



## Employment Relations Tribunal

# Decision

**Title of Matter:** Manaini Tuibua  
v  
Westpac Group Fiji

**Section:** Section 211(1)(a) *Employment Relations Act 2007*

**Subject:** Adjudication of Employment Grievance (Unjustifiable Dismissal)

**Matter Number:** ERT Grievance 78 of 2018

**Appearances:** Mr S Naidu, Fiji Bank and Finance Sector Employees Union, for the Grievor  
Mr M Chand, Munro Leys Solicitors for the Employer

**Dates of Hearing:** Monday 17 September 2018  
Tuesday 18 September 2018

**Before:** Mr Andrew J See, Resident Magistrate

**Date of Decision:** 12 November 2018

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**KEYWORDS:** Unjustifiable and Unfair dismissal; Failing to Act with Honesty and Integrity; Online Induction Training; Ostensible Authority of Supervisor

### **CASES CONSIDERED**

*Bank of Canada v Diane Lepire* (2004), 26 F.T.R. 138 (FC), 2004 FC 1555.  
*Cere v Air Terminal Services (Fiji) Ltd* [2017] FJET 25; ERT Grievance 198 of 2017 (11 December 2017)  
*Fiji Bank and Finance Sector Employees Union v ANZ Banking Group Pty Ltd* Case No 63 of 2006 (5 December 2006)  
*Fiji Bank and Finance Sector Employees Union v Colonial National Bank* [2004] FJAT 39; Award 33 of 2004 (31 August 2004)  
*Goldman Sachs JB Were Services Pty Limited v Nikolich* [2007] FCAFC 120 (7 August 2007)  
*Josifini Lagi v Nadi Town Council* ERT Grievance 173 of 2016; [2017] FJET 7; ERT Grievance 173.2016 (27 March 2017)  
*Kumar v Nanuku Auberge Resort Fiji* [2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017)  
*McCormick v Riverwood International Australia Pty Ltd* [1999] FCA 1640; (1999) 167 ALR 689 (26 November 1999)  
*Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd* [2013] FJCA 129; ABU0011.2012 (5 December 2013)  
*Little v Commonwealth* [1947] HCA 24; 75 CLR 94; (1947) ALR 483.  
*Peni Koro Lagi v Calm Fire Professionals*, [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)  
*Rentokil Initial Ltd v Kean* [2013] FJHC 193; ERCA 6.2013 (17 April 2013)  
*State v Arbitration Tribunal & Ors* (Judicial Review No HBJ 26 of 2005 (2 June 2006).  
*Thomas v Fiji Electricity Authority* [2004] FJHC 303; HBC243J1996L (27 August 2004)  
*Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33 (14 March 2016)  
*Yanuca Island Limited trading as Shangri Law Fiji Resort and Spa v Vani Vatuinaruku* [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

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## Background

[1] This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Act*. The referred matter relates to a grievance lodged by Ms Manaini Tuibua on 2 February 2018, claiming that her termination in employment as a Teller at the Savusavu branch of the Westpac Group Fiji<sup>1</sup> was harsh, unreasonable, unjustified and unfair.

[2] The Employer's reasons for dismissal are summarised within its dismissal letter dated 15 January 2018, that allege that the Grievor had breached:-

- Westpac's Code of Conduct; and
- Teller, Cash Management and Balancing Procedures.

## Case of the Employer

[3] Counsel for the Employer told the Tribunal when giving his opening remarks, that the Grievor had been working as a Teller at Westpac's Savusavu Branch in Vanua Levu. Mr Chand stated that the incident that gave rise to the dismissal, came about when it was uncovered in October 2017, that there had been a cash shortage of \$5000 in 'Tellers Till No 1102', that had been transferred between another employee Ms Kristie Kabure and the Grievor, as part of a 'handover activity' after Ms Tuibua had been on recreational leave. The Employer's case was that the Grievor was asked by the Branch Manager following the handover, whether the till had balanced, to which it is claimed that she had replied, yes. The case of the Employer was that the Grievor had been told by Ms Kabure during handover, that the outstanding \$5,000 was unreconciled, because a customer had not as yet signed documents relating to an unsecured personal loan in that amount<sup>2</sup>. The Employer's case is that the Grievor's initial response to the Branch Manager<sup>3</sup>, together with the Grievor's complicity in the covering up of the shortage for several days, was dishonest conduct.

[4] It is the Employer's case, that the Grievor should have reported the shortfall as soon as it was identified, as being suspicious and inconsistent with the *Teller, Cash Management and Balancing Procedures*. Instead, it is alleged that the Grievor had dishonestly concealed this shortfall for some three days and that such conduct was a breach of the *Employer's Code of Conduct*.

## Mr Rishi Ram

[5] The first witness to give evidence on behalf of the Employer was Mr Rishi Ram, who is presently the Bank Manager at Westpac's Labasa Branch. According to the witness, he commenced with the Employer initially as a part time teller, before being elevated to the role of Branch Manager and Team Leader in Savusavu. The Tribunal heard that In April 2018, the witness was transferred to the role of Bank Manager at Labasa. Mr Ram told the Tribunal, that the Grievor commenced work initially as a part time employee and was then made full time. Mr Ram stated that after

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<sup>1</sup> The Tribunal has approached its task, assuming that the employer is the Westpac Banking Corporation.

<sup>2</sup> This is sometimes referred to within the decision, as relating to a 'draw down' of funds.

<sup>3</sup> It is noted at Paragraph 7(f) of the *Employer's Closing Submissions* filed on 5 November 2018, that it is claimed that the Grievor was asked several times by the bank manager, however that was not the evidence adduced at hearing, nor was it initially the case that appears to have been contained at Paragraph 12 (a) within the *Employer's Preliminary Submission* filed on 6 August 2018.

“two months” in July 2017, the Grievor was moved into the teller box and explained the process of ‘on the job’ training that was involved<sup>4</sup>. Mr Ram was taken by Counsel to the events of 11 October 2017, the day in which the Grievor had returned to work following a period of recreational leave. The Tribunal heard that during this period of absence, that Ms Kristie Kabure had been operating the Till No 1102 and had on the morning of the 11 October, ‘handed over’ to the Grievor the cash float for her to recommence work. Mr Ram said that Ms Kabure was a relieving Bank Manager with Westpac.

[6] The witness told the Tribunal that on 13 October 2017, he had received a request from his Head Office that no staff were to enter the branch over the weekend for security reasons and said that he held a meeting with staff at around 4.30pm on that Friday afternoon, to alert them to that fact<sup>5</sup>. According to Mr Ram, he said that the Grievor had told him, “I have to come to the branch on Saturday to balance cards”<sup>6</sup>, to which he replied, that nobody could enter the branch over the weekend and that she was to do this on Monday. Mr Ram stated that some time between 9.00am and 11.30am, that he had been contacted by Ms Lilikibau (Lili) Maramanikaiyanuca, a staff member from the Labasa branch, who told him that she was on the phone with one of his staff members who was crying and that she wished to connect him into a three – way telephone conference. That staff member was the Grievor. According to Mr Ram, after having a discussion with the Grievor and Lili in relation to the missing cash, he advised that the matter could be sorted out on Monday 16 October. Following the discussion, Mr Ram said that he contacted his area Manager, Ms Fareena Chanel and the Risk Officer, Field Investigations, Mr Lui Versoni. Mr Ram explained that on the following Monday morning, that he, the leading teller and the Grievor, counted the Till Number 1102 and found that it was short \$5,000.

[7] The witness was shown a series of *Cash Balance and Till Total Display Reports* that have been collectively marked in proceedings as Exhibit E1. The *Cash Balance Report* dated 13 October 2017, that is, as at the close of banking on that Friday afternoon, shows that the number of \$100 notes held within the till should be 78. That is, equivalent to \$7,800.00. The subsequent counting of the cash float on Monday morning, revealed that there were only 28 x \$100 notes held in the float. That is, that it was short 50 x \$100 notes. Mr Ram noted in his own hand writing on that Cash Balance Report the following:

*Full Branch cash count cash counted and varified (sic) to be twenty thousand one hundred (sic) fifty (sic) six dollars and twenty five cents only \$20156.25 by Rishi Ram  
Till is short by \$5000- in hundred (sic) dollar bills<sup>7</sup>.*

[8] The witness advised that thereafter he filled in an Incident Report and asked the Grievor for an explanation. Mr Ram said that he had been told by Lili, that “it happened on Wednesday when (the Grievor) took over the cash”. Mr Ram said that initially there was no response from the

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<sup>4</sup> Note here, this evidence is at odds with what is claimed within the *Employer’s Preliminary Submissions* at Paragraph 9, where it had been claimed that the Grievor “had been employed as a teller for at least 15 months”.

<sup>5</sup> The evidence of the Employer later reveals that the initiation of this measure, was in response to a security breach at the Nausori branch.

<sup>6</sup> This concept is understood to relate to the reconciliation of client’s (EFTPOS & ATM transaction) Handy Cards that have been received by the bank and have not as yet been issued to customers.

<sup>7</sup> The Tribunal is astounded at the spelling mistakes contained within this notation and would anticipate that such a state of affairs would logically have a bearing on the quality of any staff training and development activities that may be supervised or facilitated through that person.

Grievor and then he was asked by Operations, for the Grievor to write a memo as to her version of events. Mr Ram said in response, he removed the Grievor from the Teller Box to the office and she provided the following statement<sup>8</sup>:

*On Wednesday 11<sup>th</sup> of October I had resumed work and took over cash that was out \$5000. I did not declare the outage thinking that it was in order since it is a loan drawdown. However, after a few days I somehow came to realise that I was actually signing and balancing a till that is not really balanced which is not right. And that is why I had to sought advise (sic) but I realise that it was too late. The till number was 1102.*

[9] According to Mr Ram, he then did the same with Ms Kabure, who he said came by herself and said “something had happened”, though didn’t mention anything about a loan. Mr Ram said that Ms Kabure told him, that she took the money and lent it to a friend. The witness said that “Kristie asked me after cash count, could she put money back.”

[10] The witness was shown Exhibit 3, the memorandum written by Ms Kabure, that read:

*On Monday Oct 9<sup>th</sup> I took \$5000 in cash and lent it to a friend and this was supposed to be returned on Friday 13<sup>th</sup> Oct however this did not happen. I handed over on 11<sup>th</sup> to Manaini with the 5k shortage and I told her that I will settle this by Friday when Customer gets his drawdown. Till Number 1102*

*Kristie*

[11] Mr Ram advised that the memoranda were sent to Mr Lui Versoni of the Operational Risk Section and that a decision came back by midday, advising that the employees were to be issued with a suspension letter<sup>9</sup>. Mr Ram told the Tribunal that the next step that followed, was the conduct of a Telephone Interview, in which the Grievor was interviewed by Mr Versoni and whereupon a record of that discussion was ultimately produced and verified as being accurate by Ms Tuibua<sup>10</sup>. According to the witness, following the conduct of an investigation, the Grievor was issued a Show Cause letter that Mr Ram signed on behalf of the bank<sup>11</sup>. The Tribunal heard, that the Show Cause letter whilst dated 13 December 2017, was not received by the Grievor until 3 January 2018 and the reason given for this, was that Ms Tuibua was sick and the witness had been advised she had been hospitalised. Mr Ram said that the written response to the allegation was forwarded to Mr Versoni directly. Finally, the witness was shown a Dismissal Letter dated 15 January 2018<sup>12</sup>. Mr Ram told the Tribunal, that he had organised for the Grievor to come to the bank and sign for this letter, which the Grievor did some time later.

[12] In cross examination, it was put to the witness that the bank had been advised by the Grievor of the discrepancy in funds on the Sunday prior to the spot audit taking place. That is, on 15 October 2017. The Grievor’s representative, Mr Naidu, asked the witness about the request that

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<sup>8</sup> See Exhibit E2.  
<sup>9</sup> See Exhibit E4.  
<sup>10</sup> See Exhibit E11.  
<sup>11</sup> See Exhibit E5.  
<sup>12</sup> See Exhibit E6.

had been made by the Grievor to come to the bank during the weekend in order to reconcile the 'cards' and the witness indicated that he had no idea if that task and request had ever been entertained previously<sup>13</sup>. Mr Ram then clarified the manner in which cash was stored on site and the protocols involved for dealing with excess amounts. Mr Ram was taken to Exhibit E1(g), a *Cash Balance Report* that related to the cash tallies reported by Ms Kabure on 9 October 2017, that is on the afternoon in which she claimed to have taken the \$5000. Firstly, the witness was questioned as to whose signatures appeared on that document and were advised that it was the Tellers, Ms Kabure and the Supervisor Signature was that of Mr George Baro another employee of the branch. The witness was asked that if Ms Kabure had said that she had taken money on the 9<sup>th</sup> October, did you investigate that claim and Mr Ram responded that there were no loans draw down from the teller. Mr Ram further told the Tribunal that a copy of the Interview Record that had been undertaken on 2 November by Mr Versoni, had been provided to the witness and that in his role he had also taken part in the interview with Ms Kabure. Mr Ram said that he could not recall if Ms Kabure maintained her story that the cash went missing on 9<sup>th</sup> October. The witness was questioned if he could recall a period of time when the Grievor was under suspension, where she had failed to report to the Manager and Mr Ram told the Tribunal that he did not find out what was wrong with her, as she could not be contacted<sup>14</sup>. Mr Ram stated, that he was unaware that the Grievor had been admitted to hospital and that she had not provided a sick sheet for that period<sup>15</sup>. Finally, the witness was challenged as to why it took two weeks in order to give the Grievor her Dismissal Letter, particularly when the Grievor had been assisting in the kitchen of her family's restaurant opposite the bank. Mr Ram was unable to provide a response to that question<sup>16</sup>.

### Luciano (Lui) Versoni

[13] Mr Luciano Versoni has been an employee of the Westpac Bank for 28 years having moved through the ranks of Teller, Head Teller, and Branch Manager to working finally as an Investigating Officer within the Operations Unit since 2012. Mr Versoni told the Tribunal that he could recall that around midday on 15 October 2017, he was advised by the Team Leader Savusavu<sup>17</sup>, Mr Ram, that there was an incident in the branch relating to a cash shortfall. The witness stated that he asked the Team Leader for an Incident Report and asked if he had contacted the Area Manager. The witness stated that there had been a 'surprise cash count', as part of an audit process that was held on the Monday in question, that was undertaken across all branches in response to an incident that had occurred in Nausori. According to the witness, the incident report indicated that the cash float (till) had been short when taken on the prior Wednesday.

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<sup>13</sup> The answer to that question remains unknown. It perhaps is relevant to the extent that there is an inference made by the Employer, that somehow this request to come to the office on the Saturday may have been to cover the tracks of the Grievor and Ms Kabure, although no specific pursuit of that case theory seems to have been made.

<sup>14</sup> It should be noted here, that the evidence of the Grievor was that her family operated a business directly opposite the bank's premises in the main street of Savusavu town. The Tribunal is very sceptical of such a response on that basis.

<sup>15</sup> This is a rather insightful comment that reveals much about the Manager's capacity in people management.

<sup>16</sup> The Tribunal finds that the lack of response by the witness to this question, demonstrates a less than candid display of his true state of understanding.

<sup>17</sup> It is noted that the job titles of Team Leader, Branch or Bank Manager, have been used interchangeably by several of the witnesses.

[14] Mr Chand asked the witness what documents did he access as part of his report and he responded that he had received the Preliminary Report from Mr Ram, the statements from the two workers and the M46 Reporting Form in which the shortfall had been subsequently identified.<sup>18</sup> As part of his investigation, the witness told the Tribunal, that he had looked at the Grievor's experience as a Teller and seen if she had some training in 'Doing the Right Thing',<sup>19</sup> a two hour online ethics training program for employees; as well as *Code of Conduct* training. In relation to the training module, *Doing the Right Thing* and the accompanying assessment,<sup>20</sup> the witness told the Tribunal that the component entitled 'Operational Risk' was the specific ethics training that dealt with this issue<sup>21</sup>. As evidence that the Grievor had successfully completed the assessment for both the *Code of Conduct* and the *Doing the Right Thing* training, Mr Versoni was shown Exhibit 10 an extract of a compliance report generated by the Employer in which it showed that the Grievor had achieved a score of 100% in each of these modules.<sup>22</sup> Counsel then proceeded to take the witness to the *Typed Record of Interview* that was prepared following the telephone interview that was conducted by Mr Versoni on 2 November 2017. Specifically, the witness was taken to the questions and answers:

*Q 10. Manaini, are you aware of Westpac Code of Conduct with particular emphasis on We Act with Honesty and Integrity?*

*A: Yes*

*Q 15. Manaini, it was reported to Operational Risk that when you took over Till 1102 upon your return from Rec Leave on 11<sup>th</sup> October 2017 you were aware that the cash was short by \$5000, is this correct.*

*A: Yes*

*Q17. Manaini, do you know who was this person that Kristie said the money given by her was for the loan drawdown?*

*A: Yes, Kristie told me, He was a school teacher, I know him personally, His name is Master Tomasi Vakatora.*

*Q19. Manaini, when Rishi asked you if the cash taken over by you was okay, can you tell me what you answer to him?*

*A: I said yes it's OK because looking at the M36 it was second checked and I assumed somebody else knew, and that it was nothing to worry about.*

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<sup>18</sup> See documents within the bundle that is referred to as Exhibit E1.

<sup>19</sup> See Exhibit E8

<sup>20</sup> Exhibit E9

<sup>21</sup> The Tribunal has perused Exhibit 8 and can find no reference to a discrete section entitled Operational Risk. It is noted within Exhibit 9, that there are questions within Unit 3 under the heading Operational Risk, though that unit number does not appear to bear any correlation to any of the sections within Exhibit E8.

<sup>22</sup> This is an issue that perhaps warrants further comment later in the analysis of the evidence.

Q21. Manaini, in your opinion do you think Kristie's actions was suspicious when she told you that she would be checking your cash?

A: It was on the 1<sup>st</sup> day when I asked her I need to balance, she did not give an answer, she came to my till and she started balancing my Till and I stood there watching her, where she started changing figures. She did this for the 3 days.

Q22. Why then did you not raise this with the Team Leader?

A: I know at the very point in time I had been caught in making a decision, where I had someone I trusted and looked up to, put me in a difficult situation, but I was still confident with what she told me, not to worry, kept me going.

[15] The witness was then shown a Memo that he had prepared for forwarding to the General Manager in relation to this issue.<sup>23</sup> In addition, Mr Versoni was shown the *Code of Conduct*<sup>24</sup> and *Whistleblower Protection Policy*.<sup>25</sup> Mr Versoni stated in his evidence, that the Grievor knew that she had to declare if the cash was short, or if she thought that there was something wrong, that it needed reporting. Finally, in relation to the *Methods Manual -General*<sup>26</sup> that governed the cash balancing procedures to be applied, the witness was taken to Section 7.1.6.1, that reads:

*Teller's cash must be balanced with the branch teller at the close of business each day. Total Teller's Cash holding must be equal to the balance of Cash Account 9880000. Any adjustments must be recorded in the Over/Short register daily. Show full particulars of adjusting entries on Teller Cash Summary Report – GL0390*<sup>27</sup>.

[16] Mr Versoni emphasised that in the present case, the Grievor did not register the shortfall when she took over the cash. The witness stated that at the end of his investigation, he drew up an 'Allegations Letter' in conjunction with the Human Resource Department. In cross examination the witness conceded that he first became aware of this incident on the Sunday 15<sup>th</sup> October 2017. The witness also acknowledged that at the time of the incident, that the Grievor had only been working as a Teller for three months<sup>28</sup>. Mr Versoni also acknowledged that the details of the job description were not set out within the employment contract. Mr Versoni was questioned as to the training that was provided to employees when they joined the bank and responded that initially they are given a one week's induction, followed by online training specific to their role. Mr Versoni told the Tribunal that the bank no longer had a specific training centre and that on-line training had been relied upon for the last four or five years. During cross examination, the witness was taken by Mr Naidu to the '*Do the Right Thing*' policy and asked if

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<sup>23</sup> Exhibit E12.

<sup>24</sup> Exhibit E13

<sup>25</sup> Exhibit E14.

<sup>26</sup> Exhibit E15.

<sup>27</sup> The Tribunal later notes, that there was no evidence whatsoever provided by the Employer as to what specific training the Grievor had been provided with in relation to this policy.

<sup>28</sup> It should be noted here, that the *Preliminary Submissions of the Employer* filed on 6 August 2018, claims on the other hand that "the Grievor had been holding the position of a teller for 15 months. (and that) During these 15 months, she did not raise any issues about understanding the role and responsibilities of a teller".



he could identify anywhere within that document where it dealt with staff interactions and their reporting obligations. Mr Versoni told the Tribunal that this was dealt with in the *Whistleblower Policy*<sup>29</sup>.

[17] The witness was shown the Statement provided by Ms Kristie Kabure<sup>30</sup> and the Grievor's Record of Interview<sup>31</sup> and was asked why the monies were not detected missing when the cash checking first took place on 9 October 2017. The witness responded by saying that the checking officer Mr George Baro was not required to count the cash individually, but only to check the bundles of cash. Mr Versoni stated that only a 'surprise audit' would be the circumstance where cash was "flicked and counted" individually. The witness was taken to page 2 of the 'Memo' prepared by him at the conclusion of the investigation and it was suggested to the witness that the Grievor was inexperienced<sup>32</sup>. The witness was asked:

*Mr Naidu: On 11<sup>th</sup> do you think Manaini would have know the cash was stolen?*

*Mr Versoni: No.*

[18] It was then put to the witness, how then do you say that the Grievor had been dishonest, to which the witness replied, "she allowed Kristie to change the report". Mr Versoni was of the view that the Grievor would have known by the Friday that something was wrong after she had signed the M36 report for three days, knowing that funds were missing. The witness believed that the Grievor called the Bank Manager on the Sunday, because she got scared<sup>33</sup>. Mr Versoni explained for the Tribunal that the Methods Manual-General document<sup>34</sup>, was part of a large manual document. The witness was taken to Section 7.1.6.3 of the Manual entitled 'Checking Procedures', where it provides that:

*Day 1*

*Bank Manager, Team Leader Tellers Team Leader Tellers or alternative key holder to:*

- *Check the notes in flats/sections as they are locked away.*

[19] The witness was asked to explain why cash counts had not earlier been undertaken and Mr Versoni responded by advising that there was a difference between a cash count and cash checking. In re-examination, the witness stated that whilst the Grievor had not been provided with a job description upon commencement with the bank, that she had been given the opportunity to read procedures and was provided with on the job training, that included cash management training.<sup>35</sup> The witness was taken back to the on line training that was Exhibit 8 and indicated that this training could be completed in about two hours. The witness was asked to

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<sup>29</sup> Again the Employer failed to provide any evidence that the Grievor had undertaken any training in this regard.

<sup>30</sup> Exhibit 3

<sup>31</sup> Exhibit 11

<sup>32</sup> This is an interesting issue and one that will be addressed at a later point. Within the report at Page 2, it states, "Manaini Tuibua is a new Teller trained by Kristie and she was still learning as she has just been 3 months in the Teller box.

<sup>33</sup> The witness provided no insight into how he reached that view.

<sup>34</sup> Exhibit 15.

<sup>35</sup> Somewhat ironically here, is the fact that some, if not all of this on the job training, was provided by the person who had in fact misappropriated the money from the bank.

confirm whether or not the Record of Interview<sup>36</sup> was a verbatim account of the telephone interview that was conducted, to which he relied, yes.

[20] Finally, the Tribunal decided to ask the witness some questions in relation to the cash checking that had taken place on 9 October 2017, when Ms Kabure acknowledged that she had taken the \$5000. The Tribunal was intrigued to understand why Mr Baro could not detect the difference between the actual cash present in the Till No 1102 on that date, that is a bundle of \$100 notes in the amount of \$12,800 and a bundle of \$100 notes in the amount of \$7800. Specifically, the Tribunal put to the witness, that the notes if folded into bundles of \$1000 would mean that in one instance, there would be at most thirteen bundles, whereas in the other case, there would be eight. The question for the witness was, Why wouldn't an experienced teller have detected that discrepancy when it first occurred? That is, that more than one third of that denomination of notes was missing. Mr Versoni did not appear to be particularly surprised by that lack of precision, which begged the further question, what would be the purpose of a checking process, if the checking did not take place with any degree of certainty?

[21] Whilst Counsel for the Employer, at the end of this questioning by the Tribunal, said that he "objected" to the Tribunal's line of questioning on the basis of its relevance to proceedings, the Tribunal made it abundantly clear at that time, that it did not share the views of Mr Chand in this regard. In fact, quite the opposite<sup>37</sup>.

#### Ms Lilikibau (Lili) Maramanikaiyanuca

[22] Ms Maramanikaiyanuca was appointed to the bank as a Teller in Labasa on 10 March 2015. The witness recalls that on 15 October 2017, she was called by the Grievor who is a family friend around 9.00am. The witness said that the Grievor had told her she was scared and was wanting to understand the bank's procedure for how personal loans that were unsecured, were recorded through the telling system. According to Ms Maramanikaiyanuca, the Grievor wanted to understand which column on the Cash Balance Report should a customer loan 'draw down' be entered. The witness said that she asked the Grievor whether she had reported the matter to her Team Leader and was advised that she was suppose to have reported to him, but had not at that time, even after her father had told her to do so. Ms Maramanikaiyanuca stated that the Grievor needed confirmation as to whether a 'draw down' would have required a double entry of the transaction<sup>38</sup> and a sign off, that was ordinarily by an email attached to the voucher, by the Team Leader. The witness told the Tribunal that after the discussion with the Grievor, she indicated to her that she intended to connect the Team Leader into a conference call with them and that the Grievor had no objection to that course of action. When asked did any bank investigator talk to the witness about this telephone conversation, the witness responded, "I don't know". In cross examination, Ms Maramanikaiyanuca said that the Grievor had told her, "it was my fault for not reporting to the Team Leader". Ms Maramanikaiyanuca said that the Grievor "was scared and followed what Kristie had told her". When asked by Mr Naidu, did the teller training cover 'loan draw downs', the witness responded, that "it should be, because

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<sup>36</sup> Exhibit 11

<sup>37</sup> Unsurprisingly, the Employer led no evidence as to what transpired the following day when the checking of those monies took place on 10 October. Why was it the case that the cash shortfall represented by the missing bundles of notes, would not have been detected by an experienced bank teller? And what happened in the days that followed?

<sup>38</sup> It was explained that this required a debit to the loan account and to credit the customer's account, with a supporting email.

there would be entries... that she would be trained<sup>39</sup>.” In re-examination, the witness stated that in her first six months with Westpac on probation, that she was not in the teller box and at the time of the telephone conversation had only been ‘in the teller box’, for one year.

## The Case of the Grievor

### Manaini Tuibua

[23] Ms Manaini Tuibua commenced her employment with Westpac Banking Corporation in October 2015, where initially she was engaged as a contract worker for six months. On 8 June 2016, the Grievor was appointed to the position of Teller.<sup>40</sup> According to the witness when she commenced working in the Savusavu branch of the bank, she dealt with basic customer inquiries, such as opening accounts and general product information. The Grievor said that she undertook these duties for approximately one year, prior to having to go on maternity leave. According to the witness that leave was required because she learnt that she was carrying a child who was dead in utero at seven months. Ms Tuibua said that upon her return from maternity leave, that she was returned to work as a Teller in the teller box and that she did this up and until 19 September when she was required to take some accumulated leave. According to the witness, when she commenced in that role, initially she was assigned a supervisor for one week in the name of Riaz Ali and after which she was trained under the supervision of Ms Kristie Kabure. Ms Tuibua said that she was instructed by Mr Ali by simply sitting at the back of the booth and watching him and that Kristie supervised her undertaking work. According to the witness, she was absent from work for three week’s annual leave, until 11 October 2017. The Grievor said that when she went on leave that she handed over her responsibilities to Ms Kabure, who also took over her Till No 1102. The witness, who later told the Tribunal that she had never done a ‘till handover’ before, said that on the day she returned to work, “we had done the physical counting like when they had handed over on before taking leave”, however said that the cash was short and that she was told by Ms Kabure that it was something to do with a loan draw down. The witness stated that Ms Kabure was the Loans Officer. According to the witness, when she expressed some concern in relation to the situation, she was told by Ms Kabure words to the effect that she should “focus on other things like balancing”. When the Grievor sought to balance her till that afternoon, she discovered that she was “\$5000 out”. The Grievor said at this point that she had asked Ms Kabure,

*“What about this.. You told me to settle today – our customer did not turn up “  
and was thereafter told, “wait for the next day.. nothing to worry about.”*

[24] According to the Grievor, by the end of the following day 12 October 2017, she “didn’t feel good”. Ms Tuibua told the Tribunal that she was not comfortable with the answer that Ms Kabure had provided and that she knew not balancing was wrong. The Grievor stated,

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<sup>39</sup> The Employer provided no evidence of such training having taken place with the Grievor, in relation to unsecured loans and the draw down procedures.

<sup>40</sup> See Exhibit E7.

*“ Since she is someone I looked up to ..a relieving bank manager, a trainer and supervisor, I had taken it from her. I believed her. I trusted her”*

[25] Ms Tuibua told the Tribunal that this belief remained with her the following day and on the weekend her sister who was a school teacher, started telling her something about how “they were looking at my colleague Kristie”. According to the Grievor, it was said that Kristie had some kind of relationship with a teacher and that they were suspicious that she was seen out spending a lot of money on drinks. Ms Tuibua said that when hearing of this, it “hit her”, that something was wrong. The Grievor told the Tribunal that she did not sleep on the Saturday night and that on the Sunday morning, she had asked her father to borrow his car, in order that she could driver to the teacher’s residence to see Tomasi Vakatora<sup>41</sup>. Ms Tuibua said that she drove to his place and his wife said that he had been in Suva for more than two weeks. The Grievor then said, it was at this point she realised that the money could not have been given to him. Ms Tuibua said that she returned to home and called Ms Maramanikaiyanuca “because she was another one I trusted.” The Grievor said that she called her and was shaking and almost broke down and asked, “How can you tell on the system a loan draw down?” Ms Tuibua said that in response her friend Lili stated, “did you check with the customer’s overdrawn account” and said that she responded to her, that she “didn’t know what it looked like, that she had never been trained”.

[26] The witness recounted how Ms Maramanikaiyanuca then sought to make a teleconference call with herself and Mr Ram and that as the reception was bad, on several occasions she was ‘dropped out’ of that call. The Grievor said that after her line had dropped out, she had purchased more phone recharge<sup>42</sup> and when she did reach Mr Ram, that he was very angry with her and said that the matter could be resolved the next day as there was nothing that he could do now.

[27] On the Monday morning, the Grievor said that she was met at the door of the bank by Ms Kamure, who “asked for forgiveness for using me.” Ms Tuibua said that what transpired next, was that both herself and Ms Kamure were called in and a cash count was conducted of the Till No 1092. Shortly after this, the witness recalls being asked to provide a memo in her handwriting as to the events that had transpired that led to the shortage. The Grievor said that after she wrote the memo, she was asked by Mr Ram, how did you know? To which she replied, that she had told him the story about her sister and the fact that Tomasi Vakatora, was not at home. Ms Tuibua said that she waited until midday and was then advised that she had been suspended from duties. The witness recalled that after being suspended from work on 16 October 2017, that she stayed home and would report to the bank manager by telephone every morning. The witness explained that on a couple of occasions she was unable to call personally and recounted on 13 December 2017 was one such occasion when she could not do so, after having been told when attending a prenatal clinic, that she had miscarried at 19 weeks and needed to be hospitalised to have the foetus removed. The witness was shown the dates of the Show Cause/Allegations Letter that had been prepared by the Bank dated 13 December 2017<sup>43</sup> and asked why the letter had not been given to her at that time. Ms Tuibua told the Tribunal that she had contacted Mr Ram and told him that she had to be taken to Labasa and was

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<sup>41</sup> It was Mr Vakatora, who Ms Kabure had claimed was waiting to bring back in the loan documentation pertaining to a personal loan unsecured .

<sup>42</sup> ‘Phone recharge’, is the process referred to when an individual needs to add credit to their pre-paid telephone account to continue access to the service.

<sup>43</sup> See Exhibit E5.

admitted into hospital. According to the Grievor, the bank did not advise her that there was a letter for her to collect. The witness said that on 3 January 2018, she had been told by one of the staff to sign something at the bank and she came in and signed the Show Cause Letter that day. Ms Tuibua said on that same day, she provided a response to that letter to Ms Fareen Chanel and Mr Dennis Quayle, the General Manager

[28] The witness was asked whether anyone else other than Mr Ram and Mr Versoni spoke to her during the course of the investigation in relation to these matters and she said, “no”. In relation to the Record of Interview dated 2 November 2017<sup>44</sup>, Mr Naidu sought clarification from Ms Tuibua in regards to some of the responses that she had provided<sup>45</sup>. In relation to Question 15, in which the Grievor had stated that she knew the cash flow was short \$5000 on 11 October 2017, the Grievor clarified the response by saying that it was true that she was aware of that fact, but had asked her supervisor, the person that she would go to for such queries and asked, “Why is this?”, assuming that the matter was to have been resolved by the day’s end. The Grievor said that in response, she was told by her supervisor, “that there was nothing to worry about”. In relation to Question 20, when asked did Mr Kabure advise her that she would be checking her float later that day, the Grievor responded that the Head Teller is the only other person to check my work; that Ms Kabure would focus on our teller work and would come in and help me balance every day. In relation to Question 22, where the Grievor had provided Mr Versoni her response to the question as to why she had not raised the issue with her Team Leader earlier, the witness replied that she had said to her, “your \$5000 is the one that will keep me back” and in response was told that the customer will come in and sign a document, so that we will leave it to the next day. Ms Tuibua said that Ms Kabure would sometimes say I was “becoming irritating”, if I expressed concerns in relation to this activity.

[29] The Grievor was shown the Dismissal Letter dated 15 January 2018<sup>46</sup>, that was signed and received by her on 29 January 2018 and was asked why it took so long for her to access this communication. According to Ms Tuibua, she had been informed by another workmate that there was something to be collected from the office. The witness said that on the first occasion, when she went to the office, she was told that the system was down, the second time was told that Mr Ram was too busy<sup>47</sup> and on the third occasion, the Union called and organised for the collection of the letter on her behalf<sup>48</sup>. The witness was asked to clarify how the training assessment result that formed the basis of Exhibit 10 was derived and she advised the Tribunal that you can keep answering the question, until such time as the correct answer and result are achieved.

[30] Finally, the witness was questioned in relation to her hospitalisation in December 2017, when she advised that she had suffered a miscarriage at 19 weeks and had been admitted to hospital for three days. According to the witness, the reason given for her hospitalisation and pregnancy termination, was not enough rest. The witness told the Tribunal that this was her third pregnancy, though as had earlier been mentioned, was the second occasion that she had lost the child in utero. The Grievor said that she felt that there had been a lot of pressure in the

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<sup>44</sup> Exhibit E11.

<sup>45</sup> The Tribunal notes here, that the Grievor was not asked about the accuracy of her response to Question 19. That is, was it her rather than Ms Kabure who had responded to the question from Mr Ram that everything was in order at the time of handover. [See also Exhibit G1, where the Grievor did not maintain that position in her formal response to the allegations]

<sup>46</sup> Exhibit E6

<sup>47</sup> If that is true, that is extraordinary conduct in these circumstances.

<sup>48</sup> This conduct of the Employer’s handling of the situation demonstrates that it was very ill equipped in managing such a situation.

branch due to staff shortages and that she would often be required to service customers, rather than take lunch breaks. At one stage, the witness stated, she was only the only Customer Services Officer and this placed pressure on her during the day to perform her duties.

[31] During cross examination by Mr Chand, the Grievor was asked to recall the training that she was provided by the Employer, particularly when she first commenced as a trainee Teller. According to the witness, she did not want to go to the teller box, however said that “Kristie and Rishi they encouraged me and said we were short of staff”. According to the witness, she was nervous and said that there was lots of things happening there before she came<sup>49</sup>. Mr Chand asked the witness were there any surpluses or shortages that she had incurred during her 3.5 months as a Teller and the Grievor indicated that she had always managed to balance. The witness thereafter explained the process of reconciling monies, including going through vouchers to ensure all entries and transactions had been properly recorded. Ms Tuibua stated in cross examination, that she knew something was wrong because of all the training that she did; although she could not remember the actual training, however was reminded every day that taking money was not right and that monies had to balance and that you had to be honest.

[32] Counsel asked the witness to recall what happened on the 11 October 2016 when she discovered that the \$5000 monies had still not been reconciled. The Grievor gave the same account of what had transpired during the giving of her Evidence in Chief. That is, she had raised it with Ms Kabure who in turn had responded that the customer did not turn up today, but that it would be “sort(ed) out tomorrow.” Ms Tuibua continued that had she known at the time that which Ms Maramanikaiyanuca explained regarding loan drawdowns, she would have checked what Ms Kabure was telling her, further. The witness explained to the Tribunal that this was her very first ‘hand over’ process.<sup>50</sup> The witness conceded that she had been suspicious from the beginning when the shortfall was brought to her attention and was asked on that basis, why she had not taken advantage of the *Whistleblower Policy* that provided for confidential reporting? Ms Tuibua replied, “to me Kristie was a Bank Manager, she had all the answers; to me it was ok.” Mr Chand repeated his question, “You could have reported to Rishi?”, to which the Grievor replied, that she was comfortable with Kristie and the explanation that she had initially been given. Counsel then proceeded to ask the Grievor in relation to her miscarriage and whether she had provided the Employer with a medical certificate at the time she was not contactable on 13 December, as she was still suspended at that time<sup>51</sup>. Ms Tuibua attributed the miscarriage due to not eating and sleeping properly because she was stressed. The witness was asked did she avail of the free counselling service provided by the Employer, to which she responded that she did not.

[33] In re-examination, Mr Naidu asked the witness to elaborate upon her earlier comments that “lots of things” had been going on in the bank prior to starting as a teller, that made her nervous. Ms Tuibua spoke of four staff who had apparently been sent home from the bank for stealing. The witness also explained how on occasions, if the bank computer network was ‘down’ and cash balancing had not been completed, that it would not be unusual for the tills to be locked up and the balancing process continued the following day. Ms Tuibua said that this was an informal arrangement and not one contained within any Operating Manual. The witness reinforced that at all times the Cash Balance Report was checked by her supervisor, who was Kristie Kabure. Finally, in response to the questioning from the Tribunal, the Grievor

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<sup>49</sup> The Tribunal later heard that this related to approximately 4 previous staff who all had been terminated from that branch for dishonest conduct.

<sup>50</sup> There was no evidence before the Tribunal as to what sort of training would have been provided in relation to this hand over process.

<sup>51</sup> The relevance of that question in the scheme of things, is difficult to understand.

advised that her Manager and Supervisor both knew that she was pregnant prior to going on leave in September 2017 and made no attempt to inquire whether she needed any modification to her work arrangements, specifically the requirement to stand all day, as part of her role.

## The Nature of the Allegations Raised by the Employer

[34] The Grievor claims that she was not given a copy of the Allegations Letter dated 13 December 2017<sup>52</sup>, however was required to respond to that same communication from memory only. This is an extraordinary state of affairs for an international banking organisation and one that has not been contradicted by the Employer's version of events. The two specific allegations are reproduced from that Allegation Letter as follows:

### Background

*On 16 October 2017, Retail Branches across the business were advised to conduct surprise cash count for all Tellers and Treasury. Upon cash count conducted by Teller till 1102 which was operated by you, was found to be \$5000 short. Rish Ram, Team Leader Savusavu branch then asked you about the short cash and you advised that when you took over cash from Kristie Kabure on 11 October 2017 till was short \$5000 and Kristie told you not to worry and that it was a loan drawdown for which she was awaiting customer to sign documents.....In order to give you the opportunity to respond and advise your position, the following is an outline of the allegation labelled against you:-*

### Allegation 1

*It is alleged that on 11 October 2017, when you took over from teller till 1102 previously operated by Kristie Kabure, you failed to declare to the Team Leader – Rishi Ram the \$5000.00 outage in the till when he asked you whether everything was fine. You accepted Kristie's explanation being that the cash was given for loan drawdown for which documents are to be signed by customer and you did not raised this Team Leader Rishi Ram.*

### Allegation 2

*It is alleged that you allowed Kristie Kabure to check and balance your end of day cash from 11 October 2017 to 13 October 2017 where she amended the figures on the M36 to conceal the \$5000.00 missing cash and you did not raise it with Team Leader Rishi Ram.*

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<sup>52</sup> See Exhibit G1.

*The allegations made against you, if substantiated, would involve serious breaches of Tellers Procedures and the Westpac Group Code of Conduct. Specifically:*

**Tellers Procedures**

- *MMG Section 7 – Tellers Procedures*

**Code of Conduct**

- ***We act with honesty and integrity***

*Trust is the foundation of our profession, we do the right thing because it is the right thing to do. Honesty and integrity go hand-in-hand. They guide us in making decision, so that we make the correct choices between right and wrong.*

*There is no room for compromise: If we do not act with honesty and integrity 100% of the time, we are undeserving of the trust of our customers, colleagues, community and shareholders. We will accept responsibility for our actions.*

- ***We comply with laws and our policies***

*We comply with our legal obligations, regulatory requirements, voluntary codes of practice to which we subscribe and Group policies, including the Westpac Code of Conduct. If we fail to comply with laws and regulations both the Westpac Group and the individual employee may face criminal sanctions or other serious consequences.*

*We must also comply with the Westpac Group's internal policies and procedures.*

*The bank believes that your conduct is not appropriate in that:*

- *You have misconducted yourself by an act of omission or commission that is inconsistent with the due and faithful discharge of your duties; and/or*
- *You are guilty of not following standard telling procedures; and/or*
- *You have acted in breach of the terms of your employment including but not limited to the Westpac Code of Conduct.*

[35] When one looks at the Allegations Letter in its entirety, it is simply hard to fathom how this document, whether in its hardcopy or electronic form, was not made available to the Grievor in



order that she prepare her response. It is also curious that the background information provided in that letter, fails to make mention of the fact that Mr Ram was already well aware of the discrepancy prior to 16 October, having been contacted by Ms Maramanikaiyanuca and the Grievor the day before. In any event, the Grievor did prepare a response to the allegations<sup>53</sup> and for the sake of completeness and hopefully for the ease of reading this decision, it is perhaps useful at this juncture to reproduce that response as follows:

**RESPONSE TO ALLEGATION LEVELLED AGAINST ME (Manaini Tuibua)**

*Sir I would like to arise my concern in regards to the allegations raised against me that I discussed with Team leader Rishi Ram today January 3<sup>rd</sup> 2018 at the Savusavu Branch. Sir I was given your memo to read through and was not given a copy to base my response to the allegation. I have been hospitalized though another miscarriage and was not able to be given the memo by our Team Leader. I would have loved to have a copy of the memo myself.*

*From what I have remembered from the memo that I would like to respond to are as follows:*

- (i) **Background of the Issue:** The memo did not state that I reported the matter to the Team leader Rishi Ram a day before the spot cash count. I reported the matter immediately after I sort advise from friends from the main branch Labasa. As a very inexperience officer who had not been given any formal briefing or training from my immediate superiors, I was somewhat operating on trial and error mode. I request a through face to face investigation instead of tele-conference.*
  
- (ii) **Allegation 1(Not declaring \$5000 shortage)** The question asked by the Team Leader in regards to the handing over of cash was directed to Kristie and I and Kristie declared to the Team Leader that the cash was in order. As a junior officer, who had never processed a loan drawdown, I believed that all was procedure which I had to tag along, (camera footage may verify this)Yes, I believed Kristie's story of a loan drawdown which made the issue looked okay to me, until I became suspicious and stated my own enquiries. I was misled and used.*
  
- (iii) **Allegation 2(Allowing Kristie to balance and cash)** Kristie had been my training officer for the two months I have been assigned to work as a teller. I was not aware that Kristie was restricted from working with me in my till and as the supervisor, in charge of looking after all operating till, I was in no position to question her authority.*

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<sup>53</sup>

A copy of that response is at Exhibit G1.

*My reflections: # The whole issue was triggered of (sic) by the report I made to the Team Leader Rishi Ram. The team Leader was not happy about my seeking advice from friends from Labasa. He mentioned to me that he could have sort things out internally.*

## Closing Submissions of the Parties

[36] The key issues arising out of the *Worker's Closing Submissions* filed on 19 October 2018, are as follows:-

- That the theft of monies at the bank by another bank officer, had taken place whilst the Grievor was not at work;
- The shortfall in the cash float was not detected by a second officer, who apparently was not cited for any breach of conduct; and
- That the bank did not give any consideration to the innocence and truthfulness of the Grievor during the investigation.
- That Savusavu is a small town and the impact on the Grievor's reputation and capacity to find another job is significant in such circumstances.

[37] In the case of the Employer<sup>54</sup>, the key issues that it raises are as follows:-

- The Grievor was well trained in *Westpac's Code of Conduct and Teller's M36 balancing procedures (which the Grievor admitted in cross examination)*
- The Grievor chose to believe another employee (albeit her supervisor) instead of declaring the discrepancy
- The Grievor was asked several times by the bank manager on consecutive days whether "everything was okay" and had the opportunity to disclose the discrepancy but the Grievor chose not to 'do the right thing' and disclose the discrepancy<sup>55</sup>.
- The Grievor's failures breached the relationship of trust and confidence, necessary between an employee and employer and warranted her summary dismissal.

## The Reasons for Dismissal

[38] The reasons for termination contained within the Dismissal Letter dated 15 January 2018, states that the Grievor had breached *Westpac's Code of Conduct* and Teller, Cash Management and Balancing Procedures. Within the Investigation Report prepared by Mr Versoni that seem to have informed the dismissal decision, the following characterisation of the breaches are made:

*Manaini Tuibua breached the Code of Conduct "we act with honesty and integrity" where Manaini failed to declare to the Team Leader at an earlier stage of the \$5000 outage rather than accepting Kristie's words and later admitting that*

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<sup>54</sup> See *Employer's Closing Submissions* filed on 5 November 2018.

<sup>55</sup> It should be noted here, that there is simply no such evidence of that. At best, the Bank Manager gave evidence that he asked that question on one occasion and it is noted that the Grievor formally responded to that allegation in her initial response to the allegations.

*Kristie's actions were suspicious in amending her Till M36 for three consecutive days (11/10, 12/10 & 13/10) when this incident was known. However, she is a new teller coached and groomed by Kristie who was her supervisor also, she was under some pressure from a Supervisor staff member.*

[39] The disciplinary action recommended within that Report for “failing to raise the cash discrepancy as required under Tellers procedures and reporting to Team Leader”, was that the Grievor should be dismissed. The Employer seems to be relying on three bases for justifying its dismissal decision, even though they have not been properly identified within the final dismissal letter itself. To repeat, these were cited as:-

- You have misconducted (sic) yourself by an act of omission or commission that is inconsistent with the due and faithful discharge of your duties; and/or
- You are guilty of not following standard telling procedures; and/or
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- You have acted in breach of the terms of your employment including but not limited to the Westpac Code of Conduct.

[40] Let us deal with these issues in turn.

### The Act of Omission or Commission

[41] The Act of omission that is alleged, is the failure of the Grievor to “declare to the Team Leader- Rishi Ram, the \$5000.00 outage in the till, when he asked (the Grievor) whether everything was fine”. Interestingly here, the Grievor states in her formal response to the allegations that it was Ms Kabure and not herself that had responded to the Team Leader<sup>56</sup>, although as mentioned earlier, the Tribunal notes the concession that was initially made by the Grievor to Mr Versoni during the Investigation Interview, that she did say, “yes it’s OK.” In her formal response, the Grievor stated:

*The question asked by the Team Leader in regards to the handing over of cash was directed to Kristie and I and Kristie declared to the Team Leader that the cash was in order. As a junior officer, who had never processed a loan drawdown, I believed that all was procedure which I had to tag along, (camera footage may verify this) Yes, I believed Kristie's story of a loan drawdown which made the issue looked okay to me, until I became suspicious and stated my own enquiries. I was misled and used.*

[42] Unfortunately during proceedings, neither party sought to ‘drill down’ into this issue and for that reason, the approach for how to deal with such matters, such as that provided by the Court of Appeal in *Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd*<sup>57</sup>, that recognised the importance of evaluating competing accounts of events, having regard to a witness’s

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<sup>56</sup> It is unfortunate that this issue was not clarified by Mr Naidu during the Grievor’s Evidence in Chief. Having said that, the Tribunal does not believe that Counsel for the Employer challenged the earlier assertion from the Grievor that in fact it was Ms Kabure and not herself that responded to Mr Ram in that way.

<sup>57</sup> [2013] FJCA 129; ABU0011.2012 (5 December 2013)

demeanour and linguistic ability when giving subsequent oral evidence, is not that assisting. It nonetheless should be pointed out, that the formal response provided by the Grievor to the allegations, was not suggested to be a 'recent invention' and so to that extent, needs to be assessed based on an evaluation of all of the evidence that has been given. That being said, this theme presented by the Grievor in response to this allegation, permeated the oral evidence that she gave. It was evidence given in a convincing and honest manner and the Tribunal found the reason that she provided, quite plausible in the circumstances. There are a couple of important issues here that should not be overlooked. Firstly, the Grievor had only be in the role of Teller for a little over three months<sup>58</sup>. Secondly, she had never undertaken a 'Till Handover' before, an issue that appears at least not from the evidence before the Tribunal, to have been factored into any considerations by the Employer. In this regard, the Tribunal notes the requirement at 7.1.4 of the Methods Manual, where it states:

*When satisfied that cash is correct, endorse face of Tellers Cash Specification with:*

*"Cash counted found to be correct and taken over by me (Amount in figures); (Amount in words); (Signature); Date".*

[43] At no stage during proceedings was this procedure discussed by either of the parties. Those words clearly do not appear on the documents Exhibit E1(e) or (f). The Methods Manual was clearly not being followed strictly by the Savusavu branch staff, nor does it appear that there had been any auditing of its adherence by the bank manager who was in charge of the branch at the relevant time. And of course the question as to whether the Grievor had been trained in relation to loan drawdown procedures, is also one that was not raised by the Employer. Put simply, the Grievor did not appear to have the sufficient skills and experience to have been placed in the position that she had, as a Teller. It seems quite clear, as the Grievor stated, that she was only placed in that situation due to staff shortages at the bank at that time. The Grievor claims she was pressured into the role by Mr Ram and Ms Kabure and the Tribunal accepts that to be the case.

### Did the Grievor Commit an Act of Omission or Commission ?

[44] Whilst the Employer has at some point in its investigation process, sought to characterise this first issue as either an act of omission or commission, it does not seem to have pressed the notion of commission. That is a fairly important point. To suggest that there had somehow been some collusion between Ms Kabure and the Grievor would have transformed the allegation into something far far more serious. Instead, what appears to be on foot, is a failure to follow procedure. So if the Grievor is being accused of falsely entering the words, "Cash counted found to be correct and taken over by me (Amount in figures); (Amount in words); (Signature); Date" on the Form M36, then she cannot be strictly accused of that, as such words have been entered nowhere on any of those forms. According to the Grievor, this was her first 'handover' and the Employer has led no evidence whatsoever as to what, if any, training she was given in this procedure. All that is clear from the evidence, is that on the day in question, Ms Tuibua's supervisor oversaw the 'handing over' process. The Grievor had deferred to her instruction as to what should have taken place, on the basis of her position and the fact that Ms Kabure had

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<sup>58</sup> It is unclear from the evidence, if this calculation included or excluded the period of recreational leave that was taken by the Grievor immediately prior to her return to work on 11 October 2017.

previously acted in the capacity of the Bank Manager. How would a person who had only been in the role for a little over three months and who knew nothing about the way in which the 'draw down' process for a Personal Loan Unsecured operated, be in a position to immediately know any better. The Grievor admits feeling a little uneasy with what was being told to her, but she had not at that stage formed the view, that what was being told to her by her supervisor, was blatantly wrong. And the Employer can point to no precise training that deals with such a case scenario and what should take place in such circumstances.

[45] It is simply pushing the envelope too far, to claim that such a suspicion when it was first formed on 11 October, falls within the ambit of the definition of 'reportable conduct' for the purposes of the Employer's *Whistleblower Policy*<sup>59</sup>. Furthermore, for the next two days, it was Ms Kabure who took over the cash counting and completion of the M36. Yes, the Grievor was aware that the \$5000.00 was still unaccounted, however she had still not understood that her supervisor was in fact deceiving her at that point in time. Had the suspicion continued for longer than the fourth day, particularly after the family discussions that were taking place regarding Ms Kabure, then a different scenario would have emerged and the credibility of the Grievor would have been at issue, but up and until this point in time, the Tribunal does not in the circumstances regard the conduct as being one of omission. Perhaps it was naïve, but there is no policy in place that addresses that question. Nor is there any policy or training that the Employer can point to, that considers this sort of issue. That is, even if you have any doubt whatsoever about a work procedure, that you need to raise the concern with your Team Leader, or if the concern is in relation to one of her or his decisions, then someone else.

[46] There is certainly no evidence at all, that the Grievor in some way has been unfaithful in the discharge of her duties. The Grievor's demeanour in the witness box, gave anything but the impression that she was an unfaithful worker. The Tribunal heard of a woman who in effect sacrificed her own health and that of the child that she was carrying at the time, when she would worked through lunch hours to attend to customer inquiries because of staff shortages at the Savusavu branch. That issue appears to be one that was overlooked by the Employer when considering the question of 'proportionality' as part of its investigative activity. That is, was the dismissal in these circumstances, just too harsh<sup>60</sup>.

### Is the Grievor Guilty of not following Standard Telling Procedures?

[47] The Grievor did not follow the standard telling procedure, based on the instruction of her supervisor, Ms Kabure. The fact that Ms Kabure had her own motive in giving such an instruction, does not override the ostensible authority that she had to direct and influence the work practices of the Grievor, particularly where the Grievor was confronted with a matter that she had no previous knowledge of, in relation to the 'draw down' procedures for unsecured personal loans. The issue that has not been particularly well ventilated by the Employer, is whether or not the failure by the Grievor to follow the procedure, is characterised as a breach of contract, or an act of negligence, being conduct that was either reckless, intentional or a simple mistake undertaken in good faith.

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<sup>59</sup> See Exhibit E14 and the definition at Section 4 of that policy document.

<sup>60</sup> Not that this would give rise to an excuse for any failure to act, but it nonetheless was demonstrative of a commitment by the Grievor to her Employer, that appears to have been overlooked.

## The Issue at Contract

[48] It is useful from a contractual view, to consider for a moment how it is said that breaches of the Code and Procedure, give rise to the right to bring the contract to an end. Exhibit E7 is the Employment Contract that the Grievor entered into with the Westpac Banking Corporation on 8 June 2016. It is noted that the Letter of Offer of that date, together with its attachment, 'Employment Terms and Conditions' make up the contract between the parties.<sup>61</sup> As can be seen at page 3 of that Attachment under the heading of 'Policies', the following words are contained:

*You must observe and comply with Westpac's procedures and policies including, but not limited to:*

- *Code of Conduct*
- *Conflict of Interest Policy*
- *Discrimination and Harassment Policy*
- *Dress and Personal Appearance Policy*
- *Information Security Policy*
- *Technology Code of Use.*

*These policies will be available on the intranet.*

*Westpac may vary, replace or discontinue any of its policies, including those set out above. They are not incorporated as terms of your employment contract. Please familiarise yourself with all updated versions of applicable procedures and policies.*

[49] Contractual terms such as these, are most interesting. Firstly, the language within pages 3 and 4 of the Terms and Conditions attached to the Grievor's offer letter, specifically seeks to exclude any of the policies and procedures from being incorporated into the employment contract, presumably to avoid the obligations that may otherwise be imposed on the employer.<sup>62</sup> As Weinberg J, said in *McCormick v Riverwood International (Australia) Pty Ltd* "(t)he actual terms of a contract are those which the parties intended to incorporate in that contract."<sup>63</sup> That being said, such policies can still be interpreted by the courts in order to give meaning to them and consider how and in what sense the obligations may not have been met. In *Goldman Sachs J B Were Services Pty Limited v Nikolich*,<sup>64</sup> Black CJ, with whom Marshal J agreed, saw that in the case of policy documents where they are being relied upon by parties, a distinction needs to be drawn between the language of "aims" and "guiding principles", as opposed to

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<sup>61</sup> Within the Offer Letter it has been described as "The Agreement of your employment with Westpac".

<sup>62</sup> *McCormick v Riverwood International Australia Pty Ltd* [1999] FCA 1640 (26 November 1999) (1999) 167 ALR 689

<sup>63</sup> *Ibidem* at [78].

<sup>64</sup> [2007] FCAFC 120 (7 August 2007)

“absolutes or guarantees”. That is to distinguish between the aspirational rather than the obligatory. In *Westpac Banking Corporation v Wittenberg*,<sup>65</sup> Buchanan J of the Federal Court of Australia with whom McKerracher and White JJ agreed, recognised that

*it is an error of analysis to argue from the language of a policy to a conclusion that the terms of the policy are contractual. The analysis must begin with the terms of the contract itself. Then, if it is suggested that a requirement for obedience to the terms of a policy (or any other instruction) by an employee is an aspect of some mutual or reciprocal obligation to obey the policy a further enquiry is warranted and necessary. It is whether the employer is free, at its own discretion and without any form of consultation with an individual employee, nevertheless to unilaterally alter the policy – i.e. its own policy. If it is, I do not readily see how the terms of the policy can be seen as a mutual statement of contractual rights and obligations. It is generally not suggested in cases of this kind that any contractual obligation represented by the policy remains fixed as at the date of contract. It is generally accepted that an employee must comply with the terms of the policy as set by the employer from time to time. That feature, in my view, denies the necessary quality of mutuality. That mutuality is not supplied by what is, in truth, an acknowledgement by an employee in a contract of employment that the policies of the employer are relevant instructions or directions which must be complied with.*

[50] In the present case involving this same employer, it is therefore necessary to consider the nature of the instructions given to the Grievor, so as to understand whether or not the breaches alleged, would give rise to a justifiable dismissal for the purposes of the *Employment Relations Act 2007*. In this regard, there is no evidence whatsoever as to the specific ‘formal’ training that was undertaken on telling procedures, either as to when, in what form and by whom. Whilst Mr Ram gave evidence as to the ‘on the job training’ for tellers and the Grievor spoke of the training and supervision she received from Mr Ali and Ms Kabure,<sup>66</sup> there is no evidence of the form of training that took place in relation to the *Methods Manual*,<sup>67</sup> that was tendered during proceedings as setting out the Employer’s policies and procedures for the handling and management of Teller’s cash. The failure to follow the policy or procedure, may ultimately give rise to a claim that there has been breach of a contractual term<sup>68</sup>, however the question needs to be asked, is such a breach in the circumstances in which it has occurred, so pervasive and of such a type, so as to justify the termination of the contract<sup>69</sup>. After all, this was not a repudiation by the Grievor, she was admittedly under a mistaken belief, but there is no evidence that she knowingly and wilfully disregarded the procedure. There was no evidence of any intent to do so and the Employer cannot establish the same, based on the evidence that has been adduced in submissions and at trial.

[51] As the Employment Contract between the parties makes clear, Westpac’s policies and procedures (including its Code of Conduct) do not form part of the contractual terms between

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<sup>65</sup> [2016] FCAFC 33 (14 March 2016)

<sup>66</sup> See Paragraph [23] of this Decision, where that evidence has been canvassed.

<sup>67</sup> See Exhibit E 15

<sup>68</sup> Such as the implied duty to exercise care in performing the work; obedience to lawful orders and honesty in dealing with an employer’s money and property

<sup>69</sup> Note here there does not appear to be any endorsement made on the Tellers Cash Specification on 11 October 2017 [See Exhibits E1(e) and (f)], in accordance with the requirement set out in Procedure 7.1.4.2 of the Methods Manual (Exhibit E15).

the parties. With that said, any claim that there has been a breach of contract by the Employee must arise as a result of her failure to carry out her duties,<sup>70</sup> or alternatively as a result of an implied term such as the exercise of care in doing the work; obedience to lawful orders and honesty in dealing with an employer's money and property. Once it had been established, if it can be, that the contractual term has been breached, then the issue arises as to whether the breach is a minor one, or one being so essential to the terms of the contract, that it gives rise to the right of termination of the contract at the initiation of the employer. That is the contractual position. It is not necessarily the same analysis that is undertaken at statute to determine whether a dismissal is justified, though it may very well assume the same steps and considerations.

[52] Yes, it is accepted that the handling of cash and balancing processes must be undertaken in a meticulous manner, that is error free. It is also accepted that such an expectation is an essential one to the contract of the parties, but that in itself doesn't mean that an error of judgment on the part of the Grievor gives rise to a justifiable termination of contract, on the basis that this essential requirement has not been met. The Employer has responsibilities to the Grievor in such a situation. Allegations of failure to exercise due care and diligence for example, may not be sustainable in the case where an employee is not adequately trained. Further, the Grievor had been misled by her very own supervisor and had submitted to her instruction in how to deal with a situation. This could easily be viewed as falling within a hierarchy of lawful orders issued, that prima facie, there was a reasonable expectation that the Grievor would obey. The Grievor did not have the full set of skills to fully comprehend the information that was being provided to her by her supervisor Ms Kabure. Certainly the Employer has provided no evidence whatsoever in relation to what took place on the subsequent days the 12<sup>th</sup> and 13<sup>th</sup> October. There was no evidence at all that the Team Leader made inquiries of the Grievor on those days and asked specifically, was everything ok<sup>71</sup>? It would seem that the checks and balances in relation to the supervision of the Grievor, were all coming through Ms Kabure at that time. Surely the bank must also be required to accept responsibility for the conduct of Ms Kabure.<sup>72</sup>

[53] The Tribunal accepts that the Grievor had been conducting herself in good faith. The term 'good faith' is concerned with the 'ends' to which an employee's conduct is directed, as opposed to the 'means' by which those ends are achieved or beliefs are ascertained. That is, whether they had been achieved negligently or recklessly. At least within the context of an employee performing a statutory function, some guidance can be provided from the words of Dixon J in *Little v Commonwealth*<sup>73</sup>, where his Honour noted,

*The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purposes of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care of judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at*

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<sup>70</sup> See Exhibit E7 and the Terms and Conditions of Employment, set out as Attachment 1 to the Letter of Offer. Note here, the clause dealing with 'Position and duties'.

<sup>71</sup> Despite the suggestions within the *Employer's Closing Submissions* that "the Grievor was asked several times by the bank manager on consecutive days whether everything was okay?" The Tribunal has neither recollection nor record of any such evidence being adduced in proceedings.

<sup>72</sup> For example, what sort of supervision was in place to overview the conduct of Ms Kabure?

<sup>73</sup> (1947) 75 CLR 94 at 112.



*the same time justify the conclusion that he acted bona fide in the course he adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive element.*

[54] To put it another way, conduct that is otherwise tortious or in breach of contract, may still be done in good faith, despite that it may have taken place due to carelessness or a mistaken belief or ignorance of certain facts. To that end, the Tribunal would be of the view that even though the issue of handling, custody and control of cash is at the heart of the bank's core business, that does not alter the fact that the Grievor's breach of contract, was without intent. The likely consequence of this would be that such a breach would hardly amount to one that would give rise to the right to terminate the contract. In the circumstances of this case and based on the evidence before the Tribunal, including the skills and training provided to the Grievor at that time, her conduct cannot be regarded as so grossly negligent, that it would justify being classified of a breach of that type.

### Did the Grievor Breach the Westpac Code of Conduct?

[55] The Westpac Code of Conduct was tendered during proceedings. At no stage, was any effort made by the Employer to isolate the specific provisions or obligations that it claims have been violated, beyond the claim that the Grievor "had failed to act with honesty and integrity."<sup>74</sup> In fact the report that was prepared following the investigation had this to say:

*Manaini Tuibua breached the Code of Conduct "we act with honesty and integrity" where Manaini failed to declare to the Team Leader at an earlier stage of the \$5000 outage rather than accepting Kristie's words and later admitting that Kristie's actions were suspicious in amending her Till M36 for three consecutive days (11/10, 12/10 & 13/10) when this incident was known. However, she is a new teller coached and groomed by Kristie who was her supervisor also, she was under some pressure from a Supervisor staff member.*

[56] It is perhaps useful to look at the specific section of the Code that is it is claimed the Grievor has breached. The section of the Code deals with the principle, 'We act with honesty, integrity and due skill, care and diligence'. The principle is described in this way:

*Trust is the foundation of our profession. We do the right thing because it is the right thing to do. Honesty and integrity go hand-in-hand. They guide us in making decisions, so that we make the correct choices between right and wrong.*

*Acting with due skill, care and diligence requires you to understand and perform your duties competently, professionally and in accordance with our controls, risk management processes and policies including this Code.*

*There is no room for compromise on these values. If we do not meet these 100% of the time we are undeserving of the trust of our customers, colleagues, community and shareholders. We will accept responsibility for our actions.*

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<sup>74</sup> Note specifically the language used within the heading entitled, 'Remarks', at page 3 of the Memorandum to the General Manager, dated 9 November 2017 ( See Exhibit E12).

*Similarly we should not put ourselves in a position of conflict with the interests of a customer, nor favour the interests of one customer over another – see "7. We manage conflicts of interests responsibly".*

[57] Let us look at the details of these principles within Section 1 of the Code, with a little more precision.

[58] The first example given, seems to focus on the choice between what is right and what is wrong. This is a very binary view of how decisions should be made. The question of fact to be determined, is whether or not the Grievor chose a particular course of action that was wrong. In saying that, within the preceding words of the somewhat vague language that it follows, means either that the decision was dishonest or lacked integrity. The term integrity, conjures up a meaning of a quality of honesty, or of strong moral principles. The Tribunal does not accept that the Grievor was acting dishonestly, or without moral principle. She was clearly under a mistaken belief, but to be accused of the other, would require an intention or purpose. No such intention or purpose has been established.

[59] The second example given within the Code, requires that employees act with due skill, care and diligence that requires they understand and perform their duties competently, professionally and in accordance with the Employer's controls, risk management processes and policies. In some ways some of these issues have already been canvassed. The first obligation imposed by this example, is that the Grievor exercises due skill, care and diligence. The skill in this regard can only possibly be, that which the Grievor brought to the employment relationship, coupled with that she had acquired through the various skills training that was made available by the Employer. Whether the Grievor does this competently, professionally and in accordance with the Employer's controls, risk management processes and policies, will be as much about the Employer's training and supervision, as it is about the employee to whom the obligation applies. The key phrase within this example is that it "require they understand... their duties". That is the point here. The Grievor who had been in the Teller Box for a little over three months, clearly did not fully understand her duties. She was told by her Supervisor that there was an explanation for the shortfall and she believed her. This was the first 'hand over' that had taken place with the Grievor and there was no evidence at all, of any training that had taken place that specifically dealt with that issue.<sup>75</sup> Specific training in this regard could have been, are there any circumstances, where the cash count does not reconcile, because of loans, vouchers or other outstanding transactions; or What do you do if you don't believe the information that you have been provided by one of your supervisors is correct? That is, where you think he or she is providing you with incorrect information, but you have not as yet formed a view that it is dishonest or reportable conduct for the purposes of the Whistleblower Policy.

[60] The third and fourth clarifications of the principle, do not really advance the analysis any further.

[61] In summary, the Tribunal reaches the view that the Grievor has not breached the Employer's *Code of Conduct*. There was simply no dishonesty on the part of the Grievor that has been demonstrated. Mr Ram said that he had asked the Grievor, "was everything ok?", on the day that she had taken over the Till. Despite the initial concession that was made in the telephone interview with Mr Versoni, the Grievor stated in her formal response to the

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Again note here, Section 7.1.4 of the Methods Manual (Exhibit E 15).

allegations, that it was Ms Kabure, who answered to that question and not her<sup>76</sup>. In the circumstances of this case, the Tribunal accepts, based on a consideration of all evidence including the respective demeanours of Mr Ram and the Grievor in the witness box, that this would have been the more likely scenario. The issue of skill has already been canvassed and there would be no further purpose achieved in repeating that analysis. Insofar as the question of whether care and diligence has been applied, again that is a rather vexed issue. One can only exercise care and diligence within the context of that which is within one's knowledge or capacity. Yes, the cash float was out \$5,000, but to a new teller such as the Grievor was, her supervisor had provided a plausible reason for this difference<sup>77</sup>. At first blush, there was no extra due diligence that was required. It may have come about had the Grievor been provided training where it was made very clear, that under no circumstances ever, is the Till not able to be balanced and cash accounted. It may have also come about had the Grievor understood the drawdown procedure for unsecured personal loans, but she did not. The Tribunal does not accept that the Grievor was put on notice at that time. She was simply oblivious to the subterfuge that had been carried out by her Supervisor.

### What is the Appropriate Test to be Applied in the Case of Assessing a Justifiable Dismissal?

[62] The question then turns as to whether or not the dismissal decision was justified in the circumstances. In relation to this question, the Employer asserts that:

*The function of the Tribunal is to review the employer's decision and is not in the nature of a rehearing and the Tribunal must not substitute its own decision or "override" the employer's (per Gates J in Thomas v FEA and Winter J in State v Arbitration Tribunal, FBFSEU & Aseri Kolikata Ex Parte LICl)*

[63] These sentiments of the Employer have been previously addressed by the Tribunal in the case of *Buna v Goodman Fielder International (Fiji) Ltd*,<sup>78</sup> when on that occasion in relation to the decision in *Thomas v FEA*, this Tribunal stated

*There are a couple of observations that must be made. Firstly, the decision to which his Lordship Gates J, as he then was refers makes the distinction between the role of the Employment Tribunal and that of the appellate bodies. This is quite an important distinction. The Tribunal is involved in a hearing of the evidence. The fact finding nature of the Tribunal lends itself to be able to make an informed view as to whether in the context of all issues, the decision of an Employer to dismiss a worker was justified or not. The activity is not restricted to a review of the employer's decision per se. That may be the ultimate act to take place, when reaching a decision as to whether a dismissal was unjustified or unfair, but it is quite appropriate to take evidence from a variety of sources so as to form that view. Secondly and far more importantly the Tribunal is not restricted in substituting or overriding the Employer's decision, in circumstances where the decision cannot be justified.*

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<sup>76</sup> Whilst it is acknowledged that this issue was not pursued by Mr Naidu during the Evidence in Chief of the Grievor, this may be as much about the fact that the issue was overlooked as anything else and the Tribunal is not prepared to disregard the earlier written statement given by the Grievor to that effect.

<sup>77</sup> That is, plausible to a person who in effect was a Teller in training.

<sup>78</sup> [2017] FJET 11; ERT Grievance 176.2016 (10 August 2017)

[64] The second case, that is referred to by the Employer in *State v Arbitration Tribunal & Ors*, correctly cites Winter J as stating in his decision of an appeal against the Arbitrator dated 25 February 2005, that:

*I keep in mind that the test for justifiable dismissal is whether the decision to dismiss was a reasonable and fair one; was a dismissal a course reasonably open to the employer in the circumstances; when applying to these enquiries the civil standard of proof it is necessary to keep in mind the distinction between the enquiry the employer makes and the enquiry the Tribunal or Court subsequently may be called upon to make. To fail to do this may result in the view of the employer, reasonably formed, being overridden by views of the Court or Tribunal formed perhaps with the benefit of hindsight (*Northern Distribution v BP Oil New Zealand* [1992] 3 ER NZ 483 at 488*

[65] There are nonetheless a couple of obvious comments that can be made arising from his Honour's decision that was made prior to the *Employment Relations Act* 2007 coming into effect. Firstly, in Fiji, it is important with the advent of the *Employment Relations Act* 2007, not to confuse concepts of unfair and unjustified dismissals<sup>79</sup> and in particular to note that the approach taken within New Zealand legislation is quite distinctive from that now taken in Fiji. As Wati J has made quite clear in *Yanuca Island Ltd v Vatuinaruku*<sup>80</sup>

*It was argued by Mr. Apted that in determining whether the termination was justified, the ERT relied on the test for justification provided for under the New Zealand legislation when there exists no such equivalent provision in the ERP.*

*It was argued that the New Zealand legislation contains only the ground for unjustified dismissal covering both justification and fairness but the ERP has separate grounds for unjustified and unfair dismissal. This is clear upon perusal of s. 230 (2) of the ERP. Fiji has been using the common law tests for unjustified and unfair dismissal.*

*Indeed, in determining whether the dismissal was justified, the ERT relied on s. 103(1) (a) & (b) of the New Zealand Employment Relations Act 2000 which says that:*

*“For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred”.*

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<sup>79</sup> See an analysis of the development of those concepts within the current *Employment Relations Act* 2007 in *Kumar v Nanuku Auberge Resort Fiji* [2017] FJET 2

<sup>80</sup> [2017] FJHC 92; ERCA9.2014 (8 February 2017) at Paragraphs [34] to [38].

*I agree with Mr. Apte that Fiji has always followed the common law concept of what is unjustified and unfair dismissal. Under the New Zealand legislation, what appears is that when the issue of “unjustified dismissal” is concerned, the law looks at both the aspects of the employer’s actions and how the employer acted.*

*I repeat that when the issue of “justified dismissal”, in cases of summary dismissal is under consideration, the reasons why the employee is terminated and the procedure leading to the termination is examined. When the issue of “unfair dismissal” is considered, the law looks at how the employer acted and behaved in carrying out the dismissal. The NZ legislation appears to encompass all the factors under one head of “justified dismissal”. If we are to follow the NZ legislation, it would mean a departure from the existing laws that Fiji has followed all these years and since these principles had been followed and applied in higher appellate courts, the ERT and this Court has no power to change the law based on some other country’s legislation.*

[66] A similar note of caution was given by this Tribunal in the case of *Cere v Air Terminal Services (Fiji) Ltd*,<sup>81</sup> when it was stated:

*....., the Grievor makes reference to several English Authorities, that are based on a statutory prescription provided for under the then Employment Rights Act 1996 (UK). As has been alluded to by this Tribunal on previous occasions, that legislative scheme and statutory direction provided by the language of Section 98(4) (a) of that Act needs to be seen and confined to that statute. The concept of ‘reasonableness’ for example, is different to that of whether a decision is justified. As Lord Hailsham LC said in *re W (an infant)*,*

*“Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable.”*

*The distinction between the concept of ‘reasonableness’ as opposed to an unjustifiable dismissal, can easily be ascertained when one considers the meaning of the word justification. The origin of the word is sourced from the Latin *justifacare*, meaning to vindicate or to make just. Put another way, if a dismissal was not justified, it would be said to have not been done justly toward someone, or that it was not just. That it could not be vindicated. As such, the concepts of ‘unjustifiably’ and ‘unfairly’ dismissed as they appear within Section 230(2) of the Employment Relations Act 2007, come about and have quite a distinctive jurisprudence.*

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[2017] FJET 25; ERT Grievance 198 of 2017 (11 December 2017)

[67] And whilst it may be the case as Winter J suggests, that Tribunals must resist applying tests that with the benefit of hindsight undermine the right of an employer to make reasonable decisions, the fact of the matter is, that with the advent of the *Employment Relations Act 2007*, the Tribunal needs to ascertain whether the decision is justified. Many Employers unsurprisingly come to this Tribunal claiming their conduct has been reasonable. But to restate Lord Hailsham's words, not every reasonable exercise of judgment is right. The Tribunal is well entitled to interrogate the rationale for how and why a decision to dismiss an employee has been made, so as to ascertain whether it is justifiable for the purposes of the Act. These present proceedings warrant no deviation from that approach. To recap the views expressed in *Kumar v Nanuku Auberge Resort Fiji*<sup>82</sup>, it has been said:

*As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, Can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68<sup>th</sup> International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.*

*Northrop J in Selvachandran v Peteron Plastics, provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid one. In that case, his Honour stated:*

*Subsection 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is "Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."*

*In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a*

*reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd, 5 May 1995, unreported, when Considering the construction and application of section 170DC.*

*...the concept of what constitutes a justifiable decision within the meaning of Section 230(2) of the Promulgation, could well canvas such concepts as to whether the dismissal decision was sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced.*

### The Relationship of Trust and Confidence in Banking : Should a Different Test Apply?

[68] Within the *Employer's Closing Submissions* it is stated that the relationship of trust and confidence between an employee and employer is heightened in the banking industry, because of the higher standard of honesty and integrity required when dealing with third party monies. To support that proposition, the Employer has relied on several authorities both locally and overseas. In the first of these, *National Bank of Canada v Diane Lepire*,<sup>83</sup> a bank officer of some 26 years' service, granted a loan to her mother in breach of the bank's Code of Professional Ethics and was subsequently issued a suspension from employment for 10 days. Six months' later, the bank officer opened an account in collaboration with her former husband, assigned the account a rating that was not consistent with that of her husband's financial situation and granted the account's user the right to limitless deposit withdrawals and no holdback of funds<sup>84</sup>. There is simply no comparability in the conduct of Ms Lepire and the Grievor, nor any benefit in attempting to draw any lessons whatsoever from that case when assessing whether the Grievor's dismissal is justified or not.

[69] The second case that has been advanced by the Employer to claim that some sort of elevated notion of trust and confidence should be applied, is that of the Arbitration Tribunal of Fiji in the case of *Fiji Bank and Finance Sector Employees Union v ANZ Banking Group Pty Ltd*.<sup>85</sup> Again, the Tribunal finds it quite difficult to draw any lessons outside of the most obvious that employees must be unscrupulously honest at work. In this case, a bank officer appears to have knowingly exploited an error made by a customer by deliberately concealing monies, modifying a deposit slip to coincide with the concealment and then storing the \$2000 into her cubicle drawer. When challenged by the Employer, the employee claimed that she had "retain(ed) the money in her draw overnight as she expected the customer to return the next day". That explanation was not accepted by the Arbitration Tribunal. The conduct was clearly seen as opportunistic and with the intent to defraud the customer and bank of those funds. Again whilst that scenario may be worthwhile considering in the case of the Grievor's supervisor Ms Kabure, who in fact admitted to having had taken the funds from Westpac, it is simply not of a category of case that is comparable to that before this Tribunal, relating to the Grievor herself.

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<sup>83</sup> (2004), 26 F.T.R. 138 (FC), 2004 FC 1555.

<sup>84</sup> Ibidem at [4].

<sup>85</sup> Case No 63 of 2006 (5 December 2006).

[70] The final case that has been put forward consistent with this theme, is that which has been cited as *Fiji Banks (sic) and Finance Sector Employees Union v Colonial National Bank*.<sup>86</sup> Again the conduct of the dismissed employee appears to have been of a type, that is distinguishable from that of the Grievor. In the *Colonial National Bank* case, the employee knew full well that the conduct of his supervisor was wrong. It was more than just an erroneous understanding, or a supervisor 'hoodwinking' or 'guising' a sub-ordinate as is the scenario in the present case. In *Colonial National Bank*, the employee knew that he had given cash from his till, a few times, for the personal request of his supervisor and that he was assured that "he will return the same if he does not use it". In the case of the Grievor, she was completely ignorant of the fact that the supervisor had misappropriated monies for her own purpose.

[71] All three cases provided by the Employer, do no more than restate the very obvious, that in the case of banking employees, or for that matter any employees dealing with monies, that they have to be completely honest in their handling of same. Of course the conduct in such cases is also demonstrative of the fact that the employee's behaviour has undermined the very foundation of the duties of trust and confidence owed to the employer, however in all three cases the conduct is of such a completely different complexion to that of the Grievor, that there is very little value attempting to draw any relationship to the present set of facts.<sup>87</sup>

[72] The Tribunal does not see the justification in the dismissal. The action taken by the Employer based on these circumstances was just too harsh. The Grievor should have been sanctioned, demoted, placed on a performance improvement plan or issued with a first and final warning, but to dismiss the employee for following the instructions of a supervisor does not seem justified, particularly when the Grievor herself struggled with the conduct of the supervisor for a couple of days before seeking the assistance of another bank employee and ultimately making contact with the Branch Manager. There was simply no evidence of relevant training that dealt with the specifics of a case of this type<sup>88</sup>. That is, in circumstances where an employee was unclear of the validity of the instructions that she was receiving from a supervisor. It is also important in cases of this type, to ensure that the Tribunal does not seek to apply a higher statutory test as to what is justifiable or not, for the simple fact that the Employer is a bank and the worker is handling cash. If that was the case, every dismissal that deals with the performance or actions of an employee working in a bank, would face an almost insurmountable obstacle.

[73] The same considerations should apply, whether a person is working in a bank, bakery or bail yard. The bank's own systems had failed. The Tribunal does not accept the view that was provided by the investigator Mr Versoni, that there was nothing wanting in the initial cash count involving Ms Kabure and Mr Baro, on 9 October 2017, when the cash first went missing. The Employer did not lead any evidence whatsoever as to who counted that Till with Ms Kabure the following day. Did that person know the money was missing? Even before the Grievor had become involved, the cash had been missing for approximately 48 hours. The Employer can hardly stand on the high moral ground and claim that its own systems were exemplary in this regard. The shortfall should have been detected earlier.

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<sup>86</sup> [2004] FJAT 39; Award 33 of 2004 (31 August 2004)

<sup>87</sup> It is far too easy for an employer (or its representatives) to make such a claim, without truly justifying the basis upon which it is made.

<sup>88</sup> Refer to Exhibits E8, E9 and E14.



## The Question of Unfairness

[74] In *Josifini Lagi v Nadi Town Council*<sup>89</sup> this Tribunal stated:

*The question of whether the dismissal was fair in my mind is quite clear. ....The issue is whether in carrying out the dismissal, the Employer acted in a manner that was harsh, aggressive, humiliating, degrading, embarrassing, or in a manner that otherwise causes humiliation, bad repute and injury to the feelings of the worker.*<sup>90</sup>

[75] The Tribunal accepts that Savusavu is a small town and that the dismissal decision has had a profound impact on the Grievor. It should be noted here, that the Grievor's family operates a restaurant across from the bank premises, so it would possibly have been, at least at the initial period post termination, a very sensitive situation for many of the residents who frequented either business. Whilst of course, cases of this type are part and parcel of everyday life, that does not though diminish the fact that a decision made, where it is not justified could very well give rise to issues that cause unnecessary embarrassment or damage to reputation. For the reasons about to be given, the Tribunal does not wish to focus on that particular aspect of the legal analysis, even though there appears to be some overlapping of matters that could give rise to a claim of both unjustifiable and unfair dismissal.

## Conclusions and Other Issues

[76] Section 230 (1) of the *Employment Relations Act 2007* provides

*If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—*

- (a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;*
- (b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;*
- (c) the payment to the worker of compensation by the worker's employer, including compensation for-*
  - (i) humiliation, loss of dignity, and injury to the feelings of the worker;*
  - (ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or*
  - (iii) loss of any personal property.*

[77] It is noted within the Second Reading Speech of the *Employment Relations Bill 2006*, by the then then Honourable Minister K Datt, that

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<sup>89</sup> ERT Grievance 173 of 2016; [2017] FJET 7; ERT Grievance 173.2016 (27 March 2017)

<sup>90</sup> See *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku* [2017] FJHC92 at [61].

*Consistent with the emphasis on the maintenance of the employment relationship wherever practicable, reinstatement becomes the primary remedy for grievance where that is sought by the complainant<sup>91</sup>.*

[78] In this case, such a remedy is deemed as appropriate. Savusavu is a small, albeit developing rural township and the Grievor is a wife and mother whose family support base is located in that town. These factors support a reinstatement in the Grievor's home town. The Tribunal is of the opinion that the Grievor should be returned to a Customer Services Officer role within the branch.

[79] There is no reason why an international employer such as Westpac should lack the human resource management tools and capacity to be able to successfully facilitate such a request. It simply requires the guidance of an experienced staff member or advisor, who is skilled in such matters. The Tribunal will order that the Respondent Employer give effect to this decision and that the Grievor should commence employment by 3 December 2018.

[80] In relation to what sort of compensation should the Grievor receive for the purposes of Section 230(1) (b) of the Act, the Tribunal is of the belief that some level of discounting should take place, due to the negligence of the employee. For that reason, it is proposed that the employee be reimbursed for her lost wages as a Teller during the period of absence from the workforce from 15 January 2018 to 30 November 2018, less a discounting of 25% for her own contribution. In all other respects the Grievor's employment record is to reflect the continuity of service for the relevant period. To restate, the Grievor should only be reinstated to the position of Customer Services Officer and not Teller.

[81] If it is the case, that at some future stage the Employer is satisfied that the Grievor has the necessary skills and abilities to undertake the task of a Teller, then it would be appropriate that she be given that opportunity. The Tribunal is nevertheless of the view that the Grievor was never suitably trained in all procedures at the requisite level, so as to ensure that she could satisfactorily perform the role and to do so in a manner that would not place the bank's operations at risk. Keep in mind here, the Grievor's evidence was that she was 'talked into' doing the role, by Mr Ram and Ms Kabure, because of the staff shortages at the time. For an international bank, or for any employer for that matter, to make staffing decisions on that basis, is obviously fraught with risks.

[82] What this case highlights, are the various issues that need to be considered when choosing the most effective and reliable workplace training delivery methods.<sup>92</sup> In particular, the case seems to expose the shortfalls in online learning and workplace training manuals, where they are not supplemented with ongoing and 'face to face' instruction, guidance and supervision, from skilled, honest and experienced staff.

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<sup>91</sup> See Parliamentary Hansard of the House of Representatives, 22 June 2006, p580.

<sup>92</sup> An objective analysis of Exhibits E8, E9 and E14, would suggest that on some occasions, something more may be required.

## Decision

[83] It is the decision of this Tribunal that:-

- (a) The Grievor was unjustifiably dismissed in her employment
- (b) The Grievor should be reinstated to the position of Customer Services Officer, at the Savusavu branch of the Westpac bank.
- (c) The Grievor should be reimbursed 75% of the lost earnings in her position as Teller, for the period 15 January 2018 to 30 November 2018.
- (d) The Applicant should prepare draft Orders to give effect to this decision and submit them to the Registry, within seven days.



**Mr Andrew J See**  
**Resident Magistrate**