

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION**

**2018/COM/lab/00039**

**BETWEEN**

**SEAN MILLER**

**Plaintiff**

**AND**

**BAHAMAS POWER & LIGHT CO. LTD**

**Defendant**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Howard Thompson with Audrey Bonamy for the Plaintiff  
Oscar Johnson Jr with Audley Hanna Jr for the Defendant**

**5 April 2019, 27 and 29 May 2019, 17 July 2019, 10 September 2019 and 15  
October 2019**

**JUDGMENT**

## WINDER J.

This is an employment dispute which was brought by the plaintiff (Miller) for breach of his contract of employment with the Defendant (BPL) as Manager of Performance, in the Fuels, Performance and Special Projects Division/Department.

### Background

1. Miller, was employed with BPL for 29 years when his employment as Manager of Fuels, Performance & Special Projects Division/Department was terminated on 18 September 2017. The termination took place just 4 months before he was eligible for retirement from the Corporation.
2. At the time of his termination, Miller was a member and officer of the Bahamas Electrical Utility Managerial Union (the Union). The terms of the relevant Industrial Agreement (the Agreement) between the Union and BPL, as with any union member, had been incorporated into the terms of Miller's contract. Relevant terms of the Agreement included:

#### Article 14

- 1) Permanent employees may terminate their employment with the Corporation by giving one calendar months' notice in writing to the Corporation.
- 2) The Corporation may terminate the services of an employee by giving reasonable notice in writing having regard for the following criteria: length of service, age of employee, status, loyalty, education and training, health and chances of alternative employment; except that the Corporation may make payment in lieu of giving notice. The Corporation shall not, however, terminate an employee unjustly. The Corporation must settle all engagements to the employee within two weeks of the effective date of termination as determined by the Corporation and will be no less favourable to the employee than the entitlements provided for in the Employment Act.

#### Article 15

- 11) Where a major breach or three minor breaches of discipline warranting suspension or discipline have been committed by an employee, the Corporation may first suspend the employee from duty with pay pending further investigation for a period of up to five days and shall confirm this suspension in writing to the employee and the Union provided always that the breach does not warrant the immediate dismissal. If at the end of five

(5) days the investigation is not completed, the suspension may be extended for a further period not exceeding 20 working days.

12)...

13)The Corporation may summarily dismiss from its service or suspend from duty without pay any employee who shall commit a major breach of discipline. The said suspension without pay would not affect the continuity of employment and other entitlements of the employee concerned save for as provided at Article 23 (Christmas Bonus)

14)...

15)...

16)Although fixed penalties are not established, major breaches of discipline that will normally call for suspension or dismissal shall include but are not limited to the following:

- a) Theft
- b) Fraudulent offense;
- c) Dishonesty;
- d) Gross Insubordination or insolence;
- e) Gross Indecency
- f) Breach of confidentiality
- g) Gross negligence;
- h) Incompetence and/or
- i) Gross misconduct.

17)When an employee is warned, suspended or dismissed, a written notice of such warning, suspension or dismissal shall be given to the employee and to the Union, setting out the reasons for the warning, suspension or dismissal.

#### Article 16

#### Grievance Procedure

#### Preliminary

- 1) During the life of this Agreement both the Union and the Corporation agree to abide by the Disputes Procedure provided for in this Agreement.
- 2) Each employee has a right to seek redress for grievances relating to his employment it is the aim of the grievance procedure which follows to provide a means by which the employee can raise grievances and have them settled fairly and promptly.

#### Stage 1

- 3) An employee having any grievances relating to his employment shall first discuss the matter with his immediate supervisor, and at the employee's option he may be accompanied by a union representative.

#### Stage 2

- 4) Failing satisfaction or a resolution of the grievance by the immediate supervisor within seven(7) days, the employee may discuss the matter within twenty-one days of the specified cause for complaint with the appropriate division or department head, and if he so wishes, he may be represented by the Union. The decision of the Corporation's representatives

shall be confirmed in writing to the Union within five (5) working days of the meeting with the division or department head.

Stage 3

- 5) Failing satisfaction or a resolution of the grievance at Stage 2 the employee(s) may together with the Union representatives, if he so wishes, approach the Grievance Committee to discuss the matter and if possible, settle the grievance. Such approach shall include providing the said Committee with a complete statement in writing as to the nature of the complaint, alleged violation and the aggrieved person(s).
- 6) The Grievance Committee shall comprise three members of the Executive Management of the Corporation, that is, from the General Manager to Assistant General Manager.
- 7) The Grievance Committee shall meet within ten working days of the submission of such written report.
- 8) The decision of the Grievance Committee shall be conveyed in writing to the Union and the employee within five working days of the meeting held to discuss the grievance or such further time as agreed by the parties.

Stage 4

- 9) Failing satisfaction or a resolution of the grievance at Stage 3 the employee, or the Union if the employee so wishes or the Corporation may take such steps as are available under the provisions of the Industrial Relations Act.
- 10) However, if at any stage of the Grievance Procedure, sufficient and appropriate action on the matter is not addressed within the stated periods at the different stages then the matter shall be referred in writing to the General Manager for resolution. It is further agreed that if a final decision from the Corporation is not communicated to the aggrieved person and the Union within a four (4) month period from the date of the dispute arising the dispute would be deemed to have been settled in favour of the aggrieved person. Receipt of such communication shall be evidenced by signatures.

3. In May 2017 BPL discovered that it had been the subject of a scheme involving the presentation and payment of fraudulent invoices. BPL commenced an investigation and engaged the firm of Ernst and Young (EY) to conduct a forensic audit and investigation.
4. During the course of the investigation, members of the Union, (excluding Miller) had been placed on suspension. BPL's actions prompted members of the Union, along with the Union itself, to commence legal proceedings to challenge, what they said was BPL's failure to adhere to the terms of the Agreement. That action (the Union Action), 2017/CLE/gen/00846, was commenced on 20 July 2017 in the

name of the Union, James Dean, Garnell Sheppard and Ene Maura as plaintiffs against BPL as the defendant.

5. On 15 August 2017 EY issued its report relative to, what they described as “the forensic investigation related to an alleged accounts payable fraud being perpetrated against Bahamas Power & Light”. The report which was identified as draft and subject to revision, was tabled in the House of Assembly by the Minister responsible for BPL, sometime in August 2017. The report was named “Project Hogfish”.
6. By letter dated 21 August 2017 BPL informed Miller that they were conducting an investigation into “Gross Misconduct” in accordance with Clause 16(i) of the Industrial Agreement and that he was being suspended from duties in accordance with Article 15(17). The letter is settled in the following terms:

**Re: Major Breach – Gross Misconduct**

The Company is presently conducting an investigation involving Gross Misconduct in accordance with Clause 16(i) of the BEC/BEUMU Industrial Agreement.

Therefore in accordance with Clause 15(11) of the Industrial Agreement effective August 22 2017, you are hereby suspended with pay for a period of five working days, pending further investigation.

Please be advised that on completion of the suspension you are to report to Mrs. Renee L. Rahming, Assistant Manager, Employee Relations on Tuesday, August 29, 2017 at 10:30.

7. Immediately upon receiving the suspension letter, Miller raised a grievance/dispute with BPL. Miller’s letter is settled in the following terms:

I am aggrieved by the disciplinary action taken against me today, and hereby seek redress in accordance with the Industrial Agreement – Conditions of Employment between Bahamas Electricity Corporation and Bahamas Electrical Utility Managerial Union, October 1<sup>st</sup> 2013 to September 30<sup>th</sup> 2018, and the laws of the Commonwealth of the Bahamas, which govern my employment with BPL.

Nature of Complaint, and Violation(s)

I have not committed any minor or major breach of discipline as alleged, and there are no justified circumstances leading up to the disciplinary action taken against me, and my legal rights have been violated. Consequently my representative and I wish to immediately meet with you as my Division/Department Head or the appropriate person who BPL may designate, to try and bring an amicable resolution to this matter. I am hereby also requesting a written notice from BPL pursuant to Article 15.17 of the Industrial Agreement, setting out the precise reasons leading up to the decision to discipline me, before the meeting is held.

Failing an amicable resolution of the matter with you, I am hereby requesting that a Grievance Committee be immediately established in accordance with Article 16.6 of the Industrial Agreement to hear and try to resolve this matter.

(emphasis added)

8. Miller's letter was never acknowledged, addressed or responded to by BPL.
9. On 30 August 2017 Miller wrote again to his division head seeking resolution of the grievance, in accordance with the Agreement, indicating that the matter was at Stage 2 of the Grievance procedure pursuant to 16(4) of the Agreement, having not obtained resolution within 7 days in Stage 1.
10. Miller's second letter was also never acknowledged, addressed or responded to by BPL.
11. On 4 September 2017 BPL conducted an interview with Miller. Chequita Johnson, Manager of Compensation and Benefits, BPL's external legal counsel and the Union representative were present at the interview. The interview was led by BPL's external legal counsel. Documents were showed to Miller, for the first time at the interview which had not been shared with him prior to the interview. He was not permitted to take copies of the documents. The Project Hogfish report was not showed to him.
12. On 5 September 2017 Miller was further suspended for 9 days. On 13 September Miller wrote to the General Manager of BPL concerning the grievance and

complaining about his treatment in the interview and seeking to see the documents which had been shown to him, to be able to make adequate representation.

13. Miller's third letter was never acknowledged, addressed or responded to by BPL. Instead, by letter dated 18 September 2017, Miller's employment with BPL was terminated. The letter of termination is settled in the following terms:

September 18, 2017

Sean Miller  
Manager – Performance  
Fuels, Performance & Special Projects

Dear Mr Miller

Re: Termination of Employment

We refer to our letter dated September 5, 2017, in which you were suspended for nine (9) days pending further investigations and our discussions with you on August 18, 2017 and September 4, 2017 to discuss the acts of gross misconduct which you committed during your employment.

We advise that the Company as a result of its investigations, has determined that you have committed major breaches as discussed in detail during our aforesaid discussions. Therefore, in accordance with Article 15(12)(b), the Company hereby terminates your employment effective immediately.

You are required to immediately return all property of the Company, inclusive of uniforms, ID, tools and or equipment, to the Human Resources and Training Division.

We wish you well in your future endeavours.

Sincerely yours,  
Bahamas Power and Light Company Ltd

14. On 20 September 2017, the Union, in support for an injunction against BPL in the Union Action, filed an affidavit which complained about the condition of Miller.
15. Upon receipt of the termination letter Miller raised another grievance/dispute in respect of the purported termination, by submitting a letter dated 27 September

2017, informing BPL of the grievance and his desire to follow the grievance procedure for resolution.

16. Again, Miller received no response or acknowledgement from BPL concerning the letter.

17. Miller wrote to BPL again on 22 December 2017 as a follow up to the grievance and again got no response. Thereafter, he engaged the services of Obie Ferguson & Co, he says, for the sole purpose of writing a letter to BPL and obtaining a response to grievance letters. On 19 January 2018 Messrs Obie Ferguson & Co. wrote to BPL on his behalf.

18. On 12 March 2018 Miller wrote to the CEO of BPL requesting reinstatement pursuant to Article 16.10 of the Industrial Agreement.

19. On 17 January 2019 the Royal Bahamas Police Force (RBPF) issued a letter indicating that Miller was spoken to by officers of the Anti-Corruption Branch with reference to a Fraud at the Bahamas Power and Light. According to the RBPF, Miller was subsequently interviewed but was not charged with any offences. Miller gave evidence on behalf of the prosecution and BPL against several persons charged with the BPL fraud.

20. In February 2019 Miller says that he was able to obtain a copy of the Project Hogfish Report.

21. Miller's claim is set out in his Amended Statement of Claim, which provided as follows:

1. The plaintiff was at all material time a senior managerial employee of the Defendant for 29 years and 8 months until he was unjustly terminated on the 18<sup>th</sup> September 2017. Prior to the unjust termination Mr Miller (i) occupied the senior position of Manager of Performance in Fuels, Performance and Special Projects Division/Department with the Defendant



company and (ii) was a member and trustee of the Bahamas Electrical Utility Managerial Union ("the Union")

2. ...
3. The Industrial Agreement conditions of Employment dated the 1 October 2013 (and registered with the Registrar of Trade Union on 4 May 2016 (the Industrial Agreement) between the Defendant and the Union also forms part of the plaintiff's employment contract with the Defendant.
4. Between August 2017 and September 2017 the Defendant disregarded and violated the terms of the Industrial Agreement culminating in the unjust termination of the Plaintiff. The Plaintiff maintains that the following violations resulted in a breach of his employment contract with the Defendant.
5. **PARTICULARS OF BREACH**
  - (i) Violation/breach of Article 12.2/12.3
  - (ii) Violation/Breach of Article 14 Termination of Employment
  - (iii) Violation/Breach of Article 15 Discipline
  - (iv) Violation/Breach of Article 16 Grievance Procedure
6. The Plaintiff claims that the Defendant violated and breached the aforementioned Articles of the Industrial Agreement by (i.) failing and or refusing to give him copies of communication, report of other matters adverse to him (or might adversely affect him) that were placed in his dossier notwithstanding repeated requests (ii) suspending him (without giving written reasons) in contravention of the said articles and as a result of (i.), (ii.), (iii.) and (iv.) the Plaintiff has suffered loss and damage.
7. Notwithstanding paragraphs 4, 5 & 6 above, the Defendant failed and or refused to communicate a final decision in writing to the Plaintiff (and the Union) within four (4) months from the date of the dispute in accordance with Article 16.10 of the Agreement and as such the dispute is deemed to have been settled in favour of the Plaintiff.
8. At the time of the purported termination the Plaintiff earned a salary from the Defendant in the amount of \$83,734.69 per annum payable by monthly payments of \$6,977.89 along with a Christmas bonus (\$1,851.82 ie 5 days) and an increment or performance bonus (\$2,012.49 as negotiated by the Union). Additionally, the Plaintiff was a part of the agreed pension plan that the Defendant provided for its employees.

#### AND THE PLAINTIFF CLAIMS

- i. A declaration that the Industrial Agreement is binding on the Defendant and that parties thereto are mandated to exactly follow the provisions of the same;

- ii. A declaration that the Defendant is legally bound to exactly follow and comply with the Industrial Agreement in particular Article 15(17);
- iii. A declaration that the letter dated 21 August 2017 suspending the Plaintiff was issued in violation and breach of Article 15(17) of the Industrial Agreement and is therefore null and void;
- iv. A declaration that the Defendant is legally bound to exactly follow and comply with Articles 14.2 and or 15.13 of the Industrial Agreement when carrying out termination of employment;
- v. A declaration that the letter dated 18 September 2017 purportedly terminating the employment of the Plaintiff was issued in violation and breach of Articles 14.2 and or 15.13 of the Industrial Agreement and is therefore null and void;
- vi. A declaration that the Defendant acted unfairly and capriciously towards the Plaintiff contrary to the aforementioned articles of the Industrial Agreement;
- vii. A declaration that the dispute raised by the Plaintiff is deemed to have been settled in favour of the Plaintiff as a consequence of the Defendant's failure to communicate a final decision in writing to the Plaintiff as mandated by Article 16.10 of the Industrial Agreement;
- viii. Damages for breach of contract of employment of the Plaintiff to be assessed;
- ix. Compound Interest on the amount of damages found to be due to the Plaintiff from the 18 September 2017 until payment of damages;
- x. Interest pursuant to the Civil Procedure Award of Interest Act 1992
- xi. An Order that the plaintiff be reinstated with full compensation for working days lost;
- xii. An order that the Defendant pay the Plaintiff's costs associate with and incidental to this action, such to be taxed if not agreed.

22. BPL defended the action denying that the dismissal was unjust. Specifically, at paragraph 2 of the Defence, it was stated:

- (i) In or about May 2017, it was ascertained that a fraudulent scheme had been perpetrated within the Defendant's organization whereby fraudulent payments were made to existing and fictitious contractors resulting in losses to the Defendant in a sum in excess of \$1,900,000 (the Fraudulent Scheme)
- (ii) Upon ascertaining the Fraudulent Scheme a general internal investigation was commenced by the Defendant during the course of which the Plaintiff was investigated. In particular, it was ascertained that there were three fraudulent invoices which were impressed with the Defendant's stamp. This

particular stamp was designated solely for the use of the Plaintiff and had appended to it the apparent signature of the Plaintiff.

- (iii) Arising from this investigation on or about 21 August 2017, the Defendant informed the Plaintiff by letter that he was being investigated for gross misconduct in accordance with clause 15.16 (i) of the Industrial Agreement subsisting between the Defendant and the Union (the Industrial Agreement). Pursuant to this letter the Plaintiff was informed that he would be suspended for 5 working days pending further investigation.
- (iv) Thereafter, the Plaintiff was informed, by further letter, that the investigation into his conduct was ongoing and that he was suspended for a further period of 5 working days pending further investigation pursuant to Article 15.11 of the Industrial Agreement.
- (v) Throughout the process of the investigation the Defendant held a number of interviews with the Plaintiff in the presence of his Union representatives. In particular, on 4 September, 2017, the Defendant conducted an interview with the Plaintiff (the interview). During the interview evidence with respect to, inter alia, the fraudulent stamped document were put to the Plaintiff. Based upon the Plaintiff's responses further investigations were conducted.
- (vi) Based upon its investigations, including the interview, the Defendant formed the honest belief that the Plaintiff was involved in the fraudulent scheme and that it was necessary to conclude the relationship of employment.

23. BPL denied the other allegations in the Amended Statement of Claim and averred:

- (1) that it conducted a fair and thorough investigation which was in compliance or substantially in compliance with the Industrial Agreement;
- (2) that during the interview in particular, information relating to the Plaintiff's suspension and the documents related thereto were expressly provided to the Plaintiff, and were available for his union representatives to view them if they wished and he was permitted a full opportunity to review and to comment upon the same.

(3) the requirement to provide a final decision within 4 months was superseded/overridden by the acts of the Union to which the Defendant was required to respond and upon which the Defendant relies in estoppel, by impleading the Defendant in Supreme Court Common Law and Equity Action 846 of 2017 (the Union Action) Specifically:

- (i) by virtue of a letter dated 18 September 2017 the Plaintiff was notified that as a result of the Defendant's investigation his employment was summarily terminated;
- (ii) in clear response to the Plaintiff's termination, by virtue of an Affidavit duly filed by the Union in the Related Action on 20<sup>th</sup> September 2017, the Union by setting out all material facts related to his cause of action, and seeking determinative relief in respect thereto from this Honourable Court.
- (iii) having regard to the fact that there is no doubt that the Union had the authority to seek such relief on behalf of the Plaintiff in the Union Action and the fact that the said Affidavit was clearly filed for that purpose, the Plaintiff claims became sub judice and thereby was irretrievably removed from the disciplinary process prescribed under the Industrial Agreement.

(4) the Statement of Claim does not advance a claim for wrongful dismissal or breach of contract.

24. At trial, Miller gave evidence and called Anthony Christie and Paul Rolle as witnesses in his case. Ms. Chequita Johnson (Johnson), Samantha Rolle and Sean Andrews gave evidence on behalf of BPL.

25. Miller's evidence in chief was contained in a witness statement dated 1 March 2019 and a supplemental witness statement dated 28 March 2019. He was subject to cross examination on his witness statements.

26. Miller says that he is presently unemployed having been terminated from BPL. He rose to the rank of a Senior Manager of Performance in Fuels, Performance & Special Projects Division with BPL. When he received the suspension letter of 21 August, 2017, informing him that BPL was conducting an investigation involving "*Gross Misconduct in accordance with Clause 16(i) of the Industrial Agreement*", there was no written notice setting out the reasons (or the particulars of the alleged "Gross Misconduct") as required under Article 15(17) of the Agreement, notwithstanding his repeated requests.
27. Miller says that he followed the grievance procedure, in accordance with Article 15(19) & 16.3 of the Agreement exactly and made numerous requests verbally and by letters dated 22 August 2017, 23 August 2017 and 13 September 2017 for BPL to comply with the grievance procedure as mandated by the Agreement.
28. Miller says that BPL breached his employment contract by unjustly terminating him and failing to give him written reasons for the termination as mandated by Article 15(17) of the Agreement.
29. Miller says that he was never a party to the Union Action and did not give instruction to the Union or its attorneys regarding the Union Action. At the date of his termination he was no longer a union member and as such the union could not have impleaded on his behalf.
30. Prior to receiving the Defence on 25 February 2019 he was unaware of reasons for his suspension nor the particulars of the alleged gross misconduct. He heard rumours that BPL paid invoices relating to numerous fictitious contractors and that signatures of numerous managers and executive managers were forged on their purported Company issued stamps.
31. Miller said that he co-operated with the investigations by BPL. He stated that during the interview he was asked whether signatures appended to the purported company stamp on the invoices was his signature. When first shown the invoices

he confirmed to EY that he was not familiar with the invoices and that the signatures appeared to be his but he was uncertain.

32. In June 2017 Miller volunteered to assist the police in its investigation and he, along with other managers attended to the Police Corruption Unit to give statement to the police to assist in their prosecution of the perpetrators of the fraud against BPL. By email dated 21 August 2017 he confirmed to BPL that he had no knowledge of the invoices showed him that bear a Fuels and Performance stamp.
33. Miller says that he noted that the signature of his former boss Shevonn Cambridge AGM Energy Supply and Ken Kociba were also on the invoices. He attended the Magistrate's Court along with Cambridge to give evidence against the perpetrators of the alleged scheme.
34. Miller says that he did not commit a major breach (or three minor breaches) during his tenure nor misconducted himself in any way deserving of unjust termination (in violation of the Agreement) after having given nearly 30 years of service to BPL.
35. Miller says that on 28 February 2019 he obtained a copy of the BPL "Project Hogfish" Report dated 15 August 2017 that was tabled in the house of assembly in August 2017 which contains key exhibits which vindicates him. Miller says that it proves that BPL did not have an *"honest belief that [he] was involved in the fraudulent scheme and that it was necessary to conclude the relationship of employment"*. Had he seen the Project Hogfish report he would have had an opportunity to persuade BPL that he was not involved in the fraudulent scheme.
36. In relation to the allegations Miller says the following:
  - a) He was issued with a BPL Stamp and whenever he affixed the Stamps to a document and signed it the document was always supported by a written memorandum to his supervisor explaining the work that was carried out. The Stamp was kept in the office that was assigned to him and that there were others with keys to the office including the janitorial staff, security personnel

and his immediate supervisors and superiors. The stamp was not unique and other managers in the Performance and Fuels Division, such as Anthony Christie has a similar stamp.

- b) Miller says that he took proper care and management of the stamp while in his possession and only used the Stamp for authorized transactions and that he never impressed any fraudulent invoices with the Stamp.

37. In relation to the questioned transactions, Miller's says that:

- a) the alleged "*flagged transaction*" related to barging services provided to BPL in 2016 was legitimate and duly authorized by BPL. The vendors who provided the said services were RORO Company Limited and Bahamas Crane-Concrete & Fuelling Tank CL.
- b) Bahamas Crane-Concrete & Fuelling Tank CL sometime shortens its name on documents to "Bah Crane and Concrete" or "Bahamas Concrete & Crane".
- c) nothing was suspicious or unusual about the said transaction by RORO/Bah Crane-Concrete as they both worked together to complete the service.
- d) that the alleged stamp impressed on the alleged Actual Fraudulent Invoice related to "Bahamas Crane & Concrete Pumps" exhibited as Exhibit H3 of the Hogfish Report (and which is expressly noted that "this was not found on Sean Miller's Computer" at the heading) is different from the grid Stamp that BPL identified as the Stamp issued to him and exhibited as Exhibit D in that there are clearly two (2) full boxes around the words of the grid Stamp impression at Exhibit H3 and one (1) Full Box around the words of the grid Stamp impression assigned to him and shown at Exhibit D.

38. Miller says that BPL never informed him that he was being investigated with respect to a Fraudulent Scheme but that by the suspension letters (dated 21 and 29 August, 2017 and 5 September 2017) he was informed that BPL was conducting an investigation involving "Gross Misconduct". He says that it was incorrect for the BPL to assert that he was informed of facts relating to the fraudulent scheme pursuant to a letter dated 29<sup>th</sup> August, 2017.

39. Miller says that no one from the Executive Management of BPL attended the 4 September, 2017 interview and that he was ambushed and interrogated by BPL's attorney at that interview without being given the opportunity to consult his attorney or have his attorney present. He was only given a fleeting glance at the alleged fraudulent document and was never provided with a copy of the same.
40. Johnson was the principal witness of BPL. Johnson's evidence in chief was contained in a witness statement dated 22 March 2019. She was subject to cross examination on her witness statement. Johnson was the Manager of Compensation and Benefits for BPL.
41. Johnson says that her duties included administration of all disciplinary actions on behalf of BPL. BPL became aware in May 2017 that a fraudulent scheme had been carried out within its organization which involved payments being made to existing and fictitious contractors which resulted in losses of \$1,900,000. BPL commenced a general internal investigation which resulted in its taking disciplinary measures in relation to a number of its employees.
42. On July 2017 the Union took action against BPL with respect to disciplinary measures taken against three of its members. At this time Miller was not the subject of any disciplinary action.
43. BPL had issued a stamp to Miller to facilitate his functions. When the stamp was affixed to a document and signed, it verified work orders which led to payment by BPL to the relevant contractor. Miller was required to secure the stamp and a failure to utilize the stamp appropriately and or to ensure that it was utilized properly would have exposed BPL to financial loss.
44. According to Johnson, during the course of the investigation it was ascertained that a number of fraudulent invoices were impressed with the stamp and bore the



apparent signature of Miller. In particular a transaction related to services allegedly provided to BPL in 2016 for the barging of items to and from Eleuthera.

45. Miller was first suspended on 21 August 2017 and informed of the investigation for gross misconduct in accordance with clause 16(i) of the Agreement. Miller denied that he committed any breaches. As the investigation concerning Miller was not completed within the investigatory period his suspension was extended for a further 5 days. On 4 September 2017 BPL conducted an interview with Miller. She along with BPL's counsel and the Union representative were present at the interview.
46. During the interview the fraudulent documents, embossed with the Stamp and his signature were shown to Miller and he was asked to provide an explanation. Miller was not able to provide any satisfactory explanation as to why the stamp and his signature were on the fraudulent documents indicating that (i) the stamp was kept in an unlocked drawer and other employees had access to it; and (ii) the signature on the documents appeared to have been forged. Following the interview Miller's suspension was extended for a further 9 days to evaluate all of the information, notwithstanding, she says, it was evident that it would be necessary to terminate Millers employment having regard to the deficiencies in the explanations provided.
47. BPL determined that Miller's employment would be terminated upon fully considering all of the evidence including Miller's responses during the interview. Miller was notified by letter dated 18 September 2017. On 20 September 2017 the Union filed an affidavit in the Union Action which brought issues related to Miller's termination into that action. BPL determined that its lawyers would deal with issues related to Miller since Miller's discipline was then one of the matters being raised in the Union Action.
48. Johnson says that the steps taken by BPL in the course of the investigation were appropriate and the various employees and the Union were provided with all material information related to the investigations, and the discipline as was

necessary, in the context of an investigation of unprecedented scope and complexity which involve certain confidential aspects and police involvement.

49. Under cross examination Johnson:

- a) admitted that she was not a part of the investigatory team and stated that the evidence was considered by the Executive Committee of BPL.
- b) confirmed that she was aware that Miller was asked to speak with the police and that whilst she was aware that there are criminal proceedings with respect to the fraudulent scheme, she was not aware that he was a witness for BPL in the case against Reno Bethel and James Dean.
- c) agreed that the suspicious document at Exhibit D of the Project Hogfish Report includes what appears to be an impression of the BPL Stamp that was issued to Miller was similar to the stamp issued to another Manager Anthony Christie.
- d) confirmed that the grid stamp on the "fraudulent invoice", which purports to be the stamp of Sean Miller, on Exhibit H does have an extra box/border surrounding it but could not say whether this distinction was part of the investigation.
- e) could not confirm whether anyone from the janitorial staff or security staff or Miller's supervisors were investigated or question about the stamp in the office. She did confirm however that Miller mentioned at the meeting the persons who had access to the office where the stamp was kept, but could not say whether this information was followed up on.
- f) confirmed that Miller stated at the meeting that "the signature on the document appeared to be forged" but could not confirm whether anyone followed up on what Miller stated.
- g) confirmed that BPL did not respond to Miller's grievance letter dated 21 August, 2017 and was not aware whether they responded to any of the others.
- h) confirmed that BPL's suspension letter relative to Miller does not speak about a fraudulent scheme.
- i) says that BPL's attorney was aware that a criminal investigation was going on when they interviewed Miller on the 4 September, 2017 and that no member of

BPL's Executive Management team was present at the interview. She says that Miller was not provided with a copy of the alleged fraudulent documents prior to the interview. She says that copies of adverse documents or fraudulent invoices regarding the investigation were not placed on Miller's dossier.

50. Anthony Christie (Christie) gave evidence that he is a former President of the Union and was President when the Union Action was commenced. Christie denied that his affidavit sworn and filed on the 20<sup>th</sup> September, 2017, in the Union Action, impleaded Miller into that action but that references to Miller and others in the affidavit was in support of the Union's contention that notwithstanding their ongoing action against BPL, additional employee's rights under the Agreement were still being blatantly violated by BPL.

51. Christie accepted under cross examination that the Union, by the affidavit, wanted Miller reinstated. He also accepted that the Union, as a matter of course, would seek redress both in relation to its current and former members.

#### The issues

52. Miller summarises his case at paragraphs 3.1-3.4 of his submission, where he states:

3.1 The Plaintiff submits that his action against BPL is grounded in the fact that the Defendant failed and/or refused to follow the mandated terms and conditions of the Industrial Agreement (which is binding on the parties thereto) as it relates to, *inter alia*, the Grievance Procedure resulting in what he maintains is a clear and obvious and fundamental breach of the terms of his employment contract and relevant law and as such he is entitled to, *inter alia*, reinstatement and damages.

3.2 Moreover, the Plaintiff submits that the grievance/dispute properly raised by him in accordance with the Industrial Agreement is deemed to have been settled in his favour with effect from 18<sup>th</sup> January 2018, as a consequence of the Defendant's failure to communicate a final decision in writing to the Plaintiff within the stipulated four (4) months from the date of the dispute arising as mandated by Article 16.10 of the Industrial Agreement.

3.3. The Plaintiff respectfully directs the Court's attention to its Amended Writ of Summons filed on the 18<sup>th</sup> February, 2019 and his Reply (to the Defence)

filed on the 27<sup>th</sup> February, 2019 for further particulars and the specific reliefs prayed.

3.4 Additionally, the Plaintiff further submits that as a result of the new revelation regarding the true reason for his purported termination i.e. *“the Plaintiff was involved in a fraudulent scheme”* the same amounts to an unjust and wrongful termination and moreover the Defendant could not for the reasons set out below justify or sustain its assertion (as set out in its Defence and proffered by its lead witness Ms. Chequita Johnson) that it had *“formed the honest belief that the Plaintiff was involved in the fraudulent scheme and that it was necessary to conclude the relationship of employment”*.

53. BPL identifies its case, at paragraphs 4.1 – 4.3 of its submission as follows:

4.1 It is respectfully submitted that, the evidence adduced during the course of the trial was clearly and decisively in favour of the Defendant and the Plaintiff failed to meet the standard of proof in relation to his claim for wrongful dismissal. In particular, within his testimony and evidence, the Plaintiff clearly and decisively failed to prove, on a balance of probability that:

- i. at the time of his dismissal, the Defendant did not hold the reasonable and honest belief that he was guilty of misconduct warranting summary dismissal;
- ii. his dismissal was not justified, particularly having regard to the fact that the Plaintiff was reasonably suspected of having committed or participated in a crime or crimes and/or an act or acts of theft/fraud.
- iii. his dismissal was not effected entirely/substantially in accordance with the procedure set out within the applicable Industrial Agreement; and
- iv. he was not duly informed, and not fully aware, of the reasons for his dismissal.

4.2 As shall be discussed more fully below, during the course of the evidence adduced during the trial, it became clear that the Plaintiff was fully informed of the reasons for his suspensions and ultimate dismissal. It also was clear that, at the time the dismissal was effected, the Defendant held an honest and reasonable belief, due to the several implicating touchpoints, that the Plaintiff was involved in the Fraudulent Scheme.

4.3 During his cross-examination, the Plaintiff, while being evasive, and notwithstanding strenuous attempts made to minimise or appear to be ignorant (in the extreme) of notorious relevant information/facts and very close and longstanding implicated operative relationships, was not able to

credibly dispute the fact that he was entirely aware of the investigation into the Fraudulent Scheme and that he was one of the subjects of the investigation. Further, while he disputed that the reasons for his dismissal were justified, it was clear that, at all material times, he was aware of what the reasons were.

#### Law and Analysis

54. This case raises claim of both wrongful and unfair dismissal. The Court of Appeal, in *Bahamasair v Omar Ferguson SCCivApp No. 16 of 2016*, acknowledged that the two claims may be pursued together (See paragraph 98, per *Crane-Scott JA*). Counsel for BPL, in his oral submissions, argued that unfair dismissal was not pleaded and the case was laid in wrongful dismissal only. That submission, in my view, fails having regard to the provisions of the Statement of Claim (above). Paragraphs 5(ii) and 6 of the Statement of Claim as well as the prayers at (iv), (v) and (vi) of the Statement of Claim (above) speak to the unfair and or unjust termination of Miller's employment. It is odd that BPL would allege there is no claim for unfair dismissal when, in paragraph 2 of the Defence there is the averment denying that the dismissal was unjust and asserting that the investigation carried out was fair. The submission of BPL is also confusing in light of the averment in the Defence that "the Statement of Claim does not advance a claim for wrongful dismissal or breach of contract".

55. I am satisfied therefore that the claim for unfair dismissal was also asserted.

56. The leading case in this jurisdiction on the question of unfair dismissal is the Court of Appeal decision in *Bahamasair v Omar Ferguson SCCivApp No. 16 of 2016*. In that case *Crane Scott JA*, delivering the decision of the Court, stated as follows:

14. It is beyond dispute that the respondent has a statutory right conferred by section 34 of the Employment Act not to be "unfairly dismissed". The section reads:

"34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer."

15. Section 35 of the Act provides that subject to sections 36 to 40, for the purposes of Part IX of the Act, the question whether the dismissal of the

employee was fair or unfair shall be determined "in accordance with the substantial merits of the case."

16. The meaning of this expression and in particular, how the question whether a dismissal was fair or unfair is to be determined, was judicially considered in *B.M.P. Limited d/b/a Crystal Palace Casino v. Ferguson* [2013] 1 BHS J. 135 (an appeal from a decision of the Industrial Tribunal).

17. In the course of its decision this Court (differently constituted) explored the broad legislative objectives of Part IX of the Act and the intended meaning of the expression "in accordance with the substantial merits of the case" in section 35. Delivering the decision of the Court, Conteh JA explained, inter alia, that given the diverse circumstances in the workplace which might lead to the dismissal of an employee, the categories of unfair dismissal are not intended to be closed. In short, a claim for unfair dismissal may arise in situations other than those specific instances or "statutory unfair dismissals" described in sections 36 to 40 of the Act. Where such a claim is instituted, section 35 mandates the question whether the dismissal is fair or unfair to be determined following a consideration of "the substantial merits of the case."

18. We can do no better than to reproduce with our wholesale approval, the Court's observations located at paragraph 38 (sic) of its decision in *Crystal Palace* as follows:

"38. 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..." [Emphasis added]

19. More recently, in *Cartwright v. US Airway* [2016] 1 BHS J. No. 96 this Court (differently constituted) considered the meaning of the phrase "the substantial merits of the case" as it appears in section 35. The Court drew assistance from the observations of Langstaff J in *West v. Percy Community Centre* UKEAT/0101/15/RN. In *West*, the court was considering the corresponding phrase in section 98(4)(b) of the English Employment Act, 1999. Langstaff J explained that the "statutory question is answered by a factual inquiry."

20. Delivering the decision of the Court of Appeal in *Cartwright* (above), Isaacs JA, stated:

"40. Thus, it was incumbent upon Winder, J to look at the case in the round, at all the circumstances of the case, and arrive at a decision based on the substantial merits of the case. This he did do."

...

53. We do not think it is necessary to consider whether an industrial agreement was or was not in effect at the time when the respondent was dismissed. Nor do we need to determine whether the disciplinary procedures contained in the 2000 industrial agreement were expressly or impliedly incorporated into the respondent's contract of employment with the appellant. In our view, the statutory right conferred by section 34 of the Employment Act on every employee in The Bahamas not to be unfairly dismissed, is to be read as having imported into every contract of employment, an implied statutory term that an employer's power of dismissal will be exercised fairly and in good faith.

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.

55. As we see it, the right to be heard, is an implied statutory term which is to be regarded as having been imported into the respondent's contract of employment with the appellant by virtue of section 34 of the Employment Act. The respondent's entitlement to procedural fairness before his dismissal emanates from statute and therefore did not depend on its having been expressed in a binding industrial agreement registered in accordance with section 49 of the Industrial Relations Act. Furthermore, the right did not depend upon the respondent having to prove that it had been incorporated into his individual contract of employment before the lapse of the 2000 industrial agreement in the manner discussed in Hutchinson. Quite simply, the right to be heard before dismissal is an implied statutory term which was incorporated into the respondent's employment contract by operation of law.

57. According to *Crane-Scott JA*, the right not to be unfairly terminated exists notwithstanding any terms which may or may not exist in Miller's contract of employment with BPL. This, *Crane-Scott JA* says, is because it is a statutory right conferred by section 34 of the Employment Act on every employee in The

Bahamas not to be unfairly dismissed and is to be read as having imported into every contract of employment, an implied statutory term that an employer's power of dismissal will be exercised fairly and in good faith.

58. In Miller's case however there is, in addition to a statutory right not to be unfairly dismissed, a codified right and contractual right not to be unjustly terminated.

Article 14(2) of the Agreement, provides:

The Corporation may terminate the services of an employee by giving reasonable notice in writing having regard for the following criteria: length of service, age of employee, status, loyalty, education and training, health and chances of alternative employment; except that the Corporation may make payment in lieu of giving notice. The Corporation shall not, however, terminate an employee unjustly. The Corporation must settle all engagements to the employee within two weeks of the effective date of termination as determined by the Corporation and will be no less favourable to the employee than the entitlements provided for in the Employment Act.

Unjust is the clear synonym to unfair. In *Bahamas Electricity Corporation (Appellant) v Andrew Gilbert (Respondent), Civil Appeal No. 49 of 2002* the Court of Appeal considered Article 11(2) [now currently Article 14(2)] of the Agreement. In Gilbert, the Court stated:

Under the terms of the industrial agreement between the corporation and the union, it is clear that under Article 11 (2) permanent employees could terminate their employment with the corporation by giving one month's notice. The corporation under the very Article may terminate the services of an employee by giving reasonable notice in writing, having regard to such matters as length of service, age, status, loyalty and certain other criteria. There is included in that Article these words, "however, the corporation shall not terminate an employee unjustly."

...

"Now implicit in 11(2) there clearly is a right in the corporation as indeed in the employee for either side to terminate the contract of employment. Now, insofar as the corporation's right to terminate the services of an employee is concerned, clearly that Article recognizes the existence of that right to do so, but in doing so, the corporation must bear in mind the various criteria that I have just adumbrated, length of service, age, dedication, et cetera. The words there, "however, the corporation shall not terminate an employee unjustly", must be read in the context in which they appear, that is to say, the circumstances must demonstrably bear out justification for termination and the reasonableness of the notice must be measured by the criteria



therein adumbrated. The approach of the corporation therefore must be two-fold: In the first place, the decision to terminate must be justified by the circumstances leading up to termination, and in the second place, the period of notice must be reasonable having regard to the criteria already mentioned. When combined, the question must be asked: "Did the corporation terminate the employee justly." (Emphasis provided)

59. The contention in this dispute, whether the claim is wrongful or unfair dismissal, is focussed on the conduct of the investigation by BPL. Section 33 of the Employment Act provides:

33. 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.

60. In my view, on balance, the investigation conducted, for BPL's consideration as to whether it could *form the honest belief that the Plaintiff was involved in the fraudulent scheme*, was not reasonably or fairly carried out. I am satisfied that the dismissal was both unfair and wrongful, having regard to BPL's conduct of the investigation. The investigation was not full and fair. Additionally I was unable to determine that BPL, in accordance with Section 33 of the Employment Act, had a reasonable belief that Miller misconducted himself after conducting a reasonable investigation.

61. BPL says at paragraph 8.1 of their closing submissions, that

there is no precise manner in which an investigation must be conducted so as to enable the employer to form a reasonable and honest belief of that the employee is guilty of the misconduct in question. Rather, all that must be established is that the investigative process was reasonable and informed the requisite reasonable and honest belief.

Further, they say at paragraph 8.3 of the closing submission:

From the above quotation, what is clear is that in gauging the reasonableness of an investigation, this Honourable Court must consider the issue not upon the basis as to whether the investigation was suggestive of wrongdoing, as this is the wrong test; but rather, this Honourable Court must consider whether the investigation was supportive of a reasonable

belief of wrongdoing. In other words, if the investigation yielded information which could have objectively led the employer to a reasonable conclusion of misconduct then this would suffice. While Island Hotel demonstrates that the employer is not to be held to a standard of conducting a forensic investigation, in the instant case, a forensic investigation was in fact conducted by Ernst & Young which was readily suggestive of the Plaintiff's involvement in the fraudulent scheme. Accordingly, upon this basis alone, it is submitted that the standards as to a reasonable investigation were duly satisfied.

62. I have no hesitation in indicating that I found both Miller and Johnson to be truthful witnesses. I am prepared however to accept Miller's evidence, in preference to Johnson's, in those instances where they differed.

63. BPL says that "in the course of Miller's evidence he was entirely uninterested in presenting the actual state of affairs in anything approaching a forthright or truthful manner". They also say that "it is clear that his responses sought to be self-serving with a view to wrongfully suggesting that either he was never investigated for involvement in the fraudulent scheme or that he was never aware that he was being investigated". I do accept that Miller, at instances in his evidence and cross-examination, slavishly stuck to a script of drawing a distinction between a charge of fraudulent offences and gross misconduct in indicating that he was unaware he was being investigated for the fraudulent scheme. I did not find that this meant he was being untruthful.

64. Section 32 of the Employment Act identifies the grounds for summary dismissal. It identifies fraudulent offences and gross misconduct as separate grounds. In the Agreement there is likewise a distinction drawn between being accused of being involved in perpetrating a fraudulent scheme and gross misconduct in the course of the employment. Section 32 provides:

32. 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 —

- (a) theft;
- (b) fraudulent offences;
- (c) dishonesty;

- (d) gross insubordination or insolence;
- (e) gross indecency;
- (f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;
- (g) gross negligence;
- (h) incompetence;
- (i) gross misconduct.

Any reading of the section or the Agreement demonstrates that every wrong listed, including fraudulent offences, is an act of misconduct. To say, as BPL did in their suspension letters, without more, does not therefore convey what action by Miller BPL complains of. When EY spoke with Miller, as to certain unusual invoices in the course of the forensic audit, this could not mean, as BPL suggests, that he understood that he was the target of the investigation. If Miller was innocent of any wrong doing it is understandable, as he testifies, he understood that he was assisting with the investigation into the fraudulent invoices and was seeking to bring the wrongdoers to justice. BPL's submission is severely hampered by the fact that there is no evidence, documentary or otherwise as to what gross misconduct was being referred to in the suspension letters and the termination letter. This despite Miller repeatedly asking for details and particulars and to the extent of filing a grievance seeking them.

65. Here was a man fighting for a job he had spent almost 30 years at, and being cross examined by the same firm of lawyers he says ambushed him at the interview. Having heard his evidence, observed his demeanour, I accepted that he was concerned that he was being tricked again and intended to keep to the distinction being drawn in his case not that he was untruthful. The truth is however, that very little of Miler's evidence was challenged.

66. Whilst I accepted Miller's evidence that he was not guilty of the claims brought against him, the authorities are clear that questions of guilt are not a matter for the Court in this exercise. In *Island Hotel Company Limited v. Shikera Isaacs-Sawyer, Longley JA* in discussing the burden imposed upon an employer, such as BPL, in effecting a summary dismissal, stated at paragraph 23:

*"The finding by the Vice President at paragraph 111 of the decision is somewhat convoluted, in my judgment, because it purports to combine two distinct tests and several incompatible positions and errors of law, namely: proof of guilt and honest belief on reasonable grounds. This runs counter to the established authorities. Proof of guilt is not the law. See *Princess Hotel v Bahamas Catering and Allied Workers Union* [1985] BHS J. No. 128 and *Carnival Leisure Industries Ltd. v. Zervos* [1988] BHS J. No. 139, both judgments of this Court, differently constituted." (emphasis added).*

67. The question is whether BPL formed an honest belief that Miller had committed acts of gross misconduct. I am not satisfied, on balance that BPL has demonstrated any such honest belief. There is no evidence as to who made the determination or what was considered in this exercise.

68. It is entirely unacceptable that the evidence does not bear out what BPL believed the involvement of Miller to have been. Mr Hanna, Counsel for BPL says that BPL was of the belief that Miller used the grid stamp. That he affixed his grid stamp to the various documents in relation to the fraudulent invoices. Respectfully, on the evidence, I can find no evidence that anyone made this allegation to Miller during the course of the investigation. I accept that he was questioned, without specific notice, by BPL as to the invoices. BPL says that an email of 21 August 2017 sent by Miller's to Chantel Williams, suggests that he was aware of the allegation. I accept Miller's evidence that whilst EY sought his assistance, in their forensic investigation, in reconciling the fraudulent invoice, EY acknowledges that he was never interviewed on the EY allegations (See page 16, paragraph 6(a)(iii)(3) of the Project Hogfish report.). The subject of the email was "Fraud Investigation Notes for Auditors"

69. Both parties relied on the test as cited in the dicta of *Longley JA* at paragraph 35 of *Island Hotel*, where he states:

35. What then is a reasonable investigation? The authorities seem clear. What one gleans from them is that *the investigation must enable the employer to ascertain the true facts upon which it can make an informed decision to ground or support an honest belief on reasonable grounds that the employee committed the act of misconduct. It must be within reason, full and fair.* That would normally involve where it is considered necessary

an account of the incident from as many eye witnesses or persons in the know as possible yet at the same time giving the employee an opportunity to be heard and to respond to the gathered information and complaint.

At paragraph 51 *Longley JA* continued:

51. The Act speaks of a reasonable investigation the purpose of which if necessary, is to enable the employer to ground its belief that the employee committed the acts in question. It is not to establish guilt. All that is required is that the employer conducts a full and fair investigation, which involves giving the employee an opportunity to be heard so as to enable it to form a belief on reasonable grounds that the employee committed the misconduct in question. It was not to determine the guilt of the employee.

70. 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** B, a cashier, was employed with the defendant hotel and had been summarily dismissed for dishonesty. On 24 April 2003 employees for the defendant approached B 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, B 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 B 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 B 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. Bullard was placed on suspension until 29 April 2003 and was not informed that an investigation was being conducted into the incident. When the Plaintiff 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 the Plaintiff 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.

71. I am not satisfied that the employer has demonstrated that it conducted a reasonable investigation. It was not a full and fair investigation, which gave Miller a true opportunity to be heard. Miller was told by BPL that he was being investigated for the omnibus and nebulous ground of gross misconduct when, according to their case they say they always knew he was being investigated for alleged participation in the fraudulent scheme. Fraudulent offences is covered by another section of the Agreement. The suspension letter speaks of gross misconduct yet the termination letter, which also speaks of discussions and an interview, cites for the first time, article 15(12)(b), which concerned fraudulent offences.

72. Miller argues that "all of the evidence given by BPL's lead witness, Johnson, should be rejected by virtue of the fact that she admitted that (i) she was not a part of the investigatory team; and (ii) the evidence was considered by the Executive Committee of the Defendant of which she was not a part; and (iii) she was not the proper person to be asked about what evidence was before the Executive Committee to consider; and (iv) she was not a part of the classification of what was considered to be gross misconduct."

73. The investigation, in my view, was not reasonable as there was material, relied upon by the investigators, which were not shown to Miller and I find that Miller was not given a reasonable opportunity to consider, and make proper representation with respect to the documents being shown to him.

74. No reason was given in the evidence, by BPL, as to why Miller was only given glimpses of the documents which BPL says demonstrates his wrong doing. Johnson says that this was a complicated and complex matter and that this was the reason why the initial 5-day suspension was extended to 10 days, by BPL, before Miller could be interviewed. The EY Project Hogfish report, however, had

already been completed since August 18. I accept that Miller must have known, or at the very least suspected that, notwithstanding persons had already been charged and that he was a witness for the crown, the allegation of misconduct may have been connected to the fraudulent invoices. But why should he have to suspect what is being alleged against him? When he was placed on suspension BPL ought, in the letter, to at the very least spell out the parameters of the disciplinary charges. If the matter is as complex as Johnson suggests, Miller ought not to have been ambushed as he alleges he was, but given a reasonable opportunity to consider the material and prepare an adequate response. There is no evidence before the Court that anyone told him the particulars. Awareness that the charges are linked to the fraudulent scheme does not, for an innocent person, translate to knowledge of what is being alleged. Instead, it appears, Miller was presumed to be guilty and therefore the little time afforded was considered adequate. Not even the termination letter condescends to any particulars.

75. In response to the complaint that it did not provide the material beforehand, BPL says:

With respect to the ability to permit the Plaintiff to consider and to respond to the allegations made against him. The following is clear from pages 29 to 32 of the May Transcript:

- i) the allegations with respect to the fraudulent invoices embossed with the Plaintiff's stamp and signature were expressly put to the Plaintiff during a meeting held on 4<sup>th</sup> September, 2017, if they were not put to him by Ernst & Young during the meeting of 18<sup>th</sup> August, 2017;
- ii) there was no requirement arising from the Industrial Agreement that the documents should have been provided to the Plaintiff prior to the interview or that copies should have been given to him as they did not necessarily or fundamentally fall within the contemplation of adverse documents within the scope of Article 12 of the Industrial Agreement at that time;
- iii) that Ms. Johnson, considered the invoices in question to be suspicious; and
- iv) that Ms. Johnson did not consider the explanation provided by the Plaintiff with respect to the touchpoints' connecting him to the suspected fraudulent activity to be satisfactory (with Ms. Johnson providing reasons in this regard).

Respectfully, there is very little force in this submission. BPL's submission, relying heavily on Jonson, is weakened by the fact that Johnson was not a part of the investigation. Johnson's evidence was clear that she was at the meeting merely as an observer. She was adamant that she was not a part of the investigative team. She could not say how the investigation was carried out, what was considered and what was not. No evidence was brought as to how the purported investigation was conducted other than Miller was interviewed as *no one from the investigation team came to court to give evidence*. We do not know who else was interviewed save for Miller. Were the other managers with the same grid stamp examined? Were there any follow up with respect to the vendors who EY identified as suspicious who Miller sought, after the fact, to demonstrate were in fact legitimate? To what extent was the EY report and its conclusions relief upon? Especially in light of the fact that Miller was never shown the report? Johnson also does not demonstrate knowledge of the decision making process in the termination of Miller's employment. Whilst Johnson said that she considered the invoices to be suspicious and that Miller was guilty of misconduct, she stated that she didn't share her views with executive management. This is understandable, as Johnson would not have had a full grasp of the investigation to make such an assessment.

76. There is no evidence as to what transpired at the meeting of 4 August 2017, BPL has brought no witness as to what transpired at that meeting and what document is says was shown to Miller. EY in its Project Hogfish Report dated 18 August 2017 specifically says that Miller was not interviewed. It was open to BPL to bring some evidence as to what was done. It produced neither an investigator nor someone involved in the decision to terminate Miller. It is not open to BPL to speculate what was shown by the auditors of EY or its investigators when it had every opportunity to produce a witness, if their allegations could have been substantiated. At this time Miller was not under suspension or placed on any notice that he was being considered for discipline, such that a meeting prior to this period would be of any relevance relative to an investigation. This is especially so when EY, by its report didn't consider it as an interview.



77. BPL has placed considerable reliance on the EY report and what it sees as damning evidence, by an independent investigation, against Miller. Indeed considerable amount, if not the vast majority, of BPL's cross examination of Miller was focused on answering concerns and complaints raised in the EY report. The importance of the report to the investigation and to BPL's case is seen at paragraph 5.2 of its submissions, where it is stated:

*It is respectfully submitted that the evidence of the Defendant, as contrasted with the evidence of the Plaintiff, is supported by virtue of a forensic accounting report (the "Report") prepared by the accounting firm of Ernst & Young, an entirely independent and neutral expert party in that field which established that a multi-faceted Fraudulent Scheme was perpetrated against the Defendant by numerous employees of the Defendant; and which established several 'touchpoints of significant concern' in respect of the Plaintiff in connection with the Fraudulent Scheme.*

78. The EY Hogfish Report, being such an important element of the investigation process, strikes me as unfair that Miller was not shown, even in the meeting of 4 September 2017, those portions of the report which related to him, and which BPL was certainly relying upon to investigate him.

79. Having regard to my findings that the dismissal was both unfair and wrongful, I do not propose to consider the other arguments relative to compliance with other aspects of the Agreement.

80. Having found in favour of Miller, I will make the simple declaration that Miller was terminated unjustly and therefore wrongfully. I will award damages for breach of his contract of employment.

81. I am not inclined to order Miller's reinstatement but will order that the appropriate award of damages be made. As neither party has made any submission on the

question of damages I will adjourn the matter to 16 July 2020 to hear the parties on the appropriate assessment for an award of damages.

82. Miller shall be entitled to his reasonable costs to be taxed if not agreed.

Dated the 3<sup>rd</sup> day of June 2020



Ian Winder

Justice