COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL LAW DIVISION
2017/COM/lab/00041

BETWEEN

PAMELA WALKINE

Plaintiff

AND

PARADISE ENTERPRISES LTD.

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Ms. Tanya Wright for the Plaintiff**
Mrs. Lakeisha Strachan appearing along with Mrs. Viola Major for the Defendant

Judgement Date: **21st February, 2022**

JUDGMENT

Commercial – Employment – Summary Dismissal – Wrongful Dismissal – Unfair Dismissal – Statutory benefits

1. The Plaintiff, Ms. Pamela Walkine **(the "Plaintiff")** seeks a declaration that she was wrongfully and/or unfairly dismissed by Paradise Enterprises Ltd. **(the "Defendant")** and compensation for the loss of her contractual benefits and damages. She claimed that she was terminated without notice or pay in lieu of notice and without cause as she was not guilty of the breaches of company policies complained of by the Defendant. She alternatively claimed that her termination was in fact a breach of her employment contract and statutory obligations.

2. On 4th July 2016 the Plaintiff was terminated by the Defendant for allegedly committing multiple violations of the Defendant's policies during her shifts on the 23rd to the 27th June, 2016. These alleged violations included routinely taking extended restroom breaks from fifty-five minutes to two hours and fourteen minutes, continually and routinely spending excessive time in the slot kiosk (at one time for four hours and forty three minutes), congregating on the casino floor with other staff for excessive lengths of time, routinely failing or refusing to monitor the casino floor, eating a full meal in the slot kiosk in violation of casino policy after being formally informed that lunch breaks were to be taken in the staff cafeteria or casino lounge and sleeping in a guest area for fifty-four minutes.

3. The Plaintiff claimed that the five day period complained of could not compare to the ten thousand days of erstwhile satisfactory and dedicated employment. She added that restroom breaks were an entitlement of all humans and that she did not recall any company policies which restricted the time limit on the use of restroom facilities. The Plaintiff also alleged that the slot kiosk was located on the casino floor and in her capacity as slots manager, her presence was required or necessary and that she was unaware of any set times to be spent therein.

4. The Plaintiff stated that because of a lack of staff, she and other members of staff were sometimes required to cover temporary absences for lunch breaks and that they would usually have to use their discretion to balance the taking of a lunch break and using the restroom. She maintained that the casino floor was at all material times in her managerial domain and that there was no internal policy to mitigate against the inevitable compromise of human physical strength and weakness due to the co-ordination of late or graveyard shifts.

5. The Defendant on the other hand denied that the Plaintiff was wrongfully and/or unfairly terminated and instead asserted that it was the Plaintiff's conduct and willful failure to follow the Defendant's policies and procedures which led to her dismissal. It denied embarking upon any campaign, malicious or otherwise to discredit the Plaintiff and terminate her summarily.

6. The Defendant claimed that the Plaintiff in fact had multiple formal and written complaints about to her behavior and her failure to follow policies throughout the course of her employment including but not limited to sleeping in a guest area during her shift, which led to her summary dismissal for willful violation of company policy.

EVIDENCE

PLAINTIFF'S EVIDENCE

7. The Plaintiff averred that her employment with the Defendant commenced in 1989 as a slot attendant and that during her first five years of employment she received performance ratings at grade four or above in her annual appraisals which meant that she exceeded the Defendant's standards. The ratings afforded her bonuses every year, including the year of her termination and that she had been promoted during her tenure to slots supervisor, senior slots supervisor and slots shift manager

8. During one of the appraisal exercises, her award was increased because the Chief Gaming Officer **("CGO")** had learnt of the tasks she had performed in addition to her regular obligations as Slots Shift Manager. After the appointment of another CGO, the supervision of her department took a negative turn. This change resulted in her having differences with the CGO as she had been very vocal about her colleagues and herself being treated unfairly. Her performance appraisal thereafter was negative because she and the CGO could not get along.

9. There were many unfavorable changes to the casino floor which negatively impacted herself and her co-workers, including but not limited to them having to stand on their feet for the duration of their shift and that there was even a recommendation for her termination which was opposed by a member of the management team.

10. During the twenty eight years employed she was never absent or late for duty. In May 2016, the Defendant's Human Resources Department directed her to its legal counsel, Mr. Samuel Rahming **("Mr. Rahming")**, who told her that she was the only manager who still worked an eight hour shift. She declined however, to work the nine hour shift and was invited to rethink her decision. On 31st May 2016 she informed Mr. Rahming that her decision was firm.

11. On 30th June 2016 she was suspended, the reasons for which were not disclosed to her and upon her return to work on 4th July 2016 she was terminated without being given an opportunity to address the allegations made against her by the Defendant. The Plaintiff maintained that the Defendant had embarked on a five day witch hunt in order to mount allegations which they used to terminate her and to evade compensating her.She immediately sought legal advice from her attorney who in turn addressed the Defendant on the termination in writing. She claimed that the Defendant's response to her attorney's letter was as callous as their decision to terminate her.

12. She had received several warnings by way of Official Notices of Unsatisfactory Performances **("ONUP")** between 1990 and 2016. She denied knowing of one and felt that the others were a result of the unmanageable policies of the Defendant or misunderstandings which could be explained and claimed that some of them should have been removed from her file. In relation to the ONUP dated 25 – 27 June 2016 (which evidenced numerous discrepancies by the Plaintiff), she stated that she had never seen the breakdown of shifts which purportedly accompanied it and claimed that it was clear that the Defendant had aggressively monitored her from 23rd June 2016 and used the same as a basis for her termination.

13. The Plaintiff questioned the level of detail kept of her movement and maintained that nothing like this was ever kept of any other staff members, she maintained that it was prepared retroactively, after her termination. She added that it was nothing short of a witch hunt which exposed the Defendant's deliberate invasion of her privacy by spying and reading messages on her cell phone.

14. In response to the Defendant's provision and reliance on several Official Notices of Unsatisfactory Performances relative to the Plaintiff, she refuted each one as follows:

    (a) ONUP dated 3rd September 1990 – Leaving the casino floor and not informing the slot technician or security and sleeping while on duty

    The Plaintiff claimed that this was the first warning she had ever received. The Defendant did not then nor at the time of her termination, provide a rest area for staff members on or near the casino floor for the grave yard shift which was between 2:00 a.m. to 10:00 a.m. It was instead located in the basement and to arrive there, which took seven to ten minutes, with several flights of stairs or elevator had to be traversed.

    It was a hard and grueling shift and during their allowed breaks, it would not be unusual for staff to get rest. She never rested on the casino floor or in any area in open view of hotel guests but that if she was sleep at any time during her shift it would be during one of her entitled breaks, in a discrete, secluded area out of sight of hotel guests. Despite receiving the warning she received an above average performance appraisal and received a bonus as a result.

(b) ONUP dated 17th May 1991 – Sleeping while on duty on casino floor. Written warning

The Plaintiff did not deny receiving the same. There was no rest area on or near the casino floor for staff who worked the graveyard shift. During their breaks they would use that time to get rest. The Plaintiff denied sleeping on the casino floor as the area where she took her break was discrete and secluded, out of the sight of casino guests. She was sitting on a stool at the time, and was not in a deep sleep as anything else would have resulted in her falling off of the stool. Despite receiving the warning, she received an above average performance appraisal and received a bonus as a result.

(c) ONUP dated 7th June 1992 – Reported sick and was allowed to go home before the end of her shift but was later seen at another section of the hotel with a male and female companion. Informed security that she would always carry the guests to their rooms

She honestly had no recollection of the incident complained of but acknowledged that the signature at the end of it appeared to be hers. Based on the description of the incident, she would have been off duty at the time of the reported violation. If she said she was sick then she was sick as she did not take sick days lightly however, she never called in sick as she had a perfect attendance record.

The fact that she returned to Atlantis five hours later did not suggest anything inappropriate. Despite being suspended for the incident she received an above average performance appraisal and received a bonus as a result.

(d) ONUP dated 14th January 1993 – Displayed very poor behavior when asked to sign in at the slot kiosk. She did not want to hand over the keys because the person asking for them was not the person she received them from.

The purported misconduct was as a result of a very petty exchange and that it was not based on any breach of policy. It was her insistence of following protocols which was why she refused to sign. The Plaintiff again concluded that despite being suspended for the incident she received an above average performance appraisal and received a bonus as a result.

(e) ONUP dated 31st May 1993 – Spoke loudly and rudely to a slot supervisor

She maintained that she never received this. She further stated that, she received an above average performance and received a bonus.

(f) ONUP dated 20th February 1993 – Left the casino floor after being denied permission to do so to change her shoes

This was a classic example of how petty casino management was at that time as casino staff was expected to be on their feet for hours, including walking about the casino floor without being able to change into comfortable shoes. She concluded that as a result, she did not sign and that she received an above average performance and received a bonus.

(g) ONUP dated 27 July 1998 – Left the hotel's premises without informing the relevant parties. Leaving her staff unsupervised which was said to be a serious violation of policies and procedures

The Plaintiff did not deny receipt but added that despite receiving the warning she received an above average performance and received a bonus.

(h) ONUP dated 23 November 2014 – Issued a warning for repeated lateness

The Plaintiff did not deny receiving the notice but successfully challenged the notice which was required to be withdrawn for inaccuracy. She concluded that again she received an above average performance and received a bonus.

(i) ONUP dated 25 – 27 June 2016 – Willful violation of known company policies

She never received this notice prior to her termination as it was issued on the date of her termination but was not actually given to her. She never saw the breakdown of shifts which purportedly accompanied it. It was clear that she was being aggressively monitored by the Defendant from 23rd June 2016 in order to have a basis for her termination. No record with this detail was ever kept of any staff members and alleged that it was prepared retroactively, after the Defendant decided to terminate her.

15. The 26th June 2016 footage from Dragons Nightclub of her sleeping was in fact taken at 6:00 a.m. during the graveyard shift and that during that hour the same was closed off to guests. In addition the area was dark and unlit with concealed partitions throughout its floor area and that many staff members took their breaks there because of its seclusion. The Plaintiff further explained that although it could be accessed by the casino, it was not a part of the casino floor.

16. The Defendant did not have a designated rest area for staff members and that it failed to recognize the toll the graveyard shift took on its workers. The breakdown would show that she rarely took her scheduled break or lunch breaks because they were usually short staffed and even when they did take a lunch break, managers were required to respond to calls immediately as situations occurred. Although they alleged that she was missing, there was no indication that she had been called and could not be reached or did not promptly respond.

17. In response to the complaint of excessive bathroom breaks and excessive time spent in the slot kiosk, the Plaintiff questioned why no one had bothered to find out whether the former was associated with a medical condition instead of using it as a reason to terminate her. She added that had she been questioned with respect to both incidences, she would have explained the reason she was required to be in the bathroom from time to time.

18. In any event, her time in the bathroom or the slot kiosk never prevented her from responding to any calls for assistance. She was not aware of any company policies which limited the time a staff member could use the restroom, the amount of time spent on the casino floor or which limited the time one could congregate with other staff members, or the amount of time a supervisor should remain in the slot kiosk. Moreover, the slot kiosk was located on the casino floor. The Plaintiff further averred that in comparison to her numerous promotions and awards, the ONUPs issued against her had no bearing on her termination.

19. It was her honest belief that she had a discretion as to how much time should be spent in any area of the casino including the casino floor which was her managerial domain. She maintained that her presence on the casino floor in no way fettered or restricted her ability to supervise her staff. She did not recall eating on the casino floor on both the 25th and 26th June 2016, despite the Defendant's claim that she was seen doing so.

20. The surveillance footage showed that she had not left the casino floor during her entire shift to take lunch which was not unusual for her to do. The Plaintiff averred that had the Defendant maintained the proper complement of staff, particularly managers and supervisors on shifts, she would have been able to take her lunch in a designated area.

21. As a result of her termination she was blackballed by the Baha Mar Hotel's casino. She explained that while she had attended several interviews, she was informed that she would not be hired after the references were requested and furnished. Summary Dismissal from Atlantis would strike a blow to any professional in the industry.

22. Although she was presently employed, she only earned her a fraction of the salary that she previously earned with the Defendant or that she could have earned with another casino. Her termination negatively affected her life as she had fallen behind with so many of her financial commitments, struggled to maintain her basic utilities and struggled to keep food on her table for her and her family.

23. The Defendant's actions of malice, spite and complete disregard for her humanity had ruined her financially, emotionally and psychologically and that she was now a fraction of her former happy confident self-sufficient self.

24. During cross-examination, the Plaintiff agreed that the list of conduct that would warrant termination without notice or with payment in lieu of notice was non-exhaustive. She agreed that her Employee Handbook formed a part of her employment contract with the Defendant and that where there was a conflict between the Employee Handbook and her employment contract then the latter would prevail.

25. The Plaintiff agreed that there were strict directives under the employment contract, her Employee Handbook, a 2015 memo by Hiram Victor **(the "Victor Memo")** and the Casino Slot Operations Department Policy and Procedures Operating and Training Manual **(the "Training Manual")**, which all stated that the duty meals provided should be eaten in the staff cafeteria and later the casino lounge. Additionally, there was no directive to eat in the slot kiosk on the casino floor and that she in fact failed to follow the policies and procedures put in place by the Defendant.

26. The Plaintiff agreed that if one failed to carry out the reasonable and lawful instructions of a manager, or used facilities designated for the use of guests or failed to strictly observe all company policies and control procedures generally or specifically, these would constitute violations which warranted discipline leading to termination. In reference to the Victor Memo, the Plaintiff denied that she was aware that the slot office was moved from the basement to the casino floor because the managers spent too much time there and that slot managers were only required to be in the slot office for fifteen to twenty minutes per day.

27. She knew Marcia St. Vil **("St. Vil")** and confirmed that she had previously given evidence in her case against the Defendant who had dismissed St. Vil for sleeping in the slot office as a manager. She could not confirm that St. Vil's dismissal was as a result of the contents of the Memo. After being shown a photograph of the slot kiosk on the casino floor, the Plaintiff testified that the slot managers would work between the slot kiosk and the slot office as needed.

28. The Plaintiff confirmed that in order to carry out her duties, she was required to work on the casino floor but that she could be contacted by radio and phone, as a result it did not require her to walk around. She only needed to be present on the casino floor to ensure that all of the equipment functioned properly and efficiently and added that she could perform her job inside the slot kiosk because it was on the casino floor.

29. She was not aware of a policy that would allow her to remain in the kiosk until she received a call on the radio. The Plaintiff confirmed that she assisted with the creation of a Slot Attendants Floor Duties card, which was required to be filled out at the end of every shift and also confirmed that she would have to be on the casino floor to complete it.

30. Her prolonged bathroom breaks were as a result of medical challenges which she did not wish to disclose. She denied that being in the bathroom could be considered as taking a break as it was necessary and an absolute emergency. She further denied that she could have taken a lunch break based on the amount of time she spent in the bathroom.

31. It took about five or six minutes to access the casino lounge by either elevator or stairway. The casino lounge consisted of a dark room for people to rest and contained vending machines. It was mostly used by the casino dealers who took a break every twenty minutes.

32. The grave yard shift, which was between 2:00 a.m. to 10:00 a.m., was a quiet shift and on the 27th June 2016, while she could have gone to the casino lounge to take a rest, she chose not to because as a manager she was allowed to make whatever decision she felt would be in the best interest of the operation at the time.

33. The Plaintiff agreed that she had breached the policy prohibiting use of guest facilities and the guest bathrooms, but that she had needed to rest her legs even though she may have only fallen asleep for a couple of minutes. She added that it was only a short break and that she was in close proximity to the casino floor in a closed environment. She could not recall whether the room was bright due to the sun having risen at 6:00 a.m. On that particular night however, she did not have authority to go into Dragons despite sometimes being authorized by upper management to do so.

34. She admitted that it would be incorrect to say that the Defendant had not designated a rest area for staff members as the Defendant had designated the casino lounge for that purpose. Her duties in the slot kiosk, were to conduct briefings at the beginning of each new shift, being present for manual sign-ins by the slot staff, check company emails, oversee the issuance of radios, and when necessary conduct appraisals and issue keys.

35. She further explained that she would have to conduct appraisals twice a year in June and January which could sometimes take the entire month to complete because she had fifteen slot attendants and ten technicians. There were about eight hundred plus slot machines; but on weekdays there would be about three attendants and on weekends there would be about two to five attendants. The slot attendants who worked on her team had to inform her when they were taking their break.

36. It was after her suspension that the Human Resources Department asked her to discuss the allegations made against her. Her responses were:-

    1. With respect to being in the slot kiosk, she stated that in addition to checking her emails, she could have also been doing other things, even though she did not say so.

    2. With respect to eating in the slot kiosk, the Plaintiff claimed that she may have been hungry and needed to quickly grab something to eat.

37. She explained that her sleeping in the guest area was because her mother had had a stroke and that she assisted with her care which left her tired. She stated that she tried to say what the problem was which necessitated her spending long periods of time in the bathroom but she was shut down. Prior to June 2016 she did not advise the Defendant that she had a medical issue as she had wanted to manage it the best way that she could however, it had gotten worse.

38. After the questions were posed to her she was asked to leave the room and upon her return she was informed that she was terminated. She was not paid all of her accrued vacation and owed salary so she returned to Human Resources to query whether she would receive them or not and they later deposited four weeks' vacation pay in the amount of two thousand four hundred and eighty-two dollars and one cent to her account.

39. Prior to her suspension and termination she had received her bonus of one thousand two hundred and ninety-two dollars and forty-eight cents. She agreed that while she was not initially paid all of the monies owed to her when she was terminated she did in fact receive her vacation pay and holiday pay. She did not request a Review Board Hearing after she was terminated even though it was an avenue available to her by the company.

40. She denied sleeping on the job, which she acknowledged was a major breach of her employment contract, but stated that she was resting which was different and was not a major breach. She agreed that she been given prior warnings and a suspension for sleeping while on duty but that she did not recall being shown pictures of her sleeping. Upon refreshing her memory with a picture of her sleeping during her shift she explained that while she was resting she dozed off because she was very tired.

41. During re-examination, the Plaintiff averred that during the graveyard shift, the most senior person in the casino slot department on the casino floor would be a manager and as such, she was a part of management. Staff on her team would require her permission to be in guest areas which included bedrooms, corridors, swimming pools, bathrooms, toilets etc. When Dragons was closed, it was roped off to prevent guests from entering

and that was the time that staff members would go inside. She exclaimed that it was impractical to follow every guideline and policy.

42. The Plaintiff gave as an example of not following the policy that the Defendant's employees had to use the bathroom located on the casino floor because the staff bathroom always had an issue and was located at the very bottom of the basement. Further, because they were working with limited staff, the employees needed to be in and out of the bathroom as quickly as possible, hence the discretion was exercised to allow them to use the bathroom on the casino floor.

43. The Plaintiff explained that while there was a chain of command for managers and their supervisors, the system was discontinued and never replaced and meant that a manager had to make the best decisions for the operation. This sometimes meant going against the rules.

44. Between the 23rd and 28th of June 2016, she could not recall whether there was any incident which occurred on her shift which required her response and assistance. She recalled that she always had her radio or cellphone on her and that she went into Dragons instead of the casino lounge because it was closer in the event that she did receive a call.

45. Wendy Ambrose, a former Slot Attendant who had worked with the Defendant from June 1989 to March 2016 **("Ms. Ambrose")**, averred that while employed with the Defendant, she worked eight hour shifts but was subsequently required to work nine hour shifts. The Plaintiff was one of her supervisors and that she was dedicated to her job.

46. For the duration of her employment with the Defendant, she never knew the Plaintiff to be missing for long periods of time, absent or late and that the only time she knew her to be away from work was when she was on vacation. It would have been impossible for the Plaintiff to go missing for an extended period as other staff members would usually be looking for her.

47. When she worked the same shift as the Plaintiff, she personally observed that the Plaintiff would rarely take full lunch breaks when the casino floor was short staffed or when she was the sole manager. Ms. Ambrose added that being short staffed on the casino floor was the norm rather than the exception. During her earlier years with the Defendant, there would normally be five persons working a shift to adequately cover the assigned zones that the casino floor was divided into and that this amount would allow for one or sometimes two people to cover one to two zones.

48. In recent years the number of staff decreased and sometimes there would only be two people on the entire casino floor. Consequently, when one of them took a break there was only a sole individual left to cover the entire casino floor. In those instances, managers and supervisors like the Plaintiff would have to pitch in to cover the casino floor and attend to calls to ensure that there were no complaints from the Defendant's guests.

49. While it was the Defendant's policy for staff to take their lunch breaks, many times the Plaintiff would be unable to eat her lunch as she would have to remain on the casino floor, and even though the Defendant provided lunch for its staff, because of its location

it would take several minutes to get to the cafeteria which was a problem for supervisors as they would have been unable to promptly respond to any calls or complaints.

50. She claimed that it was therefore not unusual to see managers and supervisors eating in a discrete area on or near the casino floor. She acknowledged that while it was not permitted, it was a call that had to be made in order for them to attend to the Defendant's guests. If complaints made by the Defendant's guests went unresolved, the managers would be held responsible.

51. The Defendant was well aware of the challenges faced by their employees however the complaints fell on deaf ears because they did not prioritize staffing the casino floor. The Defendant was well aware of everything that its staff did on the casino floor due to the existence of surveillance equipment.

52. Ms. Ambrose claimed that the Defendant's senior management had systemically stripped amenities away from the casino staff which made the performance of their duties uncomfortable. By example they continuously failed to provide adequate staffing, they instituted a no sitting policy on the casino floor and the administrative office located in the basement was moved to the casino floor as a slot kiosk; the slot kiosk was where the managers and supervisors completed their daily paperwork which was concealed from guests by a tall machine to provide the privacy needed to prepare and store internal records and information.

53. The graveyard shift was described as such because of its hours and because the casino was dead at those times as there were hardly any guests or none at all on the floor. All of the tables were closed around 4:00 a.m. She stated that because everyone possessed a radio and could be contacted at all times, casino staff did not stand on the casino floor for the entirety of their shift. She could not account for where everyone went however, it was not unusual for the staff to be in a quiet discrete area near to the casino floor in order to sit or rest.

54. It was not uncommon for the Defendant's staff to rest in Dragons during the graveyard shift because it was closed and therefore dark with a sunken area and a bar which completely blocked the view of the dance floor. The only visual after closure would be by surveillance cameras, the existence of which all staff were aware. The Defendant was aware of this practice by its employees and that the Defendant only used the information against them when they wanted to reprimand or terminate them.

55. She concluded that the employee's lounge located off of the casino floor was an undesirable and impracticable place for staff to go to rest because of its distance, an impracticality which Defendant was aware of. She added that the distance was the reason the administrative work was moved to the casino floor.

56. During cross-examination, Ms. Ambrose confirmed that the Plaintiff functioned as a supervisor/manager and as such, would evaluate the performances of the employees on the casino floor. The Plaintiff was responsible for resolving conflicts between guests and staff and instructing staff as to which area they should work in, when they should take their break and for signing off on transactions as slot attendants were only allowed to sign off up to a certain limit.

57. If manpower allowed, the slot attendant reported to the slot supervisor who in turn reported to a manager, however there were times when there were only two slot attendants and either a supervisor or a manager on duty. If the manager was the only manager on duty then he would act as both supervisor and manager and everything would be reported to that person. Ms. Ambrose stated that she would go to the slot kiosk at the beginning of her shift and during her shift if she ran out of materials such as papers or to recharge the batteries in their radios. However, she would not stay and wait for the battery to recharge so she would be in and out of the slot kiosk.

58. She would not be able to see the slot managers from the slot kiosk when she went there as they were stationed on the casino floor.

59. While Ms. Ambrose worked with the Plaintiff, there were also other supervisors with whom she worked. There were times when there was both a supervisor, a manager and a slot attendant on duty. By the time she had left the Defendant in 2016 there would be two slot attendants and one supervisor on the casino floor. Wellington Carey was one of her supervisors who would take his breaks by physically leaving the casino floor but advised them to contact him on his cell phone if any issue arose.

60. During the day when she would go to the slot kiosks, the managers would not always be inside as they would be stationed over the casino floor. She agreed that in order for a supervisor to say whether or not a slot attendant's duties were completed as it should have been, he/she would have to be on the casino floor.

61. She recalled the slots office's removal from the basement to the casino floor but could not say why it was moved. She would sometimes take her breaks in the cafeteria, the dealer's lounge, leave the property or roam around the property. She was not allowed to eat lunch on the casino floor.

62. No one had ever told her that she could not eat in the lounge, corridor or balcony. The cafeteria was offered to her because that was where the free lunch was. She was informed of that during orientation. Lunch would not actually start until you left the casino floor. Once you were on the casino floor you would not be on a break. Once could consider a five minute standing time on the casino floor as resting.

63. During the graveyard shifts, an employee would be permitted to sit in a designated area to observe the casino floor without being seen by guests. As soon as a guest was seen entering the casino floor the floor staff would have to stand up and be ready to assist the guest. This directive was given by managers from 1989 when she first began working with the Defendant.

64. Prior to her departure in 2016 the managers did not allow sitting down on the casino floor during the grave yard shift but whether or not it was imposed was based on the particular director in charge at any given time. They would have to take a chance to do so as surveillance would be watching the casino floor and could report you at any minute. Dragons was considered a part of the casino floor due to slot machines being placed therein. They were allowed to take a break in the casino lounge.

65. Mr. Wellington Carey, a former Slots Shift Manager with the Defendant **("Mr. Carey")**, averred that the Plaintiff was a workaholic as she would regularly work double shifts and

that he would admonish her to take her breaks. He further averred that both he and the Plaintiff were dedicated workers for the Defendant who did everything needed in order to ensure the good operation of the casino floor. Both he and the Plaintiff were fortunate enough to be promoted.

66. He never knew the Plaintiff to be absent or late from work. He continued that at the time he was terminated he worked eight hour shifts with the Defendant. He never knew the Plaintiff to take her full lunch break because the casino floor was short staffed. In 1989 they had had a total of thirty five slot attendants with ten to fifteen of them on the casino floor during any shift except the graveyard shift. Later on there were only twelve slot attendants as throughout the years staff were either terminated or resigned and had never been replaced.

67. However, at the time of his termination there were only about three to four slot attendants with the exception of Fridays and Saturdays when there would be more than six. Sometimes they would be down to two people on the entire casino floor, who would be expected to cover all nine zones. If one of them had to leave the casino floor to take a break, then only one person would be left to cover the entire casino floor.

68. When the casino floor was understaffed, managers and supervisors like the Plaintiff would have to assist and attend to calls. The Defendant was well aware of the challenges casino workers faced due to their failure to maintain a satisfactory complement of staff.

69. While the Defendant provided lunch for its staff in the staff cafeteria, it would take several minutes to get there by stairs or by elevator as it was located in the basement of the resort. Once there, you would be off of the casino floor entirely and that supervisors could not promptly respond to calls made and the Defendant had a low tolerance for this. As a result, managers or supervisors would end up with shorter breaks if there was a call that they had to respond to as they were held personally accountable for resolving the Defendant's customer's complaints.

70. He confirmed that eating or drinking on the casino floor was not permitted and that he never witnessed the Plaintiff eating on the casino floor. He further stated that eating in the slot kiosk was also not permitted but a manager or supervisor could make a decision to do so. The Plaintiff rarely took a break as she always seemed to put the interest of the Defendant before her own. .

71. There was a booth area where supervisors and managers completed their daily paperwork and reports, which was concealed from the guests by tall machines provided for privacy. There was a door affixed to the booth which could be closed and that the activity therein could only be seen by the Defendant's surveillance cameras.

72. While all managers were aware that the booth had twenty four hour surveillance, eating in the booth out of sight of guests as opposed to leaving the casino floor when they were short staffed was a lesser of two evils. He further stated that every breach of a company policy would not result in reprimand as he would always consider the nature of the rule or policy. Eating in the booth, he opined would not be considered as gross misconduct.

73. He also worked the graveyard shift when the casino would be dead as there were hardly guests on the floor. As a result casino staff did not remain on the casino floor for the entire shift as they would be able to be reached by radio. He claimed that it would not be unusual for the Defendant to find casino staff in a quiet, discrete area near the casino floor, such as Dragons which would be closed, to sit or rest as actually sleeping on the job was not permitted and was a major breach of company policy. The Defendant was aware that staff rested in Dragons and only used this against staff members when they were looking for reasons to reprimand or fire them.

74. There was an employee's lounge located in the basement off of the casino floor which was an undesirable place to go to rest because of its distance. The lounge was moved to the casino floor to avoid managers leaving the area to complete their administrative duties.

75. He would have to make judgment calls regarding the conduct of his staff and that he took into account that Dragons was closed, that it was a discrete area out of the sight of guests and that it was in the immediate vicinity of the casino floor which allowed for quick responses to calls, that the area was non-sensitive as there were no cash or other transactions taking place and that the grave yard shift was a grueling shift.

76. During his shifts with the Plaintiff, he could not recall any shifts when she would go missing for long periods of time and that it would be hard to miss because everyone would be looking for her.

77. During cross examination, Mr. Carey admitted that he and the Plaintiff never worked the same shift as he was the night shift manager whilst she was the day shift manager. When he was leaving, the Plaintiff would be arriving. As he did not work the same shift with the Plaintiff, he would have never been able to witness her eating on the casino floor. However, if there was a slot tournament he would sometimes work the day shift while the Plaintiff would be the supervisor or manager on duty.

78. When he came to relieve the Plaintiff, they would exchange information on whatever took place on the casino floor during her shift and that she would make him aware that he was unable to take a break. In response, he would tell her that she needed to take her one hour lunch break. While there were policies and procedures in place, there were times, as a manager, you would be unable to take a break.

79. There were times when he took his break and he would be interrupted by a call that a slot manager or supervisor was needed back on the casino floor. He would have to leave his food and go back to the floor to perform his duties. Accordingly while it was his employer's position that staff take a lunch break, if they were understaffed, it was impossible to take a lunch break as they were told by the Defendant that the customer always came first.

80. Mr. Carey stated that while he had heard about the Victor Memo, he had never seen it. When they were moved to the slot kiosk on the casino floor it was just a work station. He had never been told to report to the casino floor. He would be apprised of any changes in policy by email and from time to time an email would be sent out with a memo attached.

81. While there was a training manual in his office, he did not personally read it. It was a strict rule not to eat in the slot kiosk on the casino floor. On a number of occasions the slot department was not the only department which ate meals in the kiosk.

82. The walk from the casino floor to the casino lounge was about five to seven minutes depending on which direction one went in and not a twenty minute walk. The time spent in the slot kiosk depended on what was being done inside and he believed that spending three to four hours a day was ridiculous, very long and excessive. He explained that he would conduct research based on complaints made which would sometimes required him to be there, on average, fifteen to twenty minutes.

83. During evening shifts he would have to review sign in details, hand out radios, give out lineups, mark the employee register of files, brief the slot attendants of what was taking place and what was expected to happen. The graveyard shift however would not have to go through such a line up. The size of the slot kiosk did not allow for any place to stay or sit and he did not recall any chairs being inside it.

84. The casino was a twenty four hour operation and that the slot machines in Dragons were available to the guests twenty four hours a day. His job was to be on the casino floor, patrol the area and oversee the day to day operation of the casino slots.

85. During re-examination he explained that the slot machines in Dragons located at the top of the bar area and not on the floor area. The policy and procedure operations and training manual were used by all departments.

86. He clarified that it would take about five to seven minutes to get to the basement and another five to seven minutes to get back to the casino floor. Time was spent in the kiosk to complete employee evaluations, a survey provided by the Human Resources Department and a money laundering test. Evaluations were conducted every six months and the money laundering test once a year.

DEFENDANT'S EVIDENCE

87. Ms. Chanel Ferguson, a Director of Labour Relations with the Defendant **("Ms. Ferguson")**, stated that she had held the position since December 2018 but prior to then had held various positions including Associate Director of Human Resources. She explained that that as an Associate Director, she provided advice, consultation and assisted in disciplinary or other matters between managers and employees.

88. She was familiar with the Plaintiff in her capacity as a former slots shift manager when she was Associate Director. She was present in in the meeting held with the Plaintiff on the 4th July 2016 which also included Ms. Hunt, a slots service manager at the time and Louis Spetrino, the former Vice President of casino operations. The meeting began with her reading the allegations to the Plaintiff. The Plaintiff responded that she had a bowel issue that she did not advise management or the slots department of in order to ensure that the casino floor was covered and that the excessive time spent in the slot kiosk was as a result of her checking emails.

89. The Plaintiff said that she ate in the slot kiosk because she was hungry and needed to eat. In response, Ms. Ferguson referred the Plaintiff to the Victor Memo which stated that lunch breaks were to be taken in the staff cafeteria or the casino lounge to which the

Plaintiff had no response. The Plaintiff's response to being caught sleeping in Dragons was that her mother was admitted to hospital where she had been all night but that she still came to work.

90. The Plaintiff's demeanor was surprising because she accepted all of the points and did not push back or argue but apologized whereas other employees would have tried to defend themselves. After the Plaintiff was given an opportunity to respond to the allegations they decided to terminate her for willful violation of company policy and the Plaintiff signed the Unsatisfactory Performance Memo and the Official Notices of Unsatisfactory Performance dated the 4th July 2016. Subsequently, the Plaintiff was paid all of her accrued vacation and her outstanding salary which was confirmed by her endorsement of the Employee Termination Worksheet.

91. Ms. Ferguson explained that it was a willful violation of company policy to sleep while on duty, which warranted disciplinary action up to and including termination as outlined in the casino slot operations department training manual. The Plaintiff being found in a guest area without authorization was also a breach of the Defendant's employee handbook.

92. The training manual stipulated that lunch was to be eaten in the staff cafeteria or the casino lounge. The employee handbook stipulated that eating was confined to a specific area provided for meals and that eating was prohibited in any other areas.

93. During cross examination, Ms. Ferguson stated that she became aware of the surveillance report prepared concerning the Plaintiff's acts after the Plaintiff returned from her suspension. She was not aware of a five day surveillance investigation of the Plaintiff.

94. She would know of the Plaintiff's shift requirements if she were to read her contract. She could not confirm whether the Plaintiff and Mr. Carey had been replaced. While she had direct knowledge of the Plaintiff's violation, she did not actually see her sleeping on duty.

95. She was not present at the meeting when the Plaintiff was suspended as Human Resources was never involved in suspension process and they only saw the employees upon their return. She explained that as it was not her area, she would not have been involved in a return meeting. She would have only been involved in a return meeting if she was asked to sit in if the person responsible for the casino was not available.

96. Ms. Anishka Hunt, the Executive Director of Casino Administration of the Defendant stated that prior to her present position, she was the Director of Slot Operations from November 2015 to 2017 and the Slot Operations Manager from April 2015 to November 2015. The duties and responsibilities for those positions included overseeing the operations of the slots department and the entire casino floor.

97. She was the immediate supervisor of the Plaintiff. She confirmed that the terms and conditions of the Plaintiff's employment were contained in her employment contract, her job description, the policy and procedures operations and training manual of the casino slot operations department, the employee handbook, the acknowledgement of prevention of sexual harassment code of conduct and the Victor Memo.

98. The Plaintiff's duties and responsibilities as a slots shift manager included but were not limited to the effective management of all slot operations, slot supervisors and slot attendants by ensuring that they routinely provided customer service in accordance to the department's core values, the effective handling and the resolving of any customer concerns, ensuring adequate staffing on the casino floor and adjusting staffing effectively based on anticipated business volumes, monitoring the staff to ensure best appearance standards are presented and compliance to all dress and grooming standards.

99. Shift managers also were to ensure that all equipment functioned properly and efficiently and handled any malfunctions appropriately, report any slot machine malfunctions to the slot technician department, provide slot staff for slots special events as needed and participate in event processes as needed and ensure the adherence to all policies, procedures and standards of the Defendant.

100. Ms. Hunt stated that in order to effectively carry out the aforementioned duties, it was mandatory for the Plaintiff to constantly walk the casino floor during each shift and that it was not a job which required her to remain behind a desk or in front of a computer. The Plaintiff's visibility on the casino floor was necessary in order to answer guest complaints and/or issues, monitor the slot attendants, ensure that all equipment was functional and to report issues or malfunctions to the slot technicians.

101. At the end of each shift, the Plaintiff was required to fill out a Slot Attendants Floor Duties Rating Card which was a tool utilized to monitor the activities of the slot attendants. This card could only be completed if the Plaintiff was walking the casino floor. It was also a part of the Plaintiff's duties to supervise the Free Slot Tournaments which took place every day at 10:00 a.m. to 10:30 a.m. and at night from 9:00 p.m. to 9:30 p.m. The Plaintiff was aware of all of her duties.

102. Prior to May 2015, all slot supervisors and slot shift managers reported to a slots office in the Casino Executive Office where a briefing of the slots team would be held, company emails were checked, keys and radios were distributed, a report on down machines was updated and disciplinary procedures were carried out. The Victor Memo was issued as a result of Ms. St. Vil being summarily dismissed for gross neglect of duties due to her being found sleeping on the job in the slots office. The Victor Memo was sent to Mr. Carey, the Plaintiff and other employees.

103. In addition to the Victor Memo, the Plaintiff along with the other slot shift managers and slot supervisors were required to write a report regarding the long periods of time being spent in the slots office because the Defendant felt that the slot shift managers and supervisors were spending too much time in the slot office and not enough time on the casino floor. This was why the slot kiosk was placed directly on the casino floor.

104. She described the slot kiosk as a wooden structure surrounded by slot machines with an open top which allowed casino surveillance to monitor it. There was a door at the front with a lock along with a desk with a computer chair and a place for filing papers.

105. Ms. Hunt then stated what the Plaintiff's infractions were. On the 27th June, 2016, the Plaintiff was caught sleeping in Dragons, which was a public guest area and she was reported to the Casino Executive team. This resulted in the decision to review the

Plaintiff's activities over the previous five days and that investigation concluded that the Plaintiff had committed the following breaches:-

(i) She routinely took extended restroom breaks,
(ii) spent excessive time in the slot kiosk,

(iii) congregated on the casino floor for an excessive period,

(iv) ate in the slot kiosk and

(v) slept in a guest area.

The Plaintiff was recorded in the slot kiosk and the restroom for over 5 hours out of her 8 hour shift, which made it impossible for her to walk the casino floor as was required of her.

106. She confirmed that sleeping while on duty was an example of misconduct in the Training Manual which warranted disciplinary action up to and including termination and the Plaintiff also breached the employee handbook by being in a guest area without authorization.

107. As a manager, the Plaintiff was to lead by example. A subordinate of the Plaintiff had seen the Plaintiff sleeping and reported it to her, adding that it was not conduct becoming of a manager who was well aware of company policies. During the 30th June 2016 meeting held with herself, the Plaintiff and Mr. Spetrino, the Plaintiff was advised of the surveillance report and the infractions found and was suspended for four days to allow the Defendant to conduct an investigation and she was given the Unsatisfactory Performance Memo dated the 30th June, 2016.

108. Upon the Plaintiff's return from suspension on 4th July 2016, a meeting was held with herself, Ms. Ferguson and Mr. Spetrino during which the Plaintiff was advised of the infractions and the surveillance report and was given the opportunity to respond. The Plaintiff explained that she spent excessive time in the slot kiosk to check emails, that she ate in the slot kiosk because she was hungry, that she was found sleeping in the guest area because she was up with her mother who was admitted to the hospital and that the time in the bathroom was as a result of a medical problem that she did not wish to elaborate on and which she did not advise management of.

109. Thereafter, the decision was made to terminate the Plaintiff. Upon being terminated, she was given the Unsatisfactory Performance Memo dated 4th July 2016 and the ONUP and she had signed both.

110. As an employee of the Defendant, the Plaintiff was entitled to a lunch break and a bathroom break whenever needed. There was no reason why the Plaintiff willfully ate in the slot kiosk knowing it was against company policy nor for spending forty five minutes in the restroom. If the Plaintiff had a medical issue she should have immediately informed management. The Plaintiff's excessive time in the slot kiosk meant that the slot attendants were left unattended and that the Plaintiff would not have been present for the free Daily Slot Tournaments.

111. The only reason that the Plaintiff would have been required to stay in the slot kiosk for any length of time was to conduct briefings at the beginning of a new shift, for the manual sign ins by the slot staff, to check company emails or to be present for the issuance of radios which would take a period of fifteen to twenty minutes for the entire day at most.

112. Sleeping on the job was the most egregious breach by the Plaintiff. From the start of her employment she was twice found sleeping on duty and twice given written warnings. She was therefore aware that there was a rule against sleeping while on duty. Ms. Hunt denied that the Defendant had pursued a malicious and transparent campaign to discredit the Plaintiff just because she had refused to sign an Addendum to her employment contract.

113. It was the Plaintiff's behavior which led to her dismissal and that the Plaintiff was well aware of the Defendant's rules and procedures as she admitted in the evidence she gave in **Marcia Knowles St. Vil v. Paradise Enterprises Ltd. Action: IT/NES/70/2016**.

114. In **Marcia Knowles St. Vil**, Vice President of the Industrial Tribunal, Marilyn Meeres, outlined the admission that was given by the Plaintiff:

> **"28. Under cross-examination Ms. Walkine says she was the immediate Supervisor of the Applicant who she gave a copy of the Company's Policy Manual and she was aware of the policies relative to her duties as a Slot Supervisor.**
>
> **30. The witness stated that Supervisors and Managers were allowed to take breaks in the Slot Operations Office. However, when referred to the Manual the witness agreed that all breaks are to be taken in the Casino Lounge or in the Employee Cafeteria. It specifically said employees are not permitted to take breaks in the Slot Operations Office. She agreed this applies to her and the Applicant.**
>
> **31. This witness also agreed that sleeping on the job was considered a major breach and that the Applicant was well aware of this fact."**

115. During cross examination, Ms. Hunt confirmed that there was nothing in the Plaintiff's contract which mandated that the Plaintiff constantly walk the casino floor but as a slot shifts manager, she should have known when she should be on the floor and what she should look for. During the week of the 23rd June 2016 to 30th June 2016, while she did receive complaints from guests with respect to members of the slot team, she did not receive any complaint specifically about the Plaintiff or about other members of the casino slots department with regard to their appearance or attendance.

116. If there was an equipment malfunction the Plaintiff would have to report it to the slot technician or ultimately the director of slot operations and depending on whether it was a minor issue or not, the Plaintiff may have had to repair a slot machine herself without the assistance of a technician. If a technician was needed, one did not have to move from the casino floor to contact him.

117. As the slot operations manager she had the same responsibilities as the Plaintiff and while she frequently walked the casino floor she did not constantly walk the casino floor. During the slot shift tournaments, the Plaintiff was responsible for confirming the players' identities, ensuring that the machines were up and running, that the slot attendants were

present and that the guests were aware of the rules as set out in the policies and procedures.

118. She could not say whether there were any complaints about the tournaments held from the 23rd to 30th June 2016. She explained that the Victor Memo was a reiteration to state that lunch breaks were to be taken in the staff cafeteria or casino lounge as it was a new move for the team and they were required to report directly to the casino and not to an office.

119. The cafeteria was for the benefit of every staff member. The surveillance team was a part of every department of the Defendant as they were responsible for protecting the company's assets thus they were everywhere yet separate. It was the duty of the surveillance team to report any inefficiencies or irregularities, whether minor or major. The surveillance department provided a daily end of day report which was given to senior management of which she was a part and she tried to review the report daily.

120. On its own, eating in a non-designated area would not amount to termination. On the 27th June 2016, she received a surveillance report which indicated that the Plaintiff was eating in the slot kiosk on the 26th June 2016. She explained that it was a huge issue that the slot attendants were left on their own while the Plaintiff spent excessive time in the slot kiosk as they needed supervision.

121. Ms. Hunt stated that a manager should not decline to take a meal break, even if the Hotel was short staffed, as everyone was entitled to a meal break and a one hour break. There were processes in place for other staff to supervise if the Plaintiff took a meal break. Slot attendants should never be left unattended as they should be properly supervised and managed throughout the day and that there was a process in place if necessary if a manager was not physically on the casino floor.

122. From the 23rd June to the 27th June 2016 the slots were fully covered by slot attendants. There were no reports by the slot attendants or the manager about the conduct of the Plaintiff. She added that she did not have any personal knowledge about the casino operations or guest experiences being adversely affected by any conduct of the Plaintiff.

123. The executive team informed her that she had to review and address a situation involving the Plaintiff. She had received a guideline of the Plaintiff's conduct from the surveillance department and the executive team had thereafter requested to review the footage directly from the surveillance department.

124. The review of the footage was conducted immediately after the request, and the [five day] report was also provided immediately. She along with the director of casino surveillance watched the footage of the five days of the Plaintiff's eight hour shifts. If security observed a staff member sitting, sleeping, chewing gum or talking to another staff member, they would usually contact the director or their immediate supervisor to notify them.

125. The surveillance report confirmed that the Plaintiff was in the slot kiosk for some three hours and five minutes on the 23rd June 2016 but she did not have firsthand knowledge of what the Plaintiff was doing while inside. She was able to complain about the time spent in the slot kiosk because she knew the duties of a slot manager as well as those of

a slot supervisor however, she had never worked on the casino floor. She did not have direct knowledge of what the Plaintiff was doing while in the slot kiosk off of the casino floor or inside of the bathroom.

126. Ms. Hunt then explained that congregating on the casino floor was different from working and being productive. There were no policies or procedures which spoke to the frequency or the duration of bathroom breaks. The Chief Gaming Officer, a position higher than the Plaintiff, would, on a few occasions, work the grave yard shift however, he did not work the grave yard shift on the 27th June 2016.

127. The Plaintiff's infractions happened prior to the five day investigation, were a taken into consideration when terminating her. The investigation entailed discussions, a review of the file, a discussion with her labour Human Resources Manager and further investigations into the footage. The Plaintiff was offered the report compiled by her and Human Resources but she made it very clear that she was not interested in viewing it and that she just accepted everything as it was.

128. All alleged infractions were not subject to a five day investigation. Company policies and procedures changed over the years and that she did not know what the company policies and procedures were in 1990 or 1993. She denied that it was a subordinate who approached her about the Plaintiff or that there was any policy or practice in place that would have prevented surveillance from providing information to her immediately.

129. She denied that the decision was made to terminate the Plaintiff, regardless of what her response may have been. Ms. Hunt agreed, that at no time did she question the employees working on the days when the Plaintiff was investigated to determine whether the operation of the casino floor was lacking in any way.

130. The time spent by the Plaintiff in the slot kiosk was not justifiable and she did not have to investigate the time spent as she knew exactly what was supposed to have been done in there. Prior to the termination and suspension, the Plaintiff could not explain what she was doing inside for such an extensive length of time. She did investigate the Plaintiff's time spent on the casino floor through the surveillance footage but the surveillance footage did not have sound and one could not hear what the Plaintiff was speaking to her staff members about.

131. She agreed that it would have been reasonable to confirm what was being said by the Plaintiff if one was contemplating terminating the Plaintiff. She disagreed with the notion that the Plaintiff had gone above and beyond in the performance of her duties She also disagreed that the Plaintiff had delivered consistent professional service in her twenty seven plus years with the Defendant. She did however agree that the Plaintiff was a knowledgeable part of the casino operation staff for the twenty seven plus years that she was employed.

132. There was a loss of trust in the Plaintiff after seeing the in the five day surveillance footage. She could not confirm that the Plaintiff's termination was as a result of a witch hunt designed to release the Plaintiff without compensating her.

133. Upon re-examination, Ms. Hunt stated that in the surveillance footage, she could see who the Plaintiff was talking to, and it was not any of the slot attendants on duty but

instead a cocktail waitress. She added that she knew the slot staff, all slot attendants, the other supervisors and the slot technicians and that she could tell them apart based on the uniform worn, which differed from the uniform of the cocktail waitress.

134. The Plaintiff was congregating with cocktail wait staff, taking drinks off of the trays, eating ice, dropping ice on the floor, sitting on the casino floor in slot chairs with gaming officers and based on the casual movement of the body she concluded that it was casual conversation.

135. Ms. Hunt stated that the 4th July, 2016 Notice of Unsatisfactory Performance was prepared after her suspension and that the lines at the bottom of the document were prepared after the discussion with the Plaintiff on return from her suspension. It would not have made a difference if it was a subordinate rather than the surveillance department who reported the Plaintiff. Additionally she could not say why the reports from the 23rd to the 26th June 2016 were not brought to her or the executive team's attention.

136. The decision to terminate the Plaintiff for the infractions was not a decision that she personally could make. Her discretion only extended to the supervision or management of the casino floor. Ms. Hunt maintained that the management and supervision of the floor was clearly lacking as the casino floor could not have been effectively managed or supervised for first one or two hours out of an eight hour shift.

137. When the Plaintiff was questioned about the time spent in the slot kiosk, she had indicated that she was checking e-mails. Ms. Hunt further stated that she did not prevent the Plaintiff from taking her lunch break on the 23rd 24th and 27th June 2016 as it was her entitlement. An infraction was taken seriously whether it was listed in the employee handbook and not listed elsewhere.

138. Ms. Heather Allen, the Executive Director of Surveillance Operations in the Security Division of the Defendant (Mrs. Allen), averred that the Surveillance Department was responsible for the operation, maintenance and observation of the Surveillance System Recording Device which was located throughout the entirety of the Defendant property. The recording device allowed the Defendant to record and download footage for future viewing.

139. Ms. Allen further averred that she was aware of a report compiled by Mr. Bethel and Mr. Pieri of the surveillance team, which resulted in her downloading the footage from cameras located throughout the property. The footage showed the movements of the Plaintiff from the 23rd June, 2016 to the 27th June, 2016. At the time of the download, the recording device was functioning properly as the time and date-stamps were accurate. She was able to view the image shown in the cameras, the device was recording and she was able to download footage.

140. During cross examination, Ms. Allen admitted that she knew Mr. Bethel and that he was still employed with the Defendant in casino surveillance however, she did not know whether he was asked to prepare a witness statement in this matter. She added that downloaded footage would be saved indefinitely in the event it was needed again and that copies would be distributed to labour relations in Human Resources, A copy of the footage was given to labour relations in 2019.

ISSUES

141. The issues to be determined considered and resolved are:

1. Whether the Plaintiff was wrongfully/summarily dismissed and if so what she is entitled to?

2. Whether the Plaintiff was unfairly dismissed and if so what is she entitled to?

142. Although worded differently, the parties' essentially agree that these are the issues to be canvassed by the Court.

143. By the Plaintiff's Statement of Facts and Issues filed the 15th February, 2019, she stated her issues to be:

> **"1. Did the Defendant breach any of the statutory obligations towards the Plaintiff (Employment Act) when they terminated her:**
> **a. S. 29**
> **b. S. 33**
> **c. S. 35 – 40**
> **2. Did any conduct of the Plaintiff warrant summary dismissal under the Act?**
> **3. Did any conduct of the Plaintiff warrant summary dismissal under her contract?**
> **4. Did the Defendant honestly and reasonably believe 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?**
> **5. Is the Plaintiff entitled to any compensation from the Defendant as a result of her dismissal?"**

144. By the Defendant's Statement of Facts and Issues filed the 15th February 2019, they stated their issues to be:

> **"1. Did the Plaintiff breach the Defendant's Policies and Procedures?**
> **2. Were the breaches by the Plaintiff sufficient to warrant summary dismissal?**
> **3. Did the Defendant have an honest and reasonable belief that the Plaintiff had committed the breaches in question?**
> **4. Is the Plaintiff entitled to any compensation from the Defendant as a result of her dismissal?"**

ISSUE ONE - SUMMARY DISMISSAL

SUBMISSIONS

145. The Plaintiff contended that her alleged conduct did not warrant her being summarily dismissed, specifically that it did not amount to gross misconduct under the Employment Act **(the "Act")**. Sections 31 – 33 of the Act states when an employer can be summarily dismissed:

> **"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."

146. The Plaintiff relied on **Bethel v Commonwealth Bank Ltd [2009] 3 BHS J. No. 134** where John JA discussed misconduct that would be considered so gross that it would justify summary dismissal:

> **"37......Whether misconduct justifies summary dismissal is a question of fact (see Neary & anor v Dean of Westminster). The question will always arise what degree of misconduct justifies summary dismissal. In Neary v Dean of Westminster [1999] 1RLR 288 @ 291, Lord Jauncey of Tullichettle said "gross misconduct justifying summary dismissal may be seen as conduct so undermining the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment." He then quoted a statement by Lord James of Hereford in Clouston & Co Ltd. v Corry [1906] AC. 122 where he said "Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service, will justify dismissal."**

147. That court held that the burden was on the employer and not the employee to prove that the employer reasonably believed that the employed committed the conduct in question.

> **"19 Mr. McDonald, Counsel for the appellant, submitted that it was incumbent on the employer to "<u>Prove</u>" (*emphasis added*) that it reasonably believed on a balance of probability that the appellant had committed the alleged misconduct. I readily accept that there is no requirement that the respondent must prove the commission of the offence. However, section 33 clearly requires that the employer prove that circumstances existed on which he could come to a reasonable belief that more than likely the employee had committed the wrongful act.**
>
> **22 The principle that has to be applied in answering that question has been the subject of consideration on numerous occasions. It will suffice for present purposes to quote from the decision in British Home Stores Ltd v Burchell; ; 302(D), in which Arnold J said:**

<u>"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old fashioned term, such as to put the matter 'beyond reasonable doubt.' The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."</u>

148. Accordingly, in order for an employer to summarily dismiss an employee on the basis that her conduct had amounted to a fundamental breach of her employment contract, the Defendant must show that the alleged conduct had so undermined the trust and confidence inherent in the employment contract that the employer should no longer be required to retain the employee.

149. To do so, the Plaintiff submitted that the nature of the conduct had to be determined, the circumstances in which the conduct occurred had to be considered, the position the employee held in the business had to be considered, the terms of the employment contract had to be considered along with the impact of the employee's conduct on the employer's interest. The Plaintiff further submitted that despite the Defendant's examples of misconduct, she would be able to prove that her conduct did not warrant her being terminated.

150. The Defendant on the other hand contended that by section 32 of the Act it had to be shown that the misconduct was so gross that it would constitute a fundamental breach of an employment contract or that the conduct may be repugnant to the fundamental interests of the employer. In order to determine whether the employer was entitled to terminate an employee on that or any of the grounds set out in section 32 of the Act, there had to be an honest and reasonable belief on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal pursuant to s. 33 of the Act.

151. The Defendant relied on Thompson J's decision in **Sheldon Jones v. Commonwealth Building Supplies Limited [2004] BHS J. No. 418** to articulate this position. At para. 13 they stated,

> **"With reference to the need for an investigation, the company dismissed Mr. Jones under the relevant provisions of the Employment Act sections 31 and 32 and the relevant provisions of its handbook. The test for the court, as pointed out by counsel was not whether Mr. Jones actively committed the breach of contract complained of, but whether the company "honestly and reasonably believed on a balance of probability that the employee (Mr. Jones) had committed the misconduct in question" and "that he (the company") conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted. Section 33 of the Employment Act."**

152. The Defendant also relied on **Laws v. London Chronicle (Indicator) Newspapers) Ltd. [1959] 1 WLR 698** which, it submitted, provided the general test of the justification of summary dismissal under the common law as the employee's act having to be sufficiently serious to amount to a repudiatory breach on the part of the employee. In **Laws**, Evershed M.R. stated that the test was,

> **"whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."**

153. The Defendant cited **Walker v. Candid Security Limited [2011] 1 BHS J. No. 77** where Allen P (as she then was) in delivering the judgment of the court held,

> **"9 Counsel for the respondent submitted that at common law an employer has a right to dismiss an employee without notice on the grounds of the employee's gross misconduct and such dismissal is not deemed wrongful (see Halsbury's Laws of England 4th Edn volume 16 para 447).**
>
> **10 We agree that at common law an employer has a right to dismiss an employee without notice on the grounds of the employee's gross misconduct, and that notwithstanding section 29 of the Employment Act (Chapter 321A of the 2000 Revised Edition of the Statute laws of The Bahamas), which provides for termination of employment and the period of notice required to be given, that right continues to exist.**
>
> **11 It is suggested at paragraph 447 of Halsbury's Laws of England 4th Edition that the right is now explained with reference to the terms of the particular contract of employment.**
>
> **12 It is further suggested by Halsburys (above) that the right arises either where the conduct of the employee is such that it shows a repudiation by him of the contract or of its essential conditions (Laws v. London Chronical (Indicator Newspapers) Ltd. [1959] 2 All ER 285), or where such conduct so undermines the trust and confidence essential to such a contractual relationship that an employer should not be required to continue to employ him (Neary v Dean of Westminister [1999] IRLR 288).**
>
> **13 Indeed, the Employment Act, which in our view applies to all employment contracts except for those specifically excepted by section 4, provides in section 31 that an employer may dismiss an employee summarily when the employee has committed a fundamental breach of his contract of employment, which is in keeping with the modern explanation of the common law right. Section 32 further sets out what conduct may constitute a fundamental breach and includes gross insubordination and gross misconduct.**

14 However, in as much as the last mentioned provisions, do not define what constitutes gross insubordination or gross misconduct, the test to be applied in determining whether a dismissal is justified, in our view, is the common law test as suggested in Halsbury's (above). Indeed, as we have stated, the test as laid down by Lord Jauncey in Neary v Dean of Westminister (above) was recently approved in Steven Kent Jarvis and KST Investments Ltd. v John Skinner, Privy Council Appeal 0103 of 2009

15 In determining whether the employee was dismissed for just cause, a judge must determine whether the employer acted reasonably (see British Home Stores Ltd. v Burchell [1980] I.C.R.). Indeed that case appears to be the precedent for section 33 of the Employment Act (above) which provides that it is for the employer to prove on a balance of probabilities that he acted reasonably in summarily dismissing an employee. The learned judge, at paragraph 24 of her judgment recognized that legal principle.

16 Further, Sir Christopher Bellamy QC, in his judgment in Meakin v. Liverpool City Council Leisure Services Directorate 2001 WL 1423031, after reviewing the conclusion of an employment tribunal which considered whether the employer had acted reasonably or unreasonably in deciding to dismiss an employee, set out instructive guidance for reviewing courts at paragraph 6. He said in part:
"The question then is whether the respondent acted reasonably or unreasonably in deciding to dismiss for that reason. The guidelines for our consideration of a case such as this are those suggested by the Employment Appeal tribunal in the case of British Home Stores Ltd –v- Burchell (1978) IRLR 379 IRLR 1996. Put shortly the questions which we had to ask ourselves are: (i) did the employer believe, as distinct from merely suspecting, that misconduct had occurred (ii) was that a reasonable belief in the light of what was known to the employer at the time (iii) was it a belief arrived at after as much investigation as was reasonable in the circumstances and (iv) was it reasonable to dismiss having regard to the gravity of the misconduct which the employer believed had occurred? In all the cases the belief is to be on the balance of probabilities... Moreover the question is not whether we ourselves would have dismissed in the circumstances which the employer believed had occurred, but whether dismissal was within the range of options open to a reasonable employer in light of that belief. *(Emphasis Added)*"

At para. 19, it was further observed,

"19..... Although this was an isolated incident, it is recognized in cases such as Jupiter General Insurance Co. Ltd v Ardeshir Bomani Shroff [1937] 3 All ER 67 and Laws v. London Chronical Ltd. [1959] 2 All ER 285, that a single act of insubordination may be such as to justify dismissal of an otherwise good employee depending on the gravity of the conduct."

154. Additionally, the Defendant cited **Sun International v. Charles Emmanuel Missick Civil Appeal No. 6 of 2002** where Ganpatsingh JA, in delivering the judgment of the Court of Appeal stated,

"The issue is not what the Tribunal itself would have thought of the circumstance, which is an entirely objective approach, but what the employer, subjectively looking at the facts and circumstance as a whole, thought the conduct of the employee amounted to...." (Emphasis added).

155. The Defendant contended that the Court must therefore examine the evidence to determine whether the Defendant, subjectively looking at the facts and circumstances as

a whole, thought that the Plaintiff's conduct demonstrated a repudiation of the essential terms of the contract. In that regard, it submitted that its evidence proved on a balance of probability, that there was an honest and reasonable belief that the Plaintiff had failed to follow its policies and procedures, which resulted in a repudiation of the employment contract.

156. The Defendant additionally contended that the Plaintiff needed to show that the Defendant terminated the employment contract without notice or with inadequate notice and that the Defendant was not justified in doing so. It added that the paramount principle in wrongful dismissal was whether an employee's breach went to the root of the contract or constituted a fundamental breach of her contract.

157. The Defendant further suggested that in order to determine the aforementioned question, it was necessary for the Court to consider whether there was sufficient evidence that would have led the Defendant having an honest and reasonable belief that the Plaintiff had committed the misconduct in question, which is the same consideration for summary dismissal.

DECISION

158. The court apologizes for the delay in producing this judgment. However all the transcripts when finally received were reviewed along with all submissions and judges notes

159. The relevant statutory provisions of the Act which address whether an employer could summarily dismiss an employee are Sections 31 – 33 of the Act. These provisions enable, the Defendant to summarily dismiss the Plaintiff without pay or notice if it considers that the Plaintiff has committed a fundamental breach of her employment contract or if she had acted in a manner considered to be offensive to the fundamental interests of the employer by committing fundamental breaches of her employment contract.

160. In **Eden Butler v Island Hotel Company Limited SCCrApp & CAIS No. 210 of 2017** Evans JA (Ag) (as he then was), stated that the paramount principle in wrongful dismissal is whether the employee's breach went to the root of the contract or if the breach constituted a fundamental breach of his contract. It was for the Court to determine whether the nature of the breach alleged constituted a fundamental breach.

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

162. Like unfair dismissal, in order to determine whether the Plaintiff was wrongfully dismissed the three additional issues set out in **Eden Butler** had to be considered i.e. (i)

whether or not the defendant in accordance with sections 33, 34 and 35 of the Act, reasonably believed that the plaintiff committed the misconduct in question at the time of the dismissal, (ii) Did the Defendant conduct a fair and reasonable investigation of such misconduct in all the circumstances of this case and (iii) whether the nature of the breach alleged constituted a fundamental breach so as to warrant dismissal.

163. Therefore, it must be shown that the Defendant held an honest and reasonable belief that the Plaintiff committed any misconduct, the nature of which, would amount to a fundamental breach of his contract. This would have to be proven by showing that there was a fair and reasonable investigation conducted by the Defendant based on the evidence gathered by them.

164. Summary dismissal differs from unfair dismissal in that, if an employer is satisfied that there has been a fundamental breach of the employment contract, after a fair and reasonable investigation was conducted, the employee can be dismissed without being given an opportunity to be heard. Jones JA, delivering the judgment of the appellate court in **Leisure Travel & Tour Limited v Norman Knowles IndTribApp No. 44 of 2020**, considered this point:

> **"19. Second, it is a proposition of law that an opportunity to be heard may not be justified in every case. This proposition was considered in Eden Butler v Island Hotel Company Limited SCCrAPP & CAIS no. 210 of 2017 where the court said.**
>
> > **"30. In wrongful dismissal, the paramount principle is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract. As such the Court was required to consider whether the nature of the breach alleged constituted a fundamental breach. It was then necessary to consider whether there was sufficient evidence so as to lead the appellant to have an honest and reasonable belief that the respondent had committed the misconduct in question. It follows then that the Court could only set aside the decision of the respondent to summarily dismiss the appellant if the Court specifically found that the respondent did not have an honest and reasonable belief that the appellant was guilty of gross misconduct.**
> >
> > **31. The question of whether the belief was reasonable will inevitably depend on the evidence available and the efforts made by way of investigation to ascertain the true facts. The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case. It must not be overlooked however, that the employer is not required to prove that the employee committed the offence but rather must show that they held an honest and reasonable belief in the guilt of the employee."**

165. Guilt does not have to be proven, only that there was an honest belief based on reasonable grounds that the employee had committed the misconduct in question. The court must determine, whether the Defendant, after conducting a reasonable investigation into the actions of the Plaintiff, formed an honest and reasonable belief that the actions constituted a fundamental breach of her employment contract.

166. By the 4th July 2016 Unsatisfactory Performance/Willful violation of Company Policy, the Defendant accused the Plaintiff of multiple and diverse violations of company policies

from the 23rd June 2016 to the 27th June 2016. The violations were routinely taking breaks ranging from 55 minutes to 2 hours and 14 minutes, spending an excessive amount of time in the slot kiosk, at one time up to 4 hours and 43 minutes, congregating on the casino floor with other staff members for excessive lengths of time, routinely failing or refusing to monitor the casino floor, eating a full meal in the slot kiosk, sleeping in a guest area.

167. These acts were caught on surveillance footage after an investigation was requested for surveillance of the Plaintiff's shifts. The Plaintiff claimed that there was a witch hunt orchestrated against her because of her refusal to work an extra hour during her shifts. She further claimed to be an excellent employee over the span of the two plus decades she was employed with the Defendant, citing her numerous promotions and awards. The Plaintiff also claimed that because of the Defendant's failure to hire the right amount of slot staff for the casino floor, she was rarely able to take a lunch break which left her no choice but to eat on the casino floor or in the slot kiosk.

168. The Defendant claims that the Plaintiff's job required her to be on the casino floor for the duration of her shift, with the exception of her break and lunch hour in order to properly supervise the slot attendants and slot machines. However, one of Defendant's witnesses, a member of the slots team did in fact state that she herself would not man the casino floor for the duration of her shift but the majority of it. In any event, I am satisfied that even if there was a shortage of staff which necessitated the Plaintiff not being able to take her breaks, and or lunch hour, in the absence of any written complaint or any evidence sent to the Defendant by the Plaintiff and in the absence of any concessions by the Defendant to the Plaintiff, she is required to comply with the policies and procedures of her employer as set out in the documents which govern her contract of employment.

169. The fact that the Defendant's own witness did not comply with the policies is a matter of concern but it does not mean that the policy should not be adhered to or enforced. I am also satisfied that based on the surveillance footage the Plaintiff was seen sleeping and committing the breaches complained of. The amount of time the Plaintiff spent off of the casino floor was in breach of her contractual duties to man the casino floor. She would not have been able to properly do so whilst spending a considerable time in the bathroom or slot kiosk. She also would not be attentive to the staff and guests if she was holding conversations with other hotel staff or sleeping in Dragons.

170. The Defendant agreed that the Plaintiff had informed them at a staff meeting that she had stomach issues and that she had to tend to her mother who was in the hospital and as such was tired.

171. The Plaintiff also stated that she would eat on the casino floor or the slot kiosk because they were so short staffed which prevented her from going to the casino lounge or cafeteria which were both located off of the casino floor. She added that it would be better for her to do so as she would usually receive calls during her break or lunch break about an issue that had occurred on the guest floor. The evidence of the Plaintiff's witnesses supported her claim that the casino floor would usually be short staffed, that the Plaintiff would hardly take her lunch breaks and that she rarely would miss work. The Plaintiff accordingly admitted to the infractions but sought to justify them.

172. The Defendant claimed that there were no complaints made by the Plaintiff during the time she carried out the acts complained of. I have reviewed the Plaintiff's employment contract in addition to the Plaintiff's employment handbook, the Victor Memo and the slot operations department's Policy and Procedures Operations and Training Manual. By signing her employment contract, the Plaintiff became bound by the terms of these documents.

173. By her employment contract, the Plaintiff agreed that she could be terminated without notice or payment in lieu of notice in the event she committed actions which amounted to serious misconduct in the course of her duties. One of those acts of misconduct listed in the employment contract is neglect of duty.

174. The employee handbook addresses conduct violations and provides a non-exhaustive list of conduct violations which can require disciplinary action and termination. Some of the conduct listed are:

> **"………4. Indifference or inattention to duties, idling or wasting time during working hours,**
>
> **26. Using facilities which are specifically provided for the use of guests only. Employees must not be found in guest areas, including bedrooms; corridors, swimming pools, bathrooms, toilets, etc., unless their jobs specifically require them to be in those areas or they have specific authority of management to do so,**
>
> **35. Failure to observe all Company policies and control procedures generally or specifically."**

175. The Victor Memo, issued on the 28th May 2015 specifically to the Plaintiff, her witness Mr. Carey and four other staff members, advised them that all slot staff were no longer to report to the Slot Office in the Casino Executive Office as the newly assigned work station for the entire department was on the casino floor. Their slot kiosk in zone one was to be utilized for the storage and charging of all company issued radios, cell phones and mobile sign-up devices. Lunch breaks were mandated to be taken in the staff cafeteria or the casino lounge.

176. The wording of the Victor Memo clearly suggests that the Defendant was aware of the past behavior of the Plaintiff and other employees. If in fact, the Plaintiff and her colleagues had made their complaint known that the reason for eating on the casino floor or inside the slot kiosk was because they were understaffed and could not move too far away from the casino floor, it was not in writing and produced as evidence. In the absence of the same, and in the absence of any response by the Defendant other than what is before the court, I must look at what the rules mandated. What is clear is the Defendant's position maintained by the documents and their evidence at trial. Their rules should have been adhered to, even if, unfortunately, it may have seemed harsh if the Plaintiffs explanation for such infractions are true.

177. By the Training Manual, the Slot Shift Manager's role was defined as the person being directly responsible for the effective management of all slot operations, slot supervisors and slot attendants during the scheduled shift, for slot technicians in the absence of the

director of slot operations to, ensure adherence to all policies, procedures and standards, and to assist the director of casino operations as directed.

178. The Training Manual also lists examples of misconduct/grounds for discipline as conducting or engaging in personal, non-work related matters or extended conversations in public areas or while guests are present, sleeping while on duty, eating, drinking, chewing gum while on duty in work or public areas, violation of company or departmental policies or procedures.

179. The Plaintiff was terminated for taking extended restroom breaks in the guest bathroom, spending excessive time in the slot kiosk, congregating on the casino floor with other staff members for excessive lengths of time, failing to monitor the casino floor, eating a full meal in the slot kiosk and sleeping in a guest area. Each act carried out by the Plaintiff was an act considered misconduct by the Defendant's aforementioned documents. The Plaintiff's past working performance albeit positive and praiseworthy is not to be considered when determining whether the acts in question should be considered gross misconduct or whether they should be considered minor unless the Defendant specifically or by other evidence, agreed or conceded that the past performance of an employee may influence any determination as to the degree of the severity of present infractions. There is no such evidence before the court.

180. More importantly, each act of misconduct, constituted a fundamental breach of her employment contract. The Plaintiff was required to monitor the activity of staff and guests on the casino floor and to address any issues or complaints that would have arisen on the casino floor during her shift. It would have been impossible for the Plaintiff to efficiently and effectively carry out her responsibilities while she was in the bathroom asleep, or spending long periods of time in the slot kiosk and while congregating with staff not employed in the slots department.

181. In consideration of the above-mentioned circumstances and the evidence of the parties in its entirety, I find that the Defendant did conduct a fair and reasonable investigation over a five day period. Consequently it was able to form an honest and reasonable belief that the Plaintiff's conduct constituted gross misconduct and dismiss the Plaintiff without notice or pay in lieu of notice. Accordingly, the Plaintiff's claim for wrongful/summary dismissal is dismissed.

UNFAIR DISMISSAL

182. The Plaintiff also claimed that she was unfairly dismissed pursuant to sections 34 - 36 of the Act as section 35 was not limited to the instances set out therein. Sections 34 - 36 states:

> **"34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer.**
> **35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case.**

36. (1) For the purposes of this Part, the dismissal of an employee by an employer shall be regarded as having been unfair if the reason for it (or, if more than one, the principal reason) was that the employee —

> **(a) was, or proposed to become, a member of an independent trade union;**
>
> **(b) had taken, or proposed to take, part at any appropriate time in the activities of an independent trade union; or**
>
> **(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused or proposed to refuse to become or remain a member.**

(2) Any reason by virtue of which a dismissal is to be regarded as unfair in consequence of subsection (1) is in this Part referred to as an "inadmissible reason".

(3) In subsection (1) "appropriate time" in relation to an employee taking part in the activities of a trade union, means time which either —

> **(a) is outside his working hours; or**
>
> **(b) is a time within his working hours at which, in accordance with prior arrangements agreed with or consent given by his employer, it is permissible for him to take part in those activities, and in this subsection "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.**

(4) In this section, unless the context otherwise requires, references to a trade union include references to a branch or section of a trade union."

183. The Plaintiff relied on **BMP Limited dba Crystal Palace Casino v Yvette Ferguson [2013] 1 BHS J. 136** , where Allen P stated,

> **"34 We find ourselves in agreement with the Tribunal that unfair dismissal is not confined to the five instances provided in ss. 36 to 40 of the Act. We find support for this conclusion from the structure and spirit of the Act. We do not believe that the Legislature by mentioning the five instances itemized in these sections intended to freeze forever other possible instances of unfair dismissal."**

184. The Plaintiff additionally relied on **Coleby v. Lowes Pharmacy Ltd. [2016] 1 BHS J No. 15** where it was discussed that the merits of the case would lead to the conclusion that she was unfairly dismissed as the infractions of the company's policy were not sufficiently grave to amount to gross misconduct, incompetence or gross negligence. Also, that the misuse of the swipe card was also not repugnant to the fundamental interests of the employer who had not proven on a balance of probabilities that the employee had committed any of the prescribed conduct under section 32 of the Act that would justify summary dismissal

.

185. The Defendant acknowledged that under section 34 of the Act, every employee had the right not to be unfairly dismissed and further that pursuant to section 35, subject to sections 36 – 40 of the Act, the question of whether such dismissal was unfair or fair was in accordance with the substantial merits of the case. They submitted however, that unfair dismissal was distinctly different from wrongful dismissal as the Plaintiff was charged with proving that the process whereby the employer arrived at his decision to terminate was unfair and relied on **B.M.P Limited D/B/A Crystal Palace Casino (supra)** which they submitted gave a broad overview of what may constitute unfair dismissal.

186. The Defendant contended that in order to determine whether an employee had been unfairly dismissed, the Court must consider whether the Plaintiff's claim fell

under the list of instances in sections 36 – 40 of the Act which are deemed statutorily unfair or whether the Plaintiff's right to natural justice was breached. The Defendant cited **Bahamasair Holdings Limited v. Omar Ferguson SCCivApp No. 16 of 2016** where Crane-Scott JA stated at paras. 36 – 41,

> **"36. In our view the judge was entitled to find that the respondent was treated unfairly when he was summarily dismissed from his job as a Customer Service Agent with effect from 31st March, 2011 by way of the appellant's letter ostensibly dated 31st March, 2011 which was issued at a time when he would still have been overseas. Even if the letter had been delivered on the same day it was issued, it would effectively have given him less than one day's notice 11 of the termination. The evidence clearly disclosed that on 4th April, 2011 when he attended the appellant's office to collect his accumulated benefits, he had already been dismissed from his job. Even more egregious is the fact that the termination letter was only handed to him on 7th April, 2011, by which time his contract of employment had already been effectively terminated for seven (7) days.**
>
> **37. The unfairness of the respondent's dismissal is evident from the following circumstances: he was never given an opportunity to make representation to the appellant on the severity of the decision to terminate him having regard to (i) the fact that he was on long-term disability with no expected date for his return to full employment; (ii) the fact that as he was not actively performing duties at LPIA (as he was on long-term disability) the security clearance from the Airport Authority during that period was not a pressing requirement; (iii) the fact that he had not been found guilty of any misconduct inasmuch as the criminal charges against him were discontinued and he was entitled to the benefit of the presumption of innocence; and (iv) the fact that by terminating him the appellant was depriving him of his long term disability benefit when he had not done anything wrong; was 37 years old and his employment opportunities were diminished because of his long-term disability.**
>
> **38. Furthermore, he was dismissed without being accorded the opportunity to appeal to the Airport Authority requesting a reconsideration of its decision to withdraw his security clearance. The respondent was denied the opportunity to make representations to the Airport Authority inviting it not to rescind the security clearance whilst he was on long term disability and that the Airport Authority could revisit the issue in the future if the respondent sought to return to work at the airport.**
>
> **39. It was therefore not unreasonable for the trial judge to find that the failure to give a hearing before termination was unfair. Furthermore, the unfair circumstances of his dismissal arose irrespective of whether or not the industrial agreement was operative and whether or not there was any express term in the employment contract with the respondent giving the rights to the disciplinary procedure contained in the industrial agreement.**
> **40. In our view the judge was correct to find that the appellant in dismissing the respondent without giving him an opportunity to be heard and make representations was unfair.**
> **41. We further agree with the trial judge when at paragraphs 36 and 37 of his Judgment, he said: "36. In Sillifant v. Powell Duffryn Timber Ltd [1983] IRLR 91 at 92, Browne-Wilkinson J. said: "The only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. 12 An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the Industrial**

Tribunal in deciding whether or not the dismissal was reasonable within s. 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial Tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair." "37. The failure to give the employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of this case a denial of natural justice and therefore unfair. As a result, the Plaintiff is entitled to damages.""'

187. The Defendants submit that its evidence demonstrates that the Plaintiff was not unfairly dismissed and requested that the Court dismiss the Plaintiff's action.

DECISION

188. Section 34 of the Act states that every employee shall have the right not to be unfairly dismissed by his employers. Section 35 of the Act states that in order to determine whether the dismissal of the employee was fair or unfair, the substantial merits of the case should be considered.

189. In **Eden Butler v. Island Hotel Company Limited (Trading as Atlantis Paradise Island) SCCrApp & CAIS No. 210 of 2017**, the appellate court explained that where there was a claim of damages for unfair dismissal, the focus was primarily on procedure. Evans JA (Actg) (as he then was) stated that in order to determine whether or not an employee was unfairly dismissed there were three other issues that had to be determined, namely (i) whether or not an employer, in accordance with section 33, 34 and 35 of the Act, reasonably believed that the plaintiff committed the misconduct in question at the time of the dismissal, (ii) Did the employer conduct a fair and reasonable investigation of such misconduct in all the circumstances of this case and (iii) whether the nature of the breach alleged constituted a fundamental breach so as to warrant dismissal.

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

191. It follows that when considering whether or not the Plaintiff was unfairly dismissed under Sections 34 and 35 of the Act, the Court must consider whether, based on the substantial merits of the case, the Defendant reasonably believed that the Plaintiff committed the misconduct in question at the time of the dismissal; whether the Defendant conducted a fair and reasonable investigation of such misconduct in all the circumstances of the case and whether the nature of the alleged breach was so fundamental as to warrant dismissal. The aforementioned considerations should be

determined in conjunction with the procedure established by the Defendant, namely whether the procedure was fair and whether it was followed.

192. According to the 4th July 2016 Unsatisfactory Performance documented by the Plaintiff, she was terminated for taking extended restroom breaks in the guest bathroom, spending excessive time in the slot kiosk, congregating on the casino floor with other staff members for excessive lengths of time, failing to monitor the casino floor, eating a full meal in the slot kiosk and sleeping in a guest area. Each act carried out by the Plaintiff was an act that was considered misconduct by the Defendant's aforementioned documents.

193. As I previously determined the acts of the Plaintiff, collectively constituted a fundamental breach of her employment contract. She could not efficiently carry out her duties if she was off of the casino floor for the periods recorded or taking extended breaks for whatever reason in areas prohibited. After she was suspended an investigation was carried out and, the Plaintiff was given an opportunity to answer the allegations made against her, to review the footage, and to have a review which she refused. The procedure for conducting and disciplining staff was complied with no matter how harsh it may have appeared to be. The Plaintiff declined a review which was available to her and which was offered to her.

194. In light of the foregoing and in consideration of the substantial merits of the case and the evidence of the parties in its entirety, I find that the Defendant did conduct a fair and reasonable investigation over a five day period. Consequently, it was able to form an honest and reasonable belief that the Plaintiff's conduct constituted gross misconduct and dismissed the Plaintiff without notice or pay in lieu of notice. Accordingly, the Plaintiff's claim for unfair dismissal is also dismissed.

195. The Defendant is awarded its costs of the action to be taxed if not agreed.

Dated this 21st day of February 2022

Hon. Madam Justice G. Diane Stewart