

IN THE HIGH COURT OF THE SUPREME COURT OF  
JUDICATURE

REGULAR JURISDICTION

Court File NO: 2020-HC-DEM-CIV-SOC-68.

BETWEEN:-

DENISE BENJAMIN, female of age.

Claimant

ELECTRA CO-OP CREDIT UNION LTD., a  
Cooperative Society registered under the  
cooperative Societies Act Chapter 88:01,  
Registered as NO. 302 of 1954.

Respondent

MS MANDISA BREEDY, Counsel for the Claimant

MS.TAMIEKA CLARKE, Counsel for the Respondent

**DECISION**

**DATED THE 10<sup>TH</sup> DAY OF JANUARY, 2022.**

1. The Respondent summarily terminated the employment of the Claimant after considering allegations made against her at a Board Meeting.
2. The Claimant contends that she received notice of her dismissal by way of an undated letter which was handed to her on the 18<sup>th</sup> day of October, 2018.
3. The reason given for the termination as contained in the undated correspondence was that “ This decision was made

after much deliberation by the Directors, and in keeping with Clause 6 of your contract, which states. “ if the person engaged, shall at any time during the currency of this agreement, neglect or effuse or form any cause ( other than ill health, not caused by her own misconduct as provided in clause 4) become unable to perform any duties, or to comply with any other, or shall disclose to any unauthorized person (s), or shall in any manner be guilty of misconduct, the Credit Union may terminate the engagement in a summary manner.”

- 4.** The correspondence was signed by Dornel McFArlane, Secretary- for and on behalf of the Board of Directors.
- 5.** Paragraph 4 of the said letter advised the Claimant that her entitlement., emoluments and recompenses would have been paid to her within 30<sup>th</sup> days.
- 6.** It is not disputed that on the 28<sup>th</sup> November, 2019, the Claimant was issued with a cheque for \$746,004.00 ( seven hundred and forty six thousand and four dollars) which represented 17 days pay for October 2019 6 weeks pay in lieu of leave for 2018, 33 days pay in lieu of accrued leave for the year 2019, traveling allowance, utility, entertainment and gratuity.
- 7.** It is not disputed that on the 12<sup>th</sup> December, 2019, the Claimant was issued with a cheque for \$169,181.00 ( one hundred and sixty nine thousand, one hundred and eighty one

dollars) for 1 day's pay on the 18<sup>th</sup> October, 2019 and one month's pay in lieu of termination.

**8.** It is also not disputed that on the 5<sup>th</sup> February, 2020, the Claimant was issued with a Cheque for \$107, 827.00 (one hundred and seven thousand, eight hundred and twenty seven dollars) which represented 1 month's pay in lieu of Notice.

**9.** A Statement of Claim was instituted against the Respondents on the 25<sup>th</sup> day of February, 2020, in which the Claimant sought the following reliefs:-

(a) A declaration that the Claimant is entitled to severance pay for the period of service to the Defendant Company, being the period May 31, 1983 to September 1, 2015.

(b) An Order that the Defendant do pay to the Claimant , such sums as represents severance pay for the period May 31, 1983 to September 1, 2015.

(c) A Declaration that the Claimant was wrongfully dismissed in breach of the contract of employment dated the 2nd day of September, 2015.

(d) Damages in excess of \$500,000.00 (five hundred thousand dollars) for wrongful dismissal.

(e) Interest in terms of the Law Reform (Miscellaneous Provisions) Act.

(f) Costs.

(g) Any further or other Order which to the Court seems just.

- 10.** The argument of the Claimant is that by way of a letter of appointment, she began working with the Defendant Co-operative Society on the 31<sup>st</sup> day of May, 1983.
- 11.** That during the year 2015, the Defendant made a decision to implement a contract system, under which the Claimant was to continue in the same position for the same salary, but she also became entitled to the payment of a gratuity, payable every six (6) months.
- 12.** The Claimant contends that in the year 2015 when the contract system was implemented, she became entitled to payment for her service for the period 1983 to 2015, in accordance with the Termination of Employment and Severance Pay Act.,
- 13.** The Claimant further argues that the 2015 contract did not amount to a severance, and that the Claimant's service was not broken by the implementation of the contract system. And was terminated by way of an undated letter given to her on the 18<sup>th</sup> day of October, 2019.
- 14.** The Defendant however contends that the Claimant is not entitled to the relief sought, since the 2015 Contract did not amount to a severance, and as such the Claimant's contract

was not broken. Her service was therefore property and legally terminated.

**15.** The issues to be determined by this Court, are:

**WHETHER THE CLAIMANT WAS WRONGFULLY DISMISSED?**

**16.** As previously stated, the Claimant was appointed on the 31<sup>st</sup> May, 1983, by way of a letter of appointment. However, upon the implementation by the Defendant of a contractual system of employment, on the 2<sup>nd</sup> day of September, 2015, the Defendant and the Claimant signed and executed an Employee Contract, under which the Claimant continued in the same position with the same salary. However under the Contract the Claimant became entitled to gratuity payable every six (6) months,

**17.** Under the Contract, Clause 1 (a) and (b) of the Schedule stipulated as follows:-

(a) Subject to the provisions of the Agreement, the terms of engagement of the person is for three (3) years resident service, commencing from the 1<sup>st</sup> January, 2015, in which the period may be extended.

(b) The term of the engagement shall be deemed to be completed on 1<sup>st</sup> January, 2018, provided that any leave accrued to the person engaged in respect of her service will not be counted as service for the purpose of gratuity.

Clause 6 of the Contract stipulated that:

If the person engaged, shall at any time during the currency of this agreement neglect or effuse from any cause (other than ill health not caused by her own misconduct as provided in Clause 4) become unable to perform any duties or to comply with any order, or shall disclose any information respecting the affairs of the credit union to any unauthorized persons, or shall in any manner be guilty of misconduct, the credit union may terminate the engagement in a summary manner.

17: The Termination of Employment and Severance Pay Act N0. 19 of 1997, Section 10 (1) & (2) and Section 11 (1) (2) and & (4), stipulates the ways in which an employer may summarily dismiss an employee. Viz:

Summary Dismissal for serious misconduct.

Section 10 (1): An employer is entitled to dismiss summarily without notice or payment of any severance or redundancy allowance or terminal benefit any employee who is guilty of serious misconduct.

(2) The Serious Misconduct referred to in subsection (1) is restricted to that conduct which is directly related to the employment relationship and has a detrimental effect on the employer's business.

Termination of employment for misconduct, breach of contract.

Section 11 (1) where the employee is guilty of an offence in employment or breach of his condition of employment or any misconduct that is not serious or any misconduct on account of which the employer cannot be expected to continue to employ the employee if it is repeated, the employer may give the employee a written warning.

(ss2) if the employee after being warned in writing pursuant to subsection 1) is guilty of the same offence or similar offence or misconduct in the following six months, the employer may terminate the employee's contract of employment without notice.

Ss4: the employment of an employee shall not be terminated for unsatisfactory performance unless the employer has given the employee instructions as to how the employee should perform his duties and a written warning to adhere to the employer's instructions and the employee continues to perform any duty unsatisfactorily.

From the evidence adduced, it is alleged by the Chairman of the Defendant's Credit Union, and not disputed by the Claimant, that from during the month of June, 2017 and August 2017, the Claimant was written concerning the "shortcoming" of her duties, and during the year 2019, cheques paid to Members of the Credit

Union were returned marked NSF ( Not sufficient Funds) and the Claimant whose responsibility it was to ensure that there were adequate cash in the Defendant's Bank Account to honour the cheques , admitted , when questioned by the Defendant, that she had not confirmed the availability of funds , as she did not have the chance to do so, and had not done so for over three months prior.

It was further alleged by the Chairman of the Defendant's Credit Union that over the period 2018 and 2019, several correspondences were sent to the Claimant regarding her dereliction of duties, but upon checking the Claimant's personal file, of which she was the custodian, along with all personal Files for the Defendant's Union employees, no copies of such letters could be found.

The Defendant Chairman evidence in this regard was not disputed by the Claimant.

The question therefore, is whether the acts complained about by the Defendant constitutes sufficient breach or misconduct to satisfy the requirements of summary dismissal of the Claimant?

In the Case of **Continental Biscuit Company Ltd -v- Shanks**, **Guyana Court of Appeal NO. 5 of 1975**, Massiah JA. Relied on 934 of Halsbury's Law 3<sup>rd</sup> Edition where it is stated that " there is



no fixed rule of law defining the degree of misconduct which will justify dismissal. The extent of misconduct has to be examined to see whether it was sufficient to justify instant dismissal. This can be determined only by a close examination of all the facts of each particular case.”.

Also in the case of **Sinclair v Neighbour (1967) 2 WL:R 1**, it was held that the ultimate test is whether the circumstances of the particular case justify summary dismissal, and not whether the employee’s act amounts to a crime ,as may have been alleged.

In the case of **Guyana Sugar Corporation v Franco Boodhoo** , the Honourable Justice of Appeal Yonette Cummings highlighted the decision of the Privy Council in **Henry -v- Mount Gay Distillers Ltd (Barbados) 1999 UKPC 39**, where their Lordships stated that: “ it is well established that summary dismissal is only justifiable where there has been a breach of one or more duties of the employee, being inconsistent with the continued employment of the employee. Thus a single act of carelessness or negligence can provide grounds for Summary dismissal if the negligence itself or the circumstances surrounding it show that there has been a “deliberate flouting of the essential contractual conditions”.

This Court also noted the decision in the case of **Reda and Another -v- Flag Ltd. 2002 61 WIR 118**, where the Privy Council

in the course of dismissing an appeal by two former employees ( who were also directors of the employer company) arising out of a dispute as to the payments and other benefits due to them on the termination of their employment by the employer company's directors and shareholders , ruled that”

(a) That where a company had the contractual right to terminate an employee's employment without cause, the company directors could not be said by the employees to have acted from an improper motive; the power to dismiss without cause had to be exercised in good faith and for the benefit of the company, but the duty so to act was owed to the company not to its employees.

(b) That although a term that the employer would not without reasonable and proper cause destroy the relationship of trust and confidence between employer and employees should be implied in the employees' contract of employment, such implied term must yield to the express terms of the contract; and, in particular, the implied term could not be used to circumscribe an express power to dismiss without cause.

In the case of **Vernon Griffith -v- National Bank of Industry and Commerce Civil Appeal of Guyana #806-W of 2002,**

Justice of Appeal Ian Chang concurred with the view of the

Learned Author Fridman in the text Modern Law of Employment at page 471, when he opined that , Payment of wages, instead of the giving of notice will prevent the dismissal from being wrongful and actionable, for the payment of wages is the payment of what are, in effect, liquidated damages in advance of the action.”

In referring to the case of **Konski v Peet (1915) 1 CH 530**, which supported Fridman’s position, JA Chang stated that the dicta supports the proposition of law that where an employee has been summarily dismissed, whether with or without justification, the employer – employee relationship is then brought to an end because the contract cannot be specifically enforced and so no further performance possible.

Further more, the payment of wages in lieu of notice, together with other benefits, constituted payment, for the payment for summary dismissal- even if without just cause- which payment was accepted and received by the Claimant.

(c) Consequently, upon the evidence before this court, the court finds that in accordance with the contract and upon the basis of the complaints regarding the acts of the Claimant, the Defendant did not wrongfully dismiss the Claimant.

WHETHER THE CLAIMANT IS ENTITLED TO SEVERANCE PAY  
FOR THE PERIOD 1983-2015?

The Court accepts the argument of the Defendants that there was no break in the employment of the Claimant, when she entered into the contract in the year 2015.

The Court noted that the Claimant's position and salary remained unchanged, and she began to receive additional benefits by way of gratuity every six months.

Consequently, and notwithstanding no evidence was adduced regarding the specific entitlement of the Claimant prior to the 2015 contract, in view of the fact that this court finds that there was no break in the employment, then in accordance with Section 21 Subsection 4 (a), and in view of her summary dismissal, the Claimant is not entitled to receive severance pay from the Defendants.

The Court hereby dismisses the Claimant's Claim, with costs to the Defendants in the sum of \$75,000.00

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Hon. Sandra Kurtzious J.

