

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 OF 2010

BETWEEN:

LEONART MATTHIAS

Employees

and

ANTIGUA COMMERCIAL BANK

Employer

Before:

*The Hon. M. Althea Crick

Chairman

The Hon. Samuel R. Aymer

Member

*The Hon. Jesse Kentish

Member

Appearances:

Mrs. Denise Parillon of Jonas Parillon & Co Attorneys for the Employee

Sir Clare Roberts QC, assisted by Mrs. Andrea Roberts Nicholas of Roberts & Co for the Employer

2012, May 02, 30, 31

2017, June 30

JUDGMENT

AYMER

Background

1. The Antigua Commercial Bank (hereinafter referred to as the **Bank** or the **Employer**) is an indigenous bank that operates in the State of Antigua and Barbuda. It offers a variety of banking services to the public and provides employment to many employees. The main/head office is situated on Thames Street in the City of St. John's. In addition to the main Branch, the Bank also has Branches on Friars Hill Road, and Agencies in Barbuda and at the V. C. Bird International Airport (hereinafter referred to as the **Airport Agency**).



2. Mr. Leonart Matthias, (hereinafter referred as the **Employee**), resides at Jonas Road, Belleview Estate, in the Parish of Saint John, in Antigua. He was employed with the Bank for over 21 years, from the 15th September 1988 to 5th February 2010.
3. During his tenure at the Bank, he worked in, and rotated through various departments and positions to include: **Teller** (Treasury, Savings, General Accounts, Foreign Exchange, Loans, Bulk, Airport and Barbuda), **Customer Service Representative**, **ATM Representative**, **Systems Support Technician** and **Airport Agency Supervisor**.
4. At the time of his termination in 2010, Mr. Matthias held the position of Airport Agency Supervisor, the highest position at the Agency, to which he was first appointed on 13th August 2007. He received a basic salary of \$6,942.00.
5. The letter of offer of appointment to the position of Airport Agency Supervisor, dated 2nd August 2007, was signed by Charles Xavier, Human Resource Executive, and accepted by the Employee on 8th August 2007.
6. The Employee's job description for his position as Airport Agency Supervisor set out the 'Main Objective of Position' as follows:

"To provide strong support to the Customer Services Officer by managing the Customer Service and Cash Operations at the Airport/Cambio efficiently and effectively, in order to provide exceptional service and create profitable business opportunities through cross selling the Bank's products and services in line with targets set and in accordance with ECCB guidelines and ACB's policies and procedures"
7. Further, the 'Key Accountabilities' under the job description required of the Employee, among other things, the following:
 - to project *"a favourable and professional image, maintaining loyalty and respect for ACB at all times."*
 - to ensure *"that all required custody and security requirements and documentation are properly in place and followed so that the unit achieves at least a satisfactory or better audit rating from the ECCB/Audit and ACB does not suffer any financial loss or negative exposures due to a lack of care in this area."*

- to manage *"cash operations efficiently and effectively ...verifying cash holdings and monitoring custody and security arrangements closely to minimize risk and any loss to the bank..."*
- to ensure *"the accurate, timely and secure management of the Night Depository..."*
- to ensure *"the accurate, efficient and secure handling of the ATM function."*
- to ensure *"the pleasing ambience and functionality of the premises, monitoring and controlling the tidiness and professional appearance of the vault and public area, following the purchase, installation, servicing and inventory of all equipment and stationery as required for efficient functioning."*
- to be *"Responsible for the overall performance and productivity of the Unit's staff providing leadership by example, ensuring timely and effective performance management ...and the implementation of sound disciplinary action when required."*
- to be *"alert to changes, suspicious activity and suspicious persons and notifies Supervisor, Manager and /or security personnel immediately"*

(Emphasis added)

Preamble and Issues Leading to Termination

8. Some time in 1993 the Employee became shop steward for the Antigua and Barbuda Workers' Union, the recognized industrial Bargaining Agency for the workers at the Bank. He has stated that the Bank "was not pleased" with this latter development and that thereafter the relationship between himself and the Bank became strained.
9. In fact, he summed up his tenure as *"one of extremely unusual and persistent discriminatory treatment"*. By way of example he listed several instances, including: a) being overlooked for promotion, b) inability to get job descriptions, c) unfair suspensions, d) denial of benefits, and e) discriminatory treatment in relation to study leave.
10. The Employee was of the further opinion that it was this strained relationship between himself and the Employer, rather than the reason given in his letter of termination that resulted in his dismissal. Indeed at the opening stage of the hearing, his Attorney, Mrs. Parillon, sought to lay the foundation, and so

confirmed to the Court, that she intended to put the case that the Employer in deciding to dismiss the Employee in the way it did, was because of the Employee's shop steward activities and not as result of the reason given in his letter of termination. This issue is dealt with later in this Judgment, as well as the countervailing response from the Attorney for the Employer, Sir Clare Roberts.

11. In order to enhance its accountability and protect itself against assorted risks, including robbery, theft, burglary and embezzlement, the Bank installed a surveillance system network at its branches and agencies. This system included a series of video cameras, the images from which were digitally recorded and timed by a number of Digital Video Recorders (DVRs) installed in 2008.
12. **Mr. Sidlow Frank** started working with the Employer on 9 January 2006 as a *Network Administrator/LAN Analyst* under the direct supervision of the Manager of Corporate Operations, Mr. Irvine Lee, and was charged with "administering the network". He was stationed at the main office in St. John's. Indeed he emphasized in cross examination that he was "the one charged with ensuring that the entire computer network system worked properly".
13. In addition to Mr. Frank and the IT Department, the Audit Department and the Customer Service Department also had an interest in this equipment. The Audit Department commissioned the evaluation and purchase of the DVRs.
14. **Mr. Jonathan Lindsay** commenced working at the Bank on 29th May 2007 as the Manager of Customer Relations and Service Quality. He was Mr. Matthias' Supervisor. So he, too, had an interest in whatever happened at the Airport Agency but was stationed at the Headquarters Office.
15. On Wednesday 27th January 2010 a Help Desk #249 notification was received from the Audit Department that they were "Unable to connect to the DVR at the Airport", Mr. Frank visited the Airport Agency at approximately 11.25am, on the 29th January, 2010, after the matter could not be resolved at Central Control level (i.e. after he was unable to communicate electronically from the Headquarters).
16. Upon physically checking the DVR at the Airport, he discovered that it was unplugged. According to the Employee, at paragraph 13 of his Witness Statement, when Mr. Frank asked who had unplugged it, the Employee responded that he did not know.

"Sidlow Frank then exclaimed that the DVR was unplugged. He inquired who unplugged it and I replied that I did not know."

However in paragraph 14 of that Statement the Employee stated when asked who works near the vault:

"I informed him that from time to time I would unplug it (the DVR) when it alarms and plug it back in within about ten seconds".

Mr. Frank left the Agency and returned to the Head office.

17. At about 2 pm that same day the Operations Manager, Mr. Lindsay, called as well as Mrs. Jennifer Hector, the Employee's immediate supervisor, and inquired about the DVR. The Employee repeated what he had told Mr. Frank.

18. According to Mr. Matthias' account, Mrs. Hector called again that same day and said that **the matter was a very serious one** and that the Employee should report for work at the Head Office on Monday 1st February 2010, submit a report on the matter and turn over the combinations held by him.

19. In compliance with the instructions of his Supervisor, by letter dated 1st February 2010, the Employee submitted his report as follows:

"LEONART MATTHIAS

...

1st February, 2010

*Mr. Jonathan Lindsay
Operations Manager*

...

"Report on Unplugged Digital Video Recorder (DVR)"

The DVR is situated on the top of the night deposit vault at the Airport. Also stored on the vault are paper and ATM rolls.

From time to time the DVR would alarm as though disarmed. The beep code is one long beep then a similarly long silence followed by another beep. When this occurs I would reset it by unplugging it for about ten seconds then plugging it back again.

On Friday 29th January, Sidlow Frank came to the Agency. After a short while in the area of the vault he exclaimed that the DVR was unplugged. He inquired who unplugged it and **I replied that I did not know**. He asked who works up on there, indicating on the vault. I told him that I am the only person that anything up there pertains to. He inquired if I would have unplugged the DVR. I replied that from time to time I would do it when it alarms. Mr. Frank left soon after. (Court's emphasis)

At or about two o'clock, some persons from the Airport Administration came to the office. Two persons from the refrigeration Services came soon after. While attending to them Mr. Lindsay and Mrs. Hector called and inquired also about the DVR and I repeated what I had said before.

Sometime later Mrs. Hector called again and said that it was a very serious matter and that I should report for work at Head Office on Monday 1st February, write a report on the matter, and turn over the combinations.

This is the extent of my knowledge on the matter.

Leonart Matthias"

20. The Employee in his Witness Statement stated "On February 1st, 2010, I went to the meeting but there really was no meeting. I handed Mr. Josiah the report that was requested and he handed me a letter of suspension dated 1 February 2010". That letter is reproduced below:

"February 1, 2010

Mr. Leonart Matthias
Supervisor, Airport Agency

...

Re: Helpdesk Case #249: "Unable to connect to DVR at Airport"

With regard to the captioned subject that was noted on Wednesday 27th January 2010 by the Audit Department of the Bank, Mr. Sidlow Frank of our Systems Department visited the Airport Branch on Friday 29th instant at approximately

11.25am after the matter could not be resolved from Central Control and discovered that the DVR located at the Agency was unplugged.

He asked you in your capacity of Supervisor of the Branch if anyone had shuffled around the equipment which is situated on top of the vault. You replied that the DVR had not been removed but that you had plugged out the DVR since it was making a beeping noise, but had plugged it back in.

Mr. Frank also reported that he proceeded to plug in the DVR in your presence and heard a beep as it powered on, but the sound lasted for only one second. Even so, you insisted that the sound was constant at the time you had unplugged and re-plugged the DVR. He then advised you that you should have called IT upon hearing the noise, and asked you to contact him if the sound was heard again. Upon verifying that the DVR images were once again accessible over the network he left the Airport Agency and reported the matter to your Manager.

Your Manager, in the presence of Supervisor Hector contacted you to advise that he was in receipt of this report and indicated to you the seriousness of your action in that you had no authority to interfere with the Bank's system. You informed him that you had unplugged the DVR on several occasions due to the constant beeping sound, but that on none of these occasions did you choose to inform Mrs. Hector, the IT department or him.

You were then advised to report to Head Office first thing Monday morning (1st February, 2010) accompanied by a full written report on the matter.

Please be guided that your inexplicable misconduct has severely compromised the Bank's Security System and would have placed the safety and security of our employees, customers and the Agency in jeopardy on those occasions when you arbitrarily disabled the DVR.

As per the above, together with internal ongoing monitoring which necessitated the request from Audit which resulted in case #249 above, the Bank must further investigate this gross misconduct on your part. Further, must bring this matter to the attention of Airport Security, and to the Police. In that regard, you are placed on Administrative Leave with immediate effect until Friday 5th February, 2010, when you are to report to the Human resource department at 10.00 am for further direction.

Sincerely,

*Dr Austin Josiah
Human Resource Executive"*

21. The Employee asserts in his Memorandum that when he reported to the Human Resource Department on Friday 5th 2010 as instructed, with the intention of responding, with the assistance of his Union Representative, to the allegations of gross misconduct as contained in the Bank's letter of suspension dated 1st February 2010, he was not given the opportunity to be heard. However, he was issued with a letter of summary dismissal dated February 4th, 2010, giving the reasons for the Bank's action. The letter of dismissal is reproduced below:

"February 4, 2010

Mr. Leonart Matthias

...

Dear Mr. Matthias:

Reference is made to our letter dated February 1, 2010, and to advise on the result of the investigation into your misconduct in disabling the Digital Video Recorder (DVR) at the Airport Agency of the Bank where you are the supervisor. We confirm the contents of that letter, and are disappointed with the casual manner and brevity of your written report on the matter in view of the finding of the investigation.

Your report stated "From time to time the DVR would alarm as though disarmed. The beep code is one long beep then a similar long silence followed by another long beep. When this occurs I would reset it by unplugging it for about ten seconds then plugging it back in again". Even so, at no time have you reported the situation to your supervisor, or your Manager, or to the Information System's Department, even though you have since informed your supervisor and your manager that you did unplug the DVR several times.

You made no report on the matter even though you are well aware of the very crucial use of the equipment. When your manager asked you how long was the equipment unplugged on this occasion you were not able to give an answer, leading to the conclusion that you were not being truthful in your written report that you had only unplugged the DVR for seconds. This has led us to fear that the unplugged occasions must have gone on for some time, with serious risks exposure to employees, the Bank and our customers.

Our fears have been confirmed. An analysis of the DVR logs entries verify that the last recorded images before the power was restored occurred at 6:11 pm on December 30, 2003; and Sir, the last images depict you clearly unplugging the DVR at that time.

Mr. Matthias, in clear breach of your fiduciary responsibility to the Bank you unplugged the DVR on 2009-12-30- 18:10:58 at a time when there was a global security alert mandating heightened surveillance for businesses located at Ports of Entry, and locally, at a time when Banks were on high alert to robbery attempts. Additionally, you are aware of ongoing investigations into unlawful actions by one of your charge at the Bank.

Your action left the Bank, its employees and its customers at risk until 11:28am on January 29, 2010 when Mr. Sidlow Frank of the Information Systems Department, visited the Agency, called your attention to the breach, and plugged the device into the power socket. This means no occurrence at the Airport Agency would have been video recorded during the interval- exactly one month. As a result of your action, the Bank was exposed to several risks as noted below:

1.	Risks to the Bank	<i>(i) An incident/ theft occurs and there are no recordings to assist with investigation.</i>
		<i>(ii)The bank faces reputational risks as a result of not being able to explain to a customer what happened to their deposits and/or account etc. as the customers may think that operations and controls in the bank are weak and weak and move their deposits/ business elsewhere.</i>
		<i>(iii) There is also a cost to the bank when theft occurs and most times the customer has to be repaid.</i>
2.	Risks to the customers	<i>(i) A customer could claim they used the night deposit tray and without the images to check, we would have no evidence of their claim when in fact they may have, but for some reason their deposits got intercepted.</i>
		<i>(ii) When customers are using the ATM and the night deposit the cameras would be very useful in investigating holdups etc.</i>
3.	Risks to Employees	<i>(i) The security images should be able to identify what would have occurred if there is an incident. Without the recordings of an incident, a staff member may be considered a suspect and may get terminated when in fact he/she is actually innocent.</i>

As a service business the Bank has the responsibility of providing a safe environment to its staff and customers to work and transact business, and it did via a network upgrade inclusive of Digital Video Recording. You in turn disabled the system without authority, and without legitimate reason. Certainly, this is gross misconduct.

Mr. Matthias, we have tried to find a reasonable rationale for your action of disabling the DVR, especially as to date since it was plugged in by Mr. Sidlow Frank on January 29, 2010, there has been no report of malfunctioning or beeping as you have described. We could possibly understand if this was a single occurrence, but especially as you indicated it happened several times and you did not once make a report to any of the relevant personnel of the Bank is of the gravest concern to us. As such, your action is considered one of malicious intent, especially as you are well aware of the reason for the DVR on December 30, 2009 as outlined in this letter, and leaving the bank, its employees and its customers at serious risk as outlined above; and without the authority of the Bank constitute Gross Negligence of the highest magnitude.

As a consequence, of your gross misconduct and gross negligence we find you have conducted yourself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue. For those reasons your employment with Antigua Commercial Bank is hereby terminated with immediate effect today, Friday, 5th February, 2010.

Please find enclosed our office draft #167083 in the amount of EC\$8,841.67 as well as a breakdown of your final payment.

We shall advise the Antigua Commercial Bank's Employee Pension Scheme Board of your termination toward your due accruals in that Scheme.

Yours Sincerely,

*Dr. Austin M. Josiah
Human Resource Executive"*

The DVR Recording

22. At the very close of the hearing on 31st May 2012, the Court, on the agreement of the litigants, gave permission for the viewing of the DVR recording. This was viewed in real time and showed Mr. Matthias entering the Bank at 18.10 hours or 6.10pm, dressed in exercise apparel and not in the Bank's uniform. Upon entering the Bank he went directly to the DVR and unplugged it, after which all images ceased to be recorded. The date and time was recorded by the machine as 2009-12-30 -18:10:58. The Court requested a copy of the video, if needed, to assist in its deliberation.

Mitigation Attempts

23. After Mr. Matthias' employment was terminated he sought to mitigate his loss by finding other employment. In this regard he indicated that he sent out written applications to Community First Co-operative Credit Union, Bryson Co Ltd, St. Johns Co-operative Credit Union, St. Joseph Academy, ABI Bank and Antigua and Barbuda Workers' Union, all without success. He got employment at the Antigua and Barbuda Transport Board on 10th May 2010 until he resigned on 31st October 2010. His salary there was \$3,500 monthly with an allowance of \$350.00 monthly for travelling.

Legal Proceedings

24. The Employee commenced legal proceedings by filing a Reference on 23rd June 2010. His Memorandum and his Witness Statement were filed on 16th December 2011.
25. The Employer's Memorandum and witness statements were filed on 12th January 2012.

The Issues

26. The issues which require determination are as follows:
- 1) Whether the Employer dismissed the Employee, in the way it did, because of his shop steward activities.
 - 2) Whether the Employee's action of unplugging the DVR on 30th December 2010 amounted to gross misconduct so serious that the Employer could not reasonably have been expected to take any course other than to summarily terminate his services.
 - 3) In the event that the Employee is held to have been unfairly dismissed, what is the measure of damages due to him?

The Employee's Legal Submissions

27. Mrs. Parillon, made written submissions which were filed on 16th July 2012. In the earlier part of her submission she sought to lay the foundation that, leading up to the incident of the 30th December 2010, (i.e. the unplugging of the DVR at the Airport), the Employer/Employee relationship was a strained one as a result of the Employee's shop steward activities.
28. To this end she stated, *inter alia*, that the Employee, since becoming shop steward, "suffered being accused of planting money for another employee, being deemed to be redundant, being unable to invoke the grievance procedure, being unable to obtain copies of authenticated performance appraisals, being refused duty leave to pursue studies and being denied benefits afforded to other employees."
29. She further submitted that the Employee's re-setting of the DVR whenever it beeped was in fulfillment of his supervisory mandate and the utilization of his technical competency.
30. She urged that following the submission of the report, dated 1st February 2010, by the Employee as requested by the Employer and the letter of suspension issued on the same date, there was no investigation between then and the issue of the termination letter, dated 4th February, given to him when he reported as instructed, on the 5th February 2010.
31. Further, that he was not allowed to respond to the inaccurate charges nor was he given the opportunity to avail himself of the assistance of his Union Representative. According to the Attorney:
- "None of the matters and alleged evidence referred to in the letter of summary dismissal were ever put to the Employee for response prior to his dismissal".* She continued: *"There ended almost twenty two years of employment with the bank for this competent senior employee"*.
32. In her further analysis, Attorney Parillon submitted the following:
- 1) The action of the Employer contravenes Article 8 of the Collective Agreement between the Bank and the Antigua Barbuda Workers' Union and the rules of natural justice. Article 8.01 of the Collective

Agreement provides: *"Where there is a complaint against an employee, the bank undertakes that the management will inform the employee of the complaint in writing. Before a decision is made the employee shall be given an opportunity to state their case. In stating their case the employee shall have the right to be accompanied by a fellow worker or Union representative if they so desire"*.

- 2) After issuing the written complaint to Mr. Matthias, the Bank never allowed him to respond verbally or otherwise even though Mr. Matthias attended at the Bank on February 5th, 2010 with his Union representative for the very purpose of responding to the Bank's written complaint.

33. The Bank made the decision to summarily dismiss Mr. Matthias without first giving him the opportunity to state his case. She returned to her initial submission that:

"The Employee's only problems with the Bank concerned his long past representation of the employees of the Bank as shop steward....."

34. She then opined that the substantive issues in this matter may be stated as follows:

- 1) "Was the Employer dismissed fairly in keeping with Section C59 (1) of the Antigua and Barbuda Labour Code?
- 2) If the dismissal is found to be unfair, what is the measure of damages that should be paid to the Employee?"

35. In her further submission she stated that where there is a complaint against an employee, the Bank undertakes that the Management shall;

- 1) Inform the employee of the complaint in writing
- 2) Give the employee an opportunity to state his case

36. The Bank failed to follow its own internal procedures regarding employee discipline as laid down in its Mission Statement and Policies document which states:

"If disciplinary action is necessary, supervisors should tell the employee about such action and give the employee a written warning including:

- a) *A specific description of the violation and reference to the company procedure, policy or instruction which prohibits it.*

- b) Findings concerning and past warnings or action taken for similar violations.
- c) The disciplinary action being taken, such as a three day suspension without pay.
- d) Warning about the disciplinary steps which may be taken if the situation reoccurs.
- e) Description of what type of change is required of the employee and what assistance is available".

37. She submitted that Mr. Matthias was never referred to any Company procedure, policy or instruction that he had violated prior to his dismissal. Finally, she avers that the action by the Employee of unplugging the DVR on the 30th December 2010 rather than seen as 'gross misconduct,' *"may be more aptly described as misinterpretation or misjudgment on the part of the Employee as to the requirements detailed in his job description"*.

38. The cases of *British Telecommunications PLC v Rodrigues*, Appeal No.EAT/854/92 and *British Home Stores v Burchell* (1980) ICR303 were cited where the Court found that if the employer, in its policies, did not make it known or specifically draw employees' attention that summary dismissal would be automatic for a specific action, the employee may be found to have been unfairly dismissed. That Court found further that in dealing with dismissal for misconduct, other legitimate considerations that may be taken into account in deciding the fairness or unfairness of dismissal, are the employee's years of unblemished service and whether the contract of employment made provision for alternative sanction.

The Employer's Legal Submission

39. Attorney Sir Clare Roberts QC, for the Employer, submitted that the Employee "was caught 'red handed' disconnecting the Employer's Digital Video Recorder (DVR), which forms part of the Employer's security system at the V.C Bird International Air Terminal". He further asserted that: *"The action of the Employee put the Bank at grave risk and in the face of his inexplicable and gross misconduct the Bank after conducting an appropriate investigation was left with no alternative but to dismiss him"*.

40. The Attorney referred to the Employee's submission that the Bank had dealt with him *"harshly, unreasonably and unfairly as a result of the Employee's position as a*

shop steward". To this end, the Employee presented to the Court a compendium of 185 pages dating back to 1993 which purported to show that as the Employee was instrumental in getting the employees of the Bank unionized, the Bank *"showed its displeasure by making the rest of his tenure one of extremely unusual and persistent discriminatory treatment"*. In response, Sir Clare contended that the Employee did not bring any evidence to support that assertion and that it was trite that a mere allegation is not proof.

41. The Employer refutes the contention of the Employee that it did not carry out proper, appropriate and sufficient investigation into the matter prior to the dismissal. The Employer's countervailing response to this was that: *"Given the facts were so blatant and obvious, the investigation undertaken by the Employer was more than adequate and especially "in circumstances where the evidence of the charges is pellucid ... the Employer would deem it correct to take what action they so desire; for example, in theft, proven theft, blatant lies as in this case, and proven situations that the action is so gross that the employee/employer relationship could not continue"*.

42. Sir Clare placed much weight in his submission on a section he titled as "LIES" and attempts at cover up by the Employee, and pointed to the following:

- 1) The Employee said that he returned from exercise about 5.30pm and was working when the DVR was beeping. However the video system showed that he entered the Bank at precisely 18.10 or 6.10 pm, walked in, looked around and went straight to the DVR and unplugged it at precisely 18:10:58 hours. The last image on the DVR was of the Employee unplugging it. This has not been disputed.
- 2) The Employee stated that the DVR beeped about 4 or 5 times during which he unplugged and plugged it back in after about ten seconds on each occasion. The system showed no such thing. Mr Frank, the technician employed to service this equipment, stated that in viewing the DVR it showed that the equipment was unplugged only one time and that is, by the Employee as shown on the captured image from the machine.
- 3) The Employee stated that another employee, Goldine John, heard these beeps. Interestingly, he did not invite Ms. John to be a witness as he stated that he believed that the Bank would have penalized her

for giving evidence. Sir Clare has submitted that the Employee did not invite Ms. John to give evidence knowing that she would have further exposed his lies.

- 4) The Employee stated that he was on duty on the afternoon when the DVR was disabled. However an analysis of the video showed that other employees were closing off for the day, the cleaner was tidying up, and that the Employee was not at his desk. At 18.10 he entered the office, wearing blue shorts and a white "t" shirt. The evidence is that he was not in uniform and had not consulted his manager and therefore it was inferred that the Employee was not working overtime, as he stated.
 - 5) The Employee claimed that he was "competent to trouble shoot the DVR having worked extensively with them in the IT department". This, Sir Clare pointed to, as yet another lie as Mr. Frank stated in his testimony before the Court that the Bank's records indicated that the Employee was transferred from the IT Department effective August 17th 2007 while the records show that the DVRs were not purchased until September 2008.
 - 6) Finally, Sir Clare stated that although the Employee spoke to the malfunctioning of the DVR through its intermittent beeping, since it was plugged back in by Mr. Frank on 29th January 2010 up to the date of the hearing, 2nd May 2012, a period of over two and a half years, there has been no beeping heard.
43. Specifically dealing with the Employee's significant defence, that the Employer dealt with the Employee *"harshly, unreasonably and unfairly"* ... *"as a result of the Employee's position as shop steward"*, and chronicled in the Employee's 185 page bundle of documents, Sir Clare made a number of countervailing rebuttals to these claims which indicated that, far from being hostile to the Employee, the Bank accommodated his activities. These rebuttals went unchallenged. Consequently Sir Clare stated in his submission that the *"Employee was unable to prove even one instance of discrimination or mistreatment"*. And *"came woefully short of proving any such mistreatment much less to tie any alleged mistreatment to his dismissal"*.
44. According to the Attorney: "The Employee was charged thus: In clear breach of your fiduciary responsibility to the bank you unplugged the DVR on 2009-12-30 at a time when there was a global alert mandating heightened surveillance of businesses located at Ports of Entry, and locally, at a time when Banks were on

high alert to robbery attempts” and “The risks to which the Employee exposed the Bank were set out in the letter of dismissal” (see paragraph 21 above). “He disabled the system without authority, and without legitimate reason. He made no report of malfunctioning or beeping as he described. Under these circumstances, he submitted that the Bank was correct to infer “malicious intent”.

45. Sir Clare, in his submissions, included two Authorities. The first was from the book **Unfair Dismissal – Law, Practice & Guidance**, by Michael Duggan and especially to the case of **Denco Limited v Johnson [1991] CR 172** at page 198 of that publication in which Wood J stated:

“... in this modern industrial world, if an employee deliberately uses an unauthorized password in order to enter or to attempt to enter a computer known to contain information to which he is not entitled, then that of itself is gross misconduct which prima facie will attract summary dismissal, although there may be some exceptional circumstances in which such a response might be held unreasonable. Basically, this is a question of “absolutes” and can be compared with dishonesty. However because of the importance of preserving the integrity of the computer with its information, it is important that management should make it abundantly clear to its workplace that interfering with it will carry severe penalties”.

46. Further in the **Duggan Book** (opcit) under the sub-head “Admission of Guilt” the Author stated:

“Where the employee admits his guilt or there can be no doubt that the employee has committed the offence, because for example, he has been caught red handed, the employer may not need to carry out as detailed an investigation as would otherwise have been warranted”.

47. The author further states at page 203, “ *that where the offence is of dishonesty the courts have held that the fact that the amounts involved are trivial does not make any difference if the essential relationship of trust and confidence is undermined:* further: in **United Distillers v Conlin [1992] 1RLR 503:**

“In considering the gravity of the misconduct the nature of the employment and the effect the offence has on the possibility of continued employment are important factors that will be taken into account. The fact that the workplace is a bank and the nature of the employment depends on trust in the employees to a greater extent than most other employments”.

The Law

48. Sections C 56, C 58 and C 59 of the Labour Code provide 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 without just cause".

C 58 (1) and (2) of the Labour Code read 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 C59(1) and (2)*
- b)*
- c)*
- d)*

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

(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 the employer 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 59(1) (a) of the Labour Code reads as follows:

"C59 (1).An employer may terminate the employment of an employee where the employee has been guilty of misconduct 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.
.....

Issues to be Resolved

Issue No 1

Whether the Employer dismissed the Employee in the way it did because of his shop steward activities.

49. When Mrs. Parillon opened the case for the Employee on the 2nd May 2012, she sought to build the foundation, through her line of questioning and confirmed in response to a query from the Court, that the Employer in deciding to dismiss the Employee in the way it did, was because of the Employee's shop steward activities and not as a result of the reason given in his letter of termination.
50. To this end, both from the Examination-in-Chief and from the Employee's Witness Statement, the Court was provided with a litany of incidents and situations dating as far back as 1993 which the Employee catalogued after he became shop steward. Some of these are listed at paragraph 9 above and there were more. The Employee brought before the Court a number of negative incidents purporting to have been influenced by his activity as shop steward but by his own admission under cross examination, many of these had been resolved.
51. However, from this catalogue of events, it seemed reasonable to deduce that the Employee considered the relationship between himself and the Employer to be a strained one. At the same time, it should be noted that the Employee was employed by the Employer from 15th September 1988 to the time of his dismissal on 5th February 2010; approximately 21 and a half years.
52. Under cross examination, Attorney for the Employer placed a number of countervailing scenarios before the Employee, by way of refuting the charges of *"unreasonable and harsh treatment"* complained of by the Employee. Some were negative and against the Employer while others pointed to positive experiences at the workplace, to which the Employee agreed with qualifications. By way of example, a few of these are recounted below:

- i. A five page letter sent to the local Press in December 20, 2004 by the Employee, reportedly containing a virulent attack on the Bank and accusing the Bank of committing illegal acts. This was not denied by the Employee save to state: *"The letter was not written by myself alone it was a cooperative effort and I, as shop steward, signed it"*.
- ii. The Employee applied for and was granted study leave by the Employer with a soft loan to cover cost of same. The Employee did not deny this save to say that *"I wouldn't say that the loan was soft"*.
- iii. The Employee applied for Voluntary separation and the Employer accommodated him and agreed but this was not effected as the Employee could not agree on the terms.
- iv. The Employee was asked if the Bank had approved and given time off on occasions to allow him to attend courses and seminars and the Employee replied that this was effected *"most times"*.

Indeed, when asked during cross examination: *"So anything that happened to you was because you were a shop steward?"* The Employee replied: *"I did not say so but a lot of the circumstances are unusual"*.

- 53. When taken against the activity which led up to, and the reason given in the letter of termination, for the dismissal, it is difficult to comprehend how the reason for the dismissal could be considered to be directly related to the Employee's role as shop steward.
- 54. In the circumstances, based on the evidence before me, I agree with the Employer's submission on this issue. I find that the Employer's decision to dismiss the Employee and the way in which it effected the dismissal, were not because of or related to his shop steward activities.

Issue Number 2.

Whether the Employee's action of unplugging the DVR on 30th December 2010 amounted to gross misconduct so serious that the Employer could not reasonable have been expected to take any course other than to summarily terminate his services.

- 55. The Employee's case pointing to some other possible courses of mitigating action that might have been taken by the Employer, are summarized below. The list is not exhaustive:

- 1) The Bank should have allowed the Employee, with the help of his union Representative, to answer the charges laid against him in accordance with the Collective Agreement with the Union.
 - 2) The Bank should have followed its own internal procedure regarding discipline as laid down in its Mission Statement and Policies document. The relevant portion of this procedure is captured in paragraph 32 above.
 - 3) The Employee might have been referred to any company procedure, policy or instruction that the Employee had violated prior to his dismissal.
 - 4) The Bank suffered absolutely no loss or adverse effect with respect to the unplugging of the DVR.
56. Section C58 (1) of the Code establishes good causes for dismissal. Misconduct on the job is identified in Section C58 (1) (e) as a potentially good cause, subject to the establishment of a factual basis for same.
57. Given the nature and scope of its business, the Employer installed a security system for the protection of its business and its customers and the equipment were placed at strategic locations including the Airport Agency.
58. Further, there is no doubt in my mind that the Employee was or ought to have been mindful of the risks which all commercial banks face in the ordinary course of business. Moreover, the Employee is deemed to have known of the then prevailing 'global security alerts' and the need for 'heightened surveillance' at ports of entry in this jurisdiction. Given its location, there is no doubt as to the related obligations of the Bank generally and its Airport Agency in particular. In the circumstances, I would accept that the several risks listed by the Employer in the dismissal letter, set out at paragraph 21 above, were then present.
59. The Employee, based on his tenure with the Bank and his seniority and the position he held, knew or ought to have known of the security policy initiative of the Bank and the then prevailing need to take and maintain security and surveillance precautions. There was therefore no need for a written expression of the underlying policy or any specific prohibition against interfering or tampering with the DVR.
60. I am fortified in this view because as early as 2007, the Employee was acutely aware of the need to have a reliable electronic security system in the Bank and

expressed his concern thereon in a letter dated 12th January 2007 (contained in his bundle of documents submitted to the Court). In that letter addressed to Mrs. Hector "Manager with responsibilities for Premises & Equipment (ag)", the Employee stated, inter alia:

'For some time now I have been concerned that the system of security cameras needs improvement'.

He continued by commenting and offering advice for the improvement of the electronic system thus:

"... security cameras are not only very reliable deterrents but may also be of incalculable value to the Bank in the event of any unfortunate occurrences or mishap. The benefits, however, can only materialize if the system is properly set up and maintained".

The inadequacies of the security cameras, as he then saw them, "are both major and simple" and pointed out, inter alia, that some of the simple issues are:

"The positioning of the cameras in some instances make it easy for persons to conceal their faces with only a cap.....and that it may be a good idea to invest in cameras within the body of the ATMs.

Colour photos are much better than black and white since colour of hair, eyes, clothes and attire are established modes of identification and description. Colour systems would therefore make a more reasonable investment".

The major issues he thought that should be addressed were:

- a) *"The security system should be TC/IP and incorporated into the Bank's network. This would assist with remote access by users, backing up of the information, transfer of data and complete administrative access to computers.....Also, managers needing to check things like customer flow may need to access live videos at regular intervals.*
- b) *A system designed specifically for the operations of the security system would be very useful. This would include supervision and maintenance of the cameras and computers that record film".*

61. In fact, as confirmed in the letter of dismissal, the Employer reposed a significant level of trust and confidence in the Employee. Even in the absence of any prior reinforcement of this position held by the Employer, I am mindful as a matter of

law that in every contract of employment there is an implied term of mutual trust and confidence.

62. The existence and nature of such an implied term was conclusively settled in the case of **Woods v WM Car Services (Peterborough) Ltd.** [1981] IRLR 347 and most recently applied by this Court in its 2017 judgment delivered earlier this month in Reference No. 58 of 2013, **Humphrey Michael Blackburn v LIAT (1974) Ltd.** The implied term imposes a mutual obligation on both employer and employee to maintain trust and confidence in each other.

63. In the said recent case, **Brown P**, the Honourable President of this Court addressed this implied term thus:

*“From time to time this Court has applied pertinent common law principles when necessary, to supplement statutory provisions. In that regard, it is well settled that there is implied in every contract of employment, an implied term of mutual trust and confidence. It imposes a reciprocal duty on both employer and employee not to engage in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Each must conduct itself with reasonable skill and care to avoid harming the other. Historically, this implied term has been commonly formulated to impose the obligation on the employer. See **Woods (opcit)**...and **Malik v BCCI SA (in liq)** [1997] IRLR 462”.*

64. After his reference to the Woods case, the President went on to state the existence of a related implied term for loyalty on the part of an employee:

*“Separate and apart from the implied term for mutual trust and confidence, perhaps more fundamentally, there is also an implied term imposing on each employee an obligation to serve his employer loyally and not to act contrary to the employer’s interests. This obligation is sometimes referred to as a duty to maintain fidelity and includes a duty not to impede the employer’s business. See **Secretary of State for Employment v Associated Society of Railway Engineers & Firemen (No. 2)** [1972] 2 QB 455.”*

65. It is an employee’s duty to abide by, uphold, support and maintain his employer’s policy and related actions. By logical extension, it is also the employee’s duty not to act contrary to the employer’s policy and its implementation. If the employee breaches the fundamental implied term and damages or destroys the relationship

of trust and confidence, such misconduct may be sufficient to bring the employer/employee relationship to an end.

66. In the instant case, the Employee's conduct was clearly a deliberate and apparently premeditated act going to the heart of the Employer's security policy and its implementation. The Employee's conduct/breach went to the heart of that policy initiative by stopping the recording (and there is no question that he stopped the recording by unplugging the equipment) and thereby exposing the Employer to the very internal and external risks it was attempting to avert, and about which the Employee had expressed his concern in his letter referred to, at paragraph 60 above.
67. In my view, there was serious and irreparable damage or destruction of the Employer's **trust and confidence** in the Employee. This went to the heart of the employment relationship. On the evidence before me, I find that the Employee's conduct provided the Employer with a good cause which could by itself potentially justify his summary dismissal. However, the Employer's reaction is still subject to the mandatory test of reasonableness under Section C 58 (2) of the Labour Code.
68. To a large extent, the Employee's case is grounded on a lack of procedural fairness. I recall his Counsel's emphasis on the Employer's failure to fully and specifically notify the Employee of what was alleged against him and allowing him an opportunity to defend himself. If Counsel for the Employee is correct, then the denial of natural justice would render the dismissal unfair.
69. On the other hand, I also recall the contention of Counsel for the Employer in rebuttal that the Employee was caught "red handed" so there was no need to give him an opportunity to be heard because nothing he would say could possibly diminish the seriousness of his misconduct or could possibly provide a reasonable excuse for it.
70. Moreover, the Employee, having committed the misconduct was less than truthful about his action. He failed to be frank and disclose his breach of the policy of which he well knew. And he failed to be fully cooperative with the Employer's fact finding inquiries.

71. In effect, the Employer's position was that, being armed with the video recording of the Employee's misconduct, the Employer did not necessarily have to allow the Employee any further opportunity to be heard in the circumstances. Such a hearing, as a matter of procedure, would have made no difference in the outcome.
72. Notwithstanding, the Employer still offered the Employee the opportunity to exculpate himself, after both of his immediate seniors had informed him about the seriousness of his action. He was asked to write a report to explain his action. He produced a relatively short one page letter, seemingly written in derision, which skirted the matter at hand and showed neither sensitivity to, nor seriousness about what might have emanated from his action.
73. Having started the investigative process through Mr Frank upon receipt of the notification from the Help Desk on January 29, 2010 - and having discovered on the same date that the DVR had been unplugged since 6:10 pm on December 30, 2009; and having determined that the DVR had remained unplugged from that date until January 29, 2011; and having given the Employee an opportunity to explain orally what had happened; and having taken into account the oral explanation given by the Employee; and having told the Employee that the matter was "a very serious one" and allowing him an additional two clear days to submit a written report; and having read the scant report and considered its "casual manner" and the "brevity" of the report; and having concluded that the Employee's misconduct was "inexplicable"; and having brought the matter to the attention of the Airport Security and the Police - the Employer decided that the matter be further investigated and placed the Employee on administrative leave for five days.
74. I believe that it is important to comment on the Employee's testimony, and state my findings in respect thereof. In that regard, I am inclined to agree with Sir Clare's summary of the Employee's evidence as set out at paragraph 42 above. At the end of the day, I cannot rely on his testimony. The same is riddled with too many inconsistencies giving rise to many serious doubts as to its veracity.
75. The evidence shows that the Employee's misconduct was not discovered until one month after the fact. In effect, this meant that the Employer was left exposed to the very risks it targeted by the installation of the DVRs for that period of time as a direct consequence of the Employee's deliberate act.

76. The Employee's misconduct, although initially triggered by his deliberate act, may have been compounded by recklessness. He not only turned off the DVR but he left it turned off for an indefinite period. In the circumstances, one may surmise that the Employee was not reckless but that he intended to leave the DVR turned off. If the latter is true, then his deliberate misconduct is rendered significantly more gross.

77. At the end of the day, whether the Employee turned off the DVR and recklessly left it off, or he turned it off and intended it to stay off indefinitely, the result would be the same. He is guilty of gross misconduct which went to the heart of the employment relationship and justified the dismissal under Section C59 (1) of the Code.

78. In the premises, I find that the Employer acted reasonably in the circumstances with the result that the dismissal was not unfair.

Issue Number 3.

In the event that the Employee is held to have been unfairly dismissed, what is the measure of damages due to him?

79. Having regard to the findings in Issue Number 2 above that the Employee was not unfairly dismissed, further consideration to this issue is not necessary.

Decision

80. Having regard to all the circumstances of this case, the Employee's claim is hereby dismissed. There shall be no order as to costs.

Dated the 30th day of June 2017


Samuel R. Aymer



***This Court as constituted at the commencement of the trial comprised three members with the Hon. Althea Crick presiding as Chairman.**

The Hon. Jesse Kentish became incapacitated by reason of illness and withdrew from the panel before the completion of the trial.

The Hon. Althea Crick, Deceased, died on the 29th November, 2014 after discussing the evidence and agreeing in principle with the Hon. Samuel Aymer that the Reference be dismissed but before the completion of the written Judgment.

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 OF 2010

BETWEEN:

LEONART MATTHIAS

Employee

and

ANTIGUA COMMERCIAL BANK

Employer

JUDGMENT

*Hon. M. Althea Crick, Chairman
Hon. Samuel R. Aymer, Member
*Hon. Jesse Kentish, Member