COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL LAW DIVISION
2018/COM/lab/00031

BETWEEN

ANTHON THOMPSON

Plaintiff

AND

BAHAMAS AGRICULTURAL AND INDUSTRIAL CORPORATION

Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Phillip Mckenzie, Ms. Glenda Roker and Mr. Creswell Sturrup for the Plaintiff

Mr. Shaka Serville for the Defendant

Judgment Date: 22nd September, 2021

Commercial Law – Employment – Unfair Dismissal – Wrongful/Summary Dismissal – Whether the Defendant Corporation followed the statutory and common law test for dismissal – Whether the Plaintiff was subjected to the Industrial Agreement as a Senior Manager – Whether the Defendant Corporation's employees were subject to the Public Service Regulations or the General Orders – Whether the Plaintiff was entitled to a compensatory award or basic pay or reinstatement

JUDGMENT

1. The Plaintiff, Mr. Anthon Thompson **(the "Plaintiff")** was dismissed from the Bahamas Agricultural and Industrial Corporation **(the "Defendant")** on the 1st February, 2018. He had been employed with the Defendant for 15 years and had held the position of Senior Manager at the time of his dismissal. He claims that his dismissal was wrongful and unfair and as a result seeks damages and a declaration that the relevant provisions of the Employment Act, 2001 **("the Act")** were breached, an Order for reinstatement and the employer's contribution to the Defendant's group medical insurance.

2. At commencement of the trial, the Plaintiff raised the preliminary point that the Defendant's Defence filed on the 5th September, 2019 **(the "Defence")**, failed to satisfy the requirements of Order 18 rule 12 (1) and Order 18 rule 13 (3) of the Rules of the Supreme Court **("RSC")**. While it is important that a party's pleading should specifically state its position in order to avoid taking the other party by surprise, I allowed the Defence as the parties were at trial.

3. The Defendant claims that the Plaintiff was summarily dismissed as a result of the willful neglect of his duties and a breach thereof as he spent the majority of his time sitting in his vehicle, listening to and engaging with radio talk shows. As a result, the Plaintiff did not effectively manage the Defendant's Feed Mill as a Senior Manager was expected to do.

4. The issues for determination are:

   4.1 Whether the Defence failed to satisfy the requirements of Order 18 rule 12 (1)?;
   4.2 Whether the Plaintiff was unfairly dismissed and if so what order was he entitled to?; and
   4.3 Whether the Plaintiff was wrongfully dismissed and if so what order was he entitled to?

PLAINTIFF'S EVIDENCE

5. The Plaintiff was employed by the Defendant effective the 1st May, 2003. He was a permanent and pensionable employee who was promoted on several occasions. From 2016 to the time of his dismissal, he was assigned to the Defendant's Feed Mill on Gladstone Road, as a Senior Manager and earned a salary of $47,950.00 per annum along with an annual allowance of $6,480.00. He was not given a job description of what his responsibilities would be. Mr. Rodney Forbes, deceased, his supervisor **("Mr. Forbes")**, who also worked at the Feed Mill, was also unaware of his assignment.

6. Despite this, he sought to identify the Feed Mill's weaknesses, strengths, opportunities and threats and inform his department head of them. He did in fact compile reports as needed and averred that he was always onsite but would have to sit in his truck to work due to the myriad of physical inadequacies that affected staff, clients and management.

7. Some of the inadequacies included insufficient space for staff members and customers on a daily basis, one shared restroom for staff and customers and that the restroom, kitchen area, cashier station, clerk station and manager's desk were all contained in a 6 by 10 ft. area. There was no privacy and that he was unable to conduct any private meetings with management, staff or clients.

8. During the last several months of his employment, he was not provided with any seating and resorted, as a consequence, to sitting in his vehicle. The alternative for him and other staff members was a dilapidated building on the compound where staff often gathered or the production plant floor while feed was produced therein. He remained an active and dedicated member of the management of BAIC Feed Mill and was often tasked with making difficult decisions as well as dealing with staff and clients. He was not invited to the Department Head meetings or Management meetings and removed from the Agriculture Department's WhatsApp group without notice and reason.

9. He maintained that the production plant was inadequate as the air ventilation system and the ceiling fans were not functioning and there were several deficiencies on the floor of the plant that were hazardous to management, members of staff and clients. He had made many complaints to Arnold Dorsett, a former BAIC Employee and Department Head of Agriculture, Troy Sampson **("Mr. Sampson")**, former General Manager of the

Corporation, Vernita Rhodenwalt **(Ms. Rhodenwalt")**, Human Resources and Staff Development Head of Department and Dion Smith, the former Executive Chairman of the Corporation.

10. He only called into the radio talk shows during his break or his lunch break which would be anywhere between 7:30 a.m. to 10:00 a.m. for fifteen minutes and between 1:00 p.m. to 2:00 p.m. for an hour. It would all depend on what was happening during the course of the day. He stated that if there was a lot of activity taking place during the course of the day then he would not take a break.

11. The radio was always on during the day in the Feed Mill's office.. He denied that he failed to perform his duties because he would be calling in to the radio talk shows throughout the day. The Plaintiff acknowledged that he received an email in September 2017 from Ms. Rhodenwalt addressed to all of the Defendant's staff, informing them that they were limited to calling the various talk shows only on their lunch hour **("September 2017 Email")**.

12. He also received a letter dated the 18th December 2017, , which stated that the Corporation's Board had directed him to cease and desist from engaging in the practice of calling the talk radio shows during his working hours of 7:00 a.m. to 3:00 p.m. **("December 2017 Letter")**. He was taken by surprise by the letter which he believed seemed to undermine his right to freedom of speech.

13. He received a letter on the 1st February, 2018, terminating his employment (the "Termination Letter"), which came as a complete shock as he had been at the time, actively engaged with the Corporation's Human Resources Department relative to his request for a three month vacation leave. He had requested this leave for medical treatment for a spinal cord injury which was inflamed and which would allow him much needed personal time to complete his townhouses and to spend time with his family.

14. The Defendant never gave him any warning nor any citation as to any 'willful neglect of duties' during his tenure at the Corporation. He was unaware of any allegation of neglect nor was he aware of any complaints or investigations into his 'willful neglect of duties' prior to his disengagement. During his tenure with the Corporation, he maintained that he had gone above and beyond his duties in any capacity he was given and that he produced beyond the call of duty.

15. He tried his best to seek employment to mitigate his loss however, he was not able to secure employment or any prospects thereof with same or similar benefits and with the same earning benefits and at the same management level. He had a high school education. The appointment as senior management had placed him in the Professional Rating Category with financial institutions which was very advantageous as it afforded him better financing options for mortgage and investments.

16. The Plaintiff denied that he was not engaged with his responsibilities. He maintained that he was always onsite, either in his truck or in the administrative complex. The Plaintiff also denied that the Feed Mill was a hands on job and added that his administrative duties also were necessary and just as important. He claimed that while there were other managers in place, he would have had to tweak the work wherever he saw the need.

17. There were different levels of management at the plant. The primary focus however, was on the manual system of work which he met in place at the Feed Mill. He was not aware of any complaint from his superiors or the Corporation's Board of Directors about his spending time in his truck and participating in local talk shows. He claimed that the September 2017 Email was not specific to him but was a general email sent to all of the Defendant's staff. He also denied that the December 2017 Letter was a warning to him and insisted that it was a directive telling him what they wanted him to do.

18. He did not respond to the 20th September 2017 email because it did not ask him to. He denied that he did not care about his job and added that the job took care of him and his family. He also denied that he was dismissed as a result of his disregard for the warnings and stated that there was no investigation conducted, no evidence produced and no directive sent out to him for a response.

19. During the prior fourteen years of his employment, he had never once received a verbal or written communication directing him not to call a talk show or tell him what he could not do. He did respond to the December Letter verbally by making a call to the general manager to express his concerns about what was happening.

DEFENDANT'S EVIDENCE

20. Mr. Sampson, the Defendant's General Manager at the time of the Plaintiff's dismissal, averred that the Plaintiff was sternly warned of his specific misconduct by letter dated the 17th August, 2017, which behavior amounted to gross misconduct and a neglect of his duties **(the "August 2017 Letter")**. Thereafter, he was copied on the September 2017 email sent to all staff of the Corporation warning them to limit their participation in various call-in talk shows. The August 2017 Letter is set out as follows:-

"17th August, 2017

Mr. Anthon Thompson
Senior Manager
Animal Feed Mill
Bahamas Agricultural & Industrial Corporation
Nassau, Bahamas

Dear Mr. Anthon Thompson:

RE: Behavior Not Consistent With General Acceptable Procedures

It has come to the attention of the Corporation that one our Senior Managers stationed at the Animal Feed Mill spends his time at work sitting in his vehicle and engaging s his letter serves to advise that we have been informed by several of the Managers of the Feed Mill that your behavior is not consistent with the behavior that is expected of a Senior Manager. (sic)

We have been informed that:-

1. You frequently report to the Mill late and on arrival remain in your vehicle.

2. You would abandon your post for hours during the course of the normal work day returning only just before the close of the day.

3. You do not participate in any duties at the Mill. When the other Managers have a need to engage you, they have to walk to your vehicle to have those discussions/conversations with you.

4. When on the premises you spend your time calling into the various Talk Shows engaging in the discussions/topics of the day.

Mr. Thompson, as a Senior Manager assigned to the Animal Feed Mill you are expected to be actively involved in the day to day operations of the Mill. You are expected to provide guidance and oversight to subordinate staff. You are expected to lead by example.

Employees of the Corporation are expected to give a fair days work. Employees are entitled to one (1) hour lunch break and can spend that time as they determine. The other seven (7) hours belong to the Corporation. Every employee is expected to be actively involved in the Corporation affairs during those hours.

Mr. Thompson, to spend the majority of your work day calling into and engaging in conversations/discussions on the 'Talk Shows' sends the wrong message to the subordinate staff at the Mill, to the public at large and could cause the Corporation to be viewed as a 'non professional, slack agency.' You are therefore advised to cease and desist from the practice or be subject to the consequences attached thereto.

You are also advised to cease and desist from sitting in your vehicle during the work day. To continue would also cause you to be subject to the consequences attached thereo.

Kindly govern yourself accordingly."

21. By the December, 2017 Letter, the Board directed the Plaintiff to to stop calling the radio talk shows during work hours between the hours of 7:00 a.m. and 3:00 p.m. On the 18th January, 2017, in his capacity as General Manager, he saw a letter from Mr. Rodney Forbes who complained of the Plaintiff spending an extensive amount of time in his truck and not carrying out tasks.

22. Despite the Plaintiff being made aware that his behavior amounted to gross misconduct, he persisted in the behavior complained of. The Defendant's Board would get involved in the discipline and discharge of management and that he did not have the authority to suspend or discipline a management employee. He added that while an investigation would usually be conducted if there was a breach, he did not conduct an investigation with respect to the Plaintiff.

23. It was a directive from the Defendant's Board to terminate the Plaintiff's employment. While there was evidence that he was not privy to, he had signed the letter without having sight of that evidence.

24. The Feed Mill was in a wanting state. There was some overcrowding and the staff would have to use a derelict building on the outside of the milling area to work in. There was one restroom which had to be shared between fourteen or fifteen people. While there was a plan to upgrade the Feed Mill, it never happened. There was no written

objection to the Plaintiff's email with respect to using his vehicle in the absence of adequate accommodation for all staff.

25. Either the general manager or Executive Chairman would assign a manager to a different site and added that he did not recall any duties being formally assigned to the Plaintiff. Mr. Sampson confirmed that the Plaintiff was a permanent and pensionable employee at the time of his termination and that after ten years of employment a permanent employee became eligible for pension.

26. He additionally confirmed that the Plaintiff was entitled to an hour lunch break and a fifteen minute break and that there were no specific rules with respect to what could be done during that time. Mr. Sampson confirmed that the directive that calls to talk shows were not to take place between the hours of 7:00 a.m. to 3:00 p.m. was the first directive of its kind.

PRELIMINARY ISSUE – WHETHER THE DEFENCE SATISFIED THE REQUIREMENTS OF ORDER 18 RULE 12 (1)

27. The Plaintiff contends that the Defence fails to satisfy the requirements of Order 18 Rule 12 (1) and Rule 13 (3) of the RSC. Order 18 Rule 12 (1) states that "**every pleading must contain the necessary particulars of claim, defence or other matter pleaded including and without prejudice to the generality of the foregoing words, particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies**."

28. Order 18 Rule 13 (3) states that "**subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement or non-admission of them is not a sufficient traverse of them.** "

29. Order 18 Rule 13 (4) states that "**any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted."**
not having been made.

30. In order to meet the standard of proof in employment matters, the Plaintiff submitted that an employer must show that it honestly and reasonably believed that the employee was guilty of misconduct equivalent to a fundamental breach of his contract of employment. The Defence, he submitted, largely amounts to a bare denial of the averments of the Plaintiff and simply puts the Plaintiff to strict proof.

31. The Plaintiff additionally contended that the Defendant failed to comprehensively set out their position with respect to the specific claim laid out in his Statement of Claim for unfair and wrongful dismissal. Accordingly, he submitted that the Defendant should be bound by its pleadings and should not be allowed to proffer evidence as against the Plaintiff which was not traversed or pleaded in the Defence.

32. The Defendant submitted that its Defence supported how the Defendant's Board of Directors arrived at their decision to terminate the Plaintiff. It added that its overall defence was that, in all the circumstances, they had a certain belief which they deemed to be reasonable.

DECISION

33. Pleadings are required to ensure that parties in an action are aware of the case that they have to meet and to prevent the other side from being taken by surprise at the trial. Further, they enable the other side to know what evidence would have to be produced and to generally assist with preparation for trial.

34. In employment actions an employer bears the burden of proving that they held an honest and reasonable belief that the employee committed the misconduct that amounted to a fundamental breach of the employment contract which led to the dismissal.

35. The Defence does contain bare denials against the Plaintiff's allegations and does not contain any facts that would suggest that it held an honest and a reasonable belief that the Plaintiff's conduct amounted to willful neglect of duties that warranted a breach of his employment contract and subsequent summary dismissal.

36. Where a Plaintiff is provided with a Defence which does not meet the necessary factual requirements, Order 18 Rule 12 (3) provides for a party to apply to the Court for an order for further and better particulars. On the hearing of such an application, the Court has to consider whether what is being requested is a material fact necessary for the conduct of the Plaintiff's case or whether what is being requested is evidence which would be produced at the trial. This step was not taken by the Plaintiff and should have been done after the Defence was filed in 2018.

37. The Plaintiff instead introduced this argument in opening submissions at the commencement of the trial and seeks to have the Defendant barred from relying on any evidence not stated in the Defence. Despite this position taken the Plaintiff throughout the life of the action, willingly participated in the exchange of evidence, both sworn and documentary, without raising this issue at all.

In light of the foregoing, I will allow to Defendant to offer its evidence against the Plaintiff on the issue and allow the trial to proceed.

UNFAIR DISMISSAL

SUBMISSIONS

38. Section 34 of the Employment Act states that every employee has the right to not be unfairly dismissed by his employer. When an employee feels as though he/she has been unfairly dismissed, a civil claim for breach of statutory duty is available as confirmed in **Bahamasair Holdings Limited v Omar Ferguson SCCiv App No. 162 of 2016**. The determination of such a claim is in accordance with the substantial merits of the case as

Conteh JA held in **BMP Limited d/b/a Crystal Palace Casino v. Ferguson [2013] BHS J 132.**

39. The Plaintiff submitted that he was unaware of any allegation, complaint or investigation of his willful neglect of duties prior to his disengagement. The meeting held on the 6th February, 2018 on the Plaintiff's performance, as documented by the Defendant's "Note to File", was drafted after the Termination Letter.

40. The Plaintiff submitted that the Defendant did not adduce any evidence inconsistent with the Plaintiff's assertion that the Termination Letter came as a complete shock and that he was never given any warning about any willful neglect of his duties. He added that the documents disclosed by the Defendant did not support the reason behind the termination.

41. He contended that a Senior General Manager of the Defendant wrote to the Manager of Scotiabank on the 31st October, 2017, advising that the Plaintiff was employed with the Defendant since May 2003 and encouraging their assistance towards him, inferring his reasonable prospect for continued employment with the Corporation.

42. He contended that the employer must first find out whether the employee would wish to be reinstated in a suitable alternative employment and if so whether such action would be practical and just pursuant to Section 43 of the Act. If it is not, then a financial reward comprising a basic and a compensatory award would suffice.

43. In relation to the basic award, the Plaintiff contended that the amount should be calculated from the date of employment. The compensatory award should cover actual financial loss which is considered just and equitable and may cover earnings up to the date of the dispute and future earnings if no alternative employment was found.

44. The Plaintiff relied on **BMP Limited d/b/a Crystal Palace Casino** where Conteh JA, affirmed that section 48 of the Act limits the amount of compensation (including both the basic award calculated in accordance with section 46 of the Act and the compensatory award calculated in accordance with section 48 of the Act. The award for unfair dismissal should not exceed twenty four months' pay.

45. The Defendant contended that the answer to whether the Plaintiff was unfairly dismissed, must be based upon the substantial merits of the case. The consideration of the Court ought not be focused on whether the Plaintiff was given adequate warning about his alleged conduct and/or omissions, nor whether the Plaintiff was in fact guilty of willful neglect of his duties, but rather what was the reasonable belief of the Defendant at the time it acted to terminate the Plaintiff's employment.

46. The guilt of the Plaintiff did not need to be established as it was sufficient that the Defendant honestly believed on reasonable grounds that he was guilty of the conduct alleged, based on facts known to it at the time and the Defendant relied on **Carnival Leisure Industries Ltd. v Zervos (1988) BHS J. No. 139** where Smith JA stated.

> **".12 In my opinion, it is clear from the reasons given for its conclusion that the respondent was wrongfully dismissed that the Tribunal applied the wrong test in arriving at its decision. The conclusion was based on the finding that it had not**

been established to the satisfaction of the Tribunal that the respondent committed the dishonest act of putting excessive overtime on his time sheet. True, this is what was alleged before the Tribunal but, as shown above, it is sufficient if there were reasonable grounds for believing that the respondent had dishonestly claimed excessive overtime; and it does not follow from the finding made by the Tribunal that the appellant company, through its senior employees, did not have reasonable grounds for so believing."

47. The Defendant contended that the Plaintiff has not provided the Court with sufficient information to make a reasoned and informed determination on a compensatory award. They invited the Court to consider Section 47 (4) of the Act which provides that if a dismissal was contributed to in any way by an employee, then the amount of the compensatory award should be reduced by such proportion as it considers just and equitable.

DECISION

48. Section 34 of the Act states that every employee shall have the right not to be unfairly dismissed by his employers. Section 35 of the Act states that in order to determine whether the dismissal of the employee was fair or unfair, the substantial merits of the case should be considered. This test is a statutory one. In **West v Percy Community Centre UKEAT/0101/15/RN**, Langstaff J held that the statutory question must be answered by a factual inquiry. This finding was based on the provisions of s. 98 of the U.K. Employment Rights Act which are similar to the provisions of sections 34 and 35 of the Act which states that the employer is required to show the reason for the dismissal and whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal in accordance with equity and the substantial merits of the case.

49. Langstaff J stated,

> **"The two concepts, unfair dismissal and gross misconduct, are closely related, but they do need to be kept separate. Unfair dismissal requires a Tribunal to have close attention to the terms of s 98 *ERA 1996*. That is statutory. It requires, under s 98(1), the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is either a reason falling within sub-s (2), as conduct does, or some other substantial reason. Section 98(4) provides, critically for this case:**
>
> > **"(4) Where the employer has fulfilled the requirements of sub-s (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
> >
> > > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> > >
> > > **(b) shall be determined in accordance with equity and the substantial merits of the case."**
>
> **That statutory question is answered by a factual inquiry."**

50. In **Eden Butler v. Island Hotel Company Limited (Trading as Atlantis Paradise Island) SCCrApp & CAIS No. 210 of 2017**, the Court of Appeal explained that where there was a claim of damages for unfair dismissal, the focus was primarily on the procedure followed which led to the dismissal. Evans JA (Actg) (as he then was) stated

that in order to determine whether or not an employee was unfairly dismissed there were three issues that had to be determined, namely (i) whether or not an employer, in accordance with section 33, 34 and 35 of the Act, reasonably believed that the plaintiff committed the misconduct in question at the time of the dismissal, (ii) Did the employer conduct a fair and reasonable investigation of such misconduct in all the circumstances of this case and (iii) whether the nature of the breach alleged constituted a fundamental breach so as to warrant dismissal.

51. **Eden Butler** was affirmed in a more recent decision of the Court of Appeal namely, **Bahamas Electricity Corporation and Bahamas Power and Light Company Limited v. Sherry Jennifer Brown IndiTribApp. No. 71 of 2020,** where Evans JA agreed with the findings of the Vice President of the Industrial Tribunal who held that a claim for unfair dismissal required consideration of the procedure established for discipline and the extent to which it was followed.

52. Accordingly, when considering whether or not the Plaintiff was unfairly dismissed under Sections 34 and 35 of the Act, the Court must consider whether, based on the substantial merits of the case, the Defendant reasonably believed that the Plaintiff committed the misconduct in question at the time of the dismissal; whether the Defendant conducted a fair and reasonable investigation of such misconduct in all the circumstances of the case and whether the nature of the alleged breach was so fundamental as to warrant dismissal. The aforementioned considerations should be determined in conjunction with the procedure governing disciplinary matters as established by the Defendant, and whether the procedure was fair and whether it was followed.

53. The Plaintiff avers that as a Senior Manager of the Defendant, he was not subject to or protected by The Bahamas Agricultural & Industrial Corporation Industrial Agreement July 2013-30th June 2018 **(the "Agreement")**. The Defendant however, contends that he was and that he was therefore blameworthy under the Agreement for willful neglect of his duties. Under Article 1 of the Agreement, entitled Definitions, "Bargaining Unit" is defined as **"All employees of Bahamas Agricultural and Industrial Corporation with the exception of Management more particularly described and designated in Schedule II of this Agreement".**

54. By the Agreement, the Defendant has the discretion, when addressing minor breaches, *inter alia*, to suspend with full pay, an employee from duties for a period of not more than ten days. Once the charges are proven, an employer is mandated to inform the Union of their intention to either immediately dismiss the employee if they think that it is justified or suspend the employee for no more than fifteen days for breach confidentiality with the exception of a report made to a law enforcement agency or to a government regulatory department.

55. The Agreement, specifically states at Article 2.2 that the Union is the sole bargaining agent for the Defendant's workers with the exception of those employees who are designated as Management and Temporary Employees. Schedule II entitled 'Persons Not Designated As Members' lists the General Manager, Deputy General Manager, Senior Assistant General Manager, Assistant General Manager/Financial Controller and Senior Manager/Deputy Financial Controller 2.

56. The Plaintiff was acknowledged as a Senior Manager of the Defendant by several letters addressed to him by the Defendant's staff. Accordingly, I am satisfied that the Plaintiff does not fall within the category of persons designated as a member of the Bargaining Unit who could be disciplined by the provisions established under the Agreement. The Defendant is a statutory government corporation and quasi-government entity. The Public Service Regulations nor the General Orders are applicable.

57. Section 14 of the Bahamas Agricultural and Industrial Corporation Act **(the "BAIC Act")** provides that the Corporation may appoint and employ on such terms and conditions as it thinks fit any officers, servants or agents as it considers necessary for the proper carrying out of the provisions of the act.

58. However, the BAIC Act is silent on any disciplinary or dismissal procedures. Consequently, I must consider whether the Plaintiff was unfairly dismissed by examining the substantial merits of the case as required by section 35 of the Act. The Defendant complained that the Plaintiff would sit in his car during the course of the day and engage in the calling of radio talk shows throughout which resulted in a dereliction of his duties. While it is questionable that an employee should sit in his vehicle all day, if the work environment was not suitable for a person to sit in the office, the poor working environment should have been addressed. The Defendant did not dispute the working conditions.

59. The Plaintiff did not dispute these acts but sought to elucidate that he sat in his car to work due to the unacceptable working conditions at the Feed Mill; which conditions were confirmed by the Defendant. He stated that he called the talk shows on his breaks which were between 7:00 a.m. to 10:00 a.m. He also listened to a show that came on at 11:30 but it was never made clear that he in fact called in to that particular show. Had the Defendant produced evidence of the frequency of calls to the talk shows, credence would be given to whether the frequency equated to a dereliction of duty.

60. The Defendant provided certain documents to show that it reasonably believed that the Plaintiff was culpable of the willful neglect of his duties. They provided a draft copy of an August 2017 Letter from the Defendant which set out their knowledge of his sitting in his vehicle while at work, reporting late, abandoning his post for hours, his failure to participate in any duties and calling into the various talk shows to engage in discussions or topics of the day.

61. The August 2017 Letter advised the Plaintiff to cease and desist from the mentioned practices; the failure of which would subject him to the consequences attached thereto. I note however, that the mentioned consequences were not attached as evidence nor produced during the trial, Further, the Plaintiff questioned whether he in fact received and was able to respond to the letter.

62. By the September 2017 email addressed to all staff, Ms. Rhodenwalt stated that she was directed to advise that employees of the Defendant were only to call into the various talk shows during the employee lunch hour. The Plaintiff confirmed receipt of this email. By the December 2017 letter, the Plaintiff was specifically advised to cease and desist from the practice of calling the talk shows during the working hours of 7:00 a.m. to 3:00 p.m. The Plaintiff confirmed receipt of the letter.

63. The said email and letter were both directives. More importantly, the December 2017 Letter was specifically directed to the Plaintiff and did not invite him to respond. The August 2017 draft Letter was the only letter which suggested that there would be consequences for his actions if he did not cease and desist with the acts complained of. There is nothing before me to confirm that the Plaintiff had sight of the letter or even if the letter was ever sent. It was still worded as a directive and did not invite the Plaintiff to respond, albeit receipt of such a letter would prompt any right thinking employee to respond in light of a warning that his employment could possibly be terminated.

64. By the January 2018 Letter, Mr. Forbes, a Senior Manager of the Feed Mill, stated that the Plaintiff would leave sometime for lunch and not return until the following day and that when he was there he would spend most of his time in his truck or away from the warehouse.He would make himself available to assist with solving a problem if there was an altercation at the Feed Mill. The accusations in this letter were never put to the Plaintiff despite his communicating with Ms. Rhodenwalt about vacation leave weeks later. In the absence of any contrary evidence, the content must be accepted.

65. While it is clear that the Defendant formed an honest belief that the Plaintiff committed the conduct in question, the evidence suggests that the letters given to the Plaintiff were directives to cease and desist as opposed to invitations to respond. The Plaintiff was not afforded a fair hearing by the Board who issued the directives, in breach of the rules of natural justice. He was not informed that the Defendant was minded to dismiss him and he was subsequently not given an opportunity to present any mitigating factors or contrary evidence to dissuade the Defendant from dismissing him.

66. Moreover, I do not find that the actions of the Plaintiff were so fundamental that they warranted summary dismissal. There was no evidence led of work requested to be performed by the Plaintiff which he failed or refused to do. In the January 2018 Letter, Mr. Forbes stated that the Plaintiff would assist with resolving altercations when needed and there was also evidence of the Plaintiff's efforts on the job by way of his reports submitted. While the Defendant's counsel argued that those reports were not a part of the Plaintiff's duties, the Plaintiff nor his immediate supervisor, were provided with a formal job description. Further, there was no report of failure to specifically perform his duties. There is no evidence of how often he called or when he called the talk shows. The only evidence is that of the Plaintiff.

67. In the circumstances, after considering the substantial merits of the case, I find that the Plaintiff was unfairly dismissed as the procedure established by law were not followed

68. Section 43 of the Act provides for the Court to order the employee to be reinstated. Section 43 states:

> **"43. (1) An order made under this section may be an order for reinstatement (in accordance with subsections (2) and (3)) or an order for re-engagement (in accordance with subsection (4)), as the Tribunal may decide.**
> **(2) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, and on making such an order the Tribunal shall specify —**

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal;
(b) any rights and privileges, including seniority and pensions rights, which must be restored to the employee; and
(c) the date by which the order must be complied with.
(3) Without prejudice to the generality of subsection (2), if the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.
(4) An order for re-engagement is an order that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment, and on making such an order the Tribunal shall specify the terms on which re-engagement is to take place."

69. The Plaintiff seeks the same. In **Kayla Ward and another v The Gaming Board for The Commonwealth of The Bahamas [2020] 1 BHS J. No. 6**, Charles J. considered the provisions of Section 43. In doing so, she **cited Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal JM [2005] UKPC 3**:

> **"180 These are normal procedures which the Plaintiffs averred, were not carried out. As there is no evidence to contradict this,** they must be carried out not later than 30 June 2020 **since this Court has found that the Plaintiffs were unfairly dismissed and ought to be reinstated.**
> **181 In** Jamaica Flour Mills Ltd **[supra], the Board stated at para. 24:**
> > **"Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code...." [Emphasis added]"**

70. While the Plaintiff seeks reinstatement, I am reluctant to make such an order. Neither the Plaintiff nor the Defendant were aware of the Plaintiff's specific job description. To reinstate the Plaintiff could possibly lead him down the same road which led to the present action. Further, there is obviously a breakdown with the working relationship between the Plaintiff and the Defendant which negates against ordering any reinstatement.

71. However, the Plaintiff was employed with the Defendant for almost 15 years at the time he was dismissed and has averred that he has been unable to find work of equal

standing, most likely due to the fact that he was only the holder of a high school diploma. I will not order reinstatement but order that he be compensated for the unfair dismissal.

72. Section 45 of the Act provides for a basic award and a compensatory award to be calculated in accordance with sections 46 and 47 of the Act. By section 46 of the Act, a basic award is calculated by allowing three weeks' pay for each complete year of employment between the start date and date of termination. The amount shall not exceed twenty-four months' pay. The Plaintiff was offered employment with the Defendant on the 28th April, 2003.

73. He was employed with the Defendant for 15 years at the time when he was terminated. Using the formula provided by section 46 of the Act, the basic award to be paid to the Plaintiff is $41,495.40 as he was earning $47,950.00 per annum at the time of termination.

74. By section 47 of the Act, a compensatory award is an amount considered to be just and equitable after having regard to the loss sustained by the Plaintiff as a consequence of the dismissal; provided that the loss is attributable to the action taken by the Defendant. The loss can include any expenses reasonably incurred by the complainant in consequence of the dismissal, loss of any benefit he may have reasonably expected to have had but for the dismissal. The amount shall not exceed twenty-four months pay.

75. The Plaintiff averred that he lost the benefit of a likely salary increase between $3,500 - $5,000 along with a single increment of $1,200.00. Although, I am not certain he would have received this due to the Defendant's obvious disdain for him. He also averred that he lost the benefit of his mortgage facility with Scotiabank because he was unable to complete his executive 3 storey duplex townhouse as agreed.

76. The Plaintiff averred that his mortgage payments was or would have been around $2,000.00 a month and that he spent about $5,000 on an Appraisal Report, Quantity Surveyor Report, Engineer Report and to take out a Life Insurance Policy. He added that he injected $190,000.00 into the project of his own personal funds as was agreed. He was unable to complete the townhouse however, because of his termination and lost the costs associated with the pre-approval process in addition to the $190,000.00 injection.

77. Additionally, he was unable to meet his monthly loan payments to Commonwealth Bank in the amount of $1,080.00 and had entered into an interest payment only legal agreement which was extended for a short period of time. The Plaintiff provided a printout of his RBC personal savings account in the amount of $119,177.15. He did not provide any evidence of the money being used towards the mortgage facility at Scotiabank. However, his evidence of the injection was not contradicted by the Defendant.

78. I accept that he would have injected funds into the project but those funds were not lost as the duplex still has a value which reflects the injection. The Plaintiff has not provided any evidence that the duplex was repossessed by Scotiabank. I therefore accept that he

would have lost the pre-approval expenses, the increment, salary increases and accrued the interest on the mortgage.

79. Moreover, as he was forced to enter into an interest payment only agreement because of his termination, he is entitled to the accrued interest on that loan from his termination. No evidence was provided of how much interest was accrued on either the mortgage or the loan and therefore I will award a sum to reflect the loss.

80. I therefore find the following amounts to be appropriate compensatory awards:

$3,500 – Loss of likely salary increase
$1,200 – Loss of increment
$5,000 – Pre-approval costs
$18,000 – Accrued interest of mortgage with Scotiabank from time of termination (2018) of time of judgment
$5,000.00 – Accrued interest on loan payment with Commonwealth Bank from time of termination (2018) to time of judgment

$32,700.00 - TOTAL

WRONGFUL/SUMMARY DISMISSAL

81. The Plaintiff claims that he was summarily dismissed. He relies on the definition of summary dismissal as defined by the late Justice Emmanuel Osadebay in his text **'Labour Law in The Bahamas (An Outline)** as a dismissal without notice or compensation in lieu of notices and the definition includes misconduct among the circumstances which will justify summary dismissal.

82. Pursuant to section 33 of the Act, an employer shall prove that he honestly and reasonably believed on a balance of probabilities that the employee committed the misconduct in question at the time of the dismissal and that a reasonable investigation was conducted unless one was unwarranted.

83. The Plaintiff relies on **Section 29 (1)(c) of the Act** which provides that where an employee holds a supervisory or a managerial position the minimum period required to be given by an employer to terminate an employee's contract is one month's notice or one month's basic pay in lieu of notice and two months basic pay (or a part thereof on a pro rata basis) for each year up to forty eight weeks.

84. The Plaintiff submits that to determine what was a reasonable period of notice depended on all of the circumstances including the age, length of service, responsibilities as determined in the job description as established in **Royal Bank of Canada v Ingrid Cambridge Appeal No. 4 of 1984** in that regard.

85. The Defendant however submits that the Plaintiff was not summarily dismissed as he was offered payment in lieu of notice in accordance with the Defendant's obligations and entitlements pursuant to Section 29 of the Act.

86. They submit that the Plaintiff's wilful neglect of his duties by his acts/and or omissions, as a Senior Manager of the Defendant and of the Corporation's Policies and Procedures' were patently manifest and a repudiation of his employment contract. aIn the absence of such a finding, they submit that the neglect was constructively made out in the circumstances.

87. Additionally, they maintain that the Plaintiff was actively warned about his conduct and also given the opportunity to explain it at the time and prior to his dismissal. The Defendant adds that even if there was no actual or constructive warning(s) given to the Plaintiff, that given all of the prevailing circumstances, either no investigation of the Plaintiff's action was warranted, as a Tribunal is entitled to find in certain cases, such as this one.

88. The Defendant further submits that the Plaintiff acted in a manner repugnant to the fundamental interests of the employers as provided for in Section 31 of the Act and grounded in the provisions outlined (but not limited thereto) in Section 32 of the Act. With respect to damages, the Defendant contends that payment in accordance with Section 29 of the Act was offered to the Plaintiff, which was accepted with the exception of the issue of vacation, and they contend that twelve weeks is due.

DECISION

89. Section 31 of the Act allows the Defendant to summarily dismiss the Plaintiff without pay or notice if it considers that the employee has committed a fundamental breach of his contract of employment or has acted in a manner that is considered to be repugnant to the fundamental interests of the employer. In **Eden Butler**, Evans JA (Ag) (as he then was), stated that the paramount principle in wrongful dismissal is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract and it was for the Court to determine whether the nature of the breach alleged constituted a fundamental breach.

90. He continued that it was necessary to consider whether there was sufficient evidence so as to lead the employer to have an honest and reasonable belief that the employee had committed the misconduct in question. Evans JA (Ag) added, that the question of whether the belief was reasonable would inevitably depend on the evidence available and the efforts made by way of investigation to ascertain the true facts and that such investigation would be based on the facts of the case.

91. Like unfair dismissal, in order to determine whether the Plaintiff was wrongfully dismissed the three additional issues set out in **Eden Butler** had to be ventilated i.e. (i) whether or not the defendant in accordance with section 33, 34 and 35 of the Act, reasonably believed that the plaintiff committed the misconduct in question at the time of the dismissal, (ii) Did the Defendant conduct a fair and reasonable investigation of such misconduct in all the circumstances of this case and (iii) whether the nature of the breach alleged constituted a fundamental breach so as to warrant dismissal.

92. Therefore, it must be shown that the Defendant held an honest and reasonable belief that the Plaintiff committed any misconduct, the nature of which, would amount to a fundamental breach of his contract. This would have to be proven by showing that there

was a fair and reasonable investigation conducted by the Defendant based on the evidence gathered by them.

93. Did the Plaintiff's act of calling into radio talk shows and sitting in his truck between the hours of 7:00 a.m. to 3:00 p.m., amount to a willful neglect of his duties at the Feed Mill? More importantly, did it amount to gross negligence and gross misconduct which are two of the grounds for consideration under section 32 of the Act. In **Frederick Ferguson v. Island Hotel Company Limited** (supra), Barnett JA (Actg) (as he then was) relied on the definition of gross negligence as defined in **Marex Financial Ltd v Creative Finance Ltd [2014] 1 All E.R. (comm)122** as something different than negligence and connotes a want of care that is more fundamental than a failure to exercise reasonable care. The difference being one of degree.

94. Barnett JA (Actg) also relied on **Adesokan v. Sainsbury Supermarkets Ltd [2017] EWCA Civ 22** where the Court of Appeal held that, "it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employers policies constitutes such a grave act of misconduct as to justify summary dismissal. Therefore, was the Plaintiff's alleged neglect of his duty so gross that it amounted to gross misconduct?

95. The Plaintiff adduced that while he was not given a description of the duties he was expected to perform, he worked with management to tweak the operation to operate with greater efficiency, reduce loss, improve customer service and overall staff relations. He explained that he had compiled reports to that effect and produced numerous emails which documented his concerns in addition to issues faced at the Feed Mill.

96. The Plaintiff also averred that he would spend a considerable amount of time in his truck because it was far more comfortable than the physical buildings of the Feed Mill and it was quieter than the office which was crammed and where the staff would make noise and use profanities and which also had an influx of clients. He further averred that he called into radio talk shows during his break which was anytime between 7:30 a.m. to 10:00 a.m. for a period of fifteen to twenty minutes.

97. The Plaintiff also admitted, that he would listen to a show that aired at 11:30 a.m., which is outside his break period. The Plaintiff also stated that there was nothing in writing that dictated what a staff could do during the allotted breaks.

98. The Defendant confirmed that the Feed Mill was in a "wanting state". They admitted that there was a certain degree of overcrowding and that the staff would have to use a derelict building to work in. While there was a plan to upgrade the Feed Mill, it never happened. Mr. Sampson accepted that there was no written objection from the Defendant to the Plaintiff's email with respect to using his vehicle in the absence of adequate accommodation for all staff. The Defendant also averred that despite the Plaintiff being made aware that his behavior amounted to gross misconduct, he persisted which resulted in his termination.

99. As earlier stated, it was not proven or confirmed that the Plaintiff received the August 2017 Letter or even whether the letter was ever sent as only the draft letter was produced. While the Plaintiff received the September 2017 Email and the December 2017 Letter, he was not privy to the January 2018 Letter. The details surrounding the

January 2018 letter are unclear as the Defendant admitted that there was no investigation conducted with respect to the allegations made against the Plaintiff.

100. The January 2018 Letter does acknowledge that the Plaintiff would assist if there was an altercation and in the absence of a formal job description, it cannot be safely held that the reports the Plaintiff produced were outside the parameters of work he was expected to perform. Moreover, because there was no formal job description. I cannot safely say that the alleged breaches of the Plaintiff were fundamental breaches of his contract.

101. Notwithstanding the Defendant clearly forming a belief that the Plaintiff had committed misconduct, the Defendant admitted that there was no investigation conducted and that the Plaintiff's dismissal resulted from a directive of its Board. In that regard, despite the cease and desist letters and email, the allegations were not put to the Plaintiff verbally or in writing to allow him to respond.

102. More importantly, the Plaintiff was not informed of the Defendant's intention to dismiss him in order for him to refute any claims made against him and explain why he should not be dismissed nor was he suspended prior to his dismissal. I therefore find that the Plaintiff was wrongfully dismissed and is entitled to compensation pursuant to Section 29 of the Act.

Quantum of Damages

103. At the time of the Plaintiff's dismissal, he was offered a cheque in the amount of $60, 122.03 inclusive of vacation pay in the amount of $11, 065.44, representing 12 weeks of owed vacation. He claims however, that he is entitled to 19 weeks' vacation pay. The Defendant remains steadfast in its position that the Plaintiff is only entitled to 12 weeks' vacation and has included the same in the cheque that was given to him when he was terminated.

104. I accept that the employer as the keeper of the work records for employees would know how much vacation is owed. Neither side produced documentary evidence to support their positions. Accordingly, I find that the Plaintiff is entitled to $60,122.03 notice and vacation pay.

CONCLUSION

105. The Plaintiff was unfairly dismissed by the Defendant. As a result he is entitled to the following relief:

a. A Declaration that the Plaintiff was unfairly dismissed contrary to Sections 34 to 35 of the Employment Act; and

b. The Plaintiff is awarded a basic award in the amount of $41,495.40;

c. The Plaintiff is awarded a compensatory award in the amount of $32,700.00.

106. The Plaintiff was wrongfully dismissed by the Defendant. As a result he is entitled to the following relief:

a. A Declaration that the Plaintiff was wrongfully/ dismissed contrary to Sections 31 to 33 of the Employment Act; and

b. The Plaintiff is awarded damages in the sum of $60,122.03.

107. The Plaintiff is awarded his costs of the action to be taxed if not agreed.

108. Interest shall run from the date of judgment, pursuant to the Civil Procedure (Award of Interest) Act, 1992 and any amendments thereto.

Dated this 22nd day of September, 2021

The Hon. G. Diane Stewart