

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2014/CLE/gen/00049

BETWEEN

SHARMEAN WOODSIDE

Plaintiff

AND

LICKETY SPLIT LTD

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Obie Ferguson for the Plaintiff
Ms. Michelle Y. Campbell for the Defendant

Hearing Date: 1st day of November 2016

Employment Law– Dismissal - Unfair dismissal – Section 34 of the Employment Act – Summary dismissal – Extraneous conduct amounting to ground for dismissal – Legal responsibility for actions of others

Pleadings – Grounds of dismissal stated – Change of ground - Whether change of ground permitted under unfair dismissal

Quantum – Heads of claim –Heads of claim unchallenged – ex gratia payment

On or about April 1998, the Plaintiff commenced employment with the Defendant. She rose from a regular pantry worker to supervisor and then to manager. In early February 2014, the Plaintiff was summoned to the office of the Managing Director (“MD”). The MD told her that he was receiving numerous anonymous harassing telephone calls from someone who would not identify himself. The MD suspected that the caller was the Plaintiff’s husband. On the same day, the Plaintiff left and disclosed to her husband what was said in the meeting. Her husband wanted to meet with the MD. In the meeting, he was loud and boisterous and they were both ordered to leave the MD’s office.

On 28 February 2014, the Plaintiff was summarily dismissed for dishonesty. By letter dated 7 April 2014, the Defendant’s Counsel wrote to the Plaintiff’s Counsel stating that the Plaintiff was dismissed on the grounds of gross insubordination/insolence and gross misconduct in accordance with s. 31(d) and (i) of the Employment Act, Ch. 321A of 2001 (“the Act”) and not for

dishonesty. At the trial, the MD testified that the Plaintiff was summarily dismissed for breach of trust/confidence.

HELD, finding in favour of the Plaintiff,

- (1) The Plaintiff was unfairly dismissed against her right not to be unfairly dismissed pursuant to section 34 of the Employment Act.**
- (2) Although unfair dismissal is not defined in the Employment Act, section 35 gives a clear indication of what is the threshold test. It provides for the determination of the question whether the dismissal of an employee is fair or unfair and that question shall be determined in accordance with the substantial merits of the case.**
- (3) An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer. Thus, an employer who wishes to summarily terminate an employee's employment must assess whether or not the reason for doing so is sufficiently serious and substantial to justify relying on it to terminate: section 31 of the Act.**
- (4) In order to fulfill the requirements of section 33, an employer must show in any proceedings brought by an employee against him that he honestly and reasonably believed that the employee was guilty of misconduct equivalent to a fundamental breach of his contract of employment.**
- (5) The real reason for summarily dismissing the Plaintiff from her employment was because she brought her husband to the MD's office and her husband behaved in an unruly manner. The Plaintiff cannot be held responsible for the acts of another person.**
- (6) There is not an iota of evidence to support any of the alleged grounds for the summary termination of the Plaintiff's employment; be it dishonesty or gross insubordination/insolence and gross misconduct or breach of trust/confidence.**
- (7) An employer cannot terminate the employment of an employee on one ground and seek to change the ground as the trial progresses: *Sun International (Bahamas) Limited v Kevin Williams* (Civil Appeal No. 20 of 1998) referred to.**

JUDGMENT

**Charles J:
Introduction**

[1] The key issue to be determined in this action is whether the Plaintiff ("Ms. Woodside") was unfairly dismissed, as she alleges, or summarily dismissed, as her former employer, Lickety Split Ltd ("the Defendant") alleges.

Background facts

- [2] The background facts are largely uncontroverted. To the extent that there is any departure from the agreed facts, then what is expressed must be taken as positive findings of fact made by me.
- [3] In or about April 1998, Ms. Woodside commenced employment with the Defendant as a regular pantry worker. She was an industrious, reliable and honest worker. Her performance level was above average. It was therefore not surprising that she rose from a regular pantry worker to supervisor and eventually to manager. As manager, she earned a weekly wage of \$376.00.
- [4] On or about 4 February 2014, Ms. Woodside was summoned to a meeting with the Defendant's Vice President and Managing Director, Llewellyn Burrows ("Mr. Burrows"). During that meeting, certain personal matters arose regarding numerous harassing anonymous telephone calls that Mr. Burrows was receiving. Mr. Burrows suspected that the anonymous caller was Ms. Woodside's husband. He communicated his suspicion to her. Ms. Woodside then left the meeting and called her husband to pick her up. She disclosed to her husband what took place in the meeting. Her husband wanted to see Mr. Burrows so they arrived at Mr. Burrows' office. Her husband was loud and boisterous. As a result, Mr. Burrows asked them to leave his office. In the interim, Mr. Burrows continued his investigation into the harassing telephone calls. He had already made a report to the Wulff Road Police Station and the Fraud Department at Bahamas Telecommunications Company ("BTC").
- [5] On or about 15 February 2014, Ms. Woodside proceeded on her previously approved vacation leave for two weeks. She was due to return to work on 1 March 2014.
- [6] On 28 February 2014, the Defendant summarily terminated Ms. Woodside's employment. This was communicated to her in a termination letter dated 28 February 2014. The letter stipulated that the reason for summary dismissal was

dishonesty. She was paid the sum of \$7,000.00 as an ex-gratia payment for her services over the years as well as two weeks' vacation of \$752.00.

[7] By letter dated 7 April 2014, learned Counsel for the Defendant, Ms. Campbell wrote to Learned Counsel Mr. Ferguson who appeared for Ms. Woodside stating that Ms. Woodside's employment was terminated on the ground of gross insubordination/insolence and gross misconduct in accordance with s. 31(d) and (i) of the Employment Act, Ch. 321A of 2001 ("the Act") and not for dishonesty.

[8] On 30 April 2014, Ms. Woodside filed a Writ of Summons endorsed with a Statement of Claim against the Defendant alleging that she was unfairly dismissed against her right not to be unfairly terminated. By a Re-Amended Writ of Summons filed on 23 November 2015, she alleged that she suffered loss and damage of \$26,717.28 less 7,752.00 leaving a balance of \$18,965.28.

[9] At paragraph 5 of its Re-Amended Defence filed on 11 December 2015, the Defendant stated:

"...The Defendant again maintains that the Plaintiff was summarily dismissed as she committed misconduct which constituted a fundamental breach of her contract of employment or acted in a manner repugnant to the fundamental interests of the Defendant on the joint grounds that she was grossly insubordinate or insolent and exercised gross misconduct."

[10] The parties are in disagreement as to whether Ms. Woodside was unfairly dismissed pursuant to section 34 of the Act or summarily dismissed pursuant to section 31 of the said Act.

The law

Unfair dismissal

[11] Part IX of the Act deals with unfair dismissal. Section 34 provides that every employee shall have a right not to be unfairly dismissed by his employer, as provided in sections 35 to 40.

[12] Section 35 states that "[S]ubject to sections 36 to 40, for the purposes of this

Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case.

[13] The case of **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson** IndTribApp App No. 116 of 2012 gives a broad overview to what may constitute unfair dismissal. The Court of Appeal held, among other things, that (i) the Employment Act does not contain an exhaustive list of instances of what could be considered to be unfair dismissal; (ii) sections 35 to 40 contain what may be regarded as “statutory unfair dismissal” and section 35 provides for the determination of the question whether the dismissal of an employee is fair or unfair.

[14] At paragraph 36 of the judgment, Conteh JA stated:

“The expression “unfair dismissal” itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what we can be called “statutory unfair dismissal” such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).

[15] At page 12, paragraph 39, the learned justice continued:

“Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. And this question shall be determined in accordance with the substantial merits of the case. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?” [Emphasis added]

Summary Dismissal

[16] Section 31 of the Act (Part VIII - Summary Dismissal) states that an employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer. What constitutes a fundamental breach of contract by an employee was articulated in **Neary v Dean of Westminster** [1999] IRLR 288 where it was suggested that the basis of summary dismissal should now lie, not in unrefined ideas of repudiation and acceptance, as the earlier cases suggest, but instead in the more contemporary area of trust and confidence. This celebrated case concerned the summary dismissal of the organist of Westminster Abbey and his wife due to alleged financial irregularities in the operation of certain musical events and the adoption of inappropriate financial methods unknown to the Abbey authorities. Lord Jauncey of Tullichettle was appointed as a special commissioner by the Queen to hear their appeal petitions. He determined that summary dismissal was justified. Setting out the principle to be applied, Lord Jauncey said:

“...conduct amounting to gross misconduct justifying (summary) dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”

[17] Section 32 of the Act appears to ‘codify’ the common law with respect to what conduct constitutes a fundamental breach by an employee of his contract of employment. The section enumerates nine categories of misconduct (including dishonesty, gross insubordination or insolence, gross misconduct and breach of confidentiality by an employee) which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer. These grounds are not exhaustive.

[18] Section 33 provides as follows:

“An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.”

[19] In order to fulfill the requirements of section 33, an employer must show in any proceedings brought by an employee against him that he honestly and reasonably believed that the employee was guilty of misconduct equivalent to a fundamental breach of his contract of employment either prior to, or at the time of his dismissal, or that subsequent to the employee's dismissal he discovered that the employee had been guilty of such misconduct during his tenure of employment and based his defence to the wrongful dismissal claim upon such discovery. See: **Boston Deep Sea Fishing & Ice Co. v Ansell** [1888] 39 Ch. D. 339 and **Cyril Leonard & Co. v Simo Securities Trust Ltd** [1972] 1 WLR 80.

[20] With regards to proof of misconduct discovered at the time of or prior to an employee's dismissal, the case of **Carnival Leisure Industries Ltd v Peter Zervos** Civil Appeal No. 26 of 1985 is instructive. At paragraph 38, Melville JA said:

"...All that was required to be established was that the appellant had reasonable grounds, based on the facts known to it at the time of the dismissal, which would create in the minds of the appellant a reasonable belief that the conduct complained of had been committed by the respondent."

[21] Adhering to the strictures of section 33 may a sensible approach for an employer to take. This was highlighted in **Ingrid Patrice Higgs v Island Hotel Company Limited** No. 1642 of 2011. The learned President said at [305]:

"It would follow that in summarily dismissing an employee, the prudent approach that should be taken by an employer in determining whether an employee has been guilty of misconduct tantamount to a fundamental breach of his contract of employment should be to follow the provisions of section 33 of the Employment Act in order that a Defence might be sustained should the employee subsequently pursue a claim for wrongful or unfair dismissal..."

The evidence

[22] Ms. Woodside testified that sometime in February 2014, Mr. Burrows summoned her to a meeting. During the course of the meeting, he informed her that he was receiving some harassing anonymous calls and he believed that the caller was her husband. Ms. Woodside asked Mr. Burrows what made him think that the caller was her husband. He said that the matter was under investigation and he

would revert. The meeting ended. Ms. Woodside said that she called her husband to pick her up and on their way home, she informed him of what transpired in the meeting with Mr. Burrows. She testified that her husband wanted to see Mr. Burrows so they went to Mr. Burrows' office. Mr. Burrows gave permission to his secretary to let them in. They spoke. She said that it came as a surprise when she received a letter dated 4 February 2014 alleging an altercation with her husband.

[23] In addition, Ms. Woodside asserted that prior to the meeting she was never involved in any disciplinary incident at her work place. She continued to work for two weeks then proceeded on vacation. After her vacation ended, she called to find out her work schedule and was told that her name was not on the schedule and that she needed to pick up a letter. It was her termination letter. Her services were terminated on 28 February 2014.

[24] Under cross-examination, she was asked whether she breached the trust and confidence of her employer by discussing what was said to her in a private meeting. She said that, normally, she would not speak to anyone with respect to what was discussed in a meeting but, in these circumstances, she had to because it was totally different.

[25] Mr. Burrows testified and called Marlon Gary Smith, Manager of the Fraud Department of BTC to substantiate his account with respect to the phone calls. Mr. Burrows testified that on 21 and 22 February 2013, Ms. Woodside's husband telephoned him and accused him in a loud and rowdy manner of having an affair with his wife. Mr. Burrows said that he was shocked and admonished him not to call again. But he continued to receive numerous telephone calls, sometimes up to eighty calls a day and often in the early hours of the morning, interrupting him and his wife from their sleep. He thought of changing his phone number but was hesitant to do so knowing the importance of that number to his business. Sometime in November 2013, he visited BTC to enquire about how he could trace the origins of the calls. He instructed BTC to carry out such an inquiry. He

also reported the matter to the Wulff Road Police Station.

[26] On 2 February 2014, the harassing anonymous telephone calls started again and usually, in the early hours of the morning. Mr. Burrows put his cellular phone on vibrate mode and kept cancelling the calls every time the telephone rang. After a while it stopped ringing and he observed that a voice message was recorded. He played the voice message and listened to the recording. He heard Ms. Woodside arguing with a male and from the nature of the conversation he deduced that she was arguing with her husband.

[27] On 4 February 2014, he spoke to Ms. Woodside about the harassing anonymous telephone calls that he was receiving and inquired whether she knew who was responsible. She said that she did not and he told her that he had strong reasons to believe it was her husband. He inquired of her whether she was having marital problems and he asked her to privately monitor her husband to see if he was the person making those calls. Mr. Burrows said that the meeting ended in an amicable manner.

[28] He further testified that, about ten minutes later, Ms. Woodside came back with her husband. He was loud and boisterous so he asked them to leave his office. Mr. Burrows stated that he fired Ms. Woodside because she left a private meeting and discussed everything with her husband.

[29] Ms. Woodside continued working while Mr. Burrows pressed ahead with the investigations into the harassing telephone calls. On 15 February 2014, Ms. Woodside commenced her previously approved two weeks' vacation leave and was due to return to work on 1 March 2014.

[30] According to Mr. Burrows, on 19 February 2014, he met with Mr. Smith of BTC and received two print-outs. After reviewing the print-outs and doing some further investigations, it was established that Ms. Woodside's husband was the caller. As a result, on 28 February 2014, he summarily dismissed Ms. Woodside and paid her the sum of \$7,752.00 representing a gratuitous payment of \$7,000 plus

\$752.00 for the last two weeks of vacation pay for the year 2014.

- [31] Mr. Burrows testified that he terminated Ms. Woodside's services from the Defendant after he had done a complete investigation to determine who was harassing him. He opined that Ms. Woodside could have given his cellular number to her husband and this was further compounded when she brought her husband to his office thereby putting him in danger and fear for his life and safety. He believed that Ms. Woodside was dishonest, grossly insubordinate or insolent and committed gross misconduct towards him as Vice President. He explained his reasons for terminating her employment by saying that he had a private meeting with her and she went and discussed everything with her husband. He said that the Defendant Company has policies which discuss confidentiality especially at a manager's meeting. He maintained that he did not terminate Ms. Woodside's services because of what her husband did but because she had breached the Defendant's policies as it relates to confidentiality and breach of trust.
- [32] Under cross-examination, Mr. Burrows accepted that when he fired Ms. Woodside, he did not communicate to her that it was for breach of trust. Her termination letter stated "dishonesty" but, as he said, he is not a lawyer and, in hindsight, he probably should have expanded on the head of termination. In the National Insurance Board form, he indicated dishonesty.
- [33] He was aggressively cross-examined as to the reason for the termination as there appears to be grave legal consequences for someone who is terminated for dishonesty as opposed to breach of trust. I should add moral as well.
- [34] The next witness to testify on behalf of the Defendant was Mr. Smith of the Fraud Department, BTC. He substantiated Mr. Burrows' account that he printed two call logs for him. And that was the evidence led by the Defendant.
- [35] There is not much divergence in the evidence. However, having had the

advantage of seeing and observing the demeanour of the witnesses who testified, I make the following factual findings:

- (i) Ms. Woodside's husband was the person making the harassing anonymous telephone calls to Mr. Burrows. Mr. Burrows' testimony was corroborated by Mr. Smith's evidence and the voice message and;
- (ii) Ms. Woodside's husband was loud and boisterous on 4 February 2014 when she brought him to Mr. Burrows' office.

The issues

[36] The following issues fall for determination namely:

- (i) Was Mrs. Woodside dismissed unfairly against her right not to be unfairly terminated as set out in section 34 of the Employment Act, 2001 or was she summarily dismissed?
- (ii) If she was unfairly dismissed, what is the quantum of damages?
- (iii) Is there any vacation pay due and owing to Mrs. Woodside for the years 2013 and/or 2014? and
- (iv) Is Mrs. Woodside entitled to compensation from the Defendant for group medical insurance after 28 February 2014?

On what ground was Ms. Woodside's contract of employment was terminated?

[37] Normally, the ground on which an employer terminates an employee's services is not contentious since it is usually stated in the termination letter. But this is an unusual case.

[38] In her letter of termination dated 28 February 2014, Mr. Burrows wrote the following:

“The investigations conclude that you were clearly dishonest to me in our meeting which leaves me with no choice but to take action with a Summary Dismissal from the company for dishonesty, effective immediately.”[Emphasis added]

[39] Thus, her employment was terminated for dishonesty. In a Termination of

Service/Lay off Certificate completed on 17 March 2014 to the National Insurance Board, under the sub-heading “Reason for termination/layoff”, the Defendant stated “Summary Dismissal –Dishonesty”.

[40] A few weeks later and by letter dated 7 April 2014 to learned Counsel Mr. Ferguson, Ms. Campbell wrote:

“We are instructed to advise you that pursuant to s. 31(d) and (i) of the Employment Act 2001 your client [Ms. Woodside] was in fact terminated on the ground of gross insubordination/insolence and gross misconduct not dishonesty as indicated in our client’s letter to Ms. Woodside dated 28th February last.” [Emphasis added]

[41] In its Re-Amended Defence, the Defendant averred that Ms. Woodside was summarily dismissed in that she committed misconduct which constituted a fundamental breach of her contract of employment or acted in a manner repugnant to the fundamental interests of the Defendant on the joint grounds that she was grossly insubordinate or insolent and exercised gross misconduct.

[42] At the trial, Learned Counsel Ms. Campbell asked Mr. Burrows to state exactly on what ground(s) he terminated the employment of Ms. Woodside. This is how the discourse went (at pages 14 -15 lines 23 et seq of the transcript):

Q: So what were you now stating that she was fired for?

A: Breach of trust. If a manager is going to sit in a meeting with me that is supposed to be confidential and would leave that meeting and go 5 minutes later and tell someone everything that was discussed in that meeting, I really don’t feel I can have a proper working relationship with her. I really don’t feel I could trust her with my store, with the money that’s operated with the store, and everything else, the responsibility of the store. So I felt it was a breach of the trust I had in her and I just couldn’t see how we could continue moving forward.”

[43] Under cross-examination, Mr. Burrows agreed that he initially terminated Ms. Woodside’s employment for dishonesty. Subsequently, as pleaded, he fired her for gross insubordination/insolence and gross misconduct. At this trial, Mr. Burrows testified that he terminated her employment for breach of trust/breach of

confidentiality and that information was not communicated to Ms. Woodside.

Analysis and findings

[44] It is the law that an employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer. Thus, an employer who wishes to summarily terminate an employee's employment must assess whether or not the reason for doing so is sufficiently serious and substantial to justify relying on it to terminate.

[45] The facts which led to the summary dismissal of Ms. Woodside are bizarre. As I analyzed the evidence led in this trial, it is plain that Mr. Burrows would have had a monumental task to justify the summary dismissal of Ms. Woodside on the ground of dishonesty. There is not an iota of evidence to support that ground. On the contrary, there is ample evidence to support the fact that Ms. Woodside was an honest worker. On 7 October 2013, just about five months prior to the summary termination of her employment, Mr. Burrows described Ms. Woodside as "a very hard-working, honest and reliable person, carrying out her duties responsibly." He also inscribed:

"...I came to know Ms. Woodside personally in April 1998 when she became employed at our company. Since then I have seen Sharmean mature with the company, working her way up from a regular pantry worker to a Supervisor and now Manager position."

[46] Subsequently, with legal advice, Mr. Burrows made a complete *volte-face*. By letter dated 7 April 2014, Ms. Campbell advised Mr. Ferguson, that Ms. Woodside was in fact terminated on the joint grounds of gross insubordination/insolence and gross misconduct not dishonesty. These grounds are restated in the Defendant's Re-Amended Defence.

[47] Next, in giving evidence before this court, Mr. Burrows made another *volte-face* and declared that Ms. Woodside was summarily dismissed for breach of trust/confidence. He conceded that this reason was not communicated to her. To

substantiate this new ground, Mr. Burrows stated that Ms. Woodside should not have discussed what took place in a private meeting with her husband. He further stated that the Defendant Company has policies which discuss confidentiality especially at a manager's meeting. He said that he lost confidence in her and her ability to be trusted with the company. Like his Counsel, Mr. Burrows is of the view that this new ground fell within the broad umbrella of misconduct.

[48] Although Mr. Burrows maintained that he did not terminate Ms. Woodside's employment because of what her husband did, I find as a fact that Ms. Woodside was dismissed for the actions of her husband. As learned Counsel Mr. Ferguson opined, the actions of her husband was outside of her control. This finding is supported by Mr. Burrow's own evidence in examination in chief when he stated at page 15 lines 5 – 8 of transcript of proceedings on 1 November 2016:

“Ms. Campbell: So if you found out that her husband had been making the phone calls but the Plaintiff didn't bring her husband back to you, would she still be fired?”

Mr. Burrows: No. She would not have been.”

[49] So, the real reason for summarily dismissing Ms. Woodside is because she brought her husband to Mr. Burrows' office and he behaved in an unruly manner. Consequently, the charges of gross insubordination and misconduct cannot be implied to her. She cannot be held responsible for the acts of another person. In my opinion, by terminating Ms. Woodside' long and unfailing service for about sixteen years in such a manner rendered the termination unfair and I so find.

[50] Even if I am wrong to come to this factual finding, I will proceed to deal with the new ground of breach of trust/confidentiality. The question to be asked is in what circumstances can an employer rely upon a breakdown in trust and confidence to summarily dismiss an employee? This implied duty of trust and confidence is a mutual one.

[51] The issue was considered in the case of **The Governing Body of Tubbenden Primary School v Sylvester** (UKEAT/0527/11/RN). Ms. Sylvester was dismissed for reasons relating to her friendship with a former colleague who had been arrested for alleged possession of indecent images of children. The school initially raised concerns about Ms. Sylvester's friendship with the former colleague but took the matter no further. Some months later, she was dismissed on the grounds that trust and confidence between her and the head teacher had broken down, making her position untenable. The loss of trust and confidence effectively arose out of concerns regarding Ms. Sylvester's friendship with the former colleague.

[52] The employment tribunal had to grapple with the question of what, in law, was the potentially fair reason for dismissing her. Was it a loss of trust and confidence, which might constitute what lawyers refer to as "some other substantial reason" for dismissing an employee, or was it a misconduct dismissal dressed up in a different way?

[53] The tribunal found that there had genuinely been a breakdown in the relationship between the head teacher and Ms. Sylvester. They appeared to accept that this could give rise to a fair reason for dismissal. However, in this case, the tribunal concluded that the dismissal was unfair because:

- 1) the loss of trust and confidence emanated from issues relating to the conduct of the employee; and;
- 2) the panel was dissatisfied with the way in which the school had dealt with those conduct issues. In particular, the employee was never warned that her friendship was putting her job at risk.

[54] On appeal to the Employment Appeal Tribunal ("EAT"), the school argued that the tribunal had been wrong to look at the reasons for the breakdown in trust and confidence, if it accepted that such a breakdown had occurred. This argument was rejected and the tribunal's decision was upheld.

- [55] In a more recent case of **Leach v The Office of Communications** [2012] EWCA Civ 959, the Court of Appeal dealt with employers' use of breakdown in trust and confidence. The court upheld the tribunal's decision that the respondent's decision to summarily dismiss an employee citing a breakdown in trust and confidence after investigating information it had received from the Metropolitan Police relating to child abuse in Cambodia was reasonable in all the circumstances. It further held that if an employer wishes to rely on breakdown in the relationship between employer and employee to dismiss, in order to justify dismissal, the breakdown in trust must be for a substantial reason.
- [56] In the present case, the Defendant terminated Ms. Woodside's employment because of the actions of her husband. Mr. Burrows testified that Ms. Woodside divulged private and confidential information to her husband. He further stated that the Defendant has policies which discuss confidentiality especially at a manager's meeting. As a result, he lost confidence in her and her ability to be trusted with the company's affairs. Ms. Woodside said with respect to the Defendant's affairs, she would not speak to anyone but, in these circumstances, it was different. I agree.
- [57] The evidence did not reveal a breach of trust/confidence by Ms. Woodside. Whatever information she divulged to her husband had nothing to do with the affairs of the Defendant. Mr. Burrows was in the wrong to initiate such a personal and delicate conversation with Ms. Woodside. He had already reported the matter of anonymous harassing telephone calls to the police and the Fraud Department at BTC. He should have allowed the law to take its course.
- [58] As I see it, Mr. Burrows does not have a leg to stand on. He had no reason at all for summarily terminating the employment of Ms. Woodside. The breakdown of trust is not a "mantra" to be misused by employers whenever they are faced with establishing a more conventional conduct reason for dismissal. Whether a

reason is “substantial” and justifies dismissal depends on an examination of all the relevant circumstances surrounding the dismissal.

[59] Again, if I am wrong to come to this finding, I shall proceed to consider the legal issue advocated by learned Counsel Mr. Ferguson. Counsel submitted that an employer cannot vacillate on the ground on which he terminates the employment of his employee. A similar issue arose in the case of **Sun International (Bahamas) Limited v Kevin Williams** (Civil Appeal No. 20 of 1998). In that case, the Court of Appeal held that from the record, it was quite clear that a specific reason was given for the respondent’s termination in the following words:

“This employee is terminated for willingly and knowingly collaborating with Ms. Mackey on misappropriation of Junkanoo Festival funds totaling at least \$2,170. On could submit and say that that was the reasonable belief which they had at that time; however, in giving evidence before the Tribunal in 1998, they seemed to have moved away from that reason for the termination and gave another reason, that it was the failure to report.

The Tribunal has found on the facts that there was no collaboration as stated in this termination notice, and that their evidence did not support the reason given at the time. The appellant cannot now argue that that is not what they intended but what was intended was that there was a failure to report, because there was no evidence that in terminating the employment of the respondent it was as a result of a reasonable belief, an honest belief, that he failed to report, and that was the reason why they terminated the agreement. [Emphasis added]

...However, the reason given, we cannot speculate now as to why there has been this change of heart or change of evidence, but the Court can only surmise that the reasonable belief at that time was as stated in the termination notice, that the evidence has disclaimed this, and the Tribunal has found the fact that there was not this collaboration.”

Conclusion

[60] The real reason for summarily dismissing Ms. Woodside was because she had informed her husband of what Mr. Burrows told her in a meeting which had nothing to do with the Defendant. It was a purely personal and sensitive matter. It involved her husband. Her husband was brought to Mr. Burrows’ office and he was loud and boisterous. That being said, she cannot be held legally responsible for the actions of another person. On 28 February 2014, Ms. Woodside was

summarily dismissed for dishonesty. Under no circumstance could this be termed dishonesty. Subsequently, the ground for termination was amended to reflect gross insubordination/insolence and gross misconduct and at this trial, a further alteration to breach of trust/confidence.

[61] What is clear is that an employer must be decisive. He cannot summarily dismiss an employee on one ground and then go fishing for other grounds to justify the real reason[s] for the dismissal, as occurred in the present case: see **Sun International (Bahamas) Ltd v Kevin Williams** [supra]. Therefore, on the substantial merits of the case, Ms. Woodside was unfairly dismissed.

Quantum of damages and other issues

[62] At the date of her dismissal, she received an ex gratia payment of \$7,000 for her services over the years and \$752.00 representing two weeks' vacation. In her statement of claim, she alleges that she suffered loss and damage and at paragraph 11, she particularized the damage as follows:

Three (3) weeks' pay for each year of service @ \$376.00 weekly (48 weeks x \$376.00)	\$18,048.00
Employer's contribution to group medical (\$55.61 p/w x 48 weeks)	\$2,669.28
Compensatory Award – (s. 47 of the Employment Act)	\$6,000.00
TOTAL	\$26,717.28
Less amount paid at termination	\$ 7,000.00
BALANCE DUE AND OWING	\$18,965.28

[63] There is no challenge to the quantum of damages which was claimed. Accordingly, I will award Ms. Woodside the balance due and owing in the amount of \$18,965.28. There will be interest at the statutory rate in accordance with section (3) of the Civil Procedure (Award of Interest) Act, 1992 from 28 February 2014.

Costs

[64] The court urged Counsel to agree on costs but they cannot as learned Counsel for the Defendant needed to take further instructions. In the circumstances, I will order that costs to the Plaintiff be taxed if not agreed.

Dated this 14th day of September, A.D., 2017

Indra H. Charles

Justice