

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2017-03003**

CAVELLE DAVIS

Claimant

AND

VENTURE CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Farai Hove Masaisai

For the Defendant: Ms. Gabrielle Gellineau

Date of Delivery: 6th December, 2019

JUDGMENT

THE CLAIM

- [1] The Claimant sought damages, including aggravated and/or exemplary damages for breach of her employment contract and wrongful dismissal against the Defendant.
- [2] She pleaded that by letter dated 29th December 2015, the Defendant offered her permanent employment as a 'Member Service Supervisor' with effect from the first day of February 2016, which she accepted. The letter of Employment provided *inter alia* that:
- a. the Claimant will be paid a basic salary of \$13,500.00 a month subject to lawful deductions.
 - b. there will be a probationary period of six months commencing February 1st 2016 to July 31st 2016. Two performance appraisals would be conducted during this period, one at the end of three months and another at the end of six months; in order for her to continue in the position of Member Service Supervisor, an individual performance assessment score greater than seventy five percent of the established key performance indicators is required- any lower score shall result in termination of the contract of employment at Management's discretion.
 - c. termination of employment prior to expiry date of the contract will take effect by:
 - i. one month's notice in writing to either party
 - ii. termination without notice or salary by Venture Credit Union in the event of the Claimant's breach of employment terms, become medically unfit, misconduct or the supply of incorrect information to the Defendant regarding her qualifications/experience.
- [3] The Claimant pleaded that on the 6th April 2016 she was promoted by the Defendant to the position of Acting Branch Manager effective 5th April

2016 to the 5th October 2016. This promotion was based on her good performance as Member Service Supervisor. The Claimant asserted that she required to fulfil the requirements of both positions.

- [4] On the 11th August 2016 the Human Resource Manager gave the Claimant a letter of termination effective the 15th August 2016 which indicated that she was no longer required to act as Acting Branch Manager without providing any reasons therefor; the Claimant then resumed duties as Member Services Supervisor while also training the new Branch Manager until the end of August 2016. The Claimant averred that she was then given a performance assessment for the time that she worked with the Defendant, with the result that the Claimant's probation period was wrongfully, unfairly and unjustly extended for three months.
- [5] On the 7th September 2016 the Claimant responded to this performance appraisal in writing protesting the extension of her probationary period. On the 9th September 2016, General Manager of Operations Xoceketzal Mohammed wrote to the Claimant advising her of the extension of probation for three months. On the 8th November 2016, a meeting was scheduled between the Claimant and new Branch manager whom the Claimant had trained, but this meeting was cancelled.
- [6] On the 11th November 2016, the Defendant's Human Resource Manager Ms. Joseann Joseph wrote a job letter for the Claimant which stated that the Claimant is permanently employed with the Defendant in the capacity of 'Member Service Supervisor.'
- [7] The Claimant met with the new Branch manager on the 26th November 2016 when the latter gave her an unsigned job appraisal. On the 30th November 2016 the Claimant received a letter terminating her employment with the Defendant. She complained that she was not informed about her shortcomings nor given the opportunity/training to correct same. The Claimant was escorted off the premises the same day.

[8] The Claimant therefore claimed Special Damages as follows:

One month's salary	\$13,500.00
Loss of earnings as Acting Branch Manager	\$ 8,750.00
Loss of earnings for wrongful dismissal from the date of filing to judgment	\$108,000.00

DEFENCE

[9] The Defendant denied liability for wrongful dismissal and asserted that the Claimant was lawfully terminated.

[10] The Defendant pleaded that the Claimant was terminated because she failed to attain the requisite score to continue in the position; the Defendant therefore triggered Clause 7 of the Contract of Employment which provided for the procedure for immediate termination of employment. Further, that Clause 11(C) of the contract provided that it may be terminated by either party giving not less than one calendar month's notice in writing to either party. The Defendant therefore asserted that the measure of damages for any breach is confined to one month's salary.

[11] The Defendant averred that the reasons for the Claimant's termination are as set out in its letter dated 30th November 2016 to the Claimant:

- a. the Claimant failed to participate in the performance appraisal process choosing instead to unreasonably delay the process requesting information that had been previously provided;

- b. the Claimant's performance appraisal for February to April, 2016 noted distinct failings on the Claimant's part with respect to her communication with and approach to Staff;
- c. in the Claimant's performance appraisal for April- July, 2016 she failed to improve on her performance and it was noted that her communication skills were still below the required standard. Furthermore, the Defendant noted issues with quality control in the issuance of official correspondence.
- d. as the Claimant consistently failed to achieve the requisite 75% score her probationary period was extended.
- e. in response to the second performance appraisal, by letter dated September 7th, 2016 the Claimant stated that it was her acting stint as Branch manager that resulted in her poor performance, but she failed to indicate how her acting responsibilities affected her ability to perform to an acceptable standard.
- f. there were several instances thereafter where the Defendant attempted to coach and assist the Claimant in improving her performance to no avail:
 - i. a coaching meeting with the Branch manager on September 30th, 2017;
 - ii. a Warning Notice of October 3rd, 2016
 - iii. a coaching session of October 18th, 2016
- g. the Claimant wrote a letter dated November 16th, 2016 attempting to explain her poor performance. This letter acknowledged her shortcomings and an overall failure on her part to follow up with staff under her control on issues directly affecting the Defendant's customers.
- h. thereafter, there remained several issues raised continuously with the Claimant which were never addressed as follows:
 - i. The Claimant's lack of punctuality;
 - ii. The Claimant's inability to manage the cash reserves;
 - iii. The Claimant's inability to address Teller errors

iv. The Claimant's failure to complete performance appraisals for her staff on time.

[12] Venture Credit Union pleaded that the Claimant was employed subject to the successful completion of a probationary period as outlined in Clause 7 of the said contract:

*CLAUSE (7) "PROBATIONARY PERIOD and PERFORMANCE APPRAISAL
There is a probationary period of six (6) months commencing February 1st, 2016 to July 31st, 2016 is required. During this period two(2) performance appraisals will be conducted, one at the end of three (3) months and another at the end of six(6) months. An individual performance assessment score, greater than seventy-five percent (75%) of the established Key Performance Indicators is required for you to continue in the position of Member Service Supervisor, any score lower shall result in termination of this contract at Management's discretion."*

[13] The Defendant therefore denied that the Claimant was permanently employed at the time of her dismissal.

[14] With respect to the Claimant's appointment as Acting Manager, the Defendant averred that this appointment was not a promotion; that at the time it was made the Claimant was informed that this was an acting role and that she was occupying the position while the Defendant sought to secure a qualified person to fill the role permanently.

[15] It was denied that the Claimant was required to fulfil the demands of both Acting Branch manager and Member Service Supervisor since several employees acted in that position from the 5th April 2016 to 14th August 2016, while the Claimant acted as Branch Manager.

[16] The Defendant denied that the Claimant was responsible for the full duties of Credit Manager. The Defendant's Credit Manager demitted office on May 6th, 2016. At the time the function of the Credit Manager was twofold - Management of the Collections Unit and Management of two (2) Business Lending Officers. Ms. Mohammed took over the management of the collections unit while the Claimant was simply asked to have administrative oversight of the two (2) business lending officers which included the following:

- a. Review of credit recommendations of the business lending officers prior to submission to the General Manager-Operations. This review was done once fortnightly;
- b. Approval or disapproval of leave applications in relation to these officers; the Claimant was not responsible for the sales targets of the said officers. In any event, these duties were not taken into account with respect to her performance appraisals. In the circumstances, her limited duties in this regard would not have presented an unreasonable challenge.

[17] The Defendant asserted that in light of the above, the Claimant's duties as Credit Manager was not onerous. It was denied that the Claimant was required to train the current Branch manager Ms. Natasha Wilson in the performance of her duties. Before joining the Defendant's team Ms. Wilson possessed over twenty (20) years' experience in the Financial Industry having held senior positions such as Acting Manager - Sales and Home Financing Specialist at a Recognized Commercial Bank. The Defendant argued that the Claimant simply did not possess the experience to train Ms. Wilson for the post of Branch Manager. Furthermore, although the Claimant did conduct a short hand over, for which she was duly compensated, this was simply an update on current actions and outstanding matters. The letter ending the Claimant's acting role dated

August 11th, 2016 (attached as 'E' to the Statement of Case) specifically referred to the two (2) week transition period for which the Claimant's acting allowance continued.

[18] During her period of orientation the Claimant signed for having received the Employee Handbook which includes the Defendant's policies and procedures. The Defendant's Recruitment and selection Policy 13 of 2012 states in particular that the six (6) month probationary period may be extended if the Defendant is of the opinion that an additional period of evaluation is required.

[19] Before the Claimant's probationary period was lawfully extended the Claimant underwent two (2) performance appraisals with her direct supervisor the then Operations Manager Ms. Xoceketzal Mohammed. The first Performance Appraisal for the period February-April, 2016 was completed on June 26th 2016 and the Claimant received an individual performance assessment score of 72.6% of the established Key Performance Indicators. Thereafter, the second Performance Appraisal for the period May-July 2016 was completed on September 7th 2016 and the Claimant received an individual performance assessment score of 71.2% of the established Key Performance Indicators. At this stage the Defendant was entitled to terminate the contract of employment in accordance with Clause 7 as the Claimant had failed to attain 75% of the established Key Performance Indicators in two (2) successive performance appraisals. However, the Defendant instead chose to provide the Claimant with an opportunity to improve and extended her probationary period lawfully and in accordance with their policies and procedures.

[20] The Defendant admitted that by letter dated September 9th 2016, the Claimant was informed officially that her probationary period would be extended to October 31st 2016 as a result the Claimant's low scores at

successive performance appraisals. The Claimant was also reminded about Clause 7 of her contract which mandated that she score seventy five percent (75%) of the established Key Performance Indicators in order to be confirmed in her post. The Claimant did not respond to this letter nor did she express any further objection to the said extension.

[21] On September 30th 2016, the Claimant's supervisor, Ms. Wilson, met with her and indicated to her several areas where she had concerns with the Claimant's performance. In particular, Ms. Wilson raised the Claimant's lack of punctuality and inability to follow up on tasks given to employees under the Claimant's supervision.

[22] On October 3rd 2016, the Claimant's Supervisor Ms. Wilson issued her with a Notice of Unsatisfactory Job Performance indicating low performance in relation to five (5) key accounts. The Claimant did not respond to this Notice until six (6) weeks later on November 16th 2016. The Claimant acknowledged thereby that she had made several errors in relation to the issuance of important documents from these said accounts and she accepted that her handling of these accounts had not been as efficient as it should have been.

[23] On October 18th 2016, Ms. Wilson conducted a 'one on one' coaching session with the Claimant in an attempt to assist her in improving her performance. During this session the following issues were raised with the Claimant:

- a. The Claimant's lack of punctuality;
- b. The Claimant's inability to manage cash reserves, which are sometimes low;
- c. The Claimant's inability to adequately address Teller errors;
- d. The Claimant's failure to complete performance appraisals on time.

[24] This case fell to be decided, in no small part, on the facts of the case as determined by me. An analysis of the evidence adduced below is essential to the fact finding exercise.

EVIDENCE FOR THE CLAIMANT

Joseann Joseph

[25] Ms. Joseph filed a witness statement which was consistent with her pleaded case and was cross examined.

[26] During cross examination Ms. Joseph admitted that she was aware of the clause in the Claimant's contract relating to a period of probation before being made permanent. She stated that there is a difference from an HR perspective between acting in one position and serving a probationary period in another post. Ms. Joseph acknowledged that she did not make this distinction in her witness statement. Ms. Joseph also agreed that acting in the position of Manager was not equivalent to a promotion to that position. She held the view that the Claimant, having been asked to act in a higher position one month after her engagement by the Defendant, had excelled as a Member Service Supervisor; this amounted to evidence that the Defendant reposed trust and confidence in the Claimant especially since there were no contrary indications on her file.

[27] This witness testified that she sent the Claimant the letter dated 11th August 2016 based on instructions received, however she disagreed with the decision to end the Claimant's acting appointment and sent emails questioning said decisions. Those emails however were not disclosed to the Court. Ms. Joseph agreed that the payment of an acting allowance was wholly inconsistent with a promotion.

- [28] Ms. Joseph admitted that she had not disclosed in her witness statement that the Claimant had had three performance appraisals during her employment with the Defendant; her explanation for the omission was that she did not think that she was obliged to disclose this. She also agreed that there was no rule in the Claimant's employment contract nor in the Defendant's handbook which provided that someone from the Human Resource department must be present during an employee's appraisal. This was simply a practice in the Credit Union 'where there is a challenge.'
- [29] Ms. Joseph asserted that while the handbook provides for an extension to probation, this provision is not contained in the employment contract. This witness stated that she had not seen the manager's report complaining of the Claimant's poor performance in her file, nor did she see the Notice of Unsatisfactory Performance. Ms. Joseph later admitted that she had perused two of the Claimant's performance appraisals.

Cavelle Davis

- [30] The Claimant also admitted that she had not testified in examination in chief about the probation clause in her employment contract. While she agreed that the letter dated 6th April 2016 appointed her to act as manager, she insisted that this appointment amounted to a promotion despite the fact that she was paid an acting allowance. Ms. Davis stated that she was not aware that her acting appointment had ended because the Defendant had hired a Branch Manager. While Ms. Davis said that she had not been given a reason why she was to help with 'onboarding' the new manager, she acknowledged that the letter dated 11th August 2016 did so. The Claimant also acknowledged that she had not previously revealed in her witness statement that someone had acted in her substantive position when she acted as Manager.

- [31] The Claimant testified that the Defendant had not informed her that she had not made the minimum score of 75 at her performance appraisals.
- [32] She admitted however that in her letter of the 7th September 2016, she did not complain that her performance appraisal was late or about her removal from the position of manager. In answer to counsel Ms. Davis admitted that she had not rejected the three month extension of her probation but promised to work harder to improve her skills.
- [33] The Claimant asserted that based on a letter from the Defendant's Human Resources Department which described her as a permanent employee, she had a legitimate claim that she had been made permanent despite the fact that she was on probation, and had received low scores on her performance appraisals.
- [34] The Claimant stated that she did not consider the letter dated 3rd October 2016 a warning letter but a notice of alleged poor performance.
- [35] Ms. Davis denied having signed a document described as a 'One on One Coach Form.' She agreed that she did not say in her witness statement that this form contained writing that she knew nothing about.
- [36] She also admitted that she did not reveal in her witness statement that she was expected to respond to her appraisal the next day by 8:00a.m. Instead she asserted that she had not been given the opportunity to respond to the appraisal. Also admitted was the fact that the Claimant did not respond to the contents of the letter dated 30th November 2016.

Evidence for the Defendant

[37] Two witness statements were filed on behalf of the Defendant but only one witness attended for cross examination - Ms. Xoceketzal Mohammed, former General Manager Corporate Services in the employ of the Defendant's office. Her evidence in chief was generally consistent with the Defendant's pleaded case.

[38] She admitted that all the documents relevant to the Claimant's employment are not attached to her witness statement; the coaching form, disciplinary letter are two such examples. She asserted that a warning letter was sent to the Claimant, not a disciplinary one.

[39] This witness denied that the Claimant was promoted to the position of Branch manager. She however admitted that:

- i) appraisals were not conducted in accordance with the provisions of the contract.
- ii) the Defendant did not provide any training to the Claimant to improve/remedy her shortcomings.
- iii) the Claimant did however, improve slightly on collaboration teamwork despite receiving no training.

[40] Ms. Mohammed revealed, in answer to counsel, that the Claimant's probation ended in July 2016 but she was not advised until September 9th 2016 that her probation was extended for another three months.

[41] She asserted that she did not know whether the Claimant's termination was consistent with the terms and conditions of her contract.

ANALYSIS

[42] It should be stated at the outset that the Defendant breached Clause 7 of the contract by failing to conduct the performance appraisals within the timeframe provided. The requirement for employees' appraisals at three month intervals was included in the contract in order to ensure fairness to both the employee and employer in that:

- (i) it allowed both parties to assess their relative positions at the end of each interval.
- (ii) it gave notice to the employee of an extremely poor result which may result in termination, a middling result which could be improved before the next appraisal, or an excellent outcome which would allow the employee to continue until the end of probation.
- (iii) very importantly, timely appraisals would have allowed the Claimant time to address any legitimate issues that arose, given the fact that her score was marginally below the minimum required and she performed excellently in many areas.

[43] The failure to follow this process was unfair to the Claimant. The unfairness was compounded by the Defendant appointing the Claimant to act in the higher position of Branch Manager during the probationary period and after the time for the first appraisal. The Claimant was entitled to believe that she had successfully performed as Member Service Supervisor, such as to have met the minimum pass grade for the appraisal of that post. I note that the acting appointment was for a period beyond the probationary period for the substantive post of Member Service Supervisor; this would have served to strengthen the belief that the Defendant was entirely satisfied with the Claimant's performance for the

preceding three months or had decided to waive the six month probation for the lower position.

[44] On this point, I note that in answer to the Claimant's complaint about the unfairness of the appraisal due to the fact that she was performing as Branch Manager and Member Service Supervisor at the same time, the Defendant asserted that someone else acted in the post from April to August when the Claimant's acting position ended. It begs the question: on what basis was the Claimant allegedly appraised? It could not have been for the position of Member Service Supervisor since another employee was fulfilling that role. The only reasonable inferences to be drawn from the facts are that:

- (i) the Claimant was being appraised for her performance as Branch manager not Member Service Supervisor
- (ii) the Defendant had decided to release the Claimant in breach of contract and decided to conduct appraisals after the fact.

[45] I concluded, on the basis of the evidence, that the Defendant waived the remaining probationary period by appointing the Claimant to the position of Acting Branch Manager. The purported appraisal conducted one month before the end of the six month probation was therefore unlawful and unfair.

[46] The Claimant was appointed to act as branch manager for a six month period from April to October. I hold that the termination of this acting appointment without explanation (per letter dated 11th August 2016) is a breach of that agreement to act for that six month period.

[47] In all the circumstances I hold that the purported three month extension of the Claimant's probation was also unlawful and effected to legitimize

the Defendant's breach of contract and wrongful conduct towards her. The Defendant's case is that the Claimant's acting appointment was terminated because Ms. Wilson was hired as Branch Manager; there were no complaints about the Claimant's performance in this role. This served to strengthen my view that the Claimant's acting appointment was arbitrarily and unlawfully terminated in order to make room for Ms. Wilson.

[48] I therefore hold that at the time of her termination the Claimant was a permanent employee holding the position of Member Service Supervisor.

DAMAGES

[49] The contract provided for one month's notice on either side to effect termination. The circumstances of the Claimant's dismissal however, requires an award of aggravated damages. She was employed in the financial sector where one's reputation, competence and skill are highly valued. The Defendant's actions of abruptly terminating the Claimant's acting appointment as Branch Manager served to undermine her professional reputation for competence. This is aggravated by the Defendant's efforts to further undermine and humiliate the Claimant by having her 'onboard' the new manager, who later gave scathing reports of the Claimant's performance during the unlawful extension of her probation. The negative and damaging termination with no notice, must impact upon the Claimant's career in the future. While the Claimant did not give particulars of a failure to obtain employment, I am of the view that an award can be made for the damage to her reputation by these unfortunate events.

[50] In the circumstances I hereby Order:

i. Judgment for the Claimant against the Defendant.

- ii. The Defendant to pay to the Claimant the acting allowance of four thousand three hundred and seventy five dollars (\$4,375.00) from the 31st August 2016 to 5th October 2016
- iii. The Defendant to pay to the Claimant one month's salary in lieu of notice in the sum of thirteen thousand five hundred dollars (\$13,500.00)
- iv. The Defendant to pay to the Claimant damages including aggravated damages for wrongful dismissal in the sum of one hundred and sixty two thousand dollars (\$162,000.00)
- v. The Defendant to pay to the Claimant interest on the sums of \$4375.00 plus \$13,500.00 at the rate of 2.5% from 11th November 2016 to 6th December 2019.
- vi. The Defendant to pay the Claimant interest on the sums of \$162,000.00 at the rate of 2.5% from 16th August 2017 to 6th December 2019.
- vii. The Defendant to pay prescribed costs on the above sums.

Joan Charles

Judge