COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT OF THE BAHAMAS
COMMERCIAL AND LABOUR DIVISION
2011/COM/lab/FP/00001

BETWEEN
PHILIP HEPBURN
Plaintiff

AND
POLYMERS INTERNATIONAL LIMITED
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Harvey Tynes, QC and Ntshonda Tynes for the Plaintiff

Mr. Raynard Rigby for the Defendant

TRIAL DATES: 22 October; 16, 17, and 18 November; 10 December 2015;

22 January; 12 February, 2016

JUDGMENT

Hanna-Adderley, J

I must straightway apologize profusely for the delay in the delivery of this Judgment.

Introduction

1. The Plaintiff's claim is for damages for wrongful termination by the Defendant on July 3, 2009.
2. This is an action commenced by the Plaintiff against the Defendant by way of Specially Indorsed Writ filled on March 11, 2011.
3. In his Statement of Claim the Plaintiff claims that from November 11, 1996 to July 3, 2009 he was employed by the Defendant, a limited Company that carries on business in Freeport, Grand Bahama as makers of expandable and polystyrene beads and at the material time was employed as their Production Assistant, a supervisory position at a salary of $21,074.04 per annum. By a letter dated July 3, 2009 the Defendant wrongfully determined his employment and that no notice was given, nor was any compensation paid, nor has any compensation since been paid to the Plaintiff in lieu of notice and that his contract of employment contained no notice of termination and as such he is entitled

to one month's notice or one month's basic pay in lieu of notice and forty-eight weeks basic pay pursuant to the provisions of Section 29(1)(c) of the Employment Act, 2001 ("The Act").The Plaintiff claims that he has suffered loss and damage as a result and seeks the sum of $21,209.09 representing his entitlement under Sections 29(1)(c)(i) and (ii) of the Act; damages, interest, costs and further or other relief.

4. The Plaintiff subsequently filed an Amended Statement of Claim on February 16, 2015 whereby he made amendments to his annual salary from $21,074.04 to $45,219.20 and the sum for his entitlement under the provisions of the Act as particularized by his special damages from $1,756.17 to $3,768.27 for one month's basic pay pursuant to Section 29(1)(c)(i) of the Act and $19,452.92 to $41,740.80 for forty-eight weeks basic pay pursuant to Section 29(1)(c)(ii) of the Act and the total sum claimed under his entitlement from $21,209.09 to $45,509.07. The Plaintiff also filed a Re-Amended Statement of Claim on July 15, 2015 whereby he also claims that his contract of employment with the Defendant entitled him to medical insurance as a part of the Defendant's group medical insurance policy and as a result of his wrongful termination the Plaintiff lost his medical insurance coverage and has been deprived of the means to have necessary hand and back surgery which he was in the process of arranging prior to the termination of his employment.
5. The Defendant filed its Defence on April 6, 2011 denying the Plaintiff's claim and inter alia states that the Plaintiff's employment was summarily terminated pursuant to Section 31 of the Act on the grounds that the Plaintiff failed to properly supervise the employees under his direct supervision and the manufacturing process resulting in a catastrophic event which caused the Defendant to suffer $270,677.51 in damage to its equipment and $70,000.00 in lost profits on June 15, 2009. The Defendant also states that the Plaintiff's summary dismissal was in accordance with Section 31 of the Act after a reasonable and thorough investigation and as such the Plaintiff was not entitled to any notice or compensation as alleged other than his basic pay for the days worked up to the date of his termination and any accrued but unused vacation time.
6. The Defendant filed an Amended Defence on August 26, 2015 whereby the Defendant denied the allegations contained in the Plaintiff's Amended and Re-Amended Statement of Claim and inter alia states that the Plaintiff's employment was subject to the terms of his employment contract as well as the provisions of the Act and was terminated

summarily pursuant to Section 31 of the Act and his contract of employment. The Defendant also pleads that the Plaintiff owed the Defendant a duty to perform his work competently, using reasonable skill and care and to use such reasonable skill and care in his work not to cause damage to the Defendant's property. The Defendant also states that the Plaintiff was terminated for breach of his employment contract pursuant to the Defendant's Disciplinary Policy on the grounds that on June 15, 2009 he failed to perform or poorly performed his duties as a supervisor and that the Plaintiff was grossly negligent or grossly incompetent in that he failed to properly supervise the employees under his direct supervision and the manufacturing process using any or any reasonable or proper skill and care which resulted in a catastrophic event causing damage to the Defendant. Moreover, the Defendant also pleads that the Plaintiff was summarily dismissed in accordance with the Defendant's Disciplinary Policy or Section 31 of the Act after a reasonable and through investigation of the aforesaid incident.

7. In order for the Court to make a determination as to whether the Defendant was entitled on July 3, 2009 to summarily dismiss the Plaintiff pursuant to the Defendant Company's Disciplinary Procedures or alternatively Section 31 of the Act or alternatively his contract of employment for failure to properly supervise the employees under his direct supervision and the manufacturing process on June 15, 2009, the Defendant must prove that it 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 it had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.
8. I find for the Plaintiff in this action for the following reasons.

The Evidence

9. The evidence in support of the Plaintiff's claim is found in his Witness Statements filed February 10 and October 8, 2015 and the Plaintiff's evidence during cross examination and re-examination is found in the transcripts dated November 16, 2015 on pages 7 to 130, November 17, 2015 on pages 18 to 66 and February 12, 2016 on pages 1 to 12. The Plaintiff also relied on the evidence of Ashford Knowles as found in his Witness Statement filed February 11, 2015 and cross-examination and re-examination found in the transcript dated November 17, 2015 at pages 1 to 18; the Witness Statement of Tavaro Hanna filed February 13, 2015 and cross-examination and re-examination found in the transcript dated

November 17, 2015 at pages 84 to 110 and Diane Morgan whose evidence-in-chief was given on November 17, 2015 and found in the transcript of that day on pages 67-75 and cross examination and re-examination found at pages 75-84. The Plaintiff also relied on a Bundle of Documents filed February 10, 2015 and an Agreed Bundle of Documents filed February 27, 2015.

10. The evidence in support of the Defendant is found in the Witness Statements of Antoine Forbes filed February 3, 2015, Craig Simms filed February 10, 2015 and transcripts dated February 12, 2016 at pages 12 to 16, Greg Ebelhar filed February 10, 2015 and November 18, 2015, James Pierson filed December 2, 2015, Sean McCrea filed December 2, 2015 and transcript dated February 12, 2016 at pages 18 to 19, Valerie Barry filed December 2, 2015. The cross-examination evidence and re-examination evidence of Antoine Forbes is found in the transcripts dated November 18, 2015 at pages 14 to 40. The cross-examination and re-examination evidence of Craig Simms is found in the transcripts dated November 18, 2015 at pages 45-74 and February 12, 2016 at pages 16-18. The cross-examination and re-examination evidence of Valeria Barry is found in the transcript dated December 10, 2015 at pages 5 to 7; the cross-examination and re-examination evidence of James Pierson is found in the transcript dated December 10, 2015 at pages 8 to 10 and the cross-examination and re-examination evidence of Sean McCrea is found in the transcripts dated December 10, 2015 at pages 12 to 14 and February 12, 2016 at pages 19-20. The cross-examination and re-examination evidence of Greg Ebelhar is found in the transcript dated February 12, 2016 at pages 21 to 43.
11. In an effort to understand the layout and the conditions of the Defendant plant, on February 12, 2016 the Court visited the locus, i.e. the Defendant's plant in Freeport, Grand Bahama. Following the site visit, the Court posed several questions to the Plaintiff and Craig Simms in an effort to obtain further clarity. This additional evidence-in-chief and cross-examination is found in the transcript dated February 12, 2016 at pages 1 to 18. The Defendant relied on its Bundle of Documents filed February 10, 2015 and an Agreed Bundle of Documents filed February 27, 2015.

Issues

12. The Plaintiff's claim is for wrongful termination and as such the issues to be determined by this Court are:-

a. whether the Defendant was entitled on July 3, 2009 to summarily dismiss the Plaintiff pursuant to the Defendant Company's Disciplinary Procedures or alternatively Section 31 of the Act or alternatively his contract of employment for failing to properly supervise the employees under his direct supervision and the manufacturing process on June 15, 2009;
b. whether the Defendant honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that it had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.

Submissions, Finding of Facts, Analysis and Conclusion

Submissions

13. The Plaintiff relies on his submissions filed February 10, 2015 and March 30, 2016 in support of his claim.
14. Mr. Harvey Tynes, QC., Counsel for the Plaintiff submits that at common law a contract of employment is governed by the same principles as any other contract and termination of an employment contract by an employer without notice is ordinarily a breach of contract unless there are grounds which the law regards as sufficient to justify the termination without notice. He refers the Court to **Laws v London Chronicle (indicator Newspapers) Ltd. [1959] 2 All E.R. 285** and **Wilson v Racher [1974] ICR 428** in support of this submission.
15. It is also his submission that the summary dismissal of an employee by an employer is justified where the employee is guilty of conduct which amounts to a repudiation of a fundamental term (condition) of his employment contract or of the contract of a whole. **See Pepper v Webb [1969] WLR 514 at page 517 G.**
16. He submits that the burden rests on the Defendant to satisfy the Court on a balance of probability that on June 15, 2009 the Plaintiff committed a fundamental breach of his contract of employment or acted in a manner repugnant to the fundamental interest of the Defendant and as such the Defendant has failed to establish that based on the evidence before the Court.
17. It is his submission that the Plaintiff's evidence given during the trial serves to establish that the Plaintiff conducted himself as a responsible leader of a team of workers employed by the Defendant and did everything that could reasonably be expected of him to protect

the interest of the Defendant including the lives and safety of his fellow employees on the morning of June 15, 2009. He also submits that the Plaintiff's account as to what transpired that morning has been confirmed in large measure by the testimony of the Defendant witnesses.

18. Mr. Tynes, QC also made the following observations as it related to the evidence adduced by the Defendant witnesses, in particular Craig Simms, Antoine Forbes and Sean McCrea.
    a. Mr. Simms stated:-
        i. That the plant is highly computerized and highly automated;
        ii. The reactors are tied into the computerized system and they monitor and keep a record of the temperature and agitation function;
        iii. That there is an audio alarm and part of its function is to notify persons in the vicinity of the plant of any problems with production regarding the reactors;
        iv. That all levels of alarm are triggered by pre-programmed set points in the system and there are three levels of notification in the system with an alarm being the highest level of alert as a voice system;
        v. That the alarm would remain on until an "operator" acknowledges it on the alarm console screen and determines what the problem may be;
        vi. That the audio alarm is very vital to the instantaneous notification of an urgent problem with the reactor because it is indicating that something is wrong;
        vii. That Mr. Simms found out about the alarm system not being operational sometime after the incident;
        viii. That had the audio alarm functioned the Plaintiff and the other men on duty at the plant would have received instantaneous notification of a problem and would have led to an opportunity to save or dump the batch;
        ix. That it was not the responsibility of the Production Assistant to be "foot-to-foot" behind the Operators, Assistant Operators and Utility guys when taking the samples from the reactor nor would the Operators, Assistant Operators and Utility guys take the batch sheet with the test results to the Production Assistant;

x. That the Plaintiff had advised Mr. Simms prior to starting his shift and earlier in the week that he was unwell and that Mr. Simms was ok with the Plaintiff reporting to work in that state;

xi. That the primary concern of Mr. Simms when he received the call from the Plaintiff on the morning of the incident was to get the batch out of the reactor after the Plaintiff advised him the batch could not be saved.

b. Mr. Antoine Forbes stated:-

i. That at the time Ashford Knowles discovered the problem with reactor 3610 no audio alarm went off;

ii. That each console has a monitor where the visual alarm comes up but he did not see any visual alarm come up on those monitors at the time of the incident, that none came up on his monitor and he did not look at the other monitor;

iii. That if the audio alarm had gone off all the persons in the plant would have been notified much sooner of the existing problem including the Plaintiff;

iv. That it did not strike him as odd that the audio did not function that morning because the alarm had been off from the previous night;

v. That he had told the Operator to whom he handed over, James Edgecombe to "let them know" that the alarm was not working;

vi. That he agreed that the audio alarm was an important part of the plant, that is, the proper functioning and safe functioning of the plant, he accepted that he did not mention it in his Witness Statement because no one had bothered to ask him and it just did not come up;

vii. That he accepted that it was crucial every night that the alarm system should be functioning;

c. Mr. Sean McCrea stated:-

i. That he investigated the audible alarm output at the plant at the request of Greg Elbelhar on June 16, 2009 and determined that the failure of the audio alarm was due to the failure of the primary digital message repeater which had been in continuous 24/7 service for a number of years.

19. Mr. Tynes, QC also referred the Court to the condition of the Defendant's Freeport plant while the Court and the parties visited on February 12, 2016 and submits that the

Defendant's attitude has been the importance of the Defendant's profitability and not of the safety of its employees and proper maintenance of its equipment. He highlighted the state of the plant in that the floor at the plant had not been properly cleaned and was in a state that exposed all visitors to the risk of harm despite having advance notice of the intended visit.

20. He submits that it is clear on the evidence that the "incident" that occurred shortly before 5:00 a.m. on June 15, 2009 was a result of the failure of the alarm system in the Defendant's highly automated, highly computerized processing plant for which the Plaintiff could not be held responsible.
21. Mr. Tynes, QC also submits:-
    a. that the incident had nothing to do with whether the Plaintiff was aware of the Defendant's Standard Operating Procedure (SOP), assuming such a document did exist;
    b. that the incident had nothing to do with the fact that the Plaintiff may have "dozed off" or "fallen asleep" at some point during the night shift which lasted a full twelve hours and there was no evidence to suggest that the Plaintiff was asleep when the incident occurred around 4:50 a.m. to 5:00 a.m. on that morning;
    c. that the incident had nothing to do with a failure on the part of the Plaintiff to review the alarm monitor on the console or to ensure that his shift workers were reviewing the alarm monitor on the console;
    d. that the incident had nothing to do with a failure on the part of the Plaintiff to ensure that the PPS was charged.
22. Mr. Tynes, QC submits that the evidence before the Court is that the incident that occurred was the direct result of a failure of the alarm system at the Defendant's highly automated, highly computerized processing plant.
23. It is his submission that based on the totality of the evidence before the Court the Defendant has completely failed to establish on a balance of probability, or at all, the matters of justification pleaded by the Defendant or that on the morning of June 15, 2009 the Plaintiff committed a fundamental breach of his contract of employment or acted in a manner repugnant to the fundamental interest of the employer.
24. He further submits that the cases relied upon by the Defendant in its Closing Submissions do not provide support for the matters of justification pleaded by the Defendant.

25. The Defendant relies on its Closing Submissions filed on March 24, 2016.
26. Counsel for the Defendant, Mr. Raynard Rigby contends that during the course of the trial the Defendant has proven that the Plaintiff failed to properly supervise the Shift B workers on the night in question; the Plaintiff was not alert (and he was asleep) and was not engaged in the workings of the plant's operations on the night in question; the Plaintiff failed to pay any attention to the visual alarm monitor on the PS console and failed to ensure that the other shift workers were paying attention to the visual alarm monitor given that the audio alarm was not functioning; the Plaintiff's decision to allow Ashton (Ashford) Knowles to leave the plant (at a critical stage of the production) and his failure to ensure that the PPS was charged in the reactor by two well experienced workers was the primary cause for the damage to reactor 3610; the Plaintiff's actions were in breach of his duties and responsibilities as supervisor of Shift B; the Defendant conducted a reasonable and thorough investigation of the events that transpired on June 15, 2009 and held an honest belief of the events to justify the summary dismissal of the Plaintiff and in the prevailing circumstances the Defendant was justified in the Plaintiff's summary dismissal.
27. Mr. Rigby contends that the Plaintiff was aware of the Defendant's SOP as at the time of the incident and his failure to follow the same was the primary cause of the losses that were sustained to reactor 3610 and refers the Court to portions of the Plaintiff's evidence to which he submits evidences the Plaintiff's knowledge of the Defendant's SOP and refers the Court to the Plaintiff's evidence during trial. He also contends that the evidence of other witnesses in particular Diane Morgan, Ashford Knowles, Antoine Forbes, Craig Simms and Greg Ebelhar supports the Defendant's position that the SOPs were in existence at the material time to govern its production process and was stationed in the control room and on the general computer system in read only format for the employees to have access, inclusive of the Plaintiff.
28. Mr. Rigby also submits that the evidence supports that the Plaintiff was asleep on the night shift of June 15, 2009 and refers the Court to the evidence of Antoine Forbes. Moreover, he submits that the Plaintiff's own evidence was that he was not feeling well and should have stayed home and as such a reasonable conclusion could be drawn that the Plaintiff was asleep and/or whether his sickness caused him to fail to properly supervise the shift B workers during the production process. He submits that this evidence is compelling in that the failure to properly supervise the charging of the PPS in reactor 3610 was the

primary cause for the loss of the batch coupled with the Plaintiff's decision to allow Ashford Knowles to leave the plant during the critical stage of charging the PPS.

29. Counsel for the Defendant submits that the Plaintiff was negligent when he failed to review the alarm monitor on the console and failed to ensure that his shift workers were reviewing the alarm monitor on the console. Mr. Rigby contends that the evidence of Sean McCrea and Craig Simms was that the Defendant's alarm console computers produce both visual and audible alarms and that the alarm console screen explains the nature of the alarm. Moreover, he states that Antoine Forbes' evidence was that the visual monitors were important, and it was he who had indicated that the audio alarm was not working from the day before. Mr. Rigby also submits that it was grossly negligent in all of the prevailing circumstances for the Plaintiff to exclusively rely on the audio alarm. He also submits that the Plaintiff failed to provide any explanation as to why he failed to review the alarm console monitor in the control room during that shift that evening and that he does not watch the monitor. Further he submits that the evidence of Tavaro Hanna highlighted the significance of the audio and visual alarm during a shift; that the alarm went off so many times he did not hear it after a while; that if he did not hear the audio alarm during a 12 hour shift would be shocking and that the evidence of Ashford Knowles confirmed that he was aware of the visual alarm console and suggested that the fact that there was no audio alarm was a reason for the problem that developed on reactor 3610 that night.

30. It is his submission that as the primary supervisor on the shift that night the Plaintiff must and should have found it odd that during the entire 12 hour shift he did not hear an audio from the alarm system (whether an advisory, warning or alarm). He states it is reasonable to conclude that the Plaintiff must have known of the frequency and regularity of the audio system and its interconnection with the visual alarm monitor on the console after working at the plant for over 13 years and that the Plaintiff also failed to acknowledge that the audio advisory, warning or alarm would not indicate the nature of the issue but that workers had to resort to the visual alarm monitor on the console for the precise nature of the same. Mr. Rigby submits that the above is strikingly clear evidence of the Plaintiff's gross failings and negligence as a supervisor and it was incumbent on the Plaintiff to safeguard the production process and the shift B workers by ensuring that the visual alarm was monitored and routinely reviewed along with the printed advisory, warning and alarm indications.

31. Mr. Rigby submits that the Plaintiff failed to ensure that the PPS was charged, and this was the direct cause of the damage to reactor 3610. It his submission that the evidence during the trial was clear in that the PPS was not charged by the Operator, Baldwin Smith and Assistant Operator, Ashford Knowles but the evidence confirms that the PPS may have been charged by Baldwin Smith and Eustice Lettice (also known as Mackey), the trainee Utility Operator. He submits that the Defendant's evidence was clear that the PPS was a critical substance in the production of beads and that it was essential for maintaining suspension and refers the Court to the evidence of Craig Simms and Greg Ebelhar. Mr. Rigby states that the evidence of the Plaintiff was that he authorized Ashford Knowles to leave the plant; that the role of Mr. Knowles as Assistant Operator was to charge the reactor; that Mr. Knowles was away from the plant for about 45 minutes and during his absence he assigned Eustice Lettice (aka Mackey) to work with the Operator to charge the process. He submits that contrary to the Plaintiff's evidence that Baldwin Smith and Eustice Lettice (aka Mackey) could charge the PPS as it was a SOP, that was not the Defendant's SOP. Moreover, he contends that the evidence of Ashford Knowles confirms that he did not charge the PPS and that it was customary to check the growth of the beads every 15 minutes after the passage of 2.5 hours during the dwell stage of production. He further states that Mr. Knowles confirmed that it was the practice to leave the packaging next to the reactor when the reactor was being charged and submits that this evidence was contrary to that of the Plaintiff where the Plaintiff suggested that there was no SOP to leave the packages next to the reactor. Mr. Rigby also states that during the site visit on February 12, 2016 Mr. Craig Simms pointed to some bags on the side of the reactor and indicated that there was a requirement to keep the raw materials that were charged into it and this was also reflected in the evidence of Greg Ebelhar.
32. Mr. Rigby makes the following submissions and observations:-
    a. in light of the totality of evidence the Court can arrive at the reasonable and probable conclusion that the PPS was not added to the reactor on that evening along with the failure of the Plaintiff to properly supervise the dwell process, in light of the absence of Mr. Knowles, that the damage was caused to the reactor and the batch was a bad one;
    b. the supervisory role of the Plaintiff was most critical during the dwell stage and that by allowing Mr. Knowles to leave the plant, the Plaintiff had an obligation to

ensure that the PPS was charged in the reactor and that the requisite packaging was left on the outside to confirm that it was charged in accordance with the SOP and the evidence leads to the conclusion that the Plaintiff failed to supervise the shift B workers by having no regard to the Defendant's SOPs and occasioned thereby he did not ensure the PPS was properly charged (or charged at all) in reactor 3610;

c. that the Plaintiff allowing Mr. Knowles to leave the plant without any consideration of a suitably qualified replacement was negligent and his dereliction of duty is strengthened by his failure to direct the other Assistant Operator to undertake the charge with the operator;

d. that the evidence shows the Plaintiff was fully aware of the importance of the PPS and the dwell stage of the production and hence was mandated to manage the process to ensure its compliance with the SOPs;

e. that the Plaintiff's reliance on the audio alarm could not have assisted in the correct input of the PPS as the same had to be properly measured and inserted in the reactor and the beads had to be actually tested every 15 minutes and these were functions that had to be carried out by the workers and no alarm could have forewarned that the PPS had not been inserted at the material time.

33. Mr. Rigby submits that the evidence during the trial confirmed the responsibility of the Plaintiff was to supervise the workers on Shift B, that at the material time the Plaintiff was the most senior employee at the plant and that there can be no dispute that the Plaintiff was a supervisor. He refers the Court to the case of **Thompson v Private Investment Bank Limited – [2014] 2 BHS J. No. 5.** to which he submits addresses the term 'supervisory' in the Employment Act. He further submits that throughout the Plaintiff's evidence he failed to acknowledge that as a supervisor he had a duty and obligation to ensure that the Defendant's SOPs were carried out and followed, to take all appropriate steps and actions to ensure that the batch was a good one and that his evidence also confirmed that he did not supervise any part of the Defendant's operations on the night but left those workers to their own doing and thereby caused the batch to go bad and damage to reactor 3610.

34. Mr. Rigby also refers the Court to the evidence of Diane Morgan, former HR manager whereby she stated that the Production Assistant's role was to supervise the employees

and the evidence of the Plaintiff whereby he stated that he understood his role as Production Assistant was to supervise the staff. He further submits that the evidence of the Plaintiff's dismal failure in lending supervision to the production process on the date is riddled throughout his testimony. It is his submission that the evidence before the Court shows that the Plaintiff failed to discharge his supervisory duties and thereby was grossly negligent.

35. Mr. Rigby submits that the Defendant discharged its burden pursuant to Section 33 of the Act which places an obligation on the employer to hold a reasonable and honest belief 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. He submits that the Defendant by letters dated June 17 and 26, 2009 suspended the Plaintiff with full basic pay pending further investigation into the incident and that the Plaintiff signed both letters and cannot truthfully suggest that he had no knowledge of the pending investigation as stated by the Plaintiff during the trial. Moreover he submits that the evidence of Greg Ebelhar exhibited to his second Witness Statement filed November 18, 2015 includes the various statements taken by the Defendant's management during the investigation and the notes confirm that Baldwin, Lettice (aka Mackey), Antoine Forbes, Phil Hepburn (the Plaintiff) and Ashford Knowles were interviewed. He further submits that the Plaintiff's termination arose from the investigation conducted by the Defendant from June 16 to July 3, 2009 and that the termination letter sets out in clear terms the reasons for the Plaintiff's termination. It is his submission that based on the evidence the Defendant conducted a thorough investigation in all the prevailing circumstances and that the Defendant had justifiable grounds to summarily dismiss the Plaintiff occasioned by his conduct on June 15, 2009.

36. In support of his submissions Mr. Rigby relies on the principles of law set out in the decision of **Cordial Walker v Candid Security Limited** SCCivApp. No. 55 of 2010; **Sun International v Charles Emmanuel Missick** Civil Appeal No. 6 of 2002; **Bethel v Commonwealth Bank Ltd.** [2009] 3 BHS J. No. 134 and **Dorsett v Pictet Bank & Trust Limited** [2012] 2 BHS J. No. 62. He submits that the Court while applying the principles in the aforesaid cases and the facts in the instant case should find that the Defendant had an honest belief based upon its reasonable investigation that (i) the

Plaintiff failed to supervise the Shift B workers on June 15, 2009; (ii) the Plaintiff failed to ensure compliance with the Defendant's SOPs (for the insertion of the PPS and the dump procedure); (iii) the Plaintiff failed to monitor the visual alarm and have the workers monitor the visual alarm; (iv) the Plaintiff was not alert on the night in question and was likely asleep for portions of the 12 hour shift; and (iv) the Plaintiff failed to employ the Defendant's dump procedure to alleviate any damage to reactor 3610 and that the said conduct by the Plaintiff amounted to gross negligence and gross dereliction of the Defendant's SOPs.

The Law

37. The provision of the Act relating to summary dismissal is clear, summary dismissal is warranted when a fundamental breach of the contract of employment has been committed or the employee has acted in a manner repugnant to the fundamental interests of the employer. Therefore, the central issues for determination by a trial judge hearing a wrongful dismissal claim are whether the claimant was guilty of the misconduct complained of; and whether such misconduct was such that it breached the fundamental conditions of the contract of employment or was repugnant to the fundamental interests of the employer. **See Keturah Pinder v Windmill Investments Limited SCCiv App No. 196 of 2015**.
38. In this regard, the statutory provisions which govern summary dismissal are found in Sections 31 and 32 of the Employment Act:-

"31. An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer: Provided that such employee shall be entitled to receive previously earned pay.

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."

39. It is noted that while Section 32 lists examples of grave and serious misconduct the section states that the list is not exhaustive and admits of other similar misconduct which is not included which may constitute a fundamental breach of contract of employment, or may be repugnant to the fundamental interests of the employer.

40. What then constitutes as a fundamental breach of the Plaintiff's contract of employment in the instant case?

Fundamental Breach

41. **Pepper v Webb (supra)** referred to the Court by Mr. Tynes, QC, concerned a claim by a gardener for wrongful dismissal. The gardener had a history of complaints and refused the request of his employer to urgently plant plants inside the greenhouse to prevent them from dying. The gardener replied that he was leaving at 12 noon, and added "you can do what you like about them. If you don't like it you can give me notice." When questioned about his reaction he replied "I couldn't care less about your bloody greenhouse and your sodding garden" and walked away. The court found that the gardener's refusal to comply with a request by his employer to do his job was held to be a repudiation of his contract of service, thus justifying his summary dismissal.

42. Lord Harman, LJ at page 218 of his judgment sought to answer the question as to what would justify dismissal:-

> *"—something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract; and in my judgment if ever there was such a repudiation this is it. What is the gardener to do? He is to look after the garden and he is to look after the greenhouse. If he does not care a jot about either then he is repudiating his contract. That is what it seems to me the employee did, and I do not see, having done that, that he can complain if he is summarily dismissed."*

43. In **Wilson v Racher (supra)** also referred to the Court by Mr. Tynes, QC the Plaintiff was engaged as head gardener by the Defendant and while in the course of trimming a hedge with an electric cutter it began to rain. He stopped work because of the danger of electrocution and cleaned his tools for the rest of the afternoon. Before leaving he forgot to move his ladder which was leaning against a hedge. A few days later while passing by the Defendant's home, the Defendant confronted the Plaintiff angrily, shouting aggressively and showered him with questions, accusing him of stopping work early several days before. The Plaintiff tried to explain to the Defendant but ultimately replied to the Defendant "If you remember it was pissing rain on Friday. Do you expect me to get F….g wet?". The Defendant continued badgering the Plaintiff and the Plaintiff sought to move away to avoid any further altercation but was called back by the Defendant and again showered with questions whereby the Plaintiff told the Defendant "Get stuffed" and "Go and sh.t yourself." The Court of Appeal determined that the gardener was wrongfully dismissed. While the court recognized that the language used by the Plaintiff was not to be tolerated, there were special circumstances that were of the Defendant's own creation. In particular they considered the Plaintiff's probable lack of education compared to that of the Defendant found himself in a situation he sought to escape and fell into error of using this language and it being a solitary occasion to which he fell into error. Moreso, they found that the case was not one where it can be said that the way in which the Plaintiff behaved (although regrettable) was such to show "deliberate flouting of the essential contractual conditions" having regard to the unjust accusation that had been made against him (Edmund Davies L.J. at page 433; Cairns LJ at 434).
44. The Plaintiff's termination letter as found at Tab 8 in the Agreed Bundle of Documents February 27, 2015 states that the reason for the Plaintiff's termination was that he failed to provide proper and/or adequate supervision of the employees on duty on his shift and/or failed to ensure that the Company's Standard Operating Procedures were followed and he failed to satisfactorily perform his duties and functions in a manner as could reasonably be expected of a person with his training and experience.
45. In an action for summary dismissal, the Defendant's pleadings relating to justification can only refer to what was stated in the termination letter at the time of dismissal. As the Defendant is bound by its pleadings, the Court cannot consider the Defendant's allegations

of gross incompetence at paragraph 6 of its Amended Defence, because this allegation was not stated as the reason for termination in the termination letter.

46. Therefore, the first question for the Court to consider is whether the extent or degree of the Plaintiff's conduct as alleged by the Defendant amounts to gross negligence described in Section 32 of the Act and if it does whether such conduct is incompatible with the continuance of the employment relationship between employee and employer, namely, whether it breached the essential conditions of his contract of service (**Keturah Pinder v Windmill supra**).

47. From the evidence, there is no dispute that the Plaintiff as Production Assistant held a supervisory role in which he was responsible for supervising 10 other employees at the plant. There is also no dispute as to the events that led up to the incident of June 15, 2009 which was, at or about 4:50 or 5:00 a.m. the Plaintiff was advised by the Assistant Operator Ashford Knowles that the temperature on reactor 3610 was out of control; that the Plaintiff checked the console and saw that the temperature was between 208 to 210 degrees; that the Plaintiff pressed the Emergency cool down button on the console and called Mr. Craig Simms to inform him of the problem, that Antoine Forbes, one of the Operators, attempted to open the valve, that when the Plaintiff opened the door of the control room he could smell styrene and see the styrene residue vaporizing and coming out of the reactor main way and into the plant; that the Plaintiff told everyone to get inside and closed the doors of the control room as the walls were explosion proof.

48. The Defendant contends that the sum of the Plaintiff's actions or inactions that night led to the incident that occurred. In particular it is the Defendant's contention that the Plaintiff was not alert (and he was asleep) and was not engaged in the workings of the plant's operations that night; the Plaintiff failed to pay any attention to the visual alarm monitor on the PS console and failed to ensure that the other shift workers were paying attention to the visual alarm monitor given that the audio alarm was not functioning; the Plaintiff's decision to allow Ashford Knowles to leave the plant (at a critical stage of the production) and his failure to ensure that the PPS was charged in the reactor by two well experienced workers was the primary cause for the damage to reactor 3610; and the Plaintiff's actions were in breach of his duties and responsibilities as supervisor of Shift B.

49. The Plaintiff in his evidence stated that he understood his role as Production Assistant to be to oversee the manufacturing process at the plant, making sure everything went

smoothly and if a problem arose to deal with it and failing which he would tell his boss. His evidence was also that he performed functions which took him away from the plant, sometimes for hours at a time. He also stated that he was responsible for supervising 10 other employees at the plant during his shift. It was also his evidence that it was not his duty to micromanage the staff responsible for the manufacturing process, i.e. the Operators and Assistant Operators. He further stated during cross-examination that he was never given a job description and was not told of his job responsibilities and that he relied on his previous experience as a production supervisor at Syntex. Additionally, he stated that his role was to sit in the control room and monitor what happened, and he would leave and that all he was doing was being there.

50. The evidence of Ashford Knowles, one of the Plaintiff's witnesses, was that the Production Assistant was not involved in making the batches; did not micromanage the manufacturing process; does not have to stand over the Operator and Assistant Operator while they charge a reactor or take samples. He also stated during cross-examination that the Production Assistant does not check the batch sheets during the process. The evidence of Tavaro Hanna, one of the Plaintiff's witnesses was that from his observation Production Assistants were not responsible for watching or keeping an eye on the manufacturing process; they were not required to watch over a Utility Operator who was filling in for an Assistant Operator and they were mostly responsible for helping if the employees ran into problems.

51. The evidence of the Defendant however is contradictory in relation to the Production Assistant's role. The evidence of Craig Simms, the Operations Manager of the Defendant (and direct supervisor of the Plaintiff) at the time was that if the Plaintiff had ensured that the beads were being tested and observed in accordance with the SOP, the loss of suspension would have been observed and appropriate steps taken to save or dump the batch and if the Plaintiff had ensured that the Assistant Operator was performing the tests and analyzing for suspension and bead growth, the analysis at this point would have prompted the Plaintiff to conduct an investigation to determine the reason the batch was not in suspension and take appropriate action which would have included dumping the batch. However, his evidence following questions from the Court was that the Production Assistants would not be "foot-to-foot" behind the Operators, Assistant Operators and Utility Operators when samples were taken, nor when they take the test, nor would the

Operators, Assistant Operators and Utility Operators take the batch sheets to the Production Assistant after each batch and the results were recorded.

52. The evidence of Greg Elbehar in respect to the Plaintiff's role was that the Production Assistant serves in a supervisory role being responsible for scheduling and coordinating production in accordance with the SOPs and ensuring that the employees perform their production functions in accordance with the SOPs; oversee the employees designated to their shift and the manufacturing process; the SOPs require that the batch sheets are completed by the Operator and Assistant Operator and should be reviewed by the Production Assistant to ensure compliance with the SOPs; and in the absence of the Assistant Operator, another Operator or trained employee to include the Production Assistant should have been responsible for collecting, weighing and adding the PPS and other ingredients with the Operator. However, during cross-examination Mr. Ebelhar's evidence in relation to the Plaintiff's duty was that on any given shift there was only one Production Assistant on duty; that during the night shift the Production Assistant is the most senior person at the plant; that as the Production Assistant the Plaintiff had his full trust and backing in running the plant's operations and he was given free range to supervise as he saw fit; that the Production Assistants were not responsible for charging the reactor. His evidence in re-examination when asked to give a description of the function of the Production Assistant on a night shift in particular was that the Production Assistants on all shifts are supposed to make sure that the people that they are supervising are following the Standard Operating Procedures.
53. I have read the Witness Statements filed herein and considered the totality of the viva voce evidence and the demeanor of the witnesses as they gave evidence and I prefer the evidence of the Plaintiff and the Plaintiff's witnesses as I found them to be more credible than the Defendant's witnesses. On a balance of probabilities, it is reasonable to conclude that the incident was caused by the failure of either Baldwin Smith or Eustice Lettice (aka Mackey) to add the PPS to the batch to charge the reactor. I have difficulty too with Antoine Forbes being in the clear over this incident. The evidence is, and I accept, that he was sitting at the console and should have been the first person to have visual notice that something was wrong. I am also curious as to why Smith and Lettice (aka Mackey) were not terminated. This state of affairs erodes their credibility as witnesses for the Defendant.

54. The evidence is clear that the Production Assistant does not physically stand over the Operator, Assistant Operator or the Utility Operator as they carry out their tasks nor is he required to physically check each batch report immediately after they are completed. The Plaintiff's evidence, which I accept, is that the batch sheets are checked after the manufacturing process is completed and would only be reviewed if there was a problem with the batch at the end of the process and this evidence was not contradicted. The only way the error or omission could have been detected that night was if the Plaintiff physically verified each step taken by the responsible employees as they took them or an examination of the batch sheets every time each sample was recorded. Mr. Simms confirmed that this was not the procedure i.e. that the Plaintiff did not go "foot to foot" behind each employee as he carried out his task. Additionally, I do not accept that the Plaintiff's decision to allow Ashford Knowles to leave the plant during the dwell stage amounted to the failure to ensure that the PPS was charged to which the Defendant alleges. The evidence before the Court was that during this time Baldwin Smith, an Operator and Antoine Forbes, an Assistant Operator were still at the plant and were still in the control room. These were two individuals whose duties included charging the reactor and as such even in the absence of Mr. Knowles both individuals by way of their job duties had experience in the manufacturing process. More so, while Eustice Lettice's (aka Mackey) job title was Utility Operator, a role which he was given in March, 2009 as provided for in the dated and signed Job Description (as found in the Defendant's Bundle of Documents at Tab 4), the evidence before the Court, in particular the Plaintiff's evidence, was that the night in question was not the first time Eustice Lettice had charged a reactor. The only evidence before the Court that Eustice Lettice (aka Mackey) was a trainee at the time of the incident is proffered by the Defendant's witnesses whose evidence I do not accept. Further, to my mind, the evidence shows that during Mr. Knowles' absence there were experienced employees who had participated in the manufacturing process and as such the Plaintiff's decision to let Mr. Knowles leave the plant during the dwell stage really had no bearing on the continuation of the manufacturing process. The batch sheets demonstrate that during this crucial period when the PPS should have been added (again the likely cause of the incident), Smith and Lettice (aka Mackey) initialed the sheets. By all accounts Knowles was not there and he admitted that he had not added the PPS before he left.

55. Additionally, while the audio alarm would have alerted them all to the fact that there was a problem in the reactor in time to dump the batch, I do not agree with the submission by Mr. Tynes, QC that the absence of the alarm caused the incident. The Plaintiff cannot be held liable for an alarm system which the Defendant admits was not working. Surely it was the Defendant's responsibility to have a working alarm system to aid in the detection of problems in the production process.
56. The Defendant has failed to satisfy me that the Plaintiff failed to provide adequate and/or proper supervision of the employees on that shift that night as the evidence shows that the Plaintiff's supervision at best was limited in his duties/responsibilities as described by the Plaintiff and not the duties/responsibilities currently attributed to him by the Defendant.
57. Moreover, the Defendant's contention in the termination letter that the Plaintiff failed to ensure that the Company's Standard Operating Procedures were followed I find have not been substantiated as the document found at Tab 1, second page in the Defendant's Bundle filed February 10, 2015 makes continuous reference to the duties and roles of the Operator and Assistant Operator during the DWELL stage and not the Production Assistant. Further, throughout the course of the trial, the use of the words Standard Operating Procedures were used interchangeably as sometimes being an oral policy/directive known to all individuals but not in writing and also referred to as a written manual. However, while the Plaintiff states that he did not recall the document shown at the second page at Tab 1 of the Defendant's Bundle of Documents to which the Defendant states came from the Standard Operating Procedure Manual, he agrees that the procedure as outlined in the written document, is the same as what he knew the duties of the Operators and Assistant Operators were during the DWELL stage. To my mind, nothing turns on whether he saw the written document or not as the procedure was the same throughout the process. Therefore, the Defendant has not satisfied me, that on the night of the incident the Plaintiff failed to ensure that the Operator and Assistant Operator followed that one page document to which the Defendant asserts forms a part of its written Standard Operating Procedure Manual. Additionally, while the document at Tab 4 of the Defendant's Bundle of Documents purporting to be the job description of the Production Assistant was neither signed nor dated by the Plaintiff to determine if this document was in his purview during his employment, if I was to consider the contents of

it as a means to ground the Defendant's justification, I cannot. Upon my reading of the document, I fail to see any of the descriptors as identified by the evidence of Greg Ebelhar and while the portion of the document that speaks to job function states that the list is not all-inclusive I still do not find any express requirement by the Defendant to perform the functions to which the Plaintiff is now alleged of not performing.

58. Additionally, I find that the complaint as found in the termination letter to the Plaintiff in relation to his failure to satisfactorily perform his duties and functions in a manner as could reasonably be expected of a person with his training and experience was not established by way of any evidence that was before the Court. In finding that the Plaintiff's duties as Production Assistant was limited to a "problem solver" during the manufacturing process, it is difficult to conclude without any supporting evidence as to what could have been reasonably expected of the Plaintiff to have done during the early hours of June 15, 2009. In fact, I believe that the quick thinking and quick actions of the plaintiff saved that section of the plant and the employees there that morning and that the plaintiff risked his life in so doing.
59. Given the evidence that it is before the Court I cannot agree with the Defendant's assertion that the sum of the inactions and actions above amounted to gross negligence as pleaded or that it amounted to a breach of the fundamental conditions of the employment contract. More so, I use the language of Cairns LJ in **Wilson v Racher** (supra) that although the incident on June 15, 2009 was regrettable, I do not find that the actions of the Plaintiff on that night was such to show a "deliberate flouting of the essential contractual conditions".

Reasonable Investigation

60. However, if I am incorrect in my finding above, I find that the Defendant did not conduct a reasonable investigation of such misconduct to justify summarily dismissing the Plaintiff.
61. Section 33 of the Act places an obligation on the Employer to prove 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.
62. Mr. Rigby submits above that the evidence of the Defendant during the course of the trial has proven that the Defendant conducted a reasonable investigation into the incident and

as such held an honest and reasonable belief that the Plaintiff had committed the misconduct.

63. To my mind, I have to consider what constitutes as a reasonable investigation. Justice of Appeal, Sir Hartman Longley in **Island Hotel Company Limited v Shikera Isaacs-Sawyer**, IndTribApp No. 88 of 2018 sought to provide some clarity as to what is a reasonable investigation. Inasmuch such 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 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.(emphasis mine)**

64. The evidence of the Defendant in support of conducting a reasonable investigation, Mr. Rigby submits, is found exhibited to the Second Witness Statement of Greg Ebelhar and the two suspension letters dated June 17 and 26, 2009 addressed to and signed by the Plaintiff whereby it stated that the Plaintiff was suspended with full basic pay pending further investigation into the consequential incident which occurred on June 15, 2009.

65. The evidence before the Court on behalf of the Defendant in relation to the investigation that was conducted is found in the Witness Statement of Greg Ebelhar filed February 27, 2015, in particular he states:-

> 39. On 16th June, 2009, myself, Valerie Barry (Human Resources Manager) and Craig Simms (Operations Manager) met with the Plaintiff, Baldwin Smith, Ashford Knowles and Eustaice Lettice individually.
>
> 41. During separate interviews with both the Production Operator and Assistant Operator, both the Plaintiff and Baldwin Smith said that the Plaintiff had given Ashford Knowles permission to go home. I was told that he left around the time of the styrene charge (roughly 10:00) and returned after the addition of the PPS and other catalysts (around 11:50pm). He would have been gone almost two(2) hours based on the time of each stage in accordance with the SOPs and the batch sheet records.

43. I asked Mackey whether he had done any measurement for PPS and whether it had been added to the Reactor. He said yes. I did not find any PPS packaging in the reactor area or on the reactor cart during my investigation. I asked Mackey what happened to the packaging and was told that he threw it away…

44. Since I did not find a cup with the correct measurement on it, I asked Mackey to write down the same measurements on another cup the way he would have done the night of the incident. Craig and I noticed that the handwriting did not match the handwriting on the cup which I found. Mackey agreed that it did not match his handwriting. Craig and I later went back to the trash box designated for the Reactor and was not able to find any other cups.

45. During our interview with Baldwin Smith, the Production Operator, he insisted that PPS went in to the Reactor, although we did not find any PPS packaging in the area or any indication that PPS was measures. When I asked Baldwin to explain the reason for the slimy substance indicating lack of PPS, he said that perhaps something went wrong with the PPS.

46. I later obtained the records and Polymerization Batch Sheets of batches produced before and after Shift B. My review of these batch sheets confirms that all of the batches used the same lot of PPS.

47. Baldwin insisted that PPS was added to the Reactor recorded by his signature on the Batch Sheet and confirmed by the trainee, Mackey. I said to Baldwin that the only way there could be lack of suspension, evidenced by the slurry substance, is the absence of Ingredient A (TCP) or PPS. I had collected an empty TCP bag from the reactor cart when I went to the reactor area on the morning of the incident. I was satisfied from the packaging I found on the Reactor Cart that Ingredient A was added to the Reactor. I was unable to find any evidence of PPS being present to suggest that PPS went into the Reactor.

48. When we interviewed the Plaintiff, he confirmed that he had given Ashford permission to go home. The Plaintiff should have been aware the current stage of the process at the time permission was granted. If he allowed the Assistant Operator to go home, it was his responsibility to ensure that the Assistant Operator had returned in time to perform his duties of adding the PPS and other ingredients,

being a critical part of the process or assign a fully trained person or fill in for the Assistant Operator until his return.

49….I asked the Plaintiff why he allowed a trainee (Mackey) to perform an important part of the procedure without supervising him. He replied that he felt Baldwin would take care of him.

52. The Plaintiff also said that when Baldwin called out to him after realizing there was a problem he asked Baldwin and Ashford whether all of the chemicals had gone into the batch. I asked the Plaintiff the whereabouts of the reactor cart with the empty additive packaging. He said he did not know. He admitted that he was aware that the reactor cart must stay by the reactor until the batch is completed but could not give an account for it.

53. The Plaintiff also said that after he was alerted, he asked Ashford whether there was good suspension of the beads in the test jar.

55. I was told by Antoine Forbes, another employee on B Shift, that the Plaintiff was made aware of a temperature problem with the PS Reactor 3610 by Baldwin. By this time, the alarm would have gone off at least every five (5) minutes in the preceding hours.

56. ….I asked the Plaintiff why, when he had been made aware of the temperatures, he made no immediate attempt to open the dump valve and dump the batch. He said that the vapors were too bad for him to enter the Reactor area.

58. I was told that Antoine Forbes entered the Reactor area and opened the valve about a half hour later at 5:21 am in an attempt to dump the batch but it was too late."

66. The Second Witness Statement of Greg Ebelhar filed November 18, 2015 exhibited Mr. Ebelhar's notes taken during interviews of the Plaintiff, Baldwin Smith, Eustice Lettice (aka Mackey), Antoine Forbes and Ashford Knowles on June 16, 2009. During cross-examination however when asked several questions in relation to his notes by Counsel for the Plaintiff he responded that he made the notes during the interviews on those days starting on June 16; he made the notes in the presence of each interviewee; he did not get the interviewee to sign the notes to acknowledge that he made an accurate record of what they said because they were his notes of what they were telling them what happened that night. He also responded to questions in relation to the involvement of Sean McCrea,

the Defendant's Manager of Control and Information Systems and stated that he did not have a meeting with Sean McCrea and the notes were from interviews with the people who were on shift that night trying to find out what happened during the incident; that himself, Sean McCrea, Craig Simms and Jim Pierson had meetings going over the batch sheets, the temperature profiles, the alarms, everything; that he did not interview Sean McCrea to find out why the alarm was not working; that he found out after the fact that the alarm was not working and that he found out why it was not working after the fact .

67. The evidence of Valerie Barry, the Defendant's Human Resources Manager as found in her Witness Statement filed December 2, 2015 is that on June 16, 2009 she sat in on the interviews of the Plaintiff, Baldwin Smith, Eustice Lettice (aka Mackey) and Ashford Knowles together with Greg Ebelhar and Craig Simms and the interviews were led by Mr. Ebelhar who also took notes. She also states that the purpose of the interviews was to investigate the events that occurred on June 15, 2009.

68. The evidence of Sean McCrea, the Defendant's Manager of Control and Information Systems as found in his Witness Statement filed December 2, 2015 is that on the afternoon of June 16, 2009 he was asked by Greg Ebelhar to investigate the PA audible alarm output of the alarm console computer and that this was the first time that he was asked to check the audio alarm as no one else had brought to his attention the fact that it was not working around June 15, 2009.

69. The evidence of the Plaintiff in relation to his involvement in the investigation is found during his cross-examination at page 128 of the Transcript dated November 16, 2015 at lines 4 to 32, page 129 at lines 1 to 30 and the exchange is below:-

Q. Now, after the incident an investigation was carried out, correct?

A. I don't know. I never seen any investigation report.

Q. You were—

A. I wasn't a part of the investigation. I never seen the report. I don't think my lawyer seen the report either.

Q. You were suspended?

A. I was suspended.

Q. On two occasions?

A. Three occasions. I think it was three suspensions.

THE COURT: Involving this incident?

THE WITNESS: Yes.

Q. And your suspension was for the purpose of carrying out the investigation, correct?

A. I don't know. They never explained it to me.

Q. If I take you to Tab 6 of the bundle, this might help jog your memory.

…

Q. Tab 6, you see that letter? It's a letter dated 17th June, 2009 from Valerie Barry, HR Manager, to Mr. Phillip Hepburn. You have seen that letter before? That's your signature on 6th of – sorry, on 17th June, 2009?

A. Yes.

Q. You see what it says in the first paragraph of that letter?

A. Yes, I see what it say.

Q. "Further to our meeting held on Tuesday, 16th June, the Company has decide to suspend you on full basic pay pending further investigation into the consequential incident which occurred on 15th June, 2009".

A. There was never no investigation on this batch; that's bull-crap.

Q. You were never spoken to by management in relation to the events which transpired on 15th June?

A. No, because—

Q. Were you ever spoken to?

A. When was that?

Q. After the incident on 15th June?

A. No, I was never spoken to. I was instructed to go down and do a urine test, drug test. And then I was suspended.

Q. When you received your letter on 26th June, which is right one over, 2009, continuing your suspension on basic pay, again, pending further investigations.

A. During this time I asked a question and I told him that I had a solution for the stuff. They told me I could not talk.

Q. You could not talk?

A. I could not talk because an investigation was going on and I had nothing to say in the investigation. So they never gave me an opportunity to talk."

70. The suspension letters as found at Tab 7 of the Agreed Bundle of Documents dated June 17 and June 26, 2009 are highlighted below:-

"June 17th 2009

Mr. Philip Hepburn

Polymers International Limited

Freeport, Grand Bahama

Bahamas

Dear Mr. Hepburn

INCIDENT DATED 15th JUNE 2009

Further to our meeting held on Tuesday 16th June 2009, the Company has decided to suspend you on full basic pay pending further investigation into the consequential Incident which occurred on 15th June 2009.

Your suspension will be from today's date and continue until our next meeting to be held on Friday June 26th at 9.30am, in the Administration Office of Polymers International Limited – this meeting requires your attendance. At this meeting you will be advised of what further action is necessary.

Between now and the 26th June, if you feel you wish to add any further information which will assist us in our investigations, please feel free to contact me and we will ensure we provide you every opportunity to do so.

…."

"June 26th 2009

Mr. Philip Hepburn

Polymers International Limited

Freeport, Grand Bahama

Bahamas

Dear Mr. Hepburn

INCIDENT DATED 15th JUNE 2009

Further to our meetings held on Tuesday 16th, Friday 17th, and Friday 26th June 2009, the Company has decided to extend your current period of suspension on full basic pay, pending further investigations into the consequential Incident which occurred on 15th June 2009.

Your suspension will be extended from today's date 26th June 2009 and continue until our next meeting to be held on Friday July 3rd at 11.00am, in the Administration Office at Polymers International Limited – this meeting requires

> your attendance. At this meeting you will be advised of what further action is necessary.
>
> Between now and the 3rd of July, if you feel you wish to add any further information which will assist us in our investigations, please feel free to contact me and we will ensure we provide you every opportunity to do so.
>
> …"

71. The Plaintiff was subsequently terminated a week later. The Plaintiff accepts that he signed both suspension letters that was given to him.
72. I have reviewed the evidence adduced and the relevant case law in support of the Defendant to which Counsel for the Defendant submits supports the Defendant's contention that the Defendant conducted a reasonable investigation of the events (i.e. the alleged misconduct) that transpired on June 15, 2009 to which the Defendant held an honest and reasonable belief that the Plaintiff had committed the misconduct in question at the time of the dismissal. However, I find that the Defendant's investigation was not reasonable given the circumstances of the nature of the Defendant business and the evidence the Defendant adduced.
73. I am not satisfied on the evidence that is before the Court in support of the Defendant that at any point during its investigation the allegations advanced by the Defendant were ever put to him and that he was afforded an opportunity to respond. The evidence as to the Plaintiff's suspension was as to conduct an investigation as to the "consequential incident" however, there is no evidence that during the investigation he was advised of the nature of the investigation and the complaint to which the Defendant alleged in relation to him so that he would be able to answer the complaint before any decision was made. More so, while the suspension letters included a proviso that if the Plaintiff wished to add any further information which could have assisted in the Defendant's investigations to my mind that does not give rise to advising the Plaintiff of the nature of the complaints against him and affording him the opportunity to respond to the specific complaints before a decision was made.
74. Further, as highlighted by the Court of Appeal in **Frederick Ferguson v Island Hotel Company Limited IndTribApp. No. 249 of 2016** at paragraphs 38 and 39 the Court of Appeal in finding that the Respondent did not hold a reasonable investigation relied on two English cases in support. In **Marex Financial Ltd v Creative Finance Ltd [2014]**

1 All E.R. (comm) 122 at paragraph 67 said "gross negligence means something different than negligence. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts **is one degree**." Also in **Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22** the Court of Appeal said "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 grave act of misconduct as to justify summary dismissal."

75. In light of the above, I find that the evidence before the Court does not establish that the Defendant held an honest and reasonable belief that the Plaintiff was guilty of "gross negligence" or the alleged misconduct and that it formed that view after a reasonable investigation into the facts.

Disposition

76. Having found that the Plaintiff was wrongfully terminated he is therefore entitled to the sum of $45,509.07 representing his entitlement under Section 29(1)(c)(i) and (ii) of the Employment Act, together with interest at the statutory rate according to Section 3 of the Civil Procedure (Award of Interest) Act from the date that the cause of action arose to the date of Judgment.
77. As it relates to the Plaintiff's claim for damages including his lost medical coverage, I will hear Counsel on the assessment of damages on an adjourned date.
78. As costs usually follow the event, I see no reason to depart from this, costs are to be awarded to the Plaintiff to be taxed if not agreed.

Dated this 8th day of December, A.D. 2020

Petra M. Hanna-Adderley
Justice