

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 271 of 2016

B E T W E E N

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED
Appellant

AND

SHERWANDA JONES

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
 The Honourable Ms. Justice Crane-Scott, JA
 The Honourable Mr. Justice Evans, JA (Actg.)

APPEARANCES: **Mr. Ferron Bethell, Counsel for the Appellant**
 Mr. Obie Ferguson, Counsel for the Respondent

DATES: **22 March 2018; 19 April 2018**

Industrial Tribunal appeal – Wrongful dismissal – Summary dismissal – Breaches of employer’s code of conduct – Sections 31 - 33 of the Employment Act

After being employed with the appellant for 16½ years the respondent was dismissed from her employment on the 5th November, 2012. The background to her dismissal, in summary, is that in the course of her employment she was required travel to St. Maarten in June 2012. As is customary she was entitled to a per diem for meals and transportation in the amount of \$460. The respondent was also the recipient of a corporate credit card. Before her trip she withdrew \$450 from the corporate credit card to constitute her per diem. While in Miami airport, in transit to St. Maarten, she realized that the funds obtained from the corporate credit card were missing from her purse. Subsequent thereto the respondent obtained an additional \$460 as per diem from a bank employee in St. Maarten. The respondent signed as acknowledging receipt of the funds and there was no indication that the funds were to be repaid by the respondent; and it was not repaid.

The appellant conducted an investigation into the respondent’s conduct and the receipt of the additional per diem. Following the investigation the respondent was invited to attend a disciplinary hearing to discuss the breaches of the appellant’s code of conduct. At the hearing the respondent was found to have breached the code of conduct and she was summarily dismissed. Thereafter, the respondent indicated that she wished to appeal the decision to dismiss her. An

Appeals Committee hearing was held and the Committee supported the findings of the Disciplinary Committee.

The respondent then petitioned the Industrial Tribunal (the Tribunal) on the basis that she was wrongfully dismissed. The Tribunal found that the respondent had indeed been wrongfully dismissed and awarded her \$68,500.12 with interest; it was against this finding that the appellant appealed to this Court.

Held: appeal allowed; decision of the Tribunal set aside.

After a review of the facts the learned Vice President of the Tribunal identified the issue to be determined as "...whether the termination was reasonably in the range of reasonable responses in the circumstances and whether the dismissal was wrongful." Thereafter, she went on to review the law relative to unfair dismissal, notwithstanding that the claim to be determined before her was in relation to wrongful dismissal. In reviewing her conclusions it was clear that the excursion into the law relative to unfair dismissal infected her view of this matter.

The Vice President's decision erroneously conflated the principles of wrongful dismissal and unfair dismissal. The sole question for the Vice President's determination was whether the actions and conduct of the respondent were such that the Bank was entitled to summarily dismiss her and treat her as having committed a fundamental breach of her contract of employment or as having acted in a manner repugnant to the fundamental interests of the Bank.

In these circumstances the appellant was clearly entitled to summarily dismiss the respondent who they found to have breached its internal policies and acted in a manner repugnant to their fundamental interests.

Bahamas Princess Resort & Casino vs Richard John Wilson, Keith John Campbell, Kathrine Faulkner, and Nigel John Dickenson SCCivApp. No. 2 of 2001
Dorsett v Pictet Bank & Trust [2012] 2 BHS J No. 62 considered

REASONS FOR DECISION

Delivered by the Honourable Mr. Justice Evans, JA (Actg.):

1. This was an appeal from the Ruling of the learned Vice President of the Bahamas Industrial Tribunal, the Honourable Marilyn Meeres, wherein she found that the respondent had been wrongfully dismissed and awarded the respondent the sum of

\$68,500.12, with interest at 10%. We heard this appeal on the 22nd March, 2018 and allowed the appeal and promised to provide reasons at a later date which we do now.

2. The respondent's claim arose out of her dismissal from the appellant back on the 5th November, 2012. The appellant had conducted an internal disciplinary hearing into the respondent's conduct on the 16th October, 2012 and, as a result, it determined that the respondent was in breach of the following bank policies:

- i. **Breach of Code of Conduct - Section 1.2 Honesty and Integrity; Section 4.7 Maintaining Records; Section 5.4 Expenses**

- ii. **Breach of FirstCaribbean International Banks Expense Management Policy - Section 8 Falsification of Expenses; and Section 13 Credit Card Use.**

- iii. **Breach of Corporate Employment Expense Card Agreement - Section 3 - "I have read, understood and agree to comply with all the respective policies and guidelines as it pertains to use of the card."; Section 4 - "I will use the card for business purposes ONLY and will not use the card for any personal expenditure whatsoever."; and**

- iv. **Breach of the Employee Credit Policy 2012 - which deals with the employee's obligation to pay.**

3. The respondent was accordingly summarily dismissed, without pay and without notice.

FACTUAL BACKGROUND AND CHRONOLOGY

4. On or about the 26th May, 1996, the respondent commenced her employment with the appellant as a Teller. She was employed with the appellant for sixteen and a half years and during her tenure, she was promoted on several occasions, with her last promotion being that to a Business Support Manager, in 2010.
5. The respondent reported to Mrs. Jennifer Brown, who at the time was the Director of Regional Operations for the Northern Caribbean. The respondent travelled to St. Maarten from the 17th - 23rd June, 2012, in order to ascertain and resolve the issues that St. Maarten was having with its new automatic clearing house.
6. On Friday, the 15th June, 2012, prior to leaving for St. Maarten, Mrs. Brown asked the respondent if she had her per diem, in the amount of \$460.00. This per diem was to be used by the respondent for meals and transportation. The respondent advised Mrs. Brown that she would use her corporate card to obtain the cash and as a result the respondent did

not complete an Employee Travel Requisition Form and have Mrs. Brown authorize the same which is the standard practice.

7. At the time the respondent advised Mrs. Brown, that she would use her corporate card to get the per diem, she had already commenced withdrawing the cash, but failed to inform Mrs. Brown of this fact. The respondent withdrew \$150.00 on Thursday, the 14th June, 2012 at the ATM at the Marathon Mall; \$150.00 on Friday, the 15th June, 2012 at the ATM on Carmichael Road and \$150.00 on Saturday, the 16th June, 2012 at the ATM at the Shell Gas Station on Prince Charles Drive. While en route to St. Maarten (in Miami International Airport), the respondent purchased food items in the total amount of \$29.22 with her corporate card.
8. On Monday, the 18th June, 2012, while in St. Maarten, an Employee Travel Requisition form was completed and the respondent obtained an additional \$460.00, as per diem, from Ms. Sylvia Baly. A General Ledger entry was also signed by the respondent acknowledging receipt of this additional per diem for "business travel expenses". There was nothing on either form indicating that these funds were to be repaid by the respondent.
9. The respondent returned to Nassau on the 23rd June, 2012 and submitted an Employee Expense Report on Tuesday, the 3rd July, 2012. The respondent commenced sick leave, on Wednesday, the 4th July, 2012 (the day after submitting an Employee Expense Report) and did not return to work until Monday, the 10th September, 2012 (some 9 ½ weeks later).
10. The Bank's policy, as per Section 7 (D) of the Expense Management Policy, mandates that all expense reports must be completed, approved and submitted to Accounts Payable, within 5 working days after a trip, for all out of pocket expenses or any other expense not covered under the corporate credit card. The respondent did not complete the Employee Expense Report within 5 working days of returning to work.
11. The respondent did not, upon her return to Nassau on 23 June, 2012 and at any time subsequent to going on sick leave, inform Mrs. Brown that she (the respondent) had obtained an additional \$460.00, for per diem, from Ms. Sylvia Baly in St. Maarten. Mrs. Brown was only informed that the respondent had obtained an additional \$460.00 after she (Mrs. Brown) had contacted Ms. Baly to ascertain the hotel and any other expenses, which the Respondent had incurred during the trip.
12. The respondent never repaid the \$460.00, which she alleged she received as a loan, to Ms. Baly, or to any other employee or representative of the respondent. Moreover, the respondent never contacted Mrs. Baly regarding the alleged repayment of the funds at any time prior to her termination.
13. Section 1.2 of the appellant's Code of Conduct - (Honesty and Integrity) states that:

“The financial services industry is built on the highest level of trust. Integrity is a cornerstone of our business ... Engaging in dishonest activity negatively affects employees and FirstCaribbean ... Involvement in dishonest activity is unacceptable. All communications must be truthful and must not directly or indirectly mislead others.”

14. Section 4.7 of the appellant’s Code of Conduct (Maintaining Records) states that:

“Complete and accurate records help FirstCaribbean maintain and build customer relationships and manage its business within appropriate risk management guidelines. Without them, the integrity of our work is compromised, as is the trust of our customers. We will exercise care and diligence in maintaining documentary and electronic records. We will follow all applicable record-keeping procedures ... We will never make false or misleading entries for our benefit or for any other party ... We will not conceal any unrecorded account, fund, asset or liability...”

15. Section 5.4 of the appellant’s Code of Conduct (Expenses) states that:

“While we may claim reasonable business expenses, we will avoid making excessive or unnecessary claims. We will not make fictitious expensive claims...”

16. Section 8 of the appellant’s Expense Management Manual (Falsification of Records) states that:

“Submitting false supporting documentation that has been tampered, evidences breach of the Code of Conduct and is subject to termination of employment. Every effort must be made to retain receipts of legitimately incurred expenses.”

17. Section 11 of the appellant’s Expense Management Manual (Expense Report Approval and Submission) states that:

“Employees must have their employee expense reports reviewed and approved by the individual to whom they report (i.e. Supervisor “Approving Manager”). Both parties are responsible for the propriety of transactions appearing on an expense report. The Approving Manager is responsible for reviewing their employee’s expense reports to ensure the expenses are proper and in full compliance of the policy and common business sense...”

18. The appellant duly conducted an investigation into the respondent's conduct and her receipt of the additional per diem. The respondent gave a signed statement to Ms. Crystal Johnson, the respondent's investigator, on the 24th September, 2012 concerning the additional per diem. In the statement, the respondent admits that she did not repay the funds to Ms. Baly nor had she spoken to Ms. Baly about repaying the funds. The respondent further admitted that she had been given a fair opportunity to respond to the questions asked of her.
19. The appellant completed an internal report outlining the results of its investigation which was dated the 3rd October, 2012. As a result of the report the appellant forwarded a letter to the respondent dated the 10th October, 2012, outlining the breaches of its policies, which it alleged the respondent had committed and invited her to attend a hearing on the 16th October, 2012, with an employee representative, to discuss the said breaches.
20. A Disciplinary Hearing was held on the 16th October, 2012, and the respondent with her representative, the President of the Managers' Union, Mr. Z. Timothy Adderley, were given the opportunity to address the appellant's allegations against the respondent. A decision was thereafter made on the findings from the Disciplinary Hearing. The appellant was held to be (1) in breach of the Code of Conduct with respect to (a) honesty and integrity, (b) maintaining records; (2) in breach of FirstCaribbean International Bank's expense management policy with respect to credit card use; (3) in breach of corporate employment expense card agreement; and (4) in breach of the employee credit policy with respect to maintaining her financial position in good order. By letter dated the 5th November, 2012, the respondent was summarily dismissed by the appellant.
21. By letter dated the 8th November, 2012, the respondent's Union representative, Mr. Adderley, advised the appellant that he wished to file an appeal on the respondent's behalf and outlined in detail, the basis for the appeal. An Appeals Committee Hearing was held and the Committee supported the findings of the disciplinary committee with respect to all the charges, save for that relating to the breach of the employees' credit policy and recommended that the Bank's decision to dismiss the respondent summarily, be upheld. The Appeal Committee members found that the appellant had lost trust and confidence in the respondent and her ability to execute her duties and responsibilities as an employee, which required a high level of trust and honesty.

THE APPEAL TO THE TRIBUNAL

22. By Originating Application issued on the 29th January, 2014 the respondent petitioned the Industrial Tribunal for a finding that she had been wrongfully dismissed. The evidence before the Tribunal may be gleaned from the decision of the Honourable Marilyn M. Meeres which was dated the 10th November, 2016. The respondent testified that in the summer of 2012 she was to travel to St. Maarten for 7 days as part of her duties with the appellant. The respondent said that the appellant grants a \$60 per diem for travel expenses and gives employees a corporate credit card in such instances. However, the

respondent averred that prior to the trip, she was told by another senior or same level employee that there were issues in using the corporate card when travelling abroad and that there was a \$150.00 daily cash withdrawal limit available. She said that she therefore decided to withdraw the cash prior to the trip and did so on three different occasions.

23. The respondent said that while travelling to St. Maarten she discovered that the funds totaling \$450.00 which she had withdrawn from the ATM were missing from her purse. She said that she had no other cash with her and determined that to return to Nassau would be too costly so she continued on to St. Maarten without any cash. The respondent further stated that when she reported to the appellant's branch in St. Maarten she told the bank manager there, Ms. Baly that she had misplaced her per diem and had no cash. Ms. Baly then gave the appellant the sum of \$460.00 which, according to the appellant she intended to repay upon her return to Nassau. According to the respondent upon her return to Nassau she was unable to inform her immediate Superior Mrs. Brown of the events of her trip because Mrs. Brown was busy. She said that she had other work commitments to attend to as she was preparing to go on leave due to an upcoming surgery.
24. The respondent and her estranged husband had a mortgage with the appellant. The Respondent had notified the appellant of her marital issues and that she had left the mortgaged matrimonial home for more than a year. The appellant deducted the entire mortgage payment from the respondent's salary which was paid bi-weekly into her employee account. According to the respondent while on sick leave the appellant froze her ATM card but not her estranged husband's which was attached to her account. She said that her husband withdrew funds from her account without her knowledge and that this led to her being unable to repay the funds obtained from Ms. Baly in St. Maarten.
25. The evidence of the appellant was given in the testimony of Jennifer Brown, Director of Centralized Operations Services for the Northern Hub, CIBC/First Caribbean International Bank, employed by the Respondent for 41 years and stationed in Nassau, Bahamas as the respondent's immediate supervisor. Mrs. Brown testified that she knew the respondent, who reported directly to her while she was stationed in The Bahamas and that she also knew Ms. Baly. She explained that Ms. Baly did not report directly to her, but would report to another Manager who would report to her as part of her group.
26. According to Mrs. Brown in June 2012 she asked the respondent to visit St. Maarten LPC to review operations. Based on this, the request would have been made through the approved travel agent for her to go to St Maarten on the dates she agreed she would go. This was in the region of the 17th - 23rd June 2012. Discussions were also held with Ms. Baly in St. Maarten to make hotel reservations for the respondent and LPC St. Maarten would pay those hotel fees.
27. Mrs. Brown stated that the expense policy of the Bank requires that whoever is travelling should prepare a Travel Requisition Form prior to departure for their per diem, being their meal allowance and taxi fares and present it to their manager for approval in order to get that cash up front. She said that as the Travel Requisition Form was not presented to her she became concerned and so on Friday when the respondent came to say goodbye,

she asked the Respondent “what about your cash?”. The respondent’s response was that she was going to use her corporate credit card for a couple of days but she did not say that she had already withdrawn funds.

28. Mrs. Brown further testified that when the Respondent returned from the trip she (the respondent) was in office for a couple of days but advised that she would be going off for a surgical operation and that she would be away from the office for some weeks for that operation and then some vacation time. Mrs. Brown said that she asked the respondent to complete the Expense Report and to let her have the Report on St. Maarten prior to her departure. Mrs. Brown noted that the Bank’s guidelines required that report to be provided within five days after an employee’s return- hence her request. The Expense Report was provided dated the 3rd July, 2012 which was after the allotted time.
29. According to Mrs. Brown when she was ready to review the report to sign off in keeping with the Bank’s guidelines she realized that it was incomplete as the cost of the plane fare, and hotel was not there and there were no invoices attached that she could readily get those figures from. There was an amount being claimed for per diem and taxi but there was no account stating where that money should be credited to. As a result she called Ms. Baly to obtain the hotel charges since it would have been handled there and to get a copy of that receipt. She asked if there were any other funds unpaid while the respondent was there, just to cover all the bases. Ms. Baly advised her that per diem and taxi fare had been paid to the respondent. She asked Ms. Baly to send her copies of the documents that were used to make that payment. The Travel Requisition that was received from Ms. Baly indicated that per diem and taxi fare were paid to the respondent and the respondent had signed for it.
30. Mrs. Brown testified that given the Bank’s Expense Policy Guidelines, the person who is approving the expense ensures that everything is in order or they will also be held accountable for anything that is detected at a later date. She therefore checked to ascertain if funds were used from the corporate card as was told her initially. It was discovered that funds were drawn and the matter was referred to Corporate Security to do an investigation. It was the result of this investigation that the disciplinary process was instituted which ultimately resulted in the dismissal of the respondent

THE INVESTIGATION AND DISCIPLINARY PROCEEDINGS

31. The investigation conducted resulted in a report being produced with respect to findings of the breaches referred to earlier. Prior to the report being published, Corporate Security interviewed the respondent and Ms. Baly as a part of their process. The respondent provided a full written statement dated the 24th September, 2012 wherein she set out her version of what transpired. She was additionally afforded a hearing at the disciplinary proceedings which took place on the 16th October, 2012. The hearing procedure required certain persons to be there as they were to be represented at the hearing. There was the Adjudicator and Human Resources Manager as Chairperson for the meeting, the

respondent and a note-taker. The respondent also had a representative in the person of the President of the Manager's Union and Mrs. Brown.

THE TRIBUNAL'S DECISION

32. After a review of the facts the Vice President identified the issue to be determined as:

"...whether the termination was reasonably in the range of reasonable responses in the circumstances and whether the dismissal was wrongful."

The learned Vice President then went on to review the law which, for some inexplicable reason, contained a review of the law relative to unfair dismissal. I say inexplicable because at paragraphs 94 and 98 of her decision she expressly acknowledged that the claim before her for determination was that of wrongful dismissal. Further, she later observed that

"...the applicant has not provided any evidence of a particularized claim for unfair dismissal."

33. At paragraph 98 the Vice President clearly set out her understanding of what is meant by wrongful when she stated as follows:-

"98. This is a claim for wrongful dismissal. Wrongful dismissal occurs when two conditions are fulfilled. Firstly, the employer must have terminated the contract of employment without notice or with inadequate notice. Secondly, there was no justification in terminating the contract of employment. In order for there to have been a lawful termination, there must have been reasonable notice or reasonable pay in lieu of notice."

34. After a review of what she perceived to be the relevant law the Vice President made the following findings:

"105. The foregoing leads to a conclusion that the Respondent (sic) was wrongfully and unfairly dismissed. Whether the Respondent genuinely believed the Applicant was guilty of the alleged misconduct, was not established. The Respondent did carry out an internal investigation(s), but did not behave in a manner any reasonable employer would in light of the circumstances of the Applicant's work history, tenure, health issues, marital issues and financial constraints as a result of the mortgage deductions and marital issues."

106. Moreover, after the internal Appeal Board published its results, the Respondent made no further investigations to the matters raised in the board's report. The Respondent's decision to summarily dismiss is also unfair on procedural grounds; the grounds prescribed by the agreement between the Respondent and the Bahamas Financial Services Management Workers Banker's Union. Also, the ground that another reasonable employer would dismiss the Applicant in the same circumstances, was not proven. The Applicant's conduct or perceived gross misconduct was not so grave as to warrant summary dismissal in the circumstance. The Respondent did not investigate properly, apply another internal form of punishment for the alleged breaches of an employee of such a long tenure, i.e. warning, demotion or repayment of the funds.

107. The Tribunal is of the opinion that the Applicant was a victim of circumstances, some of which were contributed to by the Respondent. The circumstances were so egregious they surpassed the standards for wrongful dismissal. However, the Applicant has not provided any evidence of a particularized claim for unfair dismissal, only for wrongful dismissal. We therefore find that the Applicant was wrongfully dismissed."

In reviewing her conclusions it was clear that the excursion into the law relative to unfair dismissal infected her view of this matter.

DISCUSSION AND FINDINGS

35. The claim which the Tribunal was asked to deal with was clearly one based on wrongful dismissal and that the appellant's defence was that they were entitled to summarily dismiss the respondent due to her conduct. It followed then that the relevant provisions of the Employment Act were those which deal with such a claim. These are as follows:-

"31. An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer:

Provided that such employee shall be entitled to receive previously earned pay.

32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following -

- (a) theft;**
- (b) fraudulent offences;**
- (c) dishonesty;**
- (d) gross insubordination or insolence;**
- (e) gross indecency;**
- (f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;**
- (g) gross negligence;**
- (h) incompetence;**
- (i) gross misconduct.**

33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.” [Emphasis added]

36. The appellant’s position in this matter was simply that their investigation process revealed the breaches committed by the respondent and in the circumstances they had lost trust and confidence in the respondent. This was made clear as early as the letter of termination wherein the respondent was advised that:

“...the bank has lost trust and confidence in you and your abilities to execute your duties and responsibilities as an employee, which require a high level of trust and honesty. Based on the foregoing, we confirm that your actions have been classified a gross misconduct and as a result, your

employment with CIBC First Caribbean International Bank will be terminated summarily with immediate effect.”

37. It is significant that the Appeals Committee was firmly of the same view as the disciplinary body and stated as follows:-

“Further, based on the information provided per the investigation and the subsequent breaches 1 through 3, which were identified, the Bank has lost trust and confidence in the subject and her ability to execute her duties and responsibilities as an employee, which requires a high level of trust and honesty. In this vein, it is recommended that the decision to terminate the subject summarily be upheld.”

38. Mr. Bethell submitted that based on the available information the findings by the disciplinary panel as affirmed by the Appeals Committee was reasonable and provided a reasonable basis for the appellant’s belief that the respondent had committed a fundamental breach of her contract. He submitted that it was clear that trust and confidence was lost in the respondent for her dishonest behavior in not informing Mrs. Brown of the additional per diem she received.

39. Counsel acknowledged that the respondent and Ms. Baly did not conceal the fact that she (the respondent) had obtained the additional per diem because an Employee Travel Requisition Form was completed, and a General Ledger Entry was signed by the respondent acknowledging receipt of the funds for the express purpose of “business travel expenses”. However, he said that thereafter the respondent failed and/or refused to advise Mrs. Brown verbally or in writing, that she had obtained the additional funds prior or subsequent to going on sick leave. Further he said that the respondent has never given a reasonable explanation for not informing Mrs. Brown of the additional per diem she received in light of the myriad forms of communication open to the respondent. Moreover, he concluded the respondent never gave a reasonable explanation for not repaying the funds which she contends was a loan from Ms. Baly.

40. It was Mr. Bethell’s submission that the question of whether the conduct of an employee is such to undermine the trust and confidence essential to the contractual relationship between an employer and employee, must be considered in light of the circumstances, having regard to the nature of the business of the employer and the position held by the employee. In support of this submission he cited the decision of this Court in the case of **Dorsett v Pictet Bank & Trust** [2012] 2 BHS J No.62.

41. In **Dorsett’s** case a fairly senior bank employee required a job letter to obtain a loan for a television set. It was the Christmas time and the employee’s supervisor was absent from work. The employee therefore retrieved a letter from the computer, put the bank’s stamp on the letter and forwarded it to the lender. There were other persons present in the bank who were able to sign the job letter on the day in question, but the employee did not request their assistance. Moreover, the employee saw her supervisor later that day but

failed to advise the supervisor of what she had done. In fact, the employee never advised the supervisor about what she had done until the lender called to confirm the authenticity of the letter. The employee's explanation for what she had done was that she needed the letter urgently and the issuance of a job letter was routine and such a letter had been issued on her behalf on previous occasions.

42. The Court held that even though the letter was sent out without authority, the contents of the letter were not untrue, apart from the employee stating her salary to be lower than it really was. It was clearly not the employee's intent to deceive any one. However, whether such conduct would undermine the trust and confidence inherent in the relationship is only a question the bank can answer. The then President of the Court of Appeal, the Honourable Dame Anita Allen, P. stated:

“25. But is it conduct which was such as to undermine the trust and confidence essential to the contractual relationship between the Appellant and the Respondent?”

26. To determine this, I suggest that the conduct must be considered in light of the circumstances, such as the nature of the business of the Respondent, and the position held by the Appellant.

27. In this case, the Respondent is a bank which requires its employees to be trustworthy, and to conduct the business of the bank in a careful and prudent manner. One would not expect an employee of a bank to send out any letter without authority, much less an employee of her seniority.

28. On the other hand, this was an isolated incident in twenty-four years of service, and the question was, is it reasonable to dismiss her for that one act?

29. As this is a matter of discretion for the employer, the question for us is not whether we would have dismissed her in the circumstances, but whether dismissal was within the range of options open to a reasonable employer in the circumstances.

30. In the premises, I agree with the learned Chief Justice that it was, and I would not interfere with that decision.”

43. Counsel for the appellant submitted that this case is almost on “all fours” with the **Dorsett** case in that the parties involved were a bank and its employee, the employee was a fairly senior one, the misconduct complained of was done in breach of the rules however, there was no intent to deceive. The employee had no previous record of misconduct and the circumstances unfolding at the time may have warranted the employee's act. However, the failure of the employee to advise the Bank of her act

constituted dishonesty for which the Bank lost trust and confidence in the employee. In such an instance, he submitted, the summary dismissal was warranted and the ratio decidendi in the **Dorsett** case should have been followed in this matter by the learned Vice President.

44. It is of interest that Mr. Ferguson, counsel for the respondent, in his written submissions made no effort to defend the Vice President's decision, save to contend that the ability to set aside the Tribunal's finding of fact in this case is only applicable if there was no evidence to support the Vice President's finding. For this proposition he relied on the well-known decision in **Bahamas Princess Resort & Casino vs Richard John Wilson, Keith John Campbell, Kathrine Faulkner, and Nigel John Dickenson**, SCCivApp. No. 2 of 2001 Osadebay JA said, on page 4 beginning from lines 4 to 15:

“This Court has stated in a number of decisions that appeals from by the Industrial Relations Act, Chapter 296, to questions of Law only (sic). We must loyally accept the findings of fact as presented and resist the strong temptation to treat what are, in truth, findings of fact as holdings of law or mixed findings of fact and law. We recognize that Parliament has constituted the Industrial Tribunal the only tribunal of fact and its conclusions of fact must be accepted unless it is apparent that on the evidence, no reasonable tribunal could have reached them. Such is not the case in this matter.”

45. In my view, the claim before the Tribunal was clearly a claim for wrongful dismissal and the appellant was relying on its right to summarily dismiss the respondent for breaches of her employment contract. The Vice President's specific finding which was relevant to the issue was that *“whether the respondent genuinely believed the Applicant was guilty of the alleged misconduct, was not established.”* This was clearly a reference to section 33 of the Employment Act which provides as follows:-

“33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.”

46. There was before the Tribunal clear evidence of a full investigation by the appellant in compliance with section 33 of the Act. The evidence indicated that Mrs. Brown made enquiries and a report was made to the Human Resources Department. Prior to the report being published to Human Resources, Corporate Security would have interviewed the respondent and Ms. Baly as a part of their process. Based on the report received Human Resources then arranged for a hearing to take place wherein the respondent was given the opportunity to be heard. After that committee reported and made findings adverse to the

respondent she was afforded a right of appeal to the Appeals Committee. It is clear, therefore, that in compliance with the rules of natural justice, the respondent was given sufficient opportunities to answer the allegations made against her.

47. In these circumstances I was unable to discern the basis on which the Vice President concluded that the appellant did not behave in a manner which any reasonable employer would have behaved in light of the circumstances of the respondent's work history, tenure, health issues, marital issues and financial constraints as a result of the mortgage deductions and marital issues. That determination was in my view unreasonable and not supported by the evidence. The fact of the matter was that the respondent did not conduct herself in a manner consistent with the senior position which she held with the bank. She deviated from well-established protocols of the bank and offered no real satisfactory explanation for her conduct and even more egregious is that fact that she sought to justify that conduct. In those circumstances the appellant was fully entitled to lose trust and confidence in her as an employee. I did not share the Tribunal's view that the respondent's conduct or perceived gross misconduct was not so grave as to warrant summary dismissal in the circumstance.
48. The matters raised by the learned Vice President as to the respondent's marital and financial issues were matters that the appellant could have taken into consideration as mitigating factors in determining whether to terminate the respondent. However, due to the clear breaches of banking policies and the apparent dishonesty displayed by the respondent they clearly had no obligation to continue her employment. It is unfortunate that the employment of an employee who had given valuable service would end in such a manner and I sympathize with her predicament which appears to have its genesis in her marital problems. However, the Bank in my view could not be expected to turn a blind eye to the choices which she made to breach banking procedures without any reasonable explanation for doing so.
49. In reviewing the Tribunal's decision it was clear that the Vice-President's decision erroneously conflated the principles of wrongful dismissal and unfair dismissal. The sole question for the Vice-President's determination was whether the actions and conduct of the respondent were such that the Bank was entitled to summarily dismiss her and treat her as having committed a fundamental breach of her contract of employment or as having acted in a manner repugnant to the fundamental interests of the Bank.
50. The respondent may have placed herself in a better position if she had acknowledged that she had committed the breaches and explained to her employers that her conduct was not consistent with her character but driven by her circumstances i.e. her illness, and her marital and financial issues. However, in my view in seeking to justify what was clearly serious misconduct and not displaying any remorse for her conduct she only solidified the view formed by the appellant that she could not be trusted.

DISPOSITION

51. In these circumstances the appellant was clearly entitled to summarily dismiss the respondent who they found to have breached its internal policies and acted in a manner repugnant to their fundamental interests. We were therefore unable to sustain the Vice President's decision in this matter and ordered that the appeal be allowed and the decision of the Tribunal granting an award for wrongful dismissal be set aside.

The Honourable Mr. Justice Evans, JA (Actg.)

52. I agree.

The Honourable Mr. Justice Isaacs, JA

53. I also agree.

The Honourable Ms. Justice Crane-Scott, JA