COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2018/ CLE/gen/01417

BETWEEN

NICHOLAS SIMMONS

Plaintiff

-AND-

JOHNSON BROTHERS LTD
(d/b/a Little Switzerland)

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mrs. Erica D. Munroe of E.D.M. Law Group for the Plaintiff
Mr. Keith O. Major Jr. of Higgs & Johnson for the Defendant

Hearing Dates: 9 February 2021, 14 September 2021, 18 January 2022

Employment Contract – Dismissal – Wrongful dismissal – Unfair dismissal - Employee summarily dismissed - Employer alleging gross negligence – Whether employee given a reasonable opportunity to respond to the allegations – Whether employer entitled to summarily dismiss employee for cause cited - Ss. 431, 32, 33 Employment Act, Ch 321

The Plaintiff was the Manager of the Defendant's jewelry store. He was summarily dismissed by the Defendant for stealing. He filed a Generally Indorsed Writ of Summons on 5 December 2018 wherein he claimed against the Defendant damages for wrongful and unfair dismissal and breach of contract. The Plaintiff claimed damages of $30,937.50 for unfair dismissal, damages of $37,500 for wrongful dismissal; special damages of $37,000 for retaining counsel to represent him in his criminal trial at the Magistrate Court; compensatory damages of $90,000 in accordance with section 47 of the Employment Act as well as general damages, interest and costs.

The Plaintiff asserted that the summary dismissal was wrongful because the Defendant's belief that he was guilty of stealing was not reasonably held and the Defendant failed to conduct a proper investigation to justify its determination that the Plaintiff was guilty of stealing. Further, the Plaintiff alleged that the dismissal amounted to unfair dismissal under the Employment Act, having regard to the Defendant's failure to conduct a proper investigation into the alleged missing items.

The Defendant denied not having conducted a reasonable investigation. It asserted that, in addition to conducting an investigation, documentary evidence supported the determination that

the Plaintiff was guilty of stealing. On that basis, the Defendant says that its belief was an honest one and reasonably held. Accordingly, the summary dismissal was lawful.

HELD: finding that the investigation was fair and reasonable and the Defendant's belief that the Plaintiff was guilty of the alleged misconduct was honest and reasonably held, the dismissal was not wrongful or unfair. The action is therefore dismissed with no order as to costs.

1. The employer's duty to act fairly in dismissing the employee dictates that natural justice principles be adhered to. The employee must be given an opportunity to explain or respond to any charge or adverse decision to be taken against him. The right to be heard does not require a full-blown hearing per se, but can be satisfied by giving the employee an opportunity to make representation (whether in writing or in person) before the decision is made: **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016 applied.

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** [2004] BHS J No 6 and **Princess Hotel v Bahamas Hotel Catering and Allied Workers Union** [1985] BHS J No 128 applied.

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

4. Taken together, all of the facts form a reasonable basis for the Defendant's belief, at the time of termination, that the Plaintiff was guilty of theft. Had the various facts been isolated, it is unlikely that there would have been reasonable belief of guilt. The investigation was proper and fair. It follows that the Plaintiff's summary dismissal was lawful and it was not unfair.

JUDGMENT

Charles J:

Introduction

[1] By Generally Indorsed Writ of Summons filed on 5 December 2018 and Statement of Claim filed on 26 February 2019, the Plaintiff ("Mr. Simmons") claims against the Defendant, Johnson Brothers Ltd. d/b/a Little Switzerland ("the Company") damages for both wrongful and unfair dismissal and breach of contract. The allegation was that, on 22 November 2014, Mr. Simmons was accused of theft and suspended indefinitely and, on 2 January 2015, his termination was confirmed. Mr. Simmons claims special damages in the sum of $195,437.50, $37,500 representing one month's basic pay in lieu of notice and

one month's basic pay for each year he was employed by the Company for wrongful dismissal, $30,937.50 for unfair dismissal, $90,000 as compensatory damages under the Employment Act ("EA") for unfair dismissal and $37,000 as consequential loss for representation in the criminal matter brought against him which arose from the Defendant's allegations. Mr. Simmons also claims general damages.

Background Facts

[2] Mr. Simmons commenced employment with the Company in 2005. He was promoted to Store Manager of the Breitling Boutique in 2006 and earned a bi-weekly salary of $1,875.00.

[3] The Company was, at all material times, a jewelry store owned by Johnson Brothers Limited.

[4] In August 2013, the Company hired an Assistant Manager, Krizia Bethel, to work alongside Mr. Simmons. He trained her for some time.

[5] On 1 October 2014, the Company offered Mr. Simmons a new position as Store Manager of a new store, Omega Boutique. On 6 October 2014, Tom Ballas, Vice-President of Operations, sent an email to "Everyone" advising them of the new changes in management. The email selectively reads:

> **"Good morning…**
>
> > **Please be advised that the management changes as it relates to the Nassau market. These changes were effective on Oct 1, 2014.**
> >
> > **7501, Breitling Boutique Nassau… Please join me in congratulating Krizia Bethel, who will be the new Store Manager.**
> >
> > **TBD, Omega Boutique… Please join me in congratulating Nic Simmons, who will be the Store Manager of the new Nassau Omega Boutique that is scheduled to open before season."**

[6] Mr. Simmons was present at the Company store and the Breitling Boutique on 16 November 2014, the day before one of the two yearly inventory audits was held by the Company.

[7] The inventory audit was held on 17 November 2014. Mr. Simmons was not present. On that morning, he flew to another island for vacation which he says was approved by the Company.

[8] The audit revealed missing items from tray 36 of the Breitling Boutique. Mr. Howard called Mr. Simmons and asked him where he was and where the items in tray 36 were. Mr. Simmons told him that the watches were being repaired in Switzerland.

[9] There are two (2) section tray transfer documents showing twelve (12) identical electronic transfers to tray 36. One document bears Ms. Bethel's name and employee ID number and the other document bears that of Mr. Simmons.

[10] On 22 November 2014, a meeting was held by Mr. Howard and the Vice President of Human Resources ("HR"), Mr. Mike Cooney. During the meeting, Mr. Simmons was questioned about missing watches from tray 36. Mr. Simmons told them that the watches should be in the tray which was located in the safe and that he had completed the turnover process of the store to Ms. Bethel. At the meeting, Mr. Howard and Mr. Cooney accused Mr. Simmons of theft.

[11] Mr. Howard invited Mr. Simmons to submit a written statement representative of his position/defence to the allegations. Mr. Simmons was advised that he was suspended until the completion of the investigation.

[12] By letter dated 24 November 2014, Mr. Simmons wrote Mr. Howard requesting a written letter confirming his termination. He stated that he would be prepared to provide a written statement only upon the receipt of same.

[13] The parties dispute whether Mr. Simmons was terminated by letter. Mr. Simmons alleged that he never received a termination letter.

[14] Mr. Simmons was charged with stealing by reason of employment, tried before a Magistrate and was found not guilty.

The law

Summary dismissal

[15] Section 31 of the Employment Act, Ch 321 (the EA") 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 employment contract or has acted in a manner offensive to the fundamental interests of the employer. The section expressly 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."**

[16] 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. It provides:

> **"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 –**
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> **(a) theft;**
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> **(b) fraudulent offences;**
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> **(c) dishonesty;**
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> **(d) gross insubordination or insolence;**
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> **(e) gross indecency;**
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> **(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."

[17] To prove that the summary dismissal was lawful, the employer must prove that he honestly and reasonably believe on a balance of probability that the employee committed the misconduct in question and he must have conducted a reasonable investigation into such misconduct unless an investigation is unwarranted. This is elucidated in section 33 of the EA which provides:

> **"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."**

[18] Undoubtedly, the immediate dismissal of an employee is a strong measure for an employer to take.

Wrongful dismissal

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

[20] 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."

[21] 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.

[22] Wrongful dismissal under the EA 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 EA or purported summary dismissal for cause where no cause has been proven.

[23] 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 EA is wrongful dismissal (2) In determining whether the employer has lawfully summarily dismissed the employee, the question is whether, in all the circumstances, the employer can prove that his belief of the employee's misconduct is 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.

Unfair dismissal

[24] Section 34 of the EA provides that every employee shall have a right not to be unfairly dismissed by his employer, as provided in sections 35 to 40.

[25] Section 35 states that "*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*".

[26] The case of **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson** IndTribApp App No. 116 of 2012 gives a broad overview to what may constitute unfair dismissal. The Court of Appeal held, among other things, that (i) the EA does not contain an exhaustive list of instances of what could be considered to be unfair dismissal; (ii) sections 35 to 40 contain what may be regarded as "statutory unfair dismissal" and section 35 provides for the determination of the question whether the dismissal of an employee is fair or unfair.

[27] At para 36 of the judgment, Conteh JA stated:

> **"The expression "unfair dismissal" itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what can be called "statutory unfair dismissal" such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).**

[28] At page 12, para 39, the learned Justice of Appeal continued:

> **"Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. <u>And this question shall be determined in accordance with the substantial merits of the case</u>. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?"** [Emphasis added]

The evidence

Nicholas Simmons

[29] Mr. Simmons gave evidence on his behalf and he did not call any witnesses. He filed a Witness Statement on 28 September 2020 which stood as his evidence

in chief at trial. According to him, tray 36 was a repair tray to which all staff members had access.

[30] Mr. Simmons stated that he applied to his direct supervisor, Mr. Howard for vacation (and copied to Human Resources on the email). He stated that his vacation was approved. Under cross-examination by Mr. Major, Mr. Simmons said that he sent an email to Aneesh Abraham requesting pay for vacation because although Mr. Abraham was not his manager or HR, he worked with HR and was responsible for payroll.

[31] Mr. Simmons' position was that it was reasonable and convenient to take vacation at the time because he had no responsibility with respect to the 17 November 2014 inventory audit. He said that, at the time in question, he was no longer the Store Manager; that he was transferred out of that store as of 1 October (the date he was offered the position at Omega Boutique) and that he had completed the turnover process around 6 October 2014. He said that the Omega Store was not ready to be opened yet.

[32] Further to his 24 November 2014 letter, Mr. Simmons explained that the reason he did not submit a written statement for the investigation process was because he was awaiting a written termination letter. He insisted that he never received a termination letter and was only made aware of his formal termination when he went to the National Insurance Board ("NIB") to collect unemployment benefits and the Company eventually completed a completion certificate. That notwithstanding, under cross-examination, Mr. Simmons stated that, even without having received the termination letter, he understood that he was fired. Further, at that point, the criminal case against him for stealing had already commenced.

[33] Mr. Simmons further stated that he was in Nassau on 16 November 2014, the day before the audit, and he left for Eleuthera early on 17 November 2014 which was the day of the audit. He stated that, on 16 November 2014, he was at the

the Company Store and went to the Breitling Boutique because he was invited by Ms. Bethel, who was the Manager at the time.

[34] Under cross-examination, Mr. Simmons stated that it is impossible for two different employees to transfer items from one location to another at the exact same time and date. He said that, at the meeting, he was not given any document to show transfers made or shortages from the audit. He maintained that he did not make the electronic transfers and that his employee ID number appeared there because someone put it there. He further stated that no employee would give out their password. Mr. Simmons stated that it would be difficult to explain why it appears that he made the electronic transfers from the section tray transfer document with his name and number.

[35] That was the extent of the evidence adduced on his behalf.

Tom Ballas

[36] Mr. Ballas gave evidence on behalf of the Company. He filed a Witness Statement on 22 January 2021 which stood as his evidence in chief at trial. He is the Vice President of Operations at the Company and has held that position since 31 March 2008. In that role, he manages store/market operations, does periodic store visits and inspections, audit store compliance of marketing, merchandising, operations, human resources, IT accounting and inventory control, among other things.

[37] Mr. Ballas stated that it is strictly against company policy to take vacation during a scheduled inventory audit. He said that Mr. Simmons did not notify his direct supervisor in advance of the vacation but instead cavalierly advised Mr. Howard when he called him on the day of the inventory. Further, Mr. Ballas stated that reminders of this are given at managers' weekly meetings. Under cross-examination, he however admitted that he did not provide copies of emails to the effect that vacations during inventory audits were prohibited. He asserted that managers do not take vacation when there is a store inventory.

[38] Mr. Ballas maintained that Mr. Simmons was still the Store Manager of Breitling Boutique at the time of the inventory. He asserted that, at that time, the promotions of both Mr. Simmons and Ms. Bethel were just plans: the plan was that Mr. Simmons would go from being the Breitling Boutique Manager and Ms. Bethel would go from being the Sales Supervisor (Mr. Simmons' assistant) to Store Manager. However, Mr. Ballas explained that before they make any promotions or handovers of the store, they would perform an inventory so that the new person is provided with a clean inventory and then the new manager becomes responsible for that inventory. Further, according to him, the Omega Store was not ready yet which was consistent with Mr. Simmons' evidence.

[39] Under further cross-examination, learned Counsel Mrs. Munroe, who appeared for Mr. Simmons, took Mr. Ballas to his email dated 6 October 2014 declaring that the changes to management were effective 1 October 2014. He maintained that the change had not occurred by the date of the inventory and it could only become effective after the inventory had been satisfactorily completed. He emphasized that the email stated that they "*will be*" new Store Managers.

[40] Mr. Ballas also stated that he had personal knowledge of the investigation process that led to Mr. Simmons' dismissal. He said that Mr. Howard advised him that the inventory revealed missing items. He was also aware that Mr. Howard filed a complaint at the police station and that other team members including Ms. Bethel, Jerome Gray and Mr. Howard went to give statements as well. He could not say off the cuff how many watches were missing.

[41] Mr. Ballas further stated that, at the meeting, Mr. Simmons was given information relative to the company's suspicion of misconduct.

[42] When asked what about the inventory audit which led them to believe that Mr. Simmons was guilty of theft, Mr. Ballas said that, based on communications between Mr. Simmons and management along with statements they received, it was clear that the watches went missing under Mr. Simmons' watch. He was further questioned as to the reason for Mr. Simmons' suspension for theft

discovered by an inventory if there were no discrepancies with tray 36 on the day before the inventory. He said that the Company suspended him because they could not get any communication with what was going on. He then said that he believed that his evidence that there were no discrepancies the day before the inventory was wrong.

[43] Mr. Ballas asserted that inventories are done twice daily unless there are internet or power outages. If there are discrepancies in those inventories, it is shown on the computer system and if the count done by the sale staff and/or manager does not match with the system count, a discrepancy report is generated by the audit accounting team and that information is then sent to upper management.

[44] He was unable to say whether any incriminating evidence was found at Mr. Simmons' home. He stated that no employee of the Company informed him that they saw Mr. Simmons remove any items.

Cyril Valimattom

[45] Mr. Valimatom also testified on behalf of the Company. He filed a Witness Statement on 22 January 2021 which stood as his evidence in chief at trial. He is the Controller of the Company and has acted in that role since 31 July 2007. He testified that, as Controller, he oversees the operations of the Company and supervises physical inventory and inventory audits. He deals with issues with respect to inventory or cash.

[46] He explained the daily inventory – the sales person and/or manager enters two counts of items into the system and if the count is incorrect, the system will indicate so. He said that the manager and the assistant manager have access to everything in the store but employees do not have access to the repair case, layaway case or the managers' case. Only managers have access to tray 36. He rejected Mrs. Munroe's suggestion that employees other than managers can transfer items from any tray to another electronically.

[47] Mr. Valimattom could not explain why section tray transfer documents show that both Ms. Bethel and Mr. Simmons made identical electronic transfers to tray 36. He insisted that nobody could manipulate the system.

Discussion

[48] As stated, in order to resolve the main issue, which is whether the Company wrongly dismissed Mr. Simmons, it must be determined whether the summary dismissal was lawful. The question then, is whether the Company honestly and reasonably believed that Mr. Simmons was guilty of theft and, more particularly, whether in coming to that belief, they conducted a reasonable investigation that was fair to Mr. Simmons.

[49] Mrs. Munroe argued that it raised the preliminary point that it is unclear which form of misconduct led to Mr. Simmons' dismissal. According to her, the evidence of Mr. Valimattom suggests that he was dismissed for gross misconduct in that, as the Manager, he was responsible for the items in the store. She maintained that Mr. Simmons was no longer the Manager of Breitling Boutique and therefore he could not be responsible for the missing items not under his watch. Mrs. Munroe further submitted that Mr. Simmons was not in a position to respond to the Company's allegations as he was not provided with all of the documents and information that gave rise to their suspicion. As a result, he was not aware of how many items were missing, what was missing and who his accusers were.

[50] Mrs. Munroe further argued that it was not reasonable for the Company to have believed that Mr. Simmons was guilty of theft because there is vastly conflicting evidence on how many watches were missing and because the electronic transfers made by Mr. Simmons to tray 36 which were not in tray 36 were also made by Ms. Bethel. Further, the Company never produced evidence that they interviewed other employees.

[51] On the other hand, Learned Counsel Mr. Major who appeared for the Company submitted that the Company's belief as to Mr. Simmons' guilt was honest and reasonable. He next submitted that such a finding was consistent with the contemporaneous documentary evidence and the statements of the other employees. Further, says Mr. Major, the Company conducted a fair and reasonable investigation when Mr. Howard held a meeting with Mr. Simmons. Mr. Simmons was given the opportunity to explain the reason for the missing items and he was again given this opportunity when he was invited to submit a written statement, which he refused. Mr. Major contended that Mr. Simmons was the Manager of the Brietling Boutique at the time of the inventory audit and that the vacation leave he took during the audit was not approved by the Company. According to Mr. Major, that was evidence which supported the Company's suspicion and rendered its belief reasonable. He emphasised that the employer only needs to prove that it reasonably believed that the employee was guilty. They need not prove actual guilt of the employee.

Whether the investigation was reasonable and fair

[52] Mrs. Munroe submitted that the Company failed to conduct a reasonable investigation, which rendered the dismissal wrongful and unfair.

[53] Section 34 of the EA provides that the employee has the right not to be unfairly dismissed and section 35 states that the fairness or unfairness of the dismissal should be assessed in accordance with the substantial merits of the case. Specific circumstances of unfair dismissal are set out in the following paragraphs but a claim for unfair dismissal can be brought whether or not the claim falls within the statutory situations spelled out in sections 36, 37, 38 and 40 (dismissal relating to trade union membership, redundancy, pregnancy, or in connection with industrial action). This was explained by the Court of Appeal in **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016. Where an unfair dismissal claim is made other than in those spelled out circumstances, the question is the fairness or unfairness of the dismissal "*in*

accordance with the substantial merits of the case." At paras 21-22 of that Judgment, Crane-Scott JA stated:

> **"21. In The Bahamas, unfair dismissal claims are now routinely adjudicated either in the Supreme Court or alternatively, before the Industrial Tribunal through the trade dispute procedure of the Industrial Relations Act, Ch. 321. The claims for unfair dismissal are made irrespective of whether the dismissal falls within any of the statutory situations spelled out in sections 36, 37, 38 and 40 of the Employment Act; or arise in other circumstances.**
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> **22. A review of a few of the unfair dismissal decisions which have been decided in this jurisdiction will also confirm that where the claim is based on a dismissal which occurred in circumstances other than those spelled out in sections 36, 37, 38 and 40, the Supreme Court, or the Industrial Tribunal (as required by section 35 of the Act) have determined the question of the fairness or unfairness of the dismissal "*in accordance with the substantial merits of the case*." [See for example Cartwright v US Airways [2015] BHS J 80; Coleby v Lowes Pharmacy Ltd [2016] BHS J 15; Higgins v. Walkers Industries Ltd [2017] BHS J 79; and Burrows v. Ferry [2006] 3 BHS J No. 276]."**

[54] In **Omar Ferguson**, the issue was whether the employee's dismissal was unfair where he was not given a hearing before his termination. The Court of Appeal agreed with the trial judge that, among other things, the dismissal was unfair as a result of the failure to give him an opportunity to make representations before termination. At paras 43 - 44, Crane-Scott JA continued:

> **43. As we see it, the appellant acted precipitously by unfairly terminating the respondent's contract without a hearing and before hearing from him or allowing him the opportunity to make representations to the Airport Authority to have the clearance restored. Had the appellant given the respondent the opportunity to appeal the withdrawal of his security clearance with the Airport Authority, and had his efforts proved futile, the issue of frustration of the contract of employment would have been definitively settled. In such circumstances, the appellant could doubtless have argued with confidence that no explanation or mitigation by the respondent could alter their decision to formally terminate him.**
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> **44. As things stand, the appellant acted in haste and in breach of section 34. They did not wait or allow the respondent to seek restoration of the security clearance with the Airport Authority. In such circumstances, the appellant could not, in our view, properly take the view that no explanation or mitigation from the respondent could alter their decision to dismiss. Quite simply, the respondent had a statutory right not to be unfairly dismissed and at the very**

minimum, the appellant was required to hear his explanation or mitigation and give him the option to approach the Airport Authority before he was dismissed."

[55] The employer, must, at least, accord with natural justice principles. This can be satisfied by giving the employee an opportunity, *before* a decision is made, to make representations (in writing or in person). This principle is highlighted at para 54 of the Judgment where Crane-Scott stated:

> **"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]

[56] As recently as a week ago, this very issue was considered by this Court in **Lenora McKenzie v Wemco Security & Collections Limited** 2016/COM/lab/00074 – (Judgment delivered on 10 March 2022) where the Court applied the principles derived from **Omar Ferguson** and held that 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.

[57] In my judgment, the Company conducted a reasonable and fair investigation before terminating Mr. Simmons. The Company held a meeting on 22 September 2014 and thereafter, offered him the opportunity to give a written statement. Mr. Simmons himself stated that, at the meeting, Mr. Howard made it clear to him that the Company suspected that he was guilty of stealing. The

fact that he was not told which items and/or how many items were missing and/or who his accusers were did not prevent him from giving an explanation or justification. He was told what he needed to know to respond namely that the Company suspected that he was guilty of stealing items found to be missing as a result of the inventory audit. If Mr. Simmons required further information to answer to the allegations, he could have said so. No evidence was led to suggest that Mr. Simmons asked for further information to assist him in dispelling the suspicions.

[58] Mr. Simmons' insistence on providing a written statement only upon the receipt of a termination letter defeated the purpose of the written statement. It was unreasonable and was effectively a refusal since the purpose of the written statement was to aid the investigation process, to help the Company to determine whether they believed that he was guilty of theft. Accordingly, the written statement did not have the effect of rebutting the Company's suspicions as it could have if Mr. Simmons responded with a reasonable explanation.

[59] The fact of the matter is that Mr. Simmons was made aware of the allegation and he was given an opportunity to state his case and/or offer justification for the alleged theft at the 22 November 2014 meeting and again when he was invited to submit a written statement. Accordingly, the investigation was adequate and cannot therefore form the basis of allegations of wrongful or unfair dismissal.

Reasonableness of the Company's belief that Mr. Simmons was guilty of theft

[60] Mrs. Munroe raised the preliminary point that the Company's position is that Mr. Simmons was responsible for the missing items since he was the Manager of the store at that time. Accordingly, he was actually dismissed for gross negligence and not theft. I believe that Munroe's assertion is mistaken. As I understood the submissions made on behalf of the Company, the assertion that Mr. Simmons was the Store Manager at the time of the audit was made in an effort to prove that Mr. Simmons' vacation was not and could not have been

approved and that he could not have believed the vacation was reasonable or allowed at that time because he was still the Manager.

[61] In any event, it is clear from the evidence and submissions of the Company that Mr. Simmons was summarily dismissed for theft. The 2 January 2015 termination letter, which Mr. Simmons says that he never received, stated that the Company believed that he "*committed the misconduct in question*". In any event, the NIB Termination of Service Certificate stated that Mr. Simmons was summarily dismissed for theft of company merchandise and Mr. Howard was the virtual complainant of the charge brought against Mr. Simmons which was for theft by reason of employment.

[62] Having had the opportunity of seeing, hearing and observing the demeanour of the witnesses and the documentary evidence with respect to Mr. Simmons' absence from the inventory audit, I prefer the evidence of the witnesses for the Company to that of Mr. Simmons. I do not believe that Mr. Simmons' absence during the audit was approved. His evidence was that he applied to HR and Mr. Howard by email, but he provided no evidence of this yet he provided a copy of the email to Mr. Abraham requesting to be paid for vacation, which does not prove that he applied or even notified his supervisor, Mr. Howard, of his intended absence. I accept Mr. Ballas' evidence that it was made clear to managers that they should be present at audits.

[63] I believe that Mr. Simmons was still the Manager of Breitling Boutique at the time of the audit and was therefore required to be present. The email from Mr. Howard notifying all staff members of the management changes did say that the changes were made as of 1 October 2014, which was when Mr. Simmons was offered the new position, but the email also stated that Mr. Simmons *will* be the Manager of Omega Boutique and that Ms. Bethel *will* be the Manager of Breitling Boutique. I accept that Mr. Simmons carried out tasks of handing the store over to Ms. Bethel. However, Mr. Simmons himself stated that the Omega Boutique was not ready for opening yet. It is therefore difficult to see how he could

effectively be the Manager of that store. I accept the evidence of Mr. Ballas and Mr. Valimattom that it was commonplace that turnovers were not complete until an inventory audit had been done. Until the inventory audit had been done to give Ms. Bethel a clean inventory, Mr. Simmons was the Store Manager.

[64] Further and, in any event, Mr. Simmons could not have reasonably believed that it was permissible for him to be absent from the audit because, as Mr. Major correctly stated, the audit related to him, as it picked up from the prior audit. Because of the unreasonableness of Mr. Simmons' absence from the inventory audit, it was reasonable for the Company to consider this as pointing toward Mr. Simmons' guilt especially having regard to the fact that Mr. Simmons was present in the store the day before the audit and left for another island on the day of the audit. There seems to be no reasonable explanation for such a thing. He was the Manager.

[65] The Company further asserted that other employees were interviewed as part of the investigation process. Mrs. Munroe, on the other hand, submitted that the Company never produced any evidence that other employees were interviewed before they formed the view that Mr. Simmons was guilty of theft. However, Jerome Gray and Ms. Bethel gave evidence in the criminal matter along with Mr. Howard. Mr. Gray's evidence was essentially that Mr. Simmons created tray 36 as a repair tray but that it was unnecessary, in his view, because there was already a repair tray. According to Mr. Gray, a number of the watches unaccounted for were new watches, which in his experience, were rarely sent for repair. Ms. Bethel's evidence was that Mr. Simmons always objected to her seeing the contents of tray 36 and she asserted that he had care and control of the merchandise. During the handover of the store, she asked to see the contents of tray 36 when Mr. Simmons again objected. She said that she made a complaint about this to Mr. Howard.

[66] Neither Mr. Gray nor Ms. Bethel were called as witnesses to testify on behalf of either party (the burden is on the party who asserts to prove) but their witness statements to the police formed part of the Trial Bundle prepared by Mrs. Munroe who also cross-examined Mr. Ballas with respect to Mr. Gray's statement. The Court will determine what weight, if any, to give to their evidence.

[67] Be that as it may, there appeared to be facts that made the belief of misconduct reasonable. In fact, Ms. Bethel's evidence was that her complaints of Mr. Simmons's suspicious behaviour is what gave rise to the audit. Further, Mr. Ballas and Mr. Valimattom stated that employees other than Mr. Simmons were interviewed. I consider them to be credible witnesses and I see no reason not to accept that evidence.

[68] Mr. Major submitted that one of the factors on which the Company relied to determine its belief of Mr. Simmons' guilt was the section tray transfer document bearing Mr. Simmons' name and employee ID number. Mr. Simmons' evidence was that he did not make those transfers and surmised that someone must have made the transfers and put his employee number there. Mrs. Munroe correctly submitted that another document shows the exact same transfers made by Ms. Bethel. According to Mrs. Munroe, the document with Mr. Simmons' employee number does not prove that Mr. Simmons was the person who made the electronic transfers.

[69] Mrs. Munroe pointed out that it is unclear how many watches were missing. She intimated that the failure to specify a number of missing watches meant that the belief that Mr. Simmons stole them was unreasonable. Mr. Howard's evidence to the police was that 36 watches were missing valued at $130,000.00. Mr. Gray, on the other hand, said that there were over 100 watches missing. However, the fact that the Company gave conflicting evidence before the Magistrate on how many watches were missing is not relevant to whether their belief of Mr. Simmons' guilt was reasonable. Undoubtedly, that is far more relevant and probative in the criminal trial because the issue was different. The question for

summary dismissal is not whether the employee was in fact guilty of the misconduct. In **Wesley Percentie v Cost Rite Wholesale Club** [1985] BHS J No 128**,** a decision from the Industrial Tribunal, Mr. Nathaniel Dean, a member of that Tribunal, made it clear that 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. Mr. Dean said the following at para 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."**

[70] 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? At paras 18 and 19, the Court of Appeal stated:

> **"18. In my view, even apart from the judicial pronouncements to which reference has been made above, she 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."**

[71] The Court of Appeal stated that the gravity of the allegation was a consideration that was relevant and the employer was entitled to have regard. This is what the Court of Appeal said, at para 20:

> **"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."**

[72] In my judgment, the fact that Mr. Simmons was acquitted of the criminal charge is not a factor in his favour in this case as postulated by Mrs. Munroe. As stated before, the issues in a criminal case and a civil case are different. However, contrary to what Mr. Major submitted, this Court is entitled to consider the evidence given in that case. This Court has the power to decide what evidence to accept and what to reject and also, to give little or no weight to untested evidence in this Court.

[73] That said, notwithstanding that there was conflicting evidence as to how many pieces of merchandise were missing, it was reasonable for the Company to have concluded that Mr. Simmons was guilty of theft even though there were section tray transfer documents showing identical electronic transfers made by both Mr. Simmons and Ms. Bethel. Further, Mr. Simmons was absent from the audit, which, I have already determined, was unreasonable for reasons stated above.

[74] The dispute as to whether he received the termination letter is non-consequential. Whether he received it or not, he believed he was fired based on the suspension and no further communication.

[75] Taken together, all of the facts form a reasonable basis for the Company to believe, at the time of termination, that Mr. Simmons was guilty of theft. Had the various facts been isolated, it might have been unlikely for the Company to form that belief. But, when taken together, they point to the conclusion that the Company reasonably believed that Mr. Simmons was guilty of theft. The investigation was therefore proper and fair.

Conclusion

[76] In my considered opinion, Mr. Simmons was lawfully summarily dismissed and his dismissal was not unfair. The documentary evidence as well as the oral testimony of the witnesses clearly demonstrated that the Company had an honest and reasonable belief that Mr. Simmons was guilty of theft. Further, the Company conducted a reasonable and fair investigation before terminating Mr. Simmons who was afforded a right to be heard and an opportunity to make representations (in person or in writing) during the investigation process. The Company held a meeting on 22 September 2014 and thereafter, offered him the opportunity to give a written statement. Mr. Simmons denied himself the opportunity to mitigate as to why he should not be dismissed in spite of his misconduct.

[77] For all of these reasons, I will dismiss the action.

Costs

[78] In accordance with my case management powers, I directed that the parties submitted their respective Bill of Costs to the Court. They dutifully complied.

[79] A convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("**RSC**") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[80] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[81] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[82] As a general rule, the successful party is entitled to its costs. But that does not preclude a judge from departing from this normal practice. However, a judge ought to give reasons when deciding to make an unusual order as to costs: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[83] In the present case, I am of the opinion that I should depart from the usual order for costs to the Company, the successful party. I do so because Mr. Simmons was an employee with the Company for nine (9) years and had a good track record prior to this unfortunate incident.

Dated this 18th day of March, 2022

Indra H. Charles
Justice