



[2019] JMSC Civ 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 01272

IN THE MATTER of the Labour Relations
and Industrial Disputes Act, 1975 and the
Labour Relations Code, 1976

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	CLAIMANT
AND	INDUSTRIAL DISPUTES TRIBUNAL	1ST DEFENDANT
AND	NATIONAL COMMERCIAL BANK STAFF ASSOCIATION	2ND DEFENDANT

IN OPEN COURT

**Mr. Andre Earle and Nickesha-Young Shand, instructed by Earle & Wilson,
Attorneys-at-Law for the Claimant**

**Diedre Pinnock, instructed by the Director of State Proceedings, for the First
Defendant**

**Douglas Leys, Q.C. and Phylcia Williams, instructed by Ziadie Reid & Co.,
Attorneys-at-Law for the Second Defendant**

Heard: January 29 and 31, 2018 & September 20, 2019

**JUDICIAL REVIEW – CERTIORARI – ERROR OF LAW ON THE FACE OF THE RECORD – KEY EMPLOYEE
– FIT AND PROPER PERSON – BANKING SERVICES ACT – REASONABLENESS – RELEVANT AND
IRRELEVANT CONSIDERATIONS – PROPER NOTICE PERIOD WITHIN THE EMPLOYMENT
(TERMINATION AND REDUNDANCY PAYMENTS) ACT**

ANDERSON, K., J.

The Background

- [1]** The National Commercial Bank, hereinafter referred to as 'N.C.B.', or 'the N.C.B.', offers a limited number of tertiary scholarships to children of its employees, provided that certain prerequisites are met.
- [2]** An employee of N.C.B., Ms. Suzette Smith, applied for a tertiary scholarship for her son, – Warren Williamson, to study at the Caribbean Maritime Institute (as that institution was then named). Ms. Smith was, at that time, employed at N.C.B.'s Manor Park Branch. The tuition cost for Ms. Smith's son, at that time, was two hundred and ninety-four thousand, four hundred and thirty-seven dollars and thirty-one cents (\$294,437.31) per year. N.C.B. offered to pay 80% of this sum, which amounted to, at that time, two hundred and thirty-five thousand, five hundred and forty-nine dollars and eighty-five cents (\$235,549.85).
- [3]** N.C.B. notified Ms. Smith, by electronic mail dated September 9, 2014, that her son was successful in obtaining the scholarship. The sum that was to be paid by N.C.B. towards Ms. Smith's son's tuition was two hundred and thirty-five thousand, five hundred and forty-nine dollars and eighty-five cents (\$235,549.85).
- [4]** On September 29, 2014, an audit was done of the N.C.B.'s Manor Park Branch, specifically of the deposits of the bank accounts of all its then members of staff. During that time an irregularity was discovered by the bank's auditors as it related to Ms. Smith's transaction deposits.
- [5]** The sum of fifty thousand dollars (\$50,000.00) was deposited to Ms. Smith's account which was not properly accounted for, after which, enquiries were made of her, requesting her to account for the said sum.
- [6]** Further investigations were carried out, which revealed that the said sum of fifty thousand dollars (\$50,000.00) was deposited into her account. That was done with the assistance of two other members of staff, one of whom was senior to her and was, in fact, Ms. Smith's supervisor at the Manor Park Branch, at the material time.

That then supervisor's name is Kenneisha Roberts and the other, then employee, is: Angela Morrison.

- [7]** Once the N.C.B's management staff had addressed their minds to commencement of this investigation which was to be carried out and which was in fact, carried out, the three members of staff whose conduct was being questioned, in relation to the sum of \$50,000.00 which had been deposited into Ms. Smith's account, were suspended from their employment with N.C.B., without pay, during the interim period, pending the outcome of that investigation.
- [8]** Subsequently, N.C.B pursued disciplinary guidelines, set out in a document which constituted a contractual agreement between the claimant and the second defendant as to how any disciplinary proceedings were to be conducted. Pursuant to said guidelines, the requisite disciplinary proceedings were held and each of the three N.C.B. employees whose conduct, vis-a-vis that fifty thousand dollars (\$50,000.00) sum was being impugned, received an opportunity to be heard in their defence.
- [9]** For the purposes of those disciplinary proceedings, Ms. Smith was, 'charged' with two disciplinary offences, namely: (i) breach of the bank's laid down policies, and procedure, and (ii) engaging in behaviour that cause the bank to question her honesty and integrity in carrying out operating policies and procedures. The other two employees were only, 'charged' with the first-mentioned of those two disciplinary offences. Whilst those disciplinary proceedings were ongoing, each of those three employees were suspended from employment, with full pay.
- [10]** The disciplinary proceedings pertaining to all three employees were conducted simultaneously, on October 29, 2014, and before adjudicators who were then, senior employees within the bank, namely Jacqueline Mighten - Manager at N.C.B.'s Manor Park branch and Charmaine Oudith, who was then the Service Quality Manager at that branch. Ms. Smith's sanction arising out of the disciplinary hearing was termination of her employment with N.C.B., while Ms. Morrison and

Ms. Roberts were each sanctioned with one week's suspension of employment with N.C.B., without pay. Those sanctions are among those which had been specifically provided for and been agreed to by the claimant, other members of staff and the second defendant and are set out, in the Disciplinary Guidelines document. Ms. Smith was advised by means of correspondence from N.C.B., which is dated November 14, 2014, that her employment with the N.C.B was to be terminated as of November 17, 2014.

- [11] Following on the outcome of that disciplinary hearing, the 2nd defendant pursued a meeting with the Review Board, as they were not in agreement with the sanction levied against Ms. Smith. That Review Board, was convened on November 19, 2014, and there, the N.C.B. upheld its decision to terminate the employment of Ms. Smith. Subsequent upon that decision, the 2nd defendant requested that this matter be referred to appeal in accordance with N.C.B's disciplinary policy, upon the following terms of reference, that:

'To hear the appeal of the NCB Staff Association in respect of the termination of Suzette Smith who the Bank found guilty of breaching laid down policies and procedures, and engaging in behaviour that causes the Bank to question the employee's honesty and integrity in carrying out operating policies and procedures, and to determine whether the sanction of termination (SC1) was appropriate in all the circumstances.'

- [12] The 2nd defendant was, at that stage, not challenging Ms. Smith's culpability for the disciplinary offence, but rather, the sanction which was imposed on her for same and that challenge was based on their contention that the sanction imposed was unduly harsh. That contention of theirs, eventually found favour with the Industrial Disputes Tribunal, and that is why she has maintained until now, through the N.C.B Staff Association, that the Industrial Disputes Tribunal's conclusion in that regard, was appropriate, as a matter of law.
- [13] The hearing of that appeal lasted over two days, being June 17 and 30, 2015. Ms. Smith was represented by the N.C.B. Staff Association and Mr. Paul Stewart, the then Chairman of that Association, spoke on her behalf, at that hearing, along with

Mr. Lanville Henry, the then Vice President of the N.C.B. Staff Association. The General Secretary of the N.C.B. Staff Association, an observer, was also present at that appeal hearing, on Ms. Smith's behalf.

[14] At that appeal hearing, the claimant was represented by Mr. Euton Cummings, the Assistant General Manager of the N.C.B. group's Human Resource Division, along with Mr. Novar McDonald - Industrial Relations Consultant for the N.C.B. Group's Human Resources Division. Also, present on behalf of N.C.B., was Mr. Dalton Whyte, the N.C.B. Group's Human Resource Officer. Ms. Alethia McDonald recorded the appeal hearing proceedings. The hearing was presided over by Dr. Noel Cowell, who was independent of the respective parties.

[15] Following on the conclusion of that appeal hearing, Dr. Cowell provided a report dated July 21, 2015, which sets out his findings. In that report, Dr. Cowell set out what he deemed as being the aggravating factors. He stated that Ms. Smith had departed from the high standard of honesty and integrity to which an employee in a financial institution must be held. Mr. Cowell described that factor as a *'key aggravating factor and that Ms. Smith was grossly negligent in the performance of her duties.'*

[16] Dr. Cowell also set out in that said report, the mitigating factors, which he stated were that:

'1. The scholarship program was a new one and given that Ms. Smith was at the material time a junior employee, she may have had some challenge in terms of understanding the directives and policies and the meaning of the word, "tuition."

2. Up until the time of the disciplinary proceedings begun against her, Ms. Smith had committed no disciplinary infractions.

3. Ms. Smith had shown remorse for her actions.'

- [17] Dr. Cowell had reasoned that the bank had failed to show that there was any intention on Ms. Smith's part to damage any natural or legal person. Dr. Cowell concluded as follows:

'I find that the reasonableness of the decision to dismiss, the employee cannot be sustained in the context where mitigating factors cloud the issues and reduce the degree of certainty that she intentionally and premeditatedly set out to breach important bank regulations.'

- [18] Ms. Smith's explanation of the fifty thousand dollars (\$50,000.00) which was deposited into her account was that she had reimbursed herself from the bank funds with that fifty thousand dollars (\$50,000.00), because she had made a payment of forty-seven thousand, six hundred and twenty dollars (\$47,620.00) to the Caribbean Maritime Institute (hereinafter referred to as, 'the C.M.I.') to cover the cost of her son's auxiliary fees for his intended studies at that institution in the then oncoming school year.

- [19] Dr. Cowell also stated that:

'The principle of consistency in disciplinary procedure requires the employer to apply the same or similar sanctions to all employees who commit similar infractions.'

Accordingly, it was Dr. Cowell's expressed view that Ms. Smith ought to have been sanctioned by the N.C.B. to the same extent, as the other two culpable employees of theirs, had been sanctioned.

- [20] Ms. Smith claimed that she had made a payment to the C.M.I. of a specified sum towards her son's intended education there and that she had done that prior to her having been awarded the scholarship and according to her view that she was entitled to a reimbursement of the sum which she had paid to the C.M.I. The two-week suspension from employment with N.C.B., without pay, was the sanction imposed upon Ms. Morrison and Ms. Roberts, arising out of the first disciplinary hearing. At that disciplinary hearing though, the two member panel, that had presided over same, had recommended that Ms. Smith's employment be terminated.

[21] That recommendation regarding termination of Ms. Smith's employment with N.C.B. had to be considered thereafter, by the N.C.B. Group's Managing Director, at that time, namely: Mr. Patrick Hylton. That was done thereafter and Ms. Smith was informed by means of correspondence, in the form of a letter dated November 14, 2014 and under the hand of Ms. Jacqueline Mighten that her employment was terminated with effect as of November 17, 2014. That letter informed Ms. Smith that it was the N.C.B. Group's Managing Director who had ultimately decided to terminate her employment with the claimant.

[22] On August 31, 2015, Euton Cummings, the then Senior Assistant Manager, Group Human Resources and Facilities of N.C.B, in a letter to the Chairman of the 2nd defendant, stated the following:

'We acknowledge receipt of Dr. Cowell's Report on the appeal hearing into the dismissal of Suzette Smith.'

However, the Terms of Reference to the arbitrator sought a declaration as to the extent of the sanction and not for any remedy to be imposed. Therefore, as the Bank is not in agreement with the opinion expressed in the award, we will hold the dismissal to be just.'

[23] The 2nd defendant, therefore, consequent upon that letter, referred the matter to the Permanent Secretary in the Ministry of Labour and Social Security, on August 31, 2015. The Permanent Secretary in the Ministry of Labour, then referred the matter to the Industrial Disputes Tribunal (hereinafter referred to as, 'the I.D.T.') on February 9, 2016. The I.D.T. was informed by the Ministry of Labour's Permanent Secretary, by means of letter dated February 9, 2016, that the scope of the tribunal's enquiry into the matter was to be as follows:

'To determine and settle the dispute between National Commercial Bank Limited on the one hand and National Commercial Bank Staff Association on the other hand, over the termination of Ms. Smith.'

[24] The I.D.T. hearing took place over several days between June and November of 2016. A three-member panel of persons presided over that hearing, namely: Mr. C. Jones-the Chairman and Mr. R. Hall and Mr. D. Nelson. During those hearings

Attorney at law, Andre Earle, representing N.C.B, presented the bank's opening remarks and called three witnesses.

- [25] The three witnesses called by N.C.B. were cross-examined by Mr. Gregory Reid Snr.- The attorney representing the N.C.B. Staff Association and Ms. Smith. The N.C.B. Staff Association did not call any witnesses on Ms. Smith's behalf at any time during the I.D.T.'s hearing of the dispute between the parties. After all of the evidence had been presented, Mr. Reid made his opening remarks. After Mr. Earle made his closing remarks, thereafter, Mr. Reid did the same.

Findings of the I.D.T.

- [26] The I.D.T. concluded that the disciplinary proceedings in respect of Ms. Smith were flawed in that:

'I. Mrs. Mighten who signed the letter preferring the charges, had also chaired the first disciplinary meeting and had recommended the sanction of termination of Ms. Smith's employment.

II. Ms. Charmaine Oudith, who led the investigation which the bank had conducted into this matter, had also been one of the two persons who adjudicated upon Ms. Smith. Mr. Euton Cummings, in his capacity as the Assistant General Manager, after considering the report of the first disciplinary hearing, had submitted to the group managing director the recommendation to terminate Ms. Smith's employment with N.C.B. Mr. Cummings had earlier served as the Chairman of the Review Board. It was therefore the I.D.T.'s view that a review of that nature ought not to have involved an individual who was integrally involved in the decision-making process.'

- [27] The I.D.T. provided written reasons and their conclusion on April 4, 2017. The I.D.T. ordered that Ms. Smith's employment be reinstated and N.C.B. has not yet complied with that order. Accordingly, it was only at the first disciplinary hearing

that a recommendation was made that Ms. Smith's employment with N.C.B. be terminated and thereafter, her employment was terminated accordingly.

The Claim

[28] N.C.B subsequently filed an application for leave to apply for judicial review, and that application was granted, by order of this court on April 25, 2017. The claimant filed this claim on May 8, 2017. The claimant by means of this claim, has sought to quash the decision that Ms. Smith is to be reinstated in her employment with N.C.B. The claimant has also sought an order that Ms. Smith's termination be carried out in accordance with the applicable disciplinary procedures. To put it as simply as possible therefore, the claimant has sought, by means of this claim, to have this court determine that the termination of Ms. Smith's employment with the N.C.B. was appropriately carried out, in accordance with the applicable disciplinary processes and constitutes an appropriate punishment and more significantly in the context of this claim, seeking reliefs upon judicial review, is that it is the claimant's contention, that the I.D.T. erred in law and took into account irrelevant considerations and reached an unreasonable conclusion.

The Grounds of this Claim

[29] The following are the grounds upon which, the claim was brought:

- I. The Claimant, as a deposit-taking institution is required to employ persons who are 'fit and proper' and persons in whom they can properly repose trust and confidence. The reinstatement of Ms. Smith would not be consistent with this.*
- II. The tribunal acknowledged that Ms. Smith breached the bank's policies and procedures.*
- III. The I.D.T. indicated that although Ms. Smith had no intention to defraud the bank, she had, for some inexplicable reasons decided to reimburse herself in a manner contrary to the rules of the bank.*

IV. Ms. Smith was not charged with defrauding the bank or intending to defraud the bank.

V. The I.D.T. made no finding on the issue of Ms. Smith's honesty and integrity, or lack thereof.'

The Hearing

[30] This claim was tried before this court on January 30 and 31, 2018 and was the trial of an application for judicial review by N.C.B. of the decision of the I.D.T., pertaining to the sanction which was imposed upon Ms. Smith, by the N.C.B.

The Issues

[31] The issues to be determined by this court are: (i) whether the I.D.T. made errors of law in arriving at their decision; (ii) whether the I.D.T's decision was unreasonable as a matter of law; (iii) whether Ms. Smith was at the material time, a 'key employee,' under the Banking Services Act; (iv) whether the termination of Ms. Smith's then employment with N.C.B, was carried out in breach of the **Employment (Termination and Redundancy Payments) Act**; (v) whether the I.D.T. took into account irrelevant considerations in reaching its decision that Ms. Smith should be reinstated in her employment with N.C.B. I have not, in these reasons, addressed these issues in the order as has just been particularized.

Law and Analysis

[32] For the sake of brevity, I have not, in these reasons, set out most of the submissions of the respective parties. No disrespect to anyone was intended to be caused by my not having done so. All submissions made by the respective parties' counsel have been thoroughly examined and carefully considered.

Role of I.D.T.

[33] Section 11A(1) of the Labour Relations and Industrial Disputes Act provides that:

‘(1) Notwithstanding the provision of section 9, 10, and where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative –

(a) refer the dispute to the Tribunal for settlement-

(i) if he is satisfied that attempts were made’ without success , to settle the dispute by such other means as were available to the parties; or

(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;’ (Italicized for emphasis)

[34] That Act of Parliament, grants to the I.D.T. the power to hear and settle labour relations disputes for both unionized, as well as non-unionized employees, or former employees.

[35] Section 12 (4)(c) of the said Act provides: *‘an award in respect of any industrial dispute referred to the tribunal for settlement (c) **shall be final and conclusive** and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.’*

The ‘key employee’ and ‘fit and proper person’

[36] The claimant strongly contended, in their submissions, that Ms. Smith could no longer remain as an employee since they could no longer have trust and confidence in her. They based that submission, on their view, that she was a ‘key employee’ of N.C.B., and that by virtue of the charges against her, she was not a, ‘fit and proper person’ as outlined in, **The Banking Services Act**. To that end, it was their submission that since she was no longer a ‘fit and proper person’ under that Act, she was also disqualified from her role as a ‘key employee’ as defined under the said Act. That was, it should be noted, one of N.CB’s primary contentions

before the I.D.T., in respect of why it was that they were of the view, that the sanction imposed upon Ms. Smith, was appropriate.

[37] Section 3(2) of the Banking Services Act, however, states the following:

'3(2) For the purposes of this Act, the Supervisor shall assess whether the directors, officers, key employees and substantial shareholders of licensees and persons mentioned in subsection (3), are fit and proper persons.'

This provision, to my mind, clearly provides that, in order for a person contracted or employed to a bank, which is a licensee under the pertinent statute, to be subject to assessment, by the Governor of the Bank of Jamaica, as to whether he or she is a 'fit and proper person' under the statute, such person must first meet the threshold of being a 'key employee' under the said statute, or alternatively, a 'director,' 'officer,' or 'substantial shareholder' or the licensee.

[38] It is not in dispute that, at the material time, Ms. Smith was not either a 'director,' 'officer,' or 'substantial shareholder,' of the licensee – being N.C.B. Therefore, N.C.B has instead chosen to strongly urge upon this court, that at the material time, under the said statute, Ms. Smith was what is categorized in same, as a, 'key employee.'

[39] In that regard, **Section 2 of the Banking Services Act** states that the term – 'key employee' means:

'a person who is employed or contracted below the level of the management of a licensee to perform functions that –

*can substantially affect the financial condition or reputation of the licensee, or both; **and***

meet the criteria specified in any guidelines prescribed by the supervisor; or

a person who is deemed by the Supervisor to be a key employee of licensee.'

[40] Further, **section 2(1)** states: *‘Supervisor’ means ‘the Governor of the Bank acting in the capacity as the Supervisor of banks, financial holding companies and specified financial institutions under section 34B of the Bank of Jamaica Act.’* It is the Governor of the Bank of Jamaica, who is the ‘supervisor’ of banks, for the purposes of the **Banking Services Act**. That is so because, under **section 2(1) of the Banking Act**, it is also established that under that Act, ‘bank’ means the Bank of Jamaica established by the Bank of Jamaica Act.

[41] The claimant, in their submission, posited that the I.D.T.’s finding that Ms. Smith was not a ‘key employee,’ was an error in law. On a close examination of **section 2 of the Banking Services Act**, however, it is clear that, that provision lists a set of criteria that are conjunctive, for one to be considered as a, ‘key employee’ under that statute. To be considered a, ‘key employee,’ the conjunctive requirements under the **Banking Services Act**, must be met, namely: (i) that an employee is a person who is employed or contracted below the level of the management of a licensee to perform functions that can substantially affect the financial condition or reputation of the licensee, or both, and (ii) that one meets the criteria specified in any guidelines prescribed by the supervisor, or is a person who is deemed by the Supervisor, as being a key employee of the licensee.

[42] The claimant, in submissions led both before the I.D.T. and before this court, treated with the requirements of proving that an employee is a ‘key employee,’ within the meaning of the **Banking Services Act**, as though those requirements were disjunctive, as there was no evidence presented to this court, that the claimant, at any time during the proceedings before the I.D.T., had led any evidence that Ms. Smith’s employment was one that met the criteria specified in any guidelines prescribed by the ‘Supervisor,’ that she is deemed as being a ‘key employee’ of the claimant. The claimant was, bound in law, to prove to this court in respect of this claim, that this aspect of the applicable statutory provision, had been met, or that the Governor of the Bank of Jamaica had deemed that Ms. Smith, was a, ‘key employee’ of N.C.B. at the material time, in the evidence which was led before the

I.D.T., in order to succeed on their assertion that Ms. Smith was a 'key employee.' The claimant, in this claim, had the burden of proof, to prove upon a balance of probabilities, the conjunctive requirements of **section 2(1) of the Banking Services Act**, as regards the definition of a, 'key employee,' in order to satisfy this court, that upon the evidence which was led before the I.D.T., Ms. Smith should have been categorized by the I.D.T., as a, 'key employee,' of N.C.B. at the material time.

[43] There is no doubt that Ms. Smith was, in carrying out the functions, which she was to carry out at N.C.B at the material time, employed or contracted, below the level of the management of N.C.B, which is a licensee under the pertinent statute, to perform functions which could, substantially, affect the financial condition or reputation of N.C.B. In fact, I am positing that it is virtually certain that most commercial bank employees in Jamaica would, by virtue of the nature of their employment with those banks, which are required to be licensed under the **Banking Services Act**, fulfil the criterion that they are contracted or employed to perform functions which could substantially affect the financial condition or reputation of the banks which they work with.

[44] The claimant, however, as stated earlier, did not provide evidence, before the I.D.T., of the conjunctive aspect of the definition, which pertains to the criteria specified in any guidelines prescribed by the 'supervisor,' or to the 'supervisor' deeming a person as being a, 'key employee.' I am therefore of the view, that the I.D.T. was entitled, to find as they did and that, the claimant has failed to prove that Ms. Smith was, in fact, a 'key employee' as required by the **Banking Services Act**. It is also to be observed that, if no guidelines have been issued by the Supervisor, or if the supervisor has not deemed the relevant person as being a key employee of the licensee, then the definition of 'key employee' can have no application whatsoever. If that be the case, it is for banks, to recommend to the supervisor that either such guidelines be issued, or alternatively, that specific persons be deemed as 'key employees', so as to enable **section 2 of the Banking Services Act**, to be,

practically, effective. **Section 2 of the Banking Services Act** cannot, to my mind, be effective, unless, at the very least, either there are such guidelines issued by the, ‘supervisor,’ or alternatively, the, ‘supervisor,’ has deemed that there are particular bank employees who are, ‘key employees.’

[45] It ought to be carefully noted, that no evidence was presented before this court as to whether or not any guidelines have been prescribed by the supervisor, that is, the ‘*Governor of the Bank acting in the capacity as the Supervisor of banks ...*’ as defined by **the Banking Services Act**, and stated in these reasons above. As the I.D.T was not presented with evidence that Ms. Smith was a ‘key employee,’ therefore, there was no error of law on the face of the record, of the I.D.T’s decision that Ms. Smith is to be reinstated, in her post of employment with N.C.B.

[46] The claimant, before this court, made further submissions that Ms. Smith does not qualify as a ‘fit and proper’ person under **section 3 of the Banking Services Act**, and therefore, is disqualified from remaining in the employ of N.C.B. as she was, at the material time, a ‘key employee’ under the provisions of the pertinent statute. **Section 3(1) of the Banking Services Act**, which the claimant’s counsel has heavily relied on, in support of this particular submission of theirs, reads as follows:

‘3 –(1) *For the purposes of this Act, an individual, whether in Jamaica or elsewhere, is a fit and proper person if –*

(a) *the individual -*

(i) *has not been convicted of an offence involving dishonesty or of an offence listed in Part III of this Act or in the Second Schedule to the Proceeds of Crime Act or an offence that is similar to any such offence in another jurisdiction;*

(ii) *is not an undischarged bankrupt; and*

(iii) *is in compliance with any tax and other statutory requirements imposed on the individual;*

(b) *the individual's employment record or any other information does not give the Supervisory Committee reasonable cause to believe that the individual carried out any act involving dishonesty*

or any act involving impropriety in the engagement of banking business or other financial services; and

(c) *the individual is, in the opinion of the Supervisory Committee –*

(i) a person of sound probity, and is able to exercise competence, diligence and sound judgment in fulfilling his functions in relation to the licensee and whose relationship with the licensee will not threaten the interests of depositors;

(ii) a person whose appointment to the board of, employment by, or ownership of, the licensee will not result in a conflict of interest; and

(iii) a person who possesses the knowledge, skills and experience which are necessary for the intended functions to be carried out by that person.'

[47] The claimant, in that regard, posited that Ms. Smith, was a 'key employee,' and that by virtue of the dishonesty disclosed in her employment record with N.C.B., in relation to the disciplinary infractions which she was sanctioned for, she was no longer qualified as a 'fit and proper person' under the statute, and her continued employment would be in breach of the provisions of that statute. This submission, in my mind, is ill-conceived, for the reasons already given.

[48] The claimant, to my mind, could reasonably have concluded that Ms. Smith did not conduct herself in a manner consistent with bank policy and therefore, may very well, have lost trust and confidence in her. The claimant relied on the affidavit of evidence of Mr. Euton Cummings, who stated that Ms. Smith's complicity in the splitting of the cheque, had jeopardised their reputation as a deposit-taking institution and therefore to reinstate Ms. Smith would breach statutory requirements and devalue their fiduciary responsibility. That position, for the reasons earlier provided, constituted no error in law, with respect to the finding of the I.D.T. that Ms. Smith is to be reinstated, in her post of employment with N.C.B.

Was reasonable notice given?

[49] There was a submission, by the 2nd defendant, as regards whether Ms. Smith's employment with N.C.B., was terminated in breach of the provisions of **section**

3(1), 3(3) and 3(5) of the Employment (Termination and Redundancy Payments) Act, which respectively specify as follows:

'3-(1) The notice required to be given by an employer to terminate the contract of employment of an employee who has been continuously employed for four weeks or more shall be-

(a) not less than two weeks' notice if his period of continuous employment is less than five years;

(b) not less than four weeks' notice if his period of continuous employment is five years or more but less than ten years;

(c) not less than six weeks' notice if his notice period of continuous employment is ten years or more but less than fifteen years;

(d) not less than eight weeks' notice if his period of continuous employment is fifteen years or more but less than twenty years;

(e) not less than twelve weeks' notice if his period of continuous employment is twenty years or more,

and shall be in writing unless it is given in the presence of a credible witness.

(2) ...

(3) The provisions of subsections (1) and (2) shall not be taken –

(a) to prevent either party to a contract of employment from waiving his right to notice at the time of termination, or from accepting a payment in lieu of notice, or from giving or accepting notice of longer duration than that of the relevant notice specified in those subsections; or

(b) to prevent the parties to a contract of employment from providing, by agreement, for the giving of notice which is of longer duration than that of the relevant notice specified in those subsections to terminate the contract; or

(c) to affect the right of either party to a contract of employment to require notice-

(i) for which provision is made by agreement of the kind referred to in paragraph (b); or

(ii) which, by custom, is required to be of longer duration than that of the relevant notice specified in those subsections.

(4) ...

(5) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the passing of this Act, or to treat a contract of employment for a fixed term as terminated at the expiration of the term:

Provided that –

(a) if an employer does not terminate a contract of employment without notice during the first four weeks after he becomes aware of conduct by the employee by reason of which the employer has a right to terminate the contract without notice, he shall not thereafter terminate the contract without notice by reason of that conduct;

(b) if the employment of an employee whose contract of employment is for a fixed term continues for four weeks after the expiration of the term, subsections (1), (2) and (3) shall thereafter apply to the contract as if it were a contract for an indefinite period.'

[50] Since Ms. Smith had, up until the time of her dismissal, worked with N.C.B for twelve years, Ms. Smith was entitled to six weeks' notice. During the disciplinary process, Ms. Smith was terminated by way of letter notifying her of the date of her termination and she was not given the requisite six weeks' notice of her termination. In fact, she was given no notice of same, at all. Notice of a termination of employment, in this context, cannot be the institution of disciplinary proceedings. Therefore, Ms. Smith could not have been taken to have received notice of the termination of her employment, when disciplinary proceedings were instituted against her.

[51] She was entitled to that notice, by virtue of that which the applicable statute provides at section 3(5)(a) thereof, since, even if it was that she could have had her contract of employment terminated, no such termination took place within the

first four weeks after Ms. Smith's employer – N.C.B. could likely have terminated Ms. Smith's contract of employment without notice.

- [52] If even Ms. Smith was a, 'key employee,' under the **Banking Services Act**, and could not, properly as such, remain in her employment with N.C.B., the law nonetheless, requires notice to be given to her, or payment in lieu of notice. Failing that, the termination, in all likelihood, was done unlawfully. I note however, that the I.D.T. did not address this issue in the reasons for their decision, and therefore this court will state nothing further on same.

Disparity in Sanctions

- [53] The I.D.T. took the view that the disparity in sanctions in suspending the other two employees for two weeks and terminating Ms. Smith, was materially unfair. Although the claimants did not acknowledge this, the I.D.T was satisfied that since all three employees had committed the same act, they should have received the same sanction.

The Basis for Judicial Review

- [54] In **Cable and Wireless (Barbados Limited) v Fair Trading Commission** BB2003 HC 21 it was stated by the Barbados High Court, that: *'the proper function of the court was limited to the scrutiny of the process by which the decision had been reached and did not extend to the scrutiny of the decision reached.'* In that regard, the Saint Lucian High Court in **James v Ministry of Education**, SLUHCv 2005/0862, delivered on July 14, 2006, stated at paragraph 17 that: *'the question is not whether the judge disagrees with what the public body has done but whether there is some recognizable public wrong.'* This wrong is given regard where it is apparent or patently wrong and is more than a minor indiscretion on the part of the decision-making body. It must not only go to the root of the decision, but also, materially alter the decision-making process and ultimately, the conclusion. Lord Denning in **Pearlman v Keepers and Governors of Harrow School** [1979] 1 ALL

ER 365, stated that *'no court or tribunal has any jurisdiction to make any error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.'*

[55] Carey JA opined, in **Jamaica Public Service v Bancroft Smikle** (1985) 22 JLR 244, as recorded at page 249, that: *'a decision of the I.D.T. shall be final and conclusive except on point of law. The error of law which provokes such proceedings must arise on the face of the record or for want of jurisdiction.'* The purview of judicial review is only triggered when it goes to the root of the decision demonstrating an error in law. It is this court's view that this was not the reality in this case. The court then is not at large and should not engage in a rehearing of the facts or of the case or where it does not see a legal basis to quash the decision.

[56] Consistent with this, in **R v I.D.T. Ex parte Reynolds Jamaica** (1980) 17 JLR 16, as recorded at page 23, Marsh J opined as follows: *'we are not as I understand the law, entitled to substitute our judgement for that of the I.D.T.'* The court then cannot overturn the decision in disagreement with the decision, or dispute the facts. Therefore, my view as to the nature of Ms. Smith's impugned conduct, or as to how same should either be characterized or have been treated with, by the N.C.B., is of no moment for present purposes. I have therefore, throughout this judgment, recognized and applied that salutary legal principle.

[57] Cooke J, **In re Grand Lido Hotel Negril** Suit No M98/1995, set out the main duty of a court that is asked to carry out a review of an award of the I.D.T.:

'... This court does not perform an appellate function but concerns itself with the approach of the tribunal. The primary question to be asked is if the tribunal has [taken] into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness?'

[58] Having heard and considered the submissions of counsel for the respective parties, in respect of the matter at hand, the I.D.T. took the view that discrepancies

in the investigative and disciplinary procedure where persons were involved at both stages was in violation of Ms. Smith's requirement for a fair hearing. In my view, the I.D.T. asked itself the correct question and arrived at a logical conclusion based on cogent evidence.

[59] The landmark case of **Council of Civil Service Unions v Ministry of Civil Service** [1985] AC 374 outlined three grounds for judicial review, those being: illegality, irrationality and procedural impropriety. Following Lord Diplock's requirements, Lord Roskill set out the blueprint for establishing the intervention of judicial review. Regarding matters of labour relations and dismissals the court upholds these foundational limbs in addressing the treatment of decisions of tribunals and decision-making public bodies.

[60] In **R v Northumberland Compensation Appeal Tribunal ex parte Shaw** [1952] 1 KB 338, the following was stated at page 347:

'The statutory tribunals, like this one here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.'

[61] In the seminal case of **Anisminic Limited v The Foreign Compensation Commission, et al.** [1969] 1 ALL ER 208 at page pp 213-214, Lord Reid said

'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the

conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.'

[62] Lord Pearce, in that case put the matter thus, at page 234:

'My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament... Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into

something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error.'

- [63] This court has, to the extent as warranted, accepted and applied the quoted dicta from each of these cases, in respect of this matter. The said dicta had been set out in the claimant's written submissions with respect to this claim

Relevance Of I.D.T's Considerations

- [64] Where the issue of relevance arises, Lord Green's pronouncement in **Associated Provincial Picture Houses v Wednesbury Corporation** [1947] 2 ALL ER 680 is instructive. He states: '*a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.*'
- [65] Although the tribunal acknowledged N.C.B.'s dilemma, it was of the view that the employers conducted a flawed disciplinary process, in having terminated Ms. Smith's employment with the N.C.B. It was satisfied that the blurring of the lines between investigation and disciplinary procedure whereby persons were involved in both instances, indicated a departure from appropriate labour relations.
- [66] In that regard the I.D.T. primarily directed itself to essential, correct and relevant considerations. The I.D.T., to my mind, appropriately analysed, correct and relevant concerns and therefore arrived at its conclusions through rational and reasonable assessments. The I.D.T.'s assessment, demonstrated no improper or

unsound legal analysis. As such, this court cannot interfere with the I.D.T.'s decision, since the I.D.T. did not take into account, irrelevant considerations, for the purposes of its decision as regards Ms. Smith's employment with N.C.B.

[67] As was noted in **Harper v Arthur** (op. cit) the court is not called upon to determine whether the decision was right, but rather, whether the I.D.T. came to their decision reasonably and fairly. Having been satisfied of the fairness of the decision-making process, this court will not interfere with the decision of the I.D.T.

[68] Whilst the claimant insisted that the employee's conduct was reprehensible, the method of dismissal was rebuked by the I.D.T.. In that respect, the I.D.T., as a decision-making body, took the view that the method of dismissal over-rode the incident in question. The I.D.T. can be viewed as being justified and fair in arriving at that decision. As laid down by the Privy Council in **Industrial Disputes Tribunal v University of Technology** [2017] UKPC 22, the I.D.T is required to take an objective view in assessing the disputes which come before it, for adjudication. In that case, Lady Hale opined, at paragraph 27 that:

'In the opinion of the Board, those views are correct for the reasons they give. The Court of Appeal was also correct to hold that "the IDT was not restricted to examining the evidence that was before UTech's disciplinary tribunal. The IDT was carrying out its own enquiry. It was not an appellate body, it was not a review body, but had its own original jurisdiction where it was a finder of fact" (para 34). Furthermore, the Court of Appeal was correct to hold that "the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time" (para 40).'

The I.D.T has in the case at hand, to my mind, complied with this dicta.

[69] The claimant alleged that the I.D.T. failed to consider relevant factors in arriving at their decision. The I.D.T.'s decision was based on a multiplicity of factors, not least of which were, the disciplinary procedures. Whilst the I.D.T. took such factors into consideration, the I.D.T. felt that such considerations were ancillary to the disciplinary process as well as the ultimate dismissal guidelines which had earlier

been agreed as between the N.C.B. and its staff members. The I.D.T. took the view that this was unfair to Ms. Smith and a violation of natural justice. The I.D.T.'s decision should not be quashed, on that basis, as that was a reasonable conclusion, based upon the particular circumstances, of this particular case.

- [70] Furthermore, and not at all insignificantly, it is of note, that the dismissal process could also, properly and legally, be viewed as flawed, since the N.C.B. did not comply with the findings or decisions of an appellate process, to reinstate Ms. Smith. That appellate process was undergone, based upon the disciplinary principles agreed on between the claimant and the second defendant. The disregard by the N.C.B, of that appellate process' conclusion, can properly be viewed, as an unfair process, in and of itself.
- [71] Bearing in mind the terms of referral of the matter to Dr. Cowell for adjudication (as earlier disclosed), the reason as advanced by N.C.B, for their not having complied with Dr. Cowell's determination/recommendation (as earlier set out), perhaps can best be described as, significantly spurious.
- [72] The I.D.T. was cognisant of the applicable legal principles and took adequate steps to assess the most significant legal issues which had arisen. The I.D.T. demonstrated sound bases for arriving at their decision, using sound legal reasoning and logical steps in arriving at their decision.
- [73] In relation to scope of adjudication, this court is satisfied that the I.D.T. as a decision-making body, restricted themselves to the parameters of their mandate. The I.D.T. derived its authority by virtue of **Section 11 of the Labour Relations and Industrial Disputes Act** which determines the scope of their power. There is no indication that the I.D.T. derogated from that which they had been tasked by the Permanent Secretary, in the Ministry of Labour to adjudicate upon and/or inadequately or inappropriately assessed, either the disciplinary procedure itself, or the significance of either sections 2 or 3 of the **Banking Services Act** in having reached the decision which they did.

CONCLUSION

[74] The approach of the I.D.T., in considering the evidence presented, does not warrant any quashing order from this court, as this court is of the view that the I.D.T's decision was arrived at, through reasonable assessment. The decision-making process has not appeared to be arbitrary, uninformed and illogical, but rather, appears to have been consistent with the findings of a reasonable adjudicator and not been based on any palpable, if any at all, error of law. Accordingly, this court declines to overturn the decision of the I.D.T.

ORDERS

1. The claimant's claim, as filed on May 8, 2017, is denied, and judgment is entered in favour of the defendants.
2. Pursuant to Rule 56.15(5) of the Civil Procedure Rules, no orders are made as to costs, as the claimant did not act unreasonably in bringing this claim.
3. Ms. Smith's employment with N.C.B is reinstated with effect from November 17, 2014, and she shall receive all salary from the date of the termination of her employment, up until the date of her actual resumption of work, or the date of her reinstatement, whichever is later in time.
4. The 1st defendant shall file and serve this order.

.....
Hon. K. Anderson, J.