

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

COMMONWEALTH OF DOMINICA

DOMHCVAP2014/0015

BETWEEN:

CLAUDIA HENRY

Appellant

and

ROSEAU COOPERATIVE CREDIT UNION

Respondent

Before:

The Hon. Dame. Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Gildon Richards for the Appellant
Ms. Coleen Felix, with her Ms. Danielle Wilson for the Respondent

2018: October 1;
October 5.

Civil appeal – Pension fund – Wrongful dismissal – Termination of employment – Board of trustees – Whether board of trustees is a separate legal entity – Costs – Whether learned judge erred in awarding costs to the respondent

ORAL JUDGMENT

[1] **PEREIRA CJ:** This is the decision of the Court on which all members of the Panel have had input. The issues arising in this appeal may be stated as follows:

- (a) Whether the learned judge erred in holding that the appellant, in order to recover her undisputed entitlement at the date of termination of her employment by the respondent in the sum of

\$176,678.07 under a Pension Fund Plan put in place by the respondent as employer for the benefit of its employees, was required to bring an action against the Board of Trustees who had been tasked with administering the Pension Fund on the basis that the Board of Trustees was a separate legal entity distinct from her employer, the respondent; and

- (b) Whether the learned judge erred in holding that the appellant was the unsuccessful party in the claim and ordering her to pay costs to the respondent having found in her favour that she had been wrongfully terminated from her employment with the respondent and finding, given her managerial position in the respondent, that reasonable notice of termination was ten months entitling her to an award of damages in a sum equivalent to ten months' pay.

Background

[2] The appellant was employed with the respondent since 1981, beginning as a junior clerical officer. By the year 2000, she had been promoted to the post of Operations Manager earning a monthly sum of \$7,550.93.

[3] The respondent wished to change its policy of employment on indefinite terms in respect of its managerial positions to fixed contract terms. Negotiations and communications commenced around December 2007 toward this end. The appellant was reluctant to have her terms of employment changed from one of an indefinite term to a fixed term. The upshot of this was that the respondent sought to make the position of Operations Manager redundant, and by letter dated 31st October 2008 terminated the appellant's employment on the basis that the post of Operations Manager had been abolished. Accompanying that letter was the respondent's cheque in the total sum of \$118,004.40 said to be made up as follows:

- (a) \$89,069.76 as redundancy benefit for twelve months;

- (b) \$14,844.96 as payment in lieu of two months' notice;
- (c) \$5,106.29 as payment in lieu of vacation leave; and
- (d) \$26,717.52 as an ex gratia payment for years of service to the defendant [respondent] institution less income tax of \$17,734.13.

- [4] The appellant cashed the cheque and subsequently brought a claim against the respondent for, among other things, damages for wrongful dismissal. The heads of loss itemized in her statement claim included "loss of contribution to and benefits under the staff pension fund at the dated (sic) of termination: \$176,678.07".
- [5] It is common ground that during her tenure of employment the appellant was a participant in the staff pension fund which had been set up by the respondent for its employees. The scheme operated in this way: "the employee would contribute 5% of his/her salary to the Pension Fund and the employer, [the respondent] would match this amount". The Pension Fund also made provision for early termination of the employee's participation in the Fund be it by resignation or dismissal of employment".¹
- [6] It is also common ground that as at the date of her termination by the 31st October 2008 letter from the respondent, the appellant had acquired an entitlement in the Pension Fund in the sum of \$176,678.07. In paragraph 6 of the appellant's statement of claim against the respondent, she stated that "at the time of the defendant's termination of [her] employment the balance in the Plan in [her] favour was \$176,678.07. The respondent, in paragraph 6 of its Defence, stated: "With regards to paragraph 6 of the Statement of Claim, the Defendant agrees that at the time of termination of the Claimant's employment she was entitled to the sum of \$176,678.07."

¹ See the witness statement of Alymer Irish, Chief Executive Officer of the respondent, paras. 6-8. Record of Appeal p.69-75.

- [7] As has been gleaned from the transcript of the proceedings below, at some point the respondent took the decision to invest the Pension Fund with Colonial Life Insurance Company Limited ('CLICO'). The employees of the respondent had informed staff members at various staff meetings that the Pension Fund had been invested with CLICO where it was to attract a high interest rate of 8% per annum. At some point thereafter, a Board of Trustees was formed, and this Board of Trustees took over management of the Pension Fund. The Board of Trustees comprised two of the Credit Union's directors, its General Manager, its Legal Officer and four staff members of a supervisory nature. That Board in turn had "an Executive... made up of a President, a Treasurer and a Secretary".
- [8] It is a notorious fact that CLICO encountered severe financial difficulties and was eventually placed under judicial management. It would appear that just prior to maturity date of the policy under which the Pension Fund was invested with CLICO, news broke of CLICO's financial troubles. The policy was cancelled, and demand made for a return of the investment. To date only a portion of the investment was recovered amounting to \$500,000 repaid by CLICO in 2010. This sum was deposited into the Staff Pension Fund account held by the respondent. It is not in dispute that the appellant is entitled to the sum of \$33,493.43 out of that sum. It is said on behalf of the respondent that this sum "was allocated to the claimant [appellant] and paid into her deposit account subsequent to her being informed". CLICO's financial position and its being placed under judicial management was referenced by the learned judge in paragraphs 48 and 48 of his judgment. It is not clear from the state of the record whether the appellant has in fact received this sum.

The Board of Trustees

- [9] In addressing the issue as to whether the Board of Trustees was a separate legal entity against whom the appellant ought to have brought proceedings in respect of her Pension Fund entitlement, the Court must observe the unsatisfactory state of the documents placed before the Court. No documentation relating to the Staff

Pension Rules referred to by the respondent was tendered. Neither was there any documentation describing or setting out the arrangement under which the Pension Fund was set up. The Court was not assisted with any documentary or other evidence showing how the Board of Trustees was established so as to establish its true legal character. All that was before the Court was the evidence of Mr. Irish on behalf of the respondent who said that the “the Fund was a separate entity which is neither governed nor controlled by the credit union [the respondent]”.

[10] It is solely on this basis that the learned judge found himself able to conclude that “the Board of Trustees ... is a separate legal entity”,² which in turn led him to conclude at paragraph 48 that “the Claimant’s action should be against the Board of Trustees since it is a separate entity...”.

[11] Neither counsel assisted the Court with any authorities on this point. The Court however was able to consider the cases of **Maniella v Trustees**³ and **Heslop v Americans for African Adoption Inc**,⁴ two cases by courts of the United States which were helpful. Given the complete lack of evidence showing that the Board of Trustees was a juridical entity or a person with a separate and distinct legal personality it was not open to him, based on the mere evidence of the Board’s management powers over and in respect of the Pension Fund, to conclude that this without more clothed it with the characteristics of a separate legal entity. What is indisputably clear is that the respondent established the Pension Fund for the benefit of its employees. Once the employer/employee relationship between the appellant and the respondent ended, so ended her benefits in respect of the Pension Fund. It was a benefit of her employment or, put another way, an incident of her employment with the respondent. The legal relationship was as between the appellant and the respondent. Accordingly, it was as against the respondent that she rightly claimed her entitlement in respect of the Pension Fund. It is trite law that the Pension Fund in and of itself has no legal personality against which a

² Para.47 of the judgment of the lower court.

³ 126 W Va 183 (W Va 1943).

⁴ United States District Court, 890 F. Supp. 2d 671,678, (NDW Va 2012).

claim can be brought. There was no evidence before the learned judge supporting his conclusion that the Board of Trustees so called, had any separate legal personality capable of being sued. Indeed, it was not an issue in dispute that the appellant was entitled as at the date of her termination to the sum of \$176,678.07.” The respondent positively averred in its pleaded case that the appellant was so entitled. Nowhere in the respondent’s pleaded case did it say that the respondent was under no liability in respect of this head of claim in respect of her Pension Fund entitlement and that such a claim would lie against the Board of Trustees only. The respondent merely stated that “the administration of the Staff Pension Fund is managed solely by a Board of Trustees.” This in our view falls short of constituting the Board of Trustees as a person sui juris and is insufficient to support such a conclusion. The learned judge therefore erred when he so found.

[12] That said, notwithstanding that she was entitled to claim as against the respondent her entitlement under the Pension Fund as at the date of termination of her employment, it is doubtful whether she will be able to recoup her entire entitlement. It is not disputed that the Pension Fund was invested with CLICO. It is a notorious fact also, that investments of the kind in which the Pension Fund was made with CLICO, may be lost. As with investments of this kind promising high yields the inherent market risks can be high. If the investment performs well the returns can be highly rewarding. Conversely, if the performance is poor losses can be suffered. It is still left to be seen what may ultimately be recovered under the judicial management regime under which CLICO was placed.

[13] The appellant is entitled at this stage to the sum of \$33,493.43 of the \$500,000.00 so far recovered in respect of the Pension Fund and the learned judge ought to have so found without resort to the making of a separate claim. The Pension Fund Plan was all part and parcel of the employer/employee relationship existing between the appellant and the respondent.

The costs order against the appellant

- [14] The learned judge concluded that the appellant was the unsuccessful party in respect of the claim and ordered that she bears the defendant's costs "based on the amount claimed in the claim form less the amount of \$118,004.40".⁵ He gave no reasons explaining why he considered the appellant to be the losing party. It is true that having found that she was wrongfully dismissed and awarding to her ten months' salary in lieu of ten months' notice, this sum, amounting to \$75,509.30, turned out to be less than what the appellant had in fact received by cheque in the sum of \$118,004.40. He gave her no relief in respect of her undisputed Pension Fund entitlement based on his finding that she ought to have brought an action in respect of this head of loss against the Board of Trustees. For the reasons we have already given, we consider that such a course was wholly unnecessary and was properly made as against the respondent who expressly agreed that the appellant was so entitled.
- [15] There was no finding by him that the appellant had behaved unreasonably thereby warranting a costs order as against her in favour of the respondent. She claimed to have been wrongfully dismissed and claimed loss of salary for a period amounting to two years (30th November 2008 to 30th October 2010) totaling some \$210,142.38. He found that she was wrongfully dismissed, as she claimed, but that her loss was the equivalent of ten months' salary being \$75,509.30. To that extent, she had succeeded in having a determination in her favour. For the reason which he gave, he made no order in respect of her Pension Fund entitlement. He ought to have found that she was so entitled even if not immediately recoverable, for the reasons which we have given, as it was undisputed. It is also possible that further monies may be recouped from CLICO.
- [16] Accordingly, we are of the view that the learned judge erred in concluding that the appellant was the unsuccessful party. We would set aside the costs order made

⁵ This is the amount which the respondent paid by cheque in respect of termination on the basis of redundancy.

by him. She had some success, although at the end of day, not in the quantum she sought. Under the Pension Fund, she is entitled to receive from the respondent the sum of \$33,493.04 so far recouped from the failed investment of the Pension Fund into CLICO by the respondent. This sum, adjusted by the excess found by the judge to have been paid to her, unless already paid, would leave a balance, albeit small, outstanding in her favour. We are unable to say any more about this as it is not clear whether this recouped pension sum has been paid over to the appellant.

- [17] Exercising the costs discretion afresh, we consider that the appropriate costs order in the circumstances is that each party bears its own costs. For the same reasons, having regard to the ultimate result in terms of money, we would similarly order that each party bears its own costs in respect of this appeal.

Conclusion

- [18] For the reasons given, the appeal is allowed. The claim in respect of the appellant's Pension Fund entitlement was properly brought against the respondent. The costs order made by the learned judge is set aside. It is hereby ordered that each party shall bear its own costs on this appeal and in the court below.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar

