



VIRGIN ISLANDS

**LABOUR CODE, 2010
(No. 4 of 2010)**

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2022/004

BETWEEN

TAMISHA DENNIS

COMPLAINANT

AND

FIRST CARIBBEAN INTERNATIONAL BANK

RESPONDENT

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Dancia Penn KC** and **John Carrington KC**, sitting as arbitrators

HEARING ON: 15 and 21 February 2024

SUBMISSIONS: 5 and 8 March 2024

DECISION ON: 1 August 2025

IN ATTENDANCE: (1) Tamisha Dennis, the Complainant
(2) Jamal Smith, instructed by Thornton Smith, legal practitioners for the Complainant
(3) Fabian Devonish, Retail Branch Manager of the Respondent
(4) Paul Dennis KC, instructed by O'Neal Webster, legal practitioners for the Respondent

ADDITIONALLY: (5) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

REASONS FOR DECISION

Introduction

1. The Complainant filed a Dispute Claim Form dated 28 September 2021 with the Labour Commissioner seeking compensation for unfair dismissal. The claim was received by the Tribunal on 24 March 2022. The Complainant was employed by the Respondent as a customer service representative under an employment contract dated 18 October 2019 but with her employment commencing on 7 October 2019 [**Tab 6 page 47 of the hearing bundle**]. She worked with the Respondent from 7 October 2019 until her summary dismissal which took effect from 24 August 2021. She received a termination letter on that date [**Tab 3 page 24**].
2. She retained Jamal Smith as counsel. Mr Smith sent the Respondent a demand letter dated 6 September 2021 [**Tab 2 page 8**]. In the letter he sought compensation of \$500,000 on behalf of the Complainant. This sum is particularised in the appendix to the Complainant's Reply filed on 14 July 2023 [**Tab 10 page 246**].
3. The Respondent relied on section 101 of the Labour Code (**the Code**). It maintained that the Complainant's conduct constituted gross or serious misconduct of a nature which rendered it unreasonable to be required to continue her employment contract and that in the circumstances the dismissal was lawful and fair.

The written cases of the parties

4. The claim is based on the following:
 - a. unfair disciplinary action,
 - b. unfair dismissal,
 - c. unsafe workplace and
 - d. breach of privacy.
5. The 5-page letter describes the basis of the claim. The case, if we can summarise it accurately, is that on Monday 28 June 2021 the Complainant was not feeling well. She saw her doctor who recommended 3 days off work and advised her to return on Wednesday 30 June if she

did not feel any better. Early on 28 June her mother notified Etma Penn-Maduro, the bank's Customer Service Manager, of the Complainant being unwell. The Complainant also spoke to Mrs Penn-Maduro later that day from her doctor's office. There is dispute as what instructions the Complainant received in those conversations of 28 June. The bank on the one hand says she was instructed by Mrs Penn-Maduro and a health care worker, Harmonie Massiah, to get tested and to isolate and not to return to work pending testing. The Complainant's version is that at no time was she instructed to do any of these. This evidential difference forms the heart of the dispute between the parties. It is to be noted that neither Ms Massiah nor the Complainant's physician gave evidence.

6. Feeling better after three days off work, the Complainant returned to work on Thursday 1 July. Fabian Devonish, the Retail Banking Manager, immediately called in the Complainant to a meeting with himself and Mrs Penn-Maduro and they contacted Ms Massiah by telephone who spoke to them on speaker in the presence and hearing of the Complainant. He asked the Complainant to return home. She was directed to take a Covid-19 test. The test was returned positive on Friday 2 July [**Tab 3 page 11**]. She returned to work on Monday 19 July without first notifying the bank. She produced a negative test when asked. She was then informed that she would be under investigation and was placed on suspension with full pay. She received a letter from the bank dated 13 August 2021 making serious allegations of misconduct against her and inviting her to attend a disciplinary hearing on 17 August. The hearing did not take place until 24 August 2021. The Complainant was summarily dismissed the same day for reasons stated in the dismissal letter.

7. The grounds of dismissal set out in the dismissal letter [**Tab 3 page 24**] were that on 28 June the Complainant was instructed by Mrs Penn-Maduro not to return to work until she was tested for Covid-19 and was advised by the Health Services Authority (the HSA) isolate pending testing and she failed to adhere to these directives and returned to work on 1 July without notifying the bank and without providing evidence of a negative test. She was charged with breaches of the following specific regulations incorporated into and forming part of the employment contract:

- a. sections 1.1 and 3.2 of the bank's Code of Conduct by failing to act honestly and with integrity and by attempting, threatening or by actual conduct or communication that caused or was likely to cause physical harm, injury or illness,
 - b. section 6.10 of the Health and Safety Policy,
 - c. section 4.2.3.7.1 of the banks Disciplinary Standards by gross insubordination, and
 - d. the Health and Safety Protocols by returning to work after a positive test and requirement to be placed in isolation, and by returning to work without first presenting a medical certificate or similar declaring her fitness to resume her duties.
8. The bank further stated that by returning to work on 1 July without having been tested and being in possession of a negative test result, the Complainant placed her work colleagues and the entire staff and customers of the bank at serious risk of harm given the infectious nature and virulence of the Covid-19 virus. We note here that the Medical Excuse Certificate [**Tab 3 page 10**] produced by the Complainant on her return to work on Thursday 1 July was meaningless and unhelpful because it was silent as to the nature of her illness and it simply requested that the Complainant be excused from work for three days and it said nothing about the Complainant's fitness to return to work.
9. The bank also complained at paragraph 9.1 of its Amended Response about the Complainant's return to work on 19 July without first producing a negative test (or a medical certificate of fitness to resume work) [**Tab 13 page 273**]. Even though the Complainant did produce a negative result when asked, the bank contends it was a breach of the Protocols to take up a position at her desk without first consulting any of her supervisors. In the circumstances it was reasonable to instruct the Complainant to return home, with pay, because of her conduct. The bank concluded that the Complainant's conduct warranted summary dismissal.

The evidence

10. The Complainant had not been vaccinated against Covid-19. On Friday 25 June 2021, during the Covid-19 pandemic, she caught a cold. She experienced the usual symptoms of fever and headache. On Monday 28 June her mother tried contacting the bank's assistant customer

service manager but was unsuccessful. Her mother then contacted Mrs Penn-Maduro, the bank's customer service manager. The Complainant could overhear her mother on the telephone describing her symptoms to Mrs Penn-Maduro. Her mother informed Mrs Penn-Maduro she was taking the Complainant to the doctor. Mrs Penn-Maduro agreed and asked to be kept informed.

11. Later the same day the Complainant was seen by the doctor. She was given 3 days off work. She said she was not advised by her doctor to take the Covid-19 test or isolate. At the end of her medical appointment, Mrs Penn-Maduro telephoned and asked the Complainant if she had had been tested for Covid-19. The Complainant said no. Mrs Penn-Maduro asked what type of doctor that was, not having tested her for Covid. The Complainant's evidence on this is that Mrs Penn-Maduro did not advise her to remain at home and not to return to work until she received a negative test. Mrs Penn-Maduro tells a different story.
12. Later still on the same day, Monday 28 June, the Complainant received a telephone call from a person who identified herself as Harmonie Massiah. The Complainant believed Ms Massiah to be from the HSA but it would appear she is the epidemiologist employed by the Ministry of Health and not by the HSA. The HSA is a government statutory corporation. The Complainant stated that she was informed by Ms Massiah that someone from the bank informed them she was experiencing flu-like symptoms and would like to have a Covid test done. The Complainant did not admit or deny to Ms Massiah that she had been experiencing these symptoms. She merely told Dr Massiah that she was confused because she did not have that conversation with anyone. She said at paragraph 29 of her affidavit [**Tab 11 page 252**] that it was not true she was told by Ms Massiah to take a Covid test before Wednesday 30 June.
13. The Complainant stated in cross-examination that even bearing her symptoms in mind she did not think she may have been infected with Covid-19 on Monday 28 June. When pressed by Mr Dennis KC as to whether, even if one was asymptomatic, it was not the reasonable thing to get tested before returning to work, bearing in mind her recent symptoms, the Complainant said 'no'. She did not think others were at risk.

14. The Complainant stated at para 45 of her affidavit [**Tab 11 page 255**] that on 29 June she was totally fine and was “back up and running”. She remained at home for three days and returned to work on Thursday 1 July. She was not seen by her doctor before returning to work. She stated at paragraph 33 of her affidavit [**page 252**] that there was no reason for her to consult her doctor before her return to work based on the doctor’s instructions. The Complainant appeared to be satisfied that the Medical Excuse Certificate giving her three days off work was sufficient documentation. On entering the office, she went to her workstation. This clearly surprised Mr Devonish. She was asked by Mr Devonish or Mrs Penn-Maduro if she had taken a Covid test or self-isolated. She said no; that nobody had told her to do so. She was summoned to Mr Devonish’s office where they had a conversation with Ms Massiah. The Complainant’s version of the conversation at paragraphs 13 and 14 of her witness statement is not clear. She did admit to speaking to Ms Massiah but maintained her denial that she was asked to submit to a Covid-19 test. She was sent home after about only 30 minutes at the office.

15. She took a Covid test the next day, on Friday 2 July. On Saturday 3 July she received a telephone call from Ms Massiah informing the test was positive. This means it was likely she was infected on 1 July when she was at the office. At paragraph 40 of her affidavit she denied that her return to work on 1 July could have potentially exposed other employees to the virus. Her reason was that she spent just 30 minutes at the office including 10 minutes at her workstation with everyone wearing masks and 20 minutes alone with in Mr Devonish’s office with him and Mrs Penn-Maduro. She did not interact in very close proximity with any person other than Mr Devonish and Mrs Penn-Maduro.

16. Before returning to work on 19 July she did not consult Mrs Penn-Maduro or Mr Devonish. She messaged a co-worker for the protocol of a return to work. The co-worker told her to bring the negative test results and give it to management. It is odd therefore that upon her return to work she went straight to her workstation (to print her test results as she stated) and it was only when confronted by Mr Devonish that she produced the test results.

17. Shortly after receiving her negative results on 19 July Mr Devonish asked the Complainant to return home and await his call. She emailed him her release letter and negative test results. She was subsequently sent a letter from Mr Devonish dated 13 August 2021 [**Tab 3 page 20**] summoning her to a disciplinary hearing.
18. Raquel Dennis, the Complainant's mother who was vacationing in Tortola at the time, also gave evidence. She corroborated the Complainant's testimony. To her knowledge, the Complainant was not given any instruction to isolate. Ms Dennis could not recall Mrs Penn-Maduro advising the Complainant not to return to work until she got tested.
19. The Complainant took issue with certain statements contained in the record of the termination hearing on 17 August 2021. Joy Anglin, the bank's Human Resources Officer attended the hearing and took a note. As we state at paragraph 27 below, we see no reason to dispute that the minutes were a true record of the proceedings.
20. Mr Devonish testified that on the morning of Monday 28 June he was advised by Mrs Penn-Maduro that the Complainant's mother had called in to report the Complainant was ill. The description he received from Mrs Penn-Maduro seemed to him to be of flu-like symptoms. He immediately became concerned because Covid-19 was prevalent. He also noted that the Complainant was a customer service representative who operated in the bank's retail branch operations in a physically confined space and the bank had to be mindful of the safety of others operating in her environment. He reached out to the public health authorities and in particular to Ms Massiah. He described the case and shared the Complainant's contact details. He did not himself instruct or advise the Complainant to isolate and get tested. His understanding was that the public health authorities would do that. He thought also that, given the Protocols which formed part of her contract, she would have known she was required to isolate and not report to work again until she had received a negative test result. He also believed she had been instructed not to return until she was tested.
21. Mr Devonish was therefore shocked when the Complainant reported for duty on 1 July without having been tested. As far as he was aware she was specifically instructed not to report for duties until she was tested. From where he sits in the bank, he could see the bank's

front line and the Complainant. He immediately summoned her to his office to meet with him and Mrs Penn-Maduro. He asked the Complainant if she had been given the “all clear” by the public health authorities. The Complainant said she had never heard from the public health authorities. He joined Ms Massiah to the meeting by telephone, placing her on the speaker so that she could hear and be heard by everyone. Ms Massiah did not give evidence so there would be no point in referring to her reported speech unless admitted by the Complainant. Mr Devonish then instructed the Complainant to return home, isolate, cooperate with the public health authorities and not to return to work until she had been tested.

22. Two days later, on Saturday 3 July, he received confirmation that the Complainant had indeed tested positive. As a result of this, the bank immediately activated the government protocols as well as its own. It directed its non-vaccinated staff in the Complainant’s department to isolate and directed all employees in the department to undergo testing. It closed the retail branch for the next 4 working days. Eight employees in the department tested positive. Mr Devonish considered there was considerable disruption to the bank’s operations resulting in loss of productivity and exposure to reputational damage.
23. On Monday 19 July the Complainant again returned to work and took up her position at her workstation. She was again spotted by Mr Devonish. He pithily described her sudden appearance at work as “déjà vu”. She had re-appeared at work and taken up her position without consulting any of her supervisors and without first confirming a negative test result as, in his view, she was required to do by the bank’s Covid protocols particularly the Protocols for Employees Returning to Work Following Recovery from Covid-19 [**Tab 6 page 125**]. This Protocol provided that an employee who had tested positive must provide a medical or similar certificate declaring his or her fitness to resume duties in order to be allowed to return to work. The case proceeded on the basis that a negative test result was such a certificate. The Complainant entered the workplace but without first presenting a certificate or calling ahead to state she was negative. While it would have been appropriate to send it to the bank in advance, the Complainant’s breach was merely a technical one [**Tab 5 page 43 para 19**]. When confronted by Mr Devonish she told him she had the negative test on her telephone but made no attempt to share it with him. He then asked for it and she complied. She stated

in her affidavit that she did not have a printer at home and she intended using the work printer to make a copy for the bank.

24. She was instructed to return home. She received full pay while off work. She was subsequently informed by letter dated 13 August [Tab 3 page 20] of a disciplinary hearing on 17 August. Mr Devonish denied that the allegations in his letter of 13 August were fabricated. After the hearing it was determined that her conduct warranted disciplinary action. The disciplinary action took the form of dismissal for gross misconduct on 24 August 2021.
25. Mrs Penn-Maduro was a critical witness who dealt directly with the Complainant on 28 June. At about 8am on Monday 28 June she received a call from Raquel Dennis who informed her that the Complainant had not been well for the entire weekend and had a cold and cough and a slight fever and was shivering. Raquel further informed her she was taking the Complainant to the doctor. The Complainant confirmed the symptoms herself to Mrs Penn-Maduro later that day. Mrs Penn-Maduro stated she informed the Complainant on the telephone that she should not return to work until tested for Covid and had received a negative test. She further stated that in any event the Complainant must have been aware of the risks of contracting and spreading Covid and based on the Protocols would have known that, with the symptoms she was experiencing, she was required to isolate and not report for work until she received an “all clear” in regard to her Covid status [Tab 7 page 187 para 9] .
26. Three days later, on Thursday 1 July, the Complainant showed up at work. Mrs Penn-Maduro described it as a serious concern. The Complainant was summoned to Mr Devonish’s office. She was asked why she had not returned to her doctor. They asked her if she had contacted the public health authorities regarding testing. Mr Devonish then telephoned Ms Massiah in the presence of the Complainant and Mrs Penn-Maduro. Ms Massiah was placed on speakerphone. The meeting ended with Mr Devonish instructing the Complainant to return home, isolate and wait for public health and not return to work until she could produce a negative test.
27. The final witness was Joy Anglin, the banks Human Resources Officer with the bank [Tab 17 page 288]. She attended the disciplinary hearing on 17 August 2021, listened attentively

and made a simultaneous record of the proceedings which she considered to be accurate. She stated that the minutes produced into evidence [**Tab 6 page 128**] did not contain fabrications but was a true and accurate record. We accept Ms Anglin's evidence.

Applicable contract and statutory provisions

28. There does not appear to be any dispute that the pre-conditions to which the Complainant's employment were subject have been fulfilled. The Complainant agreed to be guided by the terms and conditions of the Code of Conduct, the Disciplinary Standards, and any other bank policy in place from time to time.
29. It is provided in the employment contract [**Tab 6 page 49 text in italics**] that the contract itself and the Employment Agreement attached to the contract [**Tab 6 page 51**] and any other documents expressly incorporated by reference form part of the contract. Clauses 17 and 18 [**Tab 6 page 54**] provide that the Complainant would become familiar with and review annually the rules, regulations and procedures, policies and instructions in force including the terms of the Employment Agreement itself and the Code of Conduct which are incorporated by reference.
30. Clause 19 of the Employment Agreement [**page 54**] provided that the employment may be terminated in accordance with applicable statutory provisions, for good and sufficient cause (but in any event no less favourable than under the Code).
31. Clause 20 provided for suspension of the employee either for the purpose of conducting an investigation or for disciplinary reasons. The Disciplinary Standards [**Tab 6 page 90**] contain a description of the various levels of misconduct and the remedies such as suspension and dismissal. Clause 4.2.3 of the Disciplinary Standards [**Tab 6 page 95**] deals with gross misconduct. The term "gross misconduct" is defined as any serious breach of the law or regulations or bank policy, regulations or procedures which is so severe that it exposes the bank to serious operational or reputational risk. An employee may be summarily dismissed for an act of gross misconduct. This is arguably a more stringent standard than the standard under the Code. Section 101(1) of the Code permits an employer to dismiss summarily an

employee who is guilty of serious misconduct of a nature that it would be unreasonable to require the employer to continue the employment contract. Subsection (2) provides that the serious misconduct is restricted to conduct which is directly related to the employment contract and has a detrimental effect on the business of the employer.

The breaches as set out in the dismissal letter

32. The bank's case is based on its letters to the Complainant dated 13 and 24 August 2021.

Instructions to Complainant not to return until tested

33. No complaint is made about the Complainant's conduct after 1 July, including her return to work on 19 July. The basis of the charge against the Complainant is that on 28 June 2021 she was instructed (i) by Mrs Penn-Maduro not to return to work until she was tested for Covid-19 and (ii) by the public health authority to isolate pending testing, and that she returned to work on 1 July without having adhered to these instructions. In not complying with the instructions, the Complainant breached the regulations set out in the letter. The Complainant does not agree. The conversation between Mrs Penn Maduro and the Complainant on 28 June were not recorded or reduced to writing.

34. The Complainant admitted to receiving a call from Ms Massiah late on 28 June. She was not cooperative. She said she was confused to receive a call from the public health authorities because she never had any conversation with anyone from the authorities. She accepted Ms Massiah invited her to come in and do contact tracing and she declined. She said she would follow her own doctor's advice. She was given 3 days off work by her own doctor and she returned to work after 3 days on 1 July without having consulted her doctor again.

35. In its letter dated 13 August 2021 the bank stated that a doctor from the public health authorities had asked the Complainant to isolate until she had received a negative test. This must have been a reference to Ms Massiah. There was no evidence of this instruction. The Complainant did not admit it.

36. The bank also relied on the fact that it had to close for 4 days after the Complainant tested positive and that eight employees also tested positive. While it is clear that the bank closed as a result of the Complainant's positive test there is no evidence that she was the cause of the eight employees contracting Covid. She spent a very short time in the department and she was masked. The most that can be said is that her presence placed other employees at risk.
37. The critical issue is exactly what instructions were given by the bank or by Ms Massiah to the Complainant on Monday 28 June and, in the absence of specific instructions, what conduct was reasonably expected of the Complainant. There is, unsurprisingly, a divergence of views between Mrs Penn-Maduro and the Complainant that is difficult to reconcile. In assessing the Complainant's conduct against the standards set out in the contract and the Code, it is necessary to consider what was required of her and of the bank on her coming down possibly with flu-like symptoms over the weekend of 25 to 27 June 2021, what steps were taken and should have been taken in response to the symptoms, and whether the steps taken by the Complainant and her overall conduct met the standards, and if not, whether her behaviour could be considered serious misconduct, and whether it would be unreasonable for the employer to continue the contract.
38. The Tribunal would have been better assisted if the instructions to the Complainant had been confirmed in an email to her. The onus falls on the bank to establish what the instructions were. We are influenced on the one part by the Complainant's apparent failure to approach the risk of Covid-19 infection with a level of maturity that might be expected. Her response to Ms Massiah was to ask who told her about the symptoms she was experiencing. Having had a cold and runny nose she returned to work without any thought as to whether she might have been carrying the Covid-19 virus. None of this was a breach of the Protocols. The Protocols apply when an instruction is not followed and on the return to work after a positive test. But the above is part of the background against which we might assess the Complainant's response to her symptoms and her conversation with Mrs Penn-Maduro.
39. Mrs Penn-Maduro (and Mr Devonish) came over as competent, professional and caring managers and who were managing a new, and rapidly evolving and stressful risk and who may have expected a greater level of maturity from the Complainant. Many reasonable

persons were at the time still not convinced of the threat of serious illness or death from Covid-19, or of the science behind it or of the utility of vaccinations. Some may have been irresponsible conspiracy theorists, and some may have been what came to be called “anti-vaxxers”. There is no evidence where the Complainant lies on this spectrum.

Discussion

40. The Labour Code section 30(2) states that the Tribunal must act inter alia in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations.
41. The statutory obligations on the part of the bank were not to dismiss the Claimant without her contractual or statutory notice (whichever is more favourable to the Complainant) and not to dismiss the Complainant save for a fair and valid reason connected with her capacity or conduct (there being no allegation that the dismissal concerned the operational requirements of the bank). The Complainant does not allege that she was dismissed without proper notice. Was she therefore dismissed other than for a fair and valid reason?
42. We will now consider the specific breaches and grounds for termination alleged in the dismissal letter.

Breach of section 1.1. of the Code of Conduct [Tab 6 page 61]

43. The portions of the section relied on by the bank are as follows:

“Preserving trust and acting ethically are at the heart of what we do and how we do it. Each of us has a fundamental obligation to act honestly and with integrity at all times. This means respecting both the spirit and the letter of the Code in everything we do. ... Failing to follow the Code or comply with the laws and regulations of the territories in which we conduct business will expose CIBC First Caribbean, as well as its employees and contingent workers, to serious regulatory or legal consequences and reputational harm. ... A dishonest act may be, but is not limited to, any act or activity that is unethical, improper or illegal. Engaging in dishonest activity

negatively affects other employees, contingent workers and CIBC First Caribbean; it erodes client trust and may weaken our reputation within the community. ... Involvement or even attempted involvement in dishonest activity is unacceptable. All communications must be truthful, and must not directly or indirectly mislead others.”

44. This provision is more a statement of a goal or a general preamble to effective terms. Even so, we do not find that the Complainant acted dishonestly or unethically. We do not find that there has been a breach of the letter or spirit of the provision.

Breach of section 3.2 of the Code of Conduct [Tab 6 page 71]

45. The section provides:

“Each of us has the right to work in an environment that is safe and free of violence. At CIBC First Caribbean, we define violence as an attempt, threat, or actual conduct or communication that causes or is likely to cause physical harm, injury or illness. This includes any threatening statement or behaviour which could give a person reasonable cause to believe that they are at risk of injury regardless of whether an overt action has occurred.”

46. We think the aspects of violence set out in the clause must still be interpreted against the normal meaning of the term “violence”. We think it would strain the concept of violence too much to include the risk of the passive spread of Covid-19 in the definition. We do not find this ground for the dismissal is made out.

Breach of section 6.10 of the Bank’s Health and Safety Policy [Tab 6 page 119]

47. Section 6.10 of the Policy provides as follows:

“Employees are required to:

- a. Familiarise themselves with the contents of this Policy and adhere to its terms and conditions;
- b. Take reasonable responsibility for an awareness of their own health and safety;
- c. Be aware that their acts or omissions can impact on the health and safety of their colleagues and other individuals;

- d. Ensure that training and instructions in respect of use and maintenance of equipment and general health and safety issues are followed and
- e. Advise Managers as soon as is practicable of any work situation, which might be of a serious or imminent danger.”

48. These are also very general aims.

Breach of section 4.2.3.7.1 of the Disciplinary Standards [Tab 6 page 97]

49. This section provides as follows:

“Gross insubordination involves unyielding disobedience and flagrant disrespect of an employee towards his/her Supervisor/Manager. Examples of such behaviours include but are not limited to:

- a. Failure to abide by policies and procedures established by the Bank.
- b. Actions that lead or could lead to the endangerment of employees.
- c. Refusal to carry out a legitimate instruction by persons in authority.”

50. The critical issue is exactly what were the instructions given to the Complainant on 28 June 2022. We prefer the evidence of the bank to that of the Complainant that the Complainant was told by Mrs Penn-Maduro that she should not return to work until she received a negative Covid-19 test. We also accept that she was contacted by Ms Massiah from the Health Ministry, whom the Bank had first contacted, about her symptoms. We note that while the Complainant admitted being so contacted by Ms Massiah, she denied that she was advised to take a Covid-19 test. It appears to us to be more likely than not that the bank, as would any reasonable employer during those times, would have taken precautionary measures upon being told that a staff member had Covid-like symptoms. We do not accept the Complainant’s evidence that the bank’s representative would not have told her to stay home and not return to work until she had a negative test or that an officer from the public health sector would not have advised her to be tested, especially after her own doctor appeared not to be concerned about testing for a patient with those symptoms. Such an attitude would have rendered the public health work entirely ineffective at that crucial time. The Complainant’s own opinion that she did not think that she had Covid-19 is irrelevant and in any event was proven to be untrue.

51. The bank has discharged the onus of proof on it as to what had transpired on that date in the absence of an email confirmation. The standard of proof is that of a balance of probabilities. Where there is a conflict of evidence, this can be discharged through oral evidence where one version of the relevant events appears to be more credible and/or more likely to have taken place than the conflicting version. The bank in its oral evidence has satisfied us that its version of the events of 28 June should be preferred to the Complainant's. We are therefore of the view that the core allegation of the termination letter has been made out by the bank. We are satisfied that the Complainant did commit acts of gross insubordination as defined in the letter of 24 August 2021 by her actions in that she refused to carry out the instruction of the Bank and her actions could have led to the endangerment of other employees. This is made out by the fact of her coming to work without having taken adequate precautions to ensure that she was not a danger to the other employees by being infected with the highly contagious Covid-19 virus. This is so even if there is a dispute as to whether she was the cause of the infection spreading to other employees of the bank. The risk to such employees was sufficient.
52. Based on our findings above, we are satisfied the Complainant was in breach of this Standard. She was instructed by Mrs Penn-Maduro, her supervisor/manager, **to test and isolate** and she refused. Her disobedience to Mrs Penn-Maduro was a very serious breach. It potentially placed staff and customers of the bank at risk of contracting Covid-19. In our view, her conduct amounted to gross insubordination.

Breach of the Branch's Covid-19 Health and Safety Protocols [Tab 6 page 125]

53. The Protocol for Employees Returning to Work Following Recovery from Covid-19 provides as follows:
- “An employee who has tested positive for Covid-19 will be placed in isolation /quarantine in accordance with guidelines established by local Health Authorities. Once the employee has been discharged from isolation after the locally stipulated period and completion of any required COVID tests, he or she is required to obtain from their Medical Doctor or Local Health Authority a Medical Certificate (or

similar) declaring their fitness to resume their duties. This certificate must be presented by the employee in order to be allowed to resume work.”

54. This protocol is mentioned in the letter of 13 August 2021 [Tab 3 page 22] and in the termination letter [Tab 3 page 26]. The incident of her return to work on 19 July is also mentioned in the 13 August letter though not in the termination letter. We conclude that the circumstances of the Complainant’s return to work on 19 July is a stated ground for termination. The certificate must be presented by the employee in order to be allowed to resume work. The Complainant was in possession of a certificate [Tab 3 page 12] but had not presented it before entering the premises. It was in electronic format on her telephone and she readily submitted in when asked. The result was negative. Even if that were a breach of the Protocol we would not have found it could justify summary dismissal.
55. The Protocol on what to do if someone from the branch falls ill whether at work or at home [Tab 6 page 123] is not cited by the bank as a ground for termination in respect of the Complainant’s return to work on 1 July. The Protocol is however referred to at paragraph 2.3 of the Response [Tab 4 page 28]. The Protocol stated that an employee must not report to work if experiencing any of the symptoms associated with Covid-19 but they should seek immediate medical attention and contact their supervisor or department head. The onus then shifts to management to do certain things. The manager should then ask the employee the following questions:
- a. If they are feeling unwell
 - b. If yes, the nature of the illness and depending on the response the manager will ask the following additional questions:
 - c. Do you have a cold
 - d. Do you have a fever
 - e. How long have you been feeling unwell
 - f. Did you travel lately and if so to which countries
 - g. Have you been in contact with someone who had a suspected or confirmed case of Covid-19

Based on the answers to the above questions and if the employee is symptomatic the case should be reported to the local health authorities and the employee isolated until further guidance is received.

56. The Complainant had indeed been experiencing flu-like symptoms. She complied with the Protocol by seeking medical attention and contacting her supervisor. By 1 July when she returned to work her symptoms had abated. She was not then a person experiencing Covid-19 symptoms and her own physician had not required anything more than a sickness certificate and three days off.

Procedural objections

57. The Complainant made a number of procedural objections which we will now deal with.
58. First, she noted the failure of the bank to include in its Response a list of documents in accordance with rule 20(1)(i) of the Labour Code (Arbitration Tribunal) (Procedure) Rules, 2020 (**the LPR**). The rule requires that a response must contain as a minimum, inter alia, a list of the documents upon which it intends to reply. The Response was filed on 30 June 2023 and did not include a list of documents but in a supporting affidavit filed on the same day Mr Devonish exhibited copies of the documents in which the bank intended to reply. We therefore see no force in the objection.
59. The Complainant next complained about the introduction of hearsay evidence of Ms Massiah. Ms Massiah, the epidemiologist, was not called as a witness. Except where the Complainant relied on or accepted specific statements attributed to Ms Massiah, the Tribunal has disregarded Ms Massiah's statements as reported by Mr Devonish and Mrs Penn-Maduro.
60. Finally, the Complainant submits that without an order of the Tribunal permitting the filing of the Amended Response, the Amended Response was not properly filed and ought to be disregarded. The original Response was filed on 30 June 2023. The Complainant's Reply was filed on 14 July 2023. The Respondent filed an Amended Response on 18 July.

Provisions governing the filing of replacement or amended responses are contained in LPR 20(8) and 21(2) and (3). LPR 20(8) permits a respondent to file a replacement or amended Response up to 7 days before the filing of a Reply. LPR 21(2) and (3) permit the Tribunal to allow an unrepresented respondent time to take legal advice to remedy defects in the Response. The Amended Response contained two amendments. It added a statement that in the event the Complainant prevails, the remedies at section 86(1)(a)(i) and (ii) of the Code, namely reinstatement and re-engagement, would not be acceptable but that the remedy at section 86(1)(a)(iii), namely compensation, would be acceptable. It also included a List of Documents.

61. We do not agree with Mr Smith. The LPR provides that a Response must include a statement as to whether the remedies are acceptable but that if no statement to that effect is included the respondent accepts that the Tribunal may make a punitive award. It seems to the Tribunal that a respondent may make some other statement even outside the Response to indicate that it accepts compensation.

62. Mr Smith referred the Tribunal to a number of authorities on the standard to be applied to a party's failure to observe procedural rules. Of course, different standards may apply to different procedural missteps. The Tribunal agrees with Mr Smith that generally the parties should be held to the rules and that where there are clear rules the Tribunal cannot simply disregard the rules. This debate also took place in the Eastern Caribbean Supreme Court culminating in the Privy Council decision of **Texan Management Ltd et al v Pacific Electric Wire and Cable Company Ltd** [2009] UKPC 46 cited by Mr Smith. The Tribunal arguably has power similar to that in CPR rule 26.9 to put matters right. The Amended Response was filed early, as far back as July 2023. The Complainant did not take any step to invalidate it or strike it out either before or during the trial. In the circumstances the Tribunal will accept the Amended Response.

Suspension

63. The Complainant was suspended from work on full pay from 19 July until her dismissal on 24 August. Suspension as a disciplinary action is governed by section 102 of the Code which

deals with disciplinary action other than dismissal. The term “disciplinary action” includes a written warning and suspension for a period not exceeding one week without pay. The suspension of the Claimant was not by way of disciplinary action under section 102.

64. Section 102 provides as follows:

- (1) An employer is entitled to take disciplinary action other than dismissal when it is reasonable to do so under the circumstances.
- (2) For purposes of this section, “disciplinary action” includes in order of severity -
 - (a) a written warning;
 - (b) suspension from duty for a period not exceeding one week without pay.
- (3) In deciding what is reasonable under the circumstances pursuant to subsection (1), the employer shall have regard to the nature of the violation, the terms of the employment contract, the employee’s duties, the pattern and practice of the employer in similar situations, the procedure followed by the employer, the nature of any damage incurred and the previous conduct and the circumstances of the employee.
- (4) Where action is taken by an employer in accordance with this section, he or she shall advise the employee concerned in writing of the misconduct or action in breach of the employment contract and of what steps the employer is likely to take in the event of any repetition of the behaviour in respect of which the disciplinary action is taken.
- (5) A complaint that any disciplinary action taken against an employee was unfair or unreasonable may be made by the employee to the Commissioner pursuant to section 26.

65. The Complainant complained in the letter from Thornton Smith dated 6 September 2023 containing particulars of her claim [**Tab 3 page 9**] that the suspension was contrary to section 102(4) of the Code and the bank’s Disciplinary Standards [**Tab 6 page 93**]. Clause 4.2.1 of the Disciplinary Standards permits suspension with pay pending investigation. This must be read with section 102(4) of the Code which requires that the employee be advised in writing of the misconduct and what steps the employer is likely to take. The Complainant was informed of her suspension orally on 19 July but she did not receive notice of the disciplinary hearing until 13 August. The Respondent avers in paragraph 1.7 of the Amended Response that section 102(4) was not engaged by the requirement that the Complainant not report to work until it was determined what steps the bank should take. The Respondent therefore argues that being sent home with pay pending investigation of misconduct was not by way of disciplinary action.

66. Even if she were unlawfully suspended no action was taken by her to remedy the suspension. The matter proceeded quickly to dismissal. The Complainant did not lose salary. It might be said that an unreasonable suspension, by itself, might be added insult to injury and may affect the amount of compensation to be awarded for unfair dismissal or it may be a factor to be taken into account in assessing the amount of a punitive award.
67. The consequences of an unreasonable suspension may be shown by cases cited by Mr Smith - see **The Mayor & Burgesses of the London Borough of Lambeth v Agoreyo** [2019] EWCA Civ 322 **Mezey v South West London and St George's Mental Health NHS Trust** [2007] EWCA Civ 106. **Mezey** was a judgment of the Court of Appeal of England and Wales. In a very short judgment, the Court of Appeal agreed with the first instance judge that an injunction could be granted to restrain an employer from implementing a suspension at least insofar as it affected certain of the employee's duties. **Mezey** is a case in which the matters had not yet proceeded to dismissal and the issue before the court was a challenge to the suspension itself. In **Agoreyo**, the employee accepted what she considered a repudiatory breach of contract caused by her suspension and immediately resigned her employment and subsequently commenced proceedings for breach of contract.
68. The Complainant did not accept the suspension as a repudiatory breach. Indeed, she participated in the disciplinary hearing and commenced these proceedings for unfair dismissal resulting from the disciplinary hearing. While she raised the issue of the lawfulness or propriety of the suspension in counsel's letter forming part of the Dispute Claim Form, she did not seek any relief or claim any loss attributable to the suspension.

Breaches of privacy and confidentiality

69. Mr Smith submitted that the Complainant should be awarded "stigma" damages based on stain left by the breach of trust and confidence on the part of the bank. Counsel submits it is open to the Tribunal to award such damages in the BVI because there is no limit on the award of compensation for unfair dismissal in section 86(2) of the Code. It was decided in **Malik and Mahmud v BCCI** [1998] AC 20 if an employer carried on a corrupt or dishonest

business and there is a serious possibility that an employee's future employment prospects were consequently handicapped damages could be recovered for the financial loss sustained caused by the stigma of the association with the employer. **Malik and Mahmud** was decided on common law principles and not under that Employment Rights Act. We agree with Ms Smith that there is no reason such damages or compensation may not be sought before the Tribunal as a remedy for the unfair dismissal under the Code. So-called stigma damages have been awarded in England and Wales in two circumstances. One is where the employer has carried on a corrupt or dishonest business and the employee is affected by the taint in finding new employment – a **Malik and Mahmud** claim. The other case for the award of stigma damages arises where the employee, in most cases a whistleblower or a person discriminated against, claims to be stigmatised by having brought proceedings against the employer – see **Chagger v Abbey National PLC & Another** [2009] EWCA Civ 1202.

70. This is not a **Malik and Mahmud** case. There is absolutely no suggestion that the bank has carried on a corrupt or dishonest business. Evidence of the existence of discriminatory hiring practices by prospective employers who refuse to employ the dismissed employee would only very seldom be available to the Tribunal and is not available here. There are two passages from **Chagger** that we wish to quote:

“97. A tribunal should take a sensible and robust approach to the question of compensation, as the Court of Appeal emphasised in *Essa*. Plainly it would be wrong for them to infer that the employee will in future suffer from widespread stigma simply from his assertion to that effect, or because he is suspicious that this might be the case. If he is unwilling to make good his suspicions by taking proceedings against the alleged wrongdoing employers – notwithstanding that it may be understandable why he is reluctant to do so – he cannot expect the tribunal to put much weight on what is little more than conjecture. This is particularly so given that it will in practice be impossible for the employer effectively to counter that evidence.

98. However, where, as in this case, there is very extensive evidence of attempted mitigation failing to result in a job, a Tribunal is entitled to conclude that whatever the reason, the employee is unlikely to obtain future employment in the industry. That is essentially what the Tribunal did in this case, and that is why it was both undesirable

and unnecessary for them to reach a concluded view on the particular contribution that the stigma factor may have played in the difficulties Mr Chagger faced in obtaining fresh employment.”

71. Apart from the concluding paragraph of the Complainant’s Reply there is nothing on her post-termination employment or employment prospects. At paragraph 24 of her Reply [**Tab 8 page 194**], it is stated that she found new employment but not at a salary comparable to the salary she earned working for the bank. In her affidavit [**Tab 11**] she gives no evidence of loss or damage. What we are left with is a Schedule of Loss [**Tab 10**] served with the Reply.
72. We will not assume, in the absence of cogent evidence, that new prospective employers discriminated against the Complainant. Second, the Complainant has not taken any steps against the discriminatory employers. Perhaps prospective employers may find other means beside direct discrimination to reject job applications and perhaps a dismissed employee may not take steps against prospective simply because she fears it would only make things worse. There is a stark practical limit to the number of proceedings an out-of-work employee can bring or steps she can take. Whatever the reason, counsel could point to no evidence to support his submission. Perhaps the matter is to be resolved by taking account of the length of the period to find suitable employment despite considerable attempts to mitigate loss as suggested at paragraph 98 of **Chagger**, supra.

Compensation

73. Having found against the Complainant on the critical issue that she was instructed on 28 June 2021 to isolate and get tested, we dismiss the Complaint. We have however assessed compensation in case we are wrong on the issue of the fairness of the dismissal.
74. The Complainant was employed by the bank from 1 November 2019 although for the purposes of computing her vacation she was deemed to be employed from 7 October 2019. Her employment ended with her termination on 24 August 2021. She was 21 years of age. Her employment was for an indeterminate period. Her annual salary was \$22,932.00 payable by \$1,911.00 monthly. She found new employment on 8 May 2022. She now earns \$1,440.00 per month.

75. In the schedule of loss [**Tab 10**] the Complainant listed net loss of salary to June 2023 of \$28,584 (\$45,864 minus \$17,280). She also listed wholly unparticularised future loss of earnings of \$377,300 and she also claimed injury to feelings of \$114,116.00. There is no explanation as to how these figures are arrived at other than the loss of earnings. The Respondent did not challenge the loss of earnings. They took into account what the Complainant would have earned had she remained in her employment less what she earned in her new employment up to the 30 June 2023 when the loss was calculated.
76. There is no evidence of additional salary loss after 30 June 2023. The Respondent has effectively relied on the steps taken in mitigation of damages set out in paragraph 24 of the Reply and on the Complainant's calculation of the loss. In the circumstances the Tribunal will not make an award for future loss of earnings.
77. Regarding loss of injured feelings, Mr Dennis submits this head of loss is not recoverable. He relies on **Addis v Gramophone Co Ltd** [1909] AC 488. He further submits that injured feelings is not a factor that falls for consideration under section 86(2) of the Code. We note that the list of factors the Tribunal may take into account under section 86(2) in assessing compensation is non-exhaustive but we agree that hurt feelings is not a factor that may be considered. We would not award compensation for hurt feelings.
78. If therefore we had found in favour of the Complainant that her dismissal was unfair, we would have awarded compensation to her in the sum of \$28,584.

Summary and order

79. We therefore find that the Complainant was dismissed for a fair and valid reason. The Labour Code section 81(2) also stipulates that there should be procedural due process before dismissal. The bank's letter of 13 August 2021 shows that the complaints from the Bank had been brought to the Complainant's attention and she was given the opportunity at the hearing on 17th August 2021 to address these complaints.

80. For the foregoing reasons, we therefore have dismissed the Complaint.

81. There will be no order as to costs.

Postscript

82. We apologise to the parties for the delay in issuing this judgment and we thank them for their patience.

By Order
Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



I have read the reasons of the chairman in draft and I agree the order made.



Ms Dancia Penn KC
Arbitrator

I have read the reasons of the chairman in draft and I agree the order made.



John Carrington KC
Arbitrator