



## **EMPLOYMENT RIGHTS TRIBUNAL**

**Case: ERT/2018/012**

**Debra Brathwaite**

**CLAIMANT**

**AND**

**First Citizens Bank (Barbados) Limited**

**RESPONDENT**

**DATES:** July 30<sup>th</sup> 2019

<b>BEFORE:</b>	Christopher Blackman Esq, GCM; Q.C	Chairman
	Ulric Sealy, Esq, SCM	Member
	John Williams, Esq	Member

**APPEARANCES:** Mr. Elsworth Young for the Claimant  
Mr. Michael Koeiman, Attorney-at-Law –  
Clarke, Gittens, Farmer for the Respondent

## **DECISION**

1. At the close of the hearing on July 30, 2019 the Tribunal held that Debra Brathwaite the claimant had been unfairly dismissed by First Citizens Bank Barbados Limited (hereinafter **FCB**), the respondent on February 8, 2016. We said that we would give reasons for our decision and the determination of the award at a later date. This we now do.
2. The witness statement of the claimant and the evidence of the claimant given at the hearing elicited by questioning from her representative, Mr. Elsworth Young as well as the several exhibits and material provided by the respondent, are relied on for the factual matrix of this matter.
3. Ms. Brathwaite was employed by the Barbados Mutual Life Assurance Society (**BMLAS**) on June 16, 1987 as a cashier/customer service representative. In March 1997 she was transferred to the Mutual Bank of the Caribbean, a wholly owned subsidiary of **BMLAS**. Mutual Bank was later purchased by Butterfield Bank, and sometime in 2001, FCB became the owner of the bank. The claimant's continuous employment was preserved throughout the foregoing transactions, and by 2001 when FCB took over, her responsibilities had changed to Foreign Business/Term Deposit Loan Clerk.
4. Ms. Brathwaite maintained three accounts at FCB:
  - (i) A current account 50000770002, to which her salary was lodged.
  - (ii) A current account 50094500002 and
  - (iii) A savings account 10000199433.
5. The claimant who had become a settlement officer in 2008, was requested to act as a Senior Settlement Officer in June/July 2013, and this position had an increase in salary of \$457.84. Ms. Brathwaite in July 2013 set in place an automatic transfer of

\$500.00 from the current account 50000770002 to her savings account 10000199433 to facilitate payment of her fees at University of The West Indies, Cave Hill Campus.

6. In July 2015, when the acting appointment of Senior Settlement officer came to an end, the claimant cancelled the automatic transfer of \$500.00.
7. On August 4, 2015 Charles Gill of the Operations Risk Department of FCB held a meeting with the claimant to enquire about the automatic transfer and as to her awareness of the bank's policy governing employees processing transactions to their own accounts. Ms. Brathwaite advised that she was not aware of the bank's policy. Mr. Gill undertook to provide a report of the meeting, but never did so.
8. It is common ground that in 2013, FCB's systems were unable to detect a transaction such as that initiated by the claimant but by 2015 the system had been updated and as a result, had "caught" the cancellation.
9. Following the meeting with Mr. Gill in August, 2015 a number of meetings were called by senior personnel of FCB, variously described as Investigative or Disciplinary. The first such meeting held on October 5, 2015, called an Investigative Committee focused on the circumstances around the closure of the auto transfer on the account. The persons attending that meeting, were **Avril Husbands, Beverley Norville and Nicole Harris** who represented the respondent and the claimant with two union representatives.
10. By letter dated November 11, 2015 the claimant was requested to attend a Disciplinary Hearing on November 17, 2015 and to respond to the following charges:
  1. That in July 2013, while in the position of Senior Settlement Officer (ag.) you logged into Phoenix, set up and initiated automatic transfers (standing orders)

for the recurring sum of BDS\$500.00 from your Account# 50000770002 to your Savings Account # 10000199433.

2. That on July 16, 2015 you again logged into Phoenix and cancelled said Standing Order.
  
11. The persons attending the meeting on November 17, 2015 other than the claimant and two union representatives, were **Avril Husbands, Beverley Norville, Nicole Harris, Jacqueline Browne, Sonia Squires and Charles Gill**. The claimant in her own words, pleaded guilty to the charges detailed in the letter of November 11, and further advised that since the Investigative Meeting of October 5, 2015 she had realised that her earlier actions were wrong. She apologised to the panel for the breach but however asserted that there was no attempt to defraud the bank.
  
12. On December 11, 2015 a meeting described as Investigative was held which considered the type of Standing Order used by the claimant to effect the transfer, and the dating thereof. On December 11, the claimant was on holiday and there is no evidence that she was told of the meeting. The meeting proceeded in her absence, with those in attendance being the six persons shown in the preceding paragraph as well as **Celia Cadogan and Marion Cordice**, officers of FCB and Dwayne Durant, BWU Union representative. The meeting focused on the dates on the standing order and the role of Ms. Cordice in witnessing the signature of the claimant.
  
13. There were two further hearings, described as Disciplinary Hearings on December 30, 2015 and February 8, 2016 attended by **Avril Husbands, Nicole Harris, Jacqueline Browne, Sonia Squires and Charles Gill**, along with the claimant and a union representative. At the December 30<sup>th</sup> meeting, Ms. Husbands said the matter had been fully investigated and it had reached decision stage. Ms. Husbands also stated that FCB felt that it could no longer depend on her to follow its procedures. On February 8, Ms. Husbands reiterated her remarks of December 30<sup>th</sup> and advised that the decision had been taken to terminate her employment, with immediate effect. The sum of \$3,439.90, net of statutory deductions, representing amounts due

for outstanding vacation, overtime and salary for 8 days of February, 2016 was paid to the claimant at the time of her dismissal.

14. Mr. Michael Koeiman Counsel for FCB, sought in cross-examination of the claimant to focus on the issues relating to dates on the standing orders as discussed in paragraph 12 above as material to the charge that the claimant had acted fraudulently. The Chairman of the Tribunal disallowed this as the claimant had never been afforded an opportunity to consider this issue, and that moreover, those allegations were never reduced to writing as in the case of the transfers as shown at paragraph 10 above. It is instructive to note the comment in the headnote in ***Ramphal v. Department for Transport*** [2015] UKEAT/0352/14/DA.

***“A Claimant facing disciplinary charges and a dismissal procedure .....should be given notice of any changes in the case he has to meet so that he can deal with them.”***

15. Mr. Koeiman called Ms. Sasha Martin as the sole witness for the Respondent. Ms. Martin said she joined FCB in 2017 and said her knowledge of matters relating to the claimant were what she had read on the files. The Tribunal held that her evidence was of no assistance as the claimant’s representative could not cross-examine her as to any of the meetings held in 2015 and 2016. In response to a question from the panel, Counsel for FCB advised that most of the several participants in the Hearings, were no longer employed by FCB, and so unavailable to give evidence in the matter. It should be noted that at the Case Management Conference which preceded the hearing, enquiries were made whether other witnesses were available for the respondent, and directions given as to what should be done, if it was intended to file a further witness statement.
16. Following the ruling as to the inadmissibility of Ms. Martin’s evidence, Counsel for the respondent closed its case.

## **THE LAW**

- 17.** Section 27(1) of the Employment Rights Act, 2012-9, (the Act) states that an employee has the right not to be unfairly dismissed by his (her) employer. Section 29(5) further provides that an employer is not entitled to dismiss an employee for any reason related to ...(b) the conduct of the employee, without informing the employee of the accusation against him and giving him an opportunity to state his case, subject to the **Standard Disciplinary Procedures and the Modified Disciplinary Procedures** set out in Parts B and C, respectively of the Fourth Schedule of the Act.
- 18.** In the instant matter, the respondent seemed to have acted partially in accordance with **the Modified Disciplinary Procedures** set out in Part C of the Fourth Schedule of the Act in so far as the Investigative Meeting held on October 5, 2015. However, at that date, the report prepared by Mr. Gill after the August 4, 2015 meeting had not been provided to the claimant. In *Louies v. Coventry Hood and Seating Co. Ltd.* [1990] IRLR 324 it was held that an employee should see any written statements where an employer intends to rely on the same in disciplinary proceedings, and any other procedure would be prima facie unfair.
- 19.** A consideration of several employment law cases makes it clear that a dismissal may be unfair because the hearing of a complaint was conducted in breach of the rules of natural justice. In *Moyes v. Hylton Castle Working Men's Social Club & Institute* [1986] IRLR 483 two officials of the employers, a working men's Club, acted as witnesses of the incidents of sexual harassment and judges of the truth of the allegations by sitting on the committees which took the decision to dismiss, a procedure deemed unfair by the Employment Appeal Tribunal.
- 20.** In the instant case, three of the respondent employees **Avril Husbands, Beverley Norville and Nicole Harris**, who constituted the Investigative Committee, together

with **Charles Gill** (see paragraph 7 above) and others, constituted the panel for the Disciplinary Hearing on November 17, 2015. In our view, this ‘fusion’ of the personnel of the Investigative Committee, into the Disciplinary panel, albeit with others, rendered the deliberations of the Disciplinary Hearing procedurally unfair as the opinions of those who had formed the Investigative Committee could have affected the independent members such as **Jacqueline Browne and Sonia Squires**. Additionally, the presence of **Charles Gill** the first investigator, as a member of the Disciplinary panel further compounded the irregularity of the proceedings. For a dismissal to be fair, there has to be a fair investigation and dismissal procedure.

21. The issues discussed in *Ramphal v. Department for Transport* [2015] UKEAT/0352/14/DA and *West London Mental Health NHS Trust v. Chhabra* [2013] UKSC 80, a decision of the United Kingdom Supreme Court are of some relevance to the instant case.
22. The critical details in the *Ramphal* matter relate to Mr. Ramphal’s employment by the Department For Transport (DOT) as an Aviation Security Compliance Inspector. The DOT launched an investigation into possible misconduct by Mr. Ramphal in relation to his expenses and the use of hire cars. A Mr. Goodchild was appointed to conduct the investigation and to act as dismissing officer if necessary. Mr. Goodchild was inexperienced in disciplinary proceedings and during the course of preparing his report and decision, received advice from the DOT’s Human Resources Department. The advice he was given was not limited to matters of law and procedure, and level of appropriate sanctions with a view to achieving consistency. The advice extended to issues of Mr. Ramphal’s credibility and level of culpability. Mr. Goodchild’s first draft contained a number of findings favourable to Mr. Ramphal and concluded with the observation that he was minded to find that Mr. Ramphal guilty of misconduct rather than gross misconduct and that he should be given a final written warning.

23. However, after further contact between Mr. Goodchild and the DOT's Human Resources, Mr. Goodchild's position as evidenced by further drafts became more critical of Mr. Ramphal, leading to the recommendation that he should be dismissed. Mr. Ramphal's claim for unfair dismissal was dismissed by Employment Judge Etherington on April 30, 2014.
24. On appeal before the Employment Appeal Tribunal, Judge Serota Q.C presiding, the appeal was allowed and remitted back to Employment Judge Etherington for him to consider the findings in ***Chhabra*** cited at 21 above that although a dismissing or investigating officer is entitled to seek guidance from Human Resources or others, such advice should be limited to matters of law and procedure and to ensuring that all necessary matters have been addressed.
25. The significance of ***Chhabra*** is that it was concerned with the review of the disciplinary procedure of the employer, the West London Mental Health NHS Trust. Dr. Chhabra was a Psychiatric Consultant employed by the above NHS Trust. She was investigated under the NHS Trust's disciplinary procedure, and after concerns were expressed about the involvement of a consultant, W, from another Trust being appointed to investigate Dr. Chhabra it was agreed by the West London Mental Health NHS Trust that would play no further part in the investigation. However, W in fact became involved in the disciplinary process.
26. When the matter came before the Supreme Court, Lord Hodge giving the unanimous judgment of the Court said at paragraph 37:
- "Thirdly, I consider that the trust breached its contract with Dr. Chhabra when [W] continued to take part in the investigatory process in breach of the undertaking which the trust's solicitors gave in their letter of 24 February 2011 ... In particular, when [W] proposed extensive amendments to Dr. Taylor's draft report and Dr. Taylor accepted some of them, which strengthened her criticism of Dr. Chhabra, the trust went outside the agreed procedures which had contractual effect. Policies D4 and D4A established a procedure by which the report was to be the work of the case investigator. There*



would generally be no impropriety in a case investigator seeking advice from an employer's human resources department, for example on questions of procedure. I do not think that it is illegitimate for an employer, through the human resources department or a similar function, to assist a case investigator in the presentation of a report, for example to ensure that all necessary matters have been addressed and receive clarity. But, in this case, Dr. Taylor's report was altered in ways which went beyond clarifying its conclusions. The amendment of the draft report by a member of the employer's management which occurred in this case is not within the agreed procedure. The report had to be the product of the case investigator. It was not. Further, the disregard for the undertaking amounted to a breach of the obligation in good faith in the contract of employment. It was also contrary to paragraph 3.1 of policy D4 as it was behaviour which the objective observer would not consider reasonable: Dr. Chhabra had an implied contractual right to a fair process and [W's] involvement undermined the fairness of the disciplinary process."

#### **DISCUSSION AND DETERMINATION**

27. The Tribunal is of the view that if the only irregularity had been the failure of Charles Gill to provide a copy of the August 4, 2015 report, before the hearings, the dismissal may well have been fair, as Ms. Brathwaite knew the accusation she had to meet (see ***Khanum v. Mid-Glamorgan Area Health Authority*** [1978] IRLR 215 and ***Bell v. Devon and Cornwall Police Authority*** [1978] IRLR 283. However, when the other occurrences such as:

- (a) the conflation of the Investigative Committee with the Disciplinary panel;
- (b) the addition of Charles Gill, the original investigator, to the Disciplinary Panel;  
and
- (c) the reversion to an investigative committee to dredge up new charges, in the absence of the complainant, are taken into account.

The Tribunal was left with no alternative but to hold that the foregoing procedural irregularities caused the complainant's dismissal to be unfair.

**28.** The Tribunal feels constrained to observe that the decision to dismiss was disproportionate in the circumstances of this case. We say so for the following reasons:

- (1) when approached on the matter in August 2015, the claimant readily explained what she had done;
- (2) the claimant pleaded guilty to the charges detailed in the letter of November 11, 2015 at the first Disciplinary Hearing, having first apologised in an email to Celia Cadogan on **July 24, 2015**. (see paragraph 28 of *Chhabra* where Judge McMullen Q.C, sitting as a Judge of the High Court, expressed the view that as Dr. Chhabra had admitted her mistakes, the case cried out to be dealt with under the 'fair blame' procedure);
- (3) there was no attempt to defraud the bank; and
- (4) during the claimant's over 28 years employment with the respondent, there had only been one warning letter for an incident in May 2014.

**29.** In the civil justice system, an early admission of guilt or responsibility mitigates against the imposition of the most extreme sanction and The Tribunal urges employers to give recognition to this principle in the adjudication of matters.

### **THE AWARD**

**30.** Ms. Brathwaite's dismissal on February 8, 2016 was summary. The basis for her awards is to be found in Section 22 (Minimum period of Notice); a basic award as provided for in Section 37 and computed in accordance with the provisions of paragraph 2 (d) of The Fifth Schedule. In addition, the claimant asked for an award of damages in lieu of reinstatement or re-engagement. This claim would be considered pursuant to paragraph 1 (b) of the Fifth Schedule.

**31.** Section 22 (3) (c) of the Act provides that two and one-half months' notice is required on the termination of an employee where the period of continuous

employment is 15 years or more. At the time of dismissal, the claimant was paid \$4338.32; however, there was a 2 per cent increase on that salary arising a collective agreement concluded with the Barbados Workers' Union to cover the period January 1, 2013 to December 31, 2018. As a consequence, the claimants' revised gross salary at February 8, 2016 was \$4425.09. All our computations are based on that amount.

32. Ms. Brathwaite was employed for over 28 years with the respondent and its predecessor companies. The amount due to her in respect of Notice is  $\$4425.09 \times 2.5 \times 28 = \mathbf{\$11,062.72}$ .
33. The calculation of the basic award as computed in accordance with the provisions of paragraph 2 (d) of The Fifth Schedule, where the entitlement is three and a half weeks wages for each year where the period is 20 years but less than 33. In accordance with the schedule, the basic award is computed as follows:  $\$4425.09 \div 4 \times 3.5 \times 28 = \mathbf{\$108,414.70}$ .
34. At her dismissal on February 8, 2016 the claimant was paid a gross salary of \$1601.84 in respect of the period February 1-8, 2016. In December 2016, a payment of \$159.07 described as '**back pay**' on the increased salary for the period January 1, 2016 to February 2016 was made to the claimant. The Tribunal has determined that the claimant is entitled to be fully compensated for the month of February 2016 and the amount therefore due for that month is  $\$4425.09 - \$1601.84 - \$159.07 = \mathbf{\$2,664.18}$ .
35. The formulation at paragraph 1(b) of the Fifth Schedule which empowers the Tribunal to make an award of compensation in respect of any benefit which the employee might reasonably to be expected to have had but for the dismissal seem to be in conformity with the principles identified in *Norton Tool Co. Limited v. Tewson* [1973] 1 All ER 183, and considered later in *Adda International Ltd v.*

*Curcio* [1976] 3 All ER 620. In *Norton*, loss of earnings, that is, loss of earnings between the date of dismissal and the date of the hearing, were held recoverable.

36. In light of the foregoing, and taking into account that 41 months after dismissal, the claimant remains unemployed the Tribunal pursuant to paragraph 1(b) of the Fifth Schedule makes an award of **\$181,428.69**, being  $\$4425.09 \times 41$ .
37. In the aggregate, the claimant is due the sum of **\$303,570.29** by the respondent.
38. The respondent First Citizens Bank Barbados Limited is ordered to pay the claimant the sum of \$303,570.29 by 31<sup>st</sup> October, 2019.

Dated this 12<sup>th</sup> day of September, 2019.

**Christopher Blackman**

Chairman

**John Williams**

Employer's Representative

**Ulric Sealy**

Employee's Representative