

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2017/COM/lab/00062

**IN THE MATTER of the Industrial Agreement between the Bahamas Electrical
Workers Union**

BETWEEN

TEVAUGHN MILLER

First Plaintiff

AND

D'YANNDRA CURRY

Second Plaintiff

AND

KATONIA NEELY

Third Plaintiff

AND

BAHAMAS POWER & LIGHT COMPANY LTD.

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Alex Morley for the Plaintiffs

Audley Hanna Jr. with Keith Major Jr. for the Defendant

16 and 17 July 2020
(Submissions 9 July 2021)

JUDGMENT

WINDER, J

The plaintiffs (Tevaughn, D'Yanndra and Katonia) have brought this action for wrongful and/or unfair dismissal arising from a breach of the Industrial Agreement with the defendant (BPL).

Background

1. The plaintiffs are all former employees of BPL's Finance Division. Tevaughn was employed as a Filing and Records Clerk, D'Yanndra as a Finance Assistant and Katonia as an Accounts Payable Clerk.
2. In May 2017 BPL came to understand that it had become the object of a fraudulent scheme which began within BPL. The scheme involved the presentation of fraudulent invoices and payment of those invoices being made to both existing and fictional contractors of BPL. It resulted in the loss of some \$1.9 million for BPL. Having been made aware of the fraudulent scheme, BPL commenced investigations into several of its employees, including the plaintiffs.
3. During the months of May thru August 2017 the plaintiffs were each informed in writing by BPL that they were being investigated for gross misconduct and were individually subject to several suspensions from work.
4. During their suspensions the plaintiffs were interviewed by BPL's Human Resources personnel and ultimately terminated in writing on 16 August 2017. The letter of termination of Tevaughn, which was similar in terms for the other two plaintiffs provided as follows:

RE: Termination of Employment

We refer to our letter dated August 3, 2017, in which you were further suspended pending completion of the forensic audit and investigation regarding the vendor fraud.

We advise that at the conclusion of this investigation, the Company has determined that you have committed major breaches including gross misconduct and dishonesty. Further, based on the findings of the

investigation, the company has a reasonable and honest suspicion and belief that you were complicit in committing a fraud against the company resulting in substantial financial losses.

We consider your actions to be repugnant to the fundamental interest of this company and therefore, in accordance with Clause 16.12.1(a) of the BEC/BEWU Industrial Agreement, and Section 33 of the Employment Act you are hereby summarily dismissed effective immediately without notice or payment in lieu of notice.

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

...

Sincerely yours,
Marisa Mason-Smith (Ms)
Assistant General Manager – Human Resources & Training

5. Upon the termination of their employment, the plaintiffs commenced this action. In their Statement of Claim, filed on 16 May 2018, they seek the following:

Tevaughn Miller

3. THE FIRST PLAINTIFF

3.1 That the First Plaintiff was at all material times employed as a Filing Clerk having began his employment with the Defendant on August 14 2013.

...

3.3 That the First Plaintiff's duties included stamping invoices, logging cheques, taking the cheques to the executive wing for signature and filing away paperwork.

3.4 That in a letter dated May 16th 2017 the First Plaintiff was informed by the Defendant that they were presently conducting an investigation involving gross misconduct and therefore the First Plaintiff was suspended with half pay for five working days pending the investigation.

3.5 That in a letter dated May 23rd 2017 the First Plaintiff was informed by the Defendant that he was being further suspended with half pay for twenty working days.

3.6 That in a letter dated June 22nd 2017 the First Plaintiff was informed by the Defendant that he was being further suspended with full pay for thirty working days.

3.7 That in a letter dated August 3rd 2017 the First Plaintiff was informed by the Defendant that he was being further suspended with full pay for seven working days and that he was to report to the Defendant's Human Resources Department on August 16th 2017.

3.8 That during this suspension period the First Plaintiff was interviewed by employees of the Defendant where he was questioned about his job description, external cheques, and a renting slip.

3.9 That during this suspension period the First Plaintiff was interviewed three times by the employees of the Defendant.

3.10 That on August 16th 2017 the First Plaintiff was summarily dismissed without notice or payment in lieu of notice by the Defendant for committing major breaches including gross misconduct and dishonesty.

3.11 That the First Plaintiff's employment rights were breached by the Defendant when the Defendants suspended the First Plaintiff for the above stated amount of days which was in breach of the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

3.12 That the First Plaintiff was never given an opportunity to be heard or respond to any allegations made against him by the Defendant as mandated in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

3.13 That the First Plaintiff was never given an opportunity by the Defendant to appeal the suspension or termination as set out in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

3.14 The First Plaintiff was never told the allegations against him and nor was he given any opportunity to answer the allegations.

3.15 As a result of the aforesaid breaches the Defendant has wrongfully and or unfairly dismissed the Plaintiff and the Plaintiff has suffered loss and damages.

...

Particulars of Loss and Damages

- i. Failed to pay Notice Pay \$4,130.00;
- ii. Failed to pay Contributions from Group Medical and Life Insurance Benefits Plan (to be assessed);
- iii. Failed to pay Contributions from Pension Plan (to be assessed);
- iv. Failed to pay Christmas Bonus (to be assessed);
- v. A basic award pursuant to Section 46 of the Employment Act;
- vi. A compensatory award pursuant to Section 47 of the Employment Act.

...

D'Yanndra Curry

4. THE SECOND PLAINTIFF

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4.1 The Second Plaintiff was at all material times, employed by the Defendant as a Finance Assistant.

4.2 That the Second Plaintiff began her employment with the Defendant on September 1st 2003.

...

4.4 That the Second Plaintiff's duties included processing invoices and maintaining vendor files.

4.5 That in a letter dated May 15th 2017 the Second Plaintiff was informed by the Defendant that it was presently conducting an investigation involving gross misconduct and that therefore the Second Plaintiff was being suspended with half pay by the Defendant for a period of five working days pending the investigation.

4.6 That in a letter dated May 22nd 2017 the Second Plaintiff was informed by the Defendant that she was further suspended with half pay for a period of twenty working days.

4.7 At the end of the twenty days the Defendant's internal auditors questioned the Second Plaintiff about her job description.

4.8 That in a letter dated June 21st 2017 the Second Plaintiff (*was*) informed by the Defendant that she was further suspended with full pay for another thirty working days.

4.9 That during this thirty day period the Second Plaintiff was interviewed by an overseas firm and they asked the Second Plaintiff about a Mr. James Dean and a Mr. Reno Bethel.

4.10 That in a letter dated August 3rd 2017 the Second Plaintiff was informed by the Defendant that she was further suspended with full pay for eight working days and that she was to report to the Defendant's Human Resources Department on August 16th 2017.

4.11 That on August 16th 2017 the Second Plaintiff was summarily dismissed without notice or payment in lieu of notice by the Defendant for committing major breaches including gross misconduct and dishonesty.

4.12 That the Second Plaintiff's employment rights were breached by the Defendant when the Defendant suspended the Second Plaintiff for the above stated amount of days which was in breach of the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

4.13 That the Second Plaintiff was never given an opportunity to be heard or respond to any allegation made against her by the Defendant as mandated in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

4.14 That the Second Plaintiff was never given an opportunity by the Defendant to appeal the suspension or termination as set out in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

4.15 The Second Plaintiff was never told the allegations against her and nor was she given any opportunity to answer the allegations.

4.16 As a result of the aforesaid breaches the Defendant has wrongfully and or unfairly dismissed the Second Plaintiff and the Second Plaintiff has suffered loss and damages.

...

Particulars of Loss and Damages

- i. Failed to pay Notice Pay \$26,453.57;
- ii. Failed to pay Contributions from Group Medical and Life Insurance Benefits Plan (to be assessed);
- iii. Failed to pay Contribution from Pension Plan (to be assessed);
- iv. Failed to pay Christmas Bonus (to be assessed);
- v. A basic award pursuant to Section 46 of the Employment Act;
- vi. A compensatory award pursuant to Section 47 of the Employment Act.

AND THE SECOND PLAINTIFF CLAIMS

1. Payment of Notice Pay \$26,453.57;
2. Payment of Contributions from Group Medical Insurance Benefits Plan (to be assessed);
3. Payment of Contributions from Pension Plan (to be assessed);
4. Payment of Christmas Bonus (to be assessed);
5. A basic award pursuant to Section 46 of the Employment Act;
6. A compensatory award pursuant to Section 47 of the Employment Act;
7. Damages for Wrongful or Unfair dismissal;

...

Katonia Neely

5. THE THIRD PLAINTIFF

5.1 The Third Plaintiff is and was at all material times, employed by the Defendant as an Accounts Payable Clerk II.

5.2 That the Third Plaintiff began her employment with the Defendant on January 4th 2011 as a Finance Clerk II.

5.3 That the Third Plaintiff was later promoted on December 3rd 2012 to an Accounts Payable Clerk...;

5.4. That the Third Plaintiff's duties primarily included but were not limited to processing invoices for payment by checking accuracy of calculation, coding and authorised signatures.

5.5 That in a letter dated June 30th 2017 the Third Plaintiff was informed by the Defendant that an investigation was being conducted for gross misconduct and she was being suspended with full pay for thirty working days.

5.6. That during this suspension period the Third Plaintiff was questioned by the Defendant about a cheque and her relationship to a Mr. Reno Bethel.

5.7 That on August 16th 2017 the Third Plaintiff was summarily dismissed without notice or payment in lieu of notice by the Defendant for committing major breaches including gross misconduct and dishonesty.

5.8 That the Third Plaintiff's employment rights were breached by the Defendant when the Defendant suspended the Third Plaintiff for the above stated amount of days which was in breach of the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

5.9 That the Third Plaintiff was never given an opportunity to be heard or respond to any allegations made against her by the Defendant as mandated in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

5.10 That the Third Plaintiff was never given an opportunity by the Defendant to appeal the suspension or termination as set out in the Industrial Agreement between the Bahamas Electrical Workers Union and the Defendant.

5.11 The Third Plaintiff was never told the allegations against her and nor was she given any opportunity to answer the allegations.

5.12 As a result of the aforesaid breaches the Defendant has wrongfully and or unfairly dismissed the Third Plaintiff and the Third Plaintiff has suffered loss and damages.

...

Particulars of Loss and Damages

- i. Failed to pay Notice Pay \$12,552.58;
- ii. Failed to pay Contributions from Group Medical and Life Insurance Benefits Plan (to be assessed);
- iii. Failed to pay Contributions from Pension Plan (to be assessed);
- iv. Failed to pay Christmas Bonus (to be assessed);
- v. A basic award pursuant to Section 46 of the Employment;
- vi. A compensatory award pursuant to Section 47 of the Employment Act.

AND THE THIRD PLAINTIFF CLAIMS:

1. Payment of Notice Pay \$12,552,58;
2. Payment of Contributions from Group Medical Insurance Benefits Plan (to be assessed);

3. Payment of Contributions from Pension Plan (to be assessed);
4. Payment of Christmas Bonus (to be assessed);
5. A basic award pursuant to Section 46 of the Employment Act;
6. A compensatory award pursuant to Section 47 of the Employment Act;
7. Damages for Wrongful or Unfair dismissal;

...

6. At the trial the plaintiffs relied on their filed witness statements (Tevaughn – 15 March 2019, Katonia – 31 August 2017 and, D'Yanndra – 12 September 2017) which stood as their evidence in chief. BPL relied on the evidence of Chequita Johnson (former Human Resources Manager, Compensation and Benefits) and Chantal Williams (Finance Officer, Internal Audit Department) which were contained in their witness statements, both filed on 25 April 2019. All witnesses were subject to cross-examination on their evidence.
7. The agreed issues in this case can be summarized as follows:
 - i) *Whether BPL breached the Industrial Agreement when it suspended the plaintiffs.*
 - ii) *Whether the plaintiffs were informed of the allegations against them and afforded an opportunity to respond.*
 - iii) *Whether the plaintiffs were given the opportunity to be heard or respond to any allegations against them as per the Industrial Agreement.*
 - iv) *Whether the plaintiffs were given the opportunity to appeal their suspension or termination as per the Industrial Agreement.*
 - v) *Whether the plaintiffs were wrongfully and/ or unfairly dismissed by BPL.*
8. The plaintiffs plead that their rights were breached by BPL when the decision was made to suspend them. Further, their suspensions were in breach of the Industrial Agreement (IA) with BPL as they were at all material times members of the Bahamas Electrical Workers Union (BEWU). BPL on the other hand says that the suspensions were in accordance with the terms of the IA as well as with

Supplemental Agreements (SA) entered into between the parties during the course of BPL's investigation.

9. The evidence shows that SAs were executed in June 2017 between BPL and the BEWU. BPL says that the SAs expressly confirmed the procedural fairness of the investigation involving the plaintiffs. The recitals in the SA, in relation to Tevaughn (which is similar to that of the others), was settled in the following terms:

WHEREAS [Tevaughn] was suspended on 16 May 2017 in accordance with Clause 16.11 of the Agreement for a period of five (5) working days and further suspended 23 May 2017 in accordance with Clause 16.12 of the Agreement for a period of twenty (20) working days and all parties recognizing that the aforementioned suspensions were lawful and in accordance with the Agreement.

AND WHEREAS the Union and the Employer acknowledge that the investigation pursuant to Clause 16 of the Agreement is not completed and hereby agree that the suspension of [Tevaughn] shall be continued for an additional thirty (30) working days at full pay in order to complete the same. The Union and the Employer further agree that this supplementary agreement is lawful and binding on all parties and the Union agrees that this does not constitute a breach under the Agreement.

AND WHEREAS the Union and the Employer further agree that should the investigation not be completed within the said thirty (30) days period the parties will meet to discuss the further action to be taken.

...

10. The SA was signed by each of the plaintiffs along with Astrid Bodie, Secretary, BEWU; Antonio Dean, Chief Shop Steward, BEWU; and Chequita Johnson, Manager Compensation and Benefits as well as Renee Rahming, Assistant Manager, Employee Relations. BPL submits that the BEWU agreed, in the SA, that there was no breach of the IA. As such they maintain that the suspensions were lawful and in accordance with the IA.
11. The plaintiffs submit that they were not informed that BPL suspected them of any wrongdoing. This they say is a breach of natural justice and fairness. Further, their ability to respond or appeal any decision by BPL was impeded because they were never directly accused of any misconduct.

12. Conversely, BPL submits that the plaintiffs were not kept in the dark during the investigation, and were all informed in the course of their interviews of what their suspected involvement was in the fraudulent scheme. This was borne out in Johnson's evidence as she deposed that the plaintiffs were each presented with documents and evidence which exposed their connection to the fraudulent scheme. Insofar as Tevaughn is concerned, BPL says that he signed a letter of suspension along with his union representative dated 22 June 2017 in which he acknowledged that investigations into major breach of gross misconduct was discussed in detail with him on 25 May 2017.
13. Chantal Williams of BPL's Internal Audit Department, also gave evidence that during interviews with the plaintiffs, all plaintiffs were advised that they were being interviewed regarding their part in a fraudulent scheme that was taking place within BPL.
14. Counsel for BPL submits that Williams' evidence also spoke to the fact that certain documents were shown to the plaintiffs during their interviews. These documents, they say, spoke to the plaintiffs' involvement in the fraudulent scheme. They say the plaintiffs were given an opportunity to respond to the allegations against them during their interviews and they did use their opportunity to respond. BPL contends that there is now no room for the plaintiffs to aver that they were not informed of the allegations and/or afforded an opportunity to be heard in respect of them. They rely on the transcripts of the interviews and the aforementioned SAs to solidify the point that the plaintiffs were both informed of, and afforded an opportunity to respond to the allegations against them.
15. The plaintiffs aver that their inability to lodge an appeal of their suspension or termination is a direct result of their not having been told that they were suspected of any wrongdoing at the start of the investigation by BPL. Having not been directly

told that they were suspected of wrongdoing they say that their opportunity to appeal was impeded.

16. The right of appeal is contained in the IA at section 16.18, which provides:

“All employees that are suspended or dismissed shall have the right of appeal. Such appeal will be heard within thirty (30) days of the suspension or dismissal by the Joint Industrial Council (JIC).”

17. As far as the plaintiffs’ right to appeal their suspensions is concerned, BPL says that there is a five stage grievance procedure at Clause 17 of the IA. They say that the plaintiffs should have followed the grievance procedure in the event they had concerns that they were being treated unfairly. BPL complains that none of the plaintiffs utilized the grievance procedure but instead filed a Notice of Conciliation of a Trade Dispute on 4 September 2017. BPL contends that they skipped stages 1-4 of the grievance procedure and moved directly to stage five. The grievance procedure is set out in the IA as follows:

17.1 All employees have the right to seek redress for grievances relating to their employment. It is the aim of the procedure that follows to provide a means which employees can raise grievances and have them settled fairly and promptly.

STAGE 1

17.2 An employee having any grievances relating to his employment shall first discuss the matter with his immediate supervisor.

STAGE 2

17.3 Failing satisfaction or a solution of the grievance by the immediate supervisor, the employee may, by arrangement with his immediate supervisor and the Union’s Shop Steward, discuss the matter within ten (10) working days of the specific cause for complaint, and not thereafter, with the appropriate Section Head or his Deputy and a Union Shop Steward. The Union Shop Steward shall be an employee of the Corporation, representing that group of employees as referred to in ARTICLE 9 of the Recognition Agreement in which the aggrieved employee is working. A decision on the matter should be communicated by the Section Head to the employee and the Union within fourteen (14) working days of the matter being referred.

STAGE 3

17.4 Failing satisfaction or a solution of the grievance or dispute at Stage 2, the employee concerned and an officer or designated shop steward of the Union may, within five (5) working days of a decision by the

Manager/Section Head approach the Department Head or his Deputy to discuss the matter and if possible settle the grievance or dispute. A statement in writing from the Union on behalf of the aggrieved person describing the complaint and/or the alleged violation shall be included. The Corporation's and Union's representatives shall not exceed four (4) in number from each side at such meetings. One of the Corporation's representatives shall be the Manager/Human Resources or his designate. The decision of the Corporation shall be confirmed in writing to the Union within seven (7) working days.

STAGE 4

17.5 Failing satisfaction or a solution of the grievance or dispute the employee along with Officers or the Shop Steward of the Union, may within five (5) working days after the decision by the Corporation send a written outline of the grievance or dispute to the General Manager (or his designate) and also request a meeting with the General Manager. The General Manager (or his designate) will meet with the Union within twenty (20) working days of receiving such request for a meeting.

17.6 The total number of Union Representatives appearing at the Grievance Meeting with the General Manager (or his designate) shall not exceed two (2). The final decision of the General Manager (or his designate) shall be confirmed in writing to the Secretary of the Union within ten (10) working days of the grievance being heard.

STAGE 5

Failing satisfaction or a resolution of the grievance or dispute within ten (10) working days after the decision by the General Manager (or his designate) at Stage 4, the Union or Corporation may refer the matter to the Department of Labour as available under the provision of the Industrial Relations Act and/or any subsequent legislation.

18. In any event, BPL contends that on 30 August 2017, even before the plaintiffs moved directly to stage five of the grievance procedure, they commenced this action. The plaintiffs therefore abandoned the grievance procedure altogether and instead sought relief from the Supreme Court, says BPL.
19. BPL's primary defence is that it was of the honest and reasonable belief, based on the evidence it derived from its 'extensive investigation, that the plaintiffs were involved in the fraudulent scheme which caused loss to BPL. As such, they say, the decisions to summarily dismiss the plaintiffs were justified.

20. Johnson, who was no longer employed with BPL at the time this matter came on for trial, gave evidence that the plaintiffs were interviewed and received letters of suspension, with their Union representatives present. Also that the allegations of fraudulent activity on the plaintiffs part was put before them during the interviews.
21. The evidence of Williams, with respect to the plaintiffs suspected involvement in the fraudulent scheme, was supported by the several reports of BPL's accounts and other documents along with analysis provided by BPL's IT Department. Additionally, the accounting firm of Ernst and Young (EY) was engaged to conduct an independent forensic analysis of BPL's accounts.
22. BPL submits that Tevaughn, by virtue of his role as Filing Clerk in the Finance Division always had access to and was involved in the movement of cheques and invoices with the Accounts Payable Department. They say that this is where the opportunity for him to participate in the fraudulent scheme arose. Both the internal investigation and the report by EY pointed to Tevaughn's involvement, says BPL. It was noted that Tevaughn's job duties were to maintain a complete and accurate log of all checks that are printed and their status (e.g., still in accounts payable for vetting, released to the executive wing for signature, waiting for pickup by vendors). A review of Tevaughn's check log noted that it was generally incomplete, making it impossible to trace the final whereabouts of the fraudulent checks prior to being reviewed from BPL headquarters.
23. In addition to the EY report, the "Review of Fraudulent Checks" report produced by BPL's IT Department pinpoints Tevaughn as having entered three (3) fraudulent cheques for - Bahamas Industrial Equipment, James Munroe Co. and Scuderia Electrical for a sum of \$121,068.78.
24. BPL says that it's monitoring of Tevaughn's employee key card during its investigation showed him on the company's grounds when he was not scheduled to work, and on a day when one of the three (3) cheques in question was deposited

to a bank. There was no indication that anyone other than Tevaughn ever used his key card.

25. The evidence in favour of Tevaughn being a part of the fraudulent scheme included Johnson's evidence that six fraudulent cheques were found in his work desk. Tevaughn denied any knowledge of the cheques. Counsel for BPL submits that Tevaughn perpetuated the fraudulent scheme on the company and at the very least he knew and intentionally orchestrated the diversion of the cheques with the aim of defrauding the company.
26. With regard to D'Yanndra, BPL submits that the investigation shows that she was responsible for entering fraudulent invoices. Williams' evidence was that 25 of 44 of what were discovered to be fictitious invoices totaling \$1,441,459.57 were entered by D'Yanndra. D'Yanndra's oral evidence was that she did not consider anything suspicious about her singularly having inputted 25 of the cheques, as it was her job to process cheques.
27. The evidence showed that D'Yanndra entered and co-signed the cheque register for some of the fraudulent cheques. She admitted to co-signing the cheque register with the fraudulent cheques listed, but says that she was unaware that the cheques were fraudulent.
28. BPL says that in addition to Williams' evidence that 25 of 44 of what were discovered to be fake invoices totaling \$1,441,459.57 were entered by D'Yanndra, based on the audit. The audit report also cited that D'Yanndra inputted 6 of 13 fictitious vendors into BPL's accounts system which cheques were issued to. She also was responsible for performing a first level review and signing off on five (5) cheques which totaled \$111,734.00.
29. On 10 May 2017, D'Yanndra was also found to have fraudulent cheques in her desk drawer, six in total, which had already been cleared by the bank. She claimed that she was not made aware of the cheques being found in her desk during her

interview. BPL contended that during her interview D'Yanndra became agitated and left early without completing the interview.

30. With reference to Katonia, BPL says that she was responsible for reviewing, signing off and stamping fraudulent cheques to Bahamas Heavy Machinery and Trucking for \$23,000.00. Katonia admitted to being shown the cheque on 27 June 2017 with the accompanying invoice, and being advised that they were fraudulent.

31. BPL further says that Katonia admitted to having a non-work relationship with Reno Bethel, who the Royal Bahamas Police Force determined was a primary suspect in the fraudulent scheme. She told the Court in her evidence that she had a side business selling jewelry, amongst other items and Bethel was one of her customers. BPL says that Katonia was not forthcoming about her relationship with Bethel. Part of what led them to this conclusion is that Katonia could not or would not produce messages between herself and Bethel when asked to do so. Katonia says that her mobile phone ran out of space and the messages were deleted.

32. BPL relies on the leading case of ***Princess Hotel v Bahamas Catering and Allied Workers Union [1985] BHS J. No.128***, to assert that the basis for which any decision by the Court should be made is the reasonable belief that the acts in question were committed by the employee. Paragraph 18 of the judgment says as follows:

“In my view, even apart from the judicial pronouncements to which reference has been made above, the words “just cause” means reasonable cause in the context of the section. The dismissal must be upon reasonable grounds based on facts known to the employer at the time of the dismissal which would create a reasonable belief in the employer’s mind that misappropriation of the employer’s funds by the employee was being or had been committed and that the employer did so honestly believe.”

33. They further say that the Court of Appeal case of ***Island Hotel Company Limited v Shikera Isaacs-Sawyer*** (Unreported, March 2019) and the dicta of ***Longley JA*** reminds the Court that proof of guilt is not the law and therefore an employer need

not prove the guilt of the employee to any standard before effecting a summary dismissal. As per paragraph 26 of the judgment:

“The question therefore is not proof of guilt of misconduct although if that can be established it would justify summary dismissal. The burden, however, is not that high. All that an employer has to show is that it had an honest belief based on reasonable grounds that the employee had committed the misconduct in question. Once that is established it matters not whether the employee had in fact committed or was guilty of the misconduct alleged.”

[Emphasis added]

34. Counsel for BPL submits that all they would need to establish was that a fair and reasonable investigation was performed by BPL. Whilst there was no guide and/or specific framework set out as to how such investigations must be carried out, the only requirement is that the honest belief of the employee’s misconduct is a product of the reasonable investigation undertaken by the company. Based on the EY forensic investigation alone, they say the test was duly satisfied.

35. The Plaintiffs rely on the case of ***Sean Miller v Bahamas Power & Light Co. Ltd 2018/COM/lab 00039***, a decision of this Court. In ***Sean Miller***, the plaintiff was a manager with BPL at the time the fraudulent scheme, which is the subject of the plaintiffs’ dismissal, was discovered. Upon considering the facts and the law the Court found that the Sean Miller had been both wrongfully and unfairly dismissed. The pith of the finding was that the investigation by BPL into the Sean Miller’s involvement in the fraudulent scheme was woefully lacking. At paragraph 60 of the decision in ***Sean Miller***, the Court stated:

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

36. The summary dismissal of an employee is governed by the provisions of the Employment Act. Sections 31-33 provide as follows:

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.

33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.

37. The Industrial Agreement that applies to the plaintiffs also addresses summary dismissal of union members under the heading 'Discipline' at Clause 16:

16.3 The Corporation may summarily dismiss from its service or suspend without pay any employee who commits a major breach of discipline. The said suspension without pay would not affect the continuity of employment and other entitlements of the employee concerned, save for as provided at Clause 38 (Christmas Bonus).

16.4 Any employee summarily dismissed under the provision of this Clause 16 shall not be entitled to notice or pay in lieu of notice. The Corporation shall have the right to "set off" any loss against the employee's entitlements only up to the amount of such entitlements.

16.5 Although fixed penalties are not established, major breaches of discipline will normally call for suspension or dismissal. Major breaches of discipline include but are not limited to:

- (1) Theft of the Corporation's or employee's property;
 - (2) Removal without permission of the Corporation's employee's property;
 - (3) Drunkenness, drinking and/or selling alcoholic beverages on the job;
 - (4) Fighting or other acts of physical violence on the job;
 - (5) Malicious damage or willful neglect of duty resulting in damage to the Corporation's property or an employee's property;
 - (6) Negligence or carelessness in the performance of duty resulting in damage to the Corporation's property or an employee's property;
 - (7) Absence from duty without authorized leave for a period of five (5) consecutive working days;
 - (8) Possession and/or use of narcotics except where prescribed by a bona fide medical practitioner, or conviction for dangerous drugs as defined in the Dangerous Drugs Act;
 - (9) Alteration or falsification of any official records;
 - (10) Unauthorized use of the Corporation's properties;
 - (11) Gross Misconduct;
 - (12) Unauthorized re-connection or connection of electricity supply;
 - (13) Solicitation or acceptance of bribes in any form including money for performance or non-performance of duties;
 - (14) Dishonesty;
 - (15) Breach of Confidentiality;
- ...

38. During cross-examination it was suggested to Tevaughn that he had means of addressing his allegation that he was not able to address the suspension from BPL. He was taken to the grievance procedure and it was suggested that he could have taken the matter up with his supervisor. In response, he told the Court that he did not have his supervisor's email address, nor could he have called her because he did not have her number. As he had no access to the premises during his suspension, writing a letter was also not an option he says. While he admitted being aware that the BEWU were the collective bargaining agents, he says he made no attempts to speak with his union representative but left the union to do their job. He also says he did not remember being interviewed by EY. Concerning the allegations levied by BPL that his key card was scanned on occasions when he was not scheduled to work, he says he did not loan his key card to any other employee. Overall, I did not assess Tevaughn's responses as credible.

39. D'Yanndra told the Court during her cross examination that she did not follow the grievance procedure because she was unaware that she was being investigated. She says she allowed the process to take its course and then decided to get lawyers. However, she was never told during the EY interview that there were fraudulent cheques involved. Further, she was not aware that cheques were found in her drawer until she was interviewed at the Central Detective Unit of the Royal Bahamas Police Force. She admitted to entering several cheques into BPL's system but only as a requirement of her job. When asked why she left the interview conducted by BPL early, D'Yanndra says she was advised to do so by her union representative. Overall I did not assess these responses as adequate or credible.

40. Katonia was the last plaintiff to take the stand and says she became aware of the fraudulent scheme on 10 May 2017. During cross examination she admitted to knowing Reno Bethel and to being questioned by police with regard to the scheme. She admitted that Bethel was a customer of hers in her private business of selling jewelry. She told the Court that she was never informed that she was personally suspected of being involved in the fraudulent scheme. She did concede that based on the suspension letter she received dated 30 June 2017, that the person being investigated was her. When given the letter of termination she says she did not sign it but instead demanded to be told why she was fired. She made attempts to contact BPL's Chief Financial Officer the day after but did not receive a return call. She recalled being interviewed by EY and says she was asked about Bethel and a cheque for Bahamas Heavy Equipment. When questioned about why phone messages between herself and Bethel were not forthcoming during her EY interview, Katonia says she did not save the messages to her phone.

41. Having considered the evidence and observed the demeanor of the witnesses as they gave their oral evidence at the trial of this matter, I have no hesitation in indicating that I preferred the evidence of Johnson and Williams on behalf of BPL. On balance, I find that BPL has established that it held a reasonable belief in the

circumstances that all three of the Plaintiffs were guilty of the offences alleged and with respect to the fraudulent scheme. I believed Johnson and Williams, that the allegations against the plaintiffs were not merely levied against them during interviews but that the plaintiffs were afforded an opportunity to respond to the same. I accept that BPL was not dissuaded by the explanations offered by the plaintiffs, from forming an honest and reasonable belief that the plaintiffs were involved or responsible for BPL's financial loss. I am not required to find that they were in fact guilty of the misconduct alleged and I refrain from such a finding but on the evidence before the Court, I accept that it was open to BPL to form such a belief, which I found that it honestly held.

42. In all the circumstances, I am satisfied that BPL conducted a full and fair investigation before dismissing the plaintiffs. Their dismissals followed on the reasonable and honest belief that the plaintiffs in the circumstances were involved in a fraudulent scheme which defrauded BPL of a significant amount of money.

Faced with employees who were:

- a) found to have inputted cheques for payments of fraudulent invoices and/or companies; and
- b) found in possession of cheques for fraudulent payments at their work stations (in the case of two of them),

a reasonable employer could honestly believe that the employees were involved.

43. Further, the plaintiffs were members of the BEWU, who accompanied them during interviews and acted on their behalf throughout BPL's investigations into the allegations against them; and up to the time they were dismissed from employment. The plaintiffs were by all appearances afforded due representation during the investigatory process.

44. In the circumstances, I find that there was no breach of the Employment Act or the Industrial Agreement with the BEWU by BPL with respect to Tevaughn, D'Yanndra

and Katonia. As such, there was no wrongful or unfair dismissal of any of the plaintiffs from BPL's employ.

45. BPL shall have its reasonable costs of the action to be taxed if not agreed.

Dated this 5th day of November, 2021

A handwritten signature in black ink, appearing to read 'I. Winder', with a stylized flourish at the end.

Ian R. Winder

Justice