

IN THE MATTER OF A DISPUTE BEFORE THE EMPLOYMENT AND
LABOUR RELATIONS TRIBUNAL PURSUANT TO PROVISIONS OF THE
EMPLOYMENT ACT 2000

BETWEEN:

Complainant

AND

Respondent

DECISION

Date of Hearing: 20th May 2024

Terms of Reference: *To determine whether Ms. [redacted] was unfairly dismissed from her employment at [redacted] Limited and to make a binding award.*

TRIBUNAL MEMBERS:

Keren Lomas, Chairman

Judith Hall-Bean, Deputy Chairman

Robert K. Horton, Member

REPRESENTATION:

Complainant: In person and by her next friend, Ms [REDACTED]

Respondent: By Mr. Bradley Houlston of Carey Olson Bermuda Limited

DECISION

Introduction: The Complainant throughout had no legal representation. In a sense of fairness, and with the consent of the Respondent's counsel, the Tribunal allowed the Complainant to rely on her Statement of Facts, on her Reply, and on all documentation produced, so far as the same were within her own knowledge, and on this basis the Complainant later swore on oath that the contents were true.

A. Undisputed Background Facts

Early Facts

1. The Complainant was employed by the Respondent [REDACTED] ("the [REDACTED]") as a Private [REDACTED] from 7th June 2021 until the date of dismissal, namely, 26th June 2023. On 12th December 2022, the Complainant's position was recategorized as Assistant [REDACTED]. Thus, she had been employed for 2 years and 19 days. Her salary in June 2023 was \$85,000 gross per annum.

2. Following is an excerpt from the Complainant's employment contract:

17. Termination of Employment

The Company ("the [REDACTED]") may terminate your employment with immediate effect without notice and with no liability to make any further payment to you (other than in respect of amounts accrued due at the date of termination) if you are guilty of any serious misconduct or repeated poor performance (as outlined in the Handbook).

3. The employment contract, acknowledging that the Complainant's employment would commence on 7th June 2021, was signed on 26th May 2021. By signing the employment contract, the Complainant agreed to "adhere to the policies and guidelines outlined in the Handbook, and elsewhere". The Code of Conduct was not specifically mentioned in the contract terms.

4. The following is an excerpt from the Employee Handbook for the [REDACTED] of Companies ("the Employee Handbook"):

"Integrity is one of [REDACTED]'s core values, and as such all Employees are expected to adhere to the highest level of personal and corporate business ethical standards

of conduct and courtesy. Violation of these policies, procedures or guidelines may result in disciplinary action up to and including dismissal.

5. An August 2021 article in _____ revealed that the Complainant and her then husband had defaulted in making mortgage payments with another bank. Because of this mortgage default, the Complainant brought this matter to the attention of Ms. _____ the Respondent's _____ Human Resources, and no action was taken by the Bank in consequence of this revelation.

6. Until the events that unfolded between 2nd June 2023 and 26th June 2023, there was no history of poor performance on the part of the Complainant, nor complaints of any nature on her record. In fact, to the contrary, Mr. _____, her _____ and _____ er who had commenced employment at the Respondent _____ in August 2015, told the Tribunal that he had never previously enjoyed such a great working relationship and said, in his own words, "*she was the best co-worker I have ever had.*"

7. Under Section 8: Disciplinary/Grievance Procedures, 1.1.3 of the Employee Handbook, the following is stated:

"In determining the appropriate disciplinary action to be taken, the Company will consider the following: the nature of the conduct in question, the Employee's duties, the terms of the contract of employment, any damage (or potential damage) caused by the Employee's conduct (reputational or otherwise), the Employee's length of service and previous conduct, the Employee's circumstances, the treatment of similar past cases, as well as the penalties available to the Company, which may range from verbal warning to summary dismissal, depending on the circumstances." [These terms reflect more or less the provisions of section 24(3) of the Employment Act 2000 ("the Act")].

8. Additionally, Under Section 8: Disciplinary/Grievance Procedures, 1.4, of the Employee Handbook, the following is stated:

"If it is demonstrated that you have committed an act of serious misconduct, you may be summarily dismissed without notice or payment of any severance allowance."

9. The Respondent's reorganization in October 2022 meant that the Complainant reported directly to its _____, in this

case, Mr. [REDACTED], and it was agreed that he was “line manager” of the Complainant at all relevant times. Mr. [REDACTED] acknowledged before the Tribunal that he had responsibility in respect of vacation requests.

The Complainant’s Arrest

10. On the morning of Friday, 2nd June 2023, the Complainant telephoned Mr. [REDACTED] to say that she was unable to attend work that day. Although Mr. [REDACTED] endeavoured to correspond with the Complainant over the weekend to seek further information, the Complainant did not respond. On Monday morning, 5th June 2023, the Complainant and Mr. [REDACTED] met as they always did on a Monday morning. During that meeting, the Complainant advised her line manager that she had been arrested; that her husband had been arrested also and that the matter being investigated concerned the business account operated by her husband (from whom she was separated) and by the husband’s mother. She further informed her [REDACTED] that the arrest concerned a [REDACTED] account with the [REDACTED] on which she, the Complainant, remained a signatory, and that the matter being investigated was credit card fraud. Although there was a brief newspaper article in relation to an alleged credit card fraud, the individuals being investigated were not named.

11. On Wednesday 7th June 2023, there was a meeting with Ms. [REDACTED], arranged at the behest of Mr. [REDACTED], which he and the Complainant attended. During that meeting, the Complainant advised that she had been separated from her husband for three months; that she was still a signatory on the husband’s business account and that she was concerned that there might be fraudulent activity on this account. During that meeting, the Complainant did not advise Ms. [REDACTED] that she had been arrested on 2nd June 2023.

12. On 14th June 2023, the Respondent learned of the Complainant’s arrest in relation to a suspected credit card fraud and consequently Ms. [REDACTED] invited the Complainant to a meeting on 15th June 2023 with herself and Mr. [REDACTED], the Respondent’s [REDACTED]; and [REDACTED]. During that meeting, the Complainant twice denied having been arrested, but upon being asked for the third time whether she had been arrested, she admitted that this had been the case.

The Dismissal

13. On 15th June 2023, Ms. [redacted] learned that Mr. [redacted] had known since 5th June 2023 that the Complainant had been arrested. On the same day, Ms. [redacted] wrote to the Complainant advising that *“of the date of this letter, you have been suspended from work until further notice pending investigation into allegations of serious misconduct.”*
14. On 20th June 2023, Ms. [redacted] wrote to the Complainant inviting her to attend a Formal Disciplinary Hearing to be held on 22nd June 2023. On 21st June 2023, in a further email to the Complainant, Ms. [redacted] wrote: *“The issue to consider at the disciplinary hearing is whether you were untruthful about your arrest and the circumstances surrounding it, and/or were not forthcoming with the Bank as to what was going on.”*
15. On 22nd June 2023, the Formal Disciplinary Hearing took place, attended by the Complainant, Ms. [redacted] and Mr. [redacted].
16. On 26th June 2023, following a meeting attended by the Complainant, Ms. [redacted], Mr. [redacted] and Ms. [redacted], Ms. [redacted] wrote to the Complainant as follows: *“Notification of Dismissal with Immediate Effect. I am writing to confirm that, following the conclusion of our investigation it has been decided that your employment with [redacted] (the ‘[redacted]’, the “Company”) should be terminated for Serious Misconduct without notice or payment in lieu of notice.”* It is to be noted that during the meeting of 26th June 2023, the Complainant declined the Respondent’s offer that she resign in lieu of being terminated.

Facts in Dispute and the Evidence Adduced

17. Mr. [redacted] contended before the Tribunal that the Complainant had made disclosure of her arrest to him on 5th June 2023 in his capacity as “confidant” and not in his capacity as line manager.

Whilst the Tribunal accepts that Mr. [redacted] may have seen himself as the Complainant’s confidant and not as her [redacted] manager when she shared the information about her arrest, the Tribunal accepts also that he was nonetheless her [redacted] manager whom she apprised of her arrest. From all the evidence adduced, the Tribunal finds that Mr. [redacted] received the information as the Complainant’s line manager at a usual Monday morning meeting between himself and the Complainant and that in that capacity he had a responsibility to

advise Human Resources of the facts received. In support of this finding, the Tribunal notes that:

- (a) in his sworn statement, Mr. _____ confirms that at the time of her dismissal, the Complainant officially reported to him;
- (b) the Complainant's evidence that although she and her _____ manager had a good working relationship and friendship, they did not participate in any activities outside of the work hours and that, consequently, her friendship with him was solely one related to their working relationship; and
- (c) the fact that Mr. _____ in his witness statement acknowledged that he had erred in his decision not to share with Ms. _____ his conversation with the Complainant with respect to her arrest.

18. The Tribunal ascribes no malintent to Mr. _____ for his failure to apprise Ms. _____ of the Complainant's arrest. Nor does the Tribunal accept that, during his discussions with the Complainant after her return to work on 5th June 2023, Mr. _____ instructed her to withhold the information about her arrest from Ms. _____. Instead, the Tribunal notes from his Witness Statement and from his testimony during the Hearing that he and the Complainant had merely discussed several options whereby the arrest might be addressed at another time, including the Complainant informing Ms. _____ of her arrest. The Tribunal also noted Mr. _____ testimony that the Complainant repeatedly expressed fear of losing her job were she to inform Ms. _____ of her arrest. Mr. _____ testified that, during his discussion with the Complainant on 5th June 2023, he questioned whether disclosure was legally necessary and whether she should seek legal advice. The Tribunal considers that such discussion would, at the very least, leave a question in the Complainant's mind that her line manager himself was questioning whether she needed to disclose the arrest.

19. The Respondent contends that the Complainant's twice refusal to disclose her arrest during the meeting of 15th June 2023 (only admitting it the third time) was dishonesty that merited summary dismissal.

The Tribunal does not accept that such conduct merited summary dismissal. The Respondent was quite clear that the sole ground for summary dismissal was the dishonesty of not revealing the arrest openly on 15th June 2023 until questioned for a third time. The Complainant had at the first possible moment on 5th June 2023 disclosed to her line manager the full facts in relation to the events of the past weekend, including the fact of her arrest. The Tribunal

accepts that the lack of disclosure on 15th June 2023 initially was the result of stress and shock as expressed by the Complainant, and of the question in her mind of the extent to which she was obliged to make full disclosure, a question raised by her line manager at their meeting on 5th June 2023. The Tribunal does not agree that every act of dishonesty would merit summary dismissal. (Matthews v Bank of Bermuda Ltd [2010] Bda L.R.56, page 15)

20. The Respondent contends that it considered a case of similar disciplinary action taken against an employee who had been absent from work falsely asserting sickness. (See paragraph 7 above and section 24(3(i) of the Act).

The Tribunal finds that that case was not at all like the instant case, as that employee's absence from work did in fact have a detrimental effect on the Bank's business. Section 25(b) of the Act refers. In the instant case, the Complainant's work performance was without reproach. Further, Mr. [redacted] informed the Tribunal that the Complainant was the best banking colleague he had ever had.

Tribunal's Findings

21. The Tribunal finds that:

- (i) There was no evidence that the Complainant's conduct had a detrimental effect on the Respondent's business.
- (ii) The Respondent was plainly wrong in likening the Complainant's conduct to that of an employee who failed to report to work on the false pretext of being sick, since in that case the conduct had an obvious adverse effect on the Respondent's business.
- (iii) The Complainant's work record was previously flawless.
- (iv) The Complainant's [redacted] manager, Mr. [redacted], had failed to provide her with proper guidance on how the Complainant should conduct herself in her situation, admitting to his superiors that his judgment had been clouded by his feelings of friendship toward the Complainant.
- (v) The Respondent failed to take proper account of the Complainant's circumstances, since the Respondent (through Ms. [redacted]) failed to elicit from the Complainant any of the details relating to the arrest. Such further investigation might reasonably have led the Respondent to take

a different approach to the difficult circumstances the Complainant was experiencing on account of her position as signatory on her estranged husband's business bank account.

22. The Tribunal agrees that an employee's dishonesty is conduct that might "directly relate to the employment relationship" (section 25(a) of the Act). However, the Tribunal finds that the Complainant in this case had made full disclosure of the fact of her arrest and the circumstances surrounding it at the first available moment, namely, during the Monday morning meeting of 5th June 2023 with her manager, thereby negating the contention of dishonesty.

23. in the meeting of 15th June 2023, the Complainant finally admitted the arrest. Since the Respondent relies solely on these initial denials of her arrest as cause to dismiss the Complainant summarily, the Tribunal finds that summary dismissal was not a reasonable penalty in all the circumstances. There seems to have been little consideration of the fact that the Complainant had earlier made full disclosure of her arrest to her line manager, as confirmed by her line manager, Mr. , during his meeting of 15th June 2023 with Ms. .

Conclusion

24. The Tribunal finds that a reasonable employer would not have made the decision to summarily dismiss the Complainant. (*Matthews v Bank of Bermuda Ltd.* at paragraph 33). Drawing on language used in section 25 of the Act, the Tribunal finds that the Respondent has not proven that "*it would be unreasonable to expect the employer to continue the employment relationship*".

25. THEREFORE, THE TRIBUNAL FINDS THAT THE COMPLAINANT WAS UNFAIRLY DISMISSED FROM HER EMPLOYMENT AT

26. The Tribunal considers it just and equitable that the Complainant be awarded 26 weeks' wages, a total of \$39,289.90, her annual salary at the time of her termination having been \$85,000 per annum. The Tribunal accepts that the Complainant could not hope to achieve a personal banker role in another bank until this Decision is made because it would be unreasonable to believe that another bank would employ her without questioning the reason for her leaving after a mere 2 years and 19 days in its employment and most certainly would seek from the Respondent a reference as to her suitability.

27. Either party that is aggrieved by this Decision has the right to appeal to the Supreme Court on a point of law only within 21 days after receipt of notification of this award.

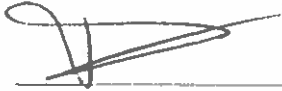
DATED this 3rd day of June 2024



Keren Lomas
Chairman



Judith Hall-Bean
Deputy Chairman



Robert K. Horton
Tribunal Member

