

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 36 OF 2002

BETWEEN:

BEVERLY SAMUEL

Employee

and

**CARIBBEAN BANKING CORPORATION LIMITED
ROYAL BANK OF TRINIDAD & TOBAGO (RBTT)**

Employers

Before:

The Hon. Cyril L. Maundy

President

The Hon. Hubert Hood

Member

The Hon. Genevieve Benjamin

Member

Appearances:

E. Ann Henry, Attorney-at-Law, for the Employers

Charlesworth Brown, Attorney-at-Law, for the Employee

2004: September 21, 22 & 23

2005: October 24, 25 & 26

2006: February 8 & 9

JUDGMENT

Unfair Dismissal – loans officer at bank gave monies of a loan to buy a motor car to client who used same to pay off another loan at another bank – no car ever bought – lending bank left unsecured – loan to the customer approved to purchase vehicle only.

Historical Background

- [1] By this Reference the Employee, Beverly Samuel claimed from the Employers, RBTT Bank, Caribbean Limited, formerly Royal Bank of Trinidad and Tobago, incorporated in St Vincent with a branch office in St John's, Antigua, compensation for Unfair Dismissal. The Employee was a Senior Loans Officer with a salary of \$ 5,350.00 per month plus benefits - she had earlier worked for fourteen years at the Royal Bank of Canada where she was a Computer Operator. The Employers denied that the dismissal was unfair and contended that the Employee was not entitled to the relief sought or at all.
- [2] By their Memorandum dated March 24, 2003 the Employers admitted some of the allegations of the Employee and set out their reasons for the dismissal which they said were justifiable.
- [3] The Employee, who had earlier worked for fourteen years at the Royal Bank of Canada, St John's, Antigua, commenced working with the Employers on September 1, 1991, and was dismissed by letter from the Country Manager, Benedict de Castro, dated June 21, 2000 on the ground that with, blatant disregard for the bank's policies and procedures when processing a loan she left the bank exposed with respect to an unauthorised and unsecured loan - See Exhibit BS1.
- [4] A customer, Claire Hurst, negotiated a loan for \$ 64,000.00 from the bank which was issued to purchase a motor car (Opel Astra) from Paragon Motors Limited and Employee was assigned to process the documents for the loan.
- [5] The Employee, on February 11, 1999, dispensed the loan in the name of the customer and took it to the Country Manager, Mr Benedict de Castro, for approval. Mr de Castro declined the application on the basis that Miss Hurst

was over her debt service ratio - he did not include her salary from her second source of income - she had a job and a business. The Country Manager later approved the loan - See Exhibit BS3 - and the Employee prepared a draft payable to Paragon Motors in the sum of \$ 46,254.00 and the original was given to Miss Hurst. The loan transaction was completed and approved and fully documented. A Bill of Sale was prepared for the full amount (\$ 64,000.00). At the request of the client the Employee substituted a draft for the same amount in the name of the client - the draft was given to the Discounts Clerk on February 10, 1999, who got a second signature since it could not be signed by the Employee since the amount of the loan was beyond her limit. The re-instated draft was initialled by Jonathan Lindsay, the Assistant Manager - Mr Lindsay had no lending authority and could not authorise or approve loans - the draft issued to Paragon Motors was signed by Arlene Perry (a senior loans officer) and the Employee.

- [6] Miss Hurst serviced the loan and it was repaid in full.
- [7] When the transaction was done in August, 1999, it was understood that there would be a registered mortgage Bill of Sale and comprehensive insurance assigned to the bank and an assignment of Miss Hurst's salary to the bank which was already in place.
- [8] When he found out what had happened and about the substituted draft Mr de Castro did not communicate directly with the Employee - he wrote to the client and it was not until May, 2000 that he sent a memo on the matter to her - See Exhibit BS7. On September 17, 2000, the Employee did not know that the vehicle had not been purchased.

- [9] In February, 2000 the Regional Manager recognised the Employee's outstanding performance and she was given a monetary award - she was the only one from the Antigua Branch to get an award.
- [10] On her dismissal the Employee still had three loans outstanding to the bank; the privileged reduced rate for employees on these were cancelled and she was called upon to pay the full rate of 13% (prime plus 2%).
- [11] The Employee fell under the retirement fund scheme for its employees and without any consultation, warning or Notice to Pay Off (the loans) the bank commandeered the entitlements under the fund and set them off against the outstanding loans (3) despite the fact that all the payments were up to date and a letter of protest from the Employee's attorney - the letter was utterly ignored.
- [12] At the time of the dismissal, in addition to her salary, the Employee was entitled to certain perks, viz,
- (a) Medical Insurance - \$ 1,500.00 per year
 - (b) Dental Insurance - \$ 3,000.00 per year
 - (c) Vision
 - (d) An annual across the board increase of 4% based on performance.
 - (e) Lunch allowance of \$ 10.00 per day.
 - (f) Uniform allowance of \$ 500.00 per annum.
 - (g) A bonus of 6% based on the profit the bank made.
- [13] On one of her loans the Employee was required to pay an additional \$ 78.00 to \$ 80.00 per month.
- [14] After the dismissal the Employee tried to find new employment and made applications to several places including the Internaitonal Regulatory Financial Sector Authority, Antigua & Barbuda Investment Bank, the former Canadian

Imperial Bank of Commerce, Cable & Wireless (West Indies) Limited, the Board of Education, the Organisation of American States, the Grand Royal Antiguan, Jolly Beach Resort and the Free Trade Zone - see Exhibit BS16. The Employee finally obtained a job as human Resource Manager at the International Institute of Technology where her present salary is \$ 4,500.00 per month.

[15] Following the dismissal the Employee's expenses increased - the bills became higher, a Mortgage, a vehicle loan to repay @ 13%, medical, dental and vision expenses an additional monthly cost of \$ 5,000.00.

[16] The Employee was dismissed on the grounds of:

- (a) Her blatant disregard for the Bank's policies and procedures.
- (b) Failure to adequately explain what she did.
- (c) Having caused the Bank to be exposed with respect to the unauthorised and unsecured loan granted by her on February 11, 1999.

Triable Issues

[17] The principal matters here for consideration appear to be whether:

- (a) The dismissal was unfair
- (b) There was a sufficient investigation of the allegation against the Employee
- (c) The approval by Jonathan Lindsay was in fact an authorisation by him to grant the loan to the customer.
- (d) The Employee had authorisation to substitute the draft or indeed details of the events as she alleges.

- (e) The Employee infringed the policy of the Bank (Employers) by re-writing the draft making it payable to the customer when she knew the vehicle had not been purchased.
- (f) Were there any sufficiently alternative punishments for the breach?
- (g) The degree of service required from a bank/bank employee.
- (h) Standard of Investigation.
- (i) The Bank acted reasonably in deciding upon dismissal.
- (j) The loan was unsecured.
- (k) The fact that the loan was repaid and the Bank did not suffer a loss of the funds a good defence.

The Arguments

[18] Counsel for the Employers submitted that the dismissal was not unfair and opposed any award. Miss Henry contended that, *inter alia*:

- (a) The Employee was not duly authorised to prepare or issue the second cheque or to use it to replace the first cheque.
- (b) The Employee failed to follow the bank's policy and rules of procedure when preparing loan cheques of which she was fully experienced.
- (c) By her actions the Employee left the bank fully unprotected and without any security for the loan and was unable to cover same had the payments not been made.
- (d) The Employers carried out a sufficient investigation of the matter and gave the Employee a sufficient opportunity to be heard and to present her case and to defend the "charge" against her.
- (e) The Employee failed to render and fell short of the kind (quality and degree) of service expected by the bank from someone in her position and with her responsibility.
- (f) Had the loan monies not been recovered the bank would have suffered a loss and be liable to find the replacement monies – the monies in a bank

are not usually its personal assets but the funds and property of its customers and depositors and to whom and for which they remain liable and have to account on request.

[19] In support of her contentions Miss Henry cited:

- (a) Sections C.58 and C.59 of the Labour Code Cap. 27 Laws of Antigua and Barbuda, Revised Edition, 1992 (the Labour Code)
- (b) *Vigo et al V Swiss American National Bank*, Reference No. 70 of 1996.
- (c) *N.C. Watling & Co. V Richardson* (1978) ICR1049/(1978) IRLR225
- (d) *British Leyland (U.K. Limited) V Swift* (1981)
- (e) *The Law of Unfair Dismissal* by Steven D. Anderman (Second Edition) 149-152.
- (f) *Selangor United Rubber Estates Limited V Craddock* (No. 3) (1968) 3ALLER.1073

[20] Mr Brown, Counsel for the Employee disagreed with Counsel for the Employers and contended that the dismissal was Unfair. Counsel submitted that:

- (a) The Employee followed the Employer's policies and procedure in issuing the draft in the name of Paragon Motors Limited on February 10, 1999, and replacing it with that in the name of the customer on February 11, 1999 and there was no rule, practice or procedure communicated to her by the bank preventing her from doing what she did.
- (b) The second transaction was authorised by Jonathon Lindsay, a duly authorised officer of the bank.
- (c) The Employer has not proved the "proper procedures" or that the transaction should have been referred to the Country Manager.
- (d) The Employer failed to advance any evidence as to what procedure existed in February, 1999, when the transaction was done.

- (e) The Employer's request for a mere explanation while it pursued its own efforts to get alternative security was not sufficient to bring home to the Employee at any time during the investigation that her job was at risk and thus the investigation was not fair and equitable in the circumstances.
- (f) There was no evidence whatsoever and no reasonable inference can be made that the Employee colluded with Miss Hurst to effect the transaction or knowingly assisted her in the alleged misappropriation of the loan proceeds.
- (g) There is no evidence of loss or risk of loss and above the risk in the normal course of business to the Employer sufficient to warrant the dismissal and thus there is no factual basis for the dismissal/
- (h) Even if the Employee made a "stupid and dangerous mistake" this would not be sufficient to warrant her dismissal.
- (i) The Employers did not suffer and would not have suffered any loss, as a result of the Employee's deeds/misdeeds as the Promissory Note, the Assignment of the customer's salary were in place and the risk of loss was minimal.
- (j) The Employers erred in seizing the Employee's share of the retirement fund.
- (k) The employee is entitled to compensation as follows:
 - (i) Notice Pay - \$ 10,700.00
 - (ii) Loss of Protection - \$ 123,050.00
 - (iii) Immediate Loss - \$ 121,454.86
 - (iv) Future Loss - \$ 10,212.56
 - (v) Fringe Benefits - \$ 73,797.53
 - (vi) Mortgage Loan and Insurance - \$ 51,000.00
 - (vii) Uniform Allowance - \$ 5,000.00
 - (viii) Lunch Allowance - \$ 24,000.00
 - Total Claim - \$ 469,214.95

The Law

[21] Reference has been made to the Law relating to this case and these appear to be:

- (i) Section C.56 of the Labour Code provides thus, "Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by the employer and no employer shall dismiss any such employee without just cause."
- (ii) Section C.58(1) sets out the instances when a dismissal will not be unfair, viz:
 - (a) relates to misconduct of the employee on the job, within the limitations of Section C.59 (1) and (2);
 - (b) relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of Section C.59 (5);
 - (c) is that the employee was made redundant;
 - (d) is that the employee could not continue to work in the position he held without contravention (on his or on the employer's part) of a requirement of law; or
 - (e) is prolonged illness or some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held;

Provided, however, that there is a factual basis for the assigned reason.

- (iii) Section C.58(2) of the Act lays down the test to be applied in deciding whether or not a dismissal was unfair and provides that it is whether or not, under the circumstances, the employer acted unreasonably but, even though he acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence,

and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.

- (iv) Section C.10 (3) of the Industrial Court Act "Notwithstanding anything in this Act or in other rule of Law to the contrary the Court in the exercise of its power shall:
 - (a) Make such order or award in relation to a dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole
 - (b) Act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations and in particular, the Antigua and Barbuda Labour Code

Decision

- [22] The total claim for the Employee, exclusive of costs is almost half a million dollars and this by itself suggests that the issues leading up to it were very grave.
- [23] It is doubtful that at the time of its consideration the framers of the Labour Code or the Industrial Court Act imagined that the Court would be called upon to consider awards of this magnitude but that is now the position.
- [24] Counsel for the Employee was very determined in his claims and he could find no real fault in the Employee whom he portrayed as an Employee without sin and virtually incapable of sin, was the subject of a large hammer by an Employer after 9 years of faithful service due to a mistake or facts which were never drawn to her attention, which were unknown to her, which were never relayed to her by the Employer. In addition to this she was the subject of a

dismissal, the maximum punishment for an incident in which the Employers did not suffer any loss – no consideration seems to have been given to the Employer's expenses even to bring Mr De Castro to Antigua and provide accommodation for him during the trial.

- [25] With regard to the contentions of Counsel for the Employee I am of the view that the Employers gave the Employee an opportunity to be heard before a decision to dismiss was taken and allowed her an opportunity to present her side of the issue. It was not an instant dismissal and several steps were taken and attempts made to resolve the issue.
- [26] Perhaps, the real story has not been told and it may never be known, at least disclosed, why the Employee replaced the first draft by the second and no allegations were made as to her possible reasons for doing so although the matter is ripe for speculation.
- [27] I would agree that a bank is a trustee of the monies of its customers and depositors and as a result it is under a duty to employ only honest employees of the highest standards of honesty and who will perform the best service. If its employees fall short of these expectations they will be pronounced unsuitable, removed and replaced.
- [28] It is true that the monies were repaid by Ms Hurst and the bank did not suffer their loss or any expense of recovery but this could easily have happened. The fact that the monies were repaid in full does not obviate responsibility for the mis-deed or make the deed cease to be wrong.
- [29] The Employee went through the task of preparing a second draft and attachments and insured that it was signed by two officers of the bank. However, in his evidence Mr Jonathan Lindsay said he had no jurisdiction to

sign loan documents on behalf of the bank and he merely signed as a witness – he worked in a different department consequently his signature did not render the document approved.

[30] Mr Brown submitted that there were no policies or procedures at the bank that the Employee was required to follow and failed so to do but I find this difficult to accept as surely the Employee knew there was a process that had to be complied with when making the loan and she followed this with regard to the first cheque – why should it not have applied to the replacement cheque?

[31] In support of his contentions Mr Brown cited the Vigo case but I do not think it can be said that this case is “on all fours” with it.

Conclusion

[32] Dismissal from a bank needs careful consideration as normally such a person may never again gain employment by a similar institution. With this in mind I carefully considered the evidence presented, the authorities cited, the relevant provisions of the Labour Code and the Industrial Court Act and at the end of the day I find that the dismissal was not Unfair and the Employee’s claim stands dismissed.

[33] With regard to the retirement fund that was seized by the Employers, if these were allowed to find themselves in the hands of the Employee the possibility is that the Employer’s debt may never be satisfied. However, any and all excess is to be paid to the Employee.

[34] Finally, and this was acknowledged by Counsel for the Employer, the Employer shall pay to the Employee the monies agreed between itself and the

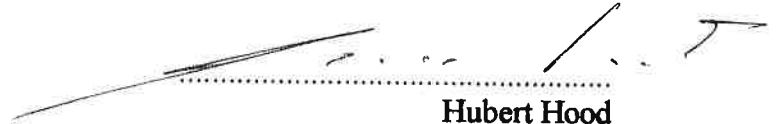
Employee as payable to her in the event of a dismissal, payment to be made by
March 15th, 2006. There shall be no Order as to Costs.

[35] There shall be no order as to Costs.

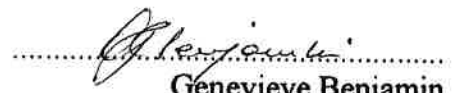
DATED the 21st day of February, 2006


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Cyril L. Maundy
President

I concur


.....
Hubert Hood
Member

I concur


.....
Genevieve Benjamin
Member