BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 16 of 2019

BETWEEN:

FIRST CITIZENS BANK (BARBADOS) LTD **APPELLANT**

AND

DEBRA BRATHWAITE **RESPONDENT**

Before: The Hon. Sir Marston Gibson, K.A., Chief Justice, The Hon. Justice Rajendra Narine and The Hon. Justice Jefferson Cumberbatch, Justices of Appeal

2020: July 21
October 13

Mr. Ramon Alleyne, Q.C., in association with Mr. Michael Koeiman of Clarke Gittens & Farmer, Attorneys-at-Law for the Appellant

Mr. Michael Yearwood, Q.C., in association with Ms. Nicole Roachford Attorneys-at-Law for the Respondent

DECISION

CUMBERBATCH JA:

INTRODUCTION

[1] This appeal seeks to have us reverse the 12 September 2019 decision of the **Employment Rights Tribunal (ERT)** in which it held that the appellant

employer, First Citizens Bank (Barbados) Ltd., (hereafter FCB) had unfairly dismissed the respondent on 8 February 2016 in contravention of her statutory right under **section 27** of the **Employment Rights Act 2012** and consequently awarded her compensation amounting to BDS$303,570. 29.

FACTUAL BACKGROUND

[2] The undisputed facts, taken liberally from the decision of the ERT, are that the respondent was employed initially by the Barbados Mutual Life Assurance Society on 16 June 1987 as a cashier/customer service representative. In March 1987 she was transferred to the Mutual Bank of the Caribbean, a wholly owned subsidiary of her previous employer. Mutual Bank was subsequently purchased by Butterfield Bank and, at sometime in 2001, the appellant FCB became the owner of the bank. Throughout these iterations of employer, the respondent's continuous employment was preserved, and by the time when FCB became the owner, her responsibilities had changed to Foreign Business/Term Deposit Loan Clerk.

[3] It is material to note that the respondent maintained three accounts at the appellant bank.

(i) A current account #30000770002, into which her salary was lodged;
(ii) A current account #50094500002; and;
(iii) A savings account #10000199432.

[4] The respondent, by 2008, had become a settlement officer and was required to act as a senior settlement officer in June/July 2013, a placement that provided an increase of $457. 84 in salary. She therefore thought it prudent to institute an automatic transfer of $500 from her current account at (ii) above to her savings account to facilitate the payment of her tuition fees at the Cave Hill Campus of the University of the West Indies where the was reading for an undergraduate degree in Human Resource Management.

[5] In July 2015, when the acting stint concluded, the respondent cancelled the automatic transfer.

[6] On 4 August 2015, Mr. Charles Gill of the Operation Risk Department of FCB held a meeting with the respondent to enquire about the details of the automatic transfer and as to her awareness of appellant's policy governing the processing of transactions on their own accounts by employees. After the respondent disavowed knowledge of the relevant policy, Mr. Gill undertook to provide a report of the meeting, but in fact never did so.

[7] Following this meeting, a number of other meetings were convened in relation to the matter, variously described as investigative or disciplinary. The first such, held on 5 October 2015, and designated as investigative, focused on the circumstances surrounding the closure of the automatic transfer on the account. Present at that meeting were Ms. Avril Husbands,

Ms. Beverley Norville, and Ms. Nicole Harris who represented the appellant employer, FCB, and the respondent, together with two union representatives.

[8] By letter, dated 11 November 2015, the respondent was requested to attend a disciplinary hearing on 17 November 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 16 July 2015 you again logged into Phoenix and cancelled said standing order.

[9] In addition to the respondent and the two union representatives, also attending that meeting were Ms. Avril Husbands, Ms. Beverley Norville, Ms. Nicole Harris, Ms. Jacqueline Browne, Ms. Sonia Squires and Mr. Charles Gill. The respondent pleaded guilty to the charges detailed in the letter of 11 November and further admitted that since the investigative meeting of 5 October 2015, she had realized that her earlier actions were wrong. She apologized to the assembled panel for the breach but, however, insisted that there was no attempt to defraud the bank.

[10] The relevant policy that the respondent was charged with infringing, reads as follows:

Section 5.10 :–

> "Employees Processing Transactions to their own account"-
>
> Under no circumstances should employees process transactions (cash or non-cash) to their own accounts or any account related to them, inclusive of CIF relationships to other RBBC account holders, that is, where an employee may not be an authorized signatory on a specific account, but where he or she is authorized on other accounts held with this account holder. This refers to any form of account type.
>
> Any employees in breach of this policy will be subject to disciplinary action up to and including dismissal".

[11] On 11 December 2015, a meeting, described as investigative, was held to consider the type of standing order used by the respondent to effect the transfer and the dating thereof. On that date, the respondent was on holiday and there is no evidence that she was even told of the meeting which was conducted in her absence. In attendance were the six people listed above as representing the appellant at the meeting of 17 November as well as Ms. Celia Cadogan and Ms. Marion Cordice, officers of the appellant Bank, and Dwayne Durant, BWU union representative. This meeting focused on the dates on the standing orders and the role of Ms. Cordice in witnessing the respondent's signature.

[12] Two further hearings, both categorized as disciplinary, ensued on 30 December 2015 and 8 February 2016. These were both attended by

Ms. Husbands, Ms. Harris, Ms. Browne, Ms. Squires and Mr. Gill along with the respondent and a union representative. At the meeting on 30 December, Ms. Husbands stated that the matter had been fully investigated and that it had reached decision stage. She also remarked that FCB felt that it could no longer depend on the respondent to follow its procedures.

[13] On 8 February 2016, Ms. Husbands reiterated her observations made on 30 December 2015, and advised the respondent that the decision had been taken to terminate her employment with immediate effect. At the time of her dismissal, the respondent was paid the sum of BDS$3, 439.90, net of statutory deductions, representing amounts owing for unused holiday leave, overtime pay and salary for the eight days of her employment in February 2016.

[14] The dismissal letter of 8 February 2016 reads as follows:

> "Re: The Processing of Transactions to your Account.
>
> Dear Ms. Brathwaite,
>
> We write in reference to the charges laid at the Discipanary Hearing held on November 17, 2015 as follows:
>
> 1. That in July 2013, while in the position of Senior Settlement Officer (Acting) you logged into Phoenix, set up and initiated automatic transfers (standing orders) for the recurring sum of BDS$500.00 from your checking account numbered #50000770002 to your savings account #10000199433.

2. That on 16 July, 2015 you logged into Phoenix and cancelled said Standing Order.

3. You have been provided with the opportunity to respond to the above charges and have agreed (pled (sic) guilty) to both charges.

4. The Bank has reviewed its evidence against you and has concluded that there was a substantial breach to its Employee Policies and has characterized your behavior as Misconduct.

   (Reference to section 5.10 of Employee Process)

5. Given the Bank's loss of confidence and trust in your ability to adhere to its Standards, Policies and Procedures; we have taken the decision to terminate your employment with immediate effect.

6. Please also be advised as follows: Our records indicate that for the vacation year, January to December 2015, you have five (5) outstanding days and would have accrued two (2) working days for the vacation year 2016. You will be paid for your outstanding days. Please see schedule 1 attached hereto.

   Next follows advice relating to Pension, Group Life and Health Plans, Loan and Credit Facilities and the Return of Company property.

7. Should you wish to appeal the Bank's decision to terminate your employment, please respond in writing within ten (10) working days of the date of this letter? Please sign both copies of this letter returning one to the Bank and retaining the other for your records.

Yours sincerely

AVRIL HUSBANDS
Senior Manager, Human Resources

AT THE TRIBUNAL

[15] Before the ERT, FCB was represented by learned counsel, while the respondent was represented by an expert industrial relations practitioner. As for its decision, as we stated earlier, the facts were undisputed and so we need cite the three paragraphs only that both counsel here considered germane to this appeal:

> *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 4 August 2015 report, before the hearings, the dismissal may well have been fair, as Ms. Brathwaite knew the accusation she had to meet ... 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 apologized in an email to Celia Cadogan on July 24, 2015...*
>
> *(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 to an incident in May 2014.*
>
> *29. In the civil (sc. criminal) 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 off matters.*

THE APPEAL

[16] It is from these holdings that FCB demurs.

In its amended notice of appeal filed on 11 June 2020, the appellant itemized the following grounds:

> (1) "The Tribunal erred in law in making the findings of law cited..., *viz.*
>
> That the appellant did not follow a fair process in dismissing the respondent because the respondent was not invited to one of the investigative meetings which led to her dismissal
>
> That the appellant did not follow a fair process in dismissing the respondent because the same officers sat on both the investigative and disciplinary hearings; and,

That the appellant did not follow a fair process in dismissing the respondent because the officer who conducted the initial investigation into the respondent's misconduct sat in the disciplinary hearings".

(2)The Tribunal erred in law as it was procedurally unfair and in breach of the rules of natural justice to make findings leading to a decision at the conclusion of evidence, but without allowing the appellant to make formal submissions.

(3)The Tribunal erred in law in failing to apply the correct test in determining whether the respondent's dismissal was unfair, specifically whether the decision to dismiss for the reason stated on the letter of dismissal fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

(4)The Tribunal erred in law in making a compensatory award under **paragraph 1 (b)** of the **Fifth Schedule** to the **Employment Rights Act, 2012** by awarding the respondent her salary for the entire period from the date of dismissal to the date of the award, a period of 41 months.

(5)The Tribunal erred in law in making a compensatory award under **paragraph 1 (b)** of the **Fifth Schedule** to the **Employment Rights Act, 2012** without any assessment of true (sic) economic impact of the respondent's dismissal by the appellant including by determining what if any income the respondent earned after dismissal.

The FCB also sought an Order: setting aside the decision of The ERT and it specifically asked this Court to remit the matter to the Tribunal for a new hearing

[17] The matter came on for hearing before us on 21July 2020. Learned leading counsel for FCB, Mr. Ramon Alleyne QC, sought to impugn the Tribunal's

decision, first, by making reference to its assertion in paragraph 27, that quoted above in paragraph 15 of this decision 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... However, when the other occurrences such as:*
>
> *the conflation of the Investigative committee with the disciplinary panel;*
>
> *the addition of Charles Gill the original investigator, to the disciplinary panel; and*
>
> *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".*

[18] Mr. Alleyne QC argued that, in fact, none of those three occurrences was sufficiently procedurally irregular to cause the dismissal to be unfair.

[19] So far as the conflation was concerned, he relied on the decision in **Bugden & Co. v C. Thomas [1976] IRLR 174.** In this case, Miss Thomas, a shop assistant, was dismissed when she failed to ring up on the till an amount in respect of certain purchases made by a customer. The matter was investigated by the company's own security officer and, during the course of the investigation, a written statement admitting the offence was signed by

Miss Thomas. On the strength of the security officer's report, it was decided at head office level to dismiss Miss Thomas. Crucially, there was no hearing of Miss Thomas' side of the story. The dismissal was held to be unfair by an Industrial Tribunal and an appeal therefrom was dismissed by the Employment Appeal Tribunal (EAT).

[20] Of course, Mr. Alleyne QC does not purport to rely on this decision in the EAT for its outcome but, rather, on the dicta therein of *Phillips J* who opined at paragraph 14 of the judgment, *"The fault of Budgen & Co is that pointed out by the Tribunal, they confused - and by their argument to the Tribunal, they clearly still confuse - two quite different things. One is the process of investigating the complaint; the other is the process of deciding whether or not dismissal is the right penalty. **Very often, those separate functions will be undertaken by the same person or body, and when that happens, there is no problem.** But if, as here, the investigation of what happened is undertaken as a separate exercise, then whatever the outcome of that investigation, and however serious the offense disclosed, it is still necessary, when decision is being taken whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say, to the person who will make the decision. It is not possible or desirable to elaborate that at greater length. The Tribunal put it admirably in a single*

sentence which is short, pithy and correct: A statement to a security officer is not a substitute for an interview with the management who will eventually dismiss...That really is what this case is about." [Emphasis added].

[21] Clearly, the learned Mr. Alleyne QC relies on the highlighted words to make his point but, equally clearly, given the context in which they were uttered, they are obiter to the decision which essentially concerned the employee's right to be heard before being dismissed.

[22] Mr. Yearwood QC, learned counsel for the respondent, for his part, sought to distinguish this case on the basis that the number of individuals on both the investigating and disciplinary panels were simply too many here and this was liable to lead to an even more biased assessment of the employee's situation. As he put it, the appellant had incorrectly stated that only a minority of the panel who heard the disciplinary hearing (sic) had been involved in the investigation. In fact, as he posited, the ERT had found that three of the persons who had sat on the investigative panel were also involved in the disciplinary hearings, namely Avril Husbands, Beverley Norville and Nicole Harris, whilst the accuser sat on the panel in the disciplinary hearings and one investigative meeting.

[23] He argued further that the burden was on the appellant to prove the fairness of the internal procedure and lack of both adverse and potential bias, in other

words, that the determination of the facts by the ERT was perverse, a matter that could not be determined at the appellate stage where there was no appeal in respect of perversity of the decision.

[24] He also urged that while such conflation might be condoned in a smaller undertaking, it should not be permitted in an establishment such as a bank with sufficient administrative resources to avoid such conflation.

[25] However, we are loath to disagree with a pronouncement on employment law from *Phillips J.*, even if obiter, and while we are of the view that even though it is desirable to keep the two functions of investigation and discipline, and the relevant personnel engaged in each, separate, we do not consider their mere conflation without more to be an automatically unfair process. This reasoning should also cover the argument that the addition of Mr. Charles Gill, the original investigator to the disciplinary panel at one stage was procedurally unfair. We note that Mr. Gill did not ever express a view, one way or another, as to the culpability of the respondent. Indeed, he rather "had failed to provide a report" of the meeting between them.

[26] With regard to the procedural fairness of the conduct of an investigative meeting conducted in the absence of the respondent employee, Mr. Alleyne QC, again relying on **Bugden & Co. v C. Thomas (supra)**, submitted that the **Act** did not prescribe a procedure for investigative meetings and, still

less, mandate a right of attendance to the accused employee. He argued further that the aim of an investigation is to find facts and to ascertain if they disclose a basis for discipline, it is then that a charge is framed and the employee invited to a disciplinary hearing. He contended that the need to exclude the employee from the investigation except when their input is required is recognised in the traditional right to suspend that is expressly mentioned in the **Fourth Schedule** to the **Act** and that the presence of the employee at that stage could impact the integrity and usefulness of the investigative process. It was thus reasonable, in his view, to exclude the employee, and it would be erroneous in law to find that a dismissal was unfair by reason of following a procedure which is in keeping with the aims of the **Act** and that does not contravene any of its provisions.

[27] While Mr. Yearwood QC for the respondent was prepared to concede the absence of any expressly prescribed procedure in the **Act** for investigative meetings, he nevertheless insisted that there was a requirement of the principles of natural justice that bound the appellant. He relied on the following excerpt from the text *Commonwealth Caribbean Employment* and *Labour Law by Corthesy* and *Harris-Roper* at *p.227:*

> *"In the second stage of the unfair dismissal determination, the adjudicating body must also inquire into the procedure used in dismissing the worker/employee. These procedures may be enshrined either in statute, codes of practice, works rules or*

> *collective labour agreements. At a basic intrinsic level of common law fairness, the concepts of natural justice, due processing particularly the right to warnings and a fair hearing are also in issue. this concept is also referred to as 'procedural fairness'. The importance of having a transparent and fair procedure in undertaking dismissals provides an opportunity not only to ascertain vital information that may ground an eventual dismissal but also for second thoughts and conciliation which could decrease the instances of industrial conflict".*

[28] He also referred to **Epicurean Ltd v Madeline Taylor, Civil Appeal No 4 of 2003 (Antigua & Barbuda, 27 May 2004)** where *Rawlins JA (ag)* observed:

> *"The principles of natural justice are well known, trite and ancient. It is said that rules that required a fair hearing before impartial adjudicators can be traced to ancient times, were known in mediaeval precedents and reached a high water-mark (sic) in their development in Dr Bonham's case (1610) 8 Co Rep 113b".*

[29] Finally, Mr. Yearwood QC contended that the absence of the respondent from the investigative meeting could have been cured had the respondent been allowed to question the witnesses, namely Ms. Cadogan and Ms. Cordice, an opportunity she was never afforded.

[30] We are not persuaded, however, that the absence of the respondent employee from an investigative meeting amounts to a procedural infelicity. While we are of the opinion that an investigation in this context should be fair, in the sense of being adequate, the conduct of an investigation of employee

misconduct is primarily a matter for the employer's discretion, cabined and confined by the requirement to take all findings, both positive and negative, into consideration when making the decision to take any further action.

[31] The traditional suspension of employees from the workplace pending an investigation lends some credence to this view and we find nothing in the authorities cited to us by the respondent that would compel the mandatory presence of an employee whose alleged misconduct is being investigated at a meeting called to carry out a related investigation. The situation is otherwise, of course, after the investigation is concluded and the disciplinary process is being undertaken. There the presence and right of the employee to be heard are essential. As was stated in **Bugden (supra):**

> *"It is still necessary, when [a] decision is being taken as to whether dismissal is to follow, for the employee to have an opportunity to say whatever he or she wishes to say, to the person who will make the decision. It is not possible or desirable to elaborate that at greater length".*

[32] These holdings do not signify, as appears to have been asserted by the appellant at paragraphs 18 and 19 of its submissions, that "the **ERT's** finding of unfair dismissal was dependent upon the findings of law on the issues identified in paragraph 27 which the appellant impugns herein on its first ground of appeal" and that "as such it is clear that if, as the appellant contends, the Tribunal was incorrect in those findings of law listed in

paragraph 27, then the decision itself must fail and the decision reversed as the Tribunal has already determined the decision [sc. to dismiss] reasonable by its ruling in paragraph 27".

[33] We do not agree with this proposition. It is true that the ERT uttered the following in rather absolute terms:

> *"if the only irregularity had been the failure of Charles Gill to provide a copy of the 4 August 2015 report, before the hearings, the dismissal may well have been fair, as Ms. Brathwaite knew the accusation she had to meet...*

and/thereafter purported to list the other three occurrences that compelled a finding of unfair dismissal. We take the view, however, that the Chairman here was in essence limiting his comment to procedural fairness only. As is perhaps trite, the concept of fairness pervades all the mechanics of the termination in this context and, in addition to the dismissal being procedurally fair, in that there has been an adequate investigation and a fair hearing, it is also required that the dismissal be for a potentially fair, and not an automatically unfair, reason and that the decision to use dismissal as a sanction for the reason was a fair one in the sense of being within the range of reasonable responses available to the employer.

[34] On this basis, a finding of procedural fairness alone would not suffice to make a dismissal fair. Indeed, it is to be noted that immediately after this much-discussed paragraph, the **ERT** went on in paragraph 28 to consider the

proportionality of the decision to dismiss the respondent in the circumstances, another critical aspect of the determination of fairness as stated above. We read paragraph 27 therefore as relating only to the fairness of the procedure used to arrive at the reason for dismissal and not to the fairness of the entire dismissal.

PROCEDURAL IRREGULARITY BY THE ERT

[35] Another ground of appeal by FCB was that the **ERT** erred in law as it was procedurally unfair and in breach of the rules of natural justice to make findings leading to a decision at the conclusion of evidence, but without allowing the appellant to make formal submissions.

[36] The gist of the appellant's argument here is that the **ERT**, via the Chairman, posed questions to learned counsel for FCB which he was allowed a limited opportunity to answer before the panel rose and returned to render its decision. Hence, the submission of Mr. Alleyne QC runs, "there was a clear breach of the rules of natural justice as the appellant was not allowed a full opportunity to be heard and thus was not able to direct the Tribunal's mind to the most important question in the case, which was whether it was reasonable to dismiss the respondent for the reason stated in her termination letter in light of the breaches of the rules of the appellant which she had admitted..."

[37] Mr. Alleyne QC cited **In the Matter of the Social Welfare Act 1952:Louisa Kieley v The Minister for Social Welfare [1977] IR 257** where *Kenny J* stated:

> *"Tribunals exercising quasi-judicial functions are frequently allowed to act informally -to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like - but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do, or, quote the frequently cited dictum of Tucker LJ in* **Russell v Duke of Norfolk**, *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings.* ***Audi alteram partem*** *means that both sides must be fairly heard."*

[38] In response to this ground of appeal, counsel for the respondent, Mr. Yearwood QC countered that learned counsel for FCB at the **ERT** did not indicate that he desired to make any further submissions and that a question must arise as to whether an appeal is allowable as being an error in these circumstances where the appellant did not make a request nor objected to an action or lack thereof.

[39] We are inclined to hold on this point that the denial of the opportunity in this matter for counsel to make final submissions does not amount to reversible

error on the part of **ERT**. We do so hold for the following reasons. First, there is no statutory provision made for the nature of the procedure to be adopted by the **ERT**, thus leaving this matter up to the tribunal itself, subject of course to the rules of natural justice; second, we note the response of counsel for the appellant during oral argument that neither was the representative for the then claimant, now respondent, permitted to make closing submissions. We do not desire to dictate to the **ERT** any specific procedure to be adopted, so long as it ensures that no party is unduly prejudiced in putting its case before the panel.

[40] On the whole, we do not accept the argument of counsel for the appellant here that the **ERT** was in breach of the rules of natural justice by the procedure it chose to adopt in its discretion. We feel ourselves unable to asseverate, as it was put in **Russell v Duke of Norfolk (supra),** that "the scales of justice were tilted against one side all through the proceedings".

THE RANGE OF REASONABE RESPONSES

[41] The fourth ground of appeal submitted to this Court by the appellant was that the Tribunal erred in law in failing to apply the correct test in determining whether the respondent's dismissal was unfair: specifically, whether the decision to dismiss for the reason stated in the letter of dismissal

fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

[42] In **Chefette Restaurants Ltd v Orlando Harris, Civil Appeal No. 11 of 2016 (decided 23 August 2017)**, an earlier iteration of this Court, apparently "deploring a slavish adoption of the principles emanating from the English legislation", had concluded that the band or range of reasonable responses test, "has absolutely no place in our law".

[43] On further appeal to the **Caribbean Court of Justice (CCJ)**, the apex court was not as starkly dismissive. At paragraph 85 of the decision, the CCJ noted:

> *"We are of the view that cases that provide judicial interpretations of general concepts and principles in employment legislation can be helpful, whatever their source, provided that the interpretations are mined from provisions which are similar, and similarly situated, to local provisions being considered. It appears self-evident that, in respect of reasonable conduct by an employer, a range of responses may be reasonable; provided that the employer responds within this range, the response will not be unreasonable. In this regard, the three-pronged test used by the* ***ERT*** *is, in our view, useful in considering whether an employer acted reasonably in treating the reason advanced for dismissal as a sufficient reason for dismissing an employee in satisfaction of* ***section 29 (4) (a)****".*

[44] We therefore consider ourselves free, by virtue of these dicta, to apply this test, notwithstanding the earlier strictures of this Court, in determining whether the employer acted reasonably or not unreasonably in treating the

ascertained reason as a sufficient reason for dismissing the employee. The elements of this test are to be found in **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** where *Lord Browne-Wilkinson* reasoned as follows:

> *"... (3) In judging the reasonableness of the employer's conduct an Industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

[45] Learned counsel for the appellant implored us in his argument to take advantage of an opportunity to clarify the manner in which **section 29 (4)** ought to be applied for the benefit of employers and employees alike. We trust that we have done so.

[46] He also urged us in his oral submissions to consider the range of reasonable responses available to the reasonable employer having regard to the business in which it is engaged. We entirely agree with this, paying especial heed to number three of *Lord Browne Wilkinson's* dicta cited above.

[47] Mr. Yearwood QC did not directly challenge the application of the "range of reasonable responses" test referred to above, but contended that dismissal was not even within that range since the appellant's disciplinary committee had concluded that the respondent was guilty of "misconduct" only and not "gross misconduct", hence FCB was not at liberty, under the **Fourth Schedule** of the **Act**, to dismiss the respondent for her first act of misconduct, given that her written warning of June 2014 for an earlier infraction had expired. He suggested further that for us to comply with the prayer of the appellant would be for us to usurp the function of Parliament.

[48] To this Mr. Alleyne QC asserted, in our view, correctly, that we are not bound by the employer's categorization of the employee's misconduct and that in any event the text of the statute speaks to misconduct only as a ground for dismissal, while it was solely the **Fourth Schedule** that expressly provided for dismissal for gross misconduct only.

[49] We cannot accept this proposition of the appellant's counsel. The Schedule is as much part of the **Employment Rights Act** as are **section 1** to **section 52** and the other **Five Schedules**. In any event, we view the progressive discipline regime outlined in the **Fourth Schedule** in **section A** as an integral aspect of the motif of fairness that now pervades the mechanics of a fair dismissal in Barbadian employment law.

[50] We note also that the concept of gross misconduct was not unknown to FCB. According to Article 8 of the Disciplinary Procedures:

> "Instances of Gross (sic) Misconduct/Gross Incompetence may result in dismissal, which may be with immediate effect and without prior informal or formal warnings.
>
> Such circumstances include (but are not limited to):
>
> (a) Theft, fraud, falsification of records;
> (b) Threatening behavior and/or physical violence;
> (c) Serious negligence or insubordination in the performance of duties;
> (d) Breach of the Bank's employment rules or of the rules and regulations of any authority, which regulates the Bank's business.

[51] The task before us now is clear. We have to determine whether the sanction of dismissal for the conduct identified fell within the range of reasonable responses available to a bank employer, bearing always in mind that we are not to substitute our own view for that of the appellant.

[52] Taking all the relevant circumstances into account; the nature of the conduct as expressly categorized by the appellant employer; the range of sanctions provided therefor by the employer; the technically unblemished nature of the respondent's work record over a substantial period; the fact that no dishonesty on the respondent's part was alleged; and the fact that the appellant suffered no financial or reputational loss in consequence, we are of the view that the appellant has not established that any reasonable employer,

identically situated as it was, would have dismissed the appellant or, more accurately put, would have included the sanction of summary dismissal within the range or background set of reasonable responses to the respondent's conduct here.

[53] We hold therefore that the respondent was indeed unfairly dismissed as found by the **ERT** and we accordingly dismiss the appeal.

[54] It remains only for us to assess the sum available as compensation for the respondent's unfair dismissal. We note that there was no dispute in this regard between the respective counsel for the parties, in light of the relatively recent decision of the **CCJ** in **Chefette Restaurants Ltd. v Orlando Harris, supra**. This Court is supplied with ample material to make the relevant calculation and we assess the compensation payable to be the basic award calculated by the **ERT** which we determine to be the figure quoted at paragraph 33 of its decision of **BDS$108, 414.70**. To this must be added the sum outstanding in respect of failure to give adequate notice, **BDS$11, 062.72**., making for a total of **BDS$119,477.42.**

DISPOSAL

[55] We therefore hold that the respondent was unfairly dismissed by the appellant. We dismiss the appeal and award to the respondent compensation

of **BDS$119,477.42** and costs fit for two counsel, such costs to be agreed and, if not so agreed, to be assessed.

[56] We should wish to thank both sets of counsel for the way in which they conducted this appeal and for the invaluable assistance they rendered to this Court.

Chief Justice

Justice of Appeal **Justice of Appeal**