COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/COM/lab/00074

BETWEEN

LENORA MCKENZIE

Plaintiff

-AND-

WEMCO SECURITY & COLLECTIONS LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Dywan Rodgers of Meridian Law Chambers for the Plaintiff
Mr. Clinton Clarke Jr of Providence Law for the Defendant

Hearing Dates: 3 May 2021, 30 July 2021 (Plaintiff's submissions). 21 February 2022 (Defendant's submissions)

Employment Contract - Summary dismissal – s. 31, 32, 33 Employment Act, Ch 321 – Whether the Plaintiff was guilty of gross negligence – Whether the Plaintiff was given a reasonable opportunity to respond to the allegations – s. 4 of Employment Act – Whether the Defendant was entitled to summarily dismiss the Plaintiff for the cause cited

The Plaintiff was a Security Supervisor with the Defendant, a security company. She was summarily dismissed as a result of an incident where no security guard was posted at a designated post for 8 hours. The Plaintiff contended that the summary dismissal was wrongful since she was not at fault. She also averred that the Defendant had not conducted a fair and reasonable investigation before determining that she was negligent. She contended that, in any event, the Defendant failed to follow the disciplinary procedure prescribed in her employment contract applicable to the cause for which she was terminated.

In its Defence filed on 1 December 2020, the Defendant denied that the Plaintiff was wrongfully dismissed. They averred that the Plaintiff was negligent and, as such, the summary dismissal was warranted. They also contended that the Plaintiff was given every reasonable opportunity to respond to the infractions.

HELD: The Plaintiff's dismissal was not wrongful. The claim is therefore dismissed with costs to the Defendant to be taxed if not agreed.

1. The cause for which the Plaintiff was terminated was not listed in either class of the infractions set out in her employment contract. It was not a minor infraction which required several warnings. Accordingly, the Defendant was entitled to use it as a ground for summary dismissal: see sections 4 and 32 of the Employment Act.

2. The appropriate test for determining whether there has been "just cause" for summary dismissal is whether, on a balance of probabilities, the employer reasonably believed so. The employer does not have to prove commission of the offence: **Wesley Percentie v Cost Rite Wholesale Club** [1985] BHS J No 128 and **Ferguson v Island Hotel Company Limited** [2018] 1 BHS J No 148 applied.

3. For an employer to summarily dismiss an employee for gross misconduct, the employer must show that the alleged conduct has so undermined 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 within its employ: **Eloise Curtis-Rolle v Doctors Hospital (Bahamas) Limited** SCivApp No 149 of 2012 and **Ferguson v Island Hotel Company Limited** [2018] 1 BHS J No 148 applied.

4. The employee's right to natural justice in being summarily dismissed is satisfied by giving the employee an opportunity to make representations before the decision is made (in writing or in person) and there need not be a full blown hearing. The process is not necessarily unfair because the decision has been made quickly. The degree of investigation required depends on the circumstances. In some circumstances, no investigation is warranted: section 33 of the Employment Act and the case of **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016 applied.

5. In determining the reasonableness of the employer's belief, the gravity of the allegation is a consideration to which the employer is entitled to have regard: **Princess Hotel v Bahamas Hotel Catering and Allied Workers Union** [1985] BHS J No 128 applied.

JUDGMENT

Charles J:

Introduction

[1] This is a claim for breach of contract and/or wrongful dismissal. By Specially Indorsed Writ of Summons filed on 4 November 2016, the Plaintiff ("Ms. McKenzie") claimed against the Defendant ("Wemco") damages for wrongful dismissal for being summarily dismissed for "*dereliction of duties and gross negligence*".

Salient facts

[2] Most of the facts surrounding Ms. McKenzie's termination are agreed. To the extent that any of the facts are not agreed, then what is expressed must be taken as positive findings of facts which I made.

[3] Ms. McKenzie commenced employment as a Security Officer/Guard with Wemco on 26 July 2004 and signed a Contract of Employment dated 29 April 2004. She eventually became a Security Supervisor. Sometime between 2011 and 2012, she began working in the control room at the Defendant's head office. Her duties are set out in a document called "*Scope of Duties of the Control Room Supervisor"*. She denied having been provided with this document before being shown.

[4] Ms. McKenzie's employment contract provided for payment of time back to offset overtime pay and provided for two weeks' paid vacation. Her employment contract classified offences into Class A and Class B.

[5] On 15 June 2014, Ms. McKenzie was scheduled to work as the Security Supervisor in the control room for the 7:00 a.m. – 3:00 p.m. shift alongside Rosetta Bain, who was the security guard in the control room for that shift. Ms. McKenzie took over from Donna Forbes, who was the Security Supervisor for the previous shift of 11:00 p.m. – 7:00 a.m.

[6] When Edward Miller, the security guard scheduled to be posted at Bank of The Bahamas, Carmichael branch ("BOB") arrived, it was discovered that no security guard had been posted at the bank for the previous shift.

[7] As a result of the incident, Ms. McKenzie was made to appear before Wemco's Tribunal. Before entering the room, she was asked to write a statement. She did. After speaking to the Tribunal for a short period, Ms. McKenzie was presented with a termination letter.

[8] Ms. Mckenzie was summarily terminated for cause without notice or pay in lieu thereof by letter dated 17 June 2014 authored by Rhoderick Coakley, the Tribunal

President. The letter cited "*dereliction of duties and gross negligence*" as the reason for her summary dismissal.

[9] Ms. Mckenzie denied the allegations made against her and insisted that there was no reasonable cause for her termination and, therefore, she should have been paid reasonable notice and pay pursuant to section 29 of the Employment Act, 2001 ("the Act"). She also claimed two (2) weeks' vacation pay and four (4) days' pay for time back in lieu of overtime which she had not received.

The law

Summary dismissal

[10] Section 31 of the Act provides for the employer to summarily dismiss the employee without pay or notice in circumstances where the employee has committed a fundamental breach of his/her employment contract or has acted in a manner offensive to the fundamental interests of the employer. It states:

> **"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."**

[11] Section 32 provides a non-exhaustive list of examples of fundamental breaches of the employment contract and/or behaviour offensive to the employer's fundamental interests that are permissible grounds for summary dismissal:

> **"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.

[12] Section 33 of the Act provides as follows:

> **"33. An employer shall prove for the purposes of any proceedings before a 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."**

Wrongful dismissal

[13] Wrongful dismissal and remedies for wrongful dismissal exist both at common law and under the Act. They exist alongside each other and employees can choose whether they wish to claim under the common law or under the Act.

[14] A helpful meaning of wrongful dismissal at common law is provided by the learned authors of Halsbury's Laws of England, 4th ed. Vol. 16 at para. 451 wherein it is stated that:

> **"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: *Hopkins v Wanostrocht* (1861) 2 F & F 368, namely:**
>
> **(1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (*Williams v Byrne* (1837) 7 Ad & E1 177); and**

(2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily: *Baillie v Kell* (1838) 4 Bing NC 638.

[15] The following circumstances may give rise to an action for wrongful dismissal at common law: (i) dismissal without notice or pay in lieu thereof, (ii) purported summary dismissal for cause where no cause has been proven, (iii) dismissal in breach of disciplinary procedure under the contract and (iv) purported dismissal for a reason which is not provided for in the restricted category of reasons in the contract.

[16] Wrongful dismissal under the Act occurs when the employer fails to give the employee adequate notice (or pay in lieu thereof) in breach of the provisions for notice in the Act or purported summary dismissal for cause where no cause has been proven.

[17] Accordingly, the principles that can be distilled with respect to summary dismissal being wrongful dismissal are as follows: (1) purported summary dismissal not in strict accordance with the provisions of summary dismissal under the Act is wrongful dismissal (2) In determining whether the employer summarily dismissed the employee lawfully, the question is whether, in all the circumstances, the employer can prove that his belief of the employee's misconduct was honestly and reasonably held. Unless it is unwarranted in the circumstances, a reasonable investigation is required to demonstrate an honest and reasonable belief of guilt.

Ms. McKenzie's assertions

[18] Preliminarily, Ms. McKenzie alleged that the summary dismissal was wrongful because the infraction cited with regard to her termination was not an infraction for which she could be summarily dismissed under her contract.

[19] She also contended that the summary dismissal was wrongful because she was not negligent and Wemco had not conducted a reasonable and fair investigation before determining that she was negligent.

Issues arising

[20] The following issues arise for determination:

1. Whether Wemco was entitled to summarily dismiss Ms. McKenzie for dereliction of duties and gross negligence having regard to her employment contract?

2. Whether it was reasonable for Wemco to have determined that Ms. McKenzie was negligent? And

3. Whether Wemco conducted a fair and reasonable investigation in the circumstances?

The evidence

[21] Ms. McKenzie gave evidence on her own behalf. Ms. Fulford was the sole witness for the Defendant.

Lenora McKenzie

[22] Ms. McKenzie filed a Witness Statement on 1 December 2020 which stood as her evidence in chief at trial. She testified that she never had sight of the Scope of Duties of the Control Room Supervisor before these proceedings. She said it was shown to her for the first time by her attorney, who received it from Wemco's Counsel.

[23] Ms. McKenzie further testified that, during her time at head office, she never received any formal training from Wemco regarding her job function in the control room. According to her, there were no operations manuals to follow and she had never seen the Scope of Duties. She said that she became aware of the practice for the control room by word of mouth from other Security Supervisors with whom she worked.

[24] According to her, some of the duties of the Security Supervisor in the control room was to place security guards in assigned posts and to ensure that they were in

place. The security guards were required to call into the control room every thirty minutes and the call was supposed to be logged. She said that the security officer who worked in the control room would ensure that all scheduled security guards were at their assigned posts at the banks.

[25] Ms. McKenzie was taught that there are two sides of security guard posting: the bank side and the field side. Her recollection was that posting security guards on the bank side included Commonwealth Bank, Fidelity Bank, First Caribbean Bank and BOB. The field side included Bahamas Electricity Corporation, St. Cecilia Church, Christ the King Church and a hotel on Paradise Island. She said that there may have been more posts but she could not recall.

[26] Ms. McKenzie asserted that there were 2 radios in the control room. The Security Supervisor uses one radio to contact guards posted on the field side and the security officer stationed in the control room uses the other radio to contact the guards on the bank side. According to her, the security guard in the control room deals with issues at the posts and absences on both the field and bank side, which he would log. She said that the security officer would pass on relevant information to the Security Supervisor but the responsibility of ensuring the accuracy of the logged information was that of the security officer.

[27] On the day in question, she arrived for her 7:00 a.m. to 3:00 p.m. shift, taking over from Donna Forbes, who was the Security Supervisor from the 11:00 p.m. to 7:00 a.m. When she arrived, Ms. Forbes was updating her logbook. She said Ms. Forbes informed her that all persons were on duty which she wrote in the book. Ms. McKenzie further stated that when she arrived for her shift, Rosetta Bain, who was the security officer for her shift, was already at work. Ms. Bain reported to her that everyone was on duty on the bank side. She said she had worked with Ms. Bain for five years and 6 months at that point and had no reason to query her report. She stated it appeared that all security guards were on duty.

[28] At approximately 2:00 p.m., a security guard assigned to BOB reported that when he reported for duty, there was no security guard at that BOB branch. When she asked Ms. Bain about it, Mrs. Bain told her that everyone was on duty. Ms. McKenzie said that she immediately called the security guard who had been assigned to BOB for the early shift. He told her that he had been advised by Mr. Cooper that he was not supposed to work at BOB that day.

[29] She then called a Manager, Mr. Johnson and advised him of the incident. He confirmed that a security guard should have been posted at BOB.

[30] Mrs. McKenzie said she would not have known whether the security guard assigned to the earlier shift at BOB was there because it was Ms. Bain's responsibility to tend to the bank side. After her shift, Ms. Bain called her to apologize. Ms. Bain said that she had honestly believed everyone was on duty.

[31] The following Monday or Tuesday she was advised that she had to meet with Wemco's Tribunal. As soon as she entered the room to meet with the Tribunal, she was asked to write a report surrounding the event on the day in question. She did. A meeting was held by Mr. Coakley and another person whose name she could not remember. They asked her a few questions but never referred to the report she had written. She said that, during the meeting, they told her that she had breached her contract. She then asked how it had been breached and no response was given. She said that Mr. Coakley and the person who accompanied him at the Tribunal discussed her written statement in her absence and asked her questions based on the statement.

[32] Ms. McKenzie denied the allegations in the termination letter. She said she received the letter from Mr. Coakley in a meeting, wherein he instructed her to sign the letter. However, she did not sign it because she did not agree with its contents. She also refused the payment offered by Wemco because she said that she did not trust them and did not accept what they said she was owed. She said that the payment did not include severance.

Jewel Fulford

[33] Ms. Fulford filed a Witness Statement on 29 April 2021 which stood as her evidence in chief at the trial. She is the General Manager (Marketing) and the Manager of Human Resources at Wemco. As a result, she has access to client files.

[34] She stated that Ms. McKenzie was hired by Wemco as a Security Officer/Guard on 26 July 2004 and she signed a Contract of Employment outlining the full terms and effect of her Contract and she was also given the Scope of Duties while she was working in that role.

[35] Under cross examination by learned Counsel Mr. Rodgers who appeared for Ms. McKenzie, Ms. Fulford said she does not have any proof that Wemco gave Ms. McKenzie the Scope of Duties but she was one of the facilitators of the training exercise in which Ms. McKenzie took part.

[36] Under further cross-examination, Ms. Fulford said Ms. Bain had worked from 6 am to 2 pm and Kim Bethel worked from 2 pm to 10 pm on the day in question.

[37] She said there are approximately 6 radios in the control room and 2 radio units, which are the same frequency.

[38] She rejected Mr. Rodgers' suggestion that one radio is assigned to the banking side. She also rejected the suggestion that Ms. Bethel was responsible for the banking side. She said there is one operation and no bank side or field side. The control room and the person in charge of the control room are in charge of the entire field.

[39] According to Ms. Fulford, on the day in question, Marlon Santilus was scheduled to work the 3:00 p.m.-11:00 p.m. shift at BOB, Carmichael Road. Mr. Santilus contacted the control room and informed security officer, Kim Bethel, who was working alongside Ms. McKenzie, that he was at the location and asked that she call the guard, Edward Miller to give him access to the building. Mr. Miller was

scheduled to work from 6:30 a.m. to 3:00 p.m. Ms. Fulford said that when Ms. McKenzie contacted Mr. Miller, he advised her that he was at home and that he had never reported for duty for his 6:30 am – 3:00 p.m. shift.

[40] Ms. Fulford said that the standard procedure is for every guard to report to the control room via radio at the start of the shift.

[41] Ms. Fulford stated that during the course of the shift, Ms. McKenzie should have received reports from that location at least 17 times. If she did not hear from the guard, her responsibility was to reach him via radio or to dispatch a unit to check on the guard assigned. Ms. Fulford said that Ms. McKenzie's unawareness of the absence of a guard at BOB, Carmichael, meant that she was working on autopilot. She said that the extent of Ms. McKenzie's duty was not to take someone's word that a guard was present. She was required to follow up.

[42] She rejected Mr. Rodgers' suggestion that Ms. Bain informed Ms. McKenzie numerous times that all was well on her side i.e. the banking side. She said although she was not in the control room, she has the record.

[43] Ms. Fulford stated that Ms. McKenzie was heard by the Tribunal and no reasonable explanation was provided. As a result, Ms. McKenzie was terminated. She said this was not the first instance of negligence. She said that Ms. McKenzie had appeared before the Tribunal on a previous occasion and she had been given warnings. Under cross-examination she conceded that she was not present at the Tribunal hearing.

[44] Ms. Fulford also conceded that "*dereliction of duties and gross negligence*" are not listed in Ms. McKenzie's employment contract as one of the Class A Offences that warrant immediate termination. She agreed that it was a Class B Offence but the procedure set out in the contract was followed. She said that the previous warnings are on file.

[45] Ms. Fulford also asserted that Ms. Bain received no penalty following the incident because Ms. McKenzie was in charge of the shift.

Factual findings

[46] Having observed the demeanour of the witnesses, I prefer the evidence of Ms. Fulford to that of Ms. McKenzie with respect to Ms. McKenzie's training, procedure and duties. In my judgment, Ms. McKenzie was aware that, as Security Supervisor, she was duty bound to assure herself that each guard was in place by following up on any confirmation from the previous Security Supervisor or the security guard working alongside her in the control room. Her own evidence was that her overall duty was to ensure that the security guards were in place. I accept Ms. Fulford's evidence that, as Security Supervisor of the control room, Ms. McKenzie was in charge of the shift.

[47] I also prefer Ms. Fulford's evidence that there was one operation and thus, there is no bank side or field side and that Ms. McKenzie, as the person in charge of the control room, was in charge of the entire field.

Whether the termination was wrongful by not following procedure in contract

[48] As stated above, dismissal can be wrongful where the employee has been dismissed in breach of disciplinary procedure under the contract. Learned Counsel Mr. Rodgers who appeared on behalf of the Plaintiff first submitted that Wemco was not entitled to immediately terminate Ms. McKenzie for dereliction of duties under her contract. As the offence for which Ms. McKenzie was terminated was a Class B (Minor) offence and not a Class A (Major) offence, Wemco was required to follow the disciplinary procedure set out in the contract.

[49] While gross negligence (which, according to the termination letter, is essentially what Ms. McKenzie was summarily dismissed for) is a ground for summary dismissal under the Employment Act, Mr. Rodgers argued that Ms. McKenzie's employment contract gave her a term more favourable than the summary dismissal provision in the Act. The contract provided that Class A infractions would result in

immediate termination. Where the employee was guilty of Class B infractions, they would be subject to the following disciplinary actions:

"*First infraction*	*Verbal Written Warning*
Repeated infraction	*First Written Warning*
Second infraction	*Second Written Warning/suspension for up to three (3) days and not allowed to work overtime for one (1) month*
Repeated infraction	*Performance probation*
Third Infraction	*Final Written Warning*
Repeated Infraction	*Termination*"

[50] Mr. Rodgers submitted that the infraction for which Ms. McKenzie was terminated was a Class B infraction. The disciplinary provisions in Ms. McKenzie's contract were as follows:

> *"14. DISCIPLINE*
> *Infractions to the Company's policy will result in disciplinary action being taken by The Company against the Employee. Infractions are divided into classes.*
> ***CLASS A***
>
> ***Class A infractions are defined as (MAJOR):***
>
> ***(i)*** *Physical violence on the job*
> ***(ii)*** *Found sleeping while on duty*
> ***(iii)*** *Job Abandonment (leaving your post without authorized approval from Management or being properly relieved)*
> ***(iv)*** *Habitual non-attendance/tardiness*
> ***(v)*** *Being under the influence of drugs or alcohol while on duty*
> ***(vi)*** *Theft – stealing from Clients, Co-workers of The Company*
> ***(vii)*** *Fraudulent offences*
> ***(viii)*** *Gross insubordination to superiors*
> ***(ix)*** *Possession and/or conviction of narcotics/dangerous drugs and other serious criminal offences*
> ***(x)*** *Having dangerous or deadly weapons on persons while on duty*
> ***(xi)*** *Intentional and/or malicious damage to The Company or Client's property*
> ***(xii)*** *Offensive Behaviour to Clients*
> ***(xiii)*** *Conflict of Interest that is actively bidding as competitor for a job that The Company is bidding for and making errors to a potential or existing client with whom The Company is/has been negotiating.*
>
> ***All Class A infractions will result in immediate Termination*** [Emphasis added]

CLASS B

Class B infractions are defined as:

i. Refusal to carry out assigned duties or reasonable job related instructions
ii. Repeated quarrelling with customers and/or employee
iii. Repeated absence without permission
iv. Repeated Dress Code Infractions – Improperly Dressed:
a. …..
…..
….."

[51] The cause for which Ms. McKenzie was summarily dismissed is not captured (neither in the same words or similar words) under Class A nor Class B infractions. However, dereliction of duties and negligence seem to be within the same class of infractions listed in Class A. Class A infractions are major while Class B offences are minor. It can hardly be disputed that a supervisor's failure to discern that a post had been unmanned for eight hours is not a major infraction. Mr. Rodgers sought to convince the court that the cause for Ms. McKenzie's termination fell under the "*Refusal to carry out assigned duties*" infraction of Class B. However, I find that this submission must fail. As such, Wemco was not bound to follow the disciplinary procedure that applied to Class B. It follows that section 4 on saving of terms more favourable to the employee does not arise and Wemco was entitled to execute summary dismissal in accordance with the Act and without reference to the employment contract.

[52] In order to resolve the main issue, which is whether Wemco wrongfully dismissed Ms. McKenzie, it must be determined whether the summary dismissal was lawful. The relevant question is whether Wemco honestly and reasonably believed that Ms. McKenzie was guilty of gross negligence and whether, in coming to that belief, they conducted a reasonable investigation that was fair to Ms. McKenzie.

Whether Wemco's belief that Ms. McKenzie was negligent was reasonable

[53] Mr. Rodgers submitted that Ms. McKenzie was not negligent; that if anybody was negligent it was Ms. Bain who was working alongside her since she was responsible for the bank side. In support of his contention, he cited **Ferguson v Island Hotel Company Limited** [2018] 1 BHS J No 148 where Barnett JA

emphasised that in order to be summarily dismissed on the ground of gross negligence, the respondent had to honestly and reasonably believe that the appellant himself was personally grossly negligent in his own conduct. The appellant had to be grossly negligent. In **Eloise Curtis- Rolle v Doctors Hospital (Bahamas) Limited** SCCiv App No 149 of 2012, the Court of Appeal explained what constitutes gross misconduct at para 28 of the Judgment:

> **"28. In our view, therefore, in order for an employer to summarily dismiss an employee on the basis that the employee's gross misconduct has amounted to a fundamental breach of the contract of employment or is repugnant to the fundamental interests of the employer, the employer must show that the alleged conduct has so undermined 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 within its employ."**[Emphasis added]

[54] However, having found that there was one operation for which Ms. McKenzie was exclusively responsible as Security Supervisor of the control room, it could not be said that the absence of a security guard at BOB, Carmichael for eight hours was not negligence attributable to her. True, Ms. McKenzie was told that persons were in place by Ms. Forbes, the Security Supervisor from the prior shift, and Ms. Bain, the security guard in the control room on her shift, but it was her responsibility to ensure that they were actually there. As such, she was duty bound to verify such information and she took a risk by not doing so. Moreover, as the Security Supervisor on duty, she should have been aware that no calls were coming into the control room from that location every thirty minutes as required. This should have prompted her to make enquiries.

[55] Ms. McKenzie understood that she was in charge of the control room. It matters not whether she had been furnished with the Scope of Duties or not. I accept Ms. McKenzie's evidence that Ms. Bain apologized to her, but in my judgment, this evidence does not give credence to Ms. McKenzie's position that the incident was not her fault. She was the supervisor and it was her duty to ensure that all posts were covered. Further, I accept Ms. Fulford's evidence that Ms. McKenzie was

trained for the Security Supervisor role. In any event, the question in determining whether the dismissal was wrongful is not whether Ms. McKenzie was actually guilty of gross negligence (although in my judgment, she was), but whether Wemco reasonably believed that she was guilty and whether that belief was reasonably held.

[56] In **Wesley Percentie v Cost Rite Wholesale Club** [1985] BHS J No 128**,** a decision from the Industrial Tribunal, Nathaniel Dean made it clear that the appropriate test for determining whether there has been "just cause" for summary dismissal is whether the employer reasonably believed so on a balance of probabilities. The employer does not have to prove commission of the offence. At para 4 of that decision, Mr. Dean said:

> **"34. It is the Tribunal's opinion that the test referred to in the authorities discussed above applies equally to the Anti-Harassment Policies as set out in the Respondent's Handbook. As stated in Alidair v. Taylor (supra) there is no burden on the employer to prove the commission of the offence. According to section 33 of the Employment Act, the Respondent had been called upon to show that they honestly and reasonably believed on a balance of probabilities that the Applicant had committed the misconduct in question. The Common Law lays down a similar test; that the dismissal be upon reasonable grounds, based on facts known to the Respondent at the time of the dismissal, which created a reasonable belief that the Applicant had committed the misconduct of sexual harassment as outlined in the Handbook or contrary to sections 32(e); gross indecency and 32(1); gross misconduct. It is the Tribunal's view that in all of the circumstances the Respondent had discharged that burden. Consequently the dismissal was not wrongful."**

[57] In **Princess Hotel v Bahamas Hotel Catering and Allied Workers Union** [1985] BHS J No 128 the Court of Appeal explained that the reasonable belief of the employer ought to be judged based on the facts known to the employer at the time of the dismissal. Was it reasonable for the employer to dismiss the employee based on the facts known at the time? In that case, the Court of Appeal stated:

> **"18 In my view, even apart from the judicial pronouncements to which reference has been made above, the words "just cause" means reasonable cause in the context of the section. The dismissal must be upon reasonable grounds based on facts known to the employer at**

> **the time of dismissal which would create a reasonable belief in the employer's mind that misappropriation of the employer's funds by the employee was being or had been committed and that the employer did so honestly believe.**
>
> **19 In the light of the facts known to the appellant at the time each of the employees in question in this case was suspended and then dismissed it is clear that the appellant had just cause for suspension and then dismissal of each of them."**

[58] The Court of Appeal stated that the gravity of the allegation was a consideration that was relevant and to which the employer was entitled to have regard.

> **"20[...] the employer shows the existence of just cause for dismissal, the dismissal is just or unjust. Unlike the English legislation no criteria for the determination of this question is furnished by section 16. In the absence of specified criteria, I would hold that all the circumstances relating to the employee's employment record and the nature and gravity of the allegation which gave rise to "just cause" for dismissal must be considered."**

[59] I am satisfied that Wemco believed that Ms. McKenzie was guilty of gross negligence and that it was reasonable for them to believe so having regard to the incident and the duties of her role of Security Supervisor in the control room, of which she was aware. Further, the gravity of the allegation was significant, which is a consideration to which the employer was entitled to have regard. Failing to notice that a post was unmanned for 8 hours was a significant mistake on Ms. McKenzie's part.

Was the investigation fair and reasonable?

[60] Mr. Rodgers submitted that Wemco did not afford Ms. McKenzie the benefit of a fair and reasonable investigation into the matter before terminating her. According to Mr. Rodgers, it was evident from Ms. McKenzie's evidence that Wemco did not properly consider her statement in determining that she was grossly negligent. Mr. Clarke, on the other hand, contended that Ms. McKenzie was given every reasonable opportunity to be heard.

[61] Section 33 of the Act requires employers who summarily dismiss employees to prove that they honestly and reasonably believed that the employee committed the

misconduct and that they had conducted a reasonable investigation of such misconduct except where an investigation was unwarranted:

[62] Section 34 provides that the employee has the right not to be unfairly dismissed. Section 35 states that the fairness or unfairness of the dismissal should be assessed in accordance with the substantial merits of the case:

> **"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."**

[63] In summarily dismissing the employee, the employer must, at least, accord with natural justice principles. The Court of Appeal in **Bahamasair Holdings Limited v Omar Ferguson SCCivApp No. 16 of 2016** emphasised that natural justice is satisfied by giving the employee an opportunity to make representations *before* the decision is made (in writing or in person) and there need not be a full blown hearing. In delivering the Judgment of the Court, Crane-Scott JA had this to say at para 54:

> **"54. At the very minimum, an employer's duty under section 34 to act fairly would require the employer to adhere to the *audi alteram partem* rule of natural justice: that most cherished principle of procedural fairness which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him. We hasten to add that the right to be heard does not require the employer to conduct a full blown hearing, but may be satisfied by giving an employee an opportunity before a decision is made, to make representation (whether in writing or in person) to the employer as to why he should not in the circumstances be terminated."**[Emphasis added]

[64] In my considered opinion, Wemco conducted an adequate investigation to the extent warranted in the circumstances. First, Mrs. McKenzie was asked to make a written report of the incident, which she did. Mr. Coakley and the person who

accompanied him at the Tribunal discussed Ms. McKenzie's written statement in her absence and asked her questions based on the statement. In my judgment, the nature of the incident did not require any more extensive investigation (or any at all) for Wemco to have reasonably determined that the incident was caused by Ms. McKenzie's negligence. The facts spoke for themselves. The fact that there was little time between the statement being written and Ms. McKenzie being presented with the termination letter is of a very limited effect.

Conclusion

[65] For all of the reasons stated above, I will dismiss Ms. McKenzie's claim with costs to Wemco to be taxed if not agreed.

Dated this 10th day of March 2022

Indra H. Charles
Justice