

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/01069

BETWEEN

PAULINE VIRGINIA CURRY

Plaintiff

AND

THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Defendant

Before Hon. Chief Justice Ian R. Winder

Appearances: Palincia Hunter for the Plaintiff

Raynard Rigby KC for the Defendant

17 August 2021, 25 November 2021 and 24 January 2022

JUDGMENT

WINDER, CJ

The plaintiff (Curry) claims wrongful and unfair dismissal from the defendant (BTC). The events leading up to Curry's dismissal arose following her interactions with another BTC employee, Jonice Lockhart (Lockhart).

Background

[1.] At the time of her dismissal Curry was employed with BTC as a Senior Manager of Health & Safety in the Industrial Relations Division, having been employed with BTC since 8 September, 2003.

[2.] In January 2018 senior management at BTC advised Curry that Lockhart, an employee in the Credit and Collections Department at BTC's JFK location, alleged there was mold present in the department, which was causing her to be sick. Lockhart attended Dr. Kevin Moss, Pulmonologist, and submitted a letter from him with a diagnosis of Mold Hypersensitivity Syndrome. Following Dr. Moss' diagnosis, arrangements were made to have Lockhart transferred to BTC's Perpall Tract location.

[3.] In February 2018, Valerie Wallace (Wallace), Vice President of Human Resources, directed Curry to send Lockhart to be examined by the company's physician, Dr. Eugene Gray. Following her consultation with Dr. Gray, Lockhart requested, via email, a third medical opinion. At the time of the request, both Wallace and Helene Ferguson (Ferguson), Senior Vice President of Human Resources, were on leave and neither of them responded to Lockhart's email.

[4.] In March 2018 Curry states that Lockhart contacted her saying that she had scheduled a third opinion consultation at a medical facility in Florida. During this time Curry avers that Lockhart was already on medical leave. Curry says she advised Lockhart that she was unable to facilitate her request for payment for the Cleveland Clinic consult as only Wallace and Ferguson could do so and they were both out of office. Following this exchange between Lockhart and Curry, Lockhart filed a grievance complaint against Curry on 5 March 2018, for bullying and insulting behaviour.

[5.] The grievance complaint against Curry asserted that Curry "displayed a disrespectful, insensitive and argumentative attitude and questioned her integrity and that

of Dr. Eugene Gray". BTC avers that it was duty bound to investigate the allegations made against Curry by Lockhart.

[6.] Lockhart's grievance complaint against Curry was addressed at a meeting held later in March. At the meeting members of the Bahamas Communication and Public Officers Union (BCPOU), the Bahamas Communications and Public Manager Union (BCPMU), Wallace, Lockhart and Curry were all present. Curry had Lockhart's medical report with her and in her possession at the meeting.

[7.] During the grievance meeting Curry says that Wallace, and the BCPOU members present, took issue with her being in receipt of Lockhart's medical records. They alleged that in having the records she had committed a breach of confidence. Curry does not admit to the alleged breach and relies on Articles 5.8 and 5.13 of the Industrial Agreement between BCPMU and BTC (the Agreement) in support of her position. She asserts that the clauses entitled her to bring all documents, reports and information needed to defend her case during the March 2018 grievance meeting.

[8.] Articles 5.8 and 5.13 of the Agreement provides:

5.8 The Company will furnish the union with information that is necessary for Industrial Relation purposes.

5.13 The Company will furnish the Union with all information /documentation for industrial relations purpose as it relates to disputes regarding employees in the bargaining unit at the beginning of the grievance procedure. The Company and the Union further agree that in the event the Company withholds information/documentation as stated above, no disciplinary action will be taken against the employee.

[9.] BTC says that it was during the grievance meeting held on 26 March, 2018 that it was revealed that Curry had visited Dr. Gray's office seeking additional medical records and information on Lockhart. It was also learned that Curry had also sought out members of a bowling team that Lockhart was a part of, requesting photos and scores of games from them. During the grievance meeting Curry disclosed a copy of Lockhart's chest x-ray report, a disclosure which was not necessary in the context of the meeting says BTC.

[10.] Following the meeting, on 29 March 2018, Bernard Evans, President of the Bahamas Communication and Public Officers Union (BCPOU), Lockhart's union, made a formal complaint to BTC's management complaining about Curry's disclosure of

Lockhart's medical information at the grievance meeting. In the email he described Curry's access to Lockhart's medical records as unauthorized and the disclosure as unwarranted and unauthorized.

[11.] On 27 April 2018, a month after the grievance meeting, Curry was dismissed from BTC's employ. The termination letter issued to Curry was settled in the following terms:

April 27, 2018

PRIVATE & CONFIDENTIAL

Pauline Curry

Sr. Manager – Health & Safety & Industrial Relations

Nassau, Bahamas.

Dear Ms. Curry:

Re: Termination of Services

BTC has established a zero tolerance approach to employees violating the Oath of Secrecy and Confidentiality Policy. Likewise, BTC deserves and expects its employees to perform their duties with the highest degree of fidelity in order to effectively perform the public service for which it has been established.

In a telephone conversation with Ms. Jonice Lockhart on March 5, 2018, you argued with and disputed her decision to seek a 2nd medical opinion while she was simply requesting clarity on the classification of the time off during the doctor's visit abroad. As a Senior HR practitioner you betrayed Ms. Lockhart's trust and confidence and suggested that her quest to seek further medical attention was unwarranted.

On Thursday, March 22, 2018, you visited Dr. C. Eugene Gray's office in search of additional medical information from Ms. Lockhart's records, despite the fact that Dr. Gray had already provided BTC with a medical report. The president of the BCPOU asked you for your reason for requesting this additional information and you were not able to give a satisfactory response. You were not justified in these actions and by so doing you infringed on the doctor/patient privilege and the privacy rights of Ms. Lockhart. Inadmissibly, Ms. Jonice Lockhart's medical records were used in an irresponsible and reckless manner when you tabled them in a grievance meeting on March 26, 2018.

Moreover, the BCPOU officials have expressed to BTC that they have lost confidence in your ability as a Senior Industrial Relations Officer to adjudicate matters confidentially and impartially. Ultimately, your conduct as a senior leader in mishandling Ms. Lockhart's matter was inconsistent with the company's core values and ethical standards of behavior expected from management and HR staff.

In view of the above, BTC has no alternative but to terminate your services effective immediately in accordance with Article 27.5 of the Industrial Agreement between BTC and the BCPMU for bullying and humiliating Ms. Jonice Lockhart and for violating the company's Oath of Secrecy/Declaration of Confidentiality.

Please return all property including your ID card immediately to your Manager who will advise you of any accrued benefits due to you.

Yours sincerely,

THE BAHAMAS TELECOMMUNICATIONS COMPANY LTD.

HELENE A. FERGUSON (MS.)

Senior Vice President

Human Resources & Training Division

[12.] Curry attempted to appeal the dismissal. Following the appeal meeting Curry says she was advised by Ricardo Thompson (Thompson), President of the BCPMU (her union representative) that Judith Smith, Director of Legal for BTC had informed him that the dismissal had been set aside and instead she would be suspended with pay while BTC conducted further investigations. She received her salary for the months of April and May 2018 but not for June 2018. On or around 15 June 2018 she contacted Thompson who advised her that her dismissal was being upheld. Curry avers that the decision to uphold her termination was not communicated to her.

[13.] Curry says that BTC has breached her employment contract. BTC contends that Curry's attendance at Dr. Gray's office and her request for additional medical records of Lockhart was 'outside of the scope of her authority and unwarranted in the prevailing circumstances.' At the time that Curry made her visit to the physician's practice BTC was already in possession of the medical report and chest x-ray produced by Dr. Gray. These, avers BTC, were sufficient for Curry to consider whether Lockhart's request should be granted. They say that the visit by Curry to Dr. Gray's office was a violation of BTC's confidentiality policy and a breach of the confidential relationship between Lockhart and Dr. Gray. The issue being considered at the grievance meeting was Curry's behaviour toward Lockhart on or around 16 February, 2018 when the pair spoke and therefore Lockhart's medical records were irrelevant at the meeting.

[14.] BTC says that Curry was summarily dismissed on 27 April 2018 in circumstances which they claim were justified. They say that the incident with Lockhart was Curry's third

major infraction committed during her employment with the company, which permitted them to call her dismissal. They rely on Article 27.5 of the Agreement which provides:

27.5 Although fixed penalties are not established, major breaches may call for dismissal. Major breaches are, but not limited to the following:

- (a) Theft;
- (b) Fighting or acts of physical violence while on the job;
- (c) Malicious acts resulting in major damage to Company's property;
- (d) Absence from duty without leave for a period of five (5) working days;
- (e) Possession and/or use of narcotics or dangerous drugs except where prescribed by a bona fide medical practitioner;
- (f) Conviction for dangerous drugs as defined in the Dangerous Drugs Act;
- (g) Violation of the Bahamas Telecommunications Company Secrecy Oath;
- (h) Sexual Harassment
- (i) Unauthorized use of the Company's vehicles or vehicles under the control of the Company;
- (j) Altering, falsifying or misrepresenting the Company's records;
- (k) Deliberate refusal to carry out a reasonable job-related instruction that is within the scope of his contract of service with the Company;

...

[15.] Curry's Statement of Claim provides, at paragraphs 26-30:

PARTICULARS OF BREACH OF CONTRACT

26. The Defendant Company, its servants and/or agents are in breach of the contract between it and/or them and the Plaintiff whom is apart (sic) of the BCPMU for:

- i) Placing the Plaintiff on paid leave for investigation purposes over a period of more than one month;
- ii) Failing to notify the BCPMU that the Defendant Company had concluded its investigation and opted to terminate the Plaintiffs Employ.
- iii) Failing to pay the Plaintiff all monies due up to the time of dismissal.

27. The Defendant Company, its servants and/or agents failed to comply with Part IX of the Employment Act in that it failed to follow the procedure outlined in the said Act and in consequence has wrongfully and unfairly dismissed the Plaintiff by way of:

PARTICULARS OF WRONGFUL DISMISSAL

- (i) Failing to pay the Plaintiff 1 month in lieu of Notice;
- (ii) Failing to pay the Plaintiff her loss of Pension
- (iii) Failing to pay the Plaintiffs for vacation accrued as at the date of the termination.
- (iv) Failing to pay the Plaintiff sums owed for vacation not taken.

(v) Failing to pay her Severance payment.

PARTICULARS OF UNFAIR DISMISSAL

28. The Defendant Company, its servants and/or agents unfairly dismissed the Plaintiff by:

(i) Failing to inform the Plaintiff that her employ was terminated while she was on paid suspension; and

Terminating the employ of the Plaintiff for reasons that are not purported to be true and correct as stated in the termination letter.

29. That the Defendant Company, its servants and/or agents Breach of Contract, Wrongful Dismissal and Unfair Dismissal caused the Plaintiff to suffer loss, mainly:

PARTICULARS OF SPECIAL DAMAGES

i. Wrongful termination (12 x \$7,090.76)	\$85,089.12
ii. Unfair dismissal (16 x \$4,908.99)	\$78,543.804
iii. 1 month in lieu of Notice	\$ 7,090.76
iv. Loss of Pension	\$14,032.44
v. Loss of Medical Coverage	\$13,536.00
TOTAL	\$198,292.12

30. The Plaintiff further claims interest pursuant to the Civil Procedure (Award of Interest) Act, 1992.

[16.] The Defence of BTC, at paragraphs 21-30 provides:

21. Paragraph 24 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof. The Defendant contends that by email dated 1st June, 2018 from Dexter Cartwright to Ricardo Thompson, Mr. Thompson was duly advised that the Plaintiff's appeal was denied and thereby the termination was upheld.

22. The Defendant contends that the filing of the appeal did not alter the effect of the termination letter dated 27th April, 2018. The Defendant further contends that the Plaintiff was duly informed of the termination and the basis thereof by the contents of the aforesaid termination letter.

23. ...

24. ...The Defendant further contends as follows:

(i) the salary paid to the Plaintiff in May, 2018 was during the period of the hearing and determination of the appeal and not during the investigation period;

(ii) the Plaintiff received full salary benefits during the period of investigation, being March and April, 2018;

(ii) the investigation of the matter involving the grievance complaint lodged by Ms. Lockhart was completed on or about 24th April, 2018;

(iii) the President of the BCPMU was notified of the decision of the appeal by email of 1st June, 2018; and

(iv) the Plaintiff was paid all accrued benefits up to the date of the termination.

25. The Defendant denies paragraph 27 of the Statement of Claim and puts the Plaintiff to strict proof thereof. The Defendant contends that it paid the Plaintiff all accrued benefits up to the date of the termination. The payment made to the Plaintiff totaled \$15,872.39 and included payment for 39 vacation days (\$12,763.37), 9 days of Christmas bonus (\$2,454.49) and salary for 1st to 4th June, 2018 (\$614.53).

26. Occasioned by the summary dismissal of the Plaintiff, the Defendant contends that notice payment or payment in lieu of notice was not required under the provisions of the Employment Act.

27. The Defendant contends that it carried out a reasonable investigation of the grievance complaint made by Ms. Lockhart and afforded the Plaintiff due notice and due process and allowed the Plaintiff to make representations in response to the said grievance complaint.

28. The Defendant further avers that it honestly and reasonably believed on a balance of probability that the Plaintiff committed the misconduct in question at the time of the dismissal as determined by the reasonable investigation which was conducted.

29. The Defendant avers that the Plaintiff's misconduct which justified her summary dismissal was of the character of a fundamental breach of the employment contract and was repugnant to the fundamental interests of the Defendant as an employer.

PARTICULARS

- (i) The Plaintiff's conduct in disclosing details of the medical results/information of Ms. Lockhart amounted to a breach of clause 27.5(g) of the aforesaid Industrial Agreement (violation of the Defendant's Secrecy Oath); or alternatively, was a breach of general confidence in the employer-employee relationship.
- (ii) By seeking additional medical information from Dr. Gray (without authorization or approval), the Plaintiff went beyond the scope of her authority and gained access to personal medical information of Ms. Lockhart, which was otherwise not relevant to the request made by Ms. Lockhart for additional medical leave.
- (iii) The allegation of the Plaintiff being argumentative and aggressive in a conversation with Ms. Lockhart was found to be true and therefore coupled with the Plaintiff's predisposition of disbelieving that Ms. Lockhart had a legitimate medical issue amounted to a course of behavior which was repugnant to good employee (and industrial) relations.
- (iv) The unwarranted and unnecessary disclosure at the grievance meeting by the Plaintiff of the x-ray results of Ms. Lockhart and her determination that Ms. Lockhart was not ill (contrary to the medical evidence) were repugnant to the interests of the Defendant.
- (v) The effect of such conduct (whether singularly or collectively) was to give Ms. Lockhart and any other employee reasonable belief the Defendant's work environment was one that did not honor medical privacy and/or allowed and permitted augmentative (sic), or over-

aggressive or "bullish" behavior by senior members of staff in its human resources department towards junior staff members.

- (iv) The Plaintiff's aforesaid behavior in the prevailing circumstances would lead to a reasonable belief or opinion that the Defendant would condone such misconduct by its senior staff and allowed or permitted for such breaches to be carried out without punishment or reprimand.

30. Paragraph 28 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof. The Defendant repeats paragraphs 21 and 22 hereof. The Defendant contends that none of the statutory reasons for unfair dismissal set out in section 35 and 40 of the Employment Act are applicable on the instant facts.

31. The Defendant avers that the Plaintiffs dismissal was fair and that at all material times it acted within the confines of the law and the provisions of the Employment Act and the aforesaid Industrial Agreement with the BCPMU.

32. Paragraphs 29 and 30 of the Statement of Claim are denied and the Plaintiff is put to strict proof thereof.

...

[17.] The issues for consideration in this action are:

- i. Whether BTC breached Curry's employment contract.
- ii. Whether BTC wrongfully dismissed Curry.
- iii. Whether BTC unfairly Dismissed Curry.

[18.] At trial, Curry gave evidence in support of her case and called Thompson. Bernard Evans, Wallace and Ferguson gave evidence for BTC. All witnesses were subject to cross examination.

[19.] Curry's evidence in chief did not differ materially from the averments in her Statement of Claim. Under cross examination she stated that after the conversation with Lockhart, she received a WhatsApp message from Arnold Bowleg, Manager of Credit & Collections which contained a copy of Lockhart's medical report from Dr. Gray, in which Bowleg stated that the report was sent from Lockhart. In March 2018 Lockhart filed a grievance complaint, accusing her of insults and bullying. Following the complaint, she completed a report of the incident as advised by Wallace. However, when she went to attach the copy of the report from Dr. Gray that had been forwarded via WhatsApp, it was not clear and she realized that she needed a hard copy. She proceeded to the doctor's office to pick up a hard copy of the same. Curry says she needed the report so that she could adequately defend the complaint against her. She also says that the medical reports from the company's doctor are sent to the Human Resources Department and not the employee. The letter which accompanied the report was therefore addressed to Sharon

Cooper and not Lockhart. She says that on 27 April 2018 she was given a termination letter. She appealed unsuccessfully and was not given any severance pay and was terminated by BTC without a fair hearing.

[20.] Thompson's evidence confirmed his attendance along with other members of the BCPMU at the grievance meeting with Curry. The meeting was called to address a grievance filed by the BCPOU on behalf of Lockhart. The grievance stated that Curry had been 'insensitive, disrespectful and argumentative' in response to Lockhart's medical matter. Thompson says that it appeared as though the BCPOU members in attendance were set on creating a problem by stating that Curry disclosed Lockhart's personal information. The BCPOU members demanded that Curry be disciplined. Wallace adjourned the meeting saying it would be reconvened following a decision. Thompson says that at some point after the meeting, the BCPMU was given a copy of Curry's termination letter.

[21.] Wallace's brief witness statement says she led the grievance meeting on 26 March, 2018 at which Curry was present and participated in. She confirmed that Curry was represented by Thompson and that both Lockhart and Curry were afforded equal opportunity to speak to the issue. According to Wallace, as a result of the meeting and the exchanges, they were satisfied that Curry committed the misconduct in question.

[22.] Ferguson's evidence was that Curry's decision to visit the office of Dr. Gray to gain access to Lockhart's file violated BTC's confidentiality policy. Lockhart's medical records could not assist in deciding whether to grant her request. She says, Curry did not have the authority to attend the offices of Dr. Gray and/or request Lockhart's medical records. BTC was already in possession of the medical report inclusive of a chest x-ray performed on Lockhart. The events which followed the March grievance meeting included Evans making a formal complaint by email on 29 March 2018 against Curry for unauthorized access to Lockhart's medical records at the grievance meeting. Wallace led the investigation into the complaints against Curry. The appeal to the CEO of BTC was launched by Thompson as Curry's BCPMU representative. She did attend the appeal hearing as this was the custom. Wallace was also in attendance but did not participate. Following the appeal, by email dated 1 June 2018 Thompson was advised that the termination of Curry was upheld. Curry was compensated for 39 vacation days, Christmas

bonus and salary (1 to 4 June 2018). This was Curry's third major infraction since being employed with BTC.

[23.] Bernard Evans deposed that he made a complaint against Curry relative to her conduct during the grievance meeting with Lockhart and that Lockhart's medical records were not required at the meeting. During the meeting Curry tabled, and started reading Lockhart's medical report. He prevented her from continuing. The revelation of Lockhart's medical records by Curry was a flagrant breach of confidentiality.

Plaintiff's Submissions

[24.] Curry submits that she was summarily dismissed contrary to the provisions of sections 31 and 32 of the Employment Act. She denies the allegations of bullying and/or violating the company's Oath of Secrecy/Declaration of Confidentiality. She submits that her refusal to approve Lockhart to have the overseas medical consultation does not amount to bullying. Further and according to the oral testimony of Ferguson, BTC has no stated anti-bullying policy, with the company relying solely on the Agreement. The behaviour stated in the Agreement is what is expected of an employee, and it was never indicated what specific section of the Agreement she is alleged to have violated.

[25.] Curry submits that BTC has never provided evidence of the secrecy oath to which it relies and as such any evidence related thereto should be ignored. Her evidence was that she never signed such a document and gave no affirmative answer as to its existence. She maintains that she was justified in the visit to Dr. Gray's office as she needed information to defend her position taken with Ms. Lockhart.

[26.] Curry relies on an extract from the learned authors of *Halsbury's Law of England, Confidence and Informational Privacy (Volume 19 (2011))*:

7. Breach of Confidence

Absent any defence, a party will be liable for breach of confidence if (1) material communicated to him had the necessary quality of confidence; (2) it was communicated or became known to him in circumstances entailing an obligation of confidence; and (3) there was an unauthorized use of that material. Moreover, liability may also exist in appropriate cases even where there is no pre-existing confidential relationship and there may be a breach of confidence where information was obtained without the claimant's consent.

Where breach of confidence is alleged, there are a number of possible defences, for example that the disclosure was in the public interest, was permitted by statute or was made in order to protect a legitimate interest.

79. Protection of legitimate interests.

A confidant may enjoy a restricted right to disclose confidences when defending legal or disciplinary proceedings brought against him.

[27.] Further, Curry says that all persons present at the grievance meeting were employees of BTC and would have all been subject to the same codes of confidentiality as she was. Even so, no one other than her actually laid eyes on the report during the meeting as members of the BCPOU started a 'ruckus' when they thought that Lockhart's medical information was being shared. In the circumstances Curry says that she was wrongfully dismissed, as there was no just cause for the dismissal or reasonable notice of termination.

[28.] Curry complains that the Agreement sets out the grievance procedure at Article 9, which was not adhered to by BTC. Article 9, in part, states the following:

9.3 Grievances shall be dealt with as follows:

...

Stage 3

9.5 Failing a solution of the grievance or dispute at Stage 2, the employee concerned and a Union Representative may, within five (5) working days of a decision by the Senior Manager or Department Head approach the Division Head to discuss the matter and if possible settle the grievance or dispute. A statement in writing from the Union on behalf of the aggrieved person, describing the nature of the complaint alleged violation shall be included. The company and Union's representatives shall not exceed four (4) in number from each side at such meetings. One of the company's representatives shall be the Senior Manager of Human Resources or the Vice President/Human Resources. The decision of the Company's representatives shall be confirmed in writing to the Union within five (5) working days.

Notwithstanding the provisions of the procedure outlined above, every employee who has disciplinary action taken against him shall have the right to appeal to the President & CEO. The written appeal must be heard within ten (10) workings days after the request is made.

...

[29.] The grievance meeting was held to discuss what took place between Lockhart and Curry, not to discuss any breach of confidentiality. As such, Curry says, she was not

afforded the opportunity to defend herself against the accusations that she breached confidentiality. Curry also says that she was not advised of the email complaint lodged by the BCPOU President, Evans.

[30.] Further, the grievance procedure as outlined in the Agreement for appeals was not followed. The appeal lay only with the CEO, Cartwright, but despite this other members of BTC management were allowed to attend. Although BTC may consider this to be customary it does not mean that their attendance was not in contravention of the Industrial Agreement. In further contravention of the Agreement, BTC did not inform the BCPMU in writing prior to dismissing Curry. In the circumstances, Curry submits that she was both unfairly and wrongfully terminated.

Defendant's submissions

[31.] Counsel for BTC relies on the recent Court of Appeal case of ***Polymers International v Hepburn SCCivAPP No 8 of 2021*** to confirm the test which ought to be applied in claims for wrongful dismissal as set out at section 33 Employment Act.

[32.] In an effort to show that Curry was combative and argumentative during the hearing of this matter, Counsel for BTC points to her testimony under cross examination. BTC says that when pressed as to whether Lockhart had actually requested that the company pay for a third medical consultation, as opposed to medical leave on her behalf in her email, Curry's response was that it was implied. Curry, they say, had to admit that the email asked about medical leave or sick days. Curry told the Court that she did not believe that she spoke to Lockhart in an insensitive manner.

[33.] Counsel relied on the following extract from Curry's testimony at trial to demonstrate her admission to disclosing information from Lockhart's medical records:

Counsel: What was the point, ma'am, in you reading to her, the contents of the x-ray report; what did you hope to achieve?

Witness: Well, she asked him to give it to me, because she seemed to have thought, that there was something in the report, that would cause me to say, you can go or I'm approving your going.

Counsel: So, you read the report – you read the x-ray to say to her, that everything was normal, essentially, there was no need for her to go?

Witness: Yes.

Counsel: And you read from the report, the actual x-ray report?

Witness: I read from my cell phone, yes.

[Emphasis added]

[34.] BTC says that the fact that Curry thought it necessary to read from Lockhart's medical records to question why she wished to have a third medical opinion went beyond her role. BTC says that a reasonable investigation was conducted and the grievance procedure outlined in Articles 9 and 27 of the Industrial Agreement followed. As such, Curry's submission that the appeal was not held in compliance with the Industrial Agreement should be rejected. The fact that Curry's union representative was sent an email on 1 June 2018 which stated that the termination was upheld should also be taken into account.

[35.] BTC, in further reliance on the case of *Polymers*, says that a reasonable investigation was carried out with regard to Curry and the allegations made against her. Additionally, Curry used both the grievance meeting and the appeals process outlined in the Agreement. Reliance was placed on the Court of Appeal decision in *Cordial Walker v Candid Security Limited SCCivApp No. 55 of 2010*. At paragraph 16 of the judgment:

...

"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 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."

[36.] BTC states that it had an honest and reasonable belief based upon its reasonable investigation that Curry misconducted herself in the circumstances, which warranted her dismissal.

Analysis & Findings

[37.] Sections 31-33 Employment Act:

31. An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer:

Provided that such employee shall be entitled to receive previously earned pay.

32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following —

- (a) theft;
- (b) fraudulent offences;
- (c) dishonesty;
- (d) gross insubordination or insolence;
- (e) gross indecency;
- (f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;
- (g) gross negligence;
- (h) incompetence;
- (i) gross misconduct.

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.

[38.] The learned authors of *Commonwealth Caribbean Employment Law* defines bullying as follows:

Bullying

Bullying is the repeated, persistent, unwelcome and offensive behaviour, mostly using unwarranted or hypercritical fault-finding, social exclusion and isolation, committed against an individual or group within the workplace. It is manifested

through malicious or humiliating attempts to undermine workers through actions such as excessive monitoring, shouting, increasing work obligations, imposing unrealistic deadlines and inflicting unnecessary verbal or written warnings. The effect of such activities is to cause the affected worker to become alienated, feel anxious, inadequate or incompetent, which may sometimes lead to adverse health conditions such as mental illness, stress and depression. The bully's action often has the effect of creating a hostile workplace environment, but one classic theme which tends to underpin bullying is the disparate position of power between the victim and the perpetrator, although it can also be committed by subordinates.

Some argue that whether bullying has occurred is dependent on the perception of the accuser, as what they may think is bullying is simply the expression of a strong leadership style. Whatever the view held, it is safe to say that extreme and demeaning action by any party is unacceptable within the workplace setting.

[39.] While there is no prescribed legal definition in this jurisdiction, for bullying, I accept the extract above as an appropriate definition. Such behaviour is inappropriate and repugnant to the trust and confidence reposed in a manager/agent by the employer. In my view, an episode of bullying need not always be a recurrent pattern of behaviour and can be a one-off incident of considerable severity.

[40.] As an employer BTC has a duty of care to look after the well-being of its employees. This means that allegations of bullying levied against Curry should be taken seriously. The employer has to show that the workplace is fair and must do its best to prevent and discourage unacceptable behaviour in the workplace.

[41.] Having considered the evidence of the parties and the demeanour of the witnesses as they were cross-examined, on balance I accepted and preferred the evidence for and on behalf of BTC. I find that the company's decision to terminate Curry was not in breach of the Agreement or statute.

[42.] Lockhart did not give evidence as to her encounter with Curry and I am not satisfied that it amounts to anything more than that Curry was discourteous to Lockhart. In as much as I am satisfied that there may have only been some discourteousness, I am not satisfied that there was bullying. Although such behaviour is unacceptable I did not find that it rose to the level of bullying behaviour as described by the learned authors of *Commonwealth Caribbean Employment Law*. Curry and Lockhart did not work directly with each other making this incident an isolated one. More importantly, I am not satisfied that BTC formed

any reasonable belief as to Curry's bullying, merely that she was discourteous on this occasion to Lockhart.

[43.] On the question of breach of confidence however, I am prepared to find on the evidence that BTC did form the view that Curry had misconducted herself in breaching the confidence of the employee. I prefer the evidence of BTC on this issue. It seems clear from the evidence that Curry visited Dr. Gray's office with the specific intent of obtaining additional medical records of Lockhart's as a medical report had already been sent to BTC's Human Resources Department. I did not accept Curry's evidence that she had to go to the doctor's office to collect Lockhart's medical report and preferred the evidence of her supervisors that she did not. Curry's sole purpose in obtaining the records was to arm herself with Lockhart's medical records during the grievance meeting and use them as ammunition against Lockhart. Her purpose was to use the information to support her contention that there was nothing wrong with Lockhart. The matter before the grievance committee was allegations of her insulting and discourteous behaviour towards Lockhart and nothing to do with Lockhart's health or entitlement to leave.

[44.] Curry admittedly shared information from Lockhart's x-ray report with those in attendance at the grievance meeting. Curry's evidence was that while she had the documents with her in the grievance meeting, she did not read directly from them. However, she did admit to referencing the radiologist's impression in the x-ray report by telling those in the meeting that everything was normal on the report. This was not, and can never be, an appropriate course of action for a Human Resources Manager who has access to employees' sensitive and confidential medical information to take.

[45.] I also did not accept the contention that the appeal meeting held by BTC's CEO Cartwright was not in accordance with the Agreement, because other managers were in attendance. On balance, Curry did not show any prejudice that she suffered as a result of the others being in attendance during the appeal hearing or any bias toward terminating her as a result of the presence of others in the meeting. There was no evidence that anything said or done in the appeal meeting, by those she says were not supposed to be in attendance, led the CEO to his decision to uphold her dismissal. Further, there was no indication that upon realizing that additional persons were in the meeting, Curry's

representative immediately brought this alleged violation of the Agreement to the CEOs attention, voicing any objections and concerns.

[46.] I am satisfied that it was open to BTC to find that Curry's behaviour warranted dismissal. The gravity of her conduct, if accepted by the employer as true, could not be ignored by them in the circumstances. There was no legitimate interest or otherwise proven by Curry that would have entitled her to use Lockhart's medical information in the manner in which she did. I accept that BTC found no justification for Curry's actions and in reviewing the evidence, I too was unable to accept the explanation given for her actions. The fact that Curry as a Human Resources Manager saw nothing wrong with doing so is also remarkable.

[47.] I remind myself that I am not required to find whether Curry was guilty of any particular conduct, merely to be satisfied that BTC reasonably believed that she did misconducted herself after conducting a proper investigation into this matter. I am satisfied that BTC honestly believed, after an adequate investigation, that Curry misconducted herself and that it could no longer have trust and confidence in her to perform the functions for which she was employed.

[48.] Curry maintains that she is not obliged to abide by a secrecy oath, that she does not recall signing one and BTC has not produced any in evidence. It is a fact that BTC did not produce a copy of any signed oath of secrecy. However, the unauthorized disclosure by Curry need not have been directly addressed in such a document. I accept that the work of Human Resources professionals puts them into contact with personal and sensitive information which is not meant to be shared. The suggestion that the absence of a formal written confidentiality document, exonerated Curry from a duty to act with the requisite professionalism and discretion expected of someone in her role, is untenable.

[49.] Employees ought to be confident that they can perform their functions with the respect of the employer and or his agents. Additionally, they must be confident that their medical information, including those obtained by submitting themselves to physicians employed by their employer, would be treated with the privacy and confidentiality which it deserves. I can find no serious fault in the decision taken by BTC to protect Lockhart and possibly other employees from behaviour of the kind displayed by Curry.

[50.] BTC's defence to the termination of Curry is based on a reasonable investigation about Curry's activities which included not only the bullying allegations but breach of confidentiality with regard to procuring and disseminating Lockhart's medical records. The test approved in *Polymers* is what the employer honestly and reasonably believed in the circumstances – not what has been proven. Dismissal was within the range of options open to BTC and they made the decision to do so. BTC has proven for the purposes of these proceedings that it honestly and reasonably believed that Curry committed the breach of confidentiality.

[51.] In *Cartwright v US Airways* the Court of Appeal confirmed that, in determining whether the dismissal was unfair or wrongful, it must be considered having regard to the substantial merits case. Paragraphs 36-39 of the decision in *Cartwright v U.S. Airways* provided as follows:

36. The test to be applied by a tribunal to determine whether or not an employee has been unfairly dismissed is stated in section 35:

“...whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case”

37. What does the phrase “the substantial merits of the case” mean? At paragraph 26 of *West v Percy Community Centre* UKEAT/0101/15/RN, (Transcript), a case decided on 20 January 2016, Langstaff, J, speaking for the tribunal said, inter alia:

“[26] ...The question is whether what the employer thought had happened, in the circumstances in which the employer thought the conduct to have occurred, was or was not sufficient to justify the employer's actions so as to be held not unfair within s 98(4).”

38. The tribunal in *West* was considering section 98 of the Employment Rights Act 1996; and in particular sub-section 4. It reads:

“98 ... (4) Where the employer has fulfilled the requirements of sub-s (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.”

39. At paragraph 23 Langstaff, J stated: “That statutory question is answered by a factual inquiry.”

[52.] In as much as the improper disclosure aspect of the allegations occurred in the presence of Wallace and Ferguson, I find that a reasonable investigation was conducted into the allegations levied against Curry and the determination to dismiss which followed was in accordance with the law and the Agreement. I accept the evidence of Evans that a complaint was lodged in the presence of Curry who was stopped by him, from reading the medical records any further, as it was the confidential and private material of Lockhart.

[53.] In any event, having regard to how the events unfolded, in the course of another grievance meeting and where Curry has admitted to the disclosure, this may very well be an appropriate case where no investigation was necessary in the circumstances. In any event, BTC would have had in mind the discourteous behaviour towards Lockhart, even if did not amount to bullying and could not by itself warrant termination. BTC says that it also considered that Curry had also committed other infractions. Therefore, having regard to the substantial merits of the case it cannot be said that the termination was unfair or wrongful. Additionally, Curry was afforded the benefit of an appellate process following a letter of termination, the subject of the appeal, which outlined and ventilated the allegations against her.

[54.] I find that there was no breach of contract or violation of the Agreement in the conduct of the appeal. The presence of both sides at the hearing of an appeal is certainly not an unusual occurrence. I was therefore not persuaded that the presence of Ferguson and Wallace tainted the appeal in any material way. Curry was duly notified, through her representative of the outcome of the appeal, confirming her dismissal. She does not say that she was unable to assert her case on the appeal before the CEO, Cartwright.

[55.] I am also satisfied that Curry was properly compensated based on the evidence presented, which I accept.

[56.] The Writ of Summons is dismissed with costs to BTC to be taxed if not agreed.

Dated this 17th day of October 2022

A handwritten signature in blue ink, consisting of a stylized 'I' followed by a large, looping 'R'.

Ian R. Winder

Chief Justice