the Union, who served during the plaintiff's presidency. Ms. Braynen served as a trustee for nine years, and as Secretary General for three years during the plaintiff's presidency. Mr. Cox was a trustee for nine years.

[31] Their witness statements roughly parallel each other. It was their evidence that they attended Board meetings regularly and were familiar with the plaintiff travelling extensively to conduct Union work. They also stated that all Board members, including the current President Mr. Ferguson, were aware of the plaintiff's vacation arrears, although the amount had not been quantified. As put by Ms. Braynen: "*All of the board members, including Mr. Kimsley Ferguson, the current president, at the time I served were aware of the numerous vacation entitlement arrears due to Mr. Pinder and there was never any concern or objection raised in relation to Mr. Pinder being paid for his outstanding entitlement arrears*." They both said that the position being adopted by Mr. Ferguson in failing to authorize payment was a departure from the practice that had pertained under the Boards.

[32] During cross-examination, Mrs. Braynen said that the Board's agreement to defer Mr. Pinder's payment "*should be in the minutes*". However, no minutes were ever produced before the court. Further, there was never any explanation as to why the plaintiff did not seek discovery of any documents which might have contained some memorialization of the agreement alleged.

[33] Mr. Cox conceded that the plaintiff, when sitting as president, could have requested and ensured the payment of his arrears. When it was suggested to him that the plaintiff in fact did not make any claim for payment of his arrears, he replied: "*He [the plaintiff], knew it was owed to him but at the time we was (sic) not in a good financial position […] When it was almost to the end (sic) of his term as president, we had the discussion as far as I can remember. And we basically deferred it because we were not financially stable at the time*."

The Defendants' evidence

[34] The defendants' sole witness was the President of the BPSU, Kimsley Ferguson, whose presidency commenced in September 2017. Mr. Ferguson indicated that he served as the Vice-President of the Union during the presidency of the plaintiff and that at no time before demitting office was the Board informed by the plaintiff that he was owed funds for his accrued vacation entitlements. He claims, therefore, to have been taken by surprise by the plaintiff's claim stretching back well over a decade. He further stated that it was open to the plaintiff to take his vacation leave during the periods, or to have applied for payment at the end of each of the contractual periods, to ensure that all accounts between himself and the BPSU were settled before demitting office. Mr. Ferguson averred that there was no time when the plaintiff sought vacation leave or payment in lieu of vacation that it was denied. In the circumstances, he contended that the plaintiff waived any claim against the Union and acquiesced over many years and election cycles to the non-payment of his accrued vacation. In his words, the Union therefore relied on the "…*Plaintiff's continued representation that he was neither taking the full vacation nor was he seeking payment in respect to it*". Mr. Ferguson stated in his witness statement that the Union was "*not prepared to pay or recognize the Plaintiff's claim*."

[35] Cross-examined as to whether he was previously aware of the plaintiff's claim, Mr. Ferguson maintained that the plaintiff never represented to the Board that he had outstanding vacation pay, and that he was only made aware of the claims after the Plaintiff demitted office in 2017. He further stated that he never agreed that the plaintiff was entitled to any outstanding vacation pay, or that the only issue to be resolved was the quantum of the arrears. He confirmed that the Union operated a cash-in policy in respect of leave for executive employees but indicated that he never saw a document codifying such a policy.

[36] His evidence as to whether or not the Union formally rejected the claim by the plaintiff is rather less clear, as may be seen from the following extracts from the evidence (quoting elliptically, with non-essential material omitted) [pp. 52-53]:

> "**Q**: So is that why you denied his claim?
> **A**: I didn't deny Mr. Pinder's claim. There was a discussion among Board members and they were advised of what the position was, and the same was agreed that we would forward it to counsel for representation in that particular regard.
> [...]
> **Q**: Any idea when it was presented to the Board?
> **A**: It was not presented to the Board. It was presented to Board members. And it wasn't at a Board meeting. It was at a discussion that was held during the normal course of the day where we spoke. I was able to have a discussion with those particular individuals.
> **Q**: So Mr. Ferguson, the claim was never denied by the Board. Is that what you are saying?
> **A**: It was presented to the Board at some point. And shortly thereafter, it was agreed that we would allow counsel to address the claim on behalf of the Bahamas Public Service Union."

[37] Counsel also confronted him with the letter from the Union dated 24 January 2019 that referred to a meeting by the Executive Board, and again his evidence was ambiguous (transcript quoted in elliptical form) [pp. 55-57]:

> "**Q**: [A]s a result of that meeting, the Secretary General was directed to provide supporting documents to substantiate the claim for outstanding vacation pay due […] owed? Is that correct?
> **A**: I know I was approached in this regard…I asked her [SG] to seek to get information regarding the claim. Yes I did.
> [...]
> **Q**: Did the plaintiff provide any documents?
> **A**: The Plaintiff? No. Sir. Not to my knowledge. I know that the document surfaced. Where it came from, I really cannot say.
> **Q**: Can you turn to the next page? You remember that letter, the letter 11 March?
> **A**: Yes, Sir.
> **Q**: And was anything attached to that letter?
> **A**: Yes, sir, the very document that you are asking about. I remember it now.
> **Q**: Did you issue a response to the letter submitted on behalf of the Plaintiff with the attached documentation that you requested?
> **A**: I am not certain. I can't remember whether or not I submitted a response to it. […]
> **Q**: [A]ccording to your recollection, the claim was never formally denied? […]
> **A**: No sir, because we forwarded it to counsel.
> **Q**: And it's still your position that you owe the Plaintiff nothing.
> **A**: Yes sir. At this point, yes sir." […]
> **Q**: So it is your evidence that because he didn't pay himself, or because he did not exercise his entitlement then, before he left office, he is no longer entitled to money?
> **A**: My response for that is…if there was evidence of entitlement prior to Mr. Pinder demitting office he could actually ensured that he was paid. And again addressing the entitlement part of it, there is no documentary evidence that I would have seen that indicated that Mr. Pinder was owed monies.
> **Q**: So he is not entitled to be paid? Is that what you are saying?
> **A**: I can't say that.
> **Q**: That is what you are saying in your statement, Mr. Ferguson: "The Union is neither prepared to pay nor does it recognize the Plaintiff's claim." […] So you are saying you do not recognize it.
> **A**: No, sir.
> **Q**: Is that your position or the Board's?
> **A**: That is the Board's position, sir."

DISCUSSION AND ANALYSIS

The Pleadings

[38] Before analyzing the merits of the claim, I should record at the outset that the pleadings of both parties left much to be desired. Order 18, r. 12 requires every pleading to contain "*…the necessary particulars of any claim, defence or other matter pleaded*". In this regard, it is notable that the plaintiff, in the inducing paragraphs of the Statement of Claim, refers to the five contracts with the defendant over a 15-year period. However, no particulars are pleaded: the contracts are not identified, it is not indicated whether they were written or oral, nor was there ever a specific pleading of breach of contract. More egregiously, none of these contracts was put into evidence. Furthermore (and I will say a

bit more about this later), the bulk of the plaintiff's legal submissions and case authorities were directed to the issue of implied contractual terms resulting from custom or usage. However, the implied terms on which he was seeking to rely were never pleaded in the Statement of Claim.

[39] The sole claim in the Statement of Claim was that there was a purported agreement: "*Both parties have agreed that [the] Plaintiff is entitled to vacation pay of approximately $71,000*." Again, contrary to established authority and practice, the generic allegation failed to state the date of the alleged agreement, the names of the parties to it, whether it was oral or in writing and, if the latter, the relevant terms relied on (*Turquand and Capital Counties Bank v Fearon* (1879) 40 LT 543).

[40] Equally, the Defendant 'pleaded' a battery of equitable defences—estoppel, waiver, laches, acquiescence and delay. All of these are required to be specifically pleaded (see, *Banks v Jarvis* [1903] 1 K.B. 549, at p. 552). Except for general allegations, the Defence does not give any particulars of the conduct raising estoppel; as to waiver, there is no indication of whether waiver was express or to be implied from conduct, nor is it alleged that any acts in this regard were done by the plaintiff with knowledge of all the material circumstances; as to laches, delay or acquiescence, there are no particulars given.

Analysis

The plaintiff's case

[41] Having said that, it is too trite to bear mentioning that the plaintiff has the legal burden to prove his claim as alleged in his writ and statement of claim. It is impossible to find on the evidence that there was any agreement between the parties as alleged in the statement of claim to pay him. The defendant denied such an agreement and even the plaintiff's witnesses, when cross-examined, were forced to concede that there was no specific agreement (written or oral) to pay any outstanding vacation leave. Several of those witnesses, when questioned as to the existence of the agreement, said it should be reflected in the Board minutes. However, no Board minutes were ever produced.

The implied terms/understanding

[42] I deal with this only for completeness, since, as mentioned, no implied terms were pleaded in the Statement of Claim. However, in his evidence the plaintiff stated that he was entitled to rely on the "precedent" set with respect to his predecessor in office, whose vacation leave was paid in arrears. Counsel for the plaintiff, Mr. Saunders, also cited in support of this proposition several of the leading authorities on the law relating to implied contractual terms arising from custom or usage in particular categories of contracts (see, for example, *Hutton v Warren* [1835-42] All ER Rep 151).

[43] As the rule is stated in *Hutton v Warren*: "*It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has been applied to other transactions of life, in which known usages have been established and prevailed.* " I am not of the opinion that the principles in these cases helps the plaintiff based on the facts of this case. I hardly think the fact that a former president may have had his accrued leave entitlement paid in arrears is sufficient to establish a custom such as to be implied into the contract of employment of all future presidents of the Union.

[44] As the plaintiff has not produced any documentary evidence that the defendant agreed to pay his claim, at the very highest his claim is an inferential one to be deduced from the pleadings and evidence, oral and documentary (see, *Mackenzie v Alcoa Manufacturing (Gb) Ltd.* [2019] EWCA Civ 2110), where the UK Court, having considered the authorities on drawing inferences said [at para. 50]):

> "50. It seems therefore that it is possible to state the following propositions. First whether it is appropriate to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference, will depend on the facts of the particular case, see *Shawe-Lincoln* at paragraphs 81-82. Secondly silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document, see *Herrington* at page 970G, *Keefe* at paragraph 19 and *Petrodel* at paragraph 44."

[45] There are, however, a few elements of the plaintiff's claim which are uncontroverted and can be accepted as facts. For example, there is no dispute that the plaintiff was employed in the capacity of president of the Union for the 15-year term. The plaintiff did not plead the material terms of his contract, but he did assert at paragraph of the Claim that: "*The Plaintiff was entitled to 5 weeks per year annual vacation leave, however, due to organization obligations the Plaintiff exhausted only one year's entitlement*." For reasons that are not clear, paragraph 3 was denied in its entirety in the amended Defence, but one suspects that the denial was directed to the allegation that the plaintiff only exhausted one year's entitlement, and not to the five-weeks leave entitlement. The salaries attaching to the various contracts were also not pleaded, but these were indicated in the plaintiff's witness statement and were not challenged.

[46] Additionally, the plaintiff and his witnesses all referred to a "cash-in policy", which it is said permitted employees to either take in or cash-in their vacation leave. This was said to be recorded in the employees' handbook (see evidence of Mr. Miller), although the handbook was not produced to the court. However, in cross-examination, Mr. Ferguson conceded that the practice existed, and in fact the parties submitted (in the agreed bundle of documents and in documents submitted by the defendant) several cheques made out to the plaintiff at various intervals during his tenure recording payouts to him for vacation time cashed in. I therefore accept that the Union did operate a cash-in policy with respect to leave for executive members.

[47] As indicated, although minutes were not produced, I have already referred to the letter from the Union's Secretary General dated 24 January 2019, which confirms that the issue of the plaintiff's claim to outstanding vacation pay was put before the Executive Board during its monthly meeting of 2 November 2018. It has been set out above, but the operative part of that letter bears setting out again: "*As a result of that meeting [2 November 2018], I have been directed to advise you to please provide any supporting documents to substantiate your claim of outstanding vacation pay that was owed to you during your tenure as President of the Bahamas Public Services Union, before any payment is made in this regard*." [Underlining supplied.] As explained further below, while this letter is not an acknowledgement by the defendants of any monies owed to the plaintiff, it certainly signals that the Union was prepared to entertain the claim subject to proof of the vacation entitlements.

[48] In this regard, something needs to be said about the view proffered by the plaintiff's witnesses that the President was acting unilaterally in rejecting the claim. It will be recalled that the evidence of Mr. Miller, Braynen and Cox described the position taken by Mr. Ferguson as deviating from the previous practice of the Boards. In his witness statement, Mr. Miller described the position as this: "*The position taken by the current President by refusing to pay Mr. Pinder for his outstanding vacation entitlements reflects a blatant departure from that of the previous board of Directors and Trustees during all my service and experience with the BPSU.*" Mr. Cox's evidence on the point was even more direct. He stated [at para. 11]: "*I am of the view that this change of policy was brought about by Mr. Ferguson of his own accord without the support or ratification of the board and appears to be the result of a personal vendetta to deny the payment of Mr. Pinder of his outstanding vacation entitlements*."

[49] I must say that other than this assertion, there was no evidence of any personal vendetta between Mr. Pinder and Mr. Ferguson, although it may be expected that in union affairs it is not unusual for leaders to have different philosophical outlooks. But in any event, I do not think this allegation takes the matter anywhere, having regard to the respective functions of the President and the Executive Board/Committee.

[50] In this regard, it is useful to refer to the terms of the Union's Constitution. Article 9 (ii) provides for the President to "…*superintend the general administration of the Union"* and *"endeavor to secure the observance of these rules by all concerned*." But it is clear that the general management of the Union falls to the Executive Board, not the President, as is evidenced by the following provisions:

> "**Art. 10**
>
> **Executive Board**
>
> (i) The Government of the Union in the periods between Annual General Meeting and the conduct of its business shall be vested in an Executive Board.

(iii) The decisions of the Executive Board shall be binding on all members of the Union until such decision is changed at an Ordinary Meeting or Annual General Meeting.

(viii) In additional to any expressed powers in these Articles provided, the Executive Board shall have the power generally to carry on the business of the Union and may delegate powers to the General Secretary as they may deem necessary; and do such things, authorize such acts, including the payment of monies on behalf of the Union as they in the general interest of the Union may deem expedient. […]

Article 11

Executive Committee

(i) The Executive Committee shall be composed of the President, Executive Vice President, Two Vice Presidents, General Treasurer, General Secretary, Assistant Secretary and the Departmental Representative who will be appointed by the Executive for each Department, Agency of Corporations of the Public Service.

(ii) The Executive Committee shall meet at least twelve times a year. "The majority shall form a quorum." […]"

[51] Having said that, I generally did not find Mr. Ferguson to be an impressive witness. It seemed to me that many of his answers were evasive or intentionally abstruse, prompting the court to intervene on more than one occasion to try to elicit answers to questions which he should have had no difficulty answering as President. His evidence with respect to several important details is confusing and contradictory. Firstly, he conceded in cross-examination that it was not the *Board* (but only certain members) that initially considered the plaintiff's claim. According to him, the matter was later brought to the Board, which referred it to counsel to be litigated.

[52] However, when his attention was drawn to the Union's letter of 24 January 2019, written on behalf of the Executive Board, he conceded that the Union never formally denied the claim. In the same breath, however, he maintains that the Board did not recognize, nor was it prepared to pay, the plaintiff's claim (consistently with what was indicated in his witness statement). Further, he indicated that there was no documentary evidence to support the plaintiff's claim, but then later conceded in cross-examination that the schedule of leave entitlement was attached to the letter.

[53] As President of the Union, it may be assumed that he presided at the meeting of the 2 November 2018 when the plaintiff's claim was raised and was aware of what was discussed and recorded. Indeed, one of the functions of the President (Art. 10) is to sign the official minutes of the meetings of the Executive Board, so he would have been aware of any conclusions of the Board. In fact, I am inclined to accept that it is more probable than not that he was aware of the outstanding leave prior to Mr. Pinder demitting Office, as it was his evidence that as the Executive Vice-President he "regularly" attended Board meetings. But he was certainly aware of the claim after Mr. Pinder demitted office and, by his own admission, was aware of documentation supporting it, whether or not the accuracy of the document was accepted. In fact, he indicated that he himself had commissioned his Secretary General to obtain such documentation.

Relevance of the Industrial Agreement between the BPSU and the Goverment

[54] The Plaintiff also relied Industrial Agreement between the Government of The Bahamas and the BPSU to buttress his claim for a right to payment for accrued leave entitlement, as he claimed that BPSU applied a similar policy internally. Article 26.9 of the Agreement provides:

> "26.9 All vacation leave must be verified by the Human Resources Division and approved by the Permanent Secretary or his designate.
> (a) Vacation leave should be taken annually. However, leave may be accumulated up to a maximum of three (3) years accrued entitlement.
>
> (b) The Permanent Secretary shall have the right to schedule vacation leave for all employees within their Ministries or Departments in order to ensure that no employee accumulates more than the maximum of his/her accumulated entitlement."

[55] There was no dispute between the parties that the internal employment policies of the BPSU adhered (at the minimum) to those of the public service. In this regard, a strict application of the Government's policy would cap the plaintiff's maximum available accrued entitlement leave for which he can be paid to three years. However, while I accept that the employment benefits of the Board of the Union are not likely to have been less than those pertaining in the public service, this does not mean that their benefits in respect of leave were circumscribed by that policy. In fact, the plaintiff in his evidence referred to the "savings provision" in the Employment Act that allows the employer to agree terms more favourable to the employee than those prescribed by statute.

[56] I accept the proposition that, at the very least, Mr. Pinder was able to accumulate up to 3 years' accrued vacation entitlement. I am also satisfied that the Union's policy of paying for unused leave by executives was not limited to 3 years, based on the evidence adduced by the plaintiff and the defendants' letter of 24 January 2019, which simply referred to payments for monies owed during the plaintiff's "tenure as President", without any limitation.

The defences

[57] As indicated, the defendants invoked a number of equitable defences. For reasons which I have touched on earlier, I do not need to dwell on these, but for completeness I will say something about them.

Estoppel by acquiescence and waiver point

[58] In his witness statement, Mr. Ferguson says that the Union relied on the plaintiff's "*continued representation*" that he was neither taking the full vacation nor was he seeking payment in respect of it. But the particulars of that representation, and or how it induced the Defendants to take any particular course of action, is never pleaded, nor is it clear what kind of estoppel is being relied on. I accept, however, the principle stated in *Taylors*

*Fashions Ltd v. Liverpool Victoria Trustees Co Ltd (1981) 2 W.L.R. 576 (*per Oliver J., at pg. 593) that whether classified as proprietary estoppel, estoppel by acquiescence or estoppel by encouragement, the correct approach is a broad one directed at "*…whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour…*".

[59] Applying the principle stated in *Taylors Fashion*, I do not accept that the conduct of the plaintiff was such as to make it unconscionable for him to attempt to enforce any claim to unpaid vacation entitlements. The defendants have placed much emphasis on the fact that the plaintiff, as president, was in a position to authorize payment, and his failure to do so must be counted as acquiescence. I accept that the plaintiff could have perhaps been more proactive in pursuing his payments, or at least formalizing an agreement for the deferral of those payments. But at the end of the day, the decision to pay him was still a corporate one to be taken by the Board, not the President. I also accept the plaintiff's statement, which was never controverted, that the financial position of the Union (a non-profit body) might have factored into his decision not to pursue payments at various times.

[60] The fact that he requested and received payment in lieu of his vacation at various intervals during his tenure as President is, however, not consistent with an intention of acquiescing in any non-payment or generally waiving his entitlement. I therefore do not find that the plaintiff waived his entitlement to seek payment for outstanding leave.

Laches

[61] There may be something to be said for the laches claim. In *Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221*, the Privy Council Board explained the equitable doctrine of laches as follows (per Lord Selbourne LC at pages 239 to 240):

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable."

[62] The defendants say the plaintiff's delay in pursuing his claim has caused the defendants prejudice as they cannot now afford to pay the plaintiff a "*late and large*" claim and that

they are unable to access the documents stretching back to 2002 in relation to the plaintiff's claim.

[63] As to its ability to access documentation, it may be noted that the defendants adduced documentation regarding the plaintiff in its bundle of documents which contained applications for vacation leave, letters and cheques dating from 2005. It was also indicated that the Union accountant was instructed by the SG to prepare an accounting report, which was done from the Union's records (although for reasons given, that was not accepted into evidence). I do not readily accept that the Union, with officers whose job responsibility include maintaining proper records and accounting records, would be prejudiced in its ability to access records, even if they go back 15 years. As mentioned, it is rather surprising that counsel for the plaintiff did not seek to discover any of these records in support of his case.

[64] With respect to the claim for the large payment, the defendant has provided nothing to substantiate its claim that it is not in a position to pay. However, I do accept that the plaintiff is a not a profit-making organization and relies heavily upon the dues of its members to cover debts. In the circumstances, it can be understood how a hefty claim, said to have accumulated over the years, and which may not have been budgeted for, might cause prejudice. For example, pursuant to Article 14 of its Constitution the Union is to perform an annual bi-annual audit (twice a year) and the Executive Committee is to "*cause an audit to be made by a team of Union Member's appointed at a General Meeting immediately after the triennial election*." It only seems logical that the purpose of the triennial audits is to allow an incoming executive to be aware of the financial position of the Union at the start of their term. Therefore, any outstanding liabilities or claims (such as accrued leave entitlements) should properly be reflected in those triennial audits. So there is some force in the argument that it would now be inequitable to force the Union to find funds to pay for accrued vacation leave which was not claimed at the end of each contractual period.

[65] However, as the defendant has also pleaded the limitation point, it is perhaps more useful to deal with the lapse of time and delay under the limitation point.

The Limitation Point

[66] In their defence to the plaintiff's claim, the defendants pleaded that the plaintiff was not entitled to any relief in respect of any cause of action that accrued six years before the issue of the Claim form (10 May 2019). It was alleged that any such claim was barred by the Limitation Act, s. 5(1)(a), which bars actions in contract after the expiry of six years. It is common that the plaintiff had a series of 5 triennial contracts: 2002-2005; 2005-2008, 2008-2011, 2011-2014, 2014-2017. Therefore, it is alleged that claims based on any period before 10 May 2013 would be caught by the limitation period.

[67] In his reply, the plaintiff pleaded that the Limitation Act is not applicable to this instant matter as the breach was a continuing breach. In this regard, reference was made to *Bell v*

Peter Browne & Co. [1990] 2 QB 495, where the distinction between a once and for all breach and a continuing breach was explicated by Nicholls L.J. (at page 501):

> "For completeness I add that the above observations are directed at the normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due under the contract. In such a case there is a single breach of contract. By way of contrast are the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation. In such cases the obligation is not breached once and for all, but it is a contractual obligation which arises anew for performance day after day, so that on each successive day there is a fresh breach. A familiar example of this is the usual form of repairing clause in a tenancy agreement. Non-repair for six years does not result in the repairing obligation becoming statute-barred while the tenancy still subsists. The obligation of the tenant or the landlord to keep the property in repair is broken afresh every day the property is out of repair, as Bramwell B. observed in *Spoor v. Green* (1874) L.R. 9 Ex. 99, 111."

[68] The plaintiff was employed under successive 3-year contracts, which terminated at the end of each term. His entitlement to vacation leave would have been granted afresh under each contract. It is also trite that the cause of action arises on the date of the breach, and time begins to run from that date in the normal case. Thus, any pecuniary or other benefits of the plaintiff arising under each of the individual contracts which were not paid thereunder, could be claimed within six years after its termination, unless earlier refused (in which case time would run from the refusal). The facts of this case are clearly not on all fours with the situation described in *Bell*, where the failure to repair was regarded as a continuing breach of covenant as long as the tenancy remained on foot. So *Bell* does not assist the plaintiff.

[69] In the absence of any reasons that would exclude the limitation defence or reset the limitation clock, such as acknowledgement of the claim or part payment [ss. 38, 39 of the Limitation Act], I see no reason why the limitation period would not apply. The plaintiff did not plead that the letter of 24 January 2019, by which the Union invited him to provide documents to substantiate his claim so that the matter could be amicably concluded, was an acknowledgement of the claim. However, he placed significant reliance on this letter as evidence of an intention to pay, or at the very least a non-denial of the claim. In any event, I would have found, on the principles of *Good v Parry* [1963] 2 Q.B. 418, that the letter was not an acknowledgment of the claim so as to bring it within ss. 38 and 39 of the Limitation Act and reset the clock. In that case, the UK Court of Appeal upheld the finding of the judge that the terms of a letter from the agent of the defendant tenant stating that "*the question of outstanding rent can be settled as a separate agreement as soon as you present your account*" was not an acknowledgement of the claim within the Limitation Act, so as to restart the limitation period.

[70] I therefore find that the defendants are entitled to rely on the limitation defence. Thus, whatever conclusion the court comes to with respect to the plaintiff's claim, it can only

sound in the period after 10 May 2013. Unfortunate though it might be, this has the effect of abrogating a large part of the plaintiff's claim.

CONCLUSIONS & DISPOSITION

[71] For the reasons discussed above, I am not satisfied that the plaintiff has made out his claim that the defendants agreed to pay him $71,000.00 for outstanding vacation leave. I do find, however, that the plaintiff is entitled to be paid the sums for accrued vacation entitlement for the period after 10 May 2013 to the end of his contract in 2017, subject to any deductions for leave taken or cashed-in during that period. I will also order that the statutory interest of 6.25% be paid on the amount found due from the date of judgment until payment.

[72] Unfortunately, it is not possible on the materials before the court to quantify the sum actually due to the plaintiff in accordance with the court's finding. This is because there is evidence that the plaintiff either cashed in or took some of his leave during that period. For example, there are copies of cheques as follows: 2017 ($4,500, 3 weeks); 2016 ($1,225.05, "partial leave"), 2015 ($1,416.67, 1 week). In fact, there may be other cheques and leave stubs to be factored into any calculation, because several of the copies of the cheques included in the bundle are illegible and undated. To complicate matters further, the monetary value of each year's vacation entitlement is contingent on the annual salary, which fluctuated due to annual increments. Additionally, the 5-weeks' entitlement in respect of 2013 would have to be pro-rated for the period after 10 May 2013 to account for the limitation period.

[73] The plaintiff did not seek an accounting (as he might have done) in support of his claim. But there is no way that justice can be done in this matter, nor the Court's decision given effect, unless an accounting is done. Even at this stage, the plaintiff could apply by summons under O.43, r 2(1) (for accounts or enquiries to be made (see *Barber v. Mackrell* (1879) 12 Ch. D. 534; *Taylor v Mostyn* (1886) 33 Ch. D. 226), or alternatively under Part 41 of the CPR 2022. However, it is hoped that commercial commonsense will prevail and the parties are able to cooperate in ascertaining the amount due based on the Court's order, so that a formal application to the court in this regard will not become necessary.

[74] As the plaintiff has only had limited success in his application, I am not inclined to award the full costs of the action and will hear the parties as to the appropriate deduction to be made in that regard, as well as any consequential matters.

Klein, J.

29 November 2023.