

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANULTPAP2017/0002

BETWEEN:

LEONART MATTHIAS

Appellant

and

ANTIGUA COMMERCIAL BANK

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Justin L. Simon, QC for the Appellant

Mrs. Andrea Roberts Nicholas and Ms. Safiyah Roberts for the Respondent

2019: September 16;
2020: May 28.

Civil appeal — Appeal from decision of Antigua and Barbuda Industrial Court — Unfair dismissal — Sections C9, C56, C58 and C59 of the Antigua and Barbuda Labour Code — Approach of Court of Appeal to findings of fact by Industrial Court — Section 17 of Industrial Court Act — Whether Court of Appeal empowered to review findings by Industrial Court — Whether there was sufficient evidential basis for findings of fact made by Industrial Court — Whether appellant's dismissal was unfair — Natural justice — Right to procedural fairness — Whether appellant's right to natural justice and procedural fairness was breached

The appellant, Mr. Leonart Matthias, was employed by the respondent, the Antigua Commercial Bank ("the Bank"), in 1988, and worked continuously with the Bank for 22 years until February 2010 when he was summarily dismissed for gross misconduct. In 2010, his key responsibilities included the duty to ensure that all required custody and security requirements and documentation were properly in place and followed.

In January 2010, the Bank discovered that a digital video recorder ("the DVR") at the airport agency of the Bank where Mr. Matthias worked had been unplugged. The Bank had installed the DVR to enhance its security systems in keeping with global security alerts. When Mr. Matthias was asked about the unplugged DVR, his initial response was that he did not know about it. When probed further, he admitted that he would unplug the DVR from time to time and plug it back within ten seconds.

Following the Bank's discovery, a report was made against Mr. Matthias. Mr. Matthias was apprised of the seriousness of the matter and was instructed to submit a report. In his report, Mr. Matthias maintained that he periodically unplugged the DVR, but that he knew nothing further about the matter. He was subsequently suspended from work pending an investigation into the incident by the Bank. The investigation revealed that Mr. Matthias had in fact unplugged the DVR and left it unplugged indefinitely. The Bank did not invite Mr. Matthias to a meeting to further explain his actions and summarily terminated his employment, by letter, on the grounds of gross misconduct and gross negligence.

Mr. Matthias commenced legal proceedings against the Bank before the Industrial Court, claiming, in essence, that he was not given an opportunity to state his case and respond to the charges made against him, prior to his dismissal. The Industrial Court dismissed Mr. Matthias' claim, and in so doing, found that Mr. Matthias acted in breach of the trust and confidence reposed in him by the Bank; that there was serious and irreparable damage or destruction of such trust and confidence; and, that Mr. Matthias' dismissal was not unfair and therefore the issue of compensation did not arise.

Being dissatisfied with the decision of the Industrial Court Mr. Matthias appealed to the Court of Appeal. The issues for determination by the Court concern: (i) the approach that the Court of Appeal should take when findings of fact by the Industrial Court are challenged; (ii) whether the Bank breached the rules of natural justice or procedural fairness; and (iii) whether the Industrial Court erred in its reliance on video evidence against Mr. Matthias.

Held: dismissing the appeal, affirming the decision of the Industrial Court, and making no order as to costs, that:

1. There is no express right of appeal against findings of fact by the Industrial Court. In order to establish that a finding of fact is susceptible to appeal, the person challenging the finding must show that it was illegal in the sense contemplated by section 17(1)(e) of the **Industrial Court Act**. Such an illegality may be established, for example, where it is shown that the Industrial Court erred by making or drawing inferences for which there is no evidentiary basis, or that the court did not consider the facts in light of the applicable principles or statutory provision, and that the error was committed during the course of the proceedings and substantially affected the merits of the matter.

Section 17(1) of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda considered; **Jewellers Warehouse v Cecile Norde** Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported) followed.

2. It is clear that the Industrial Court did not rely on direct evidence in finding, as a matter of fact, that Mr. Matthias had prior notice of the global security alerts. The Industrial Court had before it evidence that a person in Mr. Matthias' position either knew or ought to have known about the global security alerts, and relied on this evidence to infer that Mr. Matthias was in fact aware of the alerts. The Industrial Court was entitled to draw such an inference on the evidence. Accordingly, the Court of Appeal cannot interfere with the Industrial Court's finding of fact in this regard.

Section 17(1)(e) of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda applied; **Jewellers Warehouse v Cecile Norde** Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported) followed.

3. The complaint by Mr. Matthias that the evidence before the Industrial Court was insufficient to find that he acted recklessly or intentionally, is essentially a challenge to the Court's findings based on its assessment of the evidence. Such findings are quintessentially matters for the Industrial Court whose members had the opportunity to observe the witnesses as they gave their evidence and to assess their demeanor and credibility. This is even more so in an appeal from the Industrial Court where the Court of Appeal is precluded from hearing appeals on findings of fact unless the findings are illegal in the sense contemplated by section 17(1)(e) of the **Industrial Court Act**. In the circumstances, this Court cannot review or upset the findings of the Industrial Court regarding Mr. Mathias's intentions and recklessness. In any event, even if this Court could review the findings related to Mr. Matthias' conduct, it cannot be said that such findings were not open to the Industrial Court on the evidence or were blatantly wrong. There is therefore no basis to interfere with the Industrial Court's findings in this regard.

Section 17(1)(e) of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda applied; **Jewellers Warehouse v Cecile Norde** Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported) followed.

4. An employer may summarily terminate the services of an employee if the employee's misconduct is sufficiently serious that the employer can reasonably take the position that summary dismissal is justified without warning or giving an opportunity to present their case before dismissal. The allegations against Mr. Matthias were damning, overwhelming and accepted as truthful by the Industrial Court. In the circumstances, the alleged misconduct was of such nature that the Bank acted reasonably in dismissing Mr. Matthias without a further opportunity to present his case. The Industrial Court therefore did not err in finding that there was no procedural unfairness in the way that the Bank dismissed Mr. Matthias. In any event, even if Mr. Matthias did not get a proper opportunity to be heard, based on the overwhelming evidence of misconduct by him, his summary dismissal did not occasion a miscarriage of justice. There is therefore no basis upon which this Court should interfere with the finding of the Industrial Court.

Sections C9, C56, C58 and C59 of the **Antigua and Barbuda Labour Code** CAP 27 of the Laws of Antigua and Barbuda considered; **Commonwealth Caribbean Public Law, Text, Cases and Materials** Albert Fiadjoe, 4th Edn. Routledge-Cavendish, (UK), 2011 considered; **Polkey v A.E. Dayton Services Ltd** [1988] AC 344 followed; **Blackburn v LIAT (1974) Ltd** [2020] UKPC 9 followed; **Sillifant v Powell Duffryn Timber Ltd** [1983] IRLR 91 followed.

5. The Industrial Court may act outside the technical rules of evidence and may inform itself on any matter, in such manner as it thinks just. If it does so, the parties to the proceedings must be given the opportunity, if they so desire, to adduce evidence on the matter. It was open to the court to determine the procedure for trial, and the time when it would view the video footage. Mr. Matthias was aware since the date of his termination that the video evidence existed and played an important part in the Bank's decision to dismiss him. He had the opportunity to view the tape prior to the trial, but did not, and he did not raise an objection at the trial when the Bank's lawyers offered to make the tape available to the Court. He did not deny unplugging the DVR and did not dispute at trial what was shown on the tape. In all the circumstances, the Industrial Court did not err in viewing the tape and in relying on it.

Section 9 of the **Industrial Court Act** Cap. 214 of the Laws of Antigua and Barbuda applied; **Blackburn v LIAT (1974) Ltd** [2020] UKPC 9 followed.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** The appellant, Mr. Leonart Matthias ("Mr. Matthias") is a former employee of the Antigua Commercial Bank ("the Bank"). Mr. Matthias was summarily dismissed by the Bank on 4th February 2010. He filed a claim in the Industrial Court of Antigua and Barbuda ("the Industrial Court") for an order that he was unfairly dismissed. The Industrial Court dismissed the claim. This is an appeal against the decision of the Industrial Court.

Background

- [2] Mr. Matthias was employed by the Bank in 1988 and worked continuously with the Bank for 22 years until February 2010 when he was summarily dismissed for gross misconduct. During his tenure at the Bank he occupied various positions ranging from teller to systems support technician. At the time of his dismissal, he held the position of airport agency supervisor at the airport agency of the Bank. He was

tasked, in the main, 'to provide strong support to the Customer Services Officer by managing the Customer Service and Cash Operations at the Airport/Cambio'.¹ More importantly, his key responsibilities included the duty to ensure 'that all required custody and security requirements and documentation [were] properly in place and followed so that ... ACB [did] not suffer any financial loss or negative exposures due to a lack of care in this area'.²

[3] On 29th January 2010, Mr. Sidlow Frank, the network administrator/LAN analyst, visited the airport agency after he was alerted to the fact that the audit department was unable to connect to the digital video recorder ("the DVR") at the airport agency. Upon a physical inspection of the DVR, he discovered that it was unplugged. When Mr. Frank enquired about who had unplugged the DVR, Mr. Matthias' initial response was that he did not know.³ When probed further, Mr. Matthias admitted that he would unplug the DVR 'from time to time... when it alarm[ed] and plug it back within about ten seconds'.⁴

[4] Following this discovery, a report was made to Mrs. Jennifer Hector, Mr. Matthias' immediate supervisor, and Dr. Austin Josiah, the human resource executive. Mr. Matthias was apprised of the seriousness of the matter and was instructed to report to work at the Head Office on 1st February 2010, submit a report on the matter and turn over the combinations. On 1st February 2010, Mr. Matthias reported to work and submitted a written report in which he provided an explanation for the unplugging of the DVR. The essence of his report was as follows:

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

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

¹ Record of Appeal, Bundle 2 at p. 61.

² Record of Appeal, Bundle 2 at p. 62

³ Record of Appeal, Bundle 2, Tab 1, p. 2 at para. 13.

⁴ Record of Appeal, Bundle 2, Tab 1, p. 2 at para. 13.

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... This is the extent of my knowledge on the matter.”

Mr. Matthias said that when he presented his report to Dr. Josiah on 1st February 2010, he was given a suspension letter (the “suspension letter”) which read, in part:

“... Mr. Sidlow Frank of our Systems Department visited the Airport Branch on Friday 29th ... 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... if anyone had shuffled around the equipment... 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 report that he ... plugged 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 replugged the DVR. He then advised you that you should have called IT upon hearing the noise...

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... you are placed on Administrative Leave with immediate effect until Friday 5th February, 2010...”.

- [5] The investigation carried out by the Bank during Mr. Matthias’ suspension revealed that on 30th December 2010 he had unplugged the DVR which the Bank had installed in order to enhance its security systems. The Bank did not invite

Mr. Matthias to a meeting to further explain his action in unplugging the DVR. By letter dated 4th February 2010, the Bank terminated Mr. Matthias' employment on the grounds of gross misconduct and gross negligence ("the termination letter"). The Bank disclosed the results of their investigations in the termination letter to the effect that:

"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 [sic]; 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 Informations Systems Department, visited the Agency, called your attention to the breach, and plugged in 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 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 the Antigua Commercial Bank is hereby terminated with effect today, Friday, 5th February 2010."⁵

Proceedings in the Industrial Court

- [6] On 23rd June 2010, Mr. Matthias commenced legal proceedings against the Bank by filing a reference in the Industrial Court. The main thrust of his claim in the Industrial Court was to the effect that he was not given an opportunity to state his case and respond to the charges made against him. The Bank argued that, in the circumstances of this case, where Mr. Matthias was caught in the act of

⁵ Record of Appeal, Bundle 1, pp. 12 – 14.

unplugging the Bank's DVR, there was no need to carry out an in depth investigation since the facts were so blatant and obvious, and his lies about what had happened justified termination without further notice.

[7] Having heard the arguments of both parties and considered the evidence before it, three issues arose for determination by the Industrial Court, namely: (1) whether the Bank dismissed Mr. Matthias in the way that it did because of his shop steward activities; (2) whether Mr. Matthias' act of unplugging the DVR on 30th December 2010 amounted to gross misconduct so serious that the Bank could not reasonably have been expected to take any course other than summarily terminating his employment and; (3) in the event that Mr. Matthias was found to have been unfairly dismissed, what was the measure of damages due to him.

[8] On 30th June 2017, the Industrial Court found on the evidence before it that the decision made by the Bank to dismiss Mr. Matthias was not related to his role as shop steward;⁶ that by unplugging the DVR Mr. Matthias acted in breach of the trust and confidence reposed in him by the Bank; that 'there was serious and irreparable damage or destruction' of such trust and confidence; and that his dismissal was not unfair and therefore the issue of compensation did not arise.

The appeal

[9] Being dissatisfied with the decision of the Industrial Court Mr. Matthias appealed to the Court of Appeal on 11th August 2017. The notice of appeal contained five grounds of appeal:

"(a) The judgment should be deemed a nullity having been written and signed off by only one member out of a three-member panel, two of whom heard the trial to its end and one of the two having unfortunately passed away before the completion of the written judgment.

(b) The Court failed to find that the Respondent acted with procedural unfairness and in breach of the Antigua and Barbuda Labour Code and the existing Collective Agreement in the Respondent's failure and/or

⁶ Para. 54 of the judgment

refusal to give the Appellant an opportunity to defend himself from its accusations during its internal inquiry, before summarily terminating the Appellant's services immediately following his suspension.

(c) The Court misdirected itself by relying heavily on the video footage allegedly showing the Appellant disconnecting the Respondent's Digital Video Recorder (DVR) in absence of a display of the footage during the trial for the purpose of allowing the examination and/or cross-examination of the witnesses on the images being displayed.

(d) The Court wrongfully accepted the Respondent's contention that the Appellant acted in clear breach of his fiduciary responsibility at a time when there was a global security alert mandating heightened surveillance for businesses and at a time when banks were on high alert to robbery attempts in the absence of any evidence, documentary or otherwise, that the Appellant had been placed on prior notice of these 'alerts'.

(e) That the evidence adduced by the Respondent does not show, even on the balance of probabilities, that the Appellant acted recklessly or intentionally in plugging out the Respondent's DVR for the purpose of leaving the same unplugged indefinitely, thereby placing the Respondent, its staff, and customers at risk from externally-instituted criminal activity."

[10] At the hearing of the appeal, learned counsel for Mr. Matthias, Mr. Justin Simon, QC, conceded, quite correctly, that ground (a) was not viable in light of section 4(6) of the **Industrial Court Act**⁷ ("the Act"). Ground (a) raised the question of whether the Industrial Court was properly constituted pursuant to section 4(8) of the Act and thereby had the jurisdiction to deliver a judgment which was executed by only one of the three members of the panel that heard the matter. In examining the language of sub-section (6), it is apparent that Mr. Matthias is forestalled from challenging the validity of the Industrial Court's judgment on the basis of 'any vacancies in [the court's] number or in the absence of any member from the hearing or any part thereof' since the section expressly provides that 'no act, proceeding or award of the Court shall be called in question or invalidated by reason of any such vacancy or absence'.

⁷ Cap. 214 of the Laws of Antigua and Barbuda.

- [11] The remaining grounds of appeal raise three matters for consideration by the Court of Appeal. Firstly, the approach that the Court of Appeal should take when findings of fact by the Industrial Court are challenged (grounds (d) and (e)). Secondly, whether there was procedural fairness in the way that Mr. Matthias was dismissed (ground 9b)). Thirdly, the challenge to the Industrial Court's reliance on the video evidence (ground (c)). I will deal with these matters in the same order.

Challenge to findings of fact by the Industrial Court

- [12] The right of appeal against a decision of the Industrial Court is set out in section 17 of the Act. The section lists the instances where a party may appeal against the decision of the Industrial Court. Section 17 states:

“Appeal on point of law.

17. (1) Subject to this Act, any party to a matter before the Court shall be entitled as of right to appeal to the Court of Appeal on any of the following grounds, **but no others** --

- (a) that the Court had no jurisdiction in the matter, but so however, that it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Court has been formally taken at some time during the progress of the matter before the making of the order or award;
- (b) that the Court has exceeded its jurisdiction in the matter;
- (c) that the order or award has been obtained by fraud;
- (d) that any finding or decision of the Court in any matter is erroneous in point of law; or
- (e) that some other specific illegality, not hereinbefore mentioned, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.” (Emphasis supplied)

Having listed the grounds on which a decision of the Industrial Court can be challenged on appeal, it follows that the right to appeal only lies in the limited circumstances listed in the section. This interpretation follows from a plain reading of the words in the section including the fact that the list of appealable matters is preceded by the words ‘and no others’. It follows that the non-inclusion of a right to appeal against findings of fact by the Industrial Court means there is no right of appeal on that ground. The section is a classic illustration of the Latin maxim often used in the interpretation of statutory provisions, *‘expressio unius est exclusio*

alterius’; that is to say, when one or more things of a class are expressly mentioned, others of the same class are excluded.

[13] Grounds (d) and (e) of the notice of appeal appear to challenge the findings of fact made by the Industrial Court. However, Mr. Simon, QC submitted otherwise. He argued that the Industrial Court erred in finding that Mr. Matthias knew or ought to have known about the global security alerts⁸ and used this finding in coming to its overall conclusion that Mr. Matthias acted recklessly or intentionally when he unplugged the DVR and left it unplugged. Mr. Simon, QC argued therefore that the Industrial Court’s findings and conclusions were challengeable, not as stand-alone findings of fact, but as illegalities committed in the course of the proceedings that substantially affected the merits of the case. Mr. Simon, QC argued in his oral submissions that by virtue of section 17(1)(e) of the Act,⁹ an appeal may be made against facts found by the Industrial Court where the challenged finding amounts to an illegality committed in the course of the proceedings that substantially affects the merits of the matter. As a result, this Court may entertain appeals against findings of fact by the Industrial Court pursuant to section 17(1)(e) of the Act and general common law principles.

[14] Learned counsel for the Bank, Mrs. Andrea Roberts-Nicholas, responded by relying on the case of **Jewellers Warehouse v Cecile Norde**,¹⁰ a decision of the Court of Appeal sitting in this jurisdiction, that considered the meaning of section 17 of the Act. The judgment of the Court of Appeal was delivered by Rawlins JA. The judgment is instructive on how the Court of Appeal should approach challenges to findings of fact by the Industrial Court. The learned judge highlighted the five instances in section 17 by which a party may appeal as of right against a decision of the Industrial Court, then focused on ground (e), and stated:

⁸ Paras. 58 and 59 of the judgment.

⁹ Section 17(1)(e) is set out in the preceding paragraph.

¹⁰ Antigua and Barbuda Civil Appeal No. 29 of 2004 (delivered 27th November 2006, unreported) recently applied by this Court in *Sundry Workers v State Insurance Corporation* ANULTAP2013/0002 (delivered 14th January 2019, unreported) and *Cable and Wireless (Antigua and Barbuda) Limited* ANULTAP2016/0003 (delivered 23rd May 2019, unreported).

“[14] It would be a vitiating illegality under section 17(1)(e) of the Industrial Court Act, where the Industrial Court finds facts or draws inferences for which there is no evidential basis, if the facts so found substantially affect the merits of the matter. It would also be vitiating illegality where the Industrial Court does not consider the facts in the light of the applicable principles or statutory provision. The illegality would be an error committed in the course of the proceedings for the purpose of section 17(1)(e), since the proceedings would only be at an end after judgment is delivered and the Court is functus.

[15] The requirement in section 17(1)(e) that the vitiating illegality must be one ‘substantially affecting the merits of the matter’ means that the illegality must have adversely affected the central issue or issues around which the appeal revolves.”

The examples given by His Lordship in paragraph 14 are not exhaustive of the matters that can constitute vitiating illegalities within the meaning of section 17(1)(e), but they provide good guidance in this case. Following the learned judge’s guidance, Mr. Matthias has to satisfy this Court that the Industrial Court made findings of fact or drew inferences for which there is no evidentiary basis, or that the Court did not consider the facts in light of the applicable principles or statutory provision, and that the error was committed during the course of the proceedings and substantially affected the merits of the matter.

[15] Mr. Matthias complained that the Industrial Court made errors of fact for which there was no evidentiary basis or were wrong in principle. Firstly, in ground (d) of the notice of appeal, he complained that there was no evidence, documentary or otherwise, that he had been put on prior notice about the global security alerts. The Industrial Court’s finding on this point is at paragraphs 58 and 59 of the judgment. It is correct that there was no direct evidence that Mr. Matthias knew about the security alerts, but it is clear from the judgment that the Industrial Court did not rely on direct evidence in coming to its conclusion. The finding is couched in the following terms:

“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 initiatives of the bank and the then prevailing need to take and maintain security and surveillance precautions.”

There was also evidence from the Bank's human resource executive, Dr. Austin M. Josiah, that on 1st January 2010 he sent out a general communication to the Bank's staff informing them about the global security alert. This was two days after Mr. Matthias had unplugged the DVR and left it unplugged. The Industrial Court, therefore, had before it evidence that a person in Mr. Matthias' position either knew or ought to have known about the security alerts. The Industrial Court relied on this evidence to infer that Mr. Matthias was aware of the security alerts. This is an inference drawn from the facts which the Industrial Court was entitled to do and such inferences, regardless of the strength of the supporting evidence, do not fall under section 17(1)(e) and cannot be questioned by the Court of Appeal.

[16] Mr. Matthias' second complaint about the fact finding by the Industrial Court is in ground (e) where he claims that the evidence adduced by the Bank does not show, even on a balance of probabilities, that he acted recklessly or intentionally in unplugging the DVR for the purpose of leaving the same unplugged indefinitely, thereby placing the Bank, its staff and customers, at risk. Mr. Matthias is not saying here that the Industrial Court did not have evidence before it that he unplugged the DVR. The complaint is that the evidence was insufficient, even on a balance of probabilities, for the Court to find that he acted recklessly or intentionally.

[17] I confess to having difficulties with this complaint. Firstly, it is a complaint about the assessment of evidence which is quintessentially a matter for the Industrial Court whose members had the opportunity to observe the witnesses as they gave their evidence and to assess their demeanor and credibility. This is true in all civil cases and even more so in an appeal from the Industrial Court where the Court of Appeal is precluded by the statute from hearing appeals on findings of fact unless the findings are illegal in the sense contemplated by section 17(1)(e) of the Act. In the circumstances, this Court cannot review, far less upset, the findings of the Industrial Court regarding Mr. Matthias' intentions and recklessness.

[18] My second concern about the submission is that even if this Court could review the findings relating to Mr. Matthias' conduct there was abundant evidence from which the Industrial Court could have concluded that his conduct was intentional and reckless. The conduct includes, but is not limited to the fact that he was caught on camera unplugging the DVR which was not a part of his responsibility, and he made no attempt to re-plug the machine; he left the machine unplugged for an entire month; his explanation for unplugging the DVR was inconsistent; he did not give a plausible explanation for unplugging the DVR; and his general lack of candour.

[19] It was open to the Industrial Court to find on the evidence that Mr. Matthias acted in breach of his fiduciary duty and that, on the balance of probabilities, he acted recklessly and/or intentionally in unplugging the DVR and leaving it unplugged. The restrictions at common law against the Court of Appeal interfering with findings of fact by the trial court apply with full force in proceedings before the Industrial Court. The Industrial Court had the advantage of observing the witnesses while they were giving their evidence and this Court would be slow to interfere with the findings of fact unless it can be shown that such findings were not open to the Industrial Court on the evidence or were blatantly wrong.¹¹ I am satisfied that the findings were open to the Industrial Court and were not blatantly wrong. There is no basis for this Court to interfere with the findings.

[20] This leaves me now to deal with the issue of whether the Bank acted reasonably in terminating Mr. Matthias without giving him an opportunity to be heard, thus rendering the dismissal unfair.

Unfair dismissal and procedural fairness

[21] In keeping with good industrial relations and practices, there is a statutory framework regulating the procedure for dismissing an employee. Section C56 of

¹¹ See *Benmax v Austin Motor Company Ltd* (1995) 1 All ER 326 and *Watt (or Thomas) v Thomas* [1947] 1 All ER 582.

the **Antigua and Barbuda Labour Code**¹² (“the Labour Code”) vests an employee with the right not to be unfairly dismissed by their employer and imposes an obligation on the employer to not unfairly dismiss an employee ‘without just cause’. Section C56 provides: ‘Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause’. The flip side of the right not to be unfairly dismissed is in section C58 which provides that an employer can dismiss an employee fairly, but the employer must act reasonably on a proper factual basis and follow the procedures in the section.

- [22] Section C59(1)(a) deals with the situation where the employer can dismiss an employee summarily for serious misconduct. This section is relevant to this appeal. It provides that:

“(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.”

- [23] Finally, section C9 of the Labour Code bolsters section C59 as it provides for termination of employment without notice where an employee is guilty of misconduct related to his work. It reads: ‘An employer may, without advanced notice, terminate the employment of any person who has engaged in misconduct related to his work within the limitations of section C59(1) or (2)’.

- [24] The Industrial Court found that Mr. Matthias was dismissed fairly for gross misconduct. There is no appeal against the finding of gross misconduct. Mr. Matthias’ contention under this ground of appeal is that the dismissal was unfair due to lack of procedural fairness.

¹² Cap. 27, Revised Laws of Antigua and Barbuda 1992.

Whether there was a lack of procedural fairness

[25] Mr. Simon, QC posited that under the provisions of the Labour Code and the terms of the collective agreement between the Bank and its employees, the Bank was required to inform Mr. Matthias in writing of the complaint against him and give him an opportunity to state his case before the decision to dismiss him was made. He argued that the Bank did not act in accordance with the provisions of the Labour Code and the collective agreement and the Industrial Court erred in not finding that the Bank acted with lack of procedural fairness by not giving Mr. Matthias an opportunity to be heard and to defend himself before summarily terminating his employment. Mr. Simon, QC argued further that the suspension and termination letters were pre-written by the Bank in that after Mr. Matthias produced his report, he was immediately given the suspension letter. There was no meeting. Similarly, upon reporting to work on 4th February 2010, he was handed the termination letter. Learned counsel stressed that Mr. Matthias should have been given an oral hearing when he would have had an opportunity to be heard and to respond to the allegations contained in the letters.

[26] The issue whether Mr. Matthias was denied an opportunity to be heard should be approached in two stages. First, was he given an opportunity to be heard? If he was, there would have been no procedural unfairness and the second stage would be whether, on the facts, he was unfairly dismissed. On the other hand, if he was not given an opportunity to be heard, the dismissal would have been procedurally unfair and the second stage would be to determine whether, despite the procedural unfairness, he was fairly dismissed.

Opportunity to be heard

[27] Mrs. Roberts-Nicholas contended that the basic requirements of natural justice were met in that Mr. Matthias was given an opportunity to be heard and to put his case forward when he was asked to prepare and submit a written report. Further,

relying on the authority of **Khanum v Mid-Glamorgan Area Health Authority**,¹³ Mrs. Roberts-Nicholas submitted that Mr. Matthias knew the accusations made against him, and the Bank had acted in good faith in arriving at its decision. Mr. Simon's position is outlined in paragraph 25 above.

- [28] There is no fixed definition of what amounts to being given an opportunity to be heard. In every case it is a question to be determined on the facts and circumstances of each case. The decided cases provide useful guidance but I will start with a reference to Dr. Albert Fiadjoe in his work **Commonwealth Caribbean Public Law, Text, Cases and Materials**¹⁴ where he said:

"Fair hearing does not mean a hearing according to what would be required in a court of law. Basically, it means an opportunity to put one's side of a case before a decision is made. Accordingly, the legal requirement on the adjudicator is nothing more than a basic duty of fairness. Of course, in deciding on what is fair the courts have to balance several interests...There are no fixed rules nor is there a requirement that any rules of evidence should be followed or applied. There is no insistence that there must always be an oral hearing. It all depends on the circumstances of the case. It is however possible to identify from the practice of the courts what are the ingredients of a fair hearing."

- [29] Dr. Fiadjoe's statement is an accurate summary of the principles relating to giving the affected employee an opportunity to be heard. His statement includes the fact that an oral hearing is not always necessary. I agree. The need for a hearing and the type of hearing depend on the facts and circumstances of the case. In this case Mr. Matthias was given an opportunity to present his case in writing. In an appropriate case an opportunity to present one's case in writing can be sufficient. But that is not the crux of Mr. Matthias' complaint in ground (b). His real complaint is that the decision to dismiss him was made during the investigation after the Bank had viewed the DVR footage, and he was not given an opportunity to defend himself against the more serious allegations that he had unplugged the DVR

¹³ [1978] ICR 40.

¹⁴ Albert Fiadjoe, *Commonwealth Caribbean Public Law*, 4th Edn. Routledge-Cavendish, (UK), 2011.

deliberately and maliciously and left the Bank and its staff and customers exposed to serious security risks over a month long period.

- [30] The authorities in the Eastern Caribbean and England establish that an employer may terminate the services of an employee without notice or a hearing if the misconduct by the employee is sufficiently serious that the employer can take the position that summary dismissal is justified without a hearing. In the House of Lords decision of **Polkey v A.E. Dayton Services Ltd**¹⁵ the employee was not warned or given an opportunity to present his case before he was dismissed. The leading judgment was delivered by Lord Mackay of Clashfern who said:

“If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee.”¹⁶

The principle embodied in Lord Mackay’s speech was approved by the Privy Council in **Blackburn v LIAT (1974) Ltd.**,¹⁷ an appeal from this Court. In delivering the opinion of the Board Sir Rupert Jackson referred to the **Polkey** case and stated:

“The House of Lords [in *Polkey*] held that such a procedural flaw would render a dismissal unfair, except in the rare case where a reasonable employer could properly take the view that whatever the employee might say would make no difference.”

- [31] The point was also made by Browne-Wilkinson J in **Sillifant v Powell Duffryn Timber Ltd.**¹⁸ where he said:

¹⁵ [1988] AC 344.

¹⁶ Ibid at page 355.

¹⁷ [2020] UKPC 9.

¹⁸ [1983] IRLR 91.

“Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of 'equity' inherent in the failure would render the dismissal unfair. **But there may be cases where the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it could make no difference:** see the example referred to by Lawton LJ in *Bailey v BP Oil (Kent Refinery) Ltd* [1980] IRLR 287.”¹⁹ (Emphasis supplied)

- [32] These cases illustrate the principle that an employer can dismiss an employee without a hearing if the alleged conduct is so serious that the employer could reasonably have concluded that holding a meeting would not make a difference.
- [33] In the instant case, the Bank gave Mr. Matthias an opportunity to explain his conduct by submitting a written report on the unplugging of the DVR. Mr. Matthias submitted the report on 1st February 2010. The Bank referred to the report in the termination letter of 4th February 2010 saying that it was ‘...disappointed with the casual manner and brevity of your written report on the matter in view of the finding of the investigation’.²⁰
- [34] The Bank was obviously satisfied that Mr. Matthias had been given an opportunity to present his case in the form of a report, and that the report was unsatisfactory, especially in the light of the new evidence about the unplugging of the DVR that had come to the Bank’s attention. I now turn to that evidence to decide whether the Bank was justified in dismissing Mr. Matthias without giving him a further opportunity to present his case.
- [35] Following the discovery of the unplugged DVR the Bank had carried out its investigations into the incident. Upon reviewing the DVR footage, the Bank

¹⁹ Ibid at 31.

²⁰ Record of Appeal, p. 12.

officials carrying out the investigation realised that Mr. Matthias had unplugged the DVR after normal working hours, and left it unplugged for one month. The investigators also considered the threat to the security of the Bank, its staff and customers, and decided to dismiss Mr. Matthias without further consultation or notice.

[36] The Industrial Court accepted the Bank's evidence and found that Mr. Matthias was untruthful, not frank and uncooperative with the Bank during the investigation, and that his evidence was unreliable, riddled with inconsistencies, and gave rise to serious doubts as to his veracity.²¹ The Industrial Court also found that Mr. Matthias' conduct was clearly deliberate and apparently premeditated, and went to the heart of the Bank's security policies. Further, that his conduct caused serious and irreparable damage to the trust and confidence of the employment relationship and "provided the Employer with good cause which could by itself potentially justify his summary dismissal."²² These are damning findings of fact and credibility by the Industrial Court all of which are based on the court's assessment of the evidence and the credibility of the witnesses. This Court cannot interfere with those findings.

[37] The Industrial Court went on to find that the evidence was such that the Bank was justified in dismissing Mr. Matthias without further notice or an opportunity to be heard. The court found that:

"68. To a large extent, the Employee's case is grounded on 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

²¹ Para. 74 of the judgment.

²² Paras. 66 and 67 of the judgment.

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 enquiries.

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."

[38] The Industrial Court concluded at paragraph 77 that Mr. Matthias was '...guilty of gross misconduct which went to the heart of the employment relationship and justified the dismissal under section C59(1) of the Labour Code'²³ and, at paragraph 78, that '...the employer acted reasonably in the circumstances with the result that the dismissal was not unfair'.

[39] The Industrial Court did not state specifically in its judgment that there was no breach of procedural fairness and that a further hearing was not necessary, but it is clear from a reading of the judgment as a whole and the court's final conclusion at paragraphs 77 and 78 that this was its position.

[40] In the circumstances, I find that there was no procedural unfairness in the way that the Bank dismissed Mr. Matthias. In my view, the nature of the allegations and evidence against Mr. Matthias were sufficiently serious that the Bank acted reasonably, as found by the Industrial Court, in dismissing him on 4th February 2010 without a further opportunity to present his case. If I am wrong, and the dismissal was procedurally unfair, I will deal with the alternative situation of the reasonableness of the dismissal on the assumption that Mr. Matthias was not given the opportunity to present his defence. In doing so, I repeat that this is an alternative way of looking at the case because I have already found that Mr.

²³ Para. 77 of the judgment.

Matthias was given an opportunity to present his case and it was properly rejected by the Bank, and the circumstances were such that the Bank acted reasonably in summarily dismissing him.

- [41] The approach of the Court of Appeal when reviewing a finding by the Industrial Court is governed by the Act and supported by cases from England applying similar legislation. The relevant statutory provision is section 17(4) of the Act which provides that:

“The Court of Appeal may in any matter brought on appeal before it, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred although it is of the opinion that any point raised in the appeal might have been decided in favour of the appellant.”

If, contrary to my finding above, Mr. Matthias did not get a proper opportunity to present his defence and this issue could have been decided in his favour, I am satisfied, based on the overwhelming evidence of misconduct by Mr. Matthias, that he did not suffer a substantial or any miscarriage of justice by the manner of his summary dismissal by the Bank.

- [42] There is no basis upon which this Court may interfere with the finding of the Industrial Court. I would therefore dismiss this ground of appeal.

The reliance placed on the video footage

- [43] Mr. Simon, QC advanced the ground that the Industrial Court misdirected itself by relying on the video footage depicting Mr. Matthias disconnecting the DVR, without having viewed the DVR footage during the trial ‘for the purpose of allowing the examination and/or cross examination of the witnesses’.²⁴ Mr. Simon’s complaint is essentially that the Industrial Court erred by watching the DVR footage at the end of the hearing, did not allow cross examination, and then relied on the footage in coming to its decision.

²⁴ Ground (c) of the notice of appeal.

[44] Mr. Simon's objection must be viewed in the context of the proceedings in the Industrial Court. This was a hearing before an industrial tribunal and the rules of evidence and procedure normally associated with a civil trial in the courts do not apply to the Industrial Court. The statutory basis for this is section 9(1) of the Act, which provides that:

“In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto.”

[45] There is evidence that Mr. Matthias' lawyers had requested a viewing of the video before the trial. There is also evidence that Mr. Matthias was invited to view the video at the Labour Commissioner's office. He, however, cancelled the viewing on the agreed day, and did not follow up to get another date for viewing the video.²⁵ During Mr. Matthias' cross-examination, counsel for the Bank offered to make the DVR tape available to the Court and Mr. Matthias did not object.²⁶ The videotape was viewed by the Court and the parties at the end of the hearing.²⁷ According to the notes of evidence, the tape showed Mr. Matthias entering the Bank at 6:10 pm dressed in exercise apparel, going directly to the DVR and unplugging it. Applying the principles in section 9(1) of the Act, it was clearly open to the Industrial Court to determine the procedure for trial and the time when it would view the video footage. The question is therefore, whether the court exercised its discretion justly in making such a determination, in particular, by affording Mr. Matthias the opportunity to adduce evidence in regard to the tape, in keeping with section 9(1).

[46] In **Blackburn v LIAT (1974) Limited**,²⁸ the Industrial Court obtained and read a transcript of an interview of Mr. Blackburn by a local radio station on issues

²⁵ Record of Appeal, Tab 6 at p. 29.

²⁶ Record of Appeal, Tab 5 at p. 61.

²⁷ Record of Appeal, Tab 5 at p. 79.

²⁸ Supra note 29.

relevant to trial of Mr. Blackburn's claim for unfair dismissal. The court obtained the transcript after the completion of the trial when the court was considering its decision. On appeal from the decision of the Court of Appeal to the Privy Council, their Lordships opined that:

“As a matter of good practice, when the Industrial Court exercises its power under ICA section 9(1) to obtain additional evidence post trial (hopefully a relatively rare event), the court should draw the attention of all parties to their rights under section 9(1) “to adduce evidence in regard thereto.”

The Board had regard to evidence in the case that Mr. Blackburn's lawyers were informed by the Registrar of the Industrial Court that the court had obtained the transcript, but they did not request a further hearing. The Board concluded that the court had done just enough to satisfy the requirement in section 9(1) and overruled Mr. Blackburn's objection.

[47] The facts of the instant case are more compelling for not overruling the Industrial Court's reliance on the DVR tapes. Mr. Matthias was aware since the date of his termination on 4th February 2010 that the DVR tape existed and played an important role in the Bank's decision to dismiss him. He did not show up at the Labour Commissioner's office on the agreed date to view the tape, and he did not raise an objection at the trial when the Bank's lawyers offered to make the tape available to the court. At trial, Mr. Matthias did not deny unplugging the DVR and, though he had the opportunity to present evidence to contradict the video tape evidence, did not dispute what was shown on the tape. His objection, rather, was to the Bank's interpretation of the visual images. As in the **Blackburn v LIAT** case, I think that the Industrial Court did enough to meet the requirements of section 9(1) of the Act.

[48] In my opinion, the Industrial Court did not err in the procedure it adopted for the viewing the DVR tape. I would therefore dismiss Mr. Matthias' challenge to the Industrial Court's reliance on the tape.

Conclusion

- [49] I am satisfied that Mr. Matthias had a reasonable opportunity to present his case to the Bank and the Industrial Court and that the Bank acted reasonably in dismissing him summarily and without a hearing. I would dismiss the appeal, affirm the decision of the Industrial Court, and make no order as to costs.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court



Chief Registrar