

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/31 of 2021

BETWEEN:

LOUISE HENRY

Employee

and

ST. JOHN'S CO-OPERATIVE CREDIT UNION

Employer

Before:

The Hon. Samantha May- Francis

President Acting

The Hon. Hesketh A. Williams

Member

The Hon. Collin R. Maynard

Member

Appearances:

Mr. Kem Riley, President and Mr. Kofi Massiah, Attorney-at-Law of the Antigua and Barbuda Workers Union, Representatives for the Employee

Ms. E. Ann Henry, KC and Ms. Mandi Thomas of EAH Business and Legal Solutions (EC), Attorneys-at-Law for the Employer

2024: October 30

2025: February 27

Employee was employed as a Loans Manager, Employer dismissed Employee- Employer alleged Employee engaged in gross negligence and misconduct- Employee denied any misconduct and alleges that the Employer having issued her with a warning dismissed for the same infraction in the absence of any repetition of the conduct warned- Did the Employer issue a warning and then dismissed the Employee for the same infraction- Did the Employer have good cause for dismissing the Employee- Did the Employer act reasonably in dismissing the Employee- Is the Employee entitled to compensation for unfair dismissal.

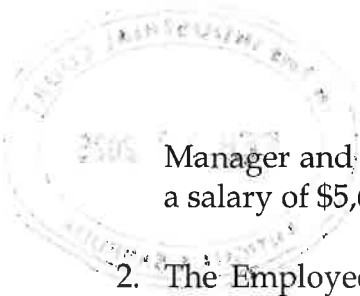
JUDGMENT

P (Acting)- May-Francis

Background

1. The Employee was employed in September 2002. She functioned at several levels during her tenure, from being a Loans Officer to acting General Manager. At the time of her dismissal on February 19, 2010, the Employee held the position of Loans





Manager and had been employed for approximately eight (8) years. She last earned a salary of \$5,665.00 per month and a monthly allowance of \$1,000.00.

2. The Employee's dismissal came in the wake of a loan granted to a customer, Mr. Samuel James, in June 2009. In its Memorandum of Defence filed on November 30, 2021, the Employer, having admitted to dismissing the Employee, claims that it was justified as the Employee had been grossly negligent and misconducted herself in the management of the Loans Department and, in particular, the loan granted to Mr. James. According to the Employer, its concerns were documented in correspondence dated December 29, 2009, to the Employee.
3. The Employee, on the other hand, challenged her dismissal as being unfair. In her Memorandum, the Employee refutes all allegations of negligence and misconduct. In particular, she contended that the Credit Committee approved the loan granted to Mr. James and that the General Manager co-signed all cheques to effect the disbursement of the loan proceeds.
4. Being dissatisfied with her dismissal, the Employee commenced these proceedings by Reference filed before this Court on August 1, 2021, claiming unfair dismissal. The Employer proffered its defence by Memorandum of Defence filed on November 30, 2021. Both parties filed written arguments.

The Dispute

5. In her Memorandum of Claim filed on August 13, 2021, Employee asserted that the December 29, 2009 letter was a warning letter. She contends that having been warned, without repetition of the conduct for which she was warned, she ought not to have been dismissed on February 19, 2010. She further contends that her dismissal was unfair.

Reasons for the Dismissal

6. In the dismissal letter, the Employer states that having reviewed the Loans Department, and after considering the Employee's response in her memorandum of January 12, 2010, it had concluded that the Employee was guilty of negligence and misconduct. We have extracted the facts relied on by the Employer from the dismissal letter and surmise as follows:

- (i) *"...The facts show that within a mere six working days of establishing membership and depositing \$37,096.00 and applying for the loan, the new member was allowed to withdraw almost all of his funds. Even by your own admission, in your memo dated January 12, 2010 as it relates to the AML concerns: "A member depositing money and within [sic] a short period*

coming from withdrawal should draw a red flag". We find this act grossly irregular."

- (ii) "...The said withdrawal was permitted by the Loans Department with the full knowledge that the effect of the withdrawal was to breach the cash security requirement of this loan application. There was an oblique reference in May 25, 2009, Loan Summary that permission was granted to allow Mr. James to withdraw the cash in an effort to meet "timelines". However, at no time did those authorising this loan understand this to mean that Mr. James' account balance was less than \$37,096.00. In an interview with the Credit Committee and Mr. Weston February 3, 2010, it was acknowledged by same that approval was granted on the June 9, 2009 on the basis that Mr. James had EC\$37,096.00 on his account with this credit union.*
- (iii) "...It should be noted that the loan file contains a printout of Mr. James' account balance prepared by the Loans Department dated May 25, 2009 showing an account balance of \$37,096.00... It was only at a much later date, when the printout was considered and examined closely, it was recognised that while the printout only recorded transactions up to 4th May, 2009, some 4 days before Mr. James was permitted to withdraw the funds as noted above... However the document presented to the Technical Team and Credit Committee was produced in such a manner as to suggest that the balance was \$37,096.00."*
- (iv) "...Having regard to the fact that the CUMME defaults to the current date when generating balances, it seems clear that the parameters of the report presented to the Technical Team and the Credit Committee was deliberately manipulated and reset in order to show a balance on the account as at May 4, 2009".*
- (v) "...by authorising Mr. James' withdrawal of what cash security existed, within 7 working days of the submission of his loan application, you demonstrated a total disregard for the approval process. You have said that you permitted Mr. James to withdraw the cash to maintain project timelines. However this action demonstrates that you had decided without the input of the authorising/approving body, the Credit Committee, that the loan would have been approved. This is a gross violation of the process."*
- (vi) "The Board was of the view that by authorising Mr. James to withdraw almost all of the cash he deposited on the April 30, without making provision to withhold, at least the negotiation fees, you have demonstrated gross negligence. Subsequently, when the loan was disbursed, no attempt was made yet again to withhold either the required initial Cash Security of \$65,000.00 (towards achieving the \$73,635.72 by July 31, 2009) or the*

negotiation fees, as conditions for the loan. At the end of the day, instead of Mr. James receiving a total sum of \$260,000.00 for his project, he received in excess of EC\$291,626.00."

(vii) "...Therefore, by your admission, in your memo dated January 12, 2010, you unilaterally authorised a three- month moratorium on the repayment of Mr. James' loan, ostensibly to give him time to surmount his "difficulties". This decision to grant moratorium was given without the knowledge or approval of the General Manager, Board or Credit Committee..."

Evidence and Arguments

7. The Employee gave evidence on her behalf, and the Employer called as witnesses former President Mr. Yves Ephraim and former General Manager Ms. Jennifer Whyte. Additionally, both parties filed written arguments.

The Employee

8. The Employee identified and stood by the evidence in her witness statement filed on October 14, 2022, and her oral evidence.
9. During her examination in Chief, the Employee gave evidence that it was the policy of the Employer that a customer had to be a member for six (6) months to be eligible to apply for a loan and that Mr. James had not been a customer for the required period having joined the Credit Union on April 30, 2009. She, therefore, sought the Board's approval to start Mr. James' application process. The Board approved the request in May 2009.
10. The loan application was prepared and passed to the Technical Team for approval. By this time, Mr. James had deposited \$37,096.00 since \$65,000.00 was required as security for the loan. However, on May 8, 2009, Mr. James withdrew from the account \$36,000.00 deposited on the account as part of the security to facilitate the loan.
11. The Employee's evidence is that on May 25, 2009, the Technical Team was advised via a Loan Summary report prepared by the Loan Officer, Ms. Connie Bramble that Mr. James had withdrawn the money. The report also informed the Technical Team that Mr. James would provide additional security and reinstate the security deposit by July 31, 2009.
12. On June 3, 2009, the Technical Team considered Mr. James' loan. On June 5, 2009, another loan summary report was submitted by Ms. Bramble to the Credit Committee. Thereafter, the Technical Team approved the loan and the money was disbursed to the customer, Mr. Samuel James.

13. The Employee acknowledged that Mr. James immediately defaulted on the loan and could not make his first loan payment due on July 1, 2009. Her evidence is that in her capacity as Loans Manager and possessing the authority, she approved a three (3) month moratorium for Mr. James. Unfortunately, he did not meet the extensions, and the loan was, therefore, featured on the list of delinquent accounts.
14. The Employee accepted that the matter was of grave concern to the Board, and on September 29, 2009, the Employer's Board of Directors met with her, after which she was advised that an audit would be performed of the Loans Department. Subsequently, on December 29, 2009, she was issued with the purported Warning Letter from the Employer. The Employee responded to the warning letter on January 12, 2010, after being advised by the General Manager that she was required to respond.
15. Under cross-examination, the Employee testified and confirmed that Mr. James had withdrawn \$36,000.00 from the account in May 2009, meaning there was insufficient security for the loan. She accepted this early withdrawal was a 'red flag'. She acknowledged that Mr. James had difficulties meeting the requirements for eligibility.
16. Additionally, she accepted that during the loan application process, she was aware that several of Mr. James existing business contracts which were predicated upon his ability to repay the loan, had fallen through. She acknowledged this was brought to her attention by Ms. Bramble but she could not recall interviewing or meeting with Mr. James to address those issues.
17. The Employee accepted that despite the 'red flags', she did not advance a recommendation against granting the loan. The Witness confirmed that the loan was granted to Mr. James in June 2009, and at the time of disbursement, she knew that he had withdrawn the security deposit. She accepted that no deductions had been made to reduce the disbursement by the sum which was required as security but which had been previously withdrawn.
18. Additionally, the Employee accepted that the loan was above her approval threshold and that she should have referred any changes to the Technical Team and Credit Committee. Nonetheless, after Mr. James failed to make his first payment, she approved a moratorium to enable him to catch up since he had been unable to meet the initial payment.
19. The Employee remained adamant under cross-examination that a policy existed regarding granting moratoria. She stated that even if she had referred the matter to the General Manager, it would have been redirected to her for handling. As such, she proceeded to deal with it on her own. She also acknowledged that she did not initially

inform her superiors of the situation. According to the Employee, nothing could have been done other than to give the customer the moratorium as the loan was already in trouble.

20. The Employee vehemently denied wrongdoing and maintained that the Technical Team approved the loan, knowing Mr. James had withdrawn the \$36,000.00. Additionally, she stated that the General Manager signed off the disbursements, knowing that Mr. James had not replenished the security deposit nor had the legal encumbrances been placed against the land identified as security for the loan to Mr. James. The Employee contends this was made clear in the Loan Summaries presented to the Technical Team.
21. Mr. Massiah, Counsel for the Employee argued on behalf of the Employee that the September 29, 2009 meeting was a disciplinary hearing. He contended that the hearing was conducted without any prior warning or advice to the Employee that she was entitled to have a representative with her. Mr. Massiah further argued that following the September 29, 2009 meeting, the Employer issued a warning letter dated December 29, 2009 in which it expressed its dissatisfaction with the Employee's performance.
22. Mr. Massiah asked the Court to accept the said correspondence of December 29, 2009, as a warning letter. He argued that should the Court so construe the Letter of December 29, 2009, as a warning letter, then, the Employee's dismissal must be considered unfair since the Employee was dismissed after being warned and in the absence of any additional infraction. He contends that the Employer failed to have any regard for Section C59 (2) of the Antigua and Barbuda Labour Code.
23. Mr. Massiah contended that no factual basis exists for the reasons assigned for the dismissal. He claimed that the dismissal letter stated that the Employee was dismissed for her handling of the Samuel James loan. He argued that Ms. Bramble had noted the exception of the withdrawal of the \$36,000.00 security deposit in her report on May 25, 2009, to the Credit Committee. Mr. Massiah asked the Court to consider Mr. Yves Ephraim's evidence that the Loan Summaries prepared by Ms. Bramble were presented to the Technical Team and that Mr. Ephraim was a member of the Credit Committee when the decision was taken to approve the loan.
24. In the final analysis, the Employee through her Representative Mr. Massiah, contended that the Board approved Mr. James' loan application; that the circumstances surrounding the withdrawal of the \$36,000.00 were communicated to the Technical Team and was known to them before the loan had been approved; the approval was granted in the face of knowledge of the circumstances of the \$36,000.00 and that the General Manager signed-off the disbursement cheques alongside the Employee.

The Employer

25. In justifying its decision to dismiss the Employee, the Employer called two (2) witnesses. Their evidence is contained in the Witness Statements of Mr. Yves Patrick Ephraim, former President of the Employer, and Ms. Jennifer Whyte, former General Manager of the Employer, as well as their oral evidence.

Yves Patrick Ephraim

26. Mr. Yves Patrick Ephraim gave evidence in chief that the Employer expressed on numerous occasions, both in writing and verbally, its dissatisfaction with the Employee's performance, innumerable errors, poor attitude and no signs of improvement. According to Mr. Ephraim, the loan granted to Mr. James was *"the straw that broke the camel's back."*

27. He stated that the Employee did not disclose to the Board Mr. James' difficulties in meeting the loan requirements, even after approval had been granted and before disbursing the funds. At all times, the information received and shared with the Credit Committee was that Mr. James held share-savings of \$65,000.00.

28. His evidence is that the Loan Summaries presented to the Credit Committee and Technical Team had been *"deliberately manipulated"* to illustrate the account balance of a previous date and not as of the current date of the report.

29. Mr. Ephraim also gave evidence that the Employee unilaterally deferred Mr. James' first loan payment and subsequently granted him a three-month moratorium. The Employee had scant regard for the policies and procedures of the Employer and its Management, as the loan was outside the threshold of her remit.

30. During cross-examination, Mr. Ephraim acknowledged that a meeting was held on September 29, 2009, to discuss the Employer's dissatisfaction with the Loans Department, primarily in the processing of loans. He stated that this was not a disciplinary hearing.

31. Mr. Ephraim explained that though he was the President, the Technical Team did not report to him. He further explained that the Technical Team is an independent ad-hoc grouping comprised of Members of Management, Credit Committee and Loan Officers. He became aware of the Customer's delinquency from the Management Meeting Reports presented by the Loans Manager. He immediately saw the red flags. He said, *"When the red flags and delinquency came to light, the horse had already bolted, meaning the funds were already disbursed."*

32. The circumstances of the delinquency came to light, and after the September 29, 2009 meeting. The Employer continued to investigate matters. Mr. Ephraim stated that there existed no policy regarding moratoria. In any event, the Employee was responsible for preparing these policies and submitting them for approval by the Board.

Jennifer Whyte

33. Like Mr. Ephraim, Ms. Whyte gave evidence of many issues within the Loans Department. She informed the Court that upon her appointment as the General Manager, she immediately noticed the Employee's refusal to be guided by the policies and procedures of the Employer concerning the approval of loans.

34. As the General Manager, she provided feedback and guidance to the Employee and, on several occasions, shared her concerns with the Employee. She said, "*There was an ongoing tendency for unsound loan assessment and decision-making by Ms. Henry.*" There were poorly underwritten loans, and the Employer faced an extensive delinquent portfolio exceeding the statutory maximum of 5%.

35. According to Ms. Whyte, the Employee had been given feedback about the Employer's dissatisfaction for months, possibly years, before her dismissal. Her evidence is that Ms. Henry did not accept the Employer's direction, so she continued to fall into error. The Employee, she says, developed a combative and resistant attitude towards direction and feedback given.

36. Regarding Samuel James' loan, Ms. Whyte gave evidence that when Mr. James' delinquency came to light, it became clear that Ms. Henry was no longer dependable. The entire loan was disbursed before the security for the loan had been perfected. A review of the loan showed that incorrect information had been presented to the Technical Team and Credit Committee.

37. According to her, it was equally clear that the Employee had placed the customer's need to clear his goods at the Port above the Employer's interest. Her evidence is that granting a moratorium was outside the Employee's authority. Ms. Whyte stated that on April 15 and 25, 2009, the Board had written to the Employee about her practice of making decisions concerning loans that were outside her approval threshold.

38. Under cross-examination, Ms. Whyte testified that the Employer was at the stage of conducting an investigation. The December 29, 2009 letter highlighted the loan accounts the Employer was concerned about. No disciplinary hearing was convened,

neither had any warning letters been issued to the Employee, nor had the Employee been placed on a performance improvement probation.

39. In explaining the procedure for granting loans, Ms. Whyte stated that the process starts in the Loans Department with the Loan Officer or Loans Manager. The application is then referred to the Technical Team. Thereafter, the loan is then managed by the Loans Department and is either forwarded to the Credit Committee or the Board for final consideration.
40. As the General Manager, she is not privy to the workings pertaining to individual loan applications. However, she accepted that as a member of the Technical Team, she received the Loan Summaries prepared by the Loans Department regarding Mr. James' loan. The Witness confirmed that she was a signatory to the Employer's banking accounts but could not recall if she had signed the cheque to Mr. James. She denied having managerial oversight of the Credit Committee.
41. Concerning the security for Samuel James' loan, Ms. Whyte stated that the loan process requires holding a cash deposit. Her evidence is that the Employee was aware of this, and sactioned Mr. James' withdrawal funds which were to have been pledged. She asserted that based on the contents of the Loan Summary of May 25, 2009, the Credit Committee was misled to believe that Mr. James had share-savings of \$65,000.00, and the statement provided suggested that there was \$37,000.00 on his account; therefore, they were of the view that those funds remained on the account.
42. In concluding her evidence, Ms. Whyte stated that she became aware of the problems with the Samuel James loan after it had been flagged as being delinquent and she reaffirmed that it was the Board and or Credit Committee that approved loans.
43. Learned Counsel Ms. E. Anne Henry KC, submitted that the Employee made certain decisions regarding the loan, which was significantly above her lending remit. She argued that the Employee's claim for unfair dismissal as pleaded, is based on the Employee's averment that her dismissal came after she had already been issued a warning letter and, secondly, she had not been given the opportunity to be heard. According to Learned Ms. Henry KC, at no point did the Employee contend that the Employer was wrong or unreasonable in its conclusion that she acted negligently and misconducted herself in handling Samuel James' loan.
44. Learned Counsel submitted on behalf of the Employer that the December 29, 2009, letter could not be construed as a warning letter by Section C59(5) of the Antigua and Barbuda Labour Code. She contended that the dismissal of the Employee following

the issuance of the letter of December 29, 2009, cannot be considered a second punishment.

45. To support the Employer's Defence that the termination was justified, Learned Counsel Ms. Henry KC argued that the factual basis existed as follows:

" ...

- (i) *The Employee permitted the withdrawal of substantially all the deposit funds which were to have been pledges as security for the loan within days of the account being opened*
- (ii) *That the withdrawal was permitted with full knowledge that the effect of the withdrawal was to breach the cash security requirements of the loan application.*
- (iii) *The Employee granted a moratorium on the repayment of the loan because of the difficulties which the borrower was experiencing.*

... "

46. Regarding the Employee's complaint that she was not allowed to be heard on the matter, Learned Counsel submitted that the Employee was invited to respond to the letter of December 29, 2009, and she did so by letter of January 12, 2010. She submitted that the Employee at the time, was aware that the Board was investigating the matter of Samuel James' Loan as well as other loans. Yet, the Employee responded to Samuel James' loan to say that there was nothing else to add as the matter had been previously discussed and exhausted, and nothing new had arisen. The Employer, therefore, concluded that sufficient opportunity was given to the Employee to be heard.

Issues

47. Having regard to the Memoranda, the main issues to be considered are:

1. Is the Letter of December 29, 2009, a warning letter?
2. Whether the Employer had a good cause for dismissing the Employee?
3. Whether the Employer acted reasonably or unreasonably in dismissing the Employee for the assigned reasons?
4. Is the Employee entitled to compensation?

Legal Framework

48. The Employer admits to dismissing the Employee; therefore, the burden is on it to prove that the dismissal was fair. Section C58 (1) of the Labour Code conditionally provides that misconduct may properly constitute a good cause for dismissal. The primary condition is that there must be a factual basis for that assigned reason. Moreover, the assignment of misconduct as a good cause for dismissal is subject to the limitations imposed by Section C58.

49. Accordingly, for the dismissal to be fair, the onus is on the employer to prove: (a) it had just cause for the dismissal under section C58 (1) of the Labour Code in that it had reasonable grounds to believe, based on its investigation that the employee had engaged in gross misconduct, and (b) it acted reasonably in dismissing the employee in the particular circumstances prevailing at the material time.
50. Therefore, given the pleadings, the resolution of these issues will be determined within the parameters of the provisions of Sections C58 and C59 of the Antigua and Barbuda Labour Code (the Labour Code), which read 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) ...**

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

C 58 (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.

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) ...**

C59 (2) Where an employee is guilty of misconduct in or in relation to his employment that is not sufficiently serious to permit his Employer to terminate his employment under subsection (1) but is such that the Employer cannot reasonably be expected to tolerate a repetition, the Employer may give the Employee a written warning which shall describe the misconduct in respect of

which the warning is given and state the action the Employer intends to take in the event of

- (a) a repetition of the misconduct; or
- (b) the commission of another misconduct which is as serious as the one in respect of which the written warning was given.

C59 (3) The action to be taken under subsection (2) may include suspension without pay for such period as may be specified in the written warning."

51. Given the statutory prohibition on unfair dismissal, the Employer must prove by cogent and precise evidence that the dismissal was not unfair.

Resolving the issues

Is the letter a warning letter?

52. The Employee contends that the December 29, 2009 letter is a Warning Letter. Contrarily, the Employer argued that the letter was not a Warning Letter within the context of Section C59 (5) of the Labour Code. We examined the letter, paying close attention to its content. It is noteworthy that in the Letter of December 29, 2009, under the rubric **'Warning - Dissatisfaction with performance'**, the Employer sets out various matters of concern and stated:

"...You are hereby warned that your attention to supervising the Loans Department operations and procedures to ensure proper follow through and ongoing adherence to proper procedure and policy directive is deficient..."

53. However, it is of equal significance that the Employer goes on to state:

"...As advised, your performance, and particularly that in relation to the grave status of the Samuel James Loan, is under review by the Board. The outcome will be communicated to you shortly."

54. We considered Section C59 (5) of the Labour Code to determine this issue. Two key requirements must be present in the content of a letter to make it a Warning Letter within the ambit of the Labour Code. Firstly, the employer must give details of the unsatisfactory performance and state the action the employer intends to take if the event of repetition occurs. Section C59 (5) then provides that if the employee's performance does not improve within the following three (3) months, the Employer may terminate the employee's employment.

55. It is clear from the correspondence that the Employer set out the various issues and areas of concern. However, the Employer had not resolved its investigation regarding

Samuel James' loan, for which it subsequently dismissed the Employee. Based on the contents of the letter we are inclined to accept the evidence and submissions of the Employer that the letter placed the Employee on notice that the Employer was dissatisfied with her performance, particularly the manner in which the Samuel James loan was handled, and which was still under review and that the Employee would be notified of the outcome. There was no indication of the action the Employer intended to take.

56. Therefore, we find that the December 29, 2009 Letter is not a Warning Letter pursuant to Section C59 (5) as the second key requirement is absent.

Whether the Employer had good cause for dismissing the Employee?

57. The Court heard details concerning the processes of the Employer, in particular, the procedure for granting loans. In this case, the Board had approved the loan application to be processed for Mr. James despite him not having held an account with the Employer for six (6) months. We heard evidence from the witnesses on both sides to indicate that Mr. James faced several issues in qualifying for the loan and meeting his initial obligations.
58. The Employee tendered into evidence three (3) Loan Summaries. The first one is dated May 25, 2009, the June 25, 2009, and the third one, though undated, must have been produced much later after the disbursement of the loan proceeds to Mr. James, since it speaks to matters which occurred up to and including October 22, 2009. The first two (2) Loan Summaries, as reported by the Loans Department, indicated that the Employee contended that the share-savings which should have been on deposit had been withdrawn. The report gives a specific date of July 31, 2009, when the complete security for the loan would be in place.
59. We did not have the benefit of the transaction activity and account balance of Mr. James' account that the Employer's witnesses said ultimately misled the Credit Committee in their consideration of the loan application. Nonetheless, having heard the evidence, we are satisfied that the Loan Summaries did indicate that the monies pledged had been withdrawn. We also did not have the benefit of the enquiries or additional information that may have been requested by the Credit Committee further to its consideration of the loan. In the final analysis, the Credit Committee decided to approve the loan application.
60. However, the Employer's contention did not end there. Their defence is that the Employee was negligent and misconducted herself by concealing certain decisions in

relation to the loan despite it being outside of her limit. Based on the evidence, including the Employee's admission that the loan was above her remit, and her attempt at explaining her reasons for unilaterally granting a moratorium, a policy which the Employer did not have as explained during the oral evidence of the former President, as well as was enunciated by the former General Manager Ms. Jennifer Whyte, we are inclined to agree with the Employer that the Employee conducted herself outside of the scope and authority assigned to her. Likewise, based on the evidence, particularly that of the Employee, , that she did not initially advise the Employer of the difficulties experienced by Mr. James in meeting his obligations, which, we agree, suggests that the Employee did not correctly conduct herself.

61. There is also the issue pertaining to the disbursement of the loan. The Employee, having already advised the Technical Team and Credit Committee that the cash security would have been perfected by July 31, 2009, and being aware at the time of disbursement that it remained outstanding, irrespective of the approval, she ought to have ensured in her capacity as the Loans Manager that the security deposit was deducted from the loan amount being disbursed, thereby resulting in the funds pledged being in place. This was paramount as, by that date, the Employee was aware of the difficulties being experienced by Mr. James and had already decided to unilaterally extend the due date of payment and the moratorium that followed.
62. Based on the evidence and determined facts, the Employer did have the factual basis to genuinely and reasonably believe that the Employee had engaged in gross negligence and misconduct.

Did the Employer act reasonably in dismissing the Employee?

63. The Employee posited that the Employer disregarded the rules of natural justice, and she was denied procedural fairness. The Employee contends that she was dismissed on the premise of her performance, and having been so dismissed, the provisions of Section 59 (3) of the Antigua and Barbuda Labour Code ought to have been invoked by the Employer. She contends that she ought to have issued a warning and be allowed to improve her performance.
64. However, we note that the dismissal letter states that the Employee was dismissed for gross negligence and misconduct and not for performance.
65. Mr. Massiah, Counsel for the Employee submitted that the Employer, in dismissing the Employee disregarded the rules of natural justice and fair procedure. He argued

that the Employer dismissed the Employee without being allowed to put forward an explanation and without a disciplinary hearing.

66. We will determine the reasonableness of the Employer's conduct in accordance with the equity and the substantial merits of the case.
67. In determining procedural fairness, we considered the processes adopted by the Employer in this case. The Employer's evidence is that having been heavily concerned about the rate of loan delinquency and other matters within the Loans Department, it decided to carry out an audit of the Department. The formal review began with a meeting with the Employee on September 29, 2009 to discuss their concerns about the several loans. Following that meeting and based on matters arising from the same, the Employer concluded that it was paramount to investigate the workings of the Loans Department. The Employer's position was documented in the 'President's Overview of the Meeting between the Credit Committee and the Loans Manager held on September 29 2009', which was submitted into evidence by the Employee.
68. Upon conclusion of the review, its findings, including allegations, were put to the Employee in the form of the December 29, 2009 letter. The aforementioned letter also notified the Employee that the Samuel James loan was being reviewed. The Employer through its General Manager requested the Employee to respond to its December 29, 2009 letter. The Employee responded on January 12, 2010.
69. It has been long established that every worker has the right to a fair opportunity to defend himself against allegations made against him and to be heard in mitigating any possible penalty, especially dismissal. We have stated in previous decisions that this is not a trifling matter to be taken lightly or viewed as a mere technicality. It is a fundamental principle of good industrial relations practices.
70. By letter dated January 12, 2010, the Employee responded to the Employer's December 29, 2009 letter. In her response, she provided an explanation to issues raised in the Employer's letter under similar headings. We note that in relation to the Samuel James loan, the Employee's position was that:

" Mr. James loan was already discussed, in depth. Your memo did not include any new facts that were not previously discussed at Management, Technical Team and Board level. Many questions concerning the loan were asked and the relevant answers given with explanation and clarification. Therefore, at this point, there is nothing more that I could add."

71. The Employee's response as reproduced in part above, suggests that the Employer engaged the Employee concerning matters related to the Samuel James loan, which was discussed 'in-depth'. We also note the Employee's position that having exhausted this discussion by January 12, 2010, there was nothing more that she could add. In our view, the Employee had stated her position, had already offered an explanation, and had nothing more to state. The Employee's statements concerning Samuel James' loan are profound. They must be considered in determining whether the Employer disregarded the rules of natural justice and the requirements of the Labour Code.
72. We do not think there exists any rigid or inflexible rules governing the grant of an opportunity to be heard. In our minds, it may be an informal process, provided an employee is always given a fair opportunity to be heard. A fair opportunity to be heard requires an employer to present all relevant information to the employee and to permit the employee to appreciate and understand the substance and gravity of the allegations against him. The employee must then be allowed to reply to such allegations and put forward any mitigation to prevent or minimise any penalty that could be imposed against him, having regard to the nature of the allegation. This process is to ensure justice and fairness.
73. In our view, the Employee, being a senior member of staff was fully aware of the importance of her response and her responsibility to herself and the Employer in responding with sufficient details and explanation in defence and mitigation of herself. We note that an employer could only reasonably arrive at a decision based on the explanations given and the documentary evidence in its possession. The totality of the steps taken by the Employer satisfies us that the Employee was given sufficient opportunity to be heard.
74. Additionally, we note that the Employer is a Credit Union, a financial institution guided by the Co-operative Societies Act No. 2 of 1997 and the amendments thereto. Subject to the provision of the Act, the Employer has as its mandate the promotion of the economic interests of its members in accordance with co-operative principles. One such way is to promote the interest of its members, is through the granting loans to its membership. However, in doing so, as a credit union, the Employer has an ineludible fiduciary responsibility to ensure that sound loans are approved and granted, that policies, rules, and procedures are adhered to and that the loans approved to its members are repayable.
75. We remain mindful that the reason proffered by the Employer for the dismissal was gross negligence and misconduct. Based on the oral testimony of the witnesses and the supporting documents, there was compelling evidence that the Employee did not

act with due diligence when she disbursed the entire loan proceeds to Mr. James without the necessary cash security being in place to protect the interest of the Employer and by extension the interest of the members of the Credit Union. The Employee compounded her negligence by leaving the Employer in the dark about the extent of the issues faced by Mr. James.

76. Additionally, outside the scope of her authority and in the absence of a policy, the Employee extended a three-month moratorium to Mr. James, which decision to approve could only have been taken by the Credit Committee or the Board.
77. The circumstances and risk to the Employer were grave and could not be considered minor. We accept the Employer's submission that its decision was based on very serious considerations regarding the position of the Employee and the fact that she functioned in one of the Employer's senior positions. There is nothing to suggest that the Employer acted frivolously or unreasonably.
78. Substantially, we have carefully analysed and considered all the evidence presented to the Court in this dispute, both written and oral. We also considered the arguments of the parties as presented in the written submissions and the references they made. Having considered all the relevant matters, the Court finds that the Employee failed to discharge her responsibility as the Loans Manager with overall oversight, especially since she had direct involvement in processing the loan for Mr. James.
79. In our view, the Employer has satisfied the Court that on a balance of probabilities with weighty and cogent evidence that the Employee acted negligently and that her conduct amounted to gross misconduct. We, therefore, determine that the decision to dismiss the Employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business would have adopted.
80. In our deliberations we observed certain weaknesses in the Employer's operation procedures which enabled the Employee to easily defer the loan payment due date and in so doing manipulated the accuracy of the reports particularly in relation to the institutions overall delinquency rate and by extension its level of profitability. The fact this was not noticed for some time by the General Manager or the Board was quite troubling. We are cognizant that these state of events transpired over a decade ago and therefore perhaps the Employer has since addressed these issues by ensuring the implementation and adherence to stricter procedures and controls having regard to its duty under the Act by which it is governed. Nonetheless, it would have been remiss of us not to mention our observations.

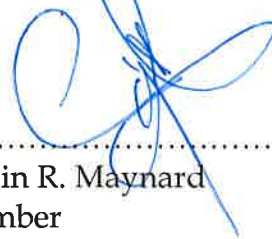
81. Notwithstanding our observations, we find that the Employer fairly dismissed the Employee, and therefore, this Reference is hereby dismissed.



.....
Samantha May-Francis
President Acting



.....
Hesketh A. Williams
Member



.....
Collin R. Maynard
Member

