

IN THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COMMONWEALTH OF DOMINICA  
IN THE HIGH COURT OF JUSTICE

(CIVIL)

SUIT NO.: DOMHCV2010/0206

BETWEEN:

CLAUDIA HENRY

Claimant

and

ROSEAU CO-OPERATIVE CREDIT UNION LTD.

Defendant

Appearances:

Mr. Gildon Richards of Gildon Richards Chambers for the Claimant

Mr. Gerald Burton and Mrs. Colleen Felix-Grant of Gerald Burton's Chambers for the Defendant

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2013: December 16<sup>th</sup> & 19<sup>th</sup>

2014: April 29<sup>th</sup>  
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**JUDGMENT**

[1] **Thomas J. [Ag.]**: This is a claim for unfair or unlawful dismissal instituted by Claudia Henry, the claimant, against Roseau Co-operative Credit Union Ltd, the defendant.

[2] The claimant's case is that she was unfairly dismissed by the defendant based on the following: based on an oral contract between the parties in 1981, the defendant agreed to employ the claimant for an indeterminate period to continue until the claimant attained the age of 60, unless determined by the defendant for reasonable cause, or by the claimant upon reasonable notice; on October 2008 the claimant's employment was unlawfully and unfairly terminated by the defendant in breach of the said agreement; at the material time the claimant held the post of Manager of Operations to which she was promoted and the functions of which she had creditably performed since the year 2000, until termination; at the time of termination the claimant was paid a salary of \$7550.93 being \$6550.93 basic and \$1000.00 allowances; by letter dated December 06, 2007 the defendant informed the claimant that the Board of Directors had decided that all managerial positions would be converted to and be governed by specific term contractual arrangements; at a

meeting of the Board, to which the claimant was summoned, the claimant sought an explanation of the rationale for the defendant's unilateral decision but the Board offered none; by letter dated February 14, 2008 from the defendant's General Manager, the claimant was requested to submit proposals for the Board's consideration; the claimant in response indicated that she was not averse to working on a contractual basis, but indicated her reluctance to consent to the termination of her existing contract of employment in substitution for a specific term contract without certain assurances; the defendant did make the position of Operations Manager redundant and that immediately upon the removal of the claimant, the defendant appointed another of its employees to the said position, named differently.

[3] In the premises the claimant contends that:

- a) unlawful unfair deprivation of her said salary, interest in and benefits from the Staff Pension Fund and other benefits to which she would be entitled and would be otherwise employed until she attained the retirement age of 60 years, alternatively;
- b) by reason of the matters hereinbefore mentioned the unlawful, unfair deprivation of her salary, interest in and benefits from the Staff Pension Fund and other benefits which she was entitled and would otherwise have employed and thereby suffered damage and loss.

#### Defence

[4] In its defence the defendant denies liability, and denies that the claimant suffered any loss or damage as a result of the termination; it is denied further that the claimant is entitled to any of the reliefs sought for the following reasons: there was no agreement with the claimant for an indeterminate period or until she attained the age of 60, unless or until her employment was terminated by the defendant for reasonable cause by offering reasonable notice; the Staff Pension Plan operated by the defendant for its employees and eligibility to the plan does not guarantee employment until the age of 60 years or any retirement age; one of the implied terms of the contract between the parties was the claimant's employment could be terminated for cause, and a further implied term was that the claimant's employment could be terminated upon giving reasonable notice, on the payment in lieu of notice of a sum equivalent thereto; upon the termination of the claimant's employment she was entitled to the sum of \$176,678.07; that the claimant was paid a sum in excess of that which would have constituted payment in lieu of reasonable notice, there was no decision that the engagement on a contractual basis would be for

short term periods; the defendant did not wrongly or unfairly seek to change the employment terms unilaterally to a specific short term employment contract or to make any change in employment that would be to the prejudice or detriment of the claimant; the defendant denies that it was unable to give any explanation of the rationale for the change in employment; by letter of 14<sup>th</sup> February 2008, the claimant was informed that the rationale for the change of employment was to standardize the conditions of all managers and to ensure uniformity; the provisions of the **Protection of Employment Act** were never incorporated into or formed part of the contract between the claimant and the defendant; even if the said Act formed part of the contract, its provisions were complied with by the defendant; in making the claimant redundant the defendant re-organised its business to improve its efficiency and create a new post which performed some of the functions similar to those previously performed by the Operations Manager, in addition to a number of new functions not performed by the Operations Manager.

[5] In the premises the defendant denies that the claimant is entitled to any of the reliefs sought.

Evidence of the claimant

[6] The Claimant's evidence is contained in the witness statement of the claimant which outlines the history of her employment with the Roseau Co-operative Credit Union Ltd. commencing in or about October 05, 1981 under a contract which entitled her to serve for an indeterminate period until she attained the age of 60 years; unless terminated for reasonable cause by the defendant or by the claimant upon reasonable notice to the defendant.

[7] The claimant also details some of the benefits arising from her employment to include: participation in the defendant's Staff Retirement Benefit Plan as a contributor and a beneficiary; her contribution to the Staff Retirement Plan; at the time of her termination of her employment the balance in her favour was \$176,678.07.

[8] In paragraph 7 of her witness statement the claimant says that it was an implied term of the agreement with the defendant that her employment "except for fault or my part or other reasonable cause." The witness goes on to say that it is her belief that her employment was not terminated for reasonable cause which happened "unlawfully and unfairly" on October 30, 2008.

- [9] At paragraphs 10 to 15 of her witness statement, the claimant gives evidence of the meeting of the Board of Directors of the defendant and the decisions taken on or about November 2007 leading to her termination. Further, by letter dated December 06, 2007 she was informed that "all managerial positions would be converted to and be governed by specific term contractual agreements."
- [10] The further evidence of the claimant is that she was dismissed without prior notice by letter on October 31, 2008 and that she was further informed that the post of Operations Manager which was held by the claimant was abolished. However, the witness went on to say that the post of Operations Manager was not made redundant as another of the defendant's employees was appointed to the post, "named differently", upon her removal. This person, according to the witness performed..
- [11] The witness concludes her witness statement by saying that because of the defendant's breach of contract of employment she was unlawfully, wrongfully or unfairly deprived of her salary, interest in and benefits from the Staff Pension Fund and other benefits to which she was entitled and would otherwise have enjoyed until retirement age of 60.
- [12] The witness, Claudia Herry, also commented on the witness statements of Aylmer Irish and Dexter Ducreay.
- [13] In so far as the witness statement of Aylmer Irish is concerned, the witness in commenting on paragraph 8 of that witness statement said that it was her understanding that once an employee had 10 years with the institution that employee would have been entitled to the full contribution to the Staff Pension Fund. With respect to paragraph 16, the witness' comment related to information given as to investment of funds from the Pension Fund with CLICO. And as far as paragraph 21 of the said witness statement, the comment was that as far as she knew the beneficiaries of the Staff Pension fund were persons who are no longer employed with the institution and to apportion \$500,000.00 among existing employees was contrary to the Staff Pension Fund.
- [14] The witness was cross examined on premises so occupied by the defendant from the early years up to the time when she left. She was also cross examined on the Staff Pension Fund and her duties as Operations Manager and also on the duties attached to the new post. Compared to what

she performed. In further cross examination on the payments received, the witness testified that the payment would amount to 18 months salary plus her payment for outstanding vacation leave.

[15] Defendant's evidence

The defendant's evidence is contained in the witness statements of Dexter Ducreay, President of the Board of Directors of the National Co-operative Credit Union Ltd, Aylmer A. Irish, Chief Executive Officer of the National Co-operative Credit Union Ltd and Joycelyn Loblack, Supervisor at the said institution and Secretary of the Board of Trustees.

[16] The defendant's evidence is that certain decisions were taken by the Board of the then Roseau Co-operative Credit Union in the interest of the efficiency of the organisation. The first of these was in about December 2007, when the decision was taken to convert all managerial positions to that of a contractual nature<sup>1</sup>. The reason for the change of employment was to standardize the conditions of all managers and to ensure uniformity. The decision of the Board to convert the managerial positions to that of a contractual nature was also communicated to the Loans Manager and the MIS Officer as well as the Operations Manager.<sup>2</sup>

[17] A further decision was taken by the Board sometime in 2008 to restructure its organization out of concern for the management of the organization's fixed assets, including investment in a new elevator.<sup>3</sup>

[18] Towards the goal of efficiency, the Board re-organised its business by creating the post of Member Services Manager/Plant Maintenance. Further, the claimant was made redundant as the new post of Member Services Manager/Plant Maintenance contained a new aspect which the claimant was unable to perform that of plant maintenance.<sup>4</sup> The defendant's witnesses were cross-examined on various aspects of their evidence in chief including: redundancy, the Staff Pension Fund and its membership and operation, the claimant's position as Operations Manager and the responsibilities of this office.

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<sup>1</sup>Witness statement of Dexter Ducreay at para. 9, witness statement of Aylmer A. Irish at para. 26

<sup>2</sup>Dexter Ducreay, Op. cit., at paras. 10 and 11

<sup>3</sup>Op. cit., at paras. 12 to 19

<sup>4</sup>Dexter Ducreay, Op. cit., at paras. 13 to 20; Aylmer A. Irish, Op. cit., at paras. 29 to 34

## Issues

[19] The issues for determination are:

1. Whether the court has jurisdiction to hear the claimant's case in view of the claim for (a) a determination and an order that the defendant pay the claimant compensation for unfair dismissal; or (b) damages for breach of contract, wrongful dismissal;
2. Whether the claimant was wrongfully dismissed and as such entitled to damages for breach of contract;
3. Whether the claimant is entitled to the special damages claimed;
4. Liability for costs.

## Issues No. 1

[20] Whether the court has jurisdiction to hear the claimant's case in view of a claim for (a) a determination and an order that the defendant pay the claimant compensation for unfair dismissal; or (b) damages for breach of contract, wrongful dismissal.

This is a preliminary issue authored by the defendant to say that in light of the claimant's pleadings the court has no jurisdiction to hear the case and as such the case should be struck out. On the other hand, learned counsel for the claimant contend that such an approach is unwarranted given the fact that in the pleadings unfair dismissal are in the alternative.

[21] The claimant's pleadings for compensation for unfair dismissal or damages for breach of contract, wrongful dismissal puts the **Protection of Employment Act**<sup>5</sup> ("the Act") into focus. This enactment has as its objects to make provisions for protecting the employment of workers in the state or for purposes connected therewith. However, section 2 (2) of the Act makes express exclusions from its purview.

[22] Thus, the said section 2 (2) of the Act reads:

- "2. This Act does not apply to or in respect of-
- (a) any person employed by an employer who-
    - (i) has and actually exercises authority to hire employees, to terminate the employment of employees, or to order that

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<sup>5</sup>Chap. 89:02 Revised Laws of Dominica

- (ii) employees be suspended without pay;
- (ii) makes effective recommendations that will, except in unusual circumstances, be acted upon by the employer respecting any matter mentioned in subparagraph (i);
- (iii) is employed in a capacity that requires that he has full knowledge of the financial position of the business of the employer; or
- (iv) is responsible for or has an effective voice in the formulation of policy in the business of the employer;
- (b) an employee who is the father, mother, husband, wife, brother, sister, son or daughter of his employer;
- (c) any employee employed as a stevedore, longshoreman or lighterman; and
- (d) the State and any employee of the State."

[23] In this connection and context, learned counsel for the defendant has made the following submission:

"The claimant's job description at Tasks VI and VII suggests that she performed such roles, as she is required "to provide effective supervision to subordinate staff (including assisting in the recruiting and selecting of personnel for the department and submitting recommendations to management regarding salary levels, rewards, training, promotions and disciplinary action for personnel in the department." The claimant was also required by Task VII to develop 'an annual work plan and budget for the department' and to prepare and submit 'timely reports on the department's progress in meeting its objectives.'"<sup>6</sup>

[24] The point being made in the submission is that some of the claimant's tasks puts her squarely within some of the disjunctive prescriptions of section 2 (2) of the Act and as such the Act as a whole does not apply to the claimant.

[25] The foregoing lays to waste the contention that the court should consider the alternatives pleaded as was done by this court in **Carlise Jno. Baptiste v Island Communications Ltd et al**<sup>7</sup>. The distinction lies in the fact that the statutory aspect in that case was considered as a substantive issue, while in this case it was a preliminary issue. In any event, the learned trial judge declined jurisdiction, not because the Act did not apply to the claimant, but because unfair dismissal was the province of a statutory tribunal.

[26] It is therefore the determination of the court that the court has no jurisdiction over the claimant

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<sup>6</sup>Defendant's closing submissions at para. 9

<sup>7</sup>DOMHCV2004/0119

under the **Act**.<sup>8</sup> However, it is within this court's competence to determine whether the claimant was wrongfully dismissed and entitled to damages.

Issue No. 2

[27] Whether the claimant was wrongfully dismissed and as such entitled to damages for breach of contract.

It is common ground that the claimant was employed by the defendant from about October 05, 1981 to October 2008 and rose from the post of Junior Clerical Officer to Operations Manager- a period of some 27 years.

[28] One of the basic strands of the claimant's pleadings is to be found in paragraph 2 of the statement of claim which states in part that:

“...and by the conduct of the Defendant and the Claimant during the term of the said agreement, the Defendant agreed to employ the Claimant who agreed to serve the Defendant for an indeterminate period, to continue until the Claimant attained the age of 60 years, unless and until it was terminated by the Defendant for reasonable cause or terminated by the Claimant upon reasonable notice given to the Defendant...”

[29] The foregoing pleading is denied by the defendant at paragraph 3 of its defence in these terms:

“3. Further in response to paragraph 2 of the Statement of Claim, the Defendant denies that there was any agreement between the parties to continue to employ the Claimant for an indeterminate period or until she attained the age of 60 years unless or until her employment was terminated by the Defendant for reasonable cause by offering reasonable notice.”

Submissions

[30] The submissions on behalf of the claimant are along the following lines: the reason given in the letter of termination is not supported by the factual circumstances in which her employment was terminated; the court is urged to find that (the claimant) was wrongfully dismissed because she refused to be coerced into terminating her existing terms of employment for an indeterminate period, for a shorter specific term, without necessary assurances, and to her detriment; Aylmer Irish admitted in cross examination that the Members Service Manager performed fully on substantially

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<sup>8</sup>Chapter 89:02

the same functions which the claimant performed before her termination; Dexter Ducreay in his witness statement and under cross examination also said that the functions performed by the person in the new post were "substantially" the same functions performed by the claimant; according to Aylmer Irish no particular technical skills or technical competence was required as the position was supervisory only the tasks which the claimant was employed to do were still in existence and in fact being performed by someone else, the evidence tends to show that the claimant's employment was terminated summarily and against her will, without notice and for no lawful or reasonable cause.

#### Defendant's submission

[31] The main submissions on behalf of the defendant are:

- "11.2 If the Claimant's employment was not in fact governed by the Act on the basis of section 2 (2), then the common law principles relating to termination of employment were applicable and the Claimant's employment could be terminated by the provision of notice or the payment of a sum equivalent to the salary for the notice period, in lieu thereof.
12. The Defendant further submits that even where the Court finds that the Claimant had been wrongfully dismissed at common law, the measure of damages due to the Claimant would be the value of salary payable for the notice period which the Court deems was applicable to her employment."

#### The law

[32] Several authorities on the matter of wrongful dismissal were cited to the court. The first of these is paragraph 649 of vol. 16, **Halsbury's Laws of England** (4<sup>th</sup> ed) which contains the following learning:

"An employer commits a breach of contract if he wrongfully dismisses an employee before the expiration of the term for which he is employed.

The fact that the dismissal of the employee is otherwise than in accordance with the procedure laid down in his contract of service does not, however, in a case where the rights of the parties are regulated by contract and are unaffected by statute, normally prevent the dismissal from being effective to terminate the contract; in such a case the employee cannot claim that the contract has not been validly terminated, and his remedy is in damages.

To entitle the employee to sue for damages, two conditions must be fulfilled, namely: (1) unless the contract of service is to be construed as a contract of life employment, or as excluding any general power of dismissal on notice, the employee must have been engaged for a period fixed or determinable upon notice, and dismissed before the expiration of the period, if fixed, or without the requisite notice, as the case may be; and (2) his dismissal must have been wrongful, that is to say without just cause or excuse on the

part of the employer..."

- [33] Also cited is a dictum of Lord Denning in M.R. In **Richardson v Koefod**<sup>9</sup> to the effect that: "In the absence of express stipulation, the rule is that every contract of service is determinable by reasonable notice." And in **Rideout's Principles of Labour Law**<sup>10</sup>, the learned authors state that: It appears that it will only be possible to displace the presumption of a right to terminate upon reasonable notice by very strong words. In **McClelland v. Northern Ireland General Health Services Board** [1957]1 W.L.R 594 both Lord Oaksey and Goddard, in the majority, stated that "a contract of service said to be permanent and pensionable could be terminated by notice."
- [34] Therefore, the rule is that regardless of whether the contract of service be to age 60, permanent or subject to an identified implied term<sup>11</sup>, it can be determined by reasonable notice. Added to that the employer must also have a reasonable cause or excuse. They are conjunctive.
- [35] The claimant's letter of dismissal<sup>12</sup> dated October 31, 2008 was placed in the orbit of the **Act** rather than in the context of the common law, however it took effect from October 30, 2008. More importantly, the claimant, through her attorney-at-law treated the event as "unlawful and unfair dismissal". Further, the cheque enclosed with the letter of dismissal was dated October 31, 2008, with the claimant as the payee, was cashed on November 05, 2008.<sup>13</sup>
- [36] In the circumstances it cannot be disputed that there was no reasonable notice given by the defendant to the claimant as required by law. This rests on the evidence accepted by the court that the claimant was informed that the defendant was on a path of efficiency and in this regard wanted to standardize the conditions of all Managers to ensure uniformity.
- [37] But what is reasonable notice? In **Saunders v St. Kitts Sugar Manufacturing Corporation**<sup>14</sup>, Floissac, C.J defined the concept in this way: "Reasonable notice was a matter of law, ... and its determination always depended on the circumstances of each case. The court should consider among other things the employee's qualifications, his stature in the position which he held, his skill,

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<sup>9</sup>[1969] 1 W.L.R. 1812

<sup>10</sup>5<sup>th</sup> Ed., at page 121

<sup>11</sup>Statement of claim at paragraph 7

<sup>12</sup>Third trial bundle at page 131

<sup>13</sup>Witness statement of Aylmer Irish at paragraph 35

<sup>14</sup>Civil Appeal No. 1 of 1993 (SKN)

his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment.”

[38] Some of the periods of notice determined by various courts with respect of wrongful dismissal are as follows: in **Saunders v St.Kitts Sugar Manufacturing Corporation**, the appellant was 56 years old, 34 years service, specialized training in the then vital sugar industry; 10 months notice was held to be reasonable; in **Ambo v Dominica Air and Sea Ports Authority**<sup>15</sup>, the claimant was 40 years old, worked as a supervisor in the security department, worked with the organisation for 5 years, was a former police officer for 12 years, was also a trained plumber- the court held that seven months notice was reasonable; in **Dominica Agricultural Industrial and Development Bank v Mavis Williams**<sup>16</sup>, the respondent had been employed by the defendant for some 21 years and was an Assistant Manager, Securities, dismissed for gross misconduct because of her part in a loan to her boyfriend which involved her persuading her uncle to make his certificate of title available as security for the loan, the boyfriend defaulted on the loan- the court held that 12 months notice was reasonable; in **Garnet L. Didier v Geest Industries (W.I) Ltd**<sup>17</sup>, the appellant was, at the time of his dismissal, the respondent's Manager of Land and Agricultural Consultant in Dominica, he was dismissed after he was selected to contest the general elections in 1990 – 9 months was held to be reasonable notice; in **Waithe v Caribbean International Airways Ltd**<sup>18</sup>, the plaintiff was an experienced Air Traffic Controller with impressive qualifications, served as a Deputy Airport Manager and Senior Research Officer with the Ministry of Civil Aviation prior to being employed by the defendant as General Manager- having regard to the plaintiff's experience, training and qualifications, the court held that 12 months notice was appropriate.

[39] Therefore, it seems reasonable to conclude that the courts in the Commonwealth Caribbean region have applied the higher period of notice to top management coupled with their qualifications and period of service and in some cases the narrowness of the specialization, for example an aspect of aviation. The other cases would fall of course below this threshold.

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<sup>15</sup>Claim No. DOMHCV2010/0297

<sup>16</sup>Civil Appeal No. 20 of 2005 (Dom.)

<sup>17</sup>Civil Appeal No. 6 of 1999 (Dom)

<sup>18</sup>[1987] 39 WIR 61 (Bdos:HC)

Claimant's notice

[40] The claimant served some 27 years with the defendant from a Junior Clerical Officer to Operations Manager, the evidence shows that she had considerable duties, served in the post of Operations Manager from December 2006 to October 2008, the monthly salary was \$7550.93, the claimant in re-examination said she holds a degree in Business Administration and also a Masters Degree, there is no evidence of the claimant's age.

[41] The absence of evidence of the claimant's age is to the claimant's disadvantage given her experience in a credit union, a financial institution. However, having regard to the precedents and the fact that she was answerable to another officer, the court determines that 10 months notice is reasonable. It is important to note that the claimant admitted under cross examination that the money paid to her amounted to about 18 months' salary.

Issue No. 3

[42] Whether the claimant is entitled to the "special damages" claimed.

The following are claimed:

1. Loss of salary for the period November 30, 2008 to October 30, 2010: \$210,142.38.
2. loss of contribution to and benefits under the staff pension fund at the date of termination: \$176,687.07.
3. loss of accrued interest on investment in the Staff Pension Fund at November 2008 at 5% per annum: 8,413.24.
4. Loss of vacation leave for 2009: \$12,381.36.
5. Uniform allowance.

[43] The matters of loss of salary and loss of vacation leave will be addressed together. In this regard, Aylmer A. Irish gives this undisputed evidence at paragraph 35 of his witness statement:

"That by letter dated 31 October 2008, the Claimant's services with the Credit Union were terminated. Attached to the letter of termination was NBD Cheque No. 39476 in the sum of One Hundred and Eighteen Thousand and Four Dollars and Forty Cents (\$118,004.40) which the Claimant cleared on 5 November 2008. The said cheque represented:

- (a) \$89,069.76 as redundancy benefit for twelve months
- (b) \$14,844.96 as payment in lieu of notice equivalent to two months notice

- (c) \$5,106.29 as payment in lieu of vacation leave
- (d) \$26,717.52 as an ex-gratia payment for years of service to the Defendant institution less deductions for Income Tax of \$17,734.13”

[44] The incorrect conclusion that the **Act** applied to the circumstances of the claimant led the defendant to pay the claimant 14 months salary consisting of \$89,069.76 (redundancy payment) plus \$14,844.96 (payment in lieu of notice) – a total of \$103,914.72. Against that total the reasonable notice of 10 months salary has already been determined by the court. The total in this regard is \$7,550.93 by 10 yields- \$75,509.30. The court does not consider that redundancy payment, though misconceived, cannot be part of the equation. This means that while in the ruling of the court, the claimant is only entitled to \$75,509.30, she received \$103,914.72 an excess of \$28,405.43. It is this fact which led learned counsel for the defendant to submit that “even in the circumstances where the court were to declare that the claimant was wrongfully dismissed, she had, already received from the defendant, compensation far in excess of her reasonable entitlement.”<sup>19</sup>

[45] But in addition to the \$103,914.72, the claimant was also paid \$12,381.36 as compensation for loss of vacation leave for 2009.

[46] Therefore, having regard to the law and the payments made to the claimant, it means that the claimant was paid well in excess of her entitlement in terms of notice and as such the amount of \$210,142.38 does not arise as an entitlement based on the law and the circumstances. The \$12,381.36 claimed for loss of vacation leave also does not arise as the cheque for \$118,004.40 includes an amount of \$5106.29 for this purpose and in any event, based on the court's calculation there was an excess of \$28,405.42 from the cheque which easily accommodates the \$5106.29 paid for vacation leave and the \$12,381.36 claimed in this connection.

Loss of contribution to and benefits under the Staff Pension Fund of \$176, 687.07 and loss of accrued interest on investment in said fund in the amount of \$85,413.24

[47] It is common ground that the staff contributions to the Staff Pension Fund are handled by a Board

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<sup>19</sup>Paragraph 50 Of the Defendant's written submission

of Trustees. The composition and related matters of the Board are detailed in the witness statement of Aylmer A. Irish.<sup>20</sup> Of significance are the following: the Board of Trustees has an executive and is a separate legal entity;<sup>21</sup> up to her termination in October 2008, the claimant was a member of the Staff Pension Fund and contributed fortnightly; the monies collected for the purposes of the fund were invested in Colonial Life Insurance Company (CLICO) with an interest rate of 8% per annum; the staff were aware of the investment in CLICO to which there was never any objection to the investment; news of the financial difficulties being faced by CLICO from January 2009 caused the Board of Trustees to cancel its policy with CLICO and request a refund of its investment; CLICO repaid \$500,000 to the Fund; CLICO was eventually placed under Judicial Management; thus far no further payments were made by CLICO to the Fund; the \$500,000 by decision of the Board of Trustees, was distributed among the members of the Fund of which the claimant was allocated \$33,493.42.

[48] All of the foregoing lead the court to agree with the submission on behalf of the defendant that the claimant's action should be against the Board of Trustees since it is a separate entity.<sup>22</sup> This of course should be informed by the fact that CLICO is under Judicial Management.

Issue No. 3

Liability for costs

[49] In her statement of claim the claimant seeks costs. But the rule is that the court must order the unsuccessful party to pay the costs of the successful party. Accordingly, the claimant, being the unsuccessful party is ordered to pay costs to the defendant based on the amount claimed in the claim form, less the amount of \$118,004.40.

#### ORDER

[50] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The claimant falls within the exclusions of section 2 (2) of the **Protection of Employment Act** and as such the court has no jurisdiction to hear an issue involving unfair dismissal,

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<sup>20</sup>See paragraphs 6 -21

<sup>21</sup>Aylmer A. Irish serves on the Board of Trustees of the Staff Pension Fund

<sup>22</sup>Indeed, Aylmer A. Irish put it accurately and elegantly when under cross examination he testified that the Board of Trustees operates independent of the employer

but it has jurisdiction to determine a claim based on wrongful dismissal.

2. Given the rule that any contract of service may be determined upon reasonable notice to the employee, although the defendant had a reasonable cause for the dismissal, the defendant dismissed the claimant summarily and as such the claimant was wrongfully dismissed.
3. Subject to paragraph 4 below, in the circumstances of the claimant with 27 years service with the defendant, approximately 2 of which were as Operations Manager, plus her duties and qualifications, the claimant was entitled to 10 months salary, in lieu of reasonable notice, as damages.
4. The claimant is not entitled to any amount of damages for loss of salary and loss of vacation leave since the claimant admitted being paid by the defendant an amount of \$118,004.40 which was in respect of 12 months redundancy benefit, being \$89,069.79, two months payment in lieu of notice, being \$14,844.96; payment in lieu of vacation leave, being \$5,106.29 and an *ex gratia* payment for years of service, being \$8,983.39.<sup>23</sup>
5. The amount of \$118,004.40 exceeds the amount \$75,509.30 as 10 months' salary at \$7,550.93 per month lawfully due to the claimant.
6. The claimant is liable to pay the defendant prescribed costs based on the value of the claim less the amount of \$118,004.40.

.....  
Errol L. Thomas  
High Court Judge [Ag.]

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<sup>23</sup>The gross *ex gratia* payment was \$26,717.52 from which the deduction for income tax was \$17,734.13. See paragraph 35 of the witness statement of Aylmer Irish