COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2015/CLE/gen/01968

BETWEEN

PATRICK ANTHONY HANLAN

Plaintiff

AND

THE COLLEGE OF THE BAHAMAS

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Donovan Gibson and Ms. Palincia Hunter of Munroe & Associates for the Plaintiff
Mr. Audley Hanna Jr. and Mr. Adrian Hunt of Higgs & Johnson for the Defendant

Hearing Dates: 9 May 2017, 17 January, 12 June, 26 September 2018

Employment - Contract of Employment – Termination of Employment - Wrongful dismissal – Summary dismissal – Employee under a fixed term contract for three years – Employer terminated contract after first year on ground of incompetence – Whether employer breached Clause 11 of contract – Whether procedural defect

Pursuant to a written contract dated 29 January 2014, the Defendant engaged the Plaintiff as its Director of Accounting for a fixed term of three years commencing 1 February 2014. On 29 April 2015, his direct supervisor did a Performance Review of him for the period 1 February 2014 – 31 January 2015. His overall performance rating was 1.80 out of a scale of 5.0. He was asked to comment on the Performance Review but he failed to do so. The Plaintiff attended a meeting on 4 June 2015 with his direct supervisor. At a meeting, it was indicated to him that the Defendant wished to part ways with him because his performance level fell below the standard required of the Director of Accounting. He was also given two options namely (i) to resign or (ii) to be terminated. He was relieved of his duties that same day.

The Plaintiff never sent in a letter of resignation but about two weeks later, he received a letter from the Defendant informing him that his resignation was accepted. That resulted in some correspondence between the parties. Three months later the Defendant issued a Notice of Termination; paid him three months' salary in lieu of notice and informed him of his right to appeal to the Defendant's Council and provided him with an additional ninety days should he wish to do so.

Instead, the Plaintiff instituted the present action against the Defendant alleging that the Defendant did not strictly comply with Clause 11 of the Contract regarding termination in that a notice of intention to terminate should have been given to him specifying the reason (s) for termination and that he should have been afforded a hearing before the Defendant's Council within ninety days. Accordingly, says the Plaintiff, the Defendant wrongfully terminated the Plaintiff and the initial purported termination amounted to a wrongful repudiation for which he is entitled to damages.

HELD: Dismissing the Plaintiff's claim with costs to the Defendant to be taxed if not agreed;

1. The Plaintiff was lawfully summarily dismissed for cause, the cause being incompetence: **Rolle v Paradise Enterprises Limited** [2004] BHS J. No. 39; **O'Shea v Grand Bahama Hotel and Country Club** [1989] BHS J. No. 22 applied.

2. Competence is to be determined according to the subjective judgment of the employer and not the judgment of the court. The correct test is for the dismissal of an employee for incapability is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee is incompetent. It is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent: **David Lashley & Partners Inc v Bayley** (1992) 30 WIR 44 at pg. 46. Consequently, there is nothing improper when the Plaintiff was only assessed by his direct supervisor.

3. The Court finds that the Plaintiff was fully aware that the Defendant wished to part ways with him because his performance did not meet the required standard. In addition, his direct supervisor specified that reason to him in the meeting on 4 June 2015 when he was relieved of his duties. She, as well as the Associate Vice President, Human Resources gave him two options namely (i) to resign or (ii) to be terminated. It was a courtesy afforded to him.

4. Indeed, there was some correspondence between the parties after the Defendant did not hear from the Plaintiff but at the end of the day, the Plaintiff was paid three months' salary in lieu of notice and afforded more than ninety days should he have wished to appeal.

5. Even if the Defendant did not follow the proper procedure laid down in Clause 11, a procedural defect in itself is insufficient to entitle a dismissed employee to damages. An employer does not have slavishly have to adhere to a procedural code or to a procedure set out in an employee's handbook or a contract of employment: **Polkey v. A.E. Dayton Services Ltd** [1988] 1 A.C. 344 H.L. and **Lucayan Beach Resort & Casino v Lewis** [1999] BHS J. No. 14 applied. See also: **Lowndes v Specialist Heavy Engineering Ltd.** [1976] IRLR 246 and **Hill v Mallinson Denny (NW) Ltd** [1982] Lexis Citation 183.

6. The Defendant bent backwards to accommodate the Plaintiff in a manner that was more favorable to him by affording him the options of either resigning or being terminated. It was a courtesy extended to him in order to leave his position with dignity in a manner which would least impact his future career path. Such a practice is unusual but not unheard of. In fact, such a practice received the sanction of the Court in **Bahamas Electricity Corporation v Smith** [2007] 5 BHS J. No. 244.

7. On a balance of probabilities, the Plaintiff was unable to adduce evidence to demonstrate to the Court that he was wrongly dismissed as alleged or at all. Further, he was unable to prove that the Defendant breached Clause 11 of the Contract.

JUDGMENT

CHARLES J:

Introduction

[1] Patrick Anthony Hanlan ("the Plaintiff") is a qualified chartered accountant. He was self-employed from 2005 to 2013 operating his own accounting firm. On or about 15 January 2014, he accepted a three-year contract ("the Contract") as the Director of Accounting with the College of The Bahamas ("the Defendant"). He commenced employment on 1 February 2014. The primary function of his position was to oversee the Accounts Receivable Department that primarily involved the collection of students' tuition and fees. His direct report was to the Vice-President of Finance, Marlo Murphy-Braynen ("Mrs. Braynen"). In accordance with the terms of the Contract, Mrs. Braynen carried out a Middle Management Performance Review ("the performance review") of the Plaintiff for the periods 1 February 2014 to 31 January 2015. His overall performance rating was 1.80 out of a scale of 5.0. He was asked to comment on the performance review but he failed to do so.

[2] On or about 4 June 2015, Mrs. Braynen met with the Plaintiff and advised him that the Defendant had decided to part ways with him because his performance fell below the standard required of a person holding that position. In his presence, she spoke with the Defendant's Vice President of Human Resources, Renee Mayers ("Mrs. Mayers") via telephone and the Plaintiff was given the option to resign or be terminated. At the end of the meeting, Mrs. Braynen requested that he turn in his laptop (which belonged to the Defendant), the building access swipe card and office keys. He complied with all requests made by Mrs. Braynen. The Plaintiff did not return to work after that day.

[3] The Plaintiff never sent in a letter of resignation but about two weeks later, he received a letter from the Defendant informing him that his resignation was accepted. This resulted in some correspondence between the parties. Three months later the Defendant issued a Notice of Termination, paid him three months'

salary in lieu of notice, informed him of his right to appeal to the Defendant's Council, and provided him with an additional ninety days should he wish to do so.

[4] Instead, the Plaintiff instituted the present action claiming damages for breach of contract in the sum of $122,394.24 and damages for wrongful dismissal. The Defendant avers that the Plaintiff was lawfully summarily dismissed for cause namely incompetence. The primary ground of contention by the Plaintiff is that the Defendant failed to follow the procedure laid down in Clause 11 of the Contract if it wanted to terminate his employment for cause.

[5] For reasons which will became more apparent in the Judgment, I will dismiss the Plaintiff's claim with costs to the Defendant to be taxed if not agreed.

Relevant facts

[6] Pursuant to a written contract dated 15 January 2014, the Defendant agreed to employ the Plaintiff as its Director of Accounting in the Office of the Vice President of Finance ('the VPF"). The employment was for a fixed term of three years, commencing 1 February 2014 and ending 31 January 2017. The primary function of his job was to oversee the Accounts Receivable Department that primarily involved the collection of students' tuition and fees. He directly reported to Mrs. Braynen.

[7] On or about 10 April 2015, Mrs. Braynen completed the performance review in accordance with clause 9 of the Contract with respect to the period 1 February 2014 to 31 January 2015.

[8] On or about 29 April 2015, Mrs. Braynen met with the Plaintiff to discuss the Review. He was requested to provide a response by 1 May 2015 and, in any event, by no later than 4 May 2015 so that the performance review could be finalized. The Plaintiff did not provide the response to the contents of the performance review.

[9] On 17 May 2015, the Plaintiff was provided with a finalized version of the performance review which indicated that his performance fell substantially below the expected standards of the management position held by him.

[10] On 4 June 2015, a meeting was held between the Plaintiff and Mrs. Braynen to consider his engagement with the Defendant, at which time he was presented with two options to conclude his employment with the Defendant namely (i) the option to resign or (ii) the option to be terminated as a result of not performing to the standard required under the Agreement.

[11] On 7 June 2015, Mrs. Braynen advised the business office that the Plaintiff was no longer employed by the Defendant. She requested that all matters which would routinely be addressed to the Plaintiff should now be addressed to Miss Patrice Strachan, Assistant Director, and be copied to her.

[12] About two weeks passed. Not having heard from the Plaintiff, Mrs. Mayers wrote to him on 16 June 2015 advising him that the Defendant had accepted his resignation. This letter was attached to an email from Nakessa Beneby ("Ms. Beneby").

[13] The following day, the Plaintiff responded via email on 17 June 2015 to Ms. Beneby and Mrs. Mayers which he copied to his attorney, Mr. Munroe QC, disputing the resignation and requesting that they produce his resignation letter.

[14] On 17 June 2015, Mrs. Mayers responded to the Plaintiff's email. She also copied Mr. Wayne Munroe QC. In it, she wrote:

> **"…You will recall that at the time of discussing the matter of your contract with you, the following two options were tabled:**
>
> **a) The option to resign**
>
> **b) The option to be terminated**
>
> **You were to revert with your decision. Having not heard from you, and considering your role as a Middle Manager, we thought it best to**

consider the option of resignation for those earlier reasons we had discussed.

If it is that you are now indicating termination, our office will follow through with the required steps for termination of contract by the College and process your associated entitlement."

[15] On 31 July 2015, Messrs. Munroe & Associates wrote to Mrs. Mayers stating:

> "**We are instructed that on Sunday, June 7th, 2015 our client was notified via email from Mrs. Marlo Murphy-Braynen,…that he had been terminated as Director of Accounting.**
>
> **We are further instructed that our client received no further notification by way of a termination letter….**
>
> **It is our considered opinion that our client's fixed term contract has been wrongfully terminated. In the premises he is entitled to damages amounting to the balance of his fixed term contract which was to conclude on January 31st, 2017…."**

[16] On 13 August 2015, Mrs. Mayers wrote to Messrs. Munroe & Associates acknowledging receipt of their letter of 31 July 2015 and stating that the matter has been referred to the Office of the Secretary of the College Council for further action.

[17] Then on 14 September 2015, Wendyi Poitier-Albury, on behalf of The College of The Bahamas, submitted a Notice of Termination on behalf of the Defendant. The letter, in part, stated:

> **"We have not received a response from you with regards to the email sent to you on June 17th 2015 from Mrs. Renee Mayers, AVP Human Resources at the College, which was sent as an indication of our intention to terminate your employment with the College as per Clause 11 Termination by the College, of your Contract of Employment.**
>
> **You have also not indicated whether you wish to appeal to the College's Council. If you wish to appeal, please be advised that the Council will meet on Wednesday, September 16th, 2015….**
>
> **If you wish for us to consider an extension to the ninety (90) days appeal period, please also indicate same to Mr. Michael Stevenson ….**
>
> **Further, please be advised that your salary for July to September will be made on the September payroll."**

[18] The following day, Mrs. Poitier-Albury wrote to Messrs. Munroe & Associates stating that:

> **"…The emails clearly indicate that there was discussion between the two (Hanlan/Murphy-Braynen) regarding your client's performance for the period being reviewed and that his rating was a 1.80 rating which is well below the acceptable performance requirement, hence the reason for termination."**

[19] Against this backdrop, the Plaintiff alleged that Clause 11 of the Contract was not followed and as a result, he was wrongfully terminated. He claims the sum of $122,394.24 for breach of contract and wrongful dismissal.

The issues

[20] The following issues were identified as arising for consideration namely:

1. Whether the Defendant breached Clause 11 of the Contract?

2. Whether the Plaintiff's contract of employment was wrongfully terminated without cause prior to its expiration?

3. Alternatively; whether the Defendant lawfully summarily terminated the Plaintiff for cause.

The Law

Wrongful Dismissal

[21] In **Kayla Ward et al v The Gaming Board of The Bahamas** [2017] CLE/gen/01506 [unreported], Judgment delivered on 17 February 2020, I set out the law on wrongful dismissal. I merely adopt what I stated in that judgment at paragraphs 82 to 85:

> **"82. Wrongful dismissal is based on contract law. A helpful meaning is provided by the learned authors of *Halsbury's Laws of England, 4th ed. Vol. 16* at para. 302 wherein it is stated that:**
>
> > **"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is**

engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: *Hopkins v Wanostrocht* (1861) 2 F & F 368, namely:

(i) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (*Williams v Byrne* (1837) 7 Ad & E1 177); and

(ii) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily: *Baillie v Kell* (1838) 4 Bing NC 638.

83. In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

84. Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.

85. A claim for wrongful dismissal is based on common law principles. It is not a statutory claim under the Act. At common law, the normal remedy for wrongful dismissal is for the innocent party to bring an action for damages: Selwyn's Law of Employment, 10th Edn. para.16:15."

Summary Dismissal

[22] The law relating to summary dismissal is set out in sections 31 to 33 of the Employment Act, 2001, Ch. 321A ("the EA").

[23] Section 31 provides 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 provided that such employee shall be entitled to receive previously earned pay.

[24] Section 32 of the EA 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 a non-exhaustive list of the types of misconduct (including incompetence) which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer entitling an employer to summarily dismiss an employee.

[25] Section 33 states that 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.

[26] In The Bahamas, there appears not to be too many judicial authorities dealing with the issue of termination on the ground of incompetence. However, Mr. Hanna who appeared as Counsel for the Defendant, helpfully provided me with **Rolle v. Paradise Enterprises Limited** [2004] BHS J. No. 39, a decision of the Bahamas Industrial Tribunal. In **Rolle**, at paragraph 35, the Tribunal stated:

> **"The other instance where an isolated breach may be sufficient to warrant summary dismissal is where the act in question is inconsistent with the continuance of confidence between the employer and the employee, as was stated in the case of SINCLAIR v. NEIGHBOUR [1967] 2 Q.B. 279."**

[27] The Tribunal continued, at paragraph 38:

> **"38. The text; The Law of Master and Servant by Francis Releigh Batt LLM, the following is stated at p. 65:**
>
> **"Incompetence is obviously a ground for dismissal; indeed, incompetence resulting in failure to perform the duties of the service destroys the whole reality of the contract from the point of view of the master. The degree of skill or competence required of the servant will vary with the character of the employment, and in the unskilled or semi-skilled occupations, probably incompetence must amount to neglect or**

disobedience in order to justify instant dismissal." [Emphasis added]

39 In the case of HARMER v. CORNELLUS [1914] English Reports at p. 98, Willes J. said the following about competence:

"We are of the opinion that [t]his rule must be made absolute. <u>When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes</u>."" [Emphasis added]

[28] Prior to the enactment of the EA, the Court of Appeal had an opportunity to consider the issue of incompetence in **O'Shea v. Grand Bahama Hotel and Country Club** [1989] BHS J. No. 22. The facts in **O'Shea** concerned the summary dismissal of a managerial employee, of approximately thirteen years tenure. One of the grounds for the summary dismissal was that he had caused financial loss to the company through unnecessary chartering of private aircrafts for his travels as well as unauthorized and excessive spending for merchandise for his employer's store. At paragraph 16, the Court of Appeal had this to say:

"In seeking to justify the summary dismissal of the appellant at the hearing of the appeal, it was submitted for the respondent that the evidence showed a pattern of consistently refusing to get approvals for ordering merchandise; that the appellant displayed incompetence in selecting marketable items and, therefore, on his own continued to acquire items which the hotel could not resell; accumulation of three million dollars worth of inventory which was paid for is a direct breach of previous lawful orders in writing that he get approval for such orders before they were placed, resulting in substantial financial loss. <u>It was said that in proof of incompetence the Tribunal could have drawn the inference from the letters and Mr. Grammer's evidence that the hotel felt that the items purchased were not saleable items.</u>" [Emphasis added]

[29] At paragraph 26, the Court of Appeal discussed the fact that there was previously "deep concern" in relation to a large quantity of "poorly selected" items of inventory. As such, new controls were put in place with Mr. O'Shea agreeing to the fact that he would require approval for large purchases. Ultimately, Mr. O'Shea continued in his practice of purchasing without prior approval. Having regard to the evidence of wasteful spending and non-adherence to protocol, the Industrial Tribunal determined

that summary dismissal was justified and this determination was confirmed by the Court of Appeal.

[30] The Court of Appeal relied heavily on **Laws v. London Chronicle (Indicator Newspapers), Ltd.** [1959] 2 All E.R. 285. At paragraphs 33 and 34 of the judgment, the Court of Appeal stated:

> **"33 Lord Evershed, MR went on to refer to the following passage in the judgment of the Privy Council in Clouston & Co. Ltd. v Corry (1906) AC 122, 129:**
>
> > **"Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal."**
>
> **34 On his own admission, the appellant willfully and, it can be said, contemptuously disregarded the system which his employer endeavored, with his agreement, to institute in order to eliminate or, at least, reduce the financial loss which the excessive accumulation of stock at the shops was causing. It was not denied that rather than being reduced, as the employer wished, the value of the accumulation had increased by about $1 million at the time when the appellant was dismissed. The appellant did not, and could not, deny that he was directly responsible for the increase. There was evidence from which it could reasonably be inferred that the refusal to implement the new system coupled with a failure on his part to exercise due diligence in the selection of merchandise, at least, contributed to the undesirable state of affairs."**

[31] Notwithstanding the different factual circumstances in **O'Shea** and the present case, the considerations reflected in the ruling by the Court of Appeal in **O'Shea** establishes that justification of a summary dismissal on the grounds of incompetence will depend on the peculiar facts of each case.

[32] In addition, competence is an issue to be determined according to the subjective judgment of the employer and not the judgment of the court, as is stated in **David Lashley & Partners Inc v Bayley** (1992) 30 WIR 44 at page 46 paragraph H:

> **"If an employee is dismissed because of his incapability, the correct test to apply is whether the employer reasonably held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent…in other words, the test …is a subjective one…It is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent."**

[33] So, as a matter of reasoning, if competence must be judged by the opinion of the decision maker – honestly and reasonably formed – so must be performance and compliance, both of which include the requirement of competence. Therefore, it is for the employer to decide if an employee's performance is satisfactory.

The evidence

[34] Although the evidence spanned over three days, it was not complex. The Plaintiff gave evidence on his own behalf and the Defendant called two witnesses, Mrs. Braynen and Mrs. Mayers.

[35] In a nutshell, the Plaintiff testified that he was summoned to a meeting on 4 June 2015 by Mrs. Braynen. He was informed that the Defendant had decided to part ways with him. Later, Mrs. Mayers joined that meeting via telephone and Mrs. Braynen informed her that the Plaintiff was no longer employed by the Defendant. They both advised him that he had two options namely the option to resign or be terminated. He simply listened and remained silent. At the end of the meeting, Mrs. Braynen requested that he return his laptop (which belonged to the Defendant), the building access swipe card, all passwords relating to his work in the Business Office and the office keys. He complied. This was his last day at work. On Sunday 7 June 2015, Mrs. Braynen sent an email informing the Business Office that the Plaintiff was no longer employed by the Defendant. He then received an email attaching a letter from Mrs. Mayers that the Defendant has accepted his resignation. He did not send in a resignation so he queried that. Shortly after, Mrs. Mayers informed him that since she did not hear from him and considering his role as a middle manager, she thought it best to consider the option of resignation. However, she also stated that if that was not the case, they would follow up with the necessary steps to formally

terminate his contract. One or two correspondence passed between the Plaintiff's Counsel and the Defendant then on 14 September 2015, the Defendant formally terminated the Plaintiff's employment and advised him of his right to appeal. The Defendant also indicated that if he needed more than the ninety days to appeal, they were prepared to give it to him.

[36] Under extensive cross-examination which lasted for nearly 1 ½ days, it was palpable from the Plaintiff's evidence that he was of the view that he was terminated on 4 June 2015 after his meeting with Mrs. Braynen. This is emphasized in paragraph 11 of his witness statement where he averred:

> **"It was not until about three months later, around September 14, 2015, Wendyi Poitier-Albury, Director Employee and Industrial Relations, submitted a Notice of Termination on behalf of the Defendant. By this time, I had been off the Defendant's premises since 4th June 2015 as at (sic) that was the date I was terminated and asked to submit all the Defendant's property."**[Emphasis added]

[37] Further, the Plaintiff insisted that he was not provided with the reasons for the termination of the Contract. However, he fully understood the terms of his contract of employment and that he could be dismissed for cause if he failed to properly carry out his functions. During cross-examination, it was also evident that in or about April 2015, the Plaintiff was aware that his performance had been reviewed and it was the view of his supervisor, Mrs. Braynen that his performance did not meet the required standard expected of the Director of Accounting.

[38] Under re-examination, the Plaintiff maintained that (i) he did not submit a resignation; (ii) no notice was ever given by the Defendant of an intention to terminate his employment with cause and (iii) he received no salary in July and August and it was not until September 2015 that he received salary for three months i.e. July to September 2015 after retaining Counsel.

[39] Mrs. Mayers testified on 12 June 2018. She is no longer employed by the Defendant having left in September 2016. She gave a witness statement on 11 April 2017 which

was filed on 20 April 2017. She was not the Plaintiff's direct supervisor but she received feedbacks about his performance from Mrs. Braynen.

[40] Under cross-examination, Mrs. Mayers stated that she had at least two conversations with Mrs. Braynen with respect to the Plaintiff's failure to deliver reports in a timely manner. That was before the performance review. She stated that since the Plaintiff's performance was not up to the standard that the Defendant expected of him, a determination was made that it was in the best interest of the Defendant to separate from him. So, in the meeting on 4 June 2015, her role, as the then Associate Vice President of Human Resources, was to communicate to the Plaintiff that the Defendant wanted to part ways with him. She gave him the option to resign or be terminated. She said that she indicated to the Plaintiff that if there was anything else that he needed her to address even after the telephone conversation, she was prepared to address it.

[41] Under further cross-examination, she admitted that the Plaintiff did not write or orally communicate to her that he was resigning. When asked as to the reason for not terminating the Plaintiff rather than saying that you accepted his resignation (when there was no communication to that effect), Mrs. Mayers said (at page 17 of the Transcript of Proceedings on 12 June 2018):

> **"Very easy. I can respond to that. I have also taken the high road relative to what would be reflected on any employee's file. At the end of the day and I do that primarily by virtue of the fact that anyone in the capacity of management should be given an opportunity to have a clean exit as they possibly can and to facilitate that I generally always admonish and accept that the resignation is the more - looking for the adjective to describe – palatable way of accepting that that person's record would remain intact. So that would be the reason I would have taken…."**

[42] It was suggested to Mrs. Mayers that the reason why she wanted the Plaintiff to resign was because she wanted to avoid the consequences of Clause 11 of the Contract. She disagreed.

[43] Under re-examination, Mrs. Mayers opined that the final day of employment of the Plaintiff was 4 June 2015.

[44] Mrs. Braynen also testified. She was subpoenaed by the Defendant. She is no longer a full-time employee of the Defendant although she is still affiliated with the now University to some degree. The decision to terminate the Plaintiff was solely made by Mrs. Braynen. Indeed, she was his direct supervisor. She was not satisfied with the Plaintiff's overall performance which she found to be 1.80 out of the scale of 5.0. In the performance review, which the Plaintiff did not respond to although he was given an opportunity to do so, Mrs. Braynen commented as follows:

> **"Mr. Hanlan is a very likeable person, with an easy-going temperament which makes interacting with him easy. Mr. Hanlan requires a lot of supervision and guidance; he functions more like a line staff who consistently needs guidance as opposed to a supervisor who takes charge.**
>
> **With regards to Mr. Hanlan's leadership style, throughout his one year tenure, he heavily delegated without being sufficiently invested in trying to learn the particulars of the processes. Consequently, he seems unable to make informed decisions without undue reliance and input from others.**
>
> **Mr. Hanlan's technical strengths seem to be more in the area of information technology, not accounting; even with his knowledge and passion for information technology, he requires supervision and constant prodding to bring assignments to completion.**
>
> **See the comments in the various sections above for an overview of Mr. Hanlan's performance during his first year as Director of Accounting."**

Factual findings

[45] Having had the opportunity to see, observe and hear the witnesses who testified before me, I found the Plaintiff to be evasive and, at times, confrontational especially when certain questions were suggested by Counsel. In my judgment, he was indignant by the decision of the Defendant to relieve him of his duties. In addition, I did not find him to be a credible witness when he said that he was not told the reason (cause) for termination of his contract of employment with the Defendant. It seems clear from the performance review that, at the very least, from 29 April 2015, the

Plaintiff was aware that his performance had been reviewed and it was the view of his direct supervisor, Mrs. Braynen that his performance did not meet the required standard.

[46] At the meeting on 4 June 2015, the day when the Plaintiff was relieved of his duties as the Director of Accounting, according to both Mrs. Braynen and Mrs. Mayer, the Plaintiff was given the option to resign or be terminated. I believed both witnesses whose evidence I accepted as truthful, that he was given the option to resign as a matter of courtesy given the small society that we live in. Mrs. Mayers confirmed that the last day that the Plaintiff was employed with the Defendant was 4 June 2015.

[47] It is a fact that Mrs. Braynen was the person who was responsible for the decision to terminate the employment of the Plaintiff due to his unsatisfactory performance. She was his direct supervisor. Indeed, she would be the most suitable person to assess his ability.

[48] All things considered, I find as a fact that (i) the Plaintiff was made aware of the reason for the termination of his employment; (ii) the back and forth of correspondence between the parties was to provide the Plaintiff with a more favourable exit of his job; which would have redound to his advantage and (iii) the Defendant paid him three months' salary up to September 2015, informed him of his right to appeal and was prepared to extend time beyond the ninety days to accommodate him. As I examined the evidence, it was clear to me that the Defendant "leant over backwards" to assist the Plaintiff.

Discussion and analysis

[49] At the end of the trial, the primary issue which arose for determination is whether the Defendant followed the process as prescribed in Clause 11 of the Contract when it terminated the Plaintiff's employment for cause.

[50] Learned Counsel for the Plaintiff Mr. Gibson submitted that based on Clause 11, the Defendant should have specified a cause (reason) for the termination and also, specify the right to be heard by the Council of the College within the 90 day period.

[51] Instead, says Counsel, the Defendant by its agent, Mrs. Braynen simply terminated the Plaintiff on 4 June 2015 leaving him to presume or assume that it had to do with the performance review. She never advised him of his right to appeal to the Council. She gave him the option to resign or be terminated.

[52] Mr. Gibson next submitted that the process was further blotched when an email was sent a few days later that the Plaintiff was no longer employed and then a letter sent accepting a resignation that was not submitted by the Plaintiff. The Defendant then stopped paying the Plaintiff's salary and, for all intents and purposes, he was terminated. Mr. Gibson contended that it was not until the Plaintiff engaged counsel who outlined the legal position was when the Defendant attempted to remedy the breach. Three months later, the Plaintiff received the Clause 11 Notice advising of his right to be heard and paying him for the three months.

[53] Mr. Gibson argued that by that time, the Defendant had already wrongly repudiated the Contract which was accepted by the Plaintiff and a demand for his loss and damages was made. Counsel further argued that the Defendant is estopped from invoking Clause 11.

[54] Learned Counsel finally submitted that, as a result of this breach, the Plaintiff was wrongly terminated and he is entitled to his full remuneration for the balance of the currency of the Contract.

[55] Although three issues were initially raised, by the time the evidence was adduced, it was clear, and learned Counsel for the Plaintiff conceded, there was a single issue to consider namely whether the Defendant followed the process prescribed in Clause 11 of the Contract. Clause 11 provides as follows:

> "**Termination by The College**
>
> **The College shall have the right to terminate this Agreement for Cause (as hereinafter defined) or Without Cause or where it has been determined that the President and Council have lost trust and confidence in the Director. Any termination that is not for Cause shall be deemed to be Without Cause.**

…

In the event of termination for Cause, no such termination shall be effective until the expiry of a period of at least ninety (90) days from the date that notice of intended termination for Cause has been given, specifying the Cause, and the right to be heard by the Council of The College. Such hearing shall take place within the said ninety (90) days, and the determination of the Council as to the existence of Cause shall be final and conclusive. [Emphasis added]

For the purposes of this Agreement, the term "Cause" shall mean failure to achieve the above-mentioned duties and responsibilities together with the stated goals of The College, or acts or omissions by the Director of Accounting that amount to a fundamental breach of this Agreement or are repugnant to the fundamental interests of The College, and which may be undertaken or omitted wittingly or unwittingly, or which are criminal or fraudulent, or which involve dishonesty or moral turpitude."[Emphasis added]

[56] Learned Counsel for the Plaintiff Mr. Gibson submitted that based on Clause 11, the Defendant should have specified a cause for the termination and specifying the right to be heard by the Council of the College within the 90 day period.

[57] Despite the numerous correspondence which passed between the parties, it was clear that, since 4 June 2015, the Plaintiff was no longer employed by the Defendant: see paragraph 11 of the Plaintiff's witness statement which was filed on 5 December 2016. This is further accentuated by his own evidence that (i) he did not go back to work since that day and (ii) his laptop which belonged to the Defendant, the building access swipe card, office keys and all passwords relating to his work were returned to the Defendant. Mrs. Mayers was specifically asked this question and she also confirmed that the Plaintiff's contract of employment came to an end on 4 June 2015.

[58] The next question is whether the Plaintiff was informed of the cause or reason for his termination in accordance with Clause 11. I found as a fact that, even though the Plaintiff was very much aware of the reason why his employment was being terminated, it was made clear to him, in the performance review, that he was not performing at the level expected of the Director of Accounting. Mrs. Braynen commented that "*he functions more like a line staff who consistently needs guidance*

as opposed to a supervisor who takes charge." Whilst he maintained that the performance review was not a proper review during cross-examination, the performance review was forwarded to him with a section titled "Employee comments". He chose not to comment.

[59] True, it cannot be disputed that, on 4 June 2015, the Plaintiff was not provided with a written letter specifying the cause of termination and the right to be heard by the Council of the Defendant. This was because the Defendant wanted to give the Plaintiff an opportunity to determine how his departure would be reflected. In this regard, Mrs. Braynen's evidence corroborated that of Mrs. Mayers. Mrs. Mayers also confirmed that the Plaintiff received three months' notice pay and was informed that he could appeal the dismissal to the Council of the Defendant.

[60] In any event, a notice of termination does not have to be in writing. Under section 30 (1) of the EA, a notice of termination may be given orally or in writing by being delivered to the employee or left for him at his usual or last known place of residence, or sent by prepaid registered post addressed to him at that place.

[61] In the present case, I found that the Plaintiff was fully aware of the reason for the termination of his employment and Mrs. Braynen also informed him of the reason. It was based on his poor performance as amplified in the performance review. I also found that the Plaintiff was informed of the ninety days within which he could appeal. He was even given more time to do so. He chose not to appeal.

[62] In addition, it cannot be overlooked that the Plaintiff was employed with the Defendant in a relatively high level management capacity. Accordingly, he was expected and required to exercise a reasonable level of skill and competence commensurate with that position. Further, the authorities set out under the law of summary dismissal (supra) indicate that this exercise of skill was an implied warranty within the Contract, the breach of which entirely justified summary dismissal.

[63] Further, as already alluded to, a wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term

for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be met: (i) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice as the case may be; and (ii) his dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily: **Halsbury's Laws of England, 4th ed, Vol. 16** at para. 302.

[64] As learned Counsel, Mr. Hanna accurately pointed out, in the present case, both conditions are relevant. With respect to the first condition, the Plaintiff's contract of employment contemplated two situations in which he could be dismissed; specifically, a dismissal with cause and, secondly, a dismissal without cause. In either case, says Counsel, the Defendant was entitled to effect a dismissal and, in both cases, the Plaintiff was entitled to compensation. The distinction as to notice is that, in the case of a dismissal without cause, the Plaintiff was entitled to be provided with pay equivalent to the term remaining on his fixed term contract whereas in the case of a dismissal with cause, the Plaintiff was entitled to ninety days' notice.

[65] With respect to the second condition, it was effectively a term of the Plaintiff's contract of employment that if he failed to perform his duties at a satisfactory level this would warrant summary dismissal with ninety days' notice.

[66] Mr. Hanna argued that, other than the Plaintiff's personal view as to the adequacy of his performance, all of the evidence supports the fact that the Plaintiff's performance was entirely insufficient and warranted a dismissal with cause as contemplated by Clause 11 of the Contract. The Plaintiff adduced no independent/impartial evidence to suggest that he performed his duties to an acceptable level. In particular, the Plaintiff did not call any witnesses, whether voluntary or by subpoena, to corroborate his view that his performance was satisfactory. In contrast, documentary evidence, in the form of the performance review was adduced by the Defendant which established that the Plaintiff's performance was entirely wanting. Additionally, two witnesses gave evidence

attesting to the Defendant's performance being deficient although the evidence of Mrs. Braynen is quite sufficient since she was his immediate and direct supervisor.

[67] Additionally, a contract of employment can expressly provide for what is a sufficient defect to warrant a summary dismissal. Reliance is placed on section 32 of the EA which provides:

> **"Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following…"** (My emphasis).

[68] Mr. Hanna correctly submitted that there is no need to go beyond the Plaintiff's Contract to appreciate whether a summary dismissal was justified. Indeed, there was also a concession in favour of the Plaintiff in this regard in that he was afforded ninety days' notice whereas at common law and pursuant to the EA, he would not have been entitled to any notice or pay in lieu of notice.

[69] It is plain that the Defendant was justified in summarily dismissing the Plaintiff. It is also plain that the Plaintiff was provided with ninety days' pay in lieu of notice.

[70] Having regard to the fact that the Plaintiff was dismissed with cause in accordance with the terms of the Contract and he was provided with the requisite pay, the Plaintiff based his claim solely upon the question as to whether the procedure related to the dismissal was flawed and whether any defects in procedure can result in a finding of wrongful dismissal.

[71] The position that a procedural defect of itself is insufficient to entitle a dismissed employee to damages is not a novel concept. More than fifty years ago, in **Polkey v. A.E. Dayton Services Ltd.**, [1988] 1 A.C. 344 H.L. this issue arose in the context of unfair dismissal. At page 355, Lord Mackay stated:

> **"If the employer could reasonably have concluded, in the light of circumstances known to him at the time of dismissal, that**

> **consultation or warning would be utterly useless, he might well act reasonably <u>even if he did not observe the provisions of the code</u>. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."** [Emphasis added]

[72] Although **Polkey** was a case of unfair dismissal, which has not been pleaded or argued in the present case, our Court of Appeal has long considered that the principles in **Polkey** can be applied analogously to a claim for wrongful dismissal. In **Lucayan Beach Resort & Casino v. Lewis** [1999] BHS J. No. 14. Gonsalves-Sabola P. stated, at paragraph 9:

> **"<u>There is another respect in which the tribunal went astray, and that is by holding that it amounted or contributed to wrongful dismissal, that the procedure for dismissal set out in the Employees Handbook was not adhered to. That this ground of the tribunals decision is an error in law is revealed by the judgment in Polkey v. Dayton Services Ltd., [1988] AC 344.</u> The facts of that case concerned the issue whether a dismissal was unfair under the provisions of the Employment Protection (Consolidation) Act, 1978, of England. Although the concept of unfair dismissal has not been enacted into law in The Bahamas, the following self-explanatory passage in the judgment of Lord Mackay of Clashfern L.C., at page 355, states a test which is analogically applicable in the instant case…"** [Emphasis added]

[73] Learned Counsel Mr. Gibson submitted that both of these authorities are distinguishable in that, in the instant case, the procedure set out in the Contract should have been strictly complied with as it correlates with the principles of natural justice. He submitted that the Contract mandates a procedure to be followed and it was not done.

[74] On this point, I agree with Mr. Hanna that an employer does not have to slavishly adhere to a procedural code or to a procedure set out in an employee handbook or a contract of employment. Rather, what an employer must do is to act reasonably and in good faith in accordance with the circumstances known to the employer at the moment of dismissal. In this case, the Defendant dismissed him on 4 June 2015.

He was given his ninety days within which to appeal. This case must be looked at on its own peculiar facts and circumstances. He knew that his performance was unsatisfactory. Instead of seeking to remedy the deficiencies in his work, the Plaintiff adopted the attitude that his performance was beyond reproach. He did not respond to the performance review. Thereafter, with his performance remaining grossly inadequate, Mrs. Braynen met and informed him that it was necessary for the parties to part ways. Both she and Mrs. Mayers provided the Plaintiff with the option of resigning as opposed to being dismissed with cause. This option was provided to the Plaintiff as a courtesy to enable him to leave the position with dignity in a manner which may lessen the impact on his future career prospects. From the evidence of Ms. Mayers such a practice is unusual but it is a practice which received the sanction of the Court in **Bahamas Electricity Corporation v. Smith** [2007] 5 BHS J No. 244. In **Smith,** the Court of Appeal was confronted with a similar situation where an employer gave an employee the option to resign or be terminated.

[75] The Court determined that there was nothing coercive about providing such an option: see paragraphs 23-25 of the Judgment. The only question is whether the option to resign is viewed as the favourable alternative by the employee.

[76] In the present case, the Plaintiff's contract of employment was already terminated on 4 June 2015. The only thing remaining was to determine the method of termination: resignation or dismissal with cause. After two weeks of silence, Mrs. Mayers interpreted this lack of communication as a resignation. In her judgment, this was a more favourable method of ending the relationship. But, the Plaintiff would have none of that. He wanted to see his resignation letter. After some correspondence between the Defendant and the Plaintiff's attorney, the Defendant provided the Plaintiff with the contractual ninety days' notice pay and invited the Defendant to either: (i) lodge an appeal to its Council; or (ii) request an extension to lodge an appeal to its Council.

[77] The Plaintiff expressly rejected both alternatives and indicated that since he was unaware of the reason for his dismissal he could not appeal. I agree with learned

Counsel for the Defendant that this was disingenuous as the Plaintiff was clearly aware of his performance review. He was also in a meeting with Mrs. Braynen who informed him that his employment was being terminated due to his inability to competently discharge his duties. Learned Counsel Mr. Hanna submitted that what is even more curious is that if the Plaintiff considered that no reason was given for his dismissal or that there was any shortfalls in procedure, his position before the Council would have been objectively stronger but he declined.

Conclusion

[78] In my considered opinion, the Defendant fulfilled its obligation under Clause 11 of the Contract by orally specifying the reason for the Plaintiff's termination and giving him an opportunity to be heard within the ninety days which is stipulated in the Contract. In fact, the Defendant was willing on 14 September 2015, to give the Plaintiff additional time to lodge his appeal to the Council. As already stated, the law provides for a notice of termination to be done orally.

[79] All things considered, the Defendant was justified in summarily dismissing the Plaintiff for cause and/or in accordance with the termination provision of the Contract. On the other hand and, on a balance of probabilities, the Plaintiff was unable to adduce evidence to demonstrate to the Court that he was wrongly dismissed as alleged or at all. Further, he was unable to prove that the Defendant breached Clause 11 of the Contract.

[80] In addition, even if the procedure specified under Clause 11 of the Contract was not adhered to, **Polkey** and **Lewis** are sound authorities for the proposition that an employer does not have to slavishly adhere to a procedural code or to a procedure set out in an employee handbook or in a contract, as in the present case. Rather, what an employer must do is to act reasonably and in good faith in accordance with the circumstances known to the employer at the moment of dismissal.

[81] The cases of **Lowndes v Specialist Heavy Engineering Ltd** [1976] IRLR 246 and **Hill v Mallinson Denny (NW) Ltd** [1982] Lexis Citation 183 also support the

proposition that even where there is a failure in procedure in cases of incapability or incompetence, the circumstances may be so egregious that dismissal is justified despite that failure.

[82] Accordingly, I will dismiss the Plaintiff's claim with costs to the Defendant to be taxed if not agreed. Both parties have already submitted their Bill of Costs; the Plaintiff claiming $60,900.00 if successful and the Defendant $71,544.00. The parties can attempt an agreement on costs. However, if no agreement is reached, then I will hear the parties on Wednesday, 1 July 2020 at 2:30 p.m.

Dated this 28th day of May, A.D., 2020

Indra H. Charles
Justice