EMPLOYMENT RIGHTS TRIBUNAL

CASE: ERT//2018/047

SONYA TOPPIN **CLAIMANT**

v

REPUBLIC BANK (BARBADOS) LIMITED **RESPONDENT**

DATES: February 19, 2020, November 23, 2020 and December 11, 2020

BEFORE: The Hon. Mr. Justice (Ret) Christopher Blackman GCM; Q.C Chairman
Edward Bushell, Esq Member
Frederick Forde, Esq; GCM Member

APPEARANCES: Mr. Larry Smith Q.C and Ms. Jamila Smith Attorneys-at law for for the Claimant
Mr. Kevin Boyce and Mr. Michael Koeiman Attorneys-at-Law for the Respondent

DECISION

1. The issue for determination in this matter is whether attempting to take a large amount of United States dollars out of Barbados without exchange control approval, warranted dismissal.

2. Section 27 of the Employment Rights Act (the Act) provides that an employee has the right not to be unfairly dismissed by his employer. Section 29 (1) of the Act further provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reason for the dismissal. Section 29 (2) states that an employer shall have the right to dismiss an employee for a reason which falls within the subsection if it (a)..... (b) relates to **the conduct** of the employee;

3. However, Section 29 (4) stipulates that the question whether the dismissal was fair or unfair, depends on whether the employer acted reasonably or unreasonably in treating the conduct as a sufficient reason for dismissing the employee; and the employer complied with the rules set out in Part A of the Fourth Schedule of the Act. Section 29 (5) further provides that an employer is not entitled to dismiss an employee for any reason related to **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"***

4. It is against the foregoing statutory provisions that the Tribunal has considered the issues in the claim for unfair dismissal by Sonya Toppin (the Claimant) against Republic Bank (Barbados) Limited (the Respondent). While there are varying views on the law relating to the issues which are in contention, there is no dispute as to the facts of the matter recorded in the two Volumes of Documents, (the Documents) presented and used at the hearing before the Tribunal, which identified 50 attachments

to the Witness Statement of the Claimant, marked **SMT 1 to SMT 50** and 23 attachments to the Witness Statement of Yvonne Hall, the sole witness for the Respondent, marked **A to W**. There has been no challenge to any of the contents in the Documents and the Tribunal has relied upon the information disclosed in the Documents and the evidence presented before the Tribunal in arriving at its decision.

BACKGROUND

5. The Claimant commenced employment with the Respondent a licensed financial institution, then known as the Barbados National Bank on February 9, 2005 in the position of clerk at its Independence Square branch. At the time of her termination she was a Supervisor, Sales at the Lime Grove, Holetown branch of the Respondent.

6. On January 7, 2017, the Claimant was departing Barbados by air and after clearing immigration at the Grantley Adams International Airport and prior to boarding a flight to the United States, customs and immigration officers questioned her and subsequently confiscated a sum of cash in United States dollars with which she was traveling and which was in excess of the permitted foreign currency travel allowance **(the incident).** The Claimant continued with her travel to the United States and returned to Barbados on January 10, 2017.

7. Consequent to rumours circulating on social media and generally in relation to the incident, management of the Respondent asked the claimant to provide an explanation. By letter dated January 31, 2017 **(SMT 5)** to the Senior Manager, Human Resources of the Respondent, the Claimant said in the third paragraph of the letter: "*On January 7, 2017 whilst at Grantley Adams International Airport on route to the United States, I was asked to surrender US cash with which I was traveling with and which was in excess of the permitted allowance. I continued with my travel to the United States and returned to Barbados on January 10, 2017."*

8. By letter dated February 7, 2017 **(SMT 7)** the Respondent placed the Claimant on suspension pending an investigation into **the incident** with her pay and other benefits reserved. On February 10, 2017 the Claimant was invited to attend an investigative meeting on February 15, 2017 at 2.00 pm and was advised that she may have a representative accompany her to the meeting.

9. The investigative meeting which was held on February 21, 2017 lasted just under 90 minutes. The persons present were the Claimant, her representatives, **Mr. Larry Smith,** and **Ms. Shanna Goddard**, attorneys-at-law for the Claimant, **Ms. Sharon Zephrin** General Manager Retail, **Ms. Yvonne Hall** Senior Manager, Human Resources and **Ms. Sasha Shillingford,** Corporate Secretary and General Counsel, all representing the Respondent. The following questions, amongst others were posed to Miss Toppin during the meeting.

(a) How much cash were you carrying?

(b) Were you carrying other financial instruments other than cash?

(c) How much cash was confiscated?

The Claimant declined to answer any of the above questions. In response to a further question, Ms. Toppin said that she had made an application to the Central Bank about recovery of the confiscated funds.

10. In conformity with the stipulations of section 29 (5) of the Act, the Claimant was requested by letter dated March 3, 2017 **(SMT 11)** to attend a disciplinary hearing on March 9, 2017 at 3.00 pm, to consider an allegation of gross misconduct in relation to **the incident** and, as in the case of the investigative meeting, was advised that she may have a representative accompany her to the meeting. In light of events which unfolded at the disciplinary hearing, the Tribunal later in this decision will comment on the role of the representative at a meeting called by the employer.

11. The letter of March 3rd stated that the investigations of the Respondent had shown:

"1. You sought to travel out of Barbados with foreign currency over the permissible

amount without having declared same amounts which is a criminal offence under the Customs and Exchange Control Laws and is therefore in violation of the Bank's Code of Ethics and Operating Principles.

2. You sought to travel out of Barbados with over BBD $10,000 in foreign currency without Exchange Control approval which is an offence under the Anti-Money Laundering Laws of Barbados and is therefore in violation of the Bank's Code of Ethics and Operating Principles.

3. Your income is not consistent with the amount of cash with which you were travelling.

4. You refused to provide management with critical information relating to ***the Incident"***

12. The Claimant was advised that the hearing would be conducted by **Sean Hussain**, General Manager, Corporate and Commercial Credit and **Rhonda Walcott Hackett,** Manager, Industrial Relations.

13. The disciplinary meeting in fact occurred on March 21, 2017. The Notes of that meeting identified as Exhibit **SMT 16** to the witness statement of the Claimant show that in addition to Mr. Sean Hussain and Mrs. Rhonda Walcott-Hackett**,** Miss Sasha Shillingford, General Counsel of the Respondent, Miss Judith Best Typist were also present. The Claimant Miss Toppin was accompanied by Mr. Larry Smith, Ms. Shanna Goddard and Ms. Desiree Browne, attorneys-at-law for the Claimant. The truthfulness and accuracy of Exhibit SMT 16 was acknowledged by Miss Toppin in her evidence before the Tribunal. A critical examination of the notes of the March 21st meeting revealed that the meeting which started at 2.41pm, ended at 5.14 pm, a period in excess of two and a half hours. Just over an hour after the meeting started, the Chairman of the meeting Mr. **Sean Hussain** is recorded as asking: *"Is Sonya Toppin prepared to say anything"*. Moreover, the notes indicate that the Claimant is recorded

as not saying anything, as she confirmed in her evidence before the Tri unal.

14. During the course of the disciplinary hearing, the Respondent indicated that it had become aware of the **quantum** of funds from a confidential source. As noted at paragraph 9 above, the Claimant had declined to answer the question as to how much cash she was carrying. At the hearing, the Claimant produced evidence of two loan bonds from the Barbados Public Workers Cooperative Credit Union issued in November and December 2016 in the sums of $21,500.00 and $15,734.71 respectively, with Mr. Smith, Counsel for the Claimant indicating that "*the other $7000.00 could have been provided through relatives, friends, aunts, people who may have given the claimant money to pack barrels and buy items."*

15. The Chairman of the disciplinary hearing ended the hearing but later decided to reconvene it to receive an affidavit from the claimant's mother Jennifer Yvette Toppin. In the affidavit sworn 3rd April, 2017 Jennifer Toppin said that on November 23, 2016 she obtained the sum of $21,500.00 by loan from the Barbados Public Workers Co-operative Credit Union, and that subsequently the proceeds of the loan were converted into United States currency and given to her daughter for travel to the USA.

16. Two further disciplinary meetings were held on April 6 and 10, 2017 and the persons present on both occasions were **Sean Hussain** and **Rhonda Walcott Hackett** on behalf of the Respondent, Juliet Best as typist and the Claimant. At the meeting on April 6, the Claimant in response to the question "***Are you prepared to continue the disciplinary meeting without your representative present?*** Replied "No". The Claimant maintained that position at the meeting held on April 10 at which point Mr. Husain declared that the disciplinary hearing was ended and that the Bank would make a decision on the information before it.

17. Prior to the meetings of April 6 and 10, 2017, the Respondent offered multiple options as to the timing of the meetings for the convenience of Mr. Larry Smith. In an email

dated April 5, 2017 to Yvonne Hall, Mr. Smith advised "***My willingness to attend the meeting tomorrow at 9.00 am would have meant my foregoing attending a previously scheduled physical therapy appointment at 8.30 am. Having had a few hours to think and reflect on it, I have decided not to skip that appointment."***

18. By letter dated April 13, 2017 **(SMT 36)** the Respondent advised the Claimant that her employment was being terminated with immediate effect, for gross misconduct. Four reasons for the dismissal were given:

19. "(i) *The evidence obtained by the Disciplinary Committee, comprising* ***Sean Hussain*** *, and* ***Rhonda Walcott –Hackett,*** *shows that you admitted that, on January 7, 2017 you sought to travel out of Barbados with foreign currency cash in excess of the permitted foreign currency equivalent of BDS$1,000. The evidence also shows that you failed to declare the excess or seek Exchange Control approval for the excess. This is in breach of the Customs and Exchange Control Laws of Barbados and constitutes an offence.*

(ii) Further, the evidence shows that the sum of US$22,000 was seized from you on January 7th 2017. This sum is in excess of BDS$1,000 in foreign currency equivalent without Exchange Control approval, is also an offence under the Anti-Money Laundering Laws of Barbados. Despite the information you have provided, the Bank is unable to verify the source of the US$22,000 seized from you on January 7th 2017 and has noted your refusal to answer further questions in this regard.

(iii) Your actions listed at (i) and (ii) above are contrary to the Bank's Ethics and Operating Principles-"Compliance with Laws and Regulations" (at page 7), which require employees to follow applicable laws and regulations of every jurisdiction in which Republic Bank operates. Therefore, you have breached the terms of your contract with the Bank.

(iv) The matters set out above have eroded the Bank's trust and confidence in you as an employee."

20. The relevant provision of the Bank's Code of Ethics and Operating Principles **(SMT 13)** referred to in the letter of March 3, 2017 under the heading **Compliance with Laws and Regulations** stated that "*The applicable laws and regulations of every jurisdiction in which Republic Bank operates must be followed. Each employee is charged with the responsibility of acquiring sufficient knowledge relating to his or her duties…"*

21. The Claimant was advised of the right to appeal the dismissal and that she had to do so by April 26, 2017, in writing to Mr. Hamant Lalla, Corporate Controller. The appeal hearing which took place on June 15, 2017 started at 2.43 pm and concluded at 4.16pm, was chaired by Mr. Lalla. Mr. Smith was present at the appeal hearing. As in the case of the disciplinary hearing, Miss Toppin took little part in the proceedings. Two matters of interest raised by Counsel for the Claimant was first, that as Miss Toppin had not been charged or convicted, the Respondent was wrong in saying the Exchange Control Laws had been breached (page 3 of 7 of the transcript of the appeal **SMT 41).** The second matter is found at **page 4 of 7** of the transcript of the appeal where Mr. Smith is recorded as saying: "***What can be said about the US$ 22, 000.00?...we provided two loan bonds ….$37,000.00 end of November 2016, and end of December 2016…ST travelled in January 2017…the issue of Source of Funds, our submission is that US$ 22,000.00 is BDS$44,000.00…….few people follow the Exchange Control provisions….there would be no flights going to the US, the Bank did not consider how this money had been come by certainly the Bank could not be alleging that she could not muster US $3,500.00…it's a Caribbean thing "***

22. On August 2, 2017 the Claimant was advised that the Appeal panel had found no grounds to overturn the decision of dismissal of April 13, 2017.

23. By letter dated August 21, 2017 to the Chief Labour Officer, the Claimant requested the conciliation efforts of that office, in accordance with the provisions of Section 42 of the Act, and on October 1, 2018, the Chief Labour Officer referred the

Claimant's claim of unfair dismissal to the Tribunal since no settlement was reached at conciliation.

24. The grounds submitted in support of the Claimant's claim of unfair dismissal, are inter alia, breach of the rules of natural justice and/or procedural fairness, or that a breach of the Customs and Exchange Control Laws when she had not been convicted of committing any offence under those laws or the Anti-Money Laundering Act of Barbados, was not sufficient to justify dismissal.

THE HEARING

25. At the hearing on February 19, 2020 the parties were reminded by the Chairman of the Tribunal of the rules governing the hearing which had been provided at the Case Management Conference in September 2019. The Claimant Ms. Sonya Toppin was thereafter sworn and she acknowledged that the contents of the Witness Statement dated 15th January, 2019 filed in the matter of her claim against the Respondent, were true. Counsel Mr. Larry Smith Q.C enquired of the Claimant whether as a result of the incident, she had been charged for any breaches of the Exchange Control Laws or the Anti-Money Laundering Act of Barbados. She replied in the negative. Miss Toppin was then tendered for cross examination.

26. The Tribunal requested the claimant to examine the several pages of the Notes of the Disciplinary Hearing, held on 21 March, 2017 (Exhibit **SMT 16)** to see where she was recorded as having spoken during that meeting. Having made the requested examination, Miss Toppin advised that there was no record of her speaking, and that in fact, she had not done so.

27. Mr. Kevin Boyce lead Counsel for the Respondent in cross-examining the Claimant, established that during her employment with the Respondent she had been required to be aware of the Bank's Code of Ethics and Operating Principles, and in particular to the statement on page 7 of the Code which read: "***The applicable laws and regulations of every jurisdiction in which Republic Bank operates must be***

followed." Miss Toppin confirmed that she had been trained, and read up on anti-money laundering matters as verified by her signature on the sign-off sheet for the quarter ending June 30, 2016, and shown on **Appendix F** to the witness statement of Yvonne Hall.

28. Further in cross-examination, Miss Toppin admitted that it was approximately US$20,000 which she had at the airport on January 7, 2017 and that she had not obtained any regulatory permission to have that amount of foreign currency.

29. In his closing remarks in cross-examination, Counsel for the Respondent reminded Miss Toppin that at the time of her suspension on February 7, 2017, the letter of that date required her to "***cooperate in our investigations***", and that she had declined to answer the questions at the investigative hearing. Mr. Boyce further put to the Claimant that she had been given several opportunities to explain the incident firstly to her immediate Supervisor, Mrs. Zephirin, then at the investigative hearing, next at the disciplinary hearing and that overall, the Bank had bent over backwards to accommodate her, and that the process had been fair.

30. The sole witness for the Respondent Bank was Mrs. Yvonne Hall, the Senior Managr, Human Resources. Mrs. Hall acknowledged that she had written and signed the several letters sent to the Claimant, previously referred to in this decision, including those which advised of termination and of the right to appeal. Mrs. Hall noted that in the letter of March 3rd 2017 the Claimant had been specifically advised that the disciplinary hearing would be held in accordance with the Standard Disciplinary Procedure set out in the Fourth Schedule to the Employment Rights Act and that she was entitled to bring a representative.

31. Mrs. Hall's cross-examination by Mr. Larry Smith Q.C, focused on what he characterized as procedural irregularities, such as the Respondent proceeding with the hearing of the matter in April 2017, in the absence of Counsel for the Claimant, and further, by not disclosing to the Claimant the identity and the letter from the

public official who had informed Republic Bank of the amount of foreign exchange seized at the Grantley Adams International Airport. Under further cross examination, Mrs. Hall informed the hearing that the public official who had informed Republic Bank of the seizure, was the Acting Comptroller of Customs.

32. Mrs. Hall, in response to questions on anti-money laundering, said that her understanding on the matter was that it was related to money obtained through illegal sources. She further stated that she was a Human Resource practitioner of over 30 years, not a lawyer and as a consequence her definition of money laundering may not be accurate. Mrs. Hall further stated no irregularities were found after an investigation of the Claimant's account at the Bank.

33. The Chairman of the Tribunal asked Mrs. Hall of the circumstances which influenced the Respondent to proceed with a hearing on April 10, 2017 in the absence of Mr. Smith. The following chain of emails, were formally read into the record:

(A) SMT 25 From Larry Smith to Yvonne Hall dated April 5, 2017 at 15: 44 pm: "***Dear Yvonne Due to circumstances beyond my control, I am unable to attend the meeting tomorrow scheduled for 3:00 pm. The Caribbean Court of Justice (CCJ) has brought forward the date and time for the delivery of a judgment in a matter in which I appear as counsel to Thursday April 6, 2017 at 3:00 pm. We received word of this change this afternoon via e-mail from the CCJ at 1:06 pm. Please be guided accordingly"***

(B) SMT 26 From Mrs Hall to Mr. Smith dated April 5, 2017 at 16:33 pm: **"*Dear Mr.* Smith We acknowledge receipt of your e-mail and advise that, under the circumstances, the Bank is again willing to reschedule the hearing due to your unavailability. We invite you to attend with your client at the reconvened Hearing, which will now be held at 9:00 am tomorrow, April 6, 2017 at our Executive Offices at Independence Square."**

(C) SMT 27 From Larry Smith to Yvonne Hall dated April 5, 2017 at 18:55 pm:

"***Dear Yvonne Thanks for your prompt response. The Bank's rescheduled time for 9:00 am conflicts with prior arranged appointments commencing at 9:30 am outside of Bridgetown. That notwithstanding, out of courtesy to the Bank's management, I, along with my client, will attend at the Bank's Executive Offices, Independence Square.***" and

(D) SMT 28 From Larry Smith to Yvonne Hall dated April 5, 2017 t 22:45 pm: "***Dear Yvonne My willingness to attend the meeting tomorrow (April 6) at 9:00 am would have meant my foregoing attending a previously scheduled physical therapy appointment at 8:30 am. Having had a few hours to think about and reflect on it, I have decided not to skip that appointment. In the circumstances, I cannot attend the meeting which was rescheduled by the Bank to 9:00 am. While my client is available, I, as her representative, am not."***

34. Mrs. Hall informed the Tribunal that the Bank convened the meeting for April 10, 2017 as the members of the Disciplinary Committee had other outstanding obligations, including travel commitments. Moreover, the Bank was concerned that the Claimant had been on suspension for two months, on full pay and that it was desirable to bring closure to the matter. As a consequence, an email dated April 7, 2017 **(SMT 34)** was sent to Mr. Smith at 18:01 which said in part: "***The Disciplinary Panel will be unable to reconvene the Disciplinary Hearing after April 10, 2017 due to existing commitments of its members. Further, the Bank has attempted to have the reconvened Disciplinary Hearing on at least four (4) occasions and does not believe it reasonable to delay it further. In the circumstances, the Disciplinary Panel has indicated to Ms. Toppin that the reconvened Disciplinary Hearing will take place on April 10, 2017 (see letter attached) and has given her the option to select the time of the hearing from one of the following options:***

(1) ***9:00 AM***

(2) ***9:30AM***

(3) ***11.30 AM***

(4) ***1:00 PM, or***

(5) ***3:00 PM***

If the Disciplinary Hearing is not conducted on April 10, 2017, the Disciplinary Panel will be forced to make a decision with "the information presently in its possession."

35. The letter to the Claimant referred to in the above email, also dated April 7, 2017 and shown as **SMT 33** in the Documents, was essentially in the above terms.

36. Under re-examination, Mrs. Hall said that the Bank had never been provided with information as to the purpose of the two Bonds negotiated with the Barbados Public Workers Co-operative Credit Union. Thereafter, Counsel for the Respondent Bank closed its case.

THE CLAIMANT'S CASE

37. The primary ground relied on by Counsel for the Claimant that the dismissal was unfair, was that in breach of the rules of natural justice and/or procedural fairness, the Respondent Bank had failed to provide disclosure of the documentation and source by which they had become aware of the amount of US$22,000 seized on January 7, 2017. In Written Submissions dated 18 November, 2020, Counsel for the Claimant submitted that the Respondent's failure to observe the procedural requirements of Section 29 (5) of the Act, rendered the dismissal unfair. It was further contended that since there had been no convictions either under the Exchange Control or Anti -Money Laundering laws of Barbados, there was no basis for dismissal by the Bank and that the Claimant's conduct did not rise to the level that warranted summary dismissal. It was also submitted that at the time the incident occurred the Claimant was lawfully absent from work, and was not engaged in the Respondent's business.

THE LAW

38. In the view of the Tribunal there are three primary matters to be considered in the claim for unfair dismissal. The first is that of process, particularly where there has been an admission of misconduct. The second is whether there has been a breach of the rules of natural justice for failure to disclose the confidential source which had advised the respondent of the amount by which the claimant had exceeded the Exchange Control limit. The third issue of significance is whether a criminal charge or indeed conviction is a prerequisite to dismissal.

39. Additionally, in light of the desultory participation by the Claimant in the investigative and disciplinary proceedings before the Respondent, the Tribunal considers it necessary to make some observations as to the role of the representative or friend at domestic hearings conducted by an employer.

THE PROCESS

40. In April 2016 the Tribunal differently constituted, in the matter of ***Orlando Harris v. Chefette Restaurants Limited*** held that Mr. Harris had been unfairly dismissed by his employer, and a compensatory award was made in his favour. Save for a modest reduction in the compensatory award, ***Chefette's*** appeal to the Court of Appeal was unsuccessful. While the appeal to the Caribbean Court of Justice on the finding of unfair dismissal was equally unsuccessful, the compensatory award was significantly reduced.

41. As the appeal to the Caribbean Court of Justice was the first from a decision of the Tribunal, the Court determined at paragraph 3 of its decision that "***it had a responsibility to provide an authoritative interpretation of the provisions of the Employment Rights Act involving the right of an employee not to be unfairly dismissed and the right of the employer to fairly dismiss an employee."***

42. Accordingly, the Court in the judgment delivered by **Anderson JCCJ** dated 7th May, entitled ***Chefette Restaurants Limited v. Orlando Harris*** [2020] CCJ 6, at paragraphs 70 and 71, considered the disciplinary procedures that an employer should follow when the dismissal of an employee for any reason related to the capability or conduct of the employee was concerned, and the requirement that the employee be informed of the accusation against him, and that he be given an opportunity to state his case. In paragraph 71, the learned Justice reproduced Part B of the Fourth Schedule which contains the Standard Disciplinary Procedure, which must be complied with by an employer before dismissing an employee for a reason relating to the capability or conduct of the employee.

43. Mr. Kevin Boyce Counsel for the Respondent submitted in Further Submissions dated January 22, 2021 that the Respondent had complied with the procedural requirements of the Act and as set out in ***Chefette.***

44. The Tribunal, on considering the attachments **SMT 11, SMT 16** and **SMT 41** to the Witness Statement of the Claimant cited earlier in this decision and the evidence given by the Claimant under cross-examination, agrees with Mr. Boyce's submission that the Respondent Bank complied with the procedural requirements of the Act. Indeed, it is the opinion of the Tribunal that the Respondent Bank had in fact done so three (3) years before the guidelines promulgated in ***Chefette.***

45. On December 11, 2020 when the hearing before the Tribunal ended, an Order was made that Counsel for the parties should file Further Submissions by noon on Friday January 22, 2021. Whereas, as shown at paragraph 43 above, Counsel for the Respondent complied with the Order, at the close of the Business Day of January 22, 2021 Counsel for the Claimant did not.

FAILURE TO DISCLOSE SOURCE OF INFORMATION

46. Counsel for the Claimant has contended that the Respondent's failure to provide her with the material which disclosed the quantum of foreign currency seized at the Grantley Adams International Airport was in breach of the rules of natural justice and procedural fairness. Counsel for the Respondent however submitted that where an employee is fully aware of the case against them, as is the case in the instant matter, the lack of disclosure of the actual documents does not render a dismissal intrinsically unfair. As noted earlier, the Claimant declined to say how much money had been seized when asked at the investigative hearing.

47. In support of the foregoing submission, Mr. Boyce cited the UK Court of Appeal decision of ***Hussain v. Elonex plc*** [1999] IRLR 420, where **Mummery LJ** at paragraph 24 noted that *"There is no universal requirement of natural justice or general principle of law that an employee must be shown in all cases copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case."*

CONVICTION OR CHARGE

48. Counsel for the Claimant has contended that as there had been no convictions either under the Exchange Control or Anti-Money Laundering laws of Barbados, there was no basis for dismissal by the Bank.

49. However, an examination of the authorities offers little support for this contention. In the 3rd edition of the textbook on **Labour Law** by Deakin and Morris, at page 486, it states that "*In a case of dismissal for a serious disciplinary offence, the employer is required to show first, that it was honestly believed that the employee had committed the offence in question; second, that it had reasonable grounds upon which to sustain that belief; and third, that the employer had at the stage at which the belief was formed carried out as much investigation into the matter as was reasonable in the circumstances of the case. Because the employer's conduct at the time of dismissal is what matters, the question of what is reasonable does not depend on the outcome of a criminal trial which takes place later.*"

50. As noted by **Wood J** in ***ILEA v. Gravett*** [1988] IRLR 497 at page 499 "*There will no doubt come a moment when the employer will need to face the employee with the information he has. This may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing"*

51. In a more recent decision of the Employment Appeal Tribunal of the United Kingdom in the matter of ***Cooper v. National Crime Agency*** [2017] UKEAT 0016 dated 16 June 2017, **Her Honour Judge Eady Q.C** observed at paragraph 44 that "*It is common ground that there is no general obligation upon an employer to postpone an internal disciplinary process pending criminal proceedings…"*

52. It is instructive at this point to consider the provisions of Section 8A subsections (1), (6) (10) (a) and (b) and (13) of the **Money Laundering and Financing of Terrorism (Prevention and Control) Act** Cap. 129 of the Laws of Barbados (the

Act). Section 8A subsection (1) is concerned that the amount of the currency involved is more than $10,000.00 in value. Subsection 6 stipulates that the penalties for breach of subsection 1, on a summary conviction to a fine of $10,000 or to imprisonment for a term of 2 years. Subsections 10 and 13, read together, provide that the time at which currency is deemed to be taken out of Barbados is when the traveller is within the departure area of the airport, takes currency or has currency in his personal luggage, and failed to declare the currency to a customs or immigration officer. In this matter, the Claimant on her own admission as shown in paragraph 6 above, contravened the Act.

53. Section 25 (1) of the Exchange Control Act Cap. 71 of the Laws of Barbados provides that the exportation from Barbados of any notes of a class which are or have been at any time, legal tender in Barbados or in any other country or any such articles exported on the person of a traveller or in a traveller's baggage, is prohibited except with the permission of the Exchange Control Authority. Part II of the Fourth Schedule of the Exchange Control Act provides for the penalties for those who commit an offence under that Act, while Part III of the Fourth Schedule of the Exchange Control Act delegates the enforcement provisions of that Act to an officer of customs or an immigration officer. The assertion by Counsel at paragraph 21 above, that there had been no breach of the currency laws is consequently, clearly erroneous. Indeed, the incident was a statutory offence in the same manner as the possession of a single bullet, under the **Firearms Act** without a licence from the Commissioner of Police. This point was recently reinforced by **Worrell J** on December 11, 2020 in imposing a fine for possession of ammunition in the matter of ***R. v. Richard Arthur*** when he observed that "*It is a strict liability offence. Either one has a licence for these things or one does not.*" (Saturday Sun December 12, 2020).

THE ROLE OF THE REPRESENTATIVE AT A HEARING

54. As noted in paragraph 30 above, the Claimant had been specifically advised that the disciplinary hearing would be held in accordance with the Standard Disciplinary Procedures set out in the Fourth Schedule to the Act and that she was entitled to bring a **representative**, the term used in Step 1 of the Fourth Schedule of the Act for the investigative process. Interestingly, for a disciplinary meeting, the term used in Step 2 of the said Schedule for the person who may accompany the employee during the proceedings is described as **a friend or shop steward**, if the employee is a member of a trade union.

55. In the view of the Tribunal, the term '**representative**' in Step 1 and that of '**friend'** in Step 2 is interchangeable. Notably, however, neither step refers to an attorney-at-law. Section 10 of the **UK Employment Relations Act of 1999**, does not confer the right to legal representation at a disciplinary or grievance hearing unless there is a provision in the contract of employment or disciplinary procedure that provides for this, or the employer permits this on an 'ad hoc' basis. The right is to be accompanied by an official or employee of a trade union or a fellow worker. In paragraph 31 of ***Kulkarni v. Milton Keynes Hospital NHS Foundation Trust and the Secretary of State for Health*** [2009] EWCA Civ 789, [2009] IRLR 829, it is further stated that: "*The employer must permit that companion to put the worker's case, sum up that case and respond on the worker's behalf to any view expressed at the hearing. The companion must be allowed to confer with the worker during the hearing. The employer need not permit the companion to answer questions on the worker's behalf, address the hearing if the worker indicates that he does not wish this or use the powers conferred by the section in a way that prevents the employer from explaining his case or prevents any other person from making his contribution to the hearing."*

56. Further on at paragraph 36 of ***Kulkarni,*** there is the further observation that: "*The hearing is not a court of law. Whilst the practitioner should be given every reasonable opportunity to present his or her case, the hearing should not be conducted in a legalistic or excessively formal manner."*

57. The Tribunal considers that the foregoing statement is apposite to domestic hearings in Barbados, particularly as section 10 of the Act makes provision for the right to legal counsel at **hearings** before the Tribunal, **not** (emphasis added) in regard to hearings under the Fourth Schedule.

58. As noted in **Selwyn's Law of Employment** (16th) edition, at page 380, paragraph **12.25** if the consequences of the disciplinary hearing would have a serious impact upon an employee's working life, or possibly expose him to criminal charges, the courts were leaning to the view he is entitled to have legal representation if he so wishes. However, at paragraph **12.27** there is the observation that the fact that the outcome of disciplinary proceedings could result in the loss of employment does not, per se, warrant legal representation. This position was suggested by **Lady Justice Smith** in ***Kulkarni,*** at paragraphs 64 and 65, albeit obiter, where Her Ladyship stated: "64. *In **Le Compte v. Belgium** [1981] 4 EHRR the appellants, who were medical practitioners had faced disciplinary proceedings before the Belgian Ordre des medecins as a result of which they were suspended from practice. Dr Le Compte had defied the suspension; criminal proceedings followed and he was imprisoned and fined. The applicants appealed to the EHCR alleging inter alia that the disciplinary proceedings had not been Article 6 compliant. What those circumstances might be was not explained. In the present case, the right to practice medicine was a civil right and article 6 was engaged.*

65. It appears to me that the distinction which the court was drawing was that, in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, article 6 would not be engaged. However, where the effect of the

proceedings could be far more serious and could, as in that case, deprive the employee of the right to practice his or her profession, the article would be engaged."

59. As a consequence, the absence of the attorney-at-law from the disciplinary proceedings on April 10 2017 should not be regarded as a procedural irregularity, particularly in the face of the declaration by Counsel that "***While my client is available, I, as her representative, am not."*** and the several options for attendance which had been provided to the Claimant's Counsel. The Tribunal has noted that at the hearings mentioned at paragraphs 9 and 13 herein, Mr. Smith was accompanied by co-counsel. Indeed, they were two at the disciplinary hearing held on March 21, 2017. The complaint such as it is, should therefore be seen as empty and moreover as disingenuous, as it was open to Mr. Smith to send one of the accompanying Counsel to the April 6 and 10, 2017 meetings and he failed to do so.

60. It is our view that when an attorney-at-law appears at the employer's proceedings, the role of that attorney-at-law is no different than that of the non-legal friend, representative or shop steward.

61. Paragraph **12.24** of **Selwyn** states that the companion is entitled to address the hearing in order to put the worker's case, sum up that case, respond to any views expressed at the hearing and to confer with the worker during the hearing. He is not however entitled to answer questions on behalf of the worker.

62. We urge employers to establish their own rules of procedure for the conduct of investigative/disciplinary meetings. A breach of the employer's guidelines entitles them to immediately adjourn or terminate the hearing and proceed to take such decisions as it may think fit.

63. We reiterate that it is the obligation of the employer to provide a process for the hearing of matters relating to incidents involving their employees that accords with the rules of natural justice, and any prescribed statutory requirements. Breach of such rules or non-compliance with any statutory obligations by the employer may well

have consequences, but it is not for an attorney-at-law or other representative, to act in such a manner as to frustrate a hearing.

DISCUSSION AND DISPOSITION

64. As noted in paragraph 7 above, the Claimant in a letter dated January 31, 2017 to the Senior Manager, Human Resources of the Respondent Bank admitted that on January 7, 2017 while at the airport on her way to the US, she was asked to surrender US cash with which she was travelling and which was in excess of the permitted allowance.

65. In the Tribunal's view, however, there was a woeful lack of candour by the Claimant in the hearings which she had with the Respondent Bank. The Claimant had an obligation to be contrite in her admission of wrong-doing, but rather, through her lawyer adopted a posture of righteous indignation. The Tribunal is further of the view that the concerns of the Claimant as to breaches of the rules of natural justice, as articulated by her attorney-at-law, were and are misplaced. Moreover, there was no burden of proof of any issue on the Respondent. It was Miss Toppin's obligation to speak to the charges presented to her in the letter of March 3, 2017. This she failed to do.

66. As to the contention that absent criminal proceedings, the Respondent Bank was not justified in dismissing the claimant, we accept the principles of law expressed in paragraphs 49 to 51 above and state that there was no obligation on the Bank to await the institution of criminal proceedings. The factual position is that the authorities relied on their powers of forfeiture and four (4) years on, there has been no return of the US$22,000 which was seized. Furthermore, notwithstanding the assertion that there was no wrongdoing on the part of the Claimant, no evidence has been adduced that legal action has been taken to recover the seized money.

67. In our judgment, having regard to the refusal by the Claimant to cooperate in the hearings, the lack of candour and absence of contrition, and the overarching negative

behaviour exhibited in the several hearings: investigative, disciplinary and appellate, the Tribunal is only concerned whether the dismissal was fair or unfair, and whether the Respondent acted reasonably in treating the conduct of the Claimant for the breaches of the Exchange Control and Anti-Money Laundering laws of Barbados, as a sufficient reason for the dismissal.

68. **Mr. Justice Anderson** at paragraphs 87 to 95 of ***Chefette*** has provided helpful guidance in determining whether the dismissal was fair or unfair. In paragraph 87, he said inter alia, "***for the dismissal to be fair, the employer must establish not only that the reason shown for the dismissal was a sufficient reason in the terms of section 29 (4) (a) but also, in accordance with section 29 (4) (b) that there was compliance with Part A of the Fourth Schedule."***

69. The rules which are to be taken into account under section 29 (4) (b) provide that (a) disciplinary action must be applied progressively in relation to a breach of discipline, and (b) except in the case of gross misconduct, an employee should not be dismissed for his first breach of discipline.

70. In the circumstances of this matter, the Tribunal is of the view that the Respondent was justified in dismissing the Claimant for gross misconduct given the admission that, on January 7, 2017 she travelled out of Barbados with foreign currency cash in excess of the permitted foreign currency equivalent of BDS$1,000.00. Moreover, the evidence also showed that the Claimant failed to declare the excess or had sought Exchange Control approval for the excess. The source of the foreign currency has never been accounted for and in the context that the Respondent is a financial institution, this was very likely a troubling concern. The Claimants' mother asserted in her affidavit of April 3, 2017 "the proceeds of the loan were converted into United States currency". How? Who provided the US currency for the Barbados cash?

71. The Tribunal recognises that prior to the incident, the Claimant had an unblemished record with the Respondent, a matter acknowledged by Mrs. Yvonne Hall under cross-examination. However, the issues involved in the incident went to the core of

Respondent's business, and as stated in ***Chefette*** at paragraph 90 "***a single failing on the part of an employee can amount to gross misconduct"*** the ground relied upon by the Respondent in its' letter of termination dated April 13, 2017.

72. The Tribunal respectfully adopts the definition of gross misconduct in the US case of ***Giles v. District of Columbia Department of Employment Services*** (August 31, 2000) cited in ***Chefette*** at paragraph 90 that gross misconduct is "***Conduct that is so outrageous that it shocks the conscience; intentional behaviour which deliberately or wilfully threatens the employer's rules, or shows a repeated disregard for the employee's obligations to the employer or disregards the standards of behaviour which an employer has a right to expect of its employee."***

73. **Mr. Justice Anderson** at paragraph 91 of ***Chefette*** cited the Barbados Court of Appeal case of ***Hilton International (Barbados) Ltd. v. Boyce*** [1996] 52 WIR 59 as illustrative of ***intentional behaviour (***emphasis added) that so seriously breached the employer's rules that it could not be reasonably expected that the employment relationship would continue. In the context of the instant matter, the Tribunal is of the view that the Claimant's ***intentional behaviour*** cited in the foregoing definition of gross misconduct may be seen in the procurement of the two loan bonds from the Barbados Public Workers Cooperative Credit Union issued in November and December 2016, in the sums of $21,500.00 and $15,734.71 to enable the Barbadian currency to be converted to US dollars.

74. In the result and for all the reasons mentioned above, the claim for unfair dismissal is dismissed.

Dated this 29th day of January 2021.

Christopher Blackman
Chairman

Edward Bushell
Member

Frederick Forde
Member