

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2016/CLE/gen/00047**

**IN THE MATTER** of the Central Bank of The Bahamas and the Union of Central Bankers  
Industrial Agreement Articles 10.3 and 102.5

**BETWEEN**

**T'SHURA A AMBROSE**

**Plaintiff**

**AND**

**THE CENTRAL BANK OF THE BAHAMAS**

**Defendant**

Before Hon. Mr. Justice Ian R. Winder

Appearances: Obie Ferguson Jr. for the Plaintiff

Ferron Bethel QC with Lakeisha Hanna for the Defendant

24 March 2021

**JUDGMENT**

## **WINDER, J**

This is the Plaintiff's (Ambrose's) application seeking various declaratory relief arising out of her unsuccessful application for the post of Assistant Legal Counsel at the Defendant (the Bank).

[1.] The background to the dispute was accurately set out in the Bank's Statement of Facts. I gratefully repeat them here, with minor amendments, in the following paragraphs.

[2.] The Bank is a body corporate which was established pursuant to Section 3(1) of the Central Bank of The Bahamas Act 1974, Chapter 321 of the Statute laws of the Commonwealth of The Bahamas. The Bank is the employer of members of the Trade Union called the Union of Central Bankers ("the Union").

[3.] On 15 March, 2013, the Union and the Bank entered into an Industrial Agreement ("the Industrial Agreement") which outlined the terms and conditions of employment for the Bank's employees.

[4.] Ambrose was offered and she accepted the entry level position of Policy Analyst I, with the starting salary of \$25,097. Ambrose was a part of the Legal & Reputational Team in the Policy Unit, Bank Supervision Department of the Bank. Ambrose's employment was made effective 16 July, 2012. Ambrose was thereafter placed on probation for 6 months and as a result of successfully passing probation, Ambrose's position was confirmed effective 16 January, 2013.

[5.] At the date that Ambrose was hired, she had been called to the Bahamas Bar for approximately 5 years, having been called on 28 September, 2007. Ambrose's performance, in her role as a Policy Analyst I, was assessed annually by way of performance reviews.

[6.] On 25 November, 2015, the Bank advertised internally for the position of Assistant Legal Counsel. Ambrose applied for the position on 7 December, 2015. By letter dated 19 February, 2016, the Bank advised Ambrose that she was not successful in her interview.

[7.] The Bank advertised the position of Assistant Legal Counsel in the Tribune and the Nassau Guardian newspapers on 25 and 26 February, 2016, 2, 6, 7, 8 and 9 June, 2016.

[8.] On 24 February, 2016, Ambrose commenced an appeal process in accordance with Articles 10.11 and 22 of the Industrial Agreement between the Bank and the Union on the ground that the Recruitment Policy was not followed by the Bank.

[9.] On 4 March, 2016, an Appeal hearing commenced with Management of the Bank and the Union. However, subsequent to the Union being dissatisfied with Management's position that Ambrose did not demonstrate the aptitude for the position, the Union terminated the Appeal process and commenced a Trade Dispute at the Department of Labour.

[10.] Ambrose has commenced this action seeking declaratory relief as follows:

1. A Declaration that the Defendant in seeking to fill the post of Assistant Legal Counsel breached the Industrial Agreement and The Recruitment, selection and appointment policy.
2. A Declaration that the Defendant failed to advertise the post of Assistant Legal Counsel internally before interviewing external applicants.
3. A Declaration that the Defendant in seeking to fill the post of Assistant Legal Counsel breached section 2.2 of the Recruitment, Selection and Appointment Policy as the Plaintiff is eligible and qualified to fill the post of Assistant Legal Counsel.
4. A Declaration that the Defendant breached sections 10(3) and 10(5) of the Industrial Agreement by interviewing external applicants for the post of Assistant Legal Counsel before affording the Plaintiff an interview for the said post.
5. A Declaration that Sections 10(3) and 10(5) of the Industrial Agreement operates as a statutory code and cannot be varied by the Defendant nor the Court.
6. A Declaration that Sections 10(3) and 10(5) of the Industrial Agreement must be exactly followed.
7. A Declaration that the Plaintiff's qualifications qualified her for the position as Assistant Legal Counsel which is the entry position in the legal profession.
8. A Declaration that the Plaintiff meets the requirements of the advertised position as Assistant Legal Counsel.
9. A Declaration that the Defendant be made to follow the requirements laid down in sections 10(3) and 10(5) of the Industrial Agreement and sections 3.6, 3.7 and 3.12 of the recruitment, selection and appointment policy while interviewing the Plaintiff.
10. A Declaration that the Defendant's action in affording external applicants an interview for the post of Assistant Legal Counsel before affording the Plaintiff an interview for

the post breached sections 3.6 and 3.7 of the Recruitment, Selection and Appointment Policy.

11. A Declaration that the Defendant has discriminated against the Plaintiff in that although the Plaintiff exceeded the requirements for the post of Assistant Legal Counsel according to sections 3.7 and 3.12 of the Recruitment, Selection and Appointment Policy, the Defendant has failed to appoint the Plaintiff to the post of Assistant Legal Counsel.
12. A Declaration that the Defendant's failure to appoint the Plaintiff to the post of Assistant Legal Counsel in all of the circumstances of the case amounts to victimization and unfair treatment of the Plaintiff.
13. A Declaration that in all of the circumstances of the case the Defendant has victimized and treated the Plaintiff unfairly.

[11.] At the trial, Ambrose gave evidence in her case and subpoenaed Vandera Woods-Carey, the attorney who successfully obtained the post of Assistant Legal Counsel as a witness. The Bank called Eva Etienne, Ambrose's former supervisor and Deborah Ferguson, the former Human Resources Manager.

[12.] The issues for determination are: (1) whether there has been a breach of the Industrial Agreement and the Recruitment, Selection and Appointment policy (the Recruitment Policy); and (2) whether Ambrose was discriminated against by the Bank when she was not appointed to the post of Assistant Legal Counsel.

#### Analysis and Disposition

[13.] Section 10 of the Industrial Agreement provides:

##### 10. Recruitment, Selection & Appointment

10.1 The Bank and the Union recognize the importance of maintaining the highest level of operational efficiency. In all matters pertaining to the recruitment of staff, permanent employees shall be given full consideration in accordance with the Bank's Recruitment, Selection & Appointment Policy.

10.2 The Bank shall determine the requirement for all jobs and the suitability of any employee or candidate to fill particular posts.

10.3 Vacant positions may emerge within the Bank through transfers, resignations, retirement and growth of the organization. The Bank shall make every effort to fill vacancies internally by promoting eligible and qualified employees. To assure the Bank of the best skill necessary for the achievement of its extremely important organizational mandate and objectives, position vacancies, except for those up to the level of Assistant, may be concurrently advertised, internally and externally, provided that such advertising does not impact the rights of employees under this Agreement.

10.4 Recruitment is not required when, in the Bank's determination:

- 10.4.1 a position is to be filled by lateral transfer of an employee within the same department;
- 10.4.2 employees are reassigned as a result of re-organization; and
- 10.4.3 an employee's current position is directly subordinate to the vacant position, and the employee is the only employee to hold the subordinate title and has met the criteria for advancing to the next position.
- 10.5 Before filling any position within the Bargaining Unit, the Bank shall advertise the vacancy internally with a view to providing an opportunity for promotion or transfer from within the Bank, bearing in mind the undertaking set out in Article 10 subsections 10.1 and 10.3. A copy of the vacancy notice is to be provided to the Union.
- 10.6 The vacancy notice shall be posted internally for a period of ten (10) working days, commencing from the first day the notice is posted. Applications received by the Human Resources Department after the closing date may not be considered.
- 10.7 All qualified internal applicants shall be granted an interview and unsuccessful candidates shall be notified accordingly, as soon as possible after the interview.
- 10.8 The Bank shall base selection decisions on the availability of positions and the readiness of the employee, and shall consider factors such as qualifications, job knowledge, efficiency, ability, merit, experience and training. The latter will be judged according to the performance management process.
- 10.9 In the event that an employee makes application for a position vacancy and the application is subsequently denied, the reason for denial must be given in writing to the employee.
- 10.10 An employee who refuses an appointment shall be superseded but shall remain eligible for consideration for future vacancies.
- 10.11 In accordance with Section 7 of the Recruitment, Selection and Appointment Policy, an employee may appeal against an unsuccessful application for recruitment to a vacancy on the grounds that the approved policy was not followed or that the Interviewing Committee made its decision on substantially incorrect information.

[14.] Sections 2.2, 3.6, 3.7 and 3.12 of the Recruitment Policy provides:

## 2. POLICY

2.2 To support career development and growth, every effort will be made to fill vacancies internally by promoting eligible and qualified employees. However, to assure the Bank of the best skills necessary to the achievement of its extremely important organizational mandate and objectives, outside recruitment as well as in-house applications will be solicited for all position vacancies. By exception, the Bank will seek to fill, on a priority basis, position vacancies up to the level of Assistant through internal recruitment.

...

## C. AREAS OF PRIORITY CONSIDERATION FOR CURRENT EMPLOYEES

3.6 The Bank will seek to fill positions of vacancies up to the level of Assistant through internal recruitment.

3.7 If there are eligible and qualified candidates by the closing date for applications, screening may proceed. One qualified in-house applicant is enough to proceed with the screening. If there are no such candidates from within, outside recruitment becomes mandatory.

...

## D. SCREENING

3.12 These are applicable to both external applicants and current employees.

- (a.) All applications, resumes and other required supporting documentation must be received formally through the HRD prior to review by the hiring department. Should applicants send employment inquires directly to departments, they should be referred to HRD.
- (b.) The HRD will perform an initial screening of the applications (reference/background checks, job-related testing) and/or resumes by determining if the candidate meets the requirements of the position as stated in the job description. Within three (3) days following the published closing date for receipt of all applications, HRD will direct the applications and /or resume of the qualified applicants to the hiring Department Head for further screening and interviewing.
- (c.) The hiring department will conduct initial interviews with the candidate(s) who appear to possess the knowledge, skills or ability to perform the duties of the position vacancy.
- (d.) Current employees of the Bank may apply for posted positions by submitting an Internal Recruitment Application to the HRD, advising of interest in being considered for the position vacancy. The employee's present Department Head will be notified by the HRD of the application. Eligibility for internal transfers or promotion will be based on the applicants' ability to satisfy job requirements, and not merely on length of service.
- (e.) An applicant (internal or external) will be declared:
  - (i.) Qualified: if he/she meets or exceeds the minimum qualifications for the position as stated in the job description.
  - (ii.) Unqualified: for lack of any of the required qualifications established for the post.
  - (iii.) Disqualified: for making a false statement of material fact on the application form or any supplements or for material evidence of conduct that would be detrimental to the purposes and working relationship of the Bank.

[emphasis added]

[15.] Ambrose's case is that the Bank breached Sections 2.2, 3.6, 3.7 and 3.12 of the Recruitment Policy by inviting external applicants to be interviewed for the post of Assistant Legal Counsel before affording Ambrose an interview and ultimately failing to appoint Ambrose to the post.

[16.] Sections 2.2 and 3.6 of the Recruitment Policy is limited to positions up to *the level* of an "Assistant". I am satisfied that notwithstanding the use of the word Assistant in the post of Assistant Counsel, the post of Assistant Counsel was not covered by the Recruitment Policy, restricting the Bank from looking outside. The posts up to the level of Assistant were clearly lower level, entry level positions. I am prepared to find, and do find, that based upon the unchallenged evidence of Deborah Ferguson, that the position of an *Assistant Legal Counsel* was a Level 8/Managerial position in the Bank, even though the word "Assistant" is used in the title. Deborah

Ferguson further testified that an Assistant position would be at the level of 1 through 3 in the organization and is generally considered to be junior and entry level position. Everything from a grade level 4 to 12, she stated, was not an Assistant position.

[17.] In any event, the evidence reflected that Ambrose was interviewed for the position of *Assistant Legal Counsel*, albeit unsuccessfully. I am not prepared to find however that section 3.7 of the Recruitment Policy mandated that, as Ambrose was qualified for the post of Assistant Counsel, no external applicant should have been interviewed. The Bank, by its mandate, was obligated to ensure that it hired an individual with the best skills possible to perform the role of *Assistant Legal Counsel*. It could not, in my view, refrain from seeking to interview external candidates, notwithstanding Ambrose was a qualified applicant. It had to pursue *the best skills necessary to the achievement of its extremely important organizational mandate and objectives* in filling the post of Assistant Counsel. Ambrose herself agreed during the course of her evidence, that the Bank was entitled to seek the best possible person to fulfill various positions in the Bank.

[18.] There was no breach of Article 10 of the Industrial Agreement as Article 10 (3) allows for the concurrent advertisement of the position of Assistant Legal Counsel, as it was above the level of an Assistant.

[19.] Ambrose's case is also that the Bank victimized, discriminated against or treated her unfairly by failing to appoint her to the post of Assistant Legal Counsel. Declarations 11-13 relate to these claims. Section 6 of the Employment Act (the EA) provides:

6. No employer or person acting on behalf of an employer shall discriminate against an employee or applicant for employment on the basis of race, creed, sex, marital status, political opinion, age or HIV/Aids by —
  - (a) refusing to offer employment to an applicant for employment or not affording the employee access to opportunities for promotion, training or other benefits, or by dismissing or subjecting the employee to other detriment solely because of his or her race, creed, sex, marital status, political opinion, age or HIV/Aids; ...

Ambrose does not allege discrimination or unfair treatment based upon any of the classes identified in section 6 of the EA. The Bank correctly submits that Ambrose has not alleged that she was discriminated against based on race, creed, sex, marital status, political opinion or age. Her allegations are based on her views and feelings about policies and procedures in the Bank and how

she says they operated against her. I was not persuaded by the allegations of victimization and discrimination, which in my view really boiled down to disappointment arising from her failure to secure advancement in the organization, having interviewed unsuccessfully for two positions, Assistant Counsel and Policy Analyst II.

[20.] The persons whom Ambrose alleges have victimized and discriminated against her, namely Ms. Eva Etienne and Ms. Deborah Ferguson, were not involved in the interview process at all for the position of Assistant Legal Counsel. Having heard the evidence and observed the witnesses I am not satisfied as to any victimization and discrimination as she was interviewed and considered for advancement and promotion. Ambrose was interviewed by Rochelle Deleveaux and personnel from the Human Resources Department, not Etienne or Ferguson.

[21.] Selection for employment by an interview panel is not a scientific endeavor. Whilst there are some clearly objective elements such as minimum qualifications, much of the decision making is subjective and based upon the applicant's performance at the interview as well as the interviewer's assessment of how the candidate will perform in the role. The interviewers' decision that Ambrose was not the right candidate they were looking for at that time does not, without more, translate into victimization and or discrimination. Ambrose has not demonstrated on balance, as was her burden, that any malice, ill will or unfair treatment was meted out to her. Eva Etienne's evidence was clear that she, as Ambrose's supervisor, had nothing to do with the Assistant Legal Counsel vacancy and that she was not even aware that Ambrose had applied for the position. The process, she says, was driven by the Unit Head that was advertising for the position, Rochelle Deleveaux. The fact that the Bank took its time, in excess of a year, to find what they felt was a suitable candidate to fill the role of Assistant Counsel, was indicative of a view that the decision was carefully arrived at and not made arbitrarily or capriciously. Woods-Carey was not hired until 20 January, 2017 as the Bank had continued to advertise for the position until the 9 June, 2016, some 6 months after Ambrose was interviewed.

[22.] In her witness statement, Ambrose alleges that the Bank was unfair in assessing her for the position of Assistant Legal Counsel because the Bank took into account her performance reviews whereas external candidates were assessed on their credentials only. Interestingly, whilst Ambrose in the earlier aspects of her claim asserted that her "*insider status*" afforded her preferential

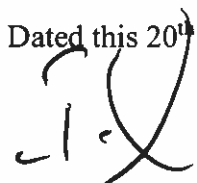


treatment, in the discrimination allegation she claims that the Bank's consideration of her prior work and performance as an employee amounted to discrimination. I accept the Bank's submission on this issue that they were obliged to rely on Article 10.8 of the Industrial Agreement. Article 10.8 required the Bank to base its selection decisions on the availability of positions and the readiness of the employee and to consider factors such as qualifications, job knowledge, efficiency, ability, merit, experience and training. The latter of these factors are required to be judged according to the performance management process, (i.e.) its performance reviews. Further, Section 3(F) of the Recruitment Policy states that Job performance evaluation is one of the criteria which the Bank should take into consideration when interviewing employees for vacant positions. It cannot reasonably be asserted that the Bank ought not to consider Ambrose's prior performances in an exercise which was essentially a promotion for her.

[23.] Understandably, Ambrose, a qualified and experienced attorney, was frustrated at her lack of advancement in the organization and the inability for her to transition into a career which she had been specifically trained. I did not find however, on the evidence, that she was being victimized, discriminated against or unfairly treated.

[24.] In all the circumstances therefore I refuse the applications for declaratory relief and dismiss the action with costs to the Bank to be taxed in default of agreement.

Dated this 20<sup>th</sup> day of July 2021



Ian R Winder  
Justice