COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00015

BETWEEN

DIANNA COX

Plaintiff

AND

DANBRAD LIMITED

Defendant

Before: Hon. Mr. Justice Ian Winder

Appearances: Sidney Campbell with Cryil Ebong for the Plaintiff

G. Dianne Stewart with Ashley Sands for the Defendant

20 June 2018, 3 September 2018 and 9 October 2018 (Closing Submissions)

JUDGMENT

WINDER, J.

This is a claim for wrongful dismissal.

1. The Plaintiff, Ms. Dianna Cox (Cox), was employed with the Defendant for 26 years. She was initially employed as a Swing Manager and subsequently confirmed as a 2nd Assistant Manager on the 16 October, 2006.

2. The Defendant, DanBrad Ltd., is a Bahamian company which, *inter alia,* operates the fast-food chain known as McDonald's.

3. This claim was brought by Cox after she was summarily dismissed by the defendant on 10 April 2015. The Amended Statement of Claim is settled in the following terms:

    1. The Defendant is a Company duly registered under the laws of the Commonwealth of The Bahamas and carrying on business as a fast food chain restaurant.
    2. At all material times the Plaintiff was employed by the Defendant for 26 years as a 2nd Manager at a salary of $454.00 per week.
    3. On April 17, 2014 the Defendant wrote to the Plaintiff and thanked her for taking over the reins in the Marlborough Street Restaurant when the restaurant manager went on extended sick leave.
    4. Sometime in or about April 10, 2015 in breach of the Plaintiff's contract of employment, the Defendant wrongfully terminated the Plaintiff's contract of employment over an error made while conducting a physical inventory audit at the Defendant's Marlborough Street Restaurant, without reasonable notice or pay in lieu thereof.

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    7. At the time the audit was being conducted, there were three managers stationed at the Marlborough Street Restaurant, 1st Assistant Manager, Sandra Williams, 2nd Assistant Manager, Monique Green as Acting Restaurant Manager and the Plaintiff, 2nd Assistant Manager.

    ...

    9. That on December 31, 2014, the company's Annual Audit of its Marlborough Street Restaurant was conducted. MS Sandra Williams, the Restaurant Manager was there to oversee the entire process. The Plaintiff took part in the Annual Audit along with the External Auditor and Ms Williams, who had returned to work from her extended sick leave for that purpose.

10. That subsequent to the physical count, the Restaurant Manager, Ms Sandra Williams the External Auditor and the Plaintiff sat in a room and agreed on the data collected during the Audit.

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12. Subsequent to the December 31st 2014 audit, a dispute arose relative to the report submitted by the Plaintiff and the report submitted by the Defendant's External Auditor regarding the physical inventory case count for sweet and sour sauces on hand.
13. On March 18th 2015 a meeting was convened by a panel of the Defendant's managers and the Plaintiff to discuss the error, and it is alleged that the Plaintiff informed the said panel that she had manipulated the audit count.
14. On March 20th 2015 another panel of the Defendant's Managers were convened in a meeting with the Plaintiff and managers from the three of the Defendant's Restaurants to explain the procedures and practices used as it relates to physical inventory counts, and it is alleged again that the Plaintiff again agreed that she manipulated the said physical inventory count.
15. On March 31st 2015 another panel of the Defendant's Managers was convened in a meeting with the Plaintiff, and subsequent to this meeting the Defendant wrongfully terminated the contract of employment of the Plaintiff without notice or pay in lieu of notice thereof.
16. The Plaintiff contends that the variance in the physical audit of the sweet and sour sauces was nothing more than an error and that because of the undue pressure from management she may have agreed to certain suggestions that she ought not have but for the intimidation and threat of management towards her.
17. In the meeting of March 31st, 2014, due to the intimidation and duress the Plaintiff was subjected to by the Defendant, the Plaintiff totally lost her composure, and one of the Defendant's Managers, Billy Bowe, advised the Plaintiff to excuse herself to regain her composure.

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19. The Plaintiff was the only Manager investigated for the Audit error, and terminated, even though the Audit was conducted by Ms Sandra Williams, the Restaurant Manager as she had returned to work from sick leave for that purpose.
20. The data keyed into the system from the physical audit was checked for variance and reconciled by Ms Sandra Williams, the Marlborough Street Restaurant Manager.

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25. By reason of the Defendant's failure to pay the Plaintiff the sum owed, the Plaintiff has suffered loss and damage.

4. The defendant's case is set out in paragraphs 4,6,7,8,14-16 and 20 of the defence, which provides:

    4. Save that the Defendant terminated the employment of the Plaintiff and save that the Defendant did not give the Plaintiff notice or payment in lieu of notice, the Defendant denies paragraph 4 of the Statement of Claim. A

thorough investigation was conducted by the Defendant and it was determined that the Plaintiff's actions of falsifying and distorting figures in the year-end count with auditor present audit amounted to gross misconduct and not an error consequently she was summarily dismissed on the 10th April 2015 and she was not entitled to notice or payment in lieu thereof.

...

7. Save that it was not an Annual Audit, but a Year End Inventory Count, it is admitted that the three managers as averred in paragraph 7 were stationed at the Marlborough Street restaurant, but Ms Williams was on extended sick leave at this time undergoing chemotherapy and only came into the restaurant when she felt well enough and for brief periods of time.
8. The Defendant denies paragraph 12 of the Statement of Claim and avers that the Defendant's external auditor, PKF (Bahamas) and the Plaintiff both concurred and agreed upon the case counts of various items in the Defendant's end of year inventory which included sweet and sour sauces which were on hand during the physical inventory conducted on the 31st December, 2014. The report subsequently submitted by the Plaintiff on the 2nd January, 2015 of that physical inventory reflected abnormally high variances in case counts for several inventory items including the sweet and sour sauces. This inconsistency was brought to the Defendant's attention on the 17th March, 2015 by the external auditor which prompted the investigation.
14. The physical inventory count conducted by the external auditor on the 31st December, 2014 which was witnessed and signed off on by the Plaintiff, was considerably different specifically in relation to condiments at the Marlborough Street McDonalds restaurant from the count provided to management by the Plaintiff. The findings revealed that the physical inventory case count for the sweet and sour sauces on hand was 16 cases and the physical inventory report subsequently submitted by the Plaintiff to the Defendant's accounting department reflected 257 cases on hand, resulting in a variance of 241 cases unaccounted for.
15. There were also similar variances in September, October and November which the Plaintiff could not explain.
16. Save that the Plaintiff did admit to manipulating the inventory figures during the meeting held on the 18th March, 2015, paragraph 13 of the Statement of Claim is denied. There was never a 'panel' convened by the Defendant. A meeting was held with the Vice President of Operations, the IT/Training Consultant and the Training Manager in Training along with the Plaintiff to explain the inventory variances that had been recently discovered. While the largest inconsistency was in relation to the sweet and sour sauces, there were also variances in a number of other items including the barbeque sauces, creamers, hot cake syrups, equal sweetener and paper bags. During this meeting, the Plaintiff admitted to changing the ending inventory count in order to improve the variances and reflect a better and realistic usage.

5. Cox was the sole witness in her case whilst the defendant called Catrice Forbes, Jacquelyn Marshall and Billie Bowe as witnesses in its case.

6. The case for Cox was:

   a) She was not properly trained as the defendant had not provided her with proper training to conduct end of year inventory count prior to her being temporarily appointed as the restaurant manager of its Marlborough Street Restaurant.

   ...

   c) She was wrongfully terminated as she was summarily dismissed by the defendant without conducting a reasonable investigation into the allegations of misconduct.

7. The case of the defendant centered around Cox's conduct during a year-end inventory count with the defendants auditors PKF (Bahamas) Limited on the 31st December, 2014. The defendant says that Cox, as manager, agreed that the inventory counted at that time was correct, however subsequently, she submitted a physical inventory report to the defendant's accounting department with figures which were considerably different, specifically in relation to the quantity of condiments, from the previously agreed figures. They say that a review of the inventory reconciliation showed abnormally high variances as follows:

   a) An agreed count of approximately 27 cases (6,780 units) of sweet & sour sauce was changed to approximately 254 cases (63,547 units) with a variance of $4,421.01;
   b) An agreed count of 8 cases (4,400 units) of creamers was changed to approximately 181 cases (99,600 units) with a variance of $4,803.27;
   c) An agreed count of 28 cases (3,360 units) of hotcakes syrup was changed to approximately 67 cases (8,091 units) with a variance of $836.99;
   d) An agreed count of approximately 5 cases (1,345 units) of BBQ sauce was changed to approximately 58 cases (14,597 units) with a variance of $,1,026.76.

8. The defendant says that during three separate meetings held with Cox and its managers on the 18th, 20th and 31st March, 2015, Cox was advised of the variance between the agreed year-end inventory count and the subsequent report that she

submitted. They say that during each meeting, Cox admitted to changing the inventory count to improve the variances between the value amount in the system and the actual inventory count. Cox, they allege, acknowledged that she knew this act was against the company's physical inventory count procedures and she was summarily dismissed.

9. The following issues have been identified by the parties.
    a) Whether the Plaintiff was adequately trained in managing a restaurant and in particular was she trained to conduct a year-end inventory?
    b) Did the Defendant conduct a proper investigation into the incident?
    c) Whether the Plaintiff manipulated the inventory figures and if so, did the manipulation justify summary dismissal?

10. The issue of adequate training, in my view, can be dealt with shortly. There was ample evidence to demonstrate that Cox was adequately equipped to conduct the year-end inventory count. The evidence which she accepted, demonstrate that she had been given considerable formal training to enable her to carry out the year end count.

11. She attended and successfully completed various training sessions and workshops on food costs, the Defendant's IT system, inventory control, inventory counts, the effect of incorrect inventory and its negative impact on food costs and profits. The witnesses attested that Cox knew the importance of performing inventory counts correctly and honestly and the effects of failing to do so from her training.

12. Cox had been appointed a Training Manager on the 6th January, 2006 and this appointment required her to have an extensive knowledge of all of the various training areas for employees, inclusive of performing the month and year end inventory counts. According to the evidence of Jacqueline Marshall, Cox would not have been appointed a Training Manager without adequate training and knowledge of the importance of the inventory counts. Cartice Forbes' evidence was that Cox was competent in troubleshooting variances and she attended

classes and workshops to improve Food Costs which I held along with regional consultants. The Food Costs workshop extensively dealt with physical inventory counts taken at the end of each month and physical inventory counts taken at the end of the year with the Defendant's external auditors. The Workshop also dealt with physical count reports and their importance, how to reconcile the physical inventory counts and specifically how large variances should be accounted for.

13. Whilst Cox may have had limited exposure to the year-end count, the evidence which I accept, was that the year-end count was no different from the monthly count save that the Auditor was present. Cox had engaged in the monthly inventory count time and again. Finally, Cox's employment was not determined as a result of improperly conducting the year-end count but for subsequently and falsely changing the numbers in the computer to reflect better (albeit inaccurate) usage of the defendant's supplies.

14. I am satisfied that this issue of adequate training ought to be resolved in favor of the defendant.

15. The second issue for determination is whether the defendant conducted a reasonable investigation with respect to the allegations of misconduct. Section 33 of the EA provides:

> An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believe 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.

16. In **Bullard v. The Ruffin Crystal Palace Hotel Corporation Ltd. d/b/a/ Wyndham Nassau Resort & Crystal Palace Casino - [2010] 4 BHS J. No. 163** the plaintiff, cashier, was employed with the defendant hotel and was summarily dismissed for dishonesty. On 24 April 2003 employees for the defendant approached the plaintiff and told her that they wanted to carry out a surprise audit or countdown of her float. She had been provided with a float of

$3,000 by the defendant and which was to be kept in her assigned safety deposit box. The evidence was that in response to the request, the plaintiff advised that her keys to the safety deposit box were at home and that she would have her sister bring them to her at work. At this time the plaintiff was made aware that failing to have the above mentioned keys was in breach of provisions HBC 167, in that she did not have her keys in her personal possession. In light of this information the security deposit box was sealed with tape. The following morning the plaintiff disclosed that the float was not in the safety deposit box, but was instead in a cabinet in the office, which could have been opened the day before by another supervisor on duty. The full amount of the float, in paper notes was found in the cabinet drawer.

17. Bullard was placed on suspension until 29 April 2003 and was not informed that an investigation was being conducted into the incident. When she returned to work on the 29 April 2003, she met with the Human Resources Department and was informed that her services had been terminated on the ground of dishonesty. ***Hepburn J*** found that Bullard had been wrongfully dismissed in breach of Section 33 of the EA as she was not made aware that she was being investigated for dishonesty, nor was she given any opportunity to answer the allegations.

18. In ***Bahamasair Holdings Ltd. V Omar Ferguson*** **SCCivApp No. 16 of 2016** the Court of Appeal outlined the basics of a reasonable investigation. In that case the Court of Appeal found that the employee had been wrongfully and unfairly dismissed on the basis of a flawed investigation. According to Crane-Scott JA at paragraph

> 54. At the very minimum, an employer's duty under section 34 to act fairly would require the employer to adhere to the audi alteram partem rule of natural justice: that most cherished principle of procedural fairness which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him. We hasten to add that the right to be heard does not require the employer to

> conduct a full blown hearing, but may be satisfied by giving an employee an opportunity before a decision is made, to make representation (whether in writing or in person) to the employer as to why he should not in the circumstances be terminated.

19. Cox says a proper investigation was not done prior to terminating her employment by the defendant. The defendant says, at paragraph 34 of its submissions, that:

> The evidence before the Court clearly shows that as employer, the Defendant carried out a reasonable and proper investigation into the Plaintiff's misconduct, gave the Plaintiff an opportunity to explain her actions and based on the findings of the investigation, had sufficient grounds to summarily dismiss the Plaintiff. The only apparent reason for the Plaintiff's conduct was an attempt to benefit from the Defendant's food costs incentive bonus program.

20. I am satisfied that the defendant conducted a proper investigation in determining whether to summarily dismiss Cox. The undisputed evidence in this case was that three meetings took place with Cox prior to the termination of her contract of employment. The first meeting was held on 18 March 2015 to determine what accounted for an abnormal variance between the agreed count and the year-end numbers subsequently submitted by Cox. Cox met with the Vice President of Operations Jacquelyn Marshall along with Catrice Forbes, the Training Consultant and Mazara Mason the Training Manager. Cox was informed that there was a huge variance with the creamers and sweet and sour sauces between the end of year physical inventory count and the subsequent report that she submitted. Cox was given an opportunity to explain why the inventory count was different. I accept that she admitted to adjusting the inventory count to improve the variances subsequent to the auditor overseeing the end of year physical count with her in December 2014.

21. The second meeting was held on 20 March with Cox and all other managers, of the various restaurants owned and operated by the defendants to discuss discrepancies with the year-end audit of the physical inventory. During both meetings, Ms. Cox was given an opportunity to explain why the inventory was

changed and she again admitted that she had adjusted the inventory to improve the usage.

22. The third and final meeting was held on 31 March, 2015 where Cox met with the President of DanBrad Ltd., Mrs. Earla Bethel, and Billie Bowe, the defendant's HR consultant. According to the evidence this was to provide her with another opportunity to explain the circumstances surrounding the huge variances in the inventory count. During this meeting, Cox again admitted that she had changed the ending inventory count and acknowledged that she knew this was against the company's physical inventory count procedures. Cox indicated that she had done this to improve the usage.

23. All of the witnesses for the defendant gave evidence of Cox admitting that she manipulated the numbers to achieve or reflect a better usage for the store.

24. Cox admitted in her witness statement and on oath that the she manipulated the year-end count. She says that it was not for the purposes of obtaining better usage and says that it was done in consultation with the manager who was on sick leave at the time. Her case was that she was troubleshooting and that the figures were changed in consultation with the store manager who was also present at the time. She says that whilst she may have been logged into the computer under her password, Sandra the store manager was also there at times. Having heard the witnesses and examined their demeanor as they gave evidence I prefer the evidence of the defendant on this issue as to the purpose for which the year-end count was manipulated. The evidence which I accept was that the substantive manager, who has since died, was undergoing chemotherapy at the time of the year-end count and which was the reason she was acting as the store manager.

25. The case of the defendant was based primarily on the defendants own admission of responsibility. Practically, it is difficult to see what else had to be put to her when she had already admitted what she had done on the three occasions. It is clear

also that the defendant had been given the opportunity to say why she ought not to be terminated having regard to what she had done and clearly she appreciated that the this was the purpose of the meeting on 31 March 2015. At paragraph 13 of her witness statement Cox says that whilst in the room with the president of the company, she was very nervous and in fear of losing her job of twenty six (26) years. She said that in one of the meetings she broke down and was asked to leave the room to regain my composure and then return.

26. The final meeting took place on 31 March 2015 however Cox's employment was not terminated until 10 April 2015. These allegations, which the defendants says caused the summary dismissal, namely fraudulently completing company documents were put to the defendant prior to her termination in a manner to afford her the opportunity before a decision is made, to make representations in person to the employer as to why she should not in the circumstances be terminated.

27. I am satisfied therefore, on the evidence, that having conducted a reasonable investigation, the defendant honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal.

28. The final issue was whether Cox manipulated the inventory figures and if so, did the manipulation justify summary dismissal? As indicated I accept, as did the defendant upon the admission of Cox, that the inventory figures were manipulated by her to reflect better usage for her restaurant. The only aspect of the issue outstanding is whether this misconduct was sufficient to warrant summary dismissal. The proper test to be applied, in determining whether conduct complained of by an employer was such as to warrant summary judgment, was confirmed in the Privy Council case of ***Jervis et al v Skinner [2011] UKPC 2***. In ***Jervis et al v Skinner***, Lord Clarke delivering the decision of the Board, stated at paragraph 22 of the decision,

The test has been much discussed in the authorities but it was not in dispute in this appeal that the test was correctly stated by Lord Jauncey sitting as the Visitor to Westminster Abbey in Neary v Dean of Westminster [1999] IRLR 28, where he said at para 22:

> "that conduct amounting to gross misconduct justifying 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."

29. The defendant says that the actions of Cox in breaching the terms of her employment contract by way of fraudulently completing company documents as well as adversely affecting the defendant's loss and profit margins in a negligent manner has completely undermined the trust and confidence of the defendant. I accept that this submission is consistent with the evidence. The evidence was that there was a personal financial advantage to improving the inventory count. Cox has admitted to manipulating the year-end count. Besides the fact that this issue clearly reflects on questions of honesty which is essential for an employer who reposes his business in the hands of a manager, the evidence was that these actions skewed the defendant's profit and loss margins relative to the restaurant. I am satisfied that the alleged misconduct was sufficient to *so undermine the trust and confidence which is inherent in the particular contract of employment that the defendant should no longer be required to retain Cox in its employment.*

30. In all the circumstances therefore I dismiss Cox's claim with costs to be taxed if not agreed.

Dated the 24th day of July 2019

Ian R. Winder

Justice