

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 6 of 2004

BETWEEN:

JOSHUA FABIAN

Employee

and

THE BANK OF NOVA SCOTIA

Employer

Before:

The Hon. Edward T. Henry

Chairman

The Hon. Genevieve L. I. Benjamin

Member

The Hon. Oscar A. Frederick

Member

Appearances:

Stacy Richards-Anjo, of Richards & Co.

Attorneys-at-Law for the Employee

Racquel A. Walsh Silston, of Simon Rogers & Murdoch

Attorneys-at-Law for Employer

2007: September 26, 27, 28

2007: October 25

2007: November 14, 20

2009: October 21

JUDGMENT

HENRY E.:

INTRODUCTION

- 1 The Bank of Nova Scotia is a foreign owned bank that operates in the state of Antigua and Barbuda. It offers a wide variety of banking

services to the public and provides employment to many employees. There are two branches of the Bank. Mr. Fabian worked at the High & Market Street branch of the Bank. For ease of reference in this judgment the Bank of Nova Scotia shall sometimes be referred to as ***“the Bank”***.

- 2 Joshua Fabian was employed at the Bank of Nova Scotia since in or about 1982 as a Teller. On May 8, 1985 he was laterally transferred from the post of CD5 Audit Clerk to the position of Senior Teller. He remained in that position until his services were terminated on March 13, 2000. Prior to his termination he worked for a salary of \$5,913.00 per month. In this judgment he shall be referred to as ***“the Employee.”***

LEGAL PROCEEDINGS

- 3 This Reference was filed on March 10, 2004 by the Employee giving notification of the existence of a trade dispute between himself and The Bank of Nova Scotia.
- 4 The Employee's Memorandum was filed on April 14, 2004 in which he alleges that his ***“dismissal was unfair, contrary to sound industrial practice, contrary to the provisions of the Antigua and Barbuda Labour Code and to the Constitution of Antigua and Barbuda”*** and sets out his financial claims. His Witness Statement was filed on September 26, 2007.

- 5 After his dismissal Mr. Fabian submitted applications to Global Bank of Commerce, CIBC Limited and the Antigua Commercial Bank. He obtained employment with Sagicor in May 2000 as a Life Underwriter. For two years after his employment with Sagicor he earned a monthly salary of \$3,000.00 after which he was remunerated on a commission basis.
- 6 The Employer's Memorandum was filed on July 07, 2005. The claims of the employee including that of Unfair Dismissal were denied. The Employer's Witness Statement was filed on September 26, 2007.

THE EMPLOYEE'S EVIDENCE

- 7 The Employee was dismissed by a letter of dismissal dated March 13, 2000. He states that he was unfairly dismissed. The letter of dismissal (**Exhibit FJ1**) states as follows:

"March 13, 2000.

Mr. Joshua Fabian

Bank of Nova Scotia,

High & Market Streets.

St. John's

Antigua.

Dear Mr. Fabian:

Further to our letters of February 28 and March 6, suspending you from work, we now advise that we have completed our investigations in respect of your performance of cashier duties assigned to you at St. John's Antigua Branch and advise that we have no alternative but to terminate your employment for just cause, effective today, March 13, 2000.

Our decision has been reached on the basis of a number of factors including the following:

- a) On February 23, as a result of the verification of cash prior to it being placed in the ATM, a bundle of \$100s was found to be short by 14 notes (\$1,400). You admitted to your Supervisor that the bundle was cleared from a Balancing Teller, but that contrary to documented procedures, you did not count the cash in detail. This is a direct breach of the procedures as documented in the Branch Systems and Procedures Manual governing the exchange of cash between Tellers.*
- b) On February 24, a detailed count of your cash holdings was performed and these were found to be short of \$3,610.00 despite the fact that you had recorded a balanced position.*
- c) A review of the sundry foreign currency holdings revealed a major shortage in the converted Eastern Caribbean currency equivalent. An attempt to investigate the variance revealed that*

the old Cash Treasury Records and Foreign Currency Tally Sheets, of which you were the sole custodian, have been removed from their location and remain outstanding.

A review of the sundry foreign currency records in our possession revealed the following:

- a. The majority of the transactions were done at a rate higher than the Bank's prevailing rate, (a discrepancy/loss of \$1,611.20 to the Bank). You were unable to provide any explanation for this discrepancy and the rationale for your using a rate higher than the prevailing days' rates.*
- b. On January 6, 2000 you carried forward the incorrect total from your Foreign Currency Tally Sheet to your Teller's Journal which should have resulted in a cash overage of \$5,221.00. You recorded a balanced position.*
- c. On January 7, 2000 you recorded transactions on your Tally Sheet, one of which was for 4,500 Swiss Francs. In response to our queries, you advised 3,500 of these funds were from a deposit to one of our major clients. Our investigations reveal that no such transaction took place.*
- d. Deposits bearing sundry currencies revealed that the customer's accounts were credited at the day's prevailing rate while you recorded a higher Eastern Caribbean currency equivalent on your Foreign Exchange Tally*

Sheet. This should have resulted in a cash overage on the days in question but your cash was recorded in a balanced position.

The foregoing constitutes, at the very least, gross misconduct on your part which has irreparably undermined the Bank's trust and confidence in you, particularly given the position that you hold and your years of service at the Bank. Your conduct has resulted in substantial loss to the Bank of which you will be held responsible.

As a result of your termination, we advise that your benefits coverage under the Bank's program ceases with immediate effect. Any Group Life Insurance and Survivor income Benefit may be converted, without evidence of health, to an individual policy up to age 65; the total maximum amount which can be converted is \$200,000. Any Dependents Group Life Insurance on the life of your spouse may also be converted to an individual policy provided the spouse is under age 70. You may apply directly to the Canada Life Assurance Company, 330 University Avenue, Toronto, Ontario, M5G 1R8 within 31 days from today, March 13, 2000.

With regards to any staff loans, Master Card, etc., presently outstanding with the Bank, you are requested to arrange an appointment with the Country Manager, or his delegate to establish new repayment terms and conditions. In the interim, the interest rate on all staff loans will from March 14, 2000 be at the prevailing customer rates.

All deposit accounts will be subject to standard customer service charges effective March 13, 2000. Medical and dental claims for expenses incurred up to and including March 13, 2000 will be reimbursed in accordance with the terms and conditions of the plan provided they are submitted within 60 days from this date.

All/any monies owing in respect of earned vacation not taken and any other matter will be forwarded in due course.

Yours truly,

Len Wright
Country Manager

cc: Keithlyn B. Smith – ABWU”

- 8 In his Witness Statement the Employee's evidence is that as Senior Teller he was responsible for clearing from each Teller at the end of the day cash that was over the Teller's limit to hold. It was the standard procedure to count cash cleared in front of the particular Teller.
- 9 On February 10, 2000, his cash was over by \$2,250.00. He reported this to his Supervisor but no detailed count was made.
- 10 On February 23, 2000, he cleared a bundle of notes from another Teller without counting them in the Teller's presence. He failed to do

so because he was extremely busy and late in fulfilling certain other duties. When the bundle was cleared there was a deficit of \$1,400.00. Upon reporting this shortage to his Supervisor he was instructed to retain the bundle until the following day as the other Teller was no longer present.

- 11 On the following day a detailed cash count was made. This analysis revealed a shortfall in cash of \$3,610.00 as opposed to the correct figure of \$1,360.00. The United States cash revealed a surplus of \$15.00.
- 12 Regarding the Swiss Francs transaction on January 6 and 7, 2000 Mr. Fabian stated in summary *inter alia* as follows:
 - i) At that time the name of the customer involved in sundry foreign currency transactions was not recorded. In addition, he forgot the name of the particular customer. As soon as he recalled the name he informed the Country Manager.
 - ii) It was “*common place*” at the Bank “*for the transposition to the Teller’s Journal to be done on the day after the actual transaction.*”
- 13 He contended that he was treated more harshly than the other officers involved in the same incident. However no evidence was led to verify this contention.

- 14 According to him, he was never presented with any evidence that he caused any loss over any given period as a result of errors in the conversion of foreign currency. Prior to his dismissal he was firstly suspended from February 28, 2000 to March 03, 2000 and secondly from March 06, 2000 to March 10, 2000.
- 15 Additionally, Mr. Fabian asserts that there was no security of records dealing with the foreign exchange. As a consequence it could not be said that he was the sole custodian of them. No previous warnings by the Employer to the Employee were given in evidence.
- 16 In cross-examination, the Employee stated that he was familiar with a document called **“the Branch Service & Procedures Manual – International.”** This was admitted into evidence and marked **“ETH1”**. When he was shown ETH1 he said that he could not attest to knowledge of the document as the date thereon was April 9, 2003 a date subsequent to his dismissal. He however, confirmed that during his service with the Bank there was a document of the same title, in which there was a clause which required employees to count cash received other than from the Central Bank. In addition, such cash should be counted in the joint custody of both parties.
- 17 He stated that if cash is received from a source other than the Central Bank and it is not counted in detail, this represents a breach of the Bank’s Procedures & Guidelines. Mr. Fabian stated *inter alia* as follows:

“Yes in both my Witness Statement and Memorandum I alluded to the fact that although it is best practice to make the count in the presence of the teller it was not unusual for this to happen.” He further stated, ***“I agree that although it happens and it is not unusual does not make it correct.”***

18 He stated that although he signed the ***“Bank’s Guidelines”*** annually, he did not follow the procedure laid down therein and ***“that being extremely busy (did) not exonerate (him) from the responsibility of counting the cash in detail.”***

19 In cross-examination he stated that he had never denied being short of \$3,610.00 on February 24, 2000. He submitted that on February 10, 2000, he had a surplus of \$2,250.00. When this was drawn to the attention of his Supervisor she did not do a detailed cash count. A count was only done on February 24, 2000. The result should be a shortage of \$1,360.00 only. He said that he was not authorized to make the assessment to offset the two, but that he spoke with Mrs. Hurst on March 25, 2000. Mrs. Hurst confirmed to him that ***“both differences would be taken into account.”*** When questioned as to the omission of this latest statement in his memorandum he responded ***“maybe I just did not choose to mention it, but it happened.”***

20 Concerning the third factor listed in the dismissal letter of the Foreign Currency Tally Sheet (ETH2) in examination in chief the Employee stated *inter alia* as follows:

“It relates to more than one employee of the Bank of Nova Scotia. It would normally be prepared by the teller dealing with foreign currency. There were two persons writing entries on them. I am one”

21 When Mr. Fabian was cross examined by Mrs. Walsh Silston he stated *inter alia* as follows:

“Yes, the information is used by the Senior Teller, and as such it belongs to me. The other person would be the one who took over from me after I left the Bank. Yes, the first entry made by this person was on March 1, 2000. Prior to that, all other entries were made by me as Senior Teller.”

22 Mr. Fabian further stated that although the Foreign Currency Tally Sheet (ETH2) does not contain a column which shows the actual daily rate, he indicated in his Memorandum that he had used incorrect rates.

23 When it was put to him that in those instances when he did not use the prevailing rate he used a rate which was above the prevailing rate, his response was:-

“There were instances when the rates used were higher than the prevailing rate.”

24 At the end of his testimony the Employee responded to questions from the Court. He stated that when he used a rate higher than the day's prevailing rate it was done in error. He did not admit that this happened repeatedly. According to him the ***“higher rates may be***

3cents which does not affect anything.” He denied that in those cases there was any money to be *“turned over.”*

- 25 The Employee further stated that the 4,500 Swiss Francs were not entered in ETH 2 on January 6, 2000 contrary to what he had stated in his written statement, and contrary to the Bank’s documented procedure of which he was well aware. They were not recorded until January 7, 2000. He said that holding cash separately in his drawer was an error. He added that this was nothing new for anybody to do in the Bank.
- 26 He also stated that because of this he carried forward an incorrect total from the foreign currency tally sheet to the foreign currency journal. He should not have recorded a balanced position but should have had an overage of \$5,221.00.
- 27 He stated that his experience at the Bank included being an audit clerk with specific responsibilities to ensure the integrity of the Bank’s record-keeping. His actions in this regard did not necessarily call into question his *“integrity and honesty”*.
- 28 After the relevant records were examined by the Bank Mr. Fabian was asked to explain the shortages which were revealed in his cash and balancing records. He did not offer any satisfactory explanation.

THE EMPLOYER'S EVIDENCE

- 29 Mrs. Erna Mae Tonge-Hurst gave evidence on behalf of the Employer. She was the Employer's Operations Manager from October 1992 to September 2005.
- 30 In her position as Operations Manager she had a first hand knowledge of matters which involved Mr. Fabian's employment. Her Witness Statement was admitted into evidence.
- 31 In her evidence she stated *inter alia* that the Employee's failure to count the cash in the presence of the balancing teller on February 23, 2000 was contrary to the Employer's documented procedures. According to her, it was standing banking procedure that all cash transactions between tellers must be verified in their joint custody. She stated that there was in existence the **Branch Services and Procedures Manual**. This was available to the Employee as a consequence of having received standard training by the bank. In this training these procedures are discussed.
- 32 With regard to the incident of February 23, 2000 Mrs. Tonge-Hurst indicated that the Employee's cash for February 23, 2000 was counted in detail on February 24, 2000. The term "*surprise counted*" is used in banking business in circumstances where an employee's cash is under investigation.

- 33 When the employee's cash for February 23, 2000 was counted on February 24, 2000 there was a shortfall of \$3,610.00. The Employee nevertheless showed a balanced position.
- 34 Mrs. Tonge-Hurst also gave evidence with respect to the Employee's use of a higher exchange rate than the prescribed rate. According to her the rates of exchange are established by the Eastern Caribbean Central Bank (ECCB). Such rates are forwarded everyday to all commercial banks inclusive of the Bank of Nova Scotia. The rates for currencies which are traded on a regular basis are posted on a notice board in the Bank on a daily basis. When the Bank receives these rates it distributes them to all departments including Mr. Fabian's. In her opinion the Employee's use of a higher rate ***"would have affected the employee's balancing position."*** In her evidence she stated that such actions on the part of the Employee took place on 13 occasions.
- 35 Mrs. Tonge-Hurst stated that on January 06, 2000 the Employee carried forward an incorrect sum of \$5,221.00 from his foreign currency tally sheet to his teller's journal.
- 36 In answer to Mrs. Stacey Richards-Anjo Attorney-at-Law for the Employee, Mrs. Tonge-Hurst indicated that if an employee experiences a shortfall in cash, the Bank may require the employee to repay this shortfall. This was at the Bank's discretion. There was an overage on February 10, 2000 of \$2,250.00 but this was not taken into consideration with regard to the shortfall of \$3,610.00 on March 23, 2000.

- 37 Mrs. Tonge-Hurst contended however that there was no right of an employee to reduce the shortfall of \$3,610.00 because of the lapse of time between the two dates.
- 38 Mrs. Stacey Richards-Anjo Attorney-at-Law also questioned Mrs. Tonge-Hurst concerning the foreign currency transaction of January 06 and 07, 2000. Mrs. Tonge-Hurst stated that it was correct for the Bank to include this transaction as part of the reason why the Bank dismissed Mr. Fabian. She further stated that the Bank's investigation revealed that the customer whose name Mr. Fabian gave denied having made this transaction. She also stated that a transaction did take place but it did not involve the particular customer which Mr. Fabian had identified.
- 39 In further answer to Mrs. Stacy Richards-Anjo, she indicated that she is not aware whether or not any warning letters were issued by the Bank to Mr. Fabian.

EMPLOYEE'S SUBMISSIONS

- 40 Mrs. Stacy Richards-Anjo Attorney-at-Law for the Employee filed her Written Submissions on November 30, 2007. Her submissions may be summarized as follows:
- (i) ***“Mr. Fabian admitted to the Employer and to the court that he had failed to count the Employees cash in the presence of that employee on the 23rd February, 2000. He also admitted in***

cross-examination that in doing so he had breached procedures in the Branch Services and Procedures Manual.”

– See page 3 of Counsel’s Submissions.

- (ii) That on February 24, 2000 his cash was short by \$3,610.00. However the overage of \$2,250.00 on February 10, 2000 should have been taken into consideration. If this was done there would have been a shortfall of \$1,360.00.

- (iii) *“The Employee’s and Employer’s evidence is that not recording the transactions on the same day was a breach of the Guidelines for Business Conduct in that transactions are to be recorded on the day they take place. The Guidelines state that “you may not under any circumstances knowingly make or allow false or misleading entries to be made to any account, record, model, system or document of the bank.” However, the Employee maintains that this “holding over” was done regularly in the business of the Employer and that it had become a matter of practice to do this, contrary to the guidelines relating to entries on bank records.”*

– See page 5 of Counsel’s Submissions.

- (iv) The Employer has not put forward any evidence to substantiate its loss of \$1,611.20 with regard to its foreign currency transactions. *“The Employee admits that in error he used rates which were not the day’s prevailing rate but that the difference would have been miniscule. It is clarified in re-examination of the Employee that at no time was this deliberate and that it would have been done in error”.*

- See page 7 of Counsel’s Written Submissions.

- (v) The Employer does not aver or plead the investigative process that it engaged in to arrive at the conclusion that the Employee was guilty of misconduct so serious that the employment relationship could not be expected to continue. In support of her contention, Mrs. Stacy Richards-Anjo cited **The Epicurean Ltd. and Madeline Taylor Civil Appeal No. 4 of 2003.**
- (vi) The evidence does not substantiate a case for summary dismissal. Any errors which the Employer was able to substantiate at the time of termination ought to have been dealt with by the issue of a warning letter or letters. The matters were not sufficient to ground summary dismissal.
- (vii) If the Court finds that the Employer's grounds for dismissal are supported by the evidence, the Employer did not act reasonably in dismissing the Employee.
- (viii) In support of her submissions Counsel cited **Cable & Wireless Ltd. v Hill (1982) 30 W.I.R. 120, Harveys on Industrial Relations and Employment Law and Antigua Village Condo v Jennifer Watt Civil Appeal No. 6 of 1992.**

EMPLOYER'S SUBMISSIONS

41 Mrs. Raquel A. Walsh-Silston of Simon Rogers Murdoch, Attorney-at-Law for the Employer filed her Written Submissions on November 30, 2007. They are summarized as follows:

- (i) The actions of the Employee were sufficient to warrant summary dismissal;

- (ii) The investigation of the Employee's action was fair;
- (iii) In support of her submissions, Counsel cited various authorities and some text book writers. They include **Sinclair v Neighbour [1966] 3 AU E.R 988; Cicely Lee v Bank of Nova Scotia Ref. No. 2 of 1985, and the Law of Unfair Dismissal, second edition, by Steven Anderman, Butterworths, London, 1985.**

ISSUES FOR DETERMINATION

42 The issues for determination are as follows:

- (i) **In the circumstances of this case did the Employee's conduct justify the Employer summarily dismissing the Employee?**
- (ii) **What compensation if any is payable to the Employee if his dismissal is unfair?**

THE LAW

43 C56 of the Labour Code states as follows:

“C56. 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:

“C58. (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.”

C58 (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:

“C59. (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)

44 Inextricably linked with the employee’s duty to act in good faith is a fundamental implied term that there must be mutual trust and confidence between the employer and the employee.

45 This Court derives some assistance from the judgment of **Neary v Dean of Westminster [1999] I.R.L.R.288**. In that judgment **Lord Jauncy** was of the view that misconduct which would justify dismissal “**must so undermine the trust and confidence which is inherent in the particular conduct of employment that the master should no longer be required to retain the servant in his employment**”. – see **Lord Jauncy** at page 291.

46 In matters of this nature whether the conduct complained of undermines the safe and proper conduct of the business varies according to the nature of the business and the position which is held

by the employee. Decisions in former cases are of little import. Each case depends upon its own particular facts.

- 47 The burden of proof is upon the employer to show just cause for dismissing the employee. The standard of proof “*should be strict, persuasive and convincing*”– See **Cable and Wireless (WI) Ltd v Hill and other** (1982) 30 W.I.R.120 per Berridge J.A. at page 129.

THE FIRST ISSUE

In the circumstances of this case did the Employee’s conduct justify the Employer summarily dismissing the Employee?

- 48 In the context of an examination of this issue in **Robert Emanuel and Bank of Antigua Limited Ref. No. 12 of 1992**, Mr. H.S.R. Moe the then President of this Industrial Court stated *inter alia* at page 7 as follows:

“Dismissals relating to misconduct cover a multitude of sins and what this Court has to determine is whether the circumstances were such that would reasonably lead a reasonable employer to dismiss. What then was the state of evidence and information known to the employer at the time of dismissal?”

- 49 Mr. Fabian occupied firstly the position of Audit Clerk and secondly the position as Senior Teller with the Bank. Such positions required him to be a trustworthy employee. Characteristics of trust and

honesty are fundamental to the successful operations and conduct of a bank.

- 50 In addition, as a consequence of having been trained by the bank, coupled with his experience, he was required to have a sound knowledge of the Bank's Guidelines for Business Conduct and its Branch Services and Procedures Manual.
- 51 As a bank employee, he was also required to conduct the Bank's business in an efficient, honest and proper manner.
- 52 Mrs. Stacy Richards-Anjo, Counsel for the Employee readily conceded on at least three occasions that Mr. Fabian's actions were a clear breach of the Bank's Branch Services and Procedures Manual. These actions related to (a) his failure to count the cash in the presence of another employee; (b) his failure to record transactions on the same day and (c) his incorrect use of the wrong foreign exchange rates with respect to the loss of EC \$ 1,611.20. Counsel describes this loss as *"miniscule"*.
- 53 At paragraph 4 of the Employee's Witness Statement Mr. Fabian stated as follows:
- "4 – In my position as Senior Teller I was responsible for clearing from each teller at the end of the day monies that put each individual teller over the limit of monies that he or she should hold. It is standard procedure to count any monies cleared from that teller at the end of the day in front of that*

teller obviously to avoid a situation where the teller can say at the end of the day that any discrepancy was caused by someone other than that teller.”

54 At paragraphs 6 and 7, of Mr. Fabian’s Witness Statement he stated as follows:

(i) *“6 – On the 23rd February, 2000, I cleared a bundle of \$ 100’s from a teller Mr. Eural Baptiste without counting same in his presence. Although it is best practice to make the count in the presence of the teller whose monies are being cleared, it was not unusual for this to happen at the BNS between tellers where some level of trust had been established. On that day the 23rd February, 2007, we were extremely busy. I was late in replenishing the ATM, a function which I carried out at the time with the joint custodian for the ATM Johnesse Lord-Richards.*

7 – I used the funds cleared from Eural Baptiste to add to other monies to replenish the ATM. When we counted the bundle cleared from Eural Baptiste we found it to be short by 14 notes. Each bundle for each denomination should contain 100 notes.”

(ii) The reference to the year 2007 at paragraph 54(i) above should be fairly interpreted as the year 2000.

55 At paragraph 17 of his Witness Statement, Mr. Fabian stated as follows:

“17 – I admit that there were errors made on my part. So far as any discrepancy with conversion rates for foreign currency transactions are concerned there may have been errors but there was absolutely no misconduct on my part.”

- 56 The use of the correct foreign currency rates by an employee of a bank is indispensable for the proper conduct of the business of that bank. It is incumbent upon every appropriate banking officer to know the true foreign currency rate and apply that rate to transactions wherever necessary. To do otherwise is to create a situation which may do untold damage to the character, reputation and stability of a bank.
- 57 Suppose an employee uses a wrong foreign currency rate which results in a loss to the bank? Should this loss be considered as **“miniscule”**? If that employee’s action is found out, should the bank wait until another mistake is made before it takes appropriate action? What would happen on the next occasion when the loss is **“significant”**?
- 58 Is it however the monetary value of the sum which is lost or the actions of the Employee in his use of the wrong rate? I respectfully disagree with Mrs. Stacy Richards-Anjo that this court should have regard to the **“miniscule”** value of the loss. I do agree with Mr. Fabian that this Court should examine that **“there may have been errors”** with respect to the foreign currency transactions.

59 I have examined **Cicely Lee and Bank of Nova Scotia Ref. No. 2 of 1985**. In that case Mrs. Lee was dismissed for allowing a cheque for \$371.00 issued by her husband to be re-booked as there were not sufficient funds in the account when it was presented. The re-booking was made without authorization and in breach of standard banking policy and practice. In her evidence she said that she was not aware whether her husband had money in the account in question. She also said that she ***“did not intentionally re-book the cheque.”***

60 Maundy, the then Chairman of the hearing stated at page 4 of the judgment *inter alia* as follows:

“It is very unfortunate that a person after ten (10) years of faithful service should find her employment terminated virtually forthwith over a mere \$371.00 EC especially when no benefit accrued to herself from the transaction or indeed to the one she intended to assist, in this case her husband.”

61 At page 4 of the judgment, Maundy Chairman, also stated *inter alia* as follows:

“4 – [F]urther she in her own words made what was virtually an admission of the principal allegation.”

62 The Court in **Cicely Lee** was of the opinion that her action was serious enough to warrant dismissal as it was a serious breach of Bank policy. The Reference was dismissed.

63 The duty of a bank to employ only honest persons was reiterated in **Beverly Samuel and Caribbean Bank Corporation Ltd. Royal Bank of Trinidad & Tobago (RBTT) Ref. No. 36 of 2002 at page 11 of the judgment.** Maundy the then President, stated at paragraph 27 *inter alia* as follows:

“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.”

64 At paragraph 28 of Beverly Samuel’s (op cit) Maundy the then President stated *inter alia* as follows:

“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 misdeed or make the deed cease to be wrong.”

65 Mr. Fabian’s use of wrong foreign exchange rates was in clear breach of the Bank’s policy and practice. His actions in this regard had the potential to undermine the financial integrity of the bank.

66 In **Robert Emmanuel, (op cit) Mr. H.R.S. Moe** the then President stated *inter alia* at page 6 as follows:

“What it seems the Employee would wish the Employer to have done is to wait until he (the Employee) had given away

..... more of the Bank's money before dismissing him. Only a foolhardy bank would have accommodated him in such circumstances."

67 Maundy the then President in **Beverly Samuel (op cit) at page 12** stated *inter alia* as follows:

"Dismissal from a bank needs careful consideration as normally such a person may never again gain employment by a similar institution."

68 Having regard to all of the circumstances of this case Mr. Fabian's actions undermined the trust and confidence which is vital for a proper working relationship between himself and the Bank.

69 Taking into consideration the Employee's delinquencies, having thoroughly examined all of the evidence presented, the authorities cited by both Counsel, the appropriate sections of the Labour Code and the Industrial Court Act Cap. 214, I find that the Bank acted reasonably in terminating the employment of Mr. Fabian.

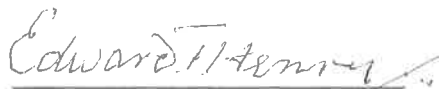
70 This Court holds that the Employee's actions constitute misconduct in accordance with sections C58 (1) (a) and C59 (1) (a) of the Labour Code. The Bank was fully justified in its dismissal of the Employee on March 13, 2000.

THE SECOND ISSUE

What compensation if any is payable to the Employee if his dismissal is unfair?

- 70 As a consequence of our findings at paragraphs [68 and 70] of this judgment there is no need to deal with this issue. The Employee's Reference is dismissed. There shall be no order as to costs.
- 71 Mrs. Stacy Richards-Anjo and Mrs. Raquel Walsh-Silston Attorneys-at-Law must be both commended for their Written Submissions. They were properly researched and helpful.

Dated this 21st day of October, 2009


EDWARD T. HENRY
Chairman

I agree


GENEVIEVE L. I. BENJAMIN
Member

I also agree


OSCAR A. FREDERICK
Member