COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
IndTribApp. No. 33 of 2021

B E T W E E N

ITAU BANK & TRUST BAHAMAS LIMITED
Appellant

AND

AVIS MUNROE
Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Ms. Michela Barnett-Ellis, Counsel for the Appellant**

Ms. Rionda Godet, Counsel for the Respondent

DATES: **18 October 2021; 22 November 2021; 8 December 2021; 11 March 2022**

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Industrial Tribunal appeal – Unfair dismissal – Wrongful dismissal – Substantial merits of the case - Section 64 of the Industrial Relations Act – Sections 31, 32, 33, 34, and 35 of the Employment Act

The respondent was employed with the appellant from 31 October 2014 until 4 November 2016 when she was summarily terminated for committing a material breach of the Bank's policies. The material breach was that the respondent sent a work-related email to her personal Yahoo email account. The appellant submits that the email contained confidential client information; the respondent submits that it did not, and she had no ill intent; but rather, the email was sent so that she could work from home having regard to her substantial workload.

The offending email was flagged by the appellant's system and brought to the attention of management. As a result, the respondent was advised that the appellant's staff would require access to her personal laptop, which was at her home, to delete the email and any other of the appellant's information. A letter was prepared to this effect. The letter stated that, inter alia, "In order to avoid any adverse consequences…by countersigning this letter you consent to…" the appellant's employees, searching your personal computer, in your presence. The respondent signed the letter consenting to the search. While at her home, the email was found on the respondent's personal laptop and deleted.

On these facts the Tribunal determined that the respondent's termination was not wrongful as it was satisfied that the appellant was justified in its belief that the respondent committed the impugned conduct. However, the Tribunal found that the respondent's dismissal was unfair because the use of the words "In order to avoid any adverse consequences" induced the respondent to consent and meant that by so consenting adverse consequences, inclusive of termination, would not follow. The Tribunal awarded $57,949.00 in damages for unfair dismissal.

The appellant now appeals the Tribunal's decision. The respondent filed a Respondent's Notice seeking to upholding the Tribunal's finding that the dismissal was unfair and asking this Court to find that the dismissal was also wrongful.

The issue for this Court's determination is whether the Tribunal was correct in finding that the respondent's dismissal was not wrongful but was unfair.

Held: appeal allowed. The finding of unfair dismissal by the Tribunal is quashed and the award is set aside. The Respondent's Notice is dismissed. No order as to costs.

By sending the email containing the appellant's clients' information over an unsecure platform the respondent put the information in jeopardy of being made public. This constituted a breach of the terms contained in her employee Handbook. In the circumstances, the Tribunal's finding that the respondent's dismissal was not wrongful cannot be faulted.

The Tribunal's finding that the respondent's dismissal was unfair cannot be sustained as there was nothing in the consent letter which could reasonably be interpreted as the appellant having held out to the respondent a promise or inducement that she would not have been dismissed if she consented to the search of her personal laptop. The finding of unfair dismissal on this basis is unreasonable.

A v. B [2003] IRLR 405 mentioned
Anya M. Dorsett v Pictet Bank & Trust Limited SCCivApp. & CAIS No. 113 of 2011 considered
Bancroft Thompson v Lyford Cay School Civil Appeal No. 95 of 2005 considered
Cherelle Cartwright v U.S. Airways SCCivApp No. 130 of 2015 considered
Sillifant v. Powell Duffryn Timber Ltd [1983] IRLR 91 applied

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JUDGMENT

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant seeks an order setting aside Vice President Simone Fitzcharles' ("the VP") finding of unfair dismissal and her award of damages to the respondent. The appellant asks also, that we dismiss the respondent's Originating Application.

Brief Background

2. The respondent was employed with the appellant as a Fiduciary Billing Officer from 31 October 2014 until her dismissal on 4 November 2016. The events leading up to her dismissal were that on 1 November 2016, the respondent forwarded confidential client information to her personal email address without first obtaining authorisation to do so. This was contrary to the appellant's policies and procedures.

3. The appellant confronted the respondent about the matter on 4 November 2016; and the respondent admitted to sending the email without the requisite authorisation; but denied that the email contained confidential information. Nevertheless, she apologised for her actions.

4. The respondent countersigned a letter prepared by the appellant's staff that authorised employees of the appellant to access and go through her personal computer in her presence; and to delete any information from her personal email regarding the appellant or its clients. The consent letter was in the following terms:

> **"Dear Avis,**
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> **It has come to our attention that confidential information of Itau Bank and Trust Bahamas Ltd. and/or Itau Bank & Trust Cayman Ltd. ("Itau") and their clients was sent to your personal e-mail address.**
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> **In order to avoid any adverse consequences of such action, by countersigning this letter you consent to authorized employee(s) of Itau to accompany you to your residence, go through your personal computer and, in your presence, delete any and all information from your personal e-mail and/or personal files pertaining to Itau and/or any of its affiliates and clients.**
>
> **You further confirm that the above referenced information has not been used for any purposes other than work related activities, and that they have not been disseminated to any third parties."**

5. Two of the appellant's employees, Mr. Daniel Amorim and Mrs. Cheryl Fox accompanied the respondent to her home and examined the respondent's laptop in her presence. They confirmed that the respondent had forwarded the flagged email to her personal mail.

6. On their return to the appellant's offices later that same day, the respondent was notified that her employment with the appellant was terminated due to her material breach of the appellant's policies and procedures. The termination letter read as follows:

> **"Dear Mrs. Munroe;**
>
> **Re: Termination of Employment for breach of Bank's policies and procedures**
>
> **This letter represents formal notice that your employment with Itau Bank & Trust Bahamas Ltd ("the Bank") is hereby terminated with cause effective 4th November 2016 (Dismissal date). We refer to our meeting on Friday 4th November, 2016 in which you were advised of your dismissal by reason of your commission of a material breach of the Bank's policies that you acknowledged and apologized for.**
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> **In the circumstances, the Bank has determined that your conduct amounted to a fundamental breach when you forwarded sensitive client information to your personal e-mail address without the required authorization on Tuesday, 1st November, 2016. As a result, you have specifically breached the Bank's Confidentiality agreement, Code of Conduct, Corporate Information Security Policy and Electronics Communication Security policy.**
>
> **Your salary up to the Dismissal date will be deposited to your account as regular on 10 November 2016 as well as any accrued but unused vacation time. All other benefit entitlements or privileges shall cease effective the Dismissal date. As for your pension proceeds, you will be notified when the disbursement cheque will be ready for collection."**

7. On 28 September 2018, the respondent filed an Originating Application alleging that she had been wrongfully and unfairly terminated by the appellant.

8. On 29 January 2021, the VP ruled that the respondent's termination had not been wrongful, but it was unfair. She awarded the respondent $57,949.00 as damages.

9. On 12 March 2021, the appellant filed an appeal against the VP's finding of unfair dismissal, setting out the following grounds:

"Errors associated with the Learned Vice President's findings relating to the Authorisation Letter (referred to in the Decision as "the consent letter")

1. The Learned Vice President erred in law and in fact in concluding at paragraph 48 of her Decision that a part of the contents of the authorisation letter, dated 4th November, 2016, alleged that the Respondent had sent confidential information to her personal email address. The authorisation letter did not accuse the Respondent, either directly or indirectly, of sending confidential information to her personal email address. The letter only went as far stating that such information "was sent" to the Respondent's email.

2. The Learned Vice President erred in law and in fact in concluding at paragraph 48 of her Decision that by signing the authorisation letter, the Respondent acknowledged and accepted that she sent confidential information to her personal email address.

3. The Learned Vice President erred in law and in fact in concluding at paragraph 51 of her Decision that the Appellant represented to the Respondent, in the authorisation letter, that the Respondent would not suffer any adverse consequences for her actions. The letter did not specify that the Respondent herself would suffer adverse consequences nor did the Respondent present any evidence to support such a conclusion.

4. The Learned Vice President erred in law and in fact in concluding at paragraph 52 of her Decision that the Appellant suggested at Trial via its witnesses that the adverse consequences referred to in the authorisation letter were consequences to the customers of the Appellant or related to the information being further transmitted and there being a further data breach which could harm the Appellant and its customers. The Appellant called three witnesses to give evidence on its behalf, namely, Daniel Amorim, Ranieh Rounce and Cheryl Fox. None of those witnesses suggested, either by their viva voce evidence or their witness statements, that the reference made to adverse consequences in the authorisation letter was in respect of adverse consequences to be suffered by customers of the Appellant. The Appellant's witnesses did affirm under

cross-examination, however, that the reference to adverse consequences was in respect of the Appellant avoiding liability for invading the Respondent's personal property (i.e. laptop) without her consent.

5. The Learned Vice President erred in law and in fact in concluding at paragraph 54 of her Decision that the Appellant, by the authorisation letter, sought a concession from the Respondent, such concession being to access her laptop in exchange for the waiving of adverse consequences. In so concluding, the Learned Vice President did not consider properly or at all the Appellant's evidence that the authorisation letter was prepared as a mere formality to evidence the Respondent's permission for the search to be conducted.

Errors associated with the Learned Vice President's finding of unfair dismissal

6. The Learned Vice President erred in law in concluding at paragraph 65 of her Decision that when the Respondent agreed to the terms of the authorisation letter the Appellant waived its rights to terminate the employment of the Respondent as an adverse consequence to her actions. She further erred in concluding at paragraph 65 of her Decision that termination of employment as an adverse consequence to the Respondent ceased to be within the range of reasonable responses open to the Appellant.

7. The Learned Vice-President erred in law by finding at paragraph 67 of her Decision that the dismissal of the Respondent was unfair and that she is entitled to an award of damages calculated on the basis of sections 46 to 48 of the Employment Act.

Errors associated with the Learned Vice President's award of damages on her finding of unfair dismissal

8. The Learned Vice-President erred in law and in fact in awarding the Respondent, at paragraph 71 of her Decision, a Compensatory Award in the sum of $53,333.00, representing 8 months' basic pay. The Learned Vice President previously acknowledged at paragraph 69 of her Decision that there was no documentation before the Tribunal to support when the

Respondent secured alternative employment following her dismissal.

9. The Learned Vice-President erred in law by failing to consider or properly consider that since the dismissal was caused or contributed to by the actions of the Respondent, the amount of the Compensatory Award ought to have been reduced by such proportion as the Learned Vice President considered just and equitable in accordance with section 47(4) of the Employment Act. It appears from the Decision that the Learned Vice President failed to properly direct herself or adhere to that provision.

10. In the alternative, when considering that the Respondent acknowledged her conduct that resulted in her dismissal, the Learned Vice President erred in law by failing to find that the Respondent was the cause of the dismissal and that no such Compensatory Award under section 47 of the Employment Act should be awarded.

11. Any other ground that the Court may deem just and equitable."

10. On 26 March 2021, the respondent filed a Respondent's Notice that sought to uphold the VP's finding of unfair dismissal and to challenge her decision that the dismissal was not wrongful. The grounds of the appeal are as follows:

> **"Errors associated with the Learned Vice President's finding of wrongful dismissal based on a proper investigation:**
>
> **1. The Learned Vice President failed to objectively and properly consider the evidence that she herself recorded at Paragraph 6 of her Decision, that at the Respondent's chronic plea for help, she was specifically told by her General Manager to do whatever was necessary to get the job done, and whether the same, to the Respondent's mind constituted approval to do what was necessary to get the job done.**
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> **2. Despite her acknowledgement at Paragraph 10 of her decision, that Mr. Daniel Amorim had deleted the emailed file without opening it, the Learned Vice President failed to properly consider or to give any consideration at all to the impact of such act on what can be construed as a proper investigation.**

3. The Learned Vice President, in accepting the act of immediate deletion of the emailed file without review, discourse or discussion, failed to properly consider the extent of prejudice levied upon the Respondent, who, in the course of a purported investigation, was denied the opportunity to show that the email was devoid of any confidential information as alleged by the Appellant.

4. The Learned Vice President failed in law and on the facts to properly consider the weight of such act against the notion of a proper investigation, and the requirement of the Appellant to have reasonable cause at the time of termination for summary dismissal. Instead, the Court permitted the Appellant to produce a random standard report culled from an unknown source two years after the fact, despite the said report never having been presented to the Respondent at the time of termination, although the same was clearly in possession of the Appellant. In so doing, the Learned Vice President failed to consider the unsafe and prejudicial nature of such 'after the fact' document, given the same was subject to manipulation and variation outside the Respondent's access and control.

5. Moreover, the Learned Vice President erred at Paragraph 48 of her decision in determining that before signing the Consent Letter, the Respondent should have opened her email in the presence of the managers, when the Vice President had already concluded that the Appellant was moving swiftly in its action, and literally did not give the Respondent any opportunity to really think about what was happening in the moment.

6. That being put altogether, the Learned Vice President failed to properly consider, or to consider at all the extent of the failed investigation that had clearly been rushed, manifesting the Appellant's desire to terminate the Respondent without the benefit of a true and proper investigation.

7. That the Learned Vice President failed in law and on the facts to properly consider that the Appellant's premature deletion of the very email, i.e., the singular strata upon which the Respondent's termination was based, constituted the intentional removal of both a pivotal and critical piece of crucial evidence, that

rendered utmost prejudice to the Respondent and breached the Appellant's requirement of a full, fair and proper investigation.

8. In so doing, the Court failed to properly consider that the Appellant's removal without review of the subject email also intentionally and ultimately removed the opportunity of a defence to the Respondent as touching her claim that that there was no confidential information transmitted and therefore, no risk to the organization. The Court failed to have any proper regard to these matters.

9. Accordingly, and in this regard, the Learned Vice President failed both in law and on the facts to properly consider that, at the time of the Respondent's termination, and based on the unsatisfactory investigation undertaken by the Appellant, there was no evidence presented to the Respondent that the content of her email was confidential, nor was there any admission to this effect.

10. That the Learned Vice President failed, as a matter of law and fact, to properly consider that in the course of a proper investigation, it was the Appellant, and not the Respondent, who had full control over the matter. If the Appellant had, in the course of a proper investigation, simply reviewed the actual document sent from the Respondent's work station, (which it had full access to do), it could have produced to the Tribunal the print out of the actual document sent by the Respondent.

11. The Learned Vice President erred in law and in fact in not finding that the Applicant had failed to provide due process for the Respondent and to be seized with the particulars of which she was accused. In the absence of anything arising in the evidence, the Learned Vice President erroneously relies on some alleged admission made by the Respondent, which finding notably, the Appellant too, takes issue. This agreed position, as regards admission, renders the finding altogether unsafe, as regards the Employer having satisfied its statutory duty pertaining to wrongful dismissal. The extent of investigation was severely wanting in the matter, and in (sic) absence of an admission or actual demonstration or presented (sic) of confidential information being

transmitted, there was no basis whereupon the Learned Vice President could have determined that the Respondent did not suffer wrongful dismissal.

12. Notably, at Paragraph 12 of the Learned Vice President's ruling, she recorded that the Applicant transmitted non-public information in the form of the Bank's entity and structure codes which are not in the public domain - but there was no assertion or admission that these documents were considered confidential. Moreover, at the time of termination, there was no such discussion or admission along this line at all.

Errors associated with the Learned Vice President's acceptance of two year old report as evidence:

13. Ultimately, at Paragraph 12 of the Ruling, it is clear that the Learned Vice President failed to give proper consideration to the fact that the file report presented was not the email upon which the Respondent worked, bringing its integrity into question, given the clear and obvious opportunities the Appellant had in both viewing and producing the actual email sent by the Respondent. The unquestioned acceptance of this document by the Tribunal left much to be desired, as the Court wrongfully concluded that the Respondent had admitted to sending confidential data, which act she had in fact denied.

14. At Paragraph 13, the learned Vice President clearly failed to properly consider that the Witness, Jacqueline Rolle gave evidence that she was simply informed that there was a possible breach of client confidentiality, however, as the same were not presented to her, she could not speak to whether or not the same did in fact contain confidential information, nor could she say that the report tendered was the same sent by the Respondent.

15. At Paragraph 15, of her Judgment, the Learned Vice President failed to give proper regard to the evidence of Mrs. Jacqueline Rolle. In her evidence, Mrs. Rolle stated that she was sent a screen shot which provided the names of the reports but not the actual content of the reports. Based on this, Mrs. Rolle gave evidence that she was asked to run 'standard form' reports. There was no evidence led that the reports she ran were the reports directly imputed to, or emailed by the Respondent.

16. If the Tribunal was satisfied that the nature of the reports allegedly transmitted by the Respondent, was known to the Appellant, then there should have been no challenge to the Appellant producing the same during its investigation or prior to the Respondent's termination. Given that the Respondent led evidence that the email she transmitted had been redacted so as to not include any sensitive information, this is the report that should have been presented, and not a report based on subject titles, as was presented.

Errors associated with the Learned Vice President's acceptance of terms stated in the Letter of Termination:

17. The Learned Vice President erred both in law and in fact in accepting the statements made in the Letter of Termination, notwithstanding that the said termination letter, although dated 4th November 2016 was presented five days later, and only after constant requests by the Respondent for the same.

18. Moreover, the letter referred to specific matters and policies that were not identified or discussed in the actual termination meeting. In so doing, the Learned Vice President failed to give any consideration to the fact that the Respondent was denied the opportunity to make any response, as part of a proper investigation exercise, to all matters the Appellant planned to hold against her.

19. The letter made specific reference that the Respondent had forwarded sensitive client information but did not speak to what this information was, and although it had full opportunity to reveal and present the same, the Appellant deleted it without checking or conferring with the Respondent as to its contents.

20. Further, by its conduct in presenting the termination letter after the fact, the Appellant denied the Respondent full opportunity to know the case against her, thereby denying the opportunity for natural justice. Ultimately, the Learned Vice President failed to consider that reliance on the basis of termination as expressed in the said letter were altogether unsafe, when the policies and matters referred to therein were never raised in the termination meeting.

Errors associated with the Learned Vice President's acceptance of Appellant's incredible witnesses

21. The Learned Vice President failed to properly consider the weightiness of the evidence led by the Appellant's witnesses who initially averred that the subject document was not deleted until they returned to office, but under cross examination, recanted, and admitted that the said email had been immediately deleted on sight at the Respondent's home.

22. Additionally, the Learned Vice President did not consider that the Appellant's witnesses all denied or made no reference to the presence of the General Manager, Jacqueline Rolle is touching the matter, but in cross examination, admitted to her presence and clear involvement in said matter.

23. The Learned Vice President also failed to give proper regard, as touching credibility, to the fact that all of the Appellant's witnesses under cross examination, finally admitted that the Respondent had received her backdated termination letter several days after the termination, notwithstanding their earlier statements that she had received the same at the point of termination.

24. The Learned Vice President failed to properly consider the evidence of Daniel Amorim, who, albeit, as Head of Information Technology Help Desk, denied knowledge of the company's data system and its capacity to restrict or limit transmission of particular (sic) 'sensitive' data.

25. The Learned Vice President erred in law and in fact in finding at Paragraph 65 of her Decision that there was any real basis for her determination that the Appellant thought, and reasonably so, that the employee transmitted sensitive, non-public, confidential information outside of its secure network to an unsecure server where there has been absolutely no evidence led of the contents of the actual document transmitted to the Respondent's external email. In so finding, the Learned Vice President also erred in her conclusion that the employer had discharged its statutory burden as pertains to wrongful dismissal. Notably, even the Appellant

accepts and agrees that the Respondent never admitted to sending confidential data.

Errors associated with the Learned Vice President's requirement of 'expert' evidence over and above that of evidence presented before the Court.

26. The learned Vice President failed to give proper regard to the fact that while the Respondent's witnesses Marie McDonald and Halson Ferguson may not have been IT experts, after working with a system on a daily basis for a number of years, it was reasonable to believe that they would have been sufficiently familiar with the Appellant's quarantine system and accordingly, they were able to speak from their respective experiences of how the system worked.

27. On the same behalf - the Learned Vice President accepted the incredible evidence of the Head of the IT Help Desk that he was not aware of the data protection system, yet his colleagues referred to him as the 'go to' for such matters.

Errors associated with the Learned Vice President's accepting the stated Policies before the Court

28. The Learned Vice President, failed in law and in fact, as regards Paragraphs 24 & 25 of her decision, to give proper regard to the fact that the Code of Conduct for The Bahamas was different from that presented to the Court, which clearly stated that it was for the Miami USA office, which, in any event, by its date, was subsequent to the Respondent's termination, rendering the same unsafe for reliance.

29. As regards Paragraph 26, the Learned Vice President failed to give any proper consideration to the fact that even the Appellant's own witnesses agreed that it was unlikely that a handbook would have been circulated with the clear statement of "Error" within the margin. The Court also failed to have proper regard that where the statement "Error" appeared was in the same section that dealt with forwarding emails. The Respondent gave evidence that the provision did not exist during her tenure, but rather, emerged after the fact. Moreover, as was led in the evidence, other employees had sent

sensitive or confidential data to external emails, but were not terminated, indicating inconsistency of application. A fortiorari, the Learned Vice President failed to consider that the Appellant's witnesses all agreed that the Respondent had no mal intentions in sending her work to her home email for completion and were satisfied that the same had not been sent elsewhere.

30. The Learned Vice President failed to give proper consideration to the evidence of the Appellant's witnesses that they were satisfied that the Respondent had sent confidential information, when they deleted the email without review and never once checked her work station to ascertain exactly what had been sent. Instead, the (sic) referred to a file on in the system and made the presumption that the particular document was the one transmitted. There was no logical or reasonable connection or sequence between the document transmitted and an open file document located more than two years after the fact. The Learned Vice President overlooked the fact that the Appellant of its own volition failed to have proper regard to the specific emails that could have made clear whether confidential information had been dispatched in the Respondent's email before, during and at the time of termination.

Errors associated with the Letter of Consent aka Letter of Authorization

31. The Learned Vice President erred in law and in fact in determining at paragraph 48 of her Decision that the Respondent, in signing the Letter of Consent permitting the Appellant access to her personal laptop constituted the Respondent's agreement and acceptance of its contents, to wit that she had transmitted confidential data, as stated in the first sentence thereof. This was clearly wrong as the Respondent's position, from start to finish was that she had sent no confidential information.

32. The Learned Vice President failed to give proper consideration to the fact that any employee, presented with the promise of avoiding 'adverse consequences' if they cooperated, would give such consent, based on that promise. In light of the Appellant's requirement that the Respondent also confirm that the information sent, had not been used for any purposes other than work related

activities or that they had not been disseminated to third parties demonstrates that they were making a direct statement that the Respondent had transmitted confidential information to her personal email.

33. The Learned Vice President failed to properly consider that if the Appellant had sufficient information upon which to base this, then it ought to have presented it to the Respondent, as part of a proper investigation, so that she could have given proper response thereto. The Respondent knew that she had not in fact transmitted any confidential information as alleged, and fully expected that she would have had an opportunity to demonstrate this. The Learned Vice President failed to properly consider the impact of prejudice suffered upon the Respondent when this opportunity was lost by the Appellant's intentional and premature deletion of the subject email without review or discussion.

34. The Learned Vice President clearly erred in her determination in Paragraph 48 that the Respondent admitted to sending confidential information on the mere signing of a Consent, which was construed as conferring an assurance that she would not be terminated, if any such confidential information had indeed been located.

35. The Learned Vice President also failed miserably in determining any adequate or proper investigation could be had when the main evidence of presumed guilt is wantonly and intentionally destroyed. This act alone breached the semblance of any meaningful or proper investigation.

36. As touching the notion of ample or proper investigation, the Learned Vice President, in paragraph 48 of her judgment, failed to give any proper consideration to the fact that none of the Appellant's witnesses could say that they saw the actual content of the email the Respondent had transmitted, nor did they investigate the sent box of her work station to ascertain what was actually transmitted in that email - i.e. - so as to determine whether the same had been blocked or launched with encryption by reason of its sophisticated data protection system. This alone contradicts the notion of an adequate investigation.

37. The Learned Vice President failed to reasonably consider the Appellant's intentional deletion of the subject email without review constituted a sabotage of the evidence the Respondent would have needed to prove the nature of the item transmitted.

38. The Learned Vice President erred in law and in fact in determining at paragraph 49 of her Judgement that during the investigation, the Respondent admitted to sending account codes, whereby the Appellant was able to form an honest and reasonable belief that non-public and confidential information as alleged, had been sent outside of their secure area of operation and without permission. This discussion never took place and the Appellant never indicated to the Respondent what it thought she had actually transmitted.

The Court of Appeal is asked to uphold the finding of Unfair Dismissal on the basis that:

39. The terms of the Letter of Consent were clearly explained to and reviewed by the Respondent, and thereupon she verily believed that she would not suffer adverse consequences for her actions. Reasonably, having regard to the contra proferentem rule, she naturally would have looked at the matter from a point of advantage, as was open to her, such that, she was led to believe that if she cooperated, she would not suffer adverse consequences. Any consequence to the Bank was not the foremost interest in that moment, but the Respondent's security of tenure, as she led in evidence. On a reasonable construction of the letter, given the circumstances, the most reasonable conclusion was that the Letter was intended and construed for the Respondent to believe that she would not suffer adverse consequences nor did the Appellant suggest otherwise.

40. There was evidence led of several other employees who transmitted confidential data to external emails, including the Human Resources Manager, but they were not terminated. The same purported policies that would have applied to them would have applied to the Respondent, yet she, despite the Appellant's stated belief that her intentions were good, was terminated.

41. Indeed, in addition to breaching the terms of its letter of Consent, the Appellant's inconsistency of application of disciplinary action rendered the termination unfair.

42. The Learned Vice President erred in law and in fact in concluding at paragraph 53 of her Judgement that there was evidence the Respondent's officials had seen the contents of the email and reports before the consent letter was presented to the Applicant to sign, so that the Appellant was aware of what the Respondent had done before the Letter of Consent was presented for signature. If this was so, then it was inexcusable for the Learned Vice President to have not made a finding of wrongful or unfair dismissal, as the Appellant produced nothing to the Respondent, as touching its claim, whereupon she was terminated without an opportunity to challenge her accusers or the subject matter considered against her.

43. The Learned Vice President erred on the facts in considering that the Appellant had 'seen the contents of the email' before the consent letter was presented, or at all. In fact, on the evidence, the Appellant never saw the contents of the email at all, because it was deleted, without review, and the Appellant never referred to the Applicant's own computer systems for many years after the fact, which rendered their purported evidence unsafe. The onus was not on the Applicant to show forth the purported breach, but on the Respondent to present what damning evidence it had to the Respondent, so that she would have had the opportunity for response. Moreover, the evidence points to a standard report that General Manager Mrs. Jacqueline Rolle had been asked to print up. Mrs. Rolle never said that this report came from the email of the Respondent.

44. While the Learned Vice President erred in determining the Respondent's signature to the Letter of Consent to be anything more than a mere formality to evidence the Respondent's permission for the search to be conducted on the promise of non adverse consequences, her conclusion as to the reliance of the Respondent on the terms thereof was correct. Given that the Appellant was satisfied the Respondent had no mal-intent, the Letter of Consent represented a promise and assurance that in exchange for her cooperation in allowing access to her computer, she would not suffer adverse consequences,

namely termination. For them to permit the Respondent to act to her detriment in this regard, was most certainly unfair.

45. The learned Vice President was entitled to find, as she did, at Paragraph 54 of her Decision, that the letter, as drafted by the Appellant's attorneys did not specify what was in the scope of any adverse consequences, nor did it delimit the application of that phrase to consequences which could be suffered only by the Bank and its customers.

46. Given this, and the fact that the Bank insisted on immediate compliance, the Learned Vice President was entitled to determine that the words used in the Letter of Consent were not to be interpreted in a vacuum, but interpreted by reference to what a reasonable person would have understood by the provision.

47. In all premises thereof, the Learned Vice President was correct to find that the Appellant's termination of the Respondent given the terms of the Consent Letter, was (sic) within the range of reasonable responses open to the employer. As such, the Vice President's finding at Paragraph 67 of her Decision that the dismissal of the Respondent was unfair and that she is entitled to an award of damages calculated on the basis of sections 46 to 48 of the Employment Act is apt and sound.

48. At paragraph 71 of her Decision, the Learned Vice-President was conservative in awarding the Respondent a Compensatory Award -in the sum of $53,333.00, representing 8 months' basic pay. The Learned Vice President previously acknowledged at paragraph 69 of her Decision that there was no documentation before the Tribunal to support when the Respondent secured alternative employment following her dismissal.

49. That there was no need for the Learned Vice-President to consider the extent to which the Respondent had contributed to her termination. The Tribunal heard ad nauseum the uncontroverted and uncontradicted evidence that the Respondent was in need of, and in fact, had asked for help, but had received none, beyond being told by the General Manager, to do whatever it took to get the job done. Moreover, the clear evidence was that it

was known and accepted that there was no malice afoot, and the Respondent was thinking only of fulfilling the mandates of her job. Instead of reward, she suffered industrial execution. The Learned Vice President was well within the realm of reason to not consider whether any deduction should have ensued against the Respondent.

50. The Learned Vice President however, did err in her suggestion that because the Respondent did not provide any documentary evidence of when she secured employment, that it would not permit same. The fact is, on the evidence, the Respondent gave evidence that she was unemployed from November 4th 2016 to May 2018 and there was no variance, objection of dispute concerning this. Therefore, any evidence led without contradiction, challenge or dispute, constitutes sound evidence accepted by the parties which the Honourable Tribunal could have relied upon as fact. Therefore, the Learned Vice President erred in law in not extending lost wages to the Applicant for the period of time unemployed.

51. Moreover, the Learned Vice President erred in fact and law to not consider the receipts submitted in the sum of $11,112.00 confirming out of pocket expenses undertaken for medical care, when, by reason of involuntary dismissal, she was no longer covered for medical insurance."

The Hearing

11. The respondent submitted a witness statement in the court below filed on 8 April 2019 which sets out her employment history with the appellant, her duties and the difficulties she encountered while trying to maintain balance between her work and personal life. I do not delve into the specifics of her difficulty in keeping up with her workload nor into the complaints she makes about not having VPN access to enable her to work from home. However, I do set out the following paragraphs:

> **"10. Between the 27th October - 1st November 2016, in addition to managing the other projects referred to herein, I was working late on a Registry Reconciliation file which contained information from The Bahamas and Cayman Registries that I needed to reconcile for billing purposes. The Fiduciary Database System has an "All Structures Report" which lists all the companies in the**

system, the Registry Company Number and the Structure/Entity's Company Number. This file was used for the purposes of reconciling the registry outstanding fees to Itau's fees to be billed, only the first few columns are this report was used and all other information is deleted.

11. On or about the 1st November, 2016, I was once again under a lot of stress and pressure to meet the deadlines of the respective projects that were going on simultaneously, and not being able to work beyond 9 pm to get as much done as possible, I forwarded to my home email address the reconciliation task that I was working on. It was my intent to complete as much of the reconciliation as I could have from home, so that I would have been that closer to completion thereof. In truth, because I was so tired and not feeling well, when I got home, I did not even open the document that I had been working on.

12) On Friday November 4, 2016, I attended to my work as usual, and around 12 noon when I was about to take lunch to pick up my son from Tambearly School, Mrs. Rolle asked me to meet with her as she had a matter to discuss briefly with me before I left for lunch. When I entered the room I saw that my Operations manager, Daniel Amorim was also there and Mrs. Rolle called the Compliance Officer, Cheryl Fox on the phone and asked her to join us. I noted that Mrs. Rolle had Bank Itau letter head paper turned down on the meeting room desk.

13) When Mrs. Fox joined us, Mrs. Rolle asked if I had sent an email to my personal email address. When I said yes, she then advised that this was a violation of the Bank Itau's information policy because it contained client information. When she asked why I sent the information to my email, I reminded her that because of the many projects thrust upon me in addition to the day to day demands, and the limited access I had to complete the reconciliation report's deadline, I sent the file to my personal email to complete it at home.

14) I told Mrs. Rolle that as far as I recalled, the information that I sent did not have client specific data because in the course of my work, I would delete the fields that were not required. I reiterated that I was only trying to complete the report before the stated deadline and that

in any event, as far as I was aware based on my knowledge and experience, any confidential information sent outside of the company would have been quarantined and rendered undeliverable, unless or until it was released by Risk and/or Compliance Department.

15) I further explained that the file was never opened, nor had it been forwarded elsewhere. I reminded Mr. Amorim of my conversation even with him concerning my work and he agreed in the meeting that I did have a lot going on. Mrs. Rolle requested that I have the Compliance Officer Mrs. Fox and Mr. Amorim accompany me to my home to delete the file from my personal computer. I explained to them that I had a lap top computer at home which I would have brought back to the office, because I really needed to pick up my son. My superiors insisted that I make other arrangements for my son because the issue at hand was very serious. I had no other option but to call my son's school to let them know that I would be late in collecting him. I was asked to sign a Bank Itau Protocol marked AM2 which shall be relied upon during the trial hereof for its true content and import thereof. This Protocol that I signed said that if I cooperated in the home visitation and review/retrieval of any documents, I would avoid any adverse consequence. This was communicated to me verbally and in writing.

16) Mr. Amorim asked to see my cell phone to check and retrieve any company documents that may have been sent there and found none because my cell phone does not have the space capacity for that sort of document. I left the premises and went home with Ms. Fox and Mr. Amorim following behind me. Once at my home, I retrieved my lap top and logged into my yahoo mail account and gave the computer to Mr. Amorim for his review. He found the email and without even opening it to determine what was in it, he deleted it and thereafter called Mr. Edsom Sossai (the head of Bank Itau Miami Information Technology Department for the Miami office). I asked Mr. Amorim for my laptop once he deleted the file. He told me that he was not done and needed to now go and delete the file from the yahoo server. So, I left my lap top computer and my tablet in the care of Mr. Amorim and Ms. Fox because I had to go and pick up my son from school.

17) When I returned back to office shortly after 3 pm, I called Mrs. Rolle who advised that they were not quite finished with my computer and will let me know when they were completed. I thought this was strange because Mr. Amorim had deleted the subject file in my presence and had called the Miami Office to confirm his action. They did not need my laptop for anything else, as everything left thereon was private and personal to me.

18) Nonetheless, about 10 minutes later, I was called back into the meeting room with Mrs. Rolle and Mr. Amorim. Mrs. Rolle advised me that the company considered the email transmission to have been a serious breach and that as a result, I was to be terminated immediately. I was further advised that because a Human Resources representative was not available, I would have to come back on Monday so that the paper work could be completed.

19) I was stunned to find that I was being terminated because I know I had transmitted no confidential information, it would have been only for work purposes and nothing else and if by chance the file had client confidential information, the quarantine system would have blocked it. I am aware that there is a Confidentiality Clause in my contract (Clause 18) but it simply required that I did not divulge or disclose any confidential commercial or bank related information to third parties, which I did not do."

12. I specifically refer to paragraph 25 which states:

"25) In any event, the report I sent myself is, <u>for the most part, within the public domain, but for the account numbers which were needed for billing purposes, so that I could determine and distinguish what was truly outstanding to the Bahamas and Cayman Registries.</u>" [Emphasis added]

13. I also mention paragraphs 39 through 41:

"39) As a result of my wrongful and unfair termination, I have suffered significantly. As a breast cancer survivor, insurance coverage is critical and loss of employment resulted in the termination of my private health insurance and lost coverage. As a result, I lost years of premiums and

was not able to see my private doctors since November 2016 to May 2018, when I was finally able to secure meaningful employment. I spent over $11,112.00 in out of pocket expenses. Copies of the receipts are hereto attached and marked collectively AM4. Itau's insurance provider Atlantic Medical did not provide full coverage for anything cancer related, so I had to keep my individual insurance while I was employed with Itau. While I was employed, I was able to cover my private health insurance premiums. After I was terminated, I simply couldn't afford to pay.

40) I have lost significant wages. I was unable to find suitable employment for over 17 months, and even then, at a far lower rate to which I was accustomed. I claim the sum of $113,333.33 by way of lost wages between the date of termination and the date I was finally able to secure full time employment.

41) I have also lost National Insurance Benefits that should have been paid out to me when I was off sick. The Human Resource Management (sic), Ranieh Rounce informed me that I had exceeded my allowed sick time and would have to get my salary cut or vacation days taken. I elected to lose the vacation days because I needed funds. Ms. Rounce refused to sign my NIB form even after I spoke with someone from National Insurance and they informed me via email that I was entitled to the NIB benefit. A copy of that communication is hereto attached and marked AM5. As a result, I lost 5 vacation days therefore I seek compensation from the company for 5 days in the sum of $1,666.67."

14. Her evidence in the hearing essentially mirrored her witness statement. I mention the following passage from the transcript:

"Q. Notwithstanding your disagreement, wouldn't you agree the ASR was a customer list and contained customer information. That it was a report generated by Itau, the Bank's property? Isn't that confidential information?

A. Not the version I worked on, no.

Q. The redacted version is still Itau generated.

A . It's an Itau document.

Q. Wouldn't that mean it's company property?

A. But not confidential.

Q. By any previous or this definition, it contains non-public (sic) such as file numbers.

A. The report contained that.

Q. Therefore it constituted confidential information and is Itau's property.

A. Correct."

15. Mrs. Jacqueline Rolle was an employee of the appellant and was intimately involved in the matter under appeal. She had functioned as General Manager of Fiduciary, Director of Bank & Trust Bahamas Limited and Senior Official 1. Mrs. Rolle spoke to the weighty matters that occupied the respondent's time at work and she spoke to the events surrounding her involvement with the event that triggered the respondent's dismissal. Of particular importance was Mrs. Rolle's evidence about the reports that were allegedly emailed by the respondent to her personal computer comprising, in her opinion, confidential material; and that what I will refer to as the "consent letter" signed by the respondent and allowing the appellant's personnel to have access to her computer at home, was created to enable the appellant to gain access to the impugned email quickly. At paragraphs 9 through 15 of her witness statement filed on 8 April 2019 the following appears:

"9) The reports as generated from Viewpoint contained among other items client names, beneficiary names, addresses, bank account information, account values, fiduciary structure names, internal reference numbers, etc. We reported to the Miami team the information contained in the standard reports as named, however, I reiterate that I did not have actual sight of the Applicant's email so I cannot say whether or not these were exactly the same reports that were sent to the Applicant's email. The management team determined that the information contained in the standard reports were confidential/client sensitive and hence violated Itau's policies. Therefore, the bank needed to immediately access the email/information on the Applicant's home computer for the purpose of deleting and erasing same.

10) The internal discussions also considered the various disciplinary actions to be taken. Such options ranged from a very strong reprimand to dismissal. Such options may have also been discussed with external counsel. I do not recall whether the discussions with external counsel occurred the day before or on the day of the Applicant's

dismissal. Primary focus at that time was to access her personal computer and delete/erase the information from it.

11) The following morning, 4th November 2016, the management team discussed the approach to take and to agree "speaking points" for our impending discussions with the Applicant as it was anticipated that she may not readily give access to her personal computer and that such discussion would be difficult based on her strong personality and previous interaction with HR/management on other personal matters. Thereafter, I, along with the Operations Manager, Daniel Amorim and Compliance Officer, Cheryl Fox, met with the Applicant just prior to her leaving for lunch break. She was informed that compliance was alerted to an email she sent to her personal email which contained sensitive client information. We advised that the matter had been reported in accordance with the Bank's protocol.

12) The Applicant explained that she had forwarded the reports to her personal email to work on the monthly billings later that evening at home so that she could meet the internal billings deadline. She said that she was not able to work on the billings that evening as intended and up to the time of our discussion with her she had not opened the email she had sent to herself on her home computer. We stated that we needed to immediately go to her house to delete the information from her personal computer. She responded that she was about to begin her lunch hour and needed to collect her son from school. She offered to bring her personal laptop to the office upon her return from her lunch break. We insisted that we needed to retrieve the laptop right away.

13) We informed her that the forwarding of such report/client sensitive information was a violation of the bank's policy and Bahamian client confidentiality rules. We further advised that this was a very serious matter and that it would be more favourable for her if she cooperated in giving the bank access to her personal laptop to delete the email and information. A Protocol document with wording to this effect had been prepared and forwarded to me earlier that morning which I was to take to the meeting in the event the Applicant had agreed to allow the Bank access as requested. I am not sure who

provided the wording of the Protocol, but I believe this would have come from or would have been vetted by the company's attorneys. Once the Applicant acceded to our request, I presented this document to her to sign, indicating her cooperation.

14) As I understood it, if the Applicant cooperated and permitted us to retrieve the information, then the matter would not have resulted in action as adverse as termination as, at that point, the bank's focus was to protect and retrieve what it considered to be sensitive information.

15) Following our meeting with the Applicant, and upon the Applicant duly signing the said Protocol, Mr. Amorim and Ms. Fox followed the Applicant to her home where the email emanating from the Applicant's work email address was deleted by Mr. Amorim. This, information was communicated to me by Mr. Amorim and Ms. Fox upon their return to the office."

16. Of some importance is Mrs. Rolle's evidence at paragraph 23 which discloses that the decision to terminate the respondent was made prior to her meeting with the local management team. Mrs. Rolle states:

"23. As before stated, by the time the Applicant returned from lunch, we had already received instructions to terminate her services. When we met with her, Mr. Amorim returned her laptop to her and we again reiterated the seriousness of the breach. She stated that on her drive to pick up her son, she reflected on the matter and reiterated that she had only sent work to her email in an effort to complete her work. She regretted having done it particularly since she did not even access the email at home and apologized for any inconvenience caused by her having transmitted the reports to her personal email address."

17. Under cross-examination, Mrs. Rolle spoke to the discussions she and other persons would have had regarding retrieval of the email; and significantly, stated that **"There was nothing definitive regarding dismissal."** That evidence is at odds with her witness statement.

18. Mr. Halson Ferguson also provided a witness statement on behalf of the respondent. His evidence tended to suggest that the appellant's computer system had the capability of identifying, containing and sanitizing confidential information that may be sent without the

proper authority. However, he was not an expert in the field and spoke only from his experience working with the appellant. It is noted that this protocol was not shared with employees generally. Hence, very little reliance, in my view, could be placed on Mr. Ferguson's evidence in this regard. The same would apply to the evidence of Dr. N Marie McDonald, another witness for the respondent.

19. Mr. Ferguson did confirm that the Code of Ethics was signed annually with the appellant and that the document acknowledges that he read and understood it; and the employee agrees to be bound by it.

20. Dr. McDonald provided the following information when she was cross-examined (p. 3, line 11 of 2nd day of hearing):

> **"Q. Dr. McDonald, turn to the Employment Contract at TAB 1 of the witness statement of Daniel Amorim. It is DA1 and look at paragraph 24. Would you agree that the terms of employment of the Bank's employees which are in the Employee Handbook are incorporated in their employment contracts?**
>
> **A. Yes**
>
> **Q. Would you agree that all employees are expected to be familiar with and abide by those terms?**
>
> **A. Yes."**

21. The appellant called a number of witnesses on its behalf to demonstrate that it was fully justified in dismissing the respondent in the manner that it did. That evidence was reasonably canvassed by the VP in her ruling which I now turn to consider; but before doing so, I highlight portions of the evidence of two of the appellant's witnesses.

22. Ms. Fox's evidence in relation to the reason for the production of the consent letter was:

> **"Q. I put to you that it was not in the intent of yourself, Mrs. Rolle or Mr. Amorim-she wanted an assurance she would not be fired.**
>
> **A. The intent was to contain the information. There was no discussion as to termination.**

Q. I put to you that in order to procure the cooperation of the Applicant you put in the inducement of avoiding adverse consequences. The Company knowingly used adverse consequences by way of assurance she would not be dismissed.

A. I disagree. The focus of the letter was to provide an indemnity for the retrieval of the information."

23. Mrs. Ranieh Rounce, Human Resource Manager with the appellant, gave a witness statement in which she stated at paragraphs 2 through 6 and 8 through 18, as follows:

"2. My duties and responsibilities as Human Resources Manager include the onboarding of all new employees with the Bank. Further, while employees are expected to read and understand all of the Bank's policies, I am also responsible for providing assistance in the event that an employee has any questions or requires further clarification regarding the Bank's policies.

3. On 31st October, 2014, I countersigned a Permanent Employment Contract ("the Contract") between the Bank and Avis Munroe ("Ms. Munroe") which facilitated Ms. Munroe's employment as a Fiduciary Billing Officer with the Bank.

4. Along with the Contract, the Bank's Employee Handbook ("the Handbook") governed the employment relationship between the Bank and Ms. Munroe. Thus, section 24 of the Contract provides as follows:

> **'Except for any provision that applies by virtue of the law, the Employer and the Employee acknowledge that his contract as read with the Employee handbook (as may be amended from time to time at the discretion of the Employer) constitutes the entire agreement between them, and that the provision (sic) within the Employee handbook are incorporated as terms of this contract.'**

5. On 1st December, 2014, Ms. Munroe commenced employment with the Bank. Prior to delving into her duties as Fiduciary Billing Officer, however, Ms. Munroe took part in the Bank's onboarding process. It is mandatory that all new employees undergo onboarding

in order to be integrated with the Bank and its culture, as well as to receive the tools and information needed to become a productive member of the team.

6. Accordingly, Ms. Munroe was provided with a copy of the Handbook as it is also a valuable reference for understanding one's responsibilities as an employee of the Bank. I have appended a copy of the Handbook hereto as Exhibit R.R.1.

...

8. Ms. Munroe also signed a Confidentiality Agreement. I refer to the third paragraph of that Agreement, which is appended hereto as Exhibit R.R.3., which provides,

> 'By signing this Agreement, you agree to receive and hold the Confidential Information in confidence and use such Confidential Information solely in connection with the tasks contemplated on your agreement with Itau. Without limiting the generality of the foregoing, you agree: (a) to protect and safeguard the Confidential Information against unauthorized use, publication or disclosure; (b) to not use any of the Confidential Information except in connection with services you may perform under this Agreement or other agreements you may have with Itau; (c) not to, directly or indirectly, in any way or form, reveal, report, publish, disclose, transfer or otherwise use any Confidential Information except as specifically authorized in accordance with this Agreement; (d) not to use any Confidential Information to unfairly compete or obtain unfair advantage against Itau Group in any commercial activity whatsoever; and (e) to comply with any other reasonable security measures requested henceforth.'

9. Additionally, Ms. Munroe was made aware that all of the Bank's policies are available on the policy portal of the Bank's intranet. Those policies include the Bank's Code of Conduct, Code of Ethics, Corporate Information and Security Policy and Electronic Communications Security Policy.

10. Some of the Bank's policies contain an acknowledgment form to evidence receipt, while other policies do not. The option to provide an acknowledgment

form is within the discretion of the Bank. In any event, all employees are expected to comply with each policy of the Bank. One violation of any of the Bank's policies could result in disciplinary action, including but not limited to termination of the employment relationship.

11. Further, as part of the onboarding process and on an annual basis, all employees are required to complete a mandatory online training course regarding Information Security. I can confirm that Ms. Munroe completed the online training course during the course of her employment with the Bank.

12. On 1st November, 2016, Ms. Munroe forwarded to her personal email a series of emails between herself and another employee of the Bank regarding a Reconciliation which she was preparing on behalf of the Bank.

13. Pursuant to the Bank's Electronic Media Policy, found at page 33 of the Handbook, all messages composed, sent, or received via email are and remain the property of the Bank. Thus, the content of all electronic communications are monitored to support operational, maintenance, auditing, security and investigative activities.

14. On 4th November, 2016, the Bank's Information Security ("IS") Team and the Chief Risk Officer ("CRO") of the Bank advised me that they discovered that Ms. Munroe had forwarded a series of emails with their attachments between herself and another employee of the Bank to her personal email. I have appended copies of those forwarded emails hereto as Exhibit R.R.4.

15. Those email messages included attached reports which contained confidential client information. The confidential information contained in those reports has been redacted by our compliance team for the purposes of these hearings, and the fields which contained the confidential information have been highlighted in yellow. Those reports were as follows:

> (1) All Structures Report — all of the structures in the Bank's ViewPoint System — appended hereto as Exhibit R.R.5;

(2) Cayman Registry Companies Listing — all structures at the Cayman Registry — appended hereto as Exhibit R.R.6;

(3) Bahamas Registry Companies Listing — all structures at The Bahamas Registry — appended hereto as Exhibit R.R.7;

(4) Closed and in the Process of Closing Report — all companies and trusts that are closed and in the process of closing — appended hereto as Exhibit R.R.8;

(5) ITAB Itau Annual Government License Fees for 2016 — government fees for companies who have an authorised share capital of less than 50,000 — appended hereto as Exhibit R.R.9;

(6) ITAB Itau Annual Government License Fees for 2916 (sic) — government fees for companies which have a share capital greater than 50,000 — appended hereto as Exhibit R.R.10;

(7) IBTC Annual Government License Fees for 2016 — government fees for companies who have various share capitals — appended hereto as Exhibit R.R.11;

(8) 2016 AGL Fee Analysis — an analysis of certain findings based on the All Structures Report — appended hereto as Exhibit R.R.12; and

(9) Client's UBO's — contained primarily in the All Structures Report.

16. Following my review of the emails and the reports provided to me by the IS Team and CRO, I immediately notified Jacqueline Rolle, General Manager at the Bank (during that time) and Cheryl Fox ("Ms. Fox"), Compliance & Money Laundering Reporting Officer at the Bank. I also notified Daniel Amorim ("Mr. Amorim"), Trust and Operations Officer at the Bank, who was Ms. Munroe's immediate supervisor. Ms. Fox and Mr. Amorim agreed to conduct a further investigation to confirm whether the discoveries by the IS Team were correct and whether there was any additional

emails or other Bank property forwarded to Ms. Munroe's personal email.

17. I subsequently countersigned a letter to Ms. Munroe advising her that it had come to the Bank's attention that confidential information of the Bank and its clients was sent to her personal email. Ms. Munroe countersigned the letter to evidence her consent to authorised employees of the Bank accompanying her to her residence, going through her personal computer and, in her presence, deleting any and all information from her personal email and or personal files pertaining to the Bank and or its affiliates and clients. I have appended a copy of that letter hereto as Exhibit R.R.6.

18. I was notified by Ms. Fox and Mr. Amorim later that day that Ms. Munroe had in fact forwarded certain emails to her personal email and that in her meeting with them she admitted to doing so. Following receipt of that information, and due to the severity of this breach, I drafted a letter addressed to Ms. Munroe to formally notify her that her employment with the Bank had been terminated with cause effective 4th November, 2016 ("termination letter"). I have appended a copy of the termination letter hereto as Exhibit R.R.7."

24. Mr. Daniel Amorim was the appellant's Trust and Operations Manager. He provided a witness statement which was filed in the court below on 9 April 2019. At paragraphs 5 through 16 he stated the following:

> **"5. On 8th June, 2016, Ms. Munroe acknowledged receipt of the Bank's Employee Handbook ("the Handbook") by a signed Employee Acknowledgment Form ("the Form"). I refer to the last paragraph of the Form, appended hereto as Exhibit D.A.2., which provides as follows:**
>
> > **'ACKNOWLEDGE RECEIPT OF POLICIES: I understand that my signature below indicates that I have read and understand the above statements and have received a copy of the Company's Handbook. I further understand that I am expected to read and understand all of the Company's policies, and if I require clarification on any policy issue, I must seek the assistance of Human Resources.'**

6. One basic tenet invariably found in all of the Bank's policies is the strict use of confidential information during the course of one's employment with the Bank and thereafter. The Bank's Code of Conduct, which is appended hereto as Exhibit D.A.3, defines confidential information at page 15 as follows:

> 'Whereas they represent legitimate competitive advantages, all inside non-public information constitute confidential information. For that very reason, they are Itau Unibanco's property.
>
> Here are some examples:
>
> - Financial information and customer information;
> - Technologies and methodologies;
> - Business plans and strategies;
> - Financial models and products;
> - Customer Lists;
> - Relevant acts or facts to which employees may have had access;
> - Technical, administrative and strategic market information;
> - Software and applications developed or in use at the Company."

7. The Code of Conduct also provides that it is absolutely essential that all employees keep confidential the customer information, facts and operations of portfolios managed by them or of portfolios managed by any of the Bank's associated entities. Further, that all employees request prior authorisation from their immediate supervisor, when it is not part of their powers thereof, to take any material containing customer information outside of the premises where they are kept.

8. On 28th October, 2016, Ms. Munroe signed an "Acknowledgment for Code of Ethics and Code of Conduct" ("Acknowledgment"). By signing the Acknowledgment, Ms. Munroe declared that she would abide by the Code of Ethics and Code of Conduct throughout the duration of her employment with the Bank or be subject to disciplinary sanctions, up to and including termination of employment. I have appended a copy of the Acknowledgment hereto as Exhibit D.A.4.

9. On 4th November, 2016, I was advised by Ranieh Rounce ("Ms. Rounce"), Human Resources Manager at the Bank, that Ms. Munroe forwarded to her personal email a series of emails between herself and another employee of the Bank regarding a Reconciliation which she was preparing on behalf of the Bank. I was further advised that those emails included as attachments thereto certain reports outlining customer information.

10. The Bank considers all electronic communications systems and all messages generated on or handled by electronic communications systems to be the property of the Bank. Therefore, pursuant to the Electronic Communications Security Policy ("ECSP"), all communications, files, documents created, transmitted or stored using company equipment are subject to monitoring and review by supervisors, the Compliance Officer and other relevant personnel of the Bank. I have appended a copy of the ECSP hereto as Exhibit D.A.5.

11. Additionally, the Bank considers those reports to be confidential information. The ECSP expressly prohibits the forwarding of such information to an employee's personal email. Thus, at page 3 of the ECSP, it provides:

> **'Individuals will not forward any company information to their personal email (Yahoo, Gmail, Hotmail etc.)'**

12. Further, in accordance with the Code of Conduct, Ms. Munroe was required to request prior authorisation from me as her immediate supervisor in order to access any material containing customer information outside of the Bank's premises.

13. The Bank does permit certain employees to access confidential information outside of the Bank's premises by way of remote access. Only employees who are given Virtual Private Network ("VPN") permission or have a VPN assignment on their employee file can do so. Ms. Munroe, as a Fiduciary Billing Officer, did not have VPN permission at any time throughout her employment relationship with the Bank. Accordingly, she was aware that she did not have the required approval to forward customer information to her personal email.

14. On 4th November, 2016, Cheryl Fox ("Ms. Fox""), Head of Risk and Compliance at the Bank, and I met with Ms. Munroe. In our meeting, Ms. Munroe explained that she forwarded those emails to herself in an effort to do additional work on the weekend. She acknowledged that her actions were in violation of the Bank's policies as she did not have VPN permission. Additionally, she apologised for her actions and took full responsibility.

15. Ms. Fox and I then travelled to Ms. Munroe's home to conduct a reasonable search of her personal laptop. Ms. Fox and I never entered Ms. Munroe's home, choosing instead to wait in our vehicle while Ms. Munroe went inside to collect her laptop. Ms. Munroe brought her laptop to us and we briefly examined the laptop before taking it back with us to the Bank for the Information Security ("IS") Team to assist us in reexamining it.

16. With the assistance of the IS Team, we discovered the series of emails which Ms. Munroe forwarded to her personal email, inclusive of the reports outlining customer information. We also determined that she had not forwarded any additional emails or other property of the Bank to her personal email. After our meeting with Ms. Munroe and our visit to her home we were satisfied that she had violated the Bank's policies as alleged. We subsequently advised Ms. Rounce of our findings following the conclusion of our investigation."

25. Mr. Amorim was cross-examined and said, inter alia:

"Q. Was there any damage done to the Bank because of this transmission?

A. No, we were able to contain the risk to the bank.

Q. With her cooperation?

A. Yes.

Q. You induced her to believe there wouldn't be any consequences.

A. I never said that.

Q. [Counsel reads Exhibit RR13]. You agree there is no evidence of the document being sent to third parties?

A. This letter was prepared by external lawyers for the Bank's protection.

Q. It was for the Bank's protection to induce her to cooperate.

A. No, for their protection to go through her files.

Q. Your letter says she would avoid adverse consequences.

A. No that was allowing the bank to go through and there would be no consequences to the Bank.

Q. She was assured she would not get fired.

A. I was present. She was not assured of that."

26. I refrain from entering further into the evidence adduced by the appellant because I hold the view that elaboration thereon serves no useful purpose since the burden of proving her case rested on the respondent. Also, I decline to do so since I am satisfied that the issues in this case fall within a narrow compass, to wit, was the VP right to find that the respondent's dismissal was not wrongful; and was she correct to find that the dismissal was unfair. As a result of my view, I will address the appellant's appeal and the respondent's notice compendiously.

The Ruling

27. The VP produced a virtually impeccable decision. She set out the evidence of the witnesses, the law and authorities relating to the dual issues of wrongful dismissal and unfair dismissal. She arrived at a number of findings among which was paragraph 50:

"50. The motive of the Applicant was not to do any harm to the Respondent or its customers, but rather to get work done. It appears from the evidence she was indeed a hard worker and had no nefarious intent. However, the Respondent demonstrated that based upon its policies and the terms and conditions of the Applicant's employment, it considered to be serious the transmission of documents owned by the Bank outside of its authorized areas by an employee, to an unsecure location (a third-party server — Yahoo), which ran the risk the information could have been hacked or otherwise accessed by third parties. It considered the Applicant could have avoided this by first obtaining authorization to send the email. This constituted Justification for disciplinary action on the part of the Respondent in accordance with the terms and conditions of the Applicant's employment and the Tribunal finds that the

Respondent discharged its statutory burden as to holding the requisite statutory belief that the Applicant committed the impugned conduct."

28. At paragraph 56 the VP found as follows:

> **"56. Having regard to the ordinary grammatical meaning of what the parties stated in the contract, the Tribunal observes that there was no restriction on "any adverse consequences." The notional reasonable person imbued with the knowledge of the parties, such as is described in the authorities, could reasonably anticipate that the transmission of the email could negatively affect, not just the Bank and its customers but the Applicant also, if the parties did not agree on the course outlined in the letter. In particular, the Respondent's and its customers' data could be in jeopardy of disclosure to third parties while remaining on the Yahoo server, Ms. Munroe could be a defendant in an action brought by the Respondent seeking the return of its data and pre-emptive relief and Ms. Munroe could be summarily dismissed for her actions and refusal to agree the return forthwith of the data. Quite reasonably, without the Bank specifying what adverse consequences it referred to in the consent letter, and instead referring to "any" (reasonably conveying 'all') adverse consequences, the phrase is capable of covering, and the Tribunal finds that it did cover, adverse consequences that could be suffered by the Applicant for sending the email, inclusive of the loss of her employment."**

29. Another finding was made at paragraph 58 where the VP said:

> **"58. The Tribunal finds that the effect of the consent letter, which promised the avoidance of any adverse consequences, sufficiently conveyed that the Applicant would avoid suffering adverse consequences if she gave consent to the Respondent. It was on that basis that her consent was given and this was understood by the Respondent acting through its General Manager in the presence of its Compliance and Money Laundering Reporting Officer and its Trust and Operations Manager."**

30. The VP traversed the evidence of the various witnesses and has formed a view of same. Where she has made certain findings of fact it is not open to the Court to interfere with such findings unless her findings were arrived at unreasonably. Osadebay, JA made the observation in an oral

judgment in **Bancroft Thompson v Lyford Cay School** Civil Appeal No. 95 of 2005, at page 3:

> **"This court is not a court of trial, unfortunately. The tribunal is vested with the exclusive jurisdiction to make decisions on fact. An appeal is only allowed on a point of law. Because of this situation, we are unable to reverse the findings of the tribunal as they stand at the moment, notwithstanding our regret that the tribunal ought perhaps to have done more than it did. In spite of legal authorities, each case depends on its own facts. The final determination of the case will depend on the facts as found by the tribunal..."**

31. He continued at page 4:

> **"On that basis, the appeal in this case will be dismissed as it is based primarily on a finding of fact by the tribunal which we are in no position to reverse, but nevertheless we express our concern."**

32. Osadebay, JA was, no doubt, cognizant of section 64(1) of the Industrial Relations Act ("the IRA") which states, inter alia:

> **"64. (1) Subject to this Act, any party to a matter before the Tribunal is entitled as of right to appeal to the Court of Appeal on any of the following grounds —**
>
> > **(d) that any finding or decision of the Tribunal in any matter is erroneous in point of law;"**

33. I do accept that a finding of unfair dismissal is a finding of law, but such a finding must be based upon a factual inquiry. This means, therefore, that the evidence adduced in the case must be supportive of such a finding. At paragraph 65 of her decision, the VP concluded:

> **"65. Applying this test of unfair dismissal, the employer thought, and reasonably so, that the employee transmitted sensitive, non-public, confidential information outside of its secure network to an unsecure server. The employer reasonably thought there was justification for the termination of the employment of the Applicant having regard to the merits. Similarly, we have seen that wrongful dismissal can be disproved where the employer has discharged its burden to show its honestly**

(sic) and reasonably (sic) believe (sic) that the employee committed the misconduct for which her employment was terminated. Having found earlier that the employer discharged the statutory burden, the Tribunal finds that the dismissal was not wrongful. However, when Ms Munroe complied with the Respondent's request that she agree the terms of the consent letter to avoid any adverse consequences, termination of employment as an adverse consequence to the Applicant, ceased to be within the range of reasonable responses open to the employer. By this agreement the employer conveyed it would not trigger adverse consequences despite the existence of justification. This made the termination of employment for that cause unfair in light of the agreement."

34. Sections 31 and 32 of the Employment Act ("the Act") state:

"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 ...

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."

35. The relevant sections of the Act pertaining to unfair dismissal include sections 34 and 35 of the Act. They provide as follows:

> **"34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer.**
>
> **35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case." [Emphasis added]**

36. The test to be applied by a tribunal to determine whether or not an employee has been unfairly dismissed is set out in section 35 of the Act where it states, **"... the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case. [Emphasis added]**

37. The Court had occasion to consider the meaning of the phrase, **"substantial merits of the case"** in **Cherelle Cartwright v U.S. Airways** SCCivApp No. 130 of 2015. The brief facts were that the appellant had an interaction with a co-worker which resulted in an internal investigation and ultimately, in her immediate termination. She filed an action against the respondent for, inter alia, unfair dismissal as she claimed that the respondent had breached the rules of natural justice and had failed to carry out an adequate investigation of the complaint made against her. She had been terminated following an incident where she approached a co-worker in a loud and offensive manner; and her employer concluded that her conduct was unprofessional.

38. She alleged that two reports had been provided by eyewitnesses to the incident, but she was not supplied with them until after her termination and just before the trial. Although this specific complaint was not addressed frontally, as Winder, J. found that, **" It could hardly be said that she was unaware of the allegations against her and not given an opportunity to meet them".** The Court agreed with his view.

39. In relation to the term "the substantial merits of the case" the Court said at paragraph 37:

> **"37. What does the phrase "the substantial merits of the case" mean? At paragraph 26 of West v Percy Community Centre UKEAT/0101/15/RN, (Transcript), a case decided on 20 January 2016, Langstaff, J, speaking for the tribunal said, inter alia:**

'[26] ...The question is whether what the employer thought had happened, in the circumstances in which the employer thought the conduct to have occurred, was or was not sufficient to justify the employer's actions so as to be held not unfair within s 98(4).'"

40. Even if there has been a procedural misstep, that is not necessarily fatal so as to lead to a finding of unfair dismissal. In **Sillifant v. Powell Duffryn Timber Ltd** [1983] IRLR 91 at 97, Browne-Wilkinson J, said:

> **"...The only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect.**
>
> **An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the Industrial Tribunal in deciding whether or not the dismissal was reasonable within s. 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair..."**

41. The appellant had a Handbook and each employee, including the respondent, was expected to be familiar with its contents and to abide by its terms. Notwithstanding the respondent's assertion that she did not transmit confidential information from her work computer to her personal computer at home via the Yahoo portal, the overwhelming evidence adduced at the hearing before the VP was that is indeed what she had done. It appears that during the course of Ms. Cheryl Fox's testimony, she brought a laptop computer which she used to open and project for the VP to see, the email along with its attachments. Thus, the VP could have seen the fields on the printed reports provided, matched the attachments to the flagged email; and was better positioned - certainly in a better position than this Court - to arrive at a conclusion as to the quality of that evidence, that is to say, to make a determination whether the attachments contained confidential information or not.

42. In **Anya M. Dorsett v Pictet Bank & Trust Limited** SCCivApp. & CAIS No. 113 of 2011, the Court, differently constituted, was faced with an appellant who had been summarily dismissed from her job as Deputy Vice President in the respondent bank where she had been employed for twenty-four years. She wanted to purchase a television from Master Technicians through a financing arrangement, but needed a letter confirming her salary. She retrieved a form letter from the bank's computer, placed the bank's stamp on it and sent it to Master Technicians. She could have obtained assistance from others working that day, but did not. Also, she failed to advise her supervisor of what she had done.

43. Some days later what she had done came to the attention of her employer. Her explanation was that she needed the letter urgently and that the issuance of a job letter was routine. She had in fact had such letters issued on her behalf before. She sued for wrongful dismissal. At first instance, Barnett, CJ (as he then was) concluded that what the appellant had done was dishonest. However, this finding was not upheld. Instead, Allen, P. relying on the test of was the employee's conduct such as to undermine the trust and confidence essential to the contractual relationship between the employer and the employee said:

> **"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 employee 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."**

44. In the same vein as the employee in **Dorsett**, the respondent was a bank employee who was aware that confidential information generated by the appellant was to be kept with strict regard to that confidentiality. She transferred the appellant's information over an unsecure platform, namely Yahoo, thereby placing her employer's information in danger of being made public. She did not have the requisite VPN access but if she wished to work from home all that was necessary for her to do was to request authorisation to do so. This she did not do. Her supervisor's statement to the effect that she should do whatever was necessary to get the job done could not be taken as permitting her to breach the terms contained in her employer's Handbook. In the premises, the finding of the VP that the respondent's dismissal was not wrongful, is correct.

45. As regards the issue of unfair dismissal, the VP arrived at a conclusion that the respondent had been unfairly dismissed because the appellant had by a "specious device" (my words), secured the cooperation of the respondent to relinquish control of her personal laptop for the examination of same and deletion of the offending email. This was, the VP considered, an intervening event that rendered the respondent's dismissal unfair. While such a contrivance may indeed be regarded as underhanded had that been the case, the evidence adduced by the appellant's two witnesses refuted the premise for such a belief. Mrs. Rolle, in her witness statement, and Ms. Fox and Mr. Amorim while under cross-examination all stressed that the concern of the appellant when presenting the consent letter to the respondent was the avoidance of adverse consequences to the appellant. That evidence is understandable in view of the appellant's desire to gain access to the respondent's laptop as soon as possible.

46. What must be borne in mind, however, is that the appellant was already in possession of the incriminating evidence, namely the email and the attachments, a fact recognised by the VP in paragraphs 52 and 53 of her decision. It was the transmission of the email that alerted the system in the appellant's Miami offices. That the appellant - during Ms. Fox's testimony - was able to show the email and attachments to the VP during the hearing emphasises this point.

47. If I may be permitted to use a criminal law reference, it is as if the police investigating a crime had the security camera footage and the DNA and fingerprints of the culprit from the scene of the crime; but to make their case more airtight, interview him; and during the course of that interview, induce him to give a confession by telling him they will not prosecute him or by beating him or denying him access to a lawyer when requested. While the confession will not be admissible against the culprit due to a breach of section 20 or section 178 of the Evidence Act, the evidence already in the possession of the police will be. This is so because their collection predated the promise and are not tainted thereby.

48. It is in this regard that the VP erred. The fairness of the dismissal is to be determined by reference to **"the circumstances known to the employer at the time of dismissal not on the**

actual consequence of such [procedural] failure": Sillifant at page 97. It must be remembered that section 33 of the Act permits summary dismissal without a reasonable investigation where an investigation is not warranted. The email was "the smoking gun" and it spoke for itself.

Discussion

49. The witness statement of Mrs. Rolle suggested that the decision to terminate the respondent preceded the meeting. I note that Counsel for the appellant had suggested to the respondent during cross-examination (p. 37, line 15 of Day 1 of the transcript) that the decision to terminate her employment was not made before the meeting.

50. Having previously examined the circumstances of the dismissal and found that the respondent's dismissal was not wrongful, and that the appellant had met the standard in section 33 of the Act to have summarily dismissed her, it is incongruous, in my view, for the VP to proceed to find that the respondent was unfairly dismissed for the reason which she gave. It must be recalled that **"fairness is a broad concept and must be considered in the round."**: **A v. B** [2003] IRLR 405.

51. Apart from being inconsistent with her finding that the respondent was summarily dismissed in accordance with section 33 of the Act, the VP's decision that the dismissal was unfair is also unreasonable because it was based on her finding that the appellant had induced the respondent's cooperation by giving her the assurance that she would not be dismissed. That suggestion (based on the respondent's interpretation of the first line of the consent letter) had been put to the appellant's witnesses (Ms. Fox and Mr. Amorim) during cross-examination but was denied. The appellant's evidence was that the focus of the consent letter was to provide it with an indemnity so there would be no adverse consequences to it after they visited her residence (as clearly outlined in the letter) to **"go through [her] personal computer, and, in [her] presence, delete any and all information from [her] personal email and/or personal files pertaining to Itau and/or its affiliates and clients."**

52. Properly understood there was nothing in that consent letter which could reasonably be interpreted as the appellant having held out to the respondent a promise or inducement that she would not have been dismissed if she consented. The VP's finding of unfairness (based on such an interpretation) is unreasonable and illogical and cannot be sustained.

Conclusion

53. I am unable to sustain the VP's conclusion that the dismissal of the respondent was unfair based on her reasoning in the case. Having found that the respondent had transmitted the offending

email which had the potential of exposing the confidential/non-public information of the appellant to members of the public, this was in breach of the respondent's duty to preserve and protect the appellant's records; a flagrant and egregious fault which, in accordance with the Handbook, entitled the appellant to dismiss the respondent summarily.

54. In the premises, I am satisfied that the respondent's dismissal was not unfair, nor was it wrongful. The appeal is allowed. The finding of unfair dismissal by the VP is quashed, and her award is set aside. The consequence of my decision to quash the finding of unfair dismissal effectively determines the Respondent's Notice; and it is dismissed.

55. As this is an appeal from the Tribunal, there is no order as to costs.

The Honourable Mr. Justice Isaacs, JA

56. I agree.

The Honourable Madam Justice Crane-Scott, JA

57. I also agree.

The Honourable Madam Justice Bethell, JA