

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 38 of 2003

BETWEEN:

NICOLE POTTER

Employee

and

JEWELLER'S WAREHOUSE

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. M. Althea Crick

Member

The Hon. Samuel R. Aymer

Member

Appearances:

**Mr. Hugh C. Marshall of Marshall & Co. - Attorneys-at-Law for
the Employee**

**Dr. David Dorsett of Watt & Associates – Attorneys-at-Law for
the Employer**

2008: June 05

2008: November 25

JUDGMENT

PILGRIM, P:

INTRODUCTION

Background

[1] Jeweller's Warehouse is a business which is engaged in the duty free sale of different lines of jewellery, watches and related items. It operates in

different Caribbean and United States of America territories inclusive of Aruba, Antigua, Barbados, the Bahamas, St. Croix, St. John, St. Lucia and St. Thomas. In Antigua it conducts its business at Redcliffe Street and Heritage Quay in St. Johns. It shall afterwards be referred to sometimes as “**the Company**” or “**the Employer**”.

- [2] Ms. Nicole Potter resides in English Harbour. She was employed with Jeweller’s Warehouse from July 1998 until the 1st day of October 2002. Her employment was terminated on the later date. (She shall afterwards be sometimes referred to as “**Ms. Potter**” or “**the Employee**”.)
- [3] At the time of her dismissal she was employed as an Assistant Manager. Her annual salary was \$51,000.00. It was paid in weekly instalments of \$980.77. She stated that she earned commission as a result of sales. No evidence was led however to support her commission sales record.
- [4] Ms. Potter’s duties as Assistant Manager included being responsible for the various items of jewellery and other valuables that were offered for sale by the company. She was also in charge of the cash which was paid to the company by customers who bought different items.
- [5] The Employee states that for the most part she enjoyed her work and experienced no problems with her Employer. She referred to a letter dated April 18, 2002 which the Employer wrote to the Embassy of the United States of America to the Eastern Caribbean. This letter confirmed her employment with her Employer. It also stated *inter alia* that “***her prospects for continued employment are excellent***”. (This was admitted as “NP-1”.)

- [6] In an examination of the issue which this Court is asked to determine, it derives no assistance whatsoever from the letter of April 18, 2002 referred to in paragraph [5]. This was the usual standard letter which an Employer forwards to the Embassy. The purpose of such a letter is (a) to confirm the Employee's employment with the Employer and (b) to assist the Employee to obtain a Visitor's Visa. It has no bearing whatsoever upon the central issue. It can in no way predict the future working relationship between the Employer and Employee.
- [7] The Employer first raised concerns about Ms. Potter's conduct as Assistant Manager in letters dated April 29 and May 13, 2002. The matters highlighted by the Employer dealt with Ms. Potter's issuance of three cheques to the Company. The Company gave her cash for the value of the cheques. The bank returned the three cheques to the Company due to insufficiency of funds in Ms. Potter's account with the bank. Ms. Potter denied ever having being presented with any or both of these letters. They were admitted and marked as "**SR1 and SR2**" respectively. In the common and informal West Indian vernacular Ms. Potter's cheques "***bounced***".
- [8] The Employer also wrote two further letters dated August 16, 2002 and September 6, 2002. In the letter of August 16, 2002 the Employer stipulated to the Employee to repay all outstanding monies due to the Company on or before August 17, 2002. These monies related to the "***bounced***" cheques issued by the Employee.
- [9] In the letter of September 6, 2002 the Employer wrote to the Employee with regard to her leaving the store without adequate supervision. The Employee

denied having received any or both of the letters referred to at paragraph [8]. (Both of these letters were admitted and marked as “SR-3 and SR-4” respectively.)

- [10] The Employer wrote to the Employee letters dated September 17, 19 and 25 2002. The letter of September 17, 2002 related to the concern by the company that “*Hardly a day passes without people looking for (Ms. Potter) on the job..... [G]as stations, furniture stores, travel agents and odd jobbers all [report] that [Ms. Potter owes] money to them.*”
- [11] In its letter of September 19, 2002 by the Company to Ms. Potter, the Company brought to the attention of Ms. Potter that she had authorised and was very instrumental in the Company’s acceptance of a cheque in circumstances in which she was wrong to do so. The cheque was dated September 6, 2002. The sum in question was EC \$810.00. The cheque was accepted by Ms. Potter. In exchange for this cheque Ms. Potter gave to the drawer of the cheque EC \$810.00. He obtained from the Employer US \$300.00 in return. In due course when the cheque that Ms. Potter accepted was presented to the bank it “*bounced*”. (The cheque dated September 6, 2002 was admitted and marked “SR-11”.)
- [12] The letter of September 25, 2002 in conjunction with the evidence of the Employee and Ms. Sue Ross for the Employer related to the Company’s overpayment of one week’s vacation pay to the Employee. The Employer requested of the Employee to repay to the Employer the one week’s vacation pay due to it on or before September 30, 2002. (The letters of September 17,

19, 25 were received by Ms. Potter. They were admitted in evidence and marked “SR 5, 6, and 7” respectively.)

- [13] Ms. Potter by letter of September 27, 2002 responded to the Employer’s letters of September 17 and 19, 2002. In summary, Ms. Potter was of the view that she was not “*breaking the law*”, she had not in any way “*tarnished the reputation of the Company and [herself]*”, had “*done nothing wrong in [regard] to [her] employment*,” and had not “*jeopardised the Company, its image or the welfare of the staff*”. She reminded Ms. Ross of her “*continual commitment to [her] job*.” She blamed Ms. Ross for “*intertwining [her] personal issues into the day-to day affairs of the Company. That in itself is “unethical”*”. (This letter was admitted and marked as “NP-3”.)
- [14] The Employer in its letter of September 28, 2002 suspended Ms. Potter from her employment “*pending further investigations*”. (This letter was admitted and marked “SR-9”.)
- [15] By letter of October 1, 2002 the Employer dismissed the Employee from her employment with the Company. The letter of dismissal was admitted and marked “NP-4”. In its letter of dismissal the Employer stated *inter alia* that it had “*lost all confidence in (Ms. Potter’s) ability to make decisions that have the Company’s best interest at heart*”. The Employer listed certain matters which in its view gave the Company just cause why its dismissal of the Employee was fair. (The letter of dismissal was admitted and marked “NP-4”).

[16] The letter of dismissal in its entirety states as follows:

“October 1, 2002

Miss Nicole Potter

Due to the various points detailed below Management has lost all confidence in your ability to make decisions that have the Company's best interests at heart:

- *The issuance to the Company of personal cheques that do not have sufficient funds to cover them.*
- *Not paying back these same funds in a timely manner.*
- *Leaving the work place for a lunch break on September 5th and not returning, with no explanation given.*
- *Not coming out to work for two days, September 18th and 19th with no explanation given.*
- *Accepting a cheque that had been tampered with and changed by yourself instead of the drawer of the cheque resulting in a loss to the Company of \$300.00 U.S.'*
- *Accepting a vacation pay cheque for two weeks when you were aware that it should only have been one week and not drawing the error to Management's attention.*

These represent some of the problems we have been having with you during the year.

As a result of the above Management is terminating your services effective today. You have no vacation pay due therefore find a cheque covering salary September 30th and October 1st 2002.

Sue Ross

Island Manager”

Employee's Mitigation Efforts

- [17] Since her dismissal on October 1, 2002, Ms. Potter deposed that she obtained employment in November 2003 with D.C.T. Solid Surfaces. She earned a weekly salary of \$750.00. Prior to this she stated that she performed “*odd jobs at different stores as a sales assistant on average (of) \$350.00 weekly*”. Whether or not these sums are gross or net is uncertain.

LEGAL PROCEEDINGS

- [18] The Employee commenced legal proceedings by filing a Reference on October 23, 2003. Her Employee's Memorandum was filed on November 26, 2003. In that Memorandum she claimed the following relief:
- (a) A declaration that she was unfairly dismissed;
 - (b) Compensation;
 - (c) Exemplary damages.

- [19] The Employer filed its Employer's Memorandum on August 10, 2004. In this document the Employer submits that the actions of the Employee were of such a nature that its dismissal of her was fair having regard to all of the circumstances of this case.
- [20] The Employee filed her Witness Statement on October 15, 2007. A Witness Statement of Ms. Sue Ross on behalf of the Employer was filed on September 26, 2007.
- [21] Ms. Potter gave evidence on June 5, 2008 to support her case. Ms. Sue Ross the Island Manager of the Employer gave evidence on June 5, 2008 in support of the Company.

RELEVANT ISSUES

- [22] The relevant issues which fall for determination are as follows:
- (i) **Whether in the circumstances of this case did the Employee's conduct justify the Employer summarily dismissing the Employee having regard to C 58 (i) of the Antigua & Barbuda Labour Code (afterwards called "the Labour Code")?**
 - (ii) **Was it necessary for the Employer to conduct an investigation of the Employee's conduct?**
 - (iii) **In the event that the Employee was unfairly dismissed what is the measure of damages to which she is entitled?**

THE EMPLOYEE'S SUBMISSIONS

- [23] Mr. Hugh Marshall Attorney-at-Law for the Employee submits that the reason stated in the letter of dismissal to the effect that the Employer had *“lost all confidence in (the Employee’s) ability to make decisions that have the Company’s best interest at heart, does not amount to misconduct.”* He further submits that the Employee’s behavior was not *“so serious that the Employer cannot reasonably be expected to take no other course other than termination.”*
- [24] Mr. Marshall further submitted that *“the Employee’s issuance of bad cheques to the Company and not paying the bank in a timely fashion was not a matter that materially affected the Employee’s duties.”* Mr. Marshall is of the view that the *“bad cheques issued by her to the Company (was committed) some 8-10 months prior (to her dismissal) and settled was not a clear and sufficient reason for a summary dismissal”*.
- [25] Mr. Marshall also asserts that *“the actions complained of revolve around the perception that the Employer formed of the Employee (rather) than any misconduct on her part or in relation to her employment function.”*
- [26] Learned Counsel for the Employee cited the cases of **Cable & Wireless (WI) Ltd v Hill and others (1982) 30 W.I.R. 120** and **Diane Camacho v Camacho & Sons Ltd. [1996] E.C.L.R. 342** for the Court’s consideration. In particular Counsel referred the Court to the burden of proof and the standard of proof which is necessary to be complied with in a matter of

summary dismissal. In this regard he cited the observations of **Berridge JA** at page 129 Letters b and c in the **Cable & Wireless** case (op cit).

[27] Mr. Marshall also submitted that as the Employee was suspended pending an investigation, then it was imperative that such an investigation be carried out before any further action was taken. He asserts that the Employer did not take into consideration “*the explanations tendered by the Employee in her letter dated 28th September, 2002.*” He referred the Court to **W. H. Smith & Sons Ltd. v Casserley [1997] UK E A T 917-96-0805** which according to him confirms “*that a reasonable inquiry must be made out to justify termination upon investigation*”.

[28] With regard to the matter of the Employee’s acceptance of the one week’s overpayment of vacation pay by the Employer, Counsel for the Employee submits that this action “*is reprehensible*”. However, he asserts that since this was the Employer’s error then the Employee should not have been dismissed. Mr. Marshall’s Written Submissions on behalf of the Employee were filed on July 10, 2008.

THE EMPLOYER’S SUBMISSIONS

[29] Dr. David Dorsett Attorney-at-Law of Watt & Associates filed his Written Submissions on the Employer’s behalf also on July 10, 2008.

[30] Dr. Dorsett submits that the relevant section of the Labour Code which has a bearing upon the determination of the central issues is C58 (i) (a). He states

that “*the standard or degree of reasonableness to be applied in the case of the dismissal of an employee for misconduct.....must vary with the nature of the business and the position held by the employee.*” He cites Lord Maugham in the Privy Council decision of **Jupiter General Insurance Co. Ltd. v Shroff [1937] 3 All E. R. 67 at page 74 B.**

- [31] Dr. Dorsett also referred the Court to the test to determine misconduct which is stated at C 59 (i) of the Labour Code. In his view the test is a subjective one. Learned Counsel for the Employer also submits that “*if the misconduct alleged*” is incompatible with the due or faithful discharge of the Employee’s duty to her Employer then the dismissal would be reasonable. **Boston Deep Sea Fishing & Ice Co. v Ansell [1886-90] All E. R. Rep. 65** and **Sinclair v Neighbour [1966] 3All E.R. 988** were put forward as authorities in support of this proposition.
- [32] The dictum of **Matthew, J.A. (Ag) in Diane Camacho v Camacho & Sons Ltd (op cit) at page 345, Letter E** which adopted McKinnon J’s comment in **Ward v McDonald’s Restaurant 39 D.L.R. (4th) 469 at page 470** who held that “*Any conduct, at home or at work, can be justification for dismissal if it is prejudicial to the best interests of the employer*” was further submitted for the Court’s attention by Dr. Dorsett.
- [33] In all of the circumstances of this case Dr. Dorsett asserts “*that the employee was guilty of serious misconduct which would justify dismissal.....*” Consequently Dr. Dorsett is of the view that the Employee’s Reference should be dismissed with costs.

THE LAW

[34] C56 of the Labour Code states as follows:

“C 56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause.”

C58 (1) (a) and (2) of the Labour Code reads as follows:

“C 58. (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

(b);

(c);

(d);

(e);

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

C 58 (2) states as follows:

“ (2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably 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.”

C 58 (1) (a) must be read in conjunction with C 59 (1). C 59 1 (a) states as follows:

“C 59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct in or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has

(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;

(b)

(c)

[35] An employee owes his employer an implied duty of care in carrying out his duties. The basic authority for this is usually said to be **Harmer v Cornelius (1858) 5 C B N S 236**. - see **Smith & Wood’s Employment Law**, Ninth edition, Oxford University Press, London 2008, authored by Ian Smith & Gareth Thomas at page 163.

[36] The matter of the employee’s duty to take care arose to be considered in **Lister v Romford Ice & Storage Co Ltd. [1957] A.C.555**. Lord Radcliffe, although dissenting on the main issue stated *inter alia* as follows at page 586:

“On the first point I think it is plain that the law does impute to an employee a duty to exercise reasonable care in his handling of his employer’s property.”

- [37] In addition to the duty of the employee to discharge his responsibilities to his Employer with care, there also exists between the Employer and the Employee a fiduciary relationship of trust and confidence. This duty was defined in **Neary v Dean of Westminster** [1999] I.R.L.R. 288. Lord **Jauncy** articulated the duty at **page 290 paragraph 18** in the following manner:

“It has long been recognised that there exists between master and servant a fiduciary relationship of trust and confidence.”

- [38] *“The duty of trust and confidence can be seen as a hallmark of the employment relationship”.*

- See the text **“Principles of Employment Law”, Fourth Edition** authored by **Michael Jefferson, Cavendish Publishing Ltd; London 2002** at **page 116.**

- [39] In **Neary’s** case (op cit) **Lord Jauncy** also commented upon the degree of trust which is required of the Employee. He stated *inter alia* at **page 290 paragraph 19** as follows:

“The character of the institutional employer; the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must all be considered in determining the extent of the duty and the seriousness of any breach thereof.”

- [40] C 59 (1) of the Labour Code establishes the test which must be utilised so as to determine whether the Employee has been guilty of misconduct. The

behaviour of the Employee is therein described as being “*so serious that the employer cannot reasonably be expected to take any course other than termination.*” C 59 (1) (a) and (b) are but examples of an employee’s behaviour in which his dismissal is fair.

[41] **Lord Maugham in Jupiter General Insurance Co. V Shroff (op cit)** at **74 B** articulated the test for misconduct in the following manner:

“[W]hether the misconduct was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and therefore to justify immediate dismissal.”

[42] **Lord Maugham** also gave an indication of the manner in which the test should be applied. He stated *inter alia* at **page 74C** as follows:

“It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee; and that decisions in other cases are of little value.”

[43] (i) What is the degree of misconduct which is necessary to be obtained in order that there be compliance with C 58 (1) (a) of the Labour Code?

(ii) In **Clouston & Co. Ltd v Corry [1906] A. C. 122** **Lord James** in delivering the judgment of the Privy Council stated *inter alia* at **page 129**;

“There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand,

misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. In such a case the question whether the misconduct proved establishes the right to dismiss the servant must depend upon facts – and is a question of fact.”

[44] (i) Whether or not the employee’s action amounts to misconduct became an issue to be determined in **Sinclair v Neighbour** (op cit). In this case the manager of a betting shop took £15 from the till without his employer’s knowledge. He used the money to place a bet and replaced it on the following day. On this date the employer discovered what the employee did. The employer dismissed the employee. The trial judge held in favour of the employee. He found that the employee did not act dishonestly. The employer appealed.

(ii) The Court of Appeal held for the Employer. The headnote reads as follows:

“The manager’s conduct, even if it was not dishonest, was inconsistent with his duty towards his employer and with the continuance of the confidential relationship of master and servant between them; accordingly the employee had been entitled to dismiss the manager summarily on account of it.”

(iii) **Sellers, LJ** .: stated *inter alia* at page 989 Letters C and D:

“[I] do not think that it matters whether the conduct is to be described as dishonest misconduct or not. Views might differ. It was sufficient for the employer if he could, in all the

circumstances, regard what the employee did as being something which was seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged. To take money out of the till in such circumstances is on the face of it incompatible and inconsistent with his duty.”

- (iv) **Sachs, L. J.:** at page 991 Letter A described the employee’s conduct *“as quite simply.....to (him) enough to make plain that here indeed there was beyond a peradventure misconduct of a type which justified instant dismissal.”*

[45] In **Neary** (*op cit*) **Lord Jauncy** at page 291 Letter 22 described the nature of the misconduct which would undermine the relationship of trust and confidence sufficient to justify the instant dismissal of the employee. **Lord Jauncy** stated *inter alia* as follows:

“[C]onduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”

[46] With regard to the burden and standard of proof which are to be met in this case, I derive much assistance from **Berridge, J.A. in Cable & Wireless Ltd. V Hill & Other** (*op cit*). At page 129 of the judgment, **Berridge J. A.** stated *inter alia* that the *“burden of proof was on the company to show*

“just cause” for dismissing the employees and that summary dismissal constituted a “strong measure” the standard of proof should be strict, persuasive and convincing. Further, notwithstanding the fact that this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content”.

- [47] A number of matters were canvassed in the evidence and the Written Submissions. This Court means no disrespect to either Counsel if only those matters which are central to a determination of the issues are referred to.

THE FIRST ISSUE

- (i) **Whether in the circumstances of this case did the Employee’s conduct justify the Employer to summarily dismiss the Employee having regard to C 58 (i) of the Antigua & Barbuda Labour Code (afterwards called “the Labour Code”)?**

(a) The matter of the issuance of personal cheques which bounced.

- [48] The Employer contends that it hand delivered letters dated April 29 and May 13, 2002 to Ms. Potter. Ms. Potter denied having received them. These letters concerned the matter of Ms. Potter’s issuance of cheques which she wrote to the Employer in exchange for cash. When the Employer presented them to the bank they were returned to the Employer because of insufficiency of funds.

[49] Ms. Sue Ross in her Witness Statement at paragraph 5 thereof stated that *“the bank hammered the Employer with service charges on account of what the Employee had done when she wrote the bounced cheques.”*

[50] Mr. Walter Berridge was the Employer’s Office Manager. Ms. Potter states that he deposited her salary to her account. Ms. Potter attributed blame to Mr. Berridge for the fact that her cheques bounced. She stated in evidence *inter alia* as follows:

“My cheques were returned because sometimes Mr. Berridge does not get to the bank early enough for my salary to hit (or to be deposited into) the account.”

[51] (i) Ms. Potter in her Witness Statement at paragraph 4 stated *inter alia* as follows:

“4. That at the time I was experiencing financial difficulties. In fact, I was and still am a single mother of three (3) girls and was the main income earner of the family that included my elderly uncle. It was an established practice that the Employer would deposit our wages plus commission direct to staff bank accounts. In anticipation of this we would cash cheques for lesser amounts to the Employer. In my case, these cheques would be written to Jewellers Warehouse Ltd for amounts or \$300.00 on the same account my salary was to be paid. In these instances, the Employer paid my salary late resulting in the cheque I wrote to them not being covered.

(ii) The period referred to at paragraph 51 (i) was April 2002. That month was mentioned in paragraph 3 of her Witness Statement.

[52] At paragraph 6 of her Witness Statement she deposed to the fact that *“Things were not the best but I was managing”*.

[53] Ms. Sue Ross deposed at paragraphs 3 and 4 of her Witness Statement the following evidence:

“[3] Throughout the course of her employment there were a number of documented incidents involving the Employee. As Island Manager I also had a number of complaints with respect to how the Employee discharged her responsibilities.

[4] For example, by letter dated 29th April 2002 I drew to the Employee’s attention a number of problems dating back to January 2002. For a person in a management position the problems relating to the Employee were totally unacceptable. In a space of no less than three months there were at least three instances involving the employee where she deposited cheques that were returned for insufficient funds. I had repeatedly cautioned the employee and had told her that her actions could be the cause of her termination. Habitually depositing cheques that bounce is simply unacceptable behaviour from a manager who is in a position of responsibility and is expected to exercise and demonstrate a sense of financial responsibility. In the case of the employee her instances of lack of financial responsibility was being mixed up and intermingling with the Employer’s business. The Employee was habitually, repeatedly and regularly writing out cheques to Jewellers Warehouse and the cheques bounced. When the cheques bounced the bank hammered the

Employer with service charges on account of what the Employee had done when she wrote the bounced cheques. I find it hard to believe that the Employee did not know at the time of writing the cheques that the cheques would bounce.”

[54] (i) Ms. Potter in response to her Counsel in examination-in-chief stated *inter alia* as follows:

“I have seen the Witness Statement of Ms. Sue Ross filed on September 26, 2007. I see paragraph 3. I do not recall any documented incidents involving myself. I had no complaints from Ms. Ross concerning how I discharge my responsibilities. I see paragraph 4 which deals with the depositing of cheques which were returned because of insufficient funds and Ms. Ross’s cautioning of myself. Ms. Ross had a conversation with me concerning a few of my cheques which I wrote and which were returned to the Company because of an insufficiency of funds. I wrote the cheques to the Company. Sometimes we cash our cheques with the Company.”

(iii) Ms. Potter in further response to Mr. Marshall her Attorney-at-law did not deny that she was cautioned by Ms. Ross on or about April 29, 2002 for the issuance of cheques which were returned for a lack of funds.

(iv) In Ms. Potter’s response to Dr. Dorsett in cross examination she stated *inter alia* as follows:

“I did not have sufficient funds in my account when I wrote the personal cheques referred to in the first reason given for my dismissal.”

- [55] The Employee was employed as an Assistant Manager of the Employer's Jewellery establishment prior to her dismissal. She was a part of the management group. Other employees were employed in a subordinate position to her with the company. It was her duty to set an example of a model employee to her subordinates. In her position as Assistant Manager she was responsible for the jewellery and cash which was derived from sales.
- [56] A person in her position of managerial responsibility is expected to display good work ethics inclusive of proper financial management of her own resources. The company's property inclusive of its money ought never to be jeopardised by her in any manner whatsoever.
- [57] In her capacity as an Assistant Manager she is expected to exercise proper judgment. She stated that she *“was experiencing some financial difficulties”*. Such circumstances ought to have been utilised by her to make sure that her personal accounts do not cause her to lose the company's trust.
- [58] It was the Employee's responsibility to reconcile her account in such a manner to make sure that she had sufficient funds in her account **BEFORE SHE ISSUED ANY OF THE THREE CHEQUES TO THE COMPANY**. This is a normal standard banking practice.

[59] It is to be presumed that the Employee well knew or ought to have known that she had no funds in her account before she wrote any of the cheques to the Employer.

[60] No blame is to be apportioned whatsoever to Mr. Berridge or anyone else for Ms. Potter's actions. The matter of blaming someone else for an employee's conduct arose as a consideration in **Sinclair v Neighbour** (*op cit*). At page 989 Letters F to G Sellers L, J.: stated *inter alia* as follows:

“There was an aggravating feature in that there were in the office two others, including one boy who was only some eighteen or nineteen years of age who had said something about borrowing money out of the till, and it was said that it had been done before. On a new manager coming in, I should have thought that the one thing that was incumbent on him was to keep the till inviolate. The practice of taking money out of the till in that way, as we all know in criminal courts, can lead to endless trouble.”

[61] Ms. Ross in her letter to Ms. Potter dated September 17, 2002 states *inter alia* that she was **“breaking the law”**. She had earlier referred to Ms. Potter's issuance of **“several bad cheques”**. Ms. Potter disagrees. In her letter of September 27, 2002 she avers that she has **“done nothing wrong in (regard) to (her) employment.”** According to her she did not **“tarnish the reputation of the Company and (herself).”**

[62] Dr. Dorsett submits that **“writing a bounced cheque is an illegal act.”** He cites no authority in support of his submission. There is considerable force

however in Dr. Dorsett's submission. This Court agrees with Dr. Dorsette. The act of writing a bounced cheque is a criminal offence. The relevant statutory authority is the **Larceny Act Cap. 241 of the Laws of Antigua and Barbuda**. The relevant provisions are **sections 3 or 4** thereof. Such an act is punishable with imprisonment with hard labour for any term not exceeding three years.

[63] (i) This Court has enormous empathy and sympathy for Ms. Potter. In her own words she was "*experiencing financial difficulties*". She is "*a single mother of three girls*". She supports her elderly uncle. She is the "*main income earner of the family*". Such acts are noble and laudable.

(ii) However, as much as this Court understands Ms. Potter's actions in the writing of bounced cheques, such actions cannot and must not be condoned in the context of a commercial society. She was warned by Ms. Ross with regard to such behaviour. The issuance of bounced cheques by Ms. Potter to the Company caused it to incur some financial loss. She occupied the position of Assistant Manager. She should have known better than to issue such bounced cheques. She must take responsibility for her actions. She should not have caused the blame for her misfortune to be attributed to Mr. Berridge.

[64] Ms. Potter was wrong to state that she was not "*breaking the law*". The matter of the issuance of bounced cheques is an offence and if found guilty carries the punishment referred to at paragraph 62. In all of the circumstances of this case the Court finds that her issuance of bounced

cheques was incompatible with the performance of her duties as Assistant Manager.

- [65] Counsel for the Employee submitted that she had repaid the Employer. As a consequence the Employer could not dismiss her for writing these bounced cheques. I strongly disagree. This matter arose for consideration in **Beverly Samuel v Caribbean Banking Corporation Ltd / Royal Bank of Trinidad & Tobago (RBTT) Ref No. 36 of 2002**. Cyril Maundy the then President wrote the following at page 11:

“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 the responsibility for the mis-deed or make the deed cease to be wrong.”

- (b) **The matter of Ms. Potter’s acceptance of a non-customer’s cheque.**

- [66] Another reason which caused the Employer to dismiss the Employee related to the Employee’s acceptance of a cheque from a non-customer of the Company in exchange for Eastern Caribbean currency. This cheque was subsequently dishonoured by the bank.

- [67] In her Witness Statement at paragraph 11 she stated *inter alia* as follows:

“Sometime prior to going on sick leave/vacation, I did request of the Sister Company to sell US cash to a customer for a cheque. Unknown to me, the cheque was returned for

insufficient funds. Though the practice of taking third party's cheques for US was common, on this occasion I had requested the store to assist a customer.

By my letter I offered to pay the amount from my pay which was about EC\$800.00. Mrs Ross never took the funds from my wage nor endorsed the cheque to me."

- [68] (i) In her response to Dr. Dorsett in cross examination she stated *inter alia* as follows:

"I recall the incident of a cheque drawn on Antigua and Barbuda Investment Bank Ltd firstly in favour of Columbian Emeralds International in sum of EC\$810. I recall this cheque. I was not aware of a policy in which a cheque could not be accepted without a sale being made. I see a change made in the payee from Columbian Emeralds International Ltd. to Jewellers Warehouse. I wrote the name Jewellers Warehouse on the cheque. With the cheque the gentleman.....purchased US \$300.00 from Jewellers Warehouse. Ms. Ross told me that in her letter of September 19, 2002 the cheque bounced. The blanked out account number did not appear suspicious to me. The gentleman asked me to change the name from Columbian Emeralds International to Jewellers Warehouse. It was the responsibility of the issuer of the cheque to make the change and not my responsibility. (The gentleman) initialled the cheque."

- (ii) Ms. Potter in her Witness Statement filed on October 15, 2007 stated *inter alia* as follows:

“Unknown to me, the cheque was returned for insufficient funds.”

[69] I do not believe Ms. Potter when she states that as at October 15, 2007 she was not aware that the cheque which she accepted from a non-customer of her employer had bounced. The evidence is that she was informed by Ms. Ross in a letter to her dated September 19, 2002. Ms. Potter herself responded to this problem by her letter of September 27, 2002.

[70] The Court notes the reasoning given by Ms. Potter for her acceptance of this non-customer’s cheque. She stated *inter alia* as follows:

“I now take the time to address the correspondence dated September 19, 2002. I accepted the cheque submitted by the said individual on the fact that THE PERTINENT PERSONAL INFORMATION WAS AFFIXED TO IT. Unfortunately, the gentleman is off Island and upon his return this matter I am sure will be rectified.”

(Emphasis in capital is the Court’s)

[71] As an Assistant Manager one of Ms. Potter’s duties was to exercise good judgment of persons who present cheques. I reject as proper business practice the acceptance of a cheque in such circumstances based upon the affixing of the drawer’s personal contact information being placed thereon.

[72] Ms. Potter gave no evidence that she knew the drawer of the cheque. No evidence was led to show if he was a past customer of the company with a proven business record.

[73] In addition an examination of this cheque caused the Court some concern. Firstly, the original account number was obliterated. Secondly another account number was written in its place. Thirdly, this change of account number was not initialled. Fourthly, in Ms. Potter's own language she stated *inter alia* as follows:

"The gentleman asked me to change the name from Columbian Emeralds International to Jeweller's Warehouse. It was the responsibility of the issuer of the cheque to make the change and not my responsibility. He initialled the cheque."

[74] This cheque was presented to Ms. Potter with some major discrepancies. These should have alerted her not to accept it. This Court also notes that the drawer of the cheque would not have been in the store when Ms. Potter made the change of the drawee's name. For these reasons Ms. Potter should not have accepted this cheque.

[75] Ms. Sue Ross gave evidence with regard to the acceptance of this cheque. She stated *inter alia* as follows:

"The company had a policy that a cheque must be tied back to an invoice of a purchase from the store..... This policy was told to Ms. Potter."

[76] Ms. Potter denied knowledge of such a policy. She stated that a “*practice of taking third party’s cheques was common.....*”

[77] I believe Ms. Ross when she states that the acceptance of a cheque must be related to a purchase of an item. This is an acceptable business practice. In any event Ms. Potter must take full responsibility for her actions. Her conduct resulted in a loss to the company. She has herself to blame for such an act. Her actions caused the Employer to write her a letter dated September 19, 2002. In that letter Ms. Sue Ross expressed her concern of Ms. Potter’s sale of the US \$300.00 to the gentleman which resulted in a loss to the Company. Ms. Ross stated *inter alia* as follows:

“Upon your return from sick leave there will be further investigations into this and other matters out of which the relevant actions will be taken.”

(c) The matter of Ms. Potter’s acceptance of overpayment of one week’s vacation pay.

[78] The other reason why the Employer dismissed the Employee was due to her acceptance of an additional week’s vacation pay. Ms. Sue Ross in a letter to Ms. Potter dated September 25, 2002 requested repayment on or before September 30, 2002. Ms. Potter received this letter. She did not repay the one week’s vacation pay before the scheduled date or at all prior to her dismissal.

[79] The matter of being overpaid was never addressed by Ms. Potter in her Witness Statement or in evidence in chief. In cross examination in response to Dr. Dorsett she stated *inter alia* as follows:

“A cheque for two weeks vacation pay was given to me. I recall that on the following day after receiving the cheque I realised that I was overpaid by one week. On that day I did not inform management. A series of events unfolded which resulted in my dismissal which prevented me from repaying the money to the employer.

I see the cheque written in the sum of \$2,620.36 dated 15 August 2002. This represented two weeks vacation pay when I should have got one week’s vacation pay. I got this on 15 August 2002.

I see a letter of September 25, 2002. Between August 16 and September 25, 2002, I had opportunities to bring the matter of the overpayment of the holiday cheque to management. I do not recall bringing to management’s attention the fact that I was overpaid. I did not pay back the overpayment by the end of September 2002. I said to Ms. Ross on or about September 25, 2002 to deduct it from my next salary. I do not know why I did not pay back the money earlier.

When I got the overpayment I was the Assistant Manager at the Employer. In my position I was aware of the procedure employed by the company for a salary deduction to be made if I was underpaid or overpaid. The procedure would be that the money would be deducted from my salary or added to it. I did not tell the Office Manager to deduct it from my salary.”

[80] This Court therefore disagrees with Mr Marshall that no demand was made by the Employer to the Employee for her to repay the one week's vacation pay. I draw his attention to Ms Sue Ross's letter of September 25, 2002 and the Employee's own evidence under cross examination.

[81] The company erred in its overpayment to Ms Potter of one week's holiday pay. As an Assistant Manager it was her duty to repay the money to the Employer. Her clear evidence was *inter alia* as follows:

***“I RECALL THAT ON THE FOLLOWING DAY AFTER
RECIEVING THE CHEQUE I REALISED THAT I WAS
OVERPAID BY ONE WEEK. I DID NOT INFORM
MANAGEMENT.....I DID NOT TELL THE OFFICE
MANAGER TO DEDUCT IT FROM MY SALARY.”***

(The Emphasis in capitals is the Court's)

[82] Ms. Potter knew that she was overpaid. She kept the funds for more than five (5) weeks. She did not inform management. She knew of the company's procedure in such circumstances for repayment by deduction. She failed to follow this procedure before being asked to repay the money. The Employer requested Ms. Potter to repay the overpayment before September 30, 2002. She did not do so.

[83] The evidence shows that Ms. Potter clearly did keep the overpayment of vacation monies for herself. It was her clear intention to continue to keep such funds before she was asked to account for them. This conduct resulted in a financial detriment to the company.

- [84] Ms. Potter's conduct in this regard was not in keeping with her position as Assistant Manager. Mr. Marshall her Attorney-at-Law describes her conduct as "*reprehensible*". This Court certainly agrees in full with Mr. Marshall's assessment of Ms. Potter's conduct. The word "*reprehensible*" which he uses means "*wrong or bad and deserving of condemnation*". It also means "*blame worthy, culpable, deplorable, disgraceful and objectionable*" among others. The Latin root is "*reprehendere*" which means "*rebuke*". See the **Oxford Paperback Dictionary Thesaurus Word Power Guide**, Oxford University Press, London, 2001.

THE SECOND ISSUE

- (ii) Was it necessary for the Employer to conduct an investigation of the Employee's conduct?
- [85] Mr. Marshall in his Written Submissions raised as an issue the investigation by the Employer of the matters which caused it to dismiss the Employee. He cites **W. H. Smith & Sons Ltd. v Casserley** (op cit). In this case Mr. Casserley who worked as a packer/driver on the night shift at Wimbledon News House was dismissed by his employer, W.H. Smith & Sons Ltd. The reason for the dismissal was that the employer believed that Mr. Casserley had stolen some company property worth £100. The Industrial Tribunal held that his dismissal was unfair. The Employer appealed. The Employment Appeal Tribunal upheld the Employer's appeal. However the matter was remitted to a fresh Tribunal. In this case, Mr. Justice Lindsay referred to **British Home Stores Ltd v Burchell [1978] I.R.L.R. 379** for guidance.

[86] In her testimony in answer to Mr. Marshall, Ms. Ross stated *inter alia* as follows:

“The investigations were of a legal nature and that I should inform my boss of my intention to terminate my Assistant Manager. Of a legal nature means that I would obtain advice from my lawyer to see the legality of what I intended to do. What I actually did was to seek legal advice from the Employer’s Federation. When I wrote the letter of September 28, 2002 I then investigated the legality of dismissing Ms. Potter. At no time did I interview anyone with respect to the matters mentioned in my letter of October 1, 2002. I took no statement from Ms. Potter. At the time I wrote the dismissal letter of October 1, 2002, satisfactory settlement of Ms. Potter’s personal cheques had been made. As at October 1, 2002 all of Ms. Potter’s personal cheques which previously bounced had been repaid to the Employer.”

[87] This Court disagrees with Mr. Marshall that there was a need of the Employer to institute any investigation of Ms. Potter’s actions. The first reason why no investigation was necessary was put forward by Ms. Ross at paragraph [86] of what she meant by the word investigation.

[88] The second reason why no investigation was necessary in this case related to the types of misconduct which were committed by Ms. Potter. This case does not involve a set of circumstances in which there is uncertainty of the employee’s actions which would ordinarily require an investigation.

- [89] In Ms. Potter's case, she wrote certain specific bounced cheques. She accepted the non-customer's cheque. It subsequently bounced. She retained the one week's overpayment of her vacation monies. These actions of misconduct may be described as very blatant and obvious. They do not require any investigation. I am fortified in this view by reference to **Smith & Wood's Employment Law** (op cit) at **page 501**. The learned authors state *inter alia* as follows:

"It is clear that, in all but the most blatant and obvious case of misconduct....., the employer must have made a proper investigation of the grounds of his complaints against the employee...."

- [90] In addition, in **Principles of Employment Law, Fourth Edition 2000**, published by **Michael Jefferson, Cavendish Publishing Ltd. London**, the learned author states *inter alia* as follows:

"It should be noted that Burchell is irrelevant where the facts are clear, for example, where it is clear that.....the misconduct is obviously gross....."

- [91] In any event, had an investigation been carried out, the same findings would have been obtained by the Employer. These findings were that (a) the Employee wrote bounced cheques; (b) the Employee accepted a cheque which subsequently bounced and (c) the Employee retained monies to the detriment of the Employer. The case of **Kelly – Madden v Manor Surgery [2007] I.C.R. 203 (E.A.T)** is authority for this finding. In this case a practice manager for a general medical practice was suspected of authorising

overtime payments for herself without consulting the practice partners. Following an investigation and disciplinary hearing she was dismissed for dishonesty and her dismissal was upheld on appeal. On her complaint of unfair dismissal, an employment tribunal decided that, although the disciplinary process was flawed, in that the claimant's contention that one of the partners had checked the overtime payments had not been investigated, it was reasonable for the partners to have formed the view that by taking overtime payments without authority the claimant was in breach of her position of trust, that even if a proper procedure had been followed, she would have been dismissed and that the dismissal was fair. On appeal by the claimant, the EAT dismissed her appeal holding that even had procedures been properly complied with, the result would have been the same. **Elias J: President** in delivering the Court's judgment stated *inter alia* at paragraph 58:

“[T]he partners clearly considered that the taking of overtime pay without authority, coupled with the attempt falsely to claim that authority had been granted, itself displayed a fundamental lack of trust from which dishonesty could be inferred.”

CONCLUSION

[92] (i) What this Court is asked to determine is whether the actions of the employee briefly outlined at paragraph (89) hereof amounted to misconduct. Having regard to all of the circumstances of this case I hold that Ms. Potter's

actions demonstrated that she undermined the trust and confidence which is absolutely necessary in the relationship between employee and employer. Her conduct in this respect demonstrated that she was unable to continue and function effectively in such a manner so as to command the trust and confidence of the Employer. Such actions in the words of Sellers L.J. in **Sinclair v Neighbour** (op cit) could have led Ms. Potter to get herself in “*endless trouble*”. As a consequence of Ms. Potter’s actions the Employer was no longer required to retain her services.

(ii) On a consideration of all of the circumstances of this case this Court finds that the actions of the Employee amounts to misconduct as defined in C58 (1) (a) and C 59 (1) (a) of the Labour Code. The Employer’s action to dismiss the Employee was reasonable. It’s dismissal of the Employee was fair.

THE THIRD ISSUE

In the event that the Employee was unfairly dismissed what is the measure of damages to which she is entitled?

[93] In light of the findings at paragraph [92] there is no need to determine this issue. The Employee’s Reference is hereby dismissed. There shall be no order as to costs.

Dated the 25th day of November 2008



PHILIP. A. PILGRIM
President

I agree.



M. ALTHEA CRICK
Member

I also agree.



SAMUEL R. AYMER
Member

