COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **COM/lab/00056**

Commercial Law Division

BETWEEN

WINIFRED TOOTE

Plaintiff

AND

ISLAND HOTEL COMPANY LIMITED

Defendant

Before: The Honourable Sir Brian M. Moree Kt.

Appearances: Mr. Mr. Sidney Campbell and Mr. Cyril Ebong for the Plaintiff.
Ms. Lakeisha Hanna for the Defendant.

JUDGMENT

1. On 2 August, 2022 I handed down my decision in this case with written reasons to follow. At that time, I held that the Plaintiff was successful in her claim for damages arising from the termination of her employment by the Defendant and awarded her the sum of $15,480.00 based on a weekly salary of $215.00 (incorrectly recorded in the transcript of 2 August, 2022 as $250.00) for the period of 18 months. I also ordered the Defendant to pay the costs of the Plaintiff to be taxed if not agreed. I now set out in this Judgment the reasons for my decision.

Pleadings & Procedural history

2. This action was commenced by a Specially Indorsed Writ of Summons filed on 17 July, 2019 by Ms. Winifred Toote (***"the Plaintiff"*** or ***"Ms. Toote"***) claiming that her contract of employment was unfairly and/or wrongfully terminated by Island Hotel Company Limited ("***the Defendant'*** or ***"the Company")*** without reasonable notice or pay in lieu of notice. She sought (i) a basic award under section 46 of the Employment Act, 2002 ("***the Act***") in the sum of $16,770.00 based on 3 weeks' pay for 32 years of service; (ii) a compensatory award under section 47 of the Act of (a) $35,690.00 based on a weekly salary of $215.00 for the period 6 June, 2019 to 22 August, 2022, (b) $125,600.00 for tips covering the same period based on

$800.00 per week, and (c) $3,547.50 for 5 weeks' vacation per year for the same period based on a weekly salary of $215.00; (iii) general damages; and (iv) interest pursuant to the Civil Procedure (Award of Interest) Act, 1992.

3. The Company filed its Defence on 24 September, 2019 denying the Plaintiff's claim of unfair and/or wrongful dismissal and averred that her employment was summarily terminated on 6 May, 2019 for gross misconduct and therefore she was not entitled to reasonable notice or pay in lieu thereof. Further, the Company pleaded that it conducted a reasonable investigation into the Plaintiff's alleged gross misconduct and after considering all the evidence formed an honest and reasonable belief, on a balance of probabilities, that the Plaintiff had committed the misconduct in question. That language closely tracked the language in section 33 of the Act. The Defendant also averred in the Defence that it *"…never denied the Plaintiff natural justice and the Defendant at all times acted in good faith."* There were no other pleadings filed in the case.

4. The Documents in the Agreed Bundle filed on 10 December, 2020 ("***the Agreed Bundle***") and a copy of the Industrial Agreement between Bahamas Hotel Employers' Association and Bahamas Hotel Catering and Allied Workers' Union dated 7 January, 2003 (***"the IA"***) were admitted into evidence without objection by counsel.

5. Apart from the IA, neither party put into evidence an employment contract relating to Ms. Toote although an unsigned copy of a document described as a Job Description for the position of Bar Waiter (with what appears to be the word "Waitress" written by hand immediately after "Bar Waiter") was included at Tab 1 in the Agreed Bundle.

6. I noted several issues with regard to the pleadings in this case. First, there was no specific claim in the Statement of Claim for compensation under section 29 of the Act with regard to the wrongful dismissal claim.

7. Secondly, the Plaintiff had not specifically pleaded in her Statement of Claim whether the wrongful dismissal claim was being advanced under the Act or the common law. In his submissions, Counsel for the Plaintiff specifically referred to sections 31 and 32 of the Act in paragraph 9.6 of his written Closing Submissions dated 4 March, 2021. Also, during his closing submissions on wrongful dismissal, Mr. Campbell addressed those two sections and did not suggest that the claim was under the common law.

8. Bearing in mind the overall submissions of Mr. Campbell, I was of the view that the claim for wrongful dismissal in this case by the Plaintiff was being advanced under the Act and not the common law.

9. Thirdly, the Defendant averred in paragraph 5 of the Defence that it "….*has no knowledge of the matters contained in paragraph 6 of the Statement of Claim and puts the Plaintiff to strict proof thereof*." Paragraph 6 of the Statement of Claim sets out (from the Plaintiff's perspective)

the details of the encounter between Ms. Toote and Mr. Burch on 4 May, 2019 which is the subject matter of this case and which the Defendant claimed to have investigated in May of 2019, over four months before the Defence was filed. Based on the evidence led by the Defendant at the trial, it had full knowledge of what was pleaded in paragraph 6 of the Statement of Claim by the time it filed its Defence and had in fact decided to summarily dismiss the Plaintiff based on its knowledge of those matters. Accordingly, the plea in paragraph 5 of the Defence was perplexing.

Plaintiff's Evidence

10. Ms. Toote relied on her Witness Statement filed on 26 January, 2021 as her evidence in chief. She worked for the Company for 32 years and at the time of the termination of her employment she was a waitress in the Casino Service Bar Department. According to her evidence, her base salary was $215.00 per week and she was entitled to keep her tips which she said was, on average, $800.00 per week. Her tips sometimes included casino chips which she had to cash out at the cashier. While she did not have a record of her tips, Ms. Toote stated that her employer would have in its Human Resources Department the information on the cashed out chips.

11. Ms. Toote stated in her evidence in chief that on 4 May, 2019 she was working in the casino when a guest asked her if the drinks were complimentary. She responded in the affirmative and added that the servers work on tips. The guest, who was later identified as Scott Burch, ordered a rum and coke. According to her evidence, Ms. Toote got the drink from the Bar and returned to Mr. Burch who was at the slot machines. She stated that she was waiting to make eye contact with Mr. Burch before giving him the drink and said "*Sir, your drink is here.*" When he eventually looked at her he asked "*what is it*" and started feeling his pocket for money. Ms. Toote's evidence in her Witness Statement was that Mr. Burch said that he did not have any change. She responded by saying that she could assist him by getting change from the "*bill breaker or the cashier's cage.*" At that stage, Mr. Burch appeared to be angry and told Ms. Toote to take the drink away *"…if I had to beg for a tip."* According to her Witness Statement, Mr. Burch went on to say that "*….he would have given me a tip, but if he had to beg for the drink just take it away."* Surprised by the sudden change in Mr. Burch's attitude Ms. Toote walked away and disposed of the drink in a garbage container near to where the incident had occurred.

12. During her cross examination Ms. Toote stated that when Mr. Burch initially approached her he said "*How does it work here?"* and she replied that "*the drinks are complementary and that you may tip the server if you wish."* She stated that they were the exact words spoken. When asked by Ms. Hanna why those words – particularly the words "*you may tip the server if you wish"* were not included in her Witness Statement, Ms. Toote responded that it was an oversight. Ms. Toote initially stated that the exchange between her and Mr. Burch could be seen and heard on the surveillance video of the casino but ultimately accepted that the video did not have any audio. At another point in the cross examination, Ms. Toote explained that Mr. Burch was gesticulating with his hands and that prevented her from giving the drink to

him as she was concerned that it would be knocked over. Again, Ms. Hanna asked why that information was not included in her Witness Statement and Ms. Toote responded that it did not contain "*every detail*." She denied that she was making up the story about telling Mr. Burch that he could tip the server if he wished to do so and that she was prevented from giving him the drink because he was "*animated"* and was "*gesticulating with his hands."* Ms. Toote stated that the assertion that she did not give the drink to Mr. Burch because he did not tip her was untrue. She said that over the years she had served drinks to many guests who did not tip her. In her cross examination, Ms. Toote stated that Mr. Burch told her to throw away the drink and she accepted that this was not in her Witness Statement. Again, she explained that it was an oversight. She also stated in cross examination that "*when I offered to help him with the change that's when the outburst came*" – see Transcript of 17 February, 2021 at page 25 lines 10-12.

13. During her cross examination Ms. Toote was referred to the Incident Report dated May 4, 2019 at Tab 2 of the Agreed Bundle ("***the Toote Statement****").* That statement was given by Ms. Toote at a meeting with persons in the Security Department shortly after the incident with Mr. Burch. According to Ms. Toote, a Shop Stewart was not in attendance at that meeting and she stated that she was not comfortable giving her version of the incident at that time as she was confused and therefore she made no comment.

14. Continuing with her evidence, Ms. Toote stated that later on 4 May, 2019 she was called into a meeting with representatives of the Company ("***the Suspension Meeting***"). During her cross examination she stated that Mr. Sean Cartwright, Ms. Rodesia Adderley and Ms. Rashonique Rolle, all from the Company, together with one of the Shop Stewarts were at the meeting. After a brief discussion, one of the Company's representatives issued Ms. Toote a Bahamas Hotel Employer's Association Warning/Suspension or Dismissal Notice and suspended her for 2 days. The Notice is at Tab 4 of the Agreed Bundle and is signed by Ms. Toote, the Shop Stewart and Ms. Rashonique Rolle for the Company ("***the 1st Notice***"). The reason given for the suspension in the 1st Notice is gross misconduct under section 15.7 of the IA. At that time, the Shop Steward objected on the ground that the conduct should properly be classified as a minor breach of discipline under section 15.5 of the IA. Ms. Toote stated in her Witness Statement that the Company readily accepted the version of the incident given by Mr. Burch although during her cross examination she agreed that she was given an opportunity to explain what had occurred between her and Mr. Burch.

15. After the suspension period, Ms. Toote returned to work on 6 May, 2019. Her evidence was that she had a follow up meeting on that day ("***the Termination Meeting***") and at that time she was given another Bahamas Hotel Employer's Association Warning/Suspension or Dismissal Notice which indicated that she was "*Discharged*" for gross misconduct under section 15.7 of the IA. The Notice is at Tab 5 of the Agreed Bundle and is signed by the Shop Stewart and Ms. Rashonique Rolle but not by Ms. Toote ("***the 2nd Notice***"). There were five persons in the Termination Meeting. According to Ms. Toote's evidence, she was given an opportunity to state what had occurred on 4 May, 2019. During the Termination meeting the participants went to the Security Department to view surveillance video recordings of the incident between Ms.

Toote and Mr. Burch on 4 May, 2019 and then returned to the office where they were having the meeting.

16. At the conclusion of the Re-examination there were the following exchanges between Ms. Toote and the Court and then between Ms. Toote and Counsel for the Company at pages 66 – 68 of the Transcript of the evidence:

"THE COURT: .....
I JUST WOULD WISH TO CLARIFY ONE MATTER
MS. TOOTE, THERE WERE TWO MEETINGS WHICH YOU
HAVE BEEN ASKED ABOUT. ONE WAS ON THE 4TH OF MAY, 2019.
AND THE SECOND ONE I THINK WAS ON THE 6TH OF MAY 2019,
IS THAT CORRECT?

THE WITNESS: THAT'S CORRECT.

THE COURT: NOW, YOU SAID, I THINK YOU SAID IN
THE MEETING OF THE 4TH OF MAY, YOU DID NOT GIVE AN
EXPLANATION OF WHAT HAPPENED AND YOU PARTICULARLY SAID
YOU HAD NO COMMENTS, IS THAT CORRECT?

THE WITNESS: THAT'S THE ONE WITH THE SECURITY
OR?

THE COURT: THAT'S THE ONE WITH THE SECURITY
THAT'S THE 4TH OF MAY, THE FIRST ONE.

THE WITNESS: THAT'S RIGHT. NO COMMENT.
THAT'S RIGHT. THAT'S CORRECT.

THE COURT: NOW, IN THE MEETING OF THE SIXTH
OF MAY, 2019, DID YOU ACTUALLY GIVE AN EXPLANATION AS TO
WHAT HAD OCCURRED?

THE WITNESS: HOW DO I PUT THIS. I WAS
UNCOMFORTABLE, SO I DID NOT RESPOND THE WAY THAT WAS
REQUIRED OF ME. I DIDN'T RESPOND. THE REASON BEING WORDS
WERE BEING PUT IN MY MOUTH. ASSUMPTIONS WERE BEING MADE
BY THOSE WHO WERE SUPPOSED TO BE DOING THE
INVESTIGATION. THEY WERE ANSWERING THEIR OWN QUESTIONS
FOR ME. SO I CEASED, I DID NOT EVEN TRY.

THE COURT: SO IN YOUR EVIDENCE AND THIS IS
YOUR EVIDENCE, NOW, MS. TOOTE. IN YOUR EVIDENCE, DID
YOU EVER AT ANY TIME PRIOR TO THE TERMINATION OF YOUR
EMPLOYMENT PUT FORWARD YOUR EXPLANATION AS TO WHAT HAD

OCCURRED?

THE WITNESS: NO. I HAD NO CONFIDENCE IN WHAT I WAS DEALING WITH. IN WHAT I WAS DWELLING I HAD NO CONFIDENCE.

THE COURT: VERY WELL.

MS. HANNA, ANY QUESTIONS ARISING FROM THE COURT'S QUESTIONS?

MS. STRACHAN-HANNA: MY LORD, I JUST WANT CLARIFICATION AS TO THE MEETING THAT MS. TOOTE IS SPEAKING ABOUT. WHEN SHE SAID THAT THE PERSONS WERE PUTTING WORDS IN HER MOUTH, THAT WAS THE TERMINATION MEETING THAT SHE IS REFERRING TO?

THE WITNESS: WAS THE VERY FIRST MEETING WITH HORATIO AND RODESIA.

BY MS. STRACHAN-HANNA:
Q. THERE WERE THREE MEETINGS. THE FIRST ONE WHEN SHE MET WITH SECURITY, THE SECOND WAS THE 4TH AND THEN IT WAS THE 3RD MEETING, WHICH WAS THE TERMINATION MEETING?

A. THE SECOND MEETING.

Q. SO IN THE SECOND MEETING, THE SUSPENSION MEETING THAT'S WHEN YOU SAID PERSONS WERE PUTTING WORDS IN YOUR MOUTH?

A. EXACTLY.

MS. STRACHAN-HANNA: MY LORD, I JUST WANTED TO ASK THE WITNESS --

BY MS. STRACHAN-HANNA:
Q. SO, IT'S YOUR POSITION THAT IN THE TERMINATION MEETING ON THE 6TH OF MAY YOU WERE GIVING THE OPPORTUNITY THEN TO GIVE YOUR VERSION OF WHAT HAPPENED, AND YOU DID SO?

A. I DID NOT.

Q. YOU DIDN'T DO IT EITHER ON THE SIX?

A. BECAUSE I WAS UNCOMFORTABLE. I HAD NO CONFIDENCE IN THOSE WHO WERE DEALING WITH THE INVESTIGATION."

17. At the conclusion of the Termination Meeting, Ms. Toote was summarily dismissed. Ms. Toote stated in her Witness Statement that she was not provided with a copy of the report following the investigation to allow her to answer the allegations against her. However, during her cross examination she stated that she was aware of what was happening in the investigation and stated that it was not properly conducted.

18. According to her Witness Statement Ms. Toote was not aware of section 15.7 of the IA or any other provisions of that Agreement being incorporated into her contract of employment prior to the expiration of the IA. Her evidence during the cross examination was that she did not recall signing a contract of employment with the Company after the expiration of the IA. She agreed that after the expiration of the IA she continued to receive the following benefits which were provided for under the IA: a Ham and Turkey at Christmas – section 43; a Christmas bonus – section 33; five weeks annual vacation – section 9.2 and a day off work on her birthday – section 39.

19. Ms. Toote stated in her evidence that during her 32 years of employment with the Company she was suspended on only one occasion before the incident which occurred on 4 May, 2019. That evidence was not controverted. She claimed that her contract of employment was wrongfully and/or unfairly terminated.

20. Under cross examination, Ms. Toote agreed that during the Suspension Meeting and the Termination Meeting she was (i) given an opportunity to be heard; (ii) represented by a Shop Stewart of the Union; and (iii) advised of the complaint against her by Mr. Burch. Also, she was allowed to watch and respond to the surveillance videos during the Termination Meeting.

Evidence on behalf of the Defendant

21. The Company called three witnesses at the trial – Ms. Rashonique Rolle, Ms. Rodesia Adderley and Mr. Horatio McKenzie (together "***the Company Representatives")***. Each of them relied on his/her Witness Statement filed on 28 January, 2019 for their evidence in chief.

22. Ms. Rashonique Rolle is the Assistant Beverage Manager in the Food and Beverage Department of the Company. Her duties included investigating and resolving service complaints and scheduling staff. She identified her signature on the Incident Report at Tab 3 of the Agreed Bundle and also on the 1st and 2nd Notices at Tabs 4 and 5 of that Bundle.

23. Ms. Rolle was working in the Casino on 4 May, 2019 when she was asked to speak with a guest about a service complaint. The guest was Mr. Burch who appeared to be upset. According to Ms. Rolle's evidence, he told her about an incident which had occurred between him and a waitress, who turned out to be Ms. Toote. He had asked the waitress for a Bacardi and Coke and was told that she worked on tips. The waitress went away and returned with the drink on her tray and "*….stood with the drink for a few minutes*." I observe parenthetically that based on the video recordings that was clearly wrong as the entire incident took about one minute. Returning to what Mr. Burch had told Ms. Rolle, he felt his pocket and realized that he had put

his money into the slot machine. He explained this to the waitress but she did not give him the drink. He then told the waitress to "…*forget about it.."* after realizing that she was refusing to give him the drink. According to Ms. Rolle's evidence, Mr. Burch told her that he was "…*shocked at the service as he comes to the Resort twice a year for 2 weeks and spends lots of money.*" Ms. Rolle stated that she apologized to Mr. Burch and he left to go to the beach with his family. During her cross examination, Ms. Rolle confirmed that she was not present at any time during the exchanges between Ms. Toote and Mr. Burch.

24. Ms. Rolle then approached Ms. Toote about the incident. Ms. Toote gave her account of what had occurred – she was asked by a guest – who was Mr. Burch – to bring him a Rum and Coke and asked what the procedure was. She told him that she worked on tips. She brought the drink and the guest stated that he did not have any change and she offered to help him by getting change from one of the machines. The guest then told her to "f*orget it*" and she left the area.

25. Ms. Rolle's evidence was that she told Ms. Toote that her behavior was wrong and then reported the incident to Mr. Sean Cartwright, the Senior Director of the Beverage Department who told her to report the matter to the Security Department. She did so and her written report was at Tab 3 of the Agreed Bundle ("***the Rolle Report****").* Ms. Toote was then summoned to the Security Department where she was requested to make a report about the incident with Mr. Burch. According to Ms. Rolle's evidence, Ms. Toote refused to give any details to the Security officer and stated that she had no comment on whether she served a drink to "….*a male Caucasian"*, what the procedure was for serving drinks to guests and how the guest is expected to tip her when serving drinks. Ms. Rolle's evidence was that Ms. Toote stated that she did not recall bringing a drink to a male guest and not serving it. The Union Shop Stewart was not present at that time.

26. Ms. Rolle stated that shortly thereafter, Ms. Toote was summoned to the Suspension Meeting which she attended with Mr. Sean Cartwright, Ms. Rodesia Adderley who was the Associate General Manager in the Beverage Department and Mr. Benson Young, a Union Shop Stewart. In response to a request, Ms. Toote gave her account of what had transpired between her and Mr. Burch earlier in the morning of 4 May, 2019. Ms. Toote was then told that she was being suspended for gross misconduct for 2 days and that she was to return on 6 May, 2014. She was given the 1st Notice.

27. In her Witness Statement Ms. Rolle stated that the decision was made to suspend Ms. Toote rather than to give her a verbal or written warning because "…*the Plaintiff's refusal to serve a complimentary drink to a guest because no tip was given went to the root of the Plaintiff's contract…*"

28. According to her evidence, Ms. Rolle attended the Termination Meeting with Ms. Toote on 6 May, 2019 together with Mr. Horatio McKenzie who was the Executive Director of Human Resources of the Company, Ms. Adderley and Mr. Young. Ms. Rolle informed Ms. Toote of Management's account of the incident involving Mr. Burch which was basically the same as

the account given to her by Mr. Burch on 4 May, 2019. Ms. Toote reiterated her account of the incident which she had given to Ms. Rolle on 4 May, 2019. They then viewed the surveillance video recordings and Ms. Rolle stated that Mr. Mckenzie asked Ms. Toote why she waited to give Mr. Burch the drink as opposed to giving it to him right away without waiting for a tip as she had done with another guest who was seen on the surveillance video being served a drink by Ms. Toote shortly before the incident with Mr. Burch. In her Witness Statement Ms. Rolle stated that Ms. Toote responded that "…..*she did not know why she did that and that she was sorry for the issue."* Ms. Rolle stated that in answering a question by Ms. Adderley relating to her hand gesture when walking away from Mr. Burch after discarding the drink in the garbage container, Ms. Toote explained that she told Mr. Burch that "….*if he was not going to tip her, she was not going to serve the drink….."* and "….*she knew what she did was the wrong thing…"* and "…*that she should have never done it."*

29. After a private discussion between Mr. McKenzie, Ms. Adderley and Ms. Rolle they concluded that Ms. Toote's behavior towards Mr. Burch was unprofessional and rude and did not meet the service standards of the Resort. Ms. Rolle stated in her evidence that as a long standing employee of the Company, Ms. Toote was aware of her duties and responsibilities. She stated that in staff meetings it is emphasized that drinks are complimentary and the servers are to remain professional and courteous at all times. After Ms. Toote and Mr. Young returned to the Termination Meeting, Mr. McKenzie advised Ms. Toote that she was being summarily dismissed. Mr. Young, one of the Union's Shop Stewarts, once again stated that in his view the conduct of Ms. Toote was a minor infraction and did not justify summary dismissal.

30. During her cross examination Ms. Rolle agreed that Ms. Toote was not given an opportunity to confront her accuser, Mr. Burch, about his complaint against her. She also stated that in terminating the employment of Ms. Toote, they had accepted and acted on the version of the incident given by Mr. Burch over the statement of Ms. Toote about what had transpired between them. She said that Mr. Burch's account was consistent with the video surveillance recordings while that of Ms. Toote was not supported by those videos. Further, in addressing the 1st and 2nd Notices during her cross examination, Ms. Rolle's evidence was that that she signed both documents and that Ms. Toote was summarily dismissed under section 15.7 of the IA on the ground of gross misconduct. Ms. Rolle conceded that the complaint against Ms. Toote related to her failure to provide satisfactory service to Mr. Burch, which is a minor breach of discipline under section 15.5 of the IA. However, she stated that the act of Ms. Toote in throwing away the drink in a garbage container and "…*walking off showing hand gestures at the guest*…" made it gross misconduct – see the Transcript of 17 February, 2021 on page 80 line 22 to page 81 line 4 and on page 81 line 22 to page 82 line 1.

31. Ms. Rolle accepted that gross misconduct is not listed as a major breach of discipline in section 15.6 of the IA and she stated that it "….*came from the The Bahamas Employment Act, which is a major breach."*

32. Ms. Rodesia Adderley was the second witness for the Company. She corrected paragraph 8 of her Witness Statement to reflect that Ms. Rolle had not viewed the surveillance video with the others who are mentioned in that paragraph.

33. Ms. Adderley is the Associate General Manger in the Beverage Department of the Defendant. According to her evidence, she at no time spoke directly with Mr. Burch. She was informed of the incident between Ms. Toote and Mr. Burch by Ms. Rolle and Ms. Karen Thompson – see page 100 of the Transcript of 17 February, 2021 at lines 3 - 6 and 20 - 25. She viewed the surveillance videos in the Security Department on 4 May, 2019 with Mr. Cartwright. Ms. Adderley related what she saw on the videos and stated that after viewing them she attended the Suspension Meeting with Ms. Toote, Mr. Cartwright, Ms. Rolle and Mr. Young. Her evidence was that Ms. Toote gave her account of the incident which she stated was "…*basically the same as Mr. Burch's account…."* and confirmed "…*the rude demeanor and unprofessional behaviour described by Mr. Burch."* Her evidence relating to the suspension of Ms. Toote for 2 days and the surrounding circumstances was basically the same as the evidence of Ms. Rolle. She stated that Ms. Toote's conduct of refusing to serve a complimentary drink to a guest because a tip was not given went to the root of her contract. Therefore, Ms. Adderley stated that Ms. Toote was suspended rather than given a verbal or written warning.

34. Ms. Adderley attended the Termination Meeting on 6 May, 2019 and her account of that meeting, the viewing of the surveillance videos again on that day, the discussion with Ms. Toote after watching the videos and the summary dismissal of Ms. Toote was substantially similar to the evidence of Ms. Rolle. According to Ms. Adderley's evidence, Ms. Toote stated that "…*she knew the Defendant's standard operating procedures and what she did was the wrong thing…..and that she should have never done it."* Ms. Adderley stated in her Witness Statement that "…..*it is the Defendant's honest belief that this was not a minor infraction because the Plaintiff's action made it clear that she disregarded essential conditions of her employment contract, namely, providing 'courteous and professional service, maintaining high standards at all times and serving beverages as ordered courteously."*

35. Notably, Ms. Adderley stated that because of Ms. Toote's conduct in dealing with Mr. Burch the Company "…*could no longer repose trust and confidence in the Plaintiff and honestly believed that she would repeat this behavior with other guests."* This statement was made notwithstanding that, based on the evidence before the court, which was not challenged, Ms. Toote had only received one suspension for an infraction in 32 years of employment with the Company – see paragraph 16 of Ms. Toote's Witness Statement.

36. Ms. Adderley's evidence was that Ms. Toote was summarily dismissed for gross misconduct after the Company "….*formed an honest and reasonable belief that she was rude, discourteous and unprofessional to Mr. Burch. The belief was formed after conducting a proper investigation and watching the undisputable surveillance footage."*

37. During her cross examination Ms. Adderley stated that the Company relied on section 15.7 of the IA when summarily dismissing Ms. Toote – see the Transcript of 17 February, 2019 at page 103 at lines 23 – 29. She stated that gross misconduct is not specifically mentioned in the IA but was classified by the Company as a major breach under section 15.7. In this regard, Ms. Adderley also stated that gross misconduct is mentioned in the Employment Act.

38. The third witness for the Company was Mr. Horatio McKenzie, the Executive Director of Human Resources of the Company. His duties included assisting with the management of Industrial Relations matters, policy implementation and disciplinary matters involving Managers and Employees in the Food and Beverage Department. He explained that the Company is a member of the Bahamas Hotel Employers' Association ("***the BHEA"***) and Ms. Toote is a member of the Bargaining Unit of the Bahamas Hotel Catering and Allied Workers' Union ("***the Union****"*) which is the Bargaining Agent for line staff employees of the Company. Mr. McKenzie referred to the IA and acknowledged that it had expired on 6 January, 2008 and that a new Industrial Agreement had not been entered into between the Union and the BHEA. He stated in his Witness Statement that notwithstanding the expiration of the IA, the Company and the Union continued to abide by its terms and conditions to maintain industrial harmony. In his cross examination he stated that the Company had relied on the IA when it terminated the employment of Ms. Toote.

39. Mr. McKenzie first became involved in the matter when he attended the Termination Meeting on 6 May, 2019 with Ms. Toote, Ms. Rolle, Ms. Adderley and Mr. Young. His evidence about that meeting was essentially the same as Ms. Rolle and Ms. Adderley – he stated the purpose of the meeting and read the 1st Notice; he asked Ms. Rolle to outline management's position which she did in terms substantially similar as outlined in her evidence; Ms. Toote gave her account of the incident in line with her earlier evidence; they went to the Security Department to view the surveillance videos; and after watching the videos he asked Ms. Toote why she had not served Mr. Burch in the same way as she was seen on the videos serving a female guest shortly before approaching Mr. Burch and she responded that she did not know and "*…was sorry for the issue.*" According to Mr. McKenzie's evidence, Ms. Toote said at the meeting that while walking past Mr. Burch she told him that "….*if he was not going to tip her, she was not going to serve the drink."* Mr. McKenzie stated that Ms. Toote admitted that she knew the procedure and that "…*what she did was the wrong thing……and that she should have never done it*". He identified page 2 of the 2nd Notice as his notes taken at the meeting with Ms. Toote.

40. Mr. McKenzie stated that he regarded Ms. Toote's conduct while serving Mr. Burch as "….*very unprofessional and rude…..and fell below the standard of the Resort by requesting and waiting to receive a tip before she served Mr. Burch."* Mr. McKenzie stated, in similar terms to the evidence of Ms. Adderley, that after a private meeting with Ms. Rolle and Ms. Adderley they made the decision to summarily dismiss Ms. Toote for gross misconduct. He stated that he did not regard Ms. Toote's conduct as a minor infraction "….*because* [her] *action made it clear that she disregarded essential conditions of her employment contract, namely*

providing 'courteous and professional service, maintaining high standards at all times and serving beverages as ordered courteously." His evidence was that "….*it was impossible, after watching the video, to repose trust and confidence in the Plaintiff."* During his cross examination Mr. McKenzie stated that while he took notes during the investigation he did not prepare a Report. In his re-examination he stated that when a breach of discipline is not covered in the IA, the Company reverts to section 15.7 of that Agreement.

41. When under cross examination, Mr. McKenzie agreed that the complaint from Mr. Burch was that he did not get satisfactory service from Ms. Toote – see Transcript of 17 February, 2019 at page 115 lines1- 12. During his re-examination he further stated that a major part of the reasoning for summarily dismissing Ms. Toote was that "….*she was soliciting funds for the beverage and due to the customer not having the funds available…."* she threw the beverage in the garbage container – see Transcript of 17 February, 2019 at page 118 at lines 2 – 12. He explained that in this context soliciting funds meant that Ms. Toote "…. *witheld the product until she received funds and that's not the protocol in her area of work."* He further clarified this as meaning that Ms. Toote waited for a tip before serving the drink to Mr. Burch. Mr. McKenzie classified that as gross misconduct and not simply as providing poor service to a guest. Additionally, he stated that the breaches of discipline set out in sections 15.5 and 15.7 of the IA are not comprehensive or exhaustive.

42. Mr. McKenzie stated that they conducted a proper investigation into the incident between Ms. Toote and Mr. Burch which included taking statements from the parties and watching the surveillance video. According to his evidence, Ms. Toote had Union representation at all times and he stated that she was paid all accrued vacation and outstanding benefits by the Company upon her summary dismissal as evidenced by the document at Tab 6 of the Agreed Bundle. Ms. Toote returned her Name Tag, Employee ID Card and uniforms and, according to Mr. Mckenzie, she was advised of her right to appeal against the termination of her employment to her Department Head, which she did and the termination was upheld. Mr. McKenzie stated that Ms. Toote chose not to pursue a Review Board Hearing but commenced this action.

Surveillance videos.

43. Counsel for the parties agreed to put into evidence the surveillance videos taken in the casino on the morning of 4 May, 2019 of the incident between Ms. Toote and Mr. Burch. The relevant videos were copied onto a jump drive which was admitted into evidence as Exhibit "IL4".

44. The jump drive included 41 short videos with different time stamps showing the interaction between Ms. Toote and Mr. Burch on 4 May, 2019. The most relevant recording was the one numbered 38 ("***Video 38****")*. There was no audio on the recordings and some of the videos were blurred in places but it was possible to see Ms. Toote and Mr. Burch during their interaction. I observed on Video 38 Ms. Toote carrying a drink on a tray walking towards a male seated at a slot machine who was identified as Scott Burch. She approached Mr. Burch and they seemed to be talking. Initially Mr. Burch was not waving his hands. Ms. Toote did not give the drink to Mr. Burch or place it in front of the slot machine where he was sitting. After about 30

seconds he then began to gesticulate with his hands while apparently continuing to talk with Ms. Toote. Approximately 6 seconds later I observed Ms. Toote walk behind Mr. Burch and discard the drink which was on her tray into a nearby garbage container. From the video it appeared that Ms. Toote was calm and not in any way demonstrative when discarding the drink in the garbage container. It was apparent from the video that when the drink was discarded into the garbage container Mr. Burch's back was to Ms. Toote and so he did not see her throw away the drink. Ms. Toote then walked pass Mr. Burch in the direction which she had initially approached him. As she passed him Ms. Toote made a brief gesture with her left hand and after a short distance turned around and passed him again as she walked away in a different direction.

45. The duration of the actual interaction between Ms. Toote and Mr. Burch when they appeared to be talking to one another captured on Video 38 was approximately 37 seconds. The length of the entire incident between when Ms. Toote approached Mr. Burch with the drink on the tray and when she walked away from him for the last time was just under 1 minute. Approximately 58 seconds after Ms. Toote left, Mr. Burch stood up and walked away from the slot machines.

46. Throughout the interaction between Ms. Toote and Mr. Burch captured on Video 38 it appeared that Ms. Toote was calm as she stood passively next to Mr. Burch with the tray in her hand. The drink was on the tray until she discarded it. Her behavior was not animated and there was no aggressive action or movement by Ms. Toote shown on the video. Mr. Burch's conduct became animated after he started gesticulating with his hands.

Findings of fact.

47. I considered the evidence of all the witnesses and observed their demeanour under cross examination. I also studied the surveillance videos. This was a civil case and therefore the standard of proof was based on a balance of probabilities.

48. Ms. Toote's evidence in her Witness Statement was not in all respects the same as her oral evidence under cross examination at the trial. For example, Ms. Toote referred in her cross examination to Mr. Burch gesticulating with his hands during their interaction but this was not mentioned in her Witness Statement. Again, in her Witness Statement she stated that Mr. Burch asked her if the drinks were complimentary and she responded in the affirmative and added that "*the servers work on tips.*" However, in her cross examination, Ms. Toote stated that Mr. Burch initially approached her and said "*How does it work here?"* and she replied that "*the drinks are complementary and that you may tip the server if you wish."* She stated that they were the exact words spoken. Also, during her cross examination Ms. Toote stated that Mr. Burch told her to "*throw away the drink*" but in her Witness Statement she stated that he asked her to "*just take the drink away…"* During her cross examination Ms. Toote accounted for these differences by stating that "*not every detail"* was in the Witness Statement and she also said that oversight was partially responsible for the omissions.

49. I did not regard those differences between Ms. Toote's Witness Statement and her evidence during cross examination as impeaching her credibility as a witness. Rather, it seemed to me that they were a reflection of the incomplete account in Ms. Toote's Witness Statements of all the details of the events which occurred in the casino involving her on the morning of 4 May, 2019 and the inherent difficulties in recollecting events and specific conversations after the passage of a significant amount of time. In this case it was apparent that the events involving Ms. Toote which transpired in the casino on the morning of 4 May, 2019 were compressed in the Witness Statement. For instance, there is no reference in Ms. Toote's Witness Statement to the initial meeting in the Security Department after she spoke with Ms. Rashonique Rolle or to the Toote Statement. Obviously that omission was not an attempt to hide that information as the Toote Statement had been disclosed in the Defendant's List of Document filed on 24 June, 2020 which was approximately 7 months before the date of Ms. Toote's Witness Statement. Witness Statements are important at the trial and they should be carefully prepared setting out all relevant admissible evidence for the witness and checked for accuracy. If discrepancies, inconsistencies or omissions are exposed in cross examination they may lead to adverse findings against the witness. However, in this case, given the specific differences between her Witness Statement and her evidence during cross examination I was satisfied that they did not undermine Ms. Toote's credibility. Let us examine each of them.

50. With regard to the hand gesticulations by Mr. Burch, Video 38 clearly showed that at about 30 seconds into his interaction with Ms. Toote he began moving his hands in an animated manner as he appears to be talking to Ms. Toote. Therefore, even though it was not mentioned in her Witness Statement, Ms. Toote's reference to the hand movements by Mr. Burch was not fabricated albeit that it did not start until 30 seconds after she approached Mr. Burch.

51. On the second point, the difference between confirming that drinks were complimentary and stating to Mr. Burch that '*the servers work on tips*' on the one hand and on the other hand stating to him that "*the drinks are complementary and that you may tip the server if you wish"* was, in my view a subtle one. It did not strike at the honesty of Ms. Toote's evidence.

52. The third point was the difference between Ms. Toote stating in her Witness Statement that Mr. Burch asked her to take away the drink and she stating during her cross examination that he told her to throw away the drink. Again, while I saw the distinction between the two statements in that one was more aggressive in tone and substance than the other, it did not suggest to me that Ms. Toote was deliberately misleading or deceiving the court for her advantage.

53. Overall, I regarded Ms. Toote as a truthful witness although I bore in mind that the matters which were addressed in her evidence occurred over 2 years before the trial and the inevitable impact of that fact on her recollection of specific details relating to the events.

54. On 4 May, 2019 Ms. Toote was involved in three meetings all within a relatively short time period after the incident with Mr. Burch. The first one was with Ms. Rolle when she was

confronted about her interaction with Mr. Burch. The second one was with a Security Officer in the office of the Security Department. The third one was the Suspension Meeting with Mr. Cartwright, Ms. Rolle, Ms. Adderley and Mr. Young, the Shop Stewart. The only documents in evidence coming out of those meetings were the Toote Statement and the 1st Notice with its attachment. Mr. Young did not give evidence at the trial.

55. The general underlying point which emerged from Ms. Toote's evidence on those meetings was that in the aftermath of the incident with Mr. Burch she was somewhat overwhelmed and confused by what had transpired and felt uncomfortable in those meetings. That seemed to me to be a natural and believable reaction to what had occurred. The Transcript of her evidence records at page 38 at lines 22-26 that when referring to the 4 May, 2019 Ms. Toote stated:

> **"22 A. I WAS IN LOT OF CONFUSION. NOTHING WAS**
> **CLEAR**
> **23 TO ME THAT DAY. I WAS IN CONFUSION.**
> **24 Q. SO YOU WERE CONFUSED, THAT'S WHY YOU DIDN'T**
> **25 TELL SECURITY WHAT HAPPENED?**
> **26 A. I WAS TRYING TO FIGURE OUT WHAT HAPPENED."**

56. The Termination Meeting occurred two days later on 6 May, 2019. There were significant differences in the evidence on what precisely was stated by Ms. Toote during that meeting. Predictably, on the one hand the three Company Representatives generally agreed on what transpired and on the other hand Ms. Toote had a different recollection of certain details relating to that meeting. I address these matters later in this Judgment but I accepted Ms. Toote's evidence that she was not comfortable in that meeting as she had no confidence in the investigation – see paragraph 16 above.

57. The witnesses for the Company had no first hand knowledge of what transpired between Ms. Toote and Mr. Burch. Ms. Rolle's evidence was that Mr. Burch told her about the incident but there was no written statement in evidence from him and he did not give evidence at the trial. Ms. Adderley stated that she was told of the incident by Ms. Rolle and so she had no direct knowledge of the dealings between Ms. Toote and Mr. Burch. Mr. McKenzie did not get involved until the 6th May, 2019 at the Termination Meeting and he had no direct knowledge of the exchange between Ms. Toote and Mr. Burch on 4 May, 2019. The evidence of Ms. Adderley and Mr. McKenzie on what they were each told by Ms. Rolle and what occurred before their personal involvement in the matter was not helpful. I considered their evidence on matters which they were personally involved with during the investigation after Mr. Burch's complaint was reported to Ms. Rolle. The Company Representatives gave evidence about the video recordings but I was able to view them for myself and came to my own conclusions on those recordings.

58. In her evidence Ms. Rolle confirmed that she completed and signed the 1st Notice. In that Notice under the heading '**SUSPENSION – REASON'** (and in the document attached thereto which was identified as Mr. McKenzie's notes) it is stated that "*Even after the guest asked for*

the drink she refused because he did not have any change to tip her." That was not correct as is evident from the Rolle Report. Ms. Rolle prepared that report and set out therein what Mr. Burch had told her about the incident with Ms. Toote. It does not state in that report that Mr. Burch asked Ms. Toote for the drink and she refused to give it to him because he did not have any change to tip her. The statement in the Rolle Report is that "*He* [that is Mr. Burch] *stated that he explained to her* [Ms. Toote] *that he had just put all his money in the slot machine but the Server still did not give him the drink."*

59. Ms. Adderley stated during her cross examination that a Shop Stewart attended the meeting in the Security Department on 4 May, 2019 with Ms. Toote – see Transcript of evidence at page 99 at lines 1-3. She had not made that statement in her Witness Statement and it contradicted Ms. Toote's evidence about that meeting.

60. The three witnesses for the Defendant each stated in her/his evidence that during the Termination Meeting Ms. Toote admitted that she acted wrongly in her dealings with Mr. Burch and apologized for her actions. Their evidence was that Ms. Toote admitted that when she was walking away from Mr. Burch and made the hand gesture she told him that if he was not going to tip her she was not going to serve the drink. It is unfortunate that these alleged statements by Ms. Toote at the Termination Meeting were not put directly to her during cross examination to get her response to them. Also, Ms. Rolle, Ms. Adderley and Mr. McKenzie were not cross examined on those statements allegedly made by Ms. Toote to them at the Termination Meeting. In those circumstances I was left with the evidence of the Defendant's witnesses on those points and the unequivocal denial of Ms. Toote that she had refused to serve the drink to Mr. Burch because he had not given her a tip.

61. I made the following findings of fact based on the evidence. To the extent that there was a conflict or an inconsistency in the evidence or variances between different versions of parts of the evidence, what is stated below reflects positive findings of fact which I made based on the evidence adduced at the trial.

62. On the morning of 4 May, 2019 Ms. Toote was working in the casino. A guest identified as Scott Burch asked her if the drinks were complimentary. She responded in the affirmative and added that the servers work on tips. Mr. Burch ordered a rum and coke. Ms. Toote got the drink from the Bar and returned to Mr. Burch who was sitting at the slot machines. The drink was on the tray which Ms. Toote had in her hand. She did not immediately give the drink to Mr. Burch. She could have done so. Ms. Toote said to Mr. Burch "*Sir, your drink is here.*" He responded by saying "*what is it*" and then felt his pocket with his hands for money. Mr. Burch said that he did not have any change and Ms. Toote responded by saying that she could assist him by getting change from the "*bill breaker or the cashier's cage.*" At that time Mr. Burch became annoyed. At about 30 seconds into the exchange between Ms. Toote and Mr. Burch he began gesticulating with his hands. It would have been difficult at that point and going forward to serve the drink without the risk of it being knocked over by the hand movements of Mr. Burch. He told Ms. Toote to take the drink away *"…if I had to beg for a tip."* He went on to

say that "….*he would have given …* [Ms. Toote] *a tip, but if he had to beg for the drink just take it away."* Ms. Toote walked behind Mr. Burch and discarded the drink into a nearby garbage container. Mr. Burch, who was still sitting at the slot machines, did not see Ms. Toote discard the drink as he had his back to her at that time. Ms. Toote then walked pass Mr. Burch and made a gesture with her hand. After walking a few steps she turned around and walked in the opposite direction passing Mr. Burch again before leaving the area.

63. Mr. Burch then left the slot machines and went to the Guest Services desk in the casino. He eventually met with Ms. Rolle and reported his complaint to her about the incident with Ms. Toote. The Rolle Report purports to set out the details of what Mr. Burch told Ms. Rolle had occurred when he ordered a drink from Ms. Toote on the morning of 4 May, 2019.

64. My findings based on Video 38 are set out above in paragraphs 43-46 above.

65. Ms. Rolle went to find Ms. Toote after speaking with Mr. Burch. She found her shortly thereafter and asked her if she had any issues with a guest earlier that day. Ms. Toote responded in the affirmative and gave her account of what transpired between her and Mr. Burch. Ms. Rolle then reported the incident to Mr. Sean Cartwright, the Senior Director of the Beverage Department. In accordance with his directions Ms. Rolle went to the Security Department and while there she gave the Rolle Report to the Security Officer.

66. Ms. Rolle then informed Ms. Adderley about the incident between Ms. Toote and Mr. Burch. She told Ms. Adderely what Mr. Burch had reported to her earlier in the day. Ms. Adderley and Mr. Cartwright then watched the surveillance videos in the Security Department.

67. Ms. Toote was then summoned to the Security Department on 4 May, 2019 where she was requested to make a report about the incident with Mr. Burch. She gave the Toote Statement but was not prepared to answer all the questions put to her by the Security Officer. I accepted the evidence of Ms. Toote that a Shop Stewart was not with her at the meeting in the Security Department and that she was confused and felt uncomfortable answering all the questions at that time. I believed her when she stated that she was trying to "*figure out what had happened*" – see Transcript of 17 February, 2021 on page 38 at lines 22-26. The Toote Statement records Ms. Toote as stating that "*I do not recall bringing a drink to a male guest and not serving the drink returning to the bar instead."* Shortly before the meeting with the Security Officer Ms. Toote had told Ms. Rolle about the incident with Mr. Burch. Accordingly, she was not denying that the incident had occurred or seeking to hide the fact of the incident. Ms. Toote had decided that she would not comment on the incident at the meeting with the Security Officer. In my view that was not an unreasonable position to adopt particularly as, according to my finding of fact, a Shop Stewart was not present. I regarded the entire Toote Statement as Ms. Toote basically taking a position that she would not comment on the incident at that time.

68. Shortly thereafter, Ms. Toote was called into the Suspension Meeting with Mr. Sean Cartwright, Ms. Adderley, Ms. Rolle and Mr. Benson Young, a Union Shop Stewart. In

response to a request, Ms. Toote gave her account of what had transpired between her and Mr. Burch earlier in the morning of 4 May, 2019. Ms. Toote was then told that she was being suspended for gross misconduct for 2 days and that she was to return on 6 May, 2014. She was given the 1st Notice. Based on her evidence I was of the view that Ms. Toote was somewhat traumatized by the events which occurred on 4 May, 2021 and that she found this meeting in the presence of three representatives from the Company difficult to deal with coming shortly after she had been interviewed by Ms. Rolle and then by a Security Officer. Mr. Young, a Shop Stewart, was in the Suspension Meeting but according to the evidence he played a limited role in the meeting.

69. Ms. Toote returned to work on 6 May, 2019. She was called into the Termination Meeting in Mr. McKenzie's office with Ms. Rolle, Mr. McKenzie, Ms. Adderley and Mr. Young. Mr. McKenzie led the meeting. Ms. Toote was given an opportunity to respond to the allegations against her and give her account of what had occurred on 4 May, 2019. The persons in the meeting went to the Security Department to view the surveillance video recordings. After returning to Mr. McKenzie's office, Ms. Toote was given an opportunity to explain what had occurred on the video recordings. Ms. Toote was asked about the standard operating procedure when serving drinks to guests. She stated that:

"YOU GET EYE CONTACT WITH THE
GUEST. YOU SERVE THE DRINK. AND WISH THEM GOOD LUCK.
Q. OKAY.
A. AND ALL THAT WAS DONE.
Q. AND ARE YOU REQUIRED TO WAIT ON A TIP?
A. IF THEY REQUIRE THAT I DO.
Q. IF WHO REQUIRE THAT YOU DO?
A. THE GUEST.
Q. IF THE GUEST WANTS TO TIP YOU, YOU WAIT ON THE TIP?
A. OF COURSE.
Q. BUT YOU SERVE THE DRINK IMMEDIATELY?
A. OF COURSE.
Q. OKAY.
A. IN MOST INSTANCES THAT'S THE CASE. "

70. Ms. Toote and Mr. Young then left the room while Mr. Mckenzie, Ms. Adderley and Ms. Rolle considered the matter. They re-joined the meeting shortly thereafter and Mr. Mckenzie told Ms. Toote that her employment was terminated for gross misconduct. She was given the 2nd

Notice. Ms. Toote did not sign that document. Mr. Young stated that he did not agree with the termination as it was based on a minor infraction which did not justify summary dismissal.

71. I did not accept that Ms. Toote had told Ms. Rolle, Ms. Adderley and Mr. McKenzie at the Termination Meeting that when walking away from Mr. Burch and making the hand gesture she had said to him that if he was not going to tip her she was not going to serve the drink. It will be recalled that, according to Ms. Rolle's evidence, Mr. Burch made a complaint to her on the morning of 4 May, 2019 about the behavior of Ms. Toote when he ordered a drink. Ms. Rolle set out in the Rolle Report what Mr. Burch had told her had occurred between him and Ms. Toote. There is no reference in that Report to Ms. Toote telling Mr. Burch after discarding the drink that if he was not going to tip her she was not going to serve the drink. Given the nature and substance of the complaint by Mr. Burch to Ms. Rolle, it was my view that had Ms. Toote made that inflammatory comment he would have mentioned it to Ms. Rolle and it would have been recorded in the Rolle Report which was a contemporaneous document prepared on the same day as the incident.

72. Mr. McKenzie and Ms. Rolle stated in their respective Witness Statements that Ms. Toote had requested a tip before serving the drink. There was no evidence that such a request was made by Ms. Toote. The evidence was that she saw Mr. Burch checking his pockets for change and when he said that he did not have any change she responded by stating that she could assist him in getting change from the "*bill breaker or the cashier's cage.*" Also, Mr. Mckenzie, Ms. Adderley and Ms. Rolle had each stated in her/his evidence that Ms. Toote's conduct was "*very unprofessional and rude"* in her dealings with Mr. Burch. I found that Ms. Toote could have given the drink to Mr. Burch when she first approached him but apart from that, I found that her behavior on Video 38 was passive and non-threatening. There was no audio on that video and my findings on the verbal exchange between Ms. Toote and Mr. Burch did not support the allegation that she was "*unprofessional and rude."* I did not accept that Ms. Toote admitted during the Termination Meeting that in dealing with Mr. Burch on 4 May, 2019 her behaviour was rude and unprofessional.[1]

73. In responding to a question from the Court Ms. Rolle stated that further investigations had been carried out after the Suspension Meeting and before the Termination Meeting. However, there was no evidence that any steps in the investigation had occurred during that period. I was satisfied that the Company had not conducted any further investigation into the incident involving Ms. Toote and Mr. Burch between the date of the Suspension Meeting and the date of the Termination Meeting.

74. I concluded that Ms. Toote was summarily dismissed by the Company because it was accepted by Mr. McKenzie, Ms. Adderely and Ms. Rolle that she (i) did not give the drink to Mr. Burch immediately upon approaching him and that she waited for a tip; (ii) threw away the drink in a garbage container; (iii) taunted Mr. Burch when making the hand gesture as she walked away;

[1] See paragraph 33 in this Judgment.

and (iv) was unprofessional and rude in her dealings with Mr. Burch. I deal with each of these matters later in this Judgment.

Submissions on behalf of the Plaintiff

75. The Plaintiff's claim is for unfair and wrongful dismissal. Counsel for the Plaintiff submitted that notwithstanding the evidence of Mr. Horatio McKenzie that the Company and the Union continued to abide by the terms and conditions of the IA after it expired, the legal position was that the IA had no legal effect after its expiration on 6 January, 2008. He relied on sections 49, 50 and 51 of the Industrial Relations Act and further contended that there was no evidence adduced at the trial to show that, prior to the expiration of the IA its terms had been, either expressly or by implication, incorporated in Ms. Toote's contract of employment. Mr. Campbell cited the case of **Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers etal** SCCivApp No. 61 of 2014 to support those submissions and concluded that the termination of Ms. Toote's employment by the Company was "*vitiated"* by its reliance on the IA which was not valid at the time of her summary dismissal.

76. Alternatively, Mr. Campbell submitted that if the IA was held to be binding on the parties, the Company failed to comply with its terms when terminating Ms. Toote's employment. He contended that the complaint by Mr. Burch related to unsatisfactory service and that was a minor breach of discipline under section 15.5 of the IA which did not justify summary dismissal. Further, he contended that, even if Ms. Toote's conduct was classified as a major breach under section 15.6 of the IA, it was clear from the evidence that the Company had not carried out a proper investigation into the incident between the date of Ms. Toote's suspension and the date of the termination of her employment as required under that section.

77. Additionally, counsel stated that Ms. Toote was not allowed to confront Mr. Burch about his accusations against her and contended that she was denied a fair hearing thereby breaching the rules of natural justice. He cited **Frederick Ferguson v Island Hotel Company Limited** IndTribApp No. 249 of 2016 where the Court of Appeal approved the following statement of Bain J in her Judgment in **Newbold v Commonwealth Building Supplies Ltd.** [2013] 1 BHS J No 37:

> "**The Courts have to consider what is a reasonable investigation. The person conducting the investigation has to ensure that the person being investigated is given full particulars of the complaint and is given the opportunity to confront the complainant."**

78. Counsel for the Plaintiff further submitted that the burden of proof was on the Company to justify the summary dismissal of Ms. Toote under section 31 of the Act by proving that it "….*honestly and reasonably believed on a balance of probability that* [Ms. Toote] *had committed the misconduct in question at the time of the dismissal and that* [it] *had conducted*

a reasonable investigation of such misconduct……." He contended that the Company had failed to discharge that burden.

79. Mr. Campbell submitted that the summary dismissal of Ms. Toote was "*hasty and unfair, and was without a proper and reasonable investigation."* In reliance on section 34 of the Act, he contended that Ms. Toote had the right not to be unfairly dismissed and that right had been breached by the Company in this case.

80. On the issue of compensation for unfair dismissal, Mr. Campbell submitted that Ms. Toote was entitled to a basic award calculated under section 46 of the Act and a compensatory award under section 47 subject to the maximum amount allowed under section 48(1) of the Act and general damages. He contended that her tips are to be considered when calculating the award and in that regard relied on the National Insurance (Contributions)(Amendment) Regulations 2010 Rule 43. Counsel submitted that the aggregate amount of the award to the Plaintiff should be $181,607.50 together with general damages, interest and costs.

Submissions on behalf of the Defendant

81. Counsel for the Defendant submitted that Ms. Toote was summarily dismissed for gross misconduct after conducting a reasonable investigation into the incident between her and Mr. Burch. Therefore she was not entitled to notice and/or severance pay for wrongful dismissal and/or damages for unfair dismissal. She contended that during the investigation Ms. Toote was treated fairly and was given an opportunity to be heard and to respond to the allegations against her.

82. In her submissions, Ms. Hanna contended that Ms. Toote had failed in her evidence to advance her case for wrongful dismissal as pleaded in the Statement of Claim. In that regard, counsel contended that Ms. Toote had not denied that she had committed the misconduct in question and consequently her evidence had not met the evidentiary threshold for wrongful dismissal. Specifically Ms. Hanna contended that the Plaintiff had not "…*advanced how and/or why her behavior did not constitute a repudiatory breach of her contract and how and why* [the Company's] *classification of the breach as a major breach was incorrect.*" Counsel submitted that this point alone disposed of the wrongful dismissal claim.

83. Ms. Hanna contended that if that submission was not accepted, the court, in considering the wrongful dismissal claim, must determine whether the termination was justified and that involved a review of the law relating to summary dismissal.

84. Counsel referred to section 31 of the Act and contended that an employee may be summarily dismissed when he/she committed a fundamental breach of his/her contract of employment or had acted in a manner repugnant to the fundamental interests of the employer. She contended that under section 32 (i) of the Act, gross misconduct would satisfy that criteria and adopted the following explanation of gross misconduct set out in the Judgment of the Court of Appeal

in **Eloise Shantel Curtis-Rolle v Doctor's Hospital (Bahamas) Limited** SCCivApp. Side No. 149 of 2012:

> **"28 In our view, therefore, in order for an employer to summarily dismiss an employee on the basis that the employee's gross misconduct has amounted to a fundamental breach of the contract of employment or is repugnant to the fundamental interests of the employer, the employer must show that the alleged conduct has so undermined the trust and confidence which is inherent in the particular contract of employment that the employer shd no longer be required to retain the employee within its employ." [**My emphasis.]

85. Ms. Hanna accepted that the Company had the burden of proving that Ms. Toote's conduct so undermined the trust and confidence which was inherent in her contract of employment that it could no longer keep her in its employ. This involved considering:

    (i) The nature of the conduct;
    (ii) The circumstances in which the conduct occurred;
    (iii) The nature of the employer's business;
    (iv) The position the employee holds in the business;
    (v) The terms of the contract of employment; and
    (vi) The impact of the employee's conduct on the interests of the employer.

86. Counsel addressed each of those factors.

    (i) Ms. Hanna contended that the nature of the conduct was that Ms. Toote refused to serve a complimentary drink to Mr. Burch because he did not give her a tip and that she argued with the guest and taunted him by throwing the drink in a nearby garbage container. Ms. Hanna characterized the conduct of Ms. Toote as "*rude, discourteous and unprofessional."*

    (ii) As to the circumstances surrounding the incident, Counsel submitted that the misconduct occurred while Ms. Toote was discharging a core function of her employment. She contended that the refusal to serve the drink to Mr. Burch went to the root of her contract. Ms. Hanna stated that Ms. Toote's explanation about the guest waving his hands thereby preventing her from serving the drink as soon as she approached him was not given at the time of the investigation so the Company was unable to consider it when deciding on the appropriate disciplinary action to take in response to the incident involving Mr. Burch.

    (iii) According to Ms. Hanna, the nature of the Company's business is that it is engaged in the Tourism and Hospitality Industry where excellent guest service is required in order to retain, promote and develop its business.

(iv) Counsel submitted that the position of Ms. Toote in the business was that of a Casino Bar waitress who was an ambassador of the Company.

(v) In addressing the terms of the contract of employment, Ms. Hanna submitted that Ms. Toote's duties and responsibilities were set out in the Job Description at Tab 1 of the Agreed Bundle which included ensuring that guests are served promptly and efficiently at all times. She contended that upon the expiration of the IA, the employment relationship between Ms. Toote and the Company, including the right of summary dismissal, was governed by the provisions of the Act. Counsel relied on the Court of Appeal Judgment in **Leon Cooper v Grand Bahama Power Company Limited** SCCcivApp. No. 178 of 2017 where the Court stated:

> **"13. The Employment Act commenced on the 1st January, 2002. Section 77(2) of the Employment Act provides as follows:**
>
> > **"77. (2) This Act shall not apply to any industrial agreement registered with the Tribunal on the coming into operation of this Act but shall apply on the expiration of such an agreement."**
>
> **14. It is common ground that the industrial agreement between the respondent and BIEMSU was registered with the Tribunal on the coming into operation of the Employment Act. Accordingly, pursuant to section 77(2) of the Employment Act, on the expiration of that agreement on the 1st January, 2005, the Employment Act applied to that undertaking. "**

In her submission, the Act would have applied to the Plaintiff's contract of employment as of 7 January, 2008 following the expiration of the IA on 6 January, 2008. Ms. Hanna submitted that notwithstanding that the Company terminated Ms. Toote under the IA after it had expired, such termination was not invalid as the provisions of the Act applied and under sections 31 and 32 she could be summarily dismissed for gross misconduct.

Citing **Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al**, Counsel for the Company submitted that, notwithstanding that the parties continued to abide by the terms of the IA after it had expired, its terms and conditions had not been incorporated into Ms. Toote's contract of employment during the currency of the IA and therefore the Company had a right to summarily dismiss Ms. Toote under section 31 of the Act.

(vi) With regard to the impact of Ms. Toote's conduct on the interests of the Company, Ms. Hanna submitted that complimentary drinks and excellent service causes guests to stay longer and spend more money in the casino. Consequently, Ms. Toote's conduct had a direct and negative impact on the Company's business.

87. Counsel for the Company submitted that based on the above six factors, the conduct of Ms. Toote when dealing with Mr. Burch on 4 May, 2019 undermined the trust and confidence which was inherent in her contract of employment to a degree that the Company could no longer retain her in its employ.

88. Additionally, Ms. Hanna contended that based on the evidence obtained during the investigation, the Company, through its representatives Mr. McKenzie, Ms. Adderley and Ms. Rolle, had the honest and reasonable belief, on a balance of probabilities, that Ms. Toote had committed the misconduct complained of by Mr. Burch.

89. Counsel relied on the case of **Walker v. Candid Security Limited** SCCivApp No. 55 of 2010 to support her contention that one incident of misconduct is sufficient to warrant summary dismissal. In that case the Court stated that:

> **"19 ... Although this was an isolated incident, it is recognized in cases such as Jupiter General Insurance Co. Ltd v Ardeshir Bomani Shroff [19371 3 All ER 67 and Laws v. London Chronical Ltd. [1959 J 2 All E.R. 285, that a single act of insubordination may be such as to justify dismissal of an otherwise good employee depending on the gravity of the conduct".**

90. Turning to the claim for unfair dismissal, Counsel for the Company contended that the case pleaded by Ms. Toote in her Statement of Claim is set out in paragraphs 7 and 8 and raises only two issues: whether there was a reasonable and proper investigation into the alleged misconduct of Ms. Toote in her dealings with Mr. Burch and whether there had been a breach of natural justice in the process employed by the Company in addressing the complaint.

91. Ms. Hanna contended that Ms. Toote sought to rely on two additional points in her evidence given at the trial; first that her dismissal was under the IA which had expired and secondly that she was dismissed for a breach which was not a term of her contract of employment. Counsel submitted that the Court should not consider those two points as they had not been pleaded and referred to the case of **Bahamas Ferries Limited v Charlene Rahming** SCCivApp No. 122 of 2018 to support her position. Further, it was contended that Ms. Toote could not rely on section 15.5 of the expired IA for the purpose of classifying her conduct as a minor breach of discipline while at the same time maintaining that the IA had no legal effect upon its expiration thereby making the termination of her employment by the Company under section 15.7 of the IA both wrongful and unfair. Ms. Hanna submitted that the Plaintiff was "*reprobating and approbating with regard to the 2003 Industrial Agreement."*

92. In addressing the investigation, Counsel for the Company submitted that the surveillance videos, which provided empirical evidence of what occurred between the parties, reduced the need to conduct further investigations into the matter. Nevertheless, she contended that the Company carried out a full and proper investigation into the incident between Ms. Toote and

Mr. Burch. In that regard, prior to the suspension of Ms. Toote, (i) she was informed of the complaint against her by Mr. Burch and invited to respond to the allegations; (ii) written Statements were obtained from Ms. Toote and Ms. Rolle relating to the incident; and (iii) Mr. Cartwright and Ms. Adderley reviewed the surveillance videos. Additionally, Ms. Toote was represented by a Shop Stewart of the Union at the Suspension Meeting. Further, at the Termination meeting, Ms. Toote was again given an opportunity to respond to the complaint against her and view the surveillance video of the incident in the presence of a Union Shop Stewart. In those circumstances, Ms. Hanna submitted that the claim for Unfair Dismissal based on a failure to conduct a proper investigation was not sustainable.

93. On the issue of a breach of natural justice, Counsel for the Company contended that the failure to provide Ms. Toote with a copy of a report after completing the investigation did not undermine the fairness of the investigation. She referred to the evidence of Mr. McKenzie when he stated that a report was not produced after the investigation but all relevant notes and documents were provided to Ms. Toote. Further, Ms. Hanna recounted the evidence of Ms. Toote in her cross examination when she admitted that she was given an opportunity to be heard during the Suspension Meeting and the Termination Meeting. Counsel contended that the fact that Ms. Toote was not allowed to confront Mr. Burch did not constitute a breach of natural justice and cited the case of **Khanum v Mid Glomorgan Area Health Authority** [1978] 1 IRLR 215 where the following extract appears in the Headnote:

> **"The failure to call patients to give oral evidence did not render the disciplinary hearings unfair as being contrary to natural justice. There are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary inquiry: firstly, that the person should know of the nature of the accusation against him; secondly, that he should be given an opportunity to state his case; and thirdly, that the tribunal should act in good faith."**

94. On the subject of damages, Ms. Hanna submitted that the Plaintiff had not provided any proof of her tips and therefore her claim for $125,600.00 based on tips of $800.00 per week for the period 6 June, 2019 to 22 August, 2022 should be wholly rejected. Additionally, counsel contended that if the Court ordered any payments in respect of the other claims it should be limited to a period of eighteen months under section 48 of the Act as there was no evidence that Ms. Toote held a supervisory or managerial position while employed by the Company.

Analysis and Determination

(i) The Industrial Agreement

95. I will first dispose of a preliminary complaint made by the Company's counsel. Ms. Hanna contended that Ms. Toote was, on the one hand, relying on the IA to maintain that, under its

terms, her conduct was a '*minor breach*' of discipline which did not give rise to summary dismissal while on the other hand denying that it was binding on the parties as it had expired.

96. I did not understand Counsel for the Plaintiff to be advancing inconsistent submissions on the IA. Mr. Campbell's first submission was that the IA had expired and was not applicable at the time of Ms. Toote's summary dismissal. As the Company relied on the IA to dismiss Ms. Toote, he contended that such dismissal was '*vitiated'* and she was entitled to the damages sought in the Statement of Claim. This is clear from paragraphs 9.3 and 9.4 of the Plaintiff's written Closing Submissions. Then, in paragraph 9.5 he contended that, if his first submission was not accepted, and the IA was binding on the parties, the Company did not follow the IA when summarily dismissing Ms. Toote. It was on that latter point that Mr. Campbell submitted that the conduct of Ms. Toote was a minor breach under the IA which did not expose her to summary dismissal. There was no inconsistency in these two positions as the second one was advanced in the alternative to the first one.

97. I accepted that, at the material time, the Company was a member of the BHEA and Ms. Toote was a member of the Bargaining Unit of the Union which, under the IA, was the Bargaining Agent for line staff employees of the Company. Ms. Toote was in the category of employees who were covered by the IA.

98. Pursuant to section 53.1 of the IA it came into effect as from 7 January, 2003 and remained in force for a period of five years. Therefore it expired on 6 January, 2008. The evidence before the court was that the IA was the last Industrial Agreement between the parties as a new agreement had not been concluded and registered under the Industrial Relations Act.

99. The Act commenced on 1 January, 2002. Section 4 provides that:

> **"4. The provisions of this Act shall have effect notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act) so, however, that nothing in this Act shall be construed as limiting or restricting —**
> **(a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom;**
> **(b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or**
> **(c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."**

100. The Court of Appeal considered the effect of that section in **Leon Cooper v Grand Bahama Power Company Ltd. SCCivApp. No. 178 of 2017**. In delivering the Judgment of the Court Sir Hartman Longley, P stated:

> **"21. As a matter of construction the provisions of the Act have effect "notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act)."**
>
> **22. That must mean that as a matter of law, the Act applies to all contracts of employment however, or whatever their origin or source, except for the disciplined forces. <u>An industrial agreement that has expired or that comes into existence after the commencement of the Act is subject to the provisions of the Employment Act.</u>**
>
> **23. What the Act does not do however, is to limit or restrict "a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom; (b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or (c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."**
>
> **24. Therefore, if greater or better benefits may be found in the individual contract of employment than those conferred by the Employment Act then those rights and benefits prevail over the right and benefits conferred by the Employment Act."** [My emphasis]

101. Therefore, during the period when the IA was in force, subject to the provisions of the Act, it governed the terms and conditions of Ms. Toote's employment with the Company.

102. During their closing submissions both Counsel accepted that the IA had expired on 6 January, 2008 and therefore was not valid at the time of the summary dismissal of Ms. Toote. Mr. Campbell's position is reflected in this exchange which is recorded in the Transcript of the hearing on 8 March, 2021 at page 30 lines 16-23:

> **"THE COURT: Mr. Campbell, are you saying, in your submission that this Industrial Agreement applied or does it not apply?**
> **MR. CAMPBELL: No. It doesn't apply, my Lord, because there is no evidence before the Court that any agreement was made**

> **between the parties during the time while that agreement was, actually, in its currency or in operation."**

103. Ms. Hanna is recorded in the same Transcript at page 13 at lines 26-28 as stating:

> **"MS. HANNA: ….Now, the Defendant admits that at the time of the Plaintiff's dismissal, that agreement had expired."**

104. Also in the Skeleton Submissions of the Defendant dated 12 February, 2021 Ms. Hanna stated in paragraph 36 that "[t]**he Defendant does not dispute that at the date of the Plaintiff's dismissal the Industrial Agreement which it relied upon had expired."**[2]

105. Further, it was common ground between counsel that no other Industrial Agreements were signed by the BHEA and the Union after the expiration of the IA. Additionally, both Mr. Campbell and Ms. Hanna accepted that the terms of the expired IA had not been expressly or by implication incorporated in Ms. Toote's contract of employment during the term of the IA.

106. In his written Closing Submission dated 4 March, 2021 Mr. Campbell stated the following:

> **"9.3 In spite of Mr. McKenzie's assertion that the Hotel and the Union have agreed to use the terms of the expired Industrial Agreement in the interest of good employee relations this arrangement cannot replace the law. The legal position is that an Industrial Agreement is only binding if it falls within sections 49, 50 and 51 of the Industrial Relations Act. The exception is that the parties can agree during [the] currency of the agreement that the terms of the expired agreement will become the terms of the employees contract of employment. <u>However no evidence was adduced at the trial to convince the Court that, that is the case.</u> See Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al (SCCivApp No. 61 of 2014)."** [My emphasis]

107. In the written Closing Submissions of Counsel for the Company dated 4 March, 2021 she stated in paragraph 16 x that:

> **" …..the Defendant submits that the terms and conditions of Employment, under the 2003 Industrial Agreement, were not incorporated into the Plaintiff' Contract during the currency of the Agreement (as per Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al)……"**

[2] See also the Transcript for 8 March, 2021 at page 35 line 32 to line 7 on page 36.

108. The Court of Appeal considered whether certain provisions in an Industrial Agreement had been incorporated into the individual contracts of employment of union members in the case of **Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al SCCivApp No. 61 of 2014**. The President wrote the Judgment for the Court. In addressing the issue she stated:

> "**18 …..there are no provisions in the [**Employment] **Act which speak to the incorporation of the terms of collective Industrial agreements into the individual employment contracts of workers. The law which would therefore apply to that issue is the law of contract and the rules of interpretation.**
>
> **19. There is clear authority for the proposition that relevant provisions in an industrial agreement may be expressly or impliedly incorporated in individual contracts, but it is also undeniable that the relevant terms must be those contained in the current collective agreement at the time of incorporation. See National Coal Board v Galley [1958] 1 WLR 16.**
>
> **20. Moreover, once a term has been incorporated into individual contracts, the termination of the collective agreement does not in and of itself affect the incorporated terms. (See Robertson and Jackson v British gas Corporation [1983] ICR 351.**
>
> **21. As noted, incorporation may be effected expressly, or by implication, and must be done during the currency of the industrial agreement….."**

109. In the course of his Judgment in **The Bahamas Hotel Catering & Allied Workers Union v Cable Beach Resort Limited and New Continent Ventures Inc d/b/s Melia Beach Resort** Jones J (as he then was) stated at paragraph 75:

> **"Where a valid registered Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement. Authority for this proposition is found in The Bahamas Court of Appeal case of Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers et al SCCivApp No. 61 of 2014."**

110. The decision of Justice Jones was upheld by the Court of Appeal[3]. When dealing with whether a provision in the Industrial Agreement had been impliedly incorporated into the employees' contracts, the President stated at paragraph 28:

> **"As to whether, by the course of dealings between the parties, the rate of gratuity and distribution formula described in section 19.5.3 of the Industrial Agreement were impliedly agreed and incorporated into the employees' contracts of employment, the decision in Hutchinson (above) is apposite. <u>Following the ratio of that decision, the course of dealing must be shown to have taken place during the currency of the Industrial Agreement</u>….."** [My emphasis]

111. Based on the evidence adduced at the trial, I was not satisfied that during the currency of the IA its terms and specifically section 15, had been incorporated into the contract of employment of Ms. Toote. Mr. McKenzie's evidence was that the Union and the Company had continued to abide by the terms of the IA after it had expired. However, there was no evidence that during the currency of the IA, the parties had expressly agreed that such terms should be incorporated into the employees' contracts of employment. Further, the evidence did not show any circumstances from which it could be reasonably inferred that during the life of the IA the parties had tacitly agreed to incorporate its terms into individual contracts of employment of the Union members. As held in the **Hutchinson Lucaya** case[4], the conduct of the parties after the expiration of the Industrial Agreement is not relevant and cannot be considered in determining whether all or parts of the Industrial Agreement were impliedly incorporated into the employees' contracts of employment. Additionally, as stated above, Counsel for each of the parties had accepted that such terms had not been incorporated into Ms. Toote's contract of employment.

112. In the result, I held that the IA expired on 6 January, 2008 and was not binding on the parties thereafter; prior to that date its terms, and specifically section 15, had not been incorporated into the contract of employment of Ms. Toote; and therefore after 6 January, 2008 the provisions of the Act governed Ms. Toote's contract of employment with the Company.

(ii) Did the reliance on the expired IA by the Company vitiate the summary dismissal of Ms. Toote?

113. Counsel for Ms. Toote submitted that the Company's summary dismissal of Ms. Toote was vitiated by its reliance on section 15.7 of the IA when the IA was not valid and binding on the parties at the time. The Company's Counsel contended that while the summary dismissal was expressed to be based on section 15.7, it nonetheless had the right to summarily dismiss Ms.

[3] The Bahamas Hotel Catering & Allied Workers Union v Cable Beach Resort Limited and New Continent Ventures Inc D/B/A Melia Beach Resort SCCivApp. No. 174 of 2015.
[4] See paragraph 25 of the Judgment of Dame Anita Allen P.

Toote for gross misconduct under the provisions of the Act (and specifically sections 31 and 32) which were applicable at the time of the dismissal. She submitted that the question for the Court was not whether the reliance on section 15.7 of the IA vitiated the summary dismissal but whether the Company had the right to summarily dismiss Ms. Toote under the terms of her contract at the material time. Ms. Hanna stated that such a right existed and therefore the summary dismissal was valid.

114. It was my view that the Company's reliance on section 15.7 of the IA when summarily dismissing Ms. Toote was misconceived as that section did not apply to Ms. Toote's employment contract after the expiration of the IA on 6 January, 2008. However, I did not regard that, in and of itself, as "*vitiating the summary dismissal"* of Ms. Toote or as dispositive of her claim. The Court still had to consider whether the summary dismissal of Ms. Toote for gross misconduct was allowed under her actual contract of employment which, at the material time, was governed by the provisions of the Act. It was significant that the ground for the summary dismissal of gross misconduct had not changed throughout the entire process involving Ms. Toote; that was the ground when the Company relied, wrongly, on the IA and that was also the ground when it sought to justify the summary dismissal under the Act. Therefore, the Plaintiff was never in doubt as to the allegations made against her and the ground relied on by the Defendant when summarily terminating her contract of employment. This was in stark contrast to the position in the case of **Woodside v Lickety Split Ltd [2017] 2 BHS No. 81** where the employer vacillated on the ground for terminating the employee's services citing first dishonesty, then gross insubordination/insolence and gross misconduct and finally breach of trust / breach of confidentiality thereby leaving the employee in a state of uncertainty as to why she was being summarily dismissed.

(iii) Unfair Dismissal

115. Claims for unfair dismissal were first introduced into our law in sections 34-48 of the Act. Now every employee has a right under section 34 of the Act not to be unfairly dismissed. Sections 36 to 40 of the Act provide instances of statutory unfair dismissal. Those sections do not provide an exhaustive list of instances of unfair dismissal. The category is not closed. Section 35 states that in all instances which do not fall under sections 36 – 40, the question whether the dismissal was fair or unfair shall be determined in accordance with the substantial justice of the case.

116. Sections 34 and 35 of the Act provide that:

> **"34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer.**
>
> **35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the**

employee was fair or unfair shall be determined in accordance with the substantial merits of the case."

117. The Court of Appeal provided useful guidance on the law governing unfair dismissal in **B.M.P. Limited D/B/A Crystal Palace Casino IndtribApp App No.116 of 2012.** The Judgment of the Court was given by Conteh, J.A. He stated:

> **"34 ……unfair dismissal is not confined to the five instances provided in ss. 36 to 40 of the Act. We find support for this conclusion from the structure and spirit of the Act. We do not believe that the Legislature by mentioning the five instances itemized in these sections intended to freeze forever other possible instances of unfair dismissal.**
> **35. ……..**
> **36. 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 (deal-ing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dis-missal on ground of redundancy); section 38 (dealing with dismissal on ground of pregnancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).**
> **37. In addition to the right of every employee not to be unfairly dismissed as provided for in sections 36, 37, 38 and 40, s.35 clearly states that subject to sections 36 to 40 (what we refer to as "statutory unfair dis-missal"), the question whether the dismissal of an employee was fair or unfair shall be determined in accordance with the substantial merits of the case.**
> **……..**
> **38. 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. And this question shall be determined in accordance with the substantial merits of the case. 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?

……

40. Commendably in our view, the Legislature has provided that, subject to the cases listed in sections 36 to 40, the question whether the dismissal of an employee for the purposes of Part IX of the Act (dealing with unfair dismissal), shall be determined in accordance with the substantial merits of the case."

118. In **Bahamasair Holdings v Omar Ferguson** (supra) the Court of Appeal considered the meaning of the phrase "*in accordance with the substantial merits of the case"* and speaking through Crane-Scott, J.A. stated:

> **"19. More recently, in Cartwright v. US Airway [2016] 1 BHS J. No. 96 this Court (differently constituted) considered the meaning of the phrase "the substantial merits of the case" as it appears in section 35. The Court drew assistance from the observations of Langstaff J in West v. Percy Community Centre UKEAT/0101/15/RN. In West, the court was considering the corresponding phrase in section 98(4)(b) of the English Employment Act, 1999. Langstaff J explained that the "*statutory question is answered by a factual inquiry*."**
>
> **20. Delivering the decision of the Court of Appeal in Cartwright (above), Isaacs JA, stated:**
>
> > **"40. Thus, it was incumbent upon Winder, J to look at the case in the round, at all the circumstances of the case, and arrive at a decision based on the substantial merits of the case. This he did do."**

119. In her Judgment in **Helena McCardy** (supra) Crane-Scott JA reviewed a number of cases involving claims of unfair dismissal and stated:

> **"63. Over the years, even in spite of the minimal criteria provided in section 35, the Industrial Tribunal and our courts have had no difficulty determining whether in any given case a dismissal was fair or unfair. Case law in this jurisdiction is replete with instances in which our courts at various levels have, applying the statutory test, conducted the necessary factual inquiry required by the section and either found a dismissal to have been fair or unfair. <u>In the vast majority of cases</u>, a finding of unfairness has invariably involved a finding that some procedural unfairness occurred in the process which led to the dismissal."** [My emphasis.]

120. In **Island Hotel Company Limited IndTribApp No.54 of 2017** Evans JA (Actg) as he then was stated in paragraph 53 of his Judgment that "… *a case of unfair dismissal ……..is primarily* [concerned with] *the process whereby the employer arrived at his decision to terminate."*[My emphasis.]

121. It is important to note that in neither of those two authorities did the Court of Appeal preclude an unfair dismissal case based on matters other than process or procedural unfairness. Indeed, the example of unfair dismissal postulated by Conteh JA in paragraph 38 of his Judgment in **B.M.P Limited** is not process or procedurally based.

122. The burden was on Ms. Toote to prove on the balance of probabilities that her dismissal by the Company was unfair. She alleged that the investigation carried out by the Company was not proper and was unfair. She also claimed a breach of natural justice and that the termination of her employment *"…was carried out in a manner that breached the employer's duty of good faith and fair dealing."*

123. In following the direction of the Court of Appeal in **Cartwright** with regard to a case of unfair dismissal under section 35 of the Act, I conducted a factual inquiry looking at the case in the round and considered all the circumstances of the case based on my findings of fact which are set out above in this Judgment. I need not reiterate in detail those findings here but I relied on them when considering the claim of unfair dismissal.

124. Ms. Toote's claim of unfair dismissal was unconnected with any of the statutory grounds in sections 36 to 40 of the Act.

125. Ms. Toote was a waitress in the Casino Service Bar Department and had been employed by the Company for 32 years. During that entire period she had been suspended on one occasion for an infraction before the incident which occurred on 4 May, 2019. There was no evidence that there had been any other difficulties or problems relating to Ms. Toote's employment during that 32 year period while she was working for the Company.

126. At the time of the summary dismissal of Ms. Toote the Company Representatives purported to act under section 15.7 of the IA. Their mind set was that Ms. Toote had committed a major breach of discipline under the IA through her gross misconduct in her dealings with Mr. Burch. Their view was that this was a breach of her employment contract. In cross examination the following exchange between counsel for Ms. Toote and Ms. Rolle is recorded in the Transcript at page 80 line 21 to line 4 on page 81

"21 Q. WHAT WAS THE BREACH AGAINST THE PLAINTIFF?

22 A. WHAT WAS THE BREACH? THE BREACH WAS GROSS

23 MISCONDUCT.

24 Q. NO. WHAT WAS THE BEHAVIOUR THAT LEAD TO THE

25 BREACH THAT YOU THEN CLASSIFY AS GROSS MISCONDUCT?

26 A. THE BEHAVIOUR THAT LEAD TO IT WAS TO THE FACT

27 THAT MS. TOOTE, WHEN SHE WENT AHEAD AND SHE WENT TO

28 SERVE THE GUEST MR. BIRCH. SHE CAME BACK, SHE BROUGHT

29 THE DRINK AND DID NOT SERVE THE DRINK. THEREAFTER

30 THROWING THE DRINK IN THE GARBAGE CAN NEXT TO THE

31 GUESTS.

32 Q. SO WOULD YOU AGREE ME THEN, THAT THE COMPLAINT

81

1 AGAINST THE PLAINTIFF WAS FOR NOT PROVIDING SATISFACTORY

2 SERVICE TO THE GUESTS, WOULD YOU AGREE WITH ME WITH

3 THAT?

4 A. I WOULD AGREE WITH YOU."

127. Later on that same page starting at line 22:

"22 Q. SO, YOU WOULD AGREE WITH ME THEN THAT THE

23 COMPLAINT THAT WAS …. AGAINST THE PLAINTIFF THAT

24 WOULD HAVE LEAD TO A BREACH OF CONDUCT WAS ACTUALLY IN

25 THE MINOR BREACH OF CONDUCT ITSELF?

26 A. A PART OF IT, YES. IT WAS A PART OF IT.

27 Q. BUT WHAT WAS THE OTHER PART THAT WASN'T?

28 A. THE OTHER PART WAS THE GROSS PART, WHICH I

29 WOULD DEEM AS GROSS. WHEN SHE THREW THE DRINK IN THE

30 GARBAGE WALKING OFF, SHOWING HAND GESTURES AT THE

31 GUESTS."

128. Therefore, according to their evidence, the gross misconduct was that Ms. Toote (1) refused to serve a complimentary drink to Mr. Burch without getting a tip; (2) threw away the drink in a garbage container; (3) taunted Mr. Burch when making the hand gesture as she walked away; and (4) was unprofessional and rude in her dealings with Mr. Burch.

129. On the first point, I found that (i) Ms. Toote did not serve the drink as soon as she approached Mr. Burch and that she could have done so within the first 30 seconds of her interaction with him; (ii) Ms. Toote did not refuse to give Mr. Burch the drink in response to his request; (iii) Mr. Burch had intended to tip Ms. Toote as he checked his pockets for change; (iii) he told Ms. Toote that he did not have any change and she offered to get him change from the bill breaker machine or the cashier; and (iv) he became agitated and after gesticulating with his hands told Ms. Toote to take away the drink. The video recordings did not assist in confirming what was said by Ms. Toote and Mr. Burch as there was no audio. Consequently, the only direct evidence before the court on the conversation was Ms. Toote's evidence. Video 38 did show that Ms. Toote's physical demeanour throughout her interaction with Mr. Burch was calm, passive and non threatening.

130. On the second point, I found that Mr. Burch did not see Ms. Toote discard the drink in the garbage container behind him as he had his back to her at the time. According to the Rolle Report, Mr. Burch made no reference to that act when making his complaint to Ms. Rolle. In fact, based on the Rolle Report, Mr. Burch told Ms. Rolle that Ms. Toote "*walked away with the drink on the tray."* There is not even a reference by Mr. Burch to the drink being discarded by Ms. Toote.

131. On the third point, there was no evidence that Mr. Burch saw Ms. Toote's brief hand gesture when she was walking away. I have already stated that I did not accept as a fact that Ms. Toote said in the Termination Meeting that she had told Mr. Burch when making the hand gesture that if he was not going to tip her she was not going to serve the drink. It was simply incomprehensible to me that if Ms. Toote had made such a comment Mr. Burch would not have mentioned it to Ms. Rolle. He clearly had not mentioned it as there is no reference to it in the Rolle Report. Accordingly, I found that there was no taunting.

132. On the fourth point, Mr. McKenzie stated in paragraph 27 of his Witness Statement that "[m]*y observation of the Plaintiff's conduct, while serving the guest was very unprofessional and rude."* However, the video recordings did not provide any evidence that Ms. Toote was unprofessional and rude in her dealings with Mr. Burch. As stated earlier, there was nothing extraordinary or aggressive about Ms. Toote's physical demeanour on the video recordings. I did not accept that Ms. Toote admitted during the Termination Meeting that in dealing with Mr. Burch on 4 May, 2019 her behaviour was rude and unprofessional. Consequently, the only possible source for the conclusion by the Company Representatives that Ms. Toote was rude and unprofessional was the Rolle Report. It was stated in that report that Mr. Burch was "*shocked at the service..'* That was not a proper basis for the Company Representatives to conclude that Ms. Toote was unprofessional and rude in her dealings with Mr. Burch.

133. In the result, put at its highest, Ms. Toote's only infraction was that she had not immediately served the drink when she approached Mr. Burch. It was common ground between them that Mr. Burch was checking his pocket for change to tip Ms. Toote and a discussion ensued for approximately 37 seconds after Ms. Toote first approached Mr. Burch with the drink on her

tray. Based on my findings of fact the aggravating factors relied on by the Company Representatives as stated in points 2, 3 and 4 of paragraph 128 above when summarily dismissing Ms. Toote ("***the aggravating factors**")* were not apposite.

The investigation / natural justice

134. Under the authorities the issue of whether an investigation is reasonable is a question of law and not fact – see **Island Hotel Company Limited v John Fox IndTribApp No.54 of 2017** at paragraph 52. The question must be answered in the context of the particular facts of the case.

135. The extent of the investigation into the incident by the Company was (i) taking the oral statement of Mr. Burch to Ms. Rolle and obtaining the Rolle Report; (ii) interviewing Ms. Toote by Ms. Rolle and later by a Security Officer who took the Toote Statement; (iii) viewing the surveillance video recordings; and (iv) conducting the Suspension Meeting and the Termination Meeting.

136. The Company did not obtain a written signed statement from Mr. Burch. He was not asked to verify the accuracy of the Rolle Report to the extent that it purported to set out his oral complaint to Ms. Rolle. It was clear from the evidence of Ms. Rolle that she immediately accepted the version of events told her by Mr. Burch. In paragraph 7 of her Witness Statement she stated:

> **"Mr. Burch stated that he was shocked at the service as he comes to the Resort twice a year for Two (2) weeks and spends lots of money. I then expressed my sincere apologies and offered to get him the drink. Mr. Burch declined the offer and went to the Beach with his family after I assured him that this should not have happened."**

137. On that basis, no one from the Company pressed Mr. Burch on the differences between his version of events and that of Ms. Toote during the investigation. In fact, during the investigation no one from the Company had spoken with Mr. Burch about the incident involving Ms. Toote other than the initial conversation he had with Ms. Rolle. There was no indication that Ms. Toote's version of the incident was subsequently put to Mr. Burch for his response. Unlike Ms. Toote, Mr. Burch was not interviewed by a Security Officer.

138. Attached to the 1st Notice is a document which shows that immediately after the incident Ms. Toote went to the Casino West Service Bar where she spoke with other members of staff. There was no indication that those other staff members were interviewed to ascertain whether Ms. Toote had made any comments to them about the incident with Mr. Burch. Also, the second page of the 2nd Notice indicated that Mr. Burch was speaking with the Guest Services Manager when Ms. Rolle approached him. Again, there was no evidence that the Guest Services Manager was interviewed at any stage of the investigation.

139. It was clear that Ms. Adderley was of the view that the surveillance videos were decisive and confirmed the version of events given by Mr. Burch to Ms. Rolle. That may have contributed to the tepid investigation carried out by the Company. However, as there was no audio, those videos did not assist in ascertaining what was actually said by Ms. Toote and Mr. Burch or the tone of the conversation. Seeing two persons in a video apparently engaged in a conversation without any audio is a tenuous basis for deciding to terminate someone's employment unless the physical conduct of one or more of the parties is demonstrative in some relevant way.

140. In this case Video 38 did confirm (i) the very short duration of the interchange between Ms. Toote and Mr. Burch; (ii) that Ms. Toote did not serve the drink immediately upon approaching Mr. Burch; (iii) that Mr. Burch started gesticulating with his hands 30 seconds into the exchange; and (iv) that Ms. Toote's body conduct was calm, passive and not confrontational throughout her interchange with Mr. Burch.

141. I was satisfied on a balance of probabilities that Ms. Adderley and Ms. Rolle had already decided to terminate the employment of Ms. Toote at the time of the Suspension Meeting and that is why no further investigations were carried out between the date of that meeting and the date of the Termination Meeting. Paragraph 18 of Ms. Rolle's Witness Statement indicated her state of mind going into the Suspension Meeting. She stated in that paragraph:

> "**It should be noted that because the nature of the breach, which was the Plaintiff's refusal to serve a complimentary drink to a guest because no tip was given, went to the root of the Plaintiff's contract, the decision was made to suspend the Plaintiff rather than giving a verbal or written warning."**

142. Ms. Adderley's position at that time was reflected in paragraph 16 of her Witness Statement which was in the same terms as Ms. Rolle's Witness Statement:

> " **It should be noted that because the nature of the breach, which was the Plaintiff's refusal to serve a complimentary drink to a guest because no tip was given, went to the root of the Plaintiff's contract, the decision was made to suspend the Plaintiff rather than giving a verbal or written warning."**

143. Those statements were indicative of a pre judgment that Ms. Toote had refused to serve a complimentary drink to Mr. Burch because he had not given her a tip. Ms. Toote denied that allegation and her position was that she saw Mr. Burch checking his pockets for money and when he said that he did not have any change she offered to assist by getting change for him from the bill breaker machine or the cashier. That triggered an angry reaction from Mr. Burch and he told her to take away the drink. So while it had been established that the drink had not been given to Mr. Burch, the precise words spoken by each of them were in doubt and the

reasons for not serving the drink and the surrounding circumstances were disputatious. Those matters required further investigation.

144. In **Newbold v Commonwealth Building Supplies Ltd** [2013] 1 BHS J No 37 Bain J was dealing with a case for wrongful dismissal of an employee who had been accused of sexual harassment. When considering the investigation which had been carried out she stated at paragraph 51of her Judgment:

> **"The Courts have to consider what is a reasonable investigation. The person conducting the investigation has to ensure that the person being investigated is given full particulars of the complaint and is given the opportunity to confront the complainant."**

145. I did not understand Justice Bain to be stating in **Newbold** that an opportunity to confront your accuser is an absolute requirement in all cases. She made that comment in the context of the facts of the case before her.

146. During the investigation Ms. Toote was not given an opportunity to confront Mr. Burch about his complaints against her but I did not regard that as a requirement in this case. It would have undoubtedly been helpful and no explanation was given why there was no follow up with Mr. Burch after his initial meeting with Ms. Rolle.

147. Ms. Toote had accepted in her evidence that she was informed of the complaint made against her by Mr. Burch and given an opportunity to respond to it. She was also allowed to view the video recordings and afforded an opportunity to comment on those recordings. Additionally, Ms. Toote was provided with the relevant documents in the matter although Mr. McKenzie stated that he had not prepared a formal report following the investigation.

148. In all the circumstances I concluded that for the reasons set out in paragraphs 136 – 138 and 141-143 above, the Company had not conducted a reasonable and proper investigation into the incident between Ms. Toote and Mr. Burch.

149. Based on her own evidence I held that Ms. Toote was not denied natural justice throughout the process of dealing with the incident between her and Mr. Burch.

150. In my view this was not a case where Ms. Toote belligerently or pugnaciously refused to give Mr. Burch a complimentary drink until she was given a tip and argued with him about the matter. It was an unfortunate case of a situation escalating to an unpleasant outcome. Ms. Toote was wrong in not serving the drink immediately upon approaching Mr. Burch. However, beyond that, I did not accept that two of the aggravating factors had occurred – the taunting of Mr. Burch and the unprofessional and rude conduct of Ms. Toote - and the third one – throwing the drink in the garbage – was inconsequential as there was no evidence that Mr. Burch had

seen it and he had not mentioned it in his complaint to Ms. Rolle. That cast Ms. Toote's failure to serve the drink as soon as she approached Mr. Burch in a very different light. It was Ms. Rolle who had stated in her evidence that the aggravating factors made the conduct of Ms. Toote gross misconduct – see paragraph 127 above.

151. Having looked at the case in the round and bearing in mind all the circumstances of this case as outlined above, including my holding that the investigation by the Company was not reasonable and fair, I decided that based on the substantial merits of the case the dismissal of Ms. Toote was unfair.

(v) Wrongful Dismissal

152. Prior to the enactment of the Act a claim for wrongful dismissal was grounded in the common law. Now that the Act has been passed sections 31 – 33 give statutory status to a claim for wrongful dismissal. Under the controlling authorities the current position is that wrongful dismissal claims can be pursued under either the common law or under the Act at the option of the employee. The test for a claim under the common law is different to the test for cases under the Act.

153. Sections 31-33 provide that:

> **"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 con-stitute 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."**

154. The Company had summarily dismissed Ms. Toote on the ground of gross misconduct. In **Eloise Shantel Curtis Rolle** (supra) the Court of Appeal considered the meaning of gross misconduct and stated:

> **"26. The statute however, does not define what conduct, on the part of an employee, will amount to gross misconduct of a kind that could be considered a fundamental breach of a contract of employment or which may be repugnant to the fundamental interests of the employer. It is at this point that we must look to the common law, to give meaning to the term 'gross misconduct'.**
>
> **27. Lord Jauncey in Neary v. Dean of Westminister (1999) IRLR 28 provides that definition. He stated: "That conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."**

155. The burden was on the Company to show that it was entitled to summarily dismiss Ms. Toote.

156. In reviewing the Statement of Claim I noted that Ms. Toote had not made a specific claim for compensation under section 29 of the Act with regard to the wrongful dismissal claim. That section sets out the formula for calculating the requisite notice of termination or pay in lieu thereof in wrongful dismissal cases – see **Betty K Agencies Limited v Suzanne Fraser No. 270 of 2013**. The Statement of Claim did contain Particulars of Loss and Damage based on sections 46 and 47 of the Act but that related to the claim of unfair dismissal. Similarly, the claim for compensation in paragraph 9 of the Statement of Claim for the *"…unfair and/or wrongful termination of* [the Plaintiff's] *contract of employment…pursuant to sections 46 and 47 of the Employment Act…"* clearly only applied to unfair dismissal and not to the wrongful dismissal claim.

157. This indicated to me that the primary thrust of Ms. Toote's claim was that she had been unfairly dismissed. While she also claimed wrongful dismissal (as I found under the Act), that was somewhat tangential as evidenced by the fact that the two claims were conflated when seeking compensation only under sections 46 and 47 of the Act – see paragraphs 9 and 10 of the Statement of Claim.

158. Counsel for Ms. Toote referred to section 29 of the Act in his submissions but there was no foundation for a claim under that section in the Statement of Claim.

159. As stated above, I concluded that Ms. Toote was unfairly dismissed by the Company. Bearing that in mind and having regard to the fact that she did not claim compensation in respect of the wrongful dismissal claim I did not find it necessary to deal further with that claim.

(vi) Award of compensation

160. In her Statement of Claim Ms. Toote claimed compensation only under sections 46 and 47 of the Act. Her claim in respect of the basic award under section 46 was for three weeks for each year of completed service totaling $16,770.00. The claim under section 47 for a compensatory award was salary at $215.00 per week for the period 6 June, 2019 to 22 August, 2022 in the sum of $35,690.00. Ms. Toote also claimed tips for the same period at the rate of $800.00 per week in the total sum of $125,600.00. There was also a claim for vacation in the sum of $3,547.50, damages, interest and costs.

161. No evidence was adduced to support the claim for tips in the amount of $125,600.00 other than Ms. Toote's statement that her average weekly tips was $800.00. There was no documentary evidence to verify that figure. I acknowledge the difficulty in vouching a claim for tips but something more than a mere statement by the claimant must be given to the court. In this case nothing else was provided and therefore I did not accept that claim.

162. I accepted Mr. McKenzie's evidence that as of the date of Ms. Toote's dismissal she was paid all accrued vacation and outstanding benefits due to her by the Company. Accordingly, I did not allow the claims for those items.

163. Section 48 of the Act provides that:

> **"48. (1) The amount of compensation awarded to a person calculated in accordance with section 46 and of a compensatory award to a person calculated in accordance with section 47, shall not exceed eighteen months pay:**
> **Provided that where the employee holds a supervisory or managerial position the award shall not exceed twenty-four months pay.**
> **(2) It is hereby declared for the avoidance of doubt that the limit imposed by this section applies to the amount which the Tribunal would, apart from this section otherwise award in respect of the subject matter of the complaint after taking into account any payment made by the respondent to the complainant in respect of**

that matter and any reduction in the amount of the award required by any written law.
(3) Where the Tribunal considers that any conduct of the complainant after the dismissal was such that it would be just and equitable to reduce the amount of the award to any extent, the Tribunal shall reduce that amount accordingly."

164. In **B.M.P Limited** Conteh JA stated:

> **"But s. 48 of the Act, however, puts a limit on the amount of compensation (including a basic award calculated in accordance with s. 46 and compensatory award calculated in accordance with s. 47) that may be awardable. The operation of the limit stated would result in the position that the combined award under these two heads should not exceed eighteen months pay, provided that if the employee holds a supervisory or managerial position, the award shall not exceed twenty-four months pay."**

165. Ms. Toote did not hold a supervisory or managerial position at the time of her dismissal. Accordingly, following the statutory cap in section 48, I awarded her the sum of $15,480.00 representing her weekly salary of $215.00 for 72 weeks/18 months. The usual order for costs is made whereby the Company will pay the costs of Ms. Toote to be taxed if not agreed.

166. I note that the transcript of the hearing on 2 August, 2022 when I delivered my decision in this case records on page 4 at lines 18-19 and on page 5 at lines 2-5 the figure of $250.00. That is obviously an error probably based on my pronunciation of $215.00. The figure should be $215.00.

167. I regret the delay in delivering my reasons for my decision which was attributable to a number of factors.

Dated 16th day of May, 2023

Sir Brian M. Moree Kt.

COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **COM/lab/00056**

Commercial Law Division

BETWEEN

WINIFRED TOOTE

Plaintiff

AND

ISLAND HOTEL COMPANY LIMITED

Defendant

JUDGMENT
