COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 41 of 2022

B E T W E E N

PAMELA WALKINE

Appellant

AND

PARADISE ENTERPRISES LTD

Respondent

BEFORE: **The Honourable Madam Justice Crane-Scott, JA**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Tanya Wright, Counsel for the Appellant**
Mrs. Lakeisha Hanna with **Mrs. Viola Major, Counsel for the Respondent**

DATES: **22 June 2022; 28 June 2022; 22 September 2022**

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Civil Appeal – Employment Law – Wrongful Dismissal – Unfair Dismissal – Breach of Contract – Summary Dismissal – Sections 31,32, 33, 34, 35 & 36 Employment Act

The Appellant appealed against the entirety of a written Judgment handed down by a Supreme Court Judge who had dismissed her claims for wrongful and/or unfair dismissal; and further awarded the Respondent costs of the action to be taxed if not agreed.

In her Notice of Appeal, the Appellant raised 6 grounds of appeal, seeking to impugn the Judge's decision in various ways.

The Appellant further sought Orders from the Court which would: (i) set aside the Judgment and enter judgment instead for the Appellant; (ii) require the Respondent to pay her notice and severance pursuant to section 29 of the Employment Act; (iii)

refer the matter to the trial Judge for assessment of damages for unfair dismissal; (iv) award the Respondent costs of the Respondent's preliminary point in the court below, to be taxed if not agreed; and (v) an order that the Respondent pay the Appellant costs of the appeal and in the court below in any event.

After hearing arguments, the Court reserved its decision.

Held: Appeal dismissed. The trial Judge's decision is affirmed in its entirety. Costs of the appeal are the Respondent's to be taxed, if not agreed.

It was for the Judge (as the primary fact-finder) to examine the infractions for which the Appellant was dismissed and to determine for purposes of section 31 of the BEA whether she was satisfied that the Appellant (as the employee) had "committed a fundamental breach of her contract of employment" ***or*** had "acted in a manner repugnant to the fundamental interests" of the employer" warranting her summary dismissal. This the Judge clearly did.

Undoubtedly, there may be situations where a single infraction by an employee may not rise to the level of a fundamental breach of an employment contract warranting summary dismissal. However, this was not such a case. In this particular case, the Judge considered that (given the Appellant's duties and responsibilities as the Respondent's Slot Shift Manager) each act or infraction constituted a fundamental breach of her contract. What is more, as clearly appears from the Judgment, the learned Judge also felt (as did the Respondent) that **all** the infractions documented in the Termination Notice *collectively* met the statutory standard justifying the Appellant's summary dismissal.

As the judge found, the Appellant's acts were caught on surveillance footage after an investigation was requested for surveillance of the Appellant's shifts. The evidence established that confronted at the 4 July 2016 meeting with the fact of the surveillance footage and the infractions therein disclosed, the Appellant not only admitted her actions, but sought to justify them.

We completely agree with counsel for the Respondent's submission that the CCTV surveillance footage spoke for itself. The Appellant was, quite simply, *"caught on camera"* and there was no need for further inquiry or investigation. What is more, given the Appellant's refusal to view the footage coupled with the fact that she

admitted her actions and sought to justify them and further apologized, it is impossible to fault the learned Judge's final conclusions that the investigation had been fair and reasonable and the Appellant's dismissal consequently, not unfair.

A v. B [2003] IRLR 405 mentioned
Bahamas Electricity Corporation and Bahamas Power and Light Company Limited v. Sherry Jennifer Brown IndTribApp No. 71 of 2020 considered
Bahamasair Holdings Ltd v. Messier Dowty Inc [2018] UKPC 25 applied
Bahamasair Holdings Limited v. Omar Ferguson SCCivApp No. 16 of 2016 considered
Bethel v. Commonwealth Bank Ltd [2005] 3 BHS J. No. 134 mentioned
BMP Limited dba Crystal Palace Casino v. Yvette Ferguson [2013] 1 BHS J. 136 considered
Central Bank of Equador v. Conticorp [2015] UKPC 11 applied
Coleby v. Lowes Pharmacy Ltd, [2016] 1 BHS J. No 15 considered
Eden Butler v. Island Hotel Company Limited SCCivApp No. 210 of 2017 considered
ILEA & Gravette [1988] IRLR 497 applied
Island Hotel Company Limited v. John Fox IndTribApp No. 54 of 2017 considered
Laws v. London Chronicle (Indicator) Newspapers Ltd [1959] 1 WLR 698 mentioned
Leisure Travel & Tour Limited v. Norman Knowles IndTribApp No. 44 of 2020 mentioned
Paul F. Major v. First Caribbean International Bank (Bahamas) Limited SCCivApp. No. 77 of 2021 mentioned
Sheldon Jones v. Commonwealth Building Supplies Limited [2004] BHS J. No. 418 mentioned
Sun International v. Charles Emmanuel Missick SCCivApp No. 6 of 2002 mentioned
Walker v. Candid Security Limited [2011] 1 BHS J. No. 77 mentioned

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JUDGMENT

Judgment delivered by the Honourable Madam Justice Crane-Scott, JA;

Introduction

1. This is an appeal from a written Judgment of the Hon. Madam Justice Diane Stewart handed down in the Supreme Court on 21 February 2022 in which she dismissed the Appellant's claims for wrongful dismissal and unfair dismissal respectively; and awarded the Respondent costs of the action to be taxed, if not agreed.

2. The Notice of Appeal seeks Orders from this Court: (i) setting aside the Judgment and entering judgment for the Appellant; (ii) requiring the Respondent to pay the Appellant notice and severance pursuant to section 29 of the Employment Act; (iii) referring the matter to the trial judge for assessment of damages for unfair dismissal; (iv) awarding the Respondent costs of the Respondent's preliminary point in the court below, to be taxed if not agreed; (v) that the Respondent pay the Appellant costs of the appeal and in the court below in any event.

3. We have dismissed the appeal. Our reasons appear below.

4. The following background (including extracts from the learned Judge's written decision) will set the stage for our review of the grounds of appeal.

Background

5. The Appellant (hereinafter also referred to as "Mrs. Walkine") commenced her employment with the Respondent on 27 February 1989, as a Slot Attendant in its Casino at Atlantis, Paradise Island. Over the next 28 years, she steadily moved up through the ranks within the Casino. In due course of time, she was promoted to the position of Slots Shift Manager; a position she held until 4 July 2016, when the Respondent purported to summarily dismiss her for gross misconduct.

6. The evidence disclosed that on 27 June 2016, during her shift, Mrs. Walkine was observed by another employee sleeping in the 'Dragon's Nightclub', a

public guest area within the Respondent's establishment. The matter was reported to the Casino Executive team and a decision was taken to request a review of the Respondent's CCTV surveillance footage over the preceding 5-day period for the purpose of monitoring Mrs. Walkine's activities whilst on the Casino floor.

7. A detailed report was obtained from the Surveillance Department covering the 5-day period between 23 through 27 June 2016. The surveillance report indicated that whilst on shift during the period Mrs. Walkine had been observed on the CCTV footage: (i) routinely taking extended restroom breaks for periods ranging between 55 minutes to 2 hours and 14 minutes; (ii) continually and routinely spending excessive time in the slot kiosk (on one occasion 4 hours and 43 minutes); (iii) congregating on the Casino floor with other staff for excessive lengths of time; (iv) routinely failing or refusing to monitor the Casino floor; (v) eating a full meal in the slot kiosk in violation of Casino policy despite having been formally informed that lunch breaks were to be taken in the staff cafeteria or Casino lounge; and (vi) sleeping in a guest area for 54 minutes.

8. On 30 June 2016, the Respondent issued Mrs. Walkine with a Notice of Unsatisfactory Performance ('the Suspension Notice"). The Notice detailed breaches of company policy and she was put on suspension for four days from 30 June 2016 to 3 July 2016 and directed to return to the Human Resources Department on 4 July 2016.

9. On her return from suspension on 4 July 2016, Mrs. Walkine attended a meeting where she was given an opportunity to respond to each of the findings contained in the surveillance report and in the Suspension Notice; and to state her case. She was questioned about the alleged infractions and gave certain explanations. She did not push back or argue and ultimately accepted all the points and apologized for her actions. She was also given an opportunity to view the CCTV footage from which the surveillance report was compiled, but, according to the evidence, she declined to watch it.

10. Following the meeting, a decision was made to terminate her for unsatisfactory performance/willful violation of company policy. She was served with an

Official Notice of Unsatisfactory Performance ("the Termination Notice") dated 4 July 2016 (which she duly signed) and formally terminated.

11. The relevant portions of the Termination Notice are reproduced below:

"ATLANTIS

OFFICIAL NOTICE OF UNSATISFACTORY PERFORMANCE
(Non-union Employees)

Employee No	Last Name	First Name	Date of Hire	Job Title
223209	Walkine	Pamela	2/27/1980	Slot Shift Manager

Date of Incident: Jun 23-27, 2016. Date Issued July 4, 2016.

Review the nature of report and specifically document incident on lines below

Misconduct	Violation of Rule of Conduct #
√ **Unsatisfactory Work**	√ **Other: Willful violation of company policy**

Describe the incident in detail:

Unsatisfactory Performance/Willful violation of Company Policy–July 4, 2016

It has come to Management's attention that during the course of your duty on your regularly scheduled shifts on the 23rd, 24th, 25th, 26th and 27th June 2016 you committed multiple and diverse violations of company policies. Specifically, (i) you were routinely taking extended restroom breaks ranging from 55 minutes to 2 hours 14 minutes; (ii) you continually and routinely spent excessive time in the Slot Kiosk in one case up to 4 hours 43 minutes; (iii) you have been observed during the said period congregating on the casino floor with other staff members for excessive lengths of time; (iv) you routinely failed or refused to monitor the casino floor; You were observed eating a full meal in the Slot Kiosk in violation of Casino policy (By memo dated May 8, 2015 you were formally notified that lunch breaks are to be taken either in the Staff Cafeteria or the Casino Lounge);

(v) you were observed sleeping in a guest area for a collective period of 54 minutes which again is in violation of Casino Policy. One of your main daily duties is the observance of the Slot Attendants as you are required to rate each shift on their floor duties. It is impossible for you to effectively observe, rate or supervise the staff with spending as little as 17 minutes on the casino floor during your 8-hour shift. In totality your conduct is unprofessional and unacceptable and represents a dereliction of duty and does not accord with the standards expected of a Slot Manager.

Employee terminated Monday July 4, 2016.

Employee:…….

Director: …(A Hunt)…. 7/4/2016

This is to be considered notice of:

-	-	-
-	-	-
-	-	√ Discharge

Employee Comments: (none)

Immediate Supervisor ……(A. Hunt)……..Date: 7/4/2016
Department Head ……(signed)……Date: 7/4/2016
Employee's Signature ……(P. Walkine)…….Date: 7/4/2016"

12. Following her termination, Mrs. Walkine filed a Writ action in the Supreme Court on 10 April 2017, seeking a declaration that she was wrongfully and/or unfairly dismissed and seeking compensation for the loss of her contractual benefits together with damages. She further claimed that she was terminated without notice or pay-in-lieu of notice and without cause as she was not in breach of the Respondent's policies. She alternatively claimed that her termination was in fact in breach of her employment contract and her statutory entitlements.

13. On 30 July 2018, the Respondent filed its Defence. It denied Mrs. Walkine's allegation that she had been wrongfully and/or unfairly dismissed; and averred that she had instead been dismissed for willful violations of company policy and multiple infractions amounting to gross misconduct, which entitled the company to summarily dismiss her. The Respondent further denied Mrs. Walkine's allegation that she had been terminated in breach of her contract of employment; and averred that she had been dismissed in accordance with the terms of her contract. The Respondent further asserted that at the time she was dismissed, it had an honest and reasonable belief on the balance of probability that she had committed the infractions in question and further that it had conducted a reasonable investigation of the infractions.

14. The matter was readied for a contested trial before a Judge in the usual way, with both parties filing their respective Witness Statements and agreed bundles for use at trial. Based on the transcripts, the trial commenced on 12 March 2019. Thereafter the trial was adjourned part-heard and continued on at least five subsequent occasions before it finally concluded on 8 November 2019, when the Judge reserved her decision.

15. Almost 2.3 years later (i.e. on 21 February 2022), the Judge handed down her written Judgment which (as we noted) is the subject of this appeal.

The Written Judgment

16. As we indicated, the learned Judge dismissed Mrs. Walkine's claims and awarded the Respondent costs of the action to be taxed, if not agreed. The Judge's reasons for decision are set out in her 195 paragraph written Judgment, now under appeal.

17. At paragraph [1], the Judge began by summarizing Mrs. Walkine's claims for relief. She said:

> **"1. The Plaintiff, Ms. Pamela Walkine ("the Plaintiff") seeks a declaration that she was wrongfully and/or unfairly dismissed by Paradise Enterprises Ltd ("the Defendant")**

and compensation for the loss of her contractual benefits and damages. She claimed that she was terminated without notice or pay in lieu of notice and without cause as she was not guilty of the breaches of company policies complained of by the Defendant. She alternatively, claimed that her termination was in fact a breach of her employment contract and statutory *(sic)* obligations."

18. Between paragraphs [2] - [6], the Judge then provided a brief factual background to the dispute. Thereafter between paragraphs [7] through [140], she summarized the salient aspects of the evidence given for the respective parties.

19. At paragraph [141], she identified two broad issues which, according to her, she was required to *"determine, consider and resolve"*. These were: (i) whether the Appellant was wrongfully/summarily dismissed, and if so, her entitlements; and (ii) whether the Appellant was unfairly dismissed, and if so, her entitlements.

20. Between paragraphs [145] through [181], the learned Judge turned her attention to a consideration of the first issue, namely, Mrs. Walkine's claim that she was wrongfully dismissed and the Respondent's defence of summary dismissal. The Judge began by considering sections 31-33 of the Employment Act ("the BEA") and the legal framework governing summary dismissal. She adverted to the decision of this Court (differently constituted) in **Bethel v. Commonwealth Bank Ltd** [2005] 3 BHS J. No. 134 on which counsel for Mrs. Walkine relied. She noted that the case highlights, *inter alia*, the factual inquiry to be undertaken by a court or tribunal, which is assessing the degree of misconduct which will justify summary dismissal in any given case.

21. Next, the Judge adverted to the opposing submissions advanced on behalf of Mrs. Walkine and the Respondent, respectively. She further examined the authorities of **Sheldon Jones v. Commonwealth Building Supplies Limited** [2004] BHS J. No. 418; **Laws v. London Chronicle (Indicator) Newspapers Ltd** [1959] 1 WLR 698; **Walker v. Candid Security Limited,** [2011] 1 BHS J. No. 77; and **Sun International v. Charles Emmanuel Missick** SCCivApp

No. 6 of 2002, which had been laid over for her consideration on the Respondent's behalf.

22. At paragraph [160], she considered the guidance of this Court (differently constituted) in the case of **Eden Butler v. Island Hotel Company Limited** SCCivApp No. 210 of 2017. She observed that the paramount principle in wrongful/summary dismissal cases was whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract; noting as well that it is for *the court* to determine whether the breach alleged constituted a fundamental breach.

23. At paragraph [164], the Judge adverted to the authority of **Leisure Travel & Tour Limited v. Norman Knowles** IndTribApp No. 44 of 2020, where this Court (differently constituted) pointed out (following **Eden Butler**) that in wrongful dismissal cases, an opportunity to be heard before dismissal may not be necessary in every case.

24. Between paragraphs [165] and [178], she examined the evidence, including *inter alia,* the Termination Notice of 4 July 2016, together with various documents including Mrs. Walkine's employment contract, the Employment Handbook, the Victor Memo and the Slot Operations Department Policy and Procedures Operations and Training Manual.

25. Between paragraphs [173] and [180], the Judge continued her analysis of the wrongful dismissal claim in the following terms:

> **"173. By her employment contract, the Plaintiff agreed that she could be terminated without notice or payment in lieu of notice in the event she committed actions which amounted to serious misconduct in the course of her duties. One of those acts of misconduct listed in the employment contract is neglect of duty.**
>
> **174. The employee handbook addresses conduct violations and provides a non-exhaustive list of conduct violations**

which can require disciplinary action and termination. Some of the conduct listed are:

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

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

176. The wording of the Victor Memo clearly suggests that the Defendant was aware of the past behaviour of the Plaintiff and other employees. If in fact, the Plaintiff and her colleagues had made their complaint known that the reason for eating on the casino floor or inside the slot kiosk was because they were understaffed and could not move too far away from the casino floor, it was not in writing and produced as evidence. In the absence of the same, and in the absence of any response by the Defendant other than what is before the court, I must look at what the rules mandated. What is clear is the Defendant's position (sic) maintained by the documents and their evidence at trial. Their rules should

have been adhered to, even if, it may have seemed harsh if the Plaintiff's explanation for such infractions are true.

177. By the Training Manual, the Slot Shift Manager's role was defined as the person *being directly responsible: for the effective management of all slot operations, slot supervisors and slot attendants during the scheduled shift*, for slot technicians in the absence of the director of slot operations, *to ensure adherence to all policies, procedures and standards* and to assist the director of casino operations as directed.

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

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

> **180. More importantly, <u>each act of misconduct constituted a fundamental breach of her employment contract</u>. <u>*The Plaintiff was required to monitor the activity of staff and guests on the casino floor during her shift.*</u> <u>It would have been impossible for the Plaintiff to efficiently and effectively carry out her responsibilities while she was in the bathroom asleep, or spending long periods in the slot kiosk and while congregating with staff not employed in the slots department</u>." [Emphasis added]**

26. Finally, at paragraph [181], she dismissed Mrs. Walkine's wrongful dismissal claim and set out her final conclusions on the first issue as follows:

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

27. Between paragraphs [182] through [194], the learned Judge then turned to consider the second issue, namely, the merits of Mrs. Walkine's claim that she was unfairly dismissed.

28. She began by examining sections 34 through 36 of the BEA, noting that section 35 was not limited to the statutory dismissals set out in the Act. She examined the authorities of **BMP Limited dba Crystal Palace Casino v. Yvette Ferguson** [2013] 1 BHS J. 136 and **Coleby v. Lowes Pharmacy Ltd** [2016] 1 BHS J. No 15 on which Mrs. Walkine relied. She further examined the Respondent's submissions together with paragraphs 36-41 extracted from the decision of this Court (differently constituted) in **Bahamasair Holdings**

Limited v. Omar Ferguson SCCivApp No. 16 of 2016, on which the Respondent relied.

29. Between paragraphs [188] and [190], the Judge adverted to *"the substantial merits of the case"* test for unfair dismissal set out in sections 34 and 35 of the BEA and to the decisions of this Court (differently constituted) in **Eden Butler** *(above)* and **Bahamas Electricity Corporation and Bahamas Power and Light Company Limited v. Sherry Jennifer Brown** IndTribApp No. 71 of 2020.

30. Between paragraphs [191] through [193], she continued her analysis in the following terms:

> **"191. It follows that <u>when considering whether or not the Plaintiff was unfairly dismissed under Sections 34 and 35 of the Act, the Court must consider whether, based on the substantial merits of the case</u>, the Defendant reasonably believed that the Plaintiff committed the misconduct in question at the time of the dismissal, whether the Defendant conducted a fair and reasonable investigation of such misconduct in all the circumstances of the case and whether the nature of the alleged breach was so fundamental as to warrant dismissal. The aforementioned considerations should be determined in conjunction with the procedure established by the Defendant, namely whether the procedure was fair and whether it was followed.**
>
> **192. According to the 4th July 2016 Unsatisfactory Performance *(sic)* documented by the Plaintiff *(sic)*, she was terminated for taking extended restroom breaks in the guest bathroom, spending excessive time in the slot kiosk, congregating on the casino floor with other staff members for excessive lengths of time, failing to monitor the casino floor, eating a full meal in the slot kiosk and sleeping in a guest area. <u>Each act carried out by the Plaintiff was an act that was</u>**

considered misconduct by the Defendant's aforementioned documents.

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

31. Ultimately, at paragraphs [194] and [195], the learned Judge dismissed Mrs. Walkine's unfair dismissal claim and awarded costs of the action to the Respondent as follows:

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

195. The Defendant is awarded its costs of the action to be taxed if not agreed." [Emphasis added]

32. As we noted, Mrs. Walkine is unhappy with the learned Judge's decision and asks, *inter alia,* that it be wholly set aside; that she be found to have been wrongfully and unfairly dismissed; that she be awarded notice and severance pay and her damages be assessed; and that she be awarded costs here and in the court below.

33. Against the above background, we turn to examine the grounds of appeal. Before doing so, we keep firmly in mind the required approach of an appellate court, which is reviewing the findings of a single judge at first instance. It is well established that the approach is one of caution and restraint and we should not intervene unless we are satisfied that the judge was "plainly wrong". [See the guidance of the Privy Council in **Central Bank of Equador v. Conticorp** [2015] UKPC 11; together with paras [32], [33] and [36(3)] of the Board's subsequent guidance in **Bahamasair Holdings Ltd v. Messier Dowty Inc** [2018] UKPC 25.

The Grounds of Appeal

34. In her Notice of Appeal filed on 21 March 2022, Mrs. Walkine identified 6 grounds of appeal, all of which seek to impugn the Judge's decision in various ways. For ease of discussion, we have reproduced them in full below:

> **"1. That the learned Judge misdirected herself and erred in law and in fact in finding that the Appellant, after 28 years of employment with the Respondent, was guilty of gross misconduct detailed in the Respondent's July 4th, 2016, Notice of Unsatisfactory Performance alleging misconduct over a period of <u>5-days</u> immediately preceding her termination.**
>
> **2. That the learned Judge misdirected herself and erred in law and in fact in:**
>
> **a) Being satisfied <u>based on the surveillance footage</u> that the Plaintiff had committed the breaches complained of.**
>
> ***b) …(abandoned at the hearing)***

c) …(abandoned at the hearing)
d) …(abandoned at the hearing)

3. The learned Judge misdirected herself and erred in law and in fact ruling that:

a) The Respondent's position maintained by the documents and their evidence at trial that their rules should have been adhered to and/or
b) That each act carried out by the Plaintiff was an act that was considered misconduct by the Respondent's aforementioned documents having regard to the expressed terms contained in the documents and the Respondent's evidence which qualified the said conduct to certain circumstances and expressly ceded discretion to managers to authorize such conduct.

4. The learned Judge misdirected herself and erred in law and in fact in finding that it would have been impossible for the Appellant to efficiently and effectively carry out her responsibilities notwithstanding the fact that the Respondent had no evidence to this effect or no evidence to the required standard.

5. The learned Judge misdirected herself and erred in law and in fact ruling that:

a) The Respondent did conduct a fair and reasonable investigation over a five-day period and
b) That the procedure for conducting and disciplining staff was complied with.

6. The learned Judge misdirected herself and erred in law and in fact ruling that the Plaintiff pay the Defendant's costs of the entire action to be taxed if not agreed having regard to the fact that this award would result in the Appellant paying

costs of the Respondent's failed preliminary point raised at the commencement of the Respondent's closing submissions."

35. While various paragraphs of the written decision are extracted in the Notice of Appeal (see pages 1-5), none of the six grounds identifies the specific paragraph (or paragraphs) of the written Judgment against which complaint is made. However, at paragraph 24 of the Appellant's Skeleton Arguments and Submissions filed 15 June 2022, Counsel for the Appellant, Ms. Wright suggested that grounds 1, 2 and 3 could be considered together since they all relate to the Appellant's general complaint that the learned Judge erred **"in applying the law and misdirecting herself as to the relevant facts proven or uncontroverted."**

36. Having ourselves examined the 6 grounds of appeal together with the respective submissions, we consider that the Appellant's complaints about the Judge's decision may be distilled to 3 issues which can be conveniently discussed under the 3 italicized headings which follow:

1) Did the judge err in applying the law of wrongful/summary dismissal and misdirect herself as to the relevant facts? – *(grounds 1-4)*
2) Did the judge err in applying the law of unfair dismissal and misdirect herself as to the relevant facts? – *(ground 5)*
3) Did the judge err in awarding the Respondent costs of the entire action having regard to the Respondent's failed preliminary point? – *(ground 6)*

Discussion

Grounds 1 – 4: Did the judge err in applying the law of wrongful/summary dismissal and misdirecting herself as to the relevant facts?

37. At the hearing on 28 June 2022, Ms. Wright abandoned sub-grounds (b) through (d) of ground 2 and confined her attack on the Judge's finding that Mrs. Walkine had not been wrongfully dismissed on grounds 1, 2(a), 3 and 4.

38. At paragraph 25 of the Appellant's written Submissions, Ms. Wright commenced her challenge to the dismissal of Mrs. Walkine's wrongful dismissal claim by highlighting paragraph [1] of the Judgment *(extracted earlier).* She suggested that the Judge had erroneously mischaracterized the Appellant's claim. She suggested that the mischaracterization in paragraph [1] had *"set the entire ruling on a bad footing"* as the Judge had ignored the Appellant's assertion at paragraph 24 of her Amended Statement of Claim that: "at no time had the Respondent alleged that Mrs. Walkine had committed any act or omission amounting to gross misconduct warranting her summary dismissal."

39. There is absolutely no merit in this complaint. In the first place, properly understood, paragraph [1] of the written Judgment is no more than an introductory summary of the Appellant's pleaded case. It correctly referenced Mrs. Walkine's claims for wrongful and/or unfair dismissal and for breach of her employment contract. In our view, there is no misstatement or mischaracterization of the Plaintiff's case. Secondly and perhaps more importantly, the submission ignores the fact that in its Defence, the Respondent denied all the Plaintiff's claims; and between paragraphs 13 through 15, expressly asserted that Mrs. Walkine had been dismissed for *"Willful Violation of Company Policy"* and for *"multiple infractions which amounted to gross misconduct warranting the Defendant to dismiss the Plaintiff summarily*."

40. Next, at paragraph 27 of the Appellant's Submissions, Ms. Wright submitted that the Judge found that Mrs. Walkine had committed the violations of the Respondent's company policy set out in its Termination Notice of 4 July 2016 and had "without considering the evidence to the contrary", "automatically" stated at paragraph [180] of the Judgment that *"each act of misconduct constituted a fundamental breach of her employment contract."* Counsel further took issue with the Judge's statement at paragraph [192] that *"each act carried out by the Plaintiff was an act that was considered misconduct by the Defendant's aforementioned documents."*

41. Both these findings by the Judge, she said, were *"perverse"* as they ignored "concessions" made by the Respondent during the course of the trial that some

of the infractions, such as eating in a non-designated area; congregating on the casino floor and taking extended bathroom breaks would not *by themselves* be so egregious as to be considered a fundamental breach of the employment contract warranting summary dismissal. In support of her contention, Ms. Wright referred us to the trial transcripts for 14 March 2019 and 25 October 2019, where she said, these "concessions" by the Respondent are found.

42. Ms. Wright further contended that the alleged infractions of taking extended bathroom breaks, spending excessive time in the Slot Kiosk and sleeping in a guest area could not have been regarded as 'misconduct' warranting dismissal since they were not even mentioned in the documents, which the Judge considered.

43. In response, counsel for the Respondent, Mrs. Hanna agreed that while the Judge did indeed state at paragraph [180] that: *"each act of misconduct constituted a fundamental breach of the Appellant's employment contract"*, she appeared to have clarified the statement later in the Judgment when at paragraph [193] she clearly explained that: *"As I previously determined the acts of the Plaintiff collectively constituted a fundamental breach of her employment contract..."*.

44. Having considered the entirety of the written Judgment, the pleadings and the material which was before the learned Judge, together with the relevant law, we are satisfied that the Judgment discloses no error of law or of fact by the learned Judge.

45. Given the parties' respective pleadings and specifically paragraphs 13 and 14 of the Respondent's Defence, in which it denied the Appellant's claims for wrongful and/or unfair dismissal; and asserted that Mrs. Walkine had been dismissed for numerous infractions *amounting to* gross misconduct warranting her summary dismissal, this was a case where sections 31-33 (summary dismissal) and sections 34-35 (unfair dismissal) were *both* engaged.

46. In considering the Respondent's Defence and the Appellant's claims, the learned Judge had necessarily to consider: (a) the requirements of sections 31-

33 to determine whether the Respondent had met the statutory standards for summary dismissal; alongside (b) the Appellant's claim under sections 34-35 that she had been unfairly dismissed. As we earlier observed, the Judge's reasons for dismissing Mrs. Walkine's claim for wrongful dismissal are found between paragraphs [159] through [181] of the Judgment, while her reasons for dismissing the unfair dismissal claim are located between paragraphs [182] through [194].

47. At paragraph [159], the Judge correctly adverted to sections 31 through 33 of the BEA, noting that the sections enabled the Respondent to summarily dismiss the Appellant if it considered that she had committed a fundamental breach of her employment contract or had acted in a manner considered offensive to the Respondent's fundamental interests. At paragraph [160], she referenced **Eden Butler** *(above)* and correctly observed that it was for *the Court* to determine whether the nature of the alleged misconduct met the statutory standard justifying summary dismissal.

48. At paragraph 30 of **Eden Butler,** this Court (differently constituted) explained:

> **"30….In wrongful dismissal, the paramount principle is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract. As such *the Court* was required to consider whether the nature of the breach alleged constituted a fundamental breach. It was then necessary to consider whether there was sufficient evidence so as to lead the appellant *(sic)* to have an honest and reasonable belief that the respondent *(sic)* had committed the misconduct in question. It follows then that the Court could only set aside the decision of the respondent to summarily dismiss the appellant if *the Court* specifically found that the respondent did not have an honest and reasonable belief that the appellant was guilty of gross misconduct." [Emphasis added]**

49. As we see it, the Termination Notice of 4 July 2016 identified the specific acts which the Respondent considered constituted a fundamental breach of Mrs. Walkine's contract, warranting her summary dismissal.

50. As the primary fact-finder, it was for the learned Judge to examine the infractions for which Mrs. Walkine was dismissed and (based on the evidence) determine for purposes of section 31 of the BEA whether she was satisfied that the Appellant (as the employee) had "committed a fundamental breach of her contract of employment" ***or*** had "acted in a manner repugnant to the fundamental interests" of the employer" warranting her summary dismissal.

51. As the written Judgment amply demonstrates, as the primary fact-finder in this dispute, the learned Judge was entitled to examine the material before her (including the evidence as a whole) and to arrive at her findings of fact, including any findings of mixed fact and law that were required. This she clearly did.

52. At paragraph [179], the Judge specifically found that the Respondent's Employee Handbook provided a **"non-exhaustive list"** of conduct violations which can require disciplinary action and termination. This finding is clearly not wrong as page 7 of the handbook expressly informed all the Respondent's employees, *inter alia,* that: **"This Handbook is not intended to be *all-inclusive*, nor does it anticipate every possible circumstance that may arise."** Additionally, the violations identified in the Training Manual clearly do not purport to be a comprehensive listing either. As the Judge found at paragraph [178], the Manual simply provided **"examples"** of the *types* of misconduct for which an employee could be disciplined. These (as she found) included: "conducting or engaging in personal, non-work-related matters or *extended conversations in public areas* or while guests are present, *sleeping while on duty*, *eating*, drinking, chewing gum *while on duty in work or public areas*, *violation of company or departmental policies* or procedures."

53. It is evident that in view of *the fact* that certain conduct violations may not be contained in the employee handbook (due to its expressly "non-exhaustive" nature); and in view also of *the fact* that those violations outlined in the Training

Manual were only "examples" of the *types of misconduct* for which employees could be disciplined, the Respondent was clearly entitled to treat the Appellant's acts as caught on the surveillance footage (i.e., taking extended bathroom breaks, spending excessive time in the Slot Kiosk and sleeping in a guest area) as infractions fully warranting her summary dismissal.

54. In our view (and notwithstanding Ms. Wright's submission to the contrary), the Judge's finding that Mrs. Walkine's conduct violations identified by the Respondent in its Suspension and Termination Notices were infractions which could lead to disciplinary action, including summary dismissal, cannot be faulted.

55. The Judge's determination at paragraph [180] that each act of misconduct constituted a fundamental breach of Mrs. Walkine's employment contract was hers alone to make. This is so notwithstanding any opinion (or concession) which counsel for the Appellant, Ms. Wright, may have obtained during her cross-examination of the Respondent's witnesses that specific acts of misconduct *by themselves* may not have warranted dismissal.

56. Having examined the relevant materials, including Mrs. Walkine's duties as the Respondent's Slots Shift Manager, the learned Judge justified her conclusion that the Appellant had committed a fundamental breach of her employment contract in the following terms:

> **"[180]…The Plaintiff was required to monitor the activity of staff and guests on the casino floor and to address any issues or complaints that would have arisen on the casino floor during her shift. It would have been impossible for the Plaintiff to efficiently and effectively carry out her responsibilities while she was in the bathroom asleep or spending long periods of time in the slot kiosk and while congregating with staff not employed in the slots department."**

57. Undoubtedly, there may be situations where a single infraction by an employee may not rise to the level of a fundamental breach of an employment contract justifying summary dismissal. However, this was not such a case. In this particular case, the Judge considered that (given Mrs. Walkine's duties and responsibilities as the Respondent's Slot Shift Manager) each act or infraction constituted a fundamental breach of her contract. What is more, as clearly appears from paragraphs [192] through [193] of the Judgment, the Judge also felt (as did the Respondent) that **all** the infractions documented in the Termination Notice *collectively* met the statutory standard justifying the Appellant's summary dismissal. Grounds 1 and 3 have no merit and are dismissed.

58. As we understand the Appellant's complaint on ground 2(a), it is an attack on the judge's finding at paragraph [167] that the acts were caught on surveillance video after an investigation was requested for surveillance of the Appellant's shifts and her subsequent finding at paragraph [181] that the Respondent had conducted a fair and reasonable investigation over a five-day period and was consequently, able to form an honest and reasonable belief that the Appellant's conduct constituted gross misconduct warranting summary dismissal.

59. As originally filed, ground 2 complained that the contents of the report compiled from the CCTV surveillance footage containing the infractions on which the Respondent relied were hearsay and inadmissible and the Judge was wrong to have adverted to the footage or to place reliance on it. However, at the hearing, sub-grounds (b) through (d) were abandoned, leaving only ground 2(a).

60. As we understood ground 2 as amended, Ms. Wright essentially contends that the Judge could not reasonably conclude, based on the surveillance footage, that the Respondent conducted a reasonable investigation or that the Respondent was able to form an honest and reasonable belief at the time of her dismissal that the Appellant's conduct seen on the footage constituted gross misconduct warranting summary dismissal.

61. We agree with counsel for the Respondent, Mrs. Hanna, that no hearsay evidence was admitted at the trial. Based on the discourse which took place

between the Judge and counsel for the parties seen in the trial transcripts, the hearsay objection was withdrawn. While the maker of the Surveillance report, Sherman Bethel, was ultimately not called as a witness to enter the report into evidence, the Respondent proved the infractions through the direct evidence given by two other witnesses, namely, Heather Allen and Anishka Hunt.

62. Heather Allen, for example, gave direct evidence of the fact that she had downloaded the CCTV surveillance footage for the period in question and that the Respondent's system recording device had been functioning properly. Additionally, evidence was adduced through the Respondent's witness, Anishka Hunt, who testified, *inter alia*, that she had personally watched the CCTV surveillance footage and that the summary provided by the Surveillance Department in its report, which she had read and extracted at paragraph 19 of her Witness Statement was accurate.

63. In the face of this evidence, the Judge was entitled to find (as she did at paragraph [167]) that the acts were caught on surveillance video after an investigation was requested for surveillance of the Appellant's shifts. Additionally, at paragraph [193] of her Judgment, the Judge clearly stated that the Appellant was given an opportunity to review the surveillance footage prior to termination but had declined to do so. In this regard, she evidently accepted the Respondent's evidence that the offer to view the footage was made but had been declined.

64. In the circumstances, the Judge's finding at paragraph [181] that the Respondent had conducted a fair and reasonable investigation over a five-day period and was consequently able to form an honest and reasonable belief that the Appellant's conduct constituted gross misconduct warranting summary dismissal was not "plainly wrong". Ground 2(a) is dismissed.

65. As is evident, ground 4 is an attack on the Judge's finding at paragraph [180] that it would be impossible for the Appellant to efficiently and effectively carry out her responsibilities while she was in the bathroom asleep or spending a long period of time in the slot kiosk and congregating with staff not employed in the

slots department. The complaint clearly overlaps with grounds 1 and 3, which we have already dismissed.

66. As we have already said, it was for the learned Judge (as the primary fact-finder) to examine the infractions for which Mrs. Walkine was dismissed and to determine for purposes of section 31 of the BEA whether she was satisfied that the Appellant (as the employee) had "committed a fundamental breach of her contract of employment" ***or*** had "acted in a manner repugnant to the fundamental interests" of the employer" warranting her summary dismissal. This the Judge clearly did. Ground 4 has no merit and is dismissed.

Ground 5: - Did the judge err in applying the law of unfair dismissal and misdirecting herself as to the relevant facts?

67. Between paragraphs 53 through 100 of her written Submissions, Ms. Wright attacked the judge's finding at paragraph [194] of the Judgment that the Respondent conducted a fair and reasonable investigation over a five-day period. She submitted that the Respondent *"had already made up their minds to fire the plaintiff and had already done so before she returned to work"* following her suspension. She further complained that *"fairness and equity were absent from the actions taken by the Respondent with respect to the Appellant."*

68. Between paragraphs 68 through 71, Ms. Wright suggested that the Respondent failed to investigate the infractions by the Appellant seen on the surveillance footage. She says that the Appellant was dismissed on *"mere speculation"* as the Respondent *"failed to interview other staff members or managers"* or *"to survey its guests"* to establish whether the belief they held was reasonable, or whether the Appellant's conduct had in any way compromised the performance of her responsibilities.

69. For its part, counsel for the Respondent relied on the observations of this Court (differently constituted) in **Island Hotel Company Limited v. John Fox** IndTribApp No. 54 of 2017, regarding the nature of the investigation which is

required by an employer in order to justify summarily dismissing an employee in any given case. The Court said:

> **"52. The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case, and where there are admissions by the employee, then the need to make further investigations is manifestly diminished…"**

70. It should be noted that the Court's observation in **Fox** was made against the background of section 33 of the BEA and during an appellate review of the Tribunal's finding that Fox had been wrongfully dismissed. In our view, the observation is equally applicable to a case where a court or tribunal is considering (as required by section 35 of the BEA) the substantial merits of the case with a view to determining whether a dismissal is fair or unfair.

71. Relatively recently, in **Paul F. Major v. First Caribbean International Bank (Bahamas) Limited** SCCivApp. No. 77 of 2021, this Court (differently constituted) reproduced with approval an observation of Wood J in **ILEA & Gravette** [1988] IRLR 497 to which reference was made in **A v. B** [2003] IRLR 405 which may, once again usefully be reproduced:

> **"…in one extreme there will be cases where the employee is virtually *caught in the act* and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end so the amount of inquiry and investigation, including questioning of the employee which may be required, is likely to increase." [Emphasis added]**

72. As the Judge found, the Appellant's acts were caught on surveillance footage after an investigation was requested for surveillance of the Appellant's shifts. The evidence established that confronted at the 4 July 2016 meeting with the fact of the surveillance footage and the infractions therein disclosed, the Appellant not only admitted her actions, but sought to justify them.

73. We completely agree with Mrs. Hanna's submission that the CCTV surveillance footage spoke for itself. The Appellant was, quite simply, *"caught on camera"* and there was no need for further inquiry or investigation. What is more, given the Appellant's refusal to view the footage coupled with the fact that (as the Judge found) she admitted her actions and sought to justify them and had further apologized, it is impossible to fault the learned Judge's final conclusions at paragraph [194] of her Judgment that the investigation had been fair and reasonable and the Appellant's dismissal consequently, not unfair. Ground 5 is dismissed.

Ground 6: - Did the judge err in awarding the Respondent costs of the entire action having regard to the Respondent's failed preliminary point?

74. In urging ground 6, Ms. Wright sought to convince us that the learned Judge's decision at paragraph [195] to award the Respondent the entire costs of the action was erroneous and flawed since a preliminary point which it raised during its Closing Address had failed.

75. As we understand the submission, Ms. Wright contends that because the learned Judge went on to consider the unfair dismissal claim, the Respondent's submission in relation to the inadequacies of the Appellant's pleadings, must necessarily have failed and consequently, it ought not to have been awarded full costs. Regrettably, Ms. Wright's written submissions contained no facts or authorities from which we could assess the correctness or otherwise of the ground.

76. We were therefore left with the Respondent's written Submissions, from which we have been able to determine that the ground is completely baseless and must be dismissed.

77. As is clear from the transcripts and the Respondent's written Submissions, in her Closing Submissions before the learned Judge, counsel for the Respondent invited the Judge (following **Eden Butler**) to dismiss the Appellant's unfair dismissal claim on the basis that the Amended Writ had failed to plead any particulars in support the Appellant's claim for unfair dismissal.

78. As we see it, Mrs. Hanna's critique (made during the course of her Closing Submissions as to the inadequacies of Appellant's pleadings in respect of her unfair dismissal claim) cannot, by any stretch of the imagination, be equated with her having taken a preliminary objection. Furthermore, the fact that the Judge did not address the pleadings issue and went on to consider the substantive unfair dismissal claim, could not result in the Respondent receiving less than its full costs. Ground 6 has no merit whatsoever and is also dismissed.

Disposition and Order

79. For all the foregoing reasons, the appeal is dismissed. The learned Judge's decision is affirmed in its entirety.

80. The usual order is that costs follow the event. The Appellant shall pay the Respondent's costs of the appeal, to be taxed if not agreed.

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The Honourable Madam Justice Crane-Scott, JA

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The Honourable Mr. Justice Jones, JA

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The Honourable Mr. Justice Evans, JA