COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 121 of 2022

B E T W E E N

ISLAND HOTEL COMPANY LIMITED

Appellant

AND

WINIFRED TOOTE

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Ferron Bethell, KC, with Ms. Lakeisha Hanna, Counsel for the Appellant**

Mr. Obie Ferguson, KC, with Mr. Keod Smith and Mr. Cyril Ebong, Counsel for the Respondent

DATES: **28 March 2023; 22 May 2023; 13 July 2023, 11 September 2023**
****

Civil Appeal – Unfair Dismissal – Wrongful Dismissal – Summary dismissal – Reasonable investigation – Natural justice - Evidential burden of proof - Whether the appellant had the right to summarily dismiss the respondent – Whether the appellant conducted a reasonable investigation - Sections 31 to 35 of the Employment Act

The respondent was employed by the appellant for 32 years. At the time of her dismissal, she was a waitress in the Casino Bar. While on duty, the respondent was approached by a hotel guest, Mr. Scott Burch, who asked her "how does it work here, are the drink complimentary?" The respondent confirmed that the drinks were complimentary, but she works on tips. Mr. Burch ordered a rum and coke. The respondent brought the drink to Mr. Burch, who then proceeded to look for a tip. Mr. Burch indicated that he did not have change. The respondent informed him that she could get change for him. Mr. Burch then asked the respondent to take the drink away if he had to beg for it. Thereafter, Mr. Burch reported the matter to the assistant beverage manager.

The appellant conducted an investigation which resulted in the respondent being summarily dismissed. Thereafter, the respondent brought an action seeking damages for unfair and wrongful dismissal. The trial Judge found that the respondent was unfairly dismissed and awarded her damages in the amount of $15,480.00. The appellant now appeals that decision on the basis, inter alia, that the respondent was not unfairly dismissed as a reasonable investigation was conducted

and that the trial Judge erred in finding that, based on the evidence, the appellant could not have reasonably concluded that the respondent failed to give Mr. Burch a drink.

Held (CS: Concurring): Appeal dismissed. The Chief Justice's finding that the respondent was unfairly dismissed is affirmed. Cost of the appeal to the respondent, fit for two Counsel, to be taxed if not agreed.

per Barnett, P: A reasonable investigation, which would result in a reasonable decision to summarily dismiss, would have required a further inquiry of Mr. Burch as to the circumstances regarding what Ms. Toote said. The investigators' failure to confront Mr. Burch with Ms. Toote's explanation is a major omission.

No reasonable employer could have come to the conclusion that summary dismissal of an employee for over 30 years was a reasonable response. To justify summary dismissal, the employee's breach must go to the root of the employment contract and constitute a fundamental breach of his employment contract. 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 an employer to have an honest and reasonable belief that the employee had committed the misconduct in question. That honest and reasonable belief can only be formed after a reasonable investigation.

British Home Stores Ltd v Burchell [1978] IRLR 378 mentioned
Kendra Thomas-Long v The National Commission for Self Help Limited CV 2019-0058 considered
Newbold v Commonwealth Building Supplies [2013] 1 BHS J No. 37 considered
Reilly v Sandwell Metropolitan Borough Council [2018] IRLR 558 considered

per Crane-Scott, JA: Insofar as the appellant suggests that the respondent ought to have both pleaded and adduced evidence to establish that the appellant's investigation was unreasonable, ground 1 is clearly misconceived. It is trite that based on its pleaded Defence, it was the appellant (as the respondent's employer) and not the respondent who bore the evidential burden at trial of proving that the statutory standards for summarily dismissing the respondent had been met.

A v. B [2013] IRLR 405 mentioned
British Home Stores Ltd v. Burchell [1978] IRLR 378 mentioned
Eden Butler v. Island Hotel Company Limited (Trading as Atlantis Paradise Island) SCCivApp. No. 210 of 2017 mentioned
Paul F. Major v. First Caribbean International Bank (Bahamas) Limited SCCivApp. No.77 of 2021 mentioned
Salford Royal NHS Foundation Trust v. Roldan [2010] IRLR 72 mentioned

---

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an appeal by Island Hotel Company Limited, the operator of the casino at the Atlantis Hotel on Paradise Island, against the judgment of Sir Brian Moree, CJ (as he then was), where he found that the appellant had unfairly dismissed the respondent, Winifred Toote ("Ms. Toote"). Ms Toote had been in the employ of the appellant for more than 32 years. The Chief Justice awarded her the sum of $15,480.00 plus interest as damages for unfair dismissal.

2. Ms. Toote brought this action in the Supreme Court on 17 July 2019. The Statement of Claim was in the following terms:

> **"1. The Defendant is a company duly registered under the Laws of the Commonwealth of The Bahamas and carrying on business within the said Commonwealth.**
>
> **2. The Plaintiff was in the Defendant's employ for 32 years, having been employed from 2 June 1987 until 5 June 2019 when her employment contract was unfairly and/or wrongfully terminated by the Defendant without reasonable notice or pay in lieu of.**
>
> **3. At the time of her termination the Plaintiff was employed as a waitress in the Casino Service Bar Department. Her base salary was $215.00 per week and her tips averaged at $800.00 per week.**
>
> **4. On the dismissal notice from the Defendant to the Plaintiff, the Defendant claims that the Plaintiff was terminated for gross misconduct pursuant to Section 15.7 which refers to disciplinary procedure in the expired Industrial Agreement between the Bahamas Hotel Employers Association and the Bahamas Hotel Catering & Allied Workers Union, dated the 7th day of January 2003.**
>
> **5. The Plaintiff has disputed the Defendant's claim and avers that she did not commit the gross misconduct brought against her, and that the Shop Steward's position was that the issue was a "minor breach as we have nothing to support the slip".**
>
> **6. The Plaintiff's case is that she had just finished serving a guest at the slot machine and as she was leaving the area she was approached by another guest, Mr. Scott Burch, who asked her "how does it work here, are the**

drinks complimentary?" To which she responded that the drinks were complimentary but that the servers work on tips. Mr. Burch ordered a rum and coke. The Plaintiff got the drink, she had it on the tray and brought it to the guest. The guest started feeling in his pocket for money and then said he did not have any change, at which the Plaintiff told him she could assist him with getting change either from the bill breaker or the cashier's cage. The guest then asked her to just take it away, if he had to beg for it, and added that he was going to tip the Plaintiff but if he had to beg for it to just take it away. The Plaintiff did as she was told. The guest went and reported the incident to the manager, Ms. Rashonique Rolle.

7. The Defendant readily accepted the guest's version of the incident without proper investigation and unfairly terminated the Plaintiff's employment without more.

8. The Defendant's failure to conduct proper investigation, especially given that the Plaintiff had been in the Defendant's employ for over thirty (30) years was a denial of natural justice and unfair. Further the termination was carried out in a manner that breached the employer's duty of good faith and fair dealing.

9. By virtue of the unfair and/or wrongful termination of her contract of employment the Plaintiff is entitled to compensation pursuant to Sections 46 and 47 of the Employment Act:

- **(i) Basic Award**
- **(ii) Compensatory Award**
- **(iii) Tips**
- **(iv) Vacaton (sic) for the period 6 June 2019 to 22 August 2022**

10. By reason of the Defendant's breach and failure to pay the Plaintiff her statutory benefit/entitlements the Plaintiff has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

1. **Basic award 3 weeks for each year of completed service (years of service: 32) $16,770.00**

2. **Compensatory award:**

(i) Salary: $215.00 per week for the period 6 June 2019 to 22 August 2022 $35,690.00

(ii) Tips: $800.00 per week for the period 6 June 2019 to 22 August 2022 $125,600.00

(iii) Vacation: 5 weeks/year at $215.00 per week for the period 6 June 2019 to 22 August 2022 $3,547.50

TOTAL $181,607.50

AND THE PLAINTIFF CLAIMS:-

1.Special damages in the sum of $181,607.50;
2.Damages;
3.Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992; and
4.Such further or other relief as the Court deems just."

3. The appellant filed a Defence in the following terms:

"1. The Defendant admits paragraphs 1 of the Statement of Claim. 2.

2. As to paragraph 2 save that the Defendant admits that the Plaintiff commenced her employment on the 2nd day of June, A.D., 1987, the Defendant denies each and every allegation in paragraph 3 of the Statement of Claim and puts the Plaintiff to strict proof thereof. The Defendant avers that the Plaintiff's employment was summarily terminated on the 6th day of May, A.D., 2019 for Gross Misconduct. In such instance the Plaintiff was not entitled to reasonable notice or pay in lieu thereof.

3. As to paragraph 3, the Defendant admits that the Plaintiff was employed as a waitress in the Casino Bar Department. The Defendant, however, denies that the Plaintiff's base salary was $215.00 per week and puts the Plaintiff to strict proof thereof. The Defendant avers that the Plaintiff earned $5.25 per hour and her normal work week was 37.5 hours per week. Therefore, the Plaintiff's weekly base salary was $196.88. The Defendant denies

that the Plaintiff's weekly tips averaged $800.00 per week and puts the Plaintiff to strict proof thereof.

4. The Defendant makes no admissions as to paragraphs 4 and 5 of the Statement of Claim and puts the Plaintiff to strict proof thereof.

5. The Defendant has no knowledge of the matters contained in paragraph 6 of the Statement of Claim and puts the Plaintiff to strict proof thereof.

6. As to paragraphs 7 and 8 of the Statement of Claim, the Defendant denies that it accepted the guest's version of the incident and/or failed to conduct a proper investigation into the matter as alleged or at all and puts the Plaintiff to strict proof thereof.

7. The Defendants avers that it conducted a reasonable investigation in matter given the nature of the circumstances and after considering all the evidence, formed an honest and reasonable belief, on a balance of probabilities, that the Plaintiff had conducted the misconduct in question. The Defendant never denied the Plaintiff natural justice and the Defendant at all times acted in good faith.

8. The Defendant denies that the Plaintiff was wrongfully and/or unfairly dismissed and entitled to compensation under Sections 46 and 47 of the Employment Act as alleged in paragraphs 9 and 10 of the Statement of Claim or at all and puts the Plaintiff to strict proof thereof. The Defendant avers that the Plaintiff was summarily dismissed for Gross Misconduct subsequent to conducting a reasonable investigation into the matter and giving the Plaintiff the opportunity to be heard. The Plaintiff is therefore not entitled to notice and/or severance pay for Wrongful Dismissal and/or damages for Unfair Dismissal.

9. As to paragraph 10 of the Statement of Claim, the Defendant denies that the Plaintiff has suffered loss and damage as alleged or at all and puts the Plaintiff to strict proof thereof.

10. Save insofar as is hereinbefore expressly admitted or not admitted the Defendant denies each and every

> **allegation of fact contained in the Statement of Claim as if the same were set out herein and specifically traversed seriatim.”**

4. In essence, the appellant admits that the respondent was summarily dismissed. It asserts that the respondent was guilty of gross misconduct which entitled the appellant to dismiss her summarily. It asserts that the decision to dismiss was made after the appellant conducted a reasonable investigation of the circumstances of the respondent’s conduct, which gave rise to the dismissal. Perhaps it is helpful at this stage to set out the reasons for the termination as set out in the letter dated 6 May 2019, two days after the incident. It said:

> **“15.7 Gross misconduct. On May 4th 2019, at approximately 11:10 am a guest the name of Scott Burch, Room 16804-Cove brought to assistant manager, Rashinique Rolle attention <u>he was denied</u> cocktails from casino waitress, Winifred Toote. Scott Burch stated that Winifred said she works on tips before he received his beverage. Even after the guest asked for the drink <u>she refused</u> because he did not have any change to tip her. This will not be tolerated.” [Emphasis added]**

5. At the trial of this action, the respondent gave evidence on her behalf as to the circumstances surrounding the service of a cocktail drink to the customer of the casino.

6. The appellant called three witnesses as to its investigation and decision to terminate. That evidence included a surveillance tape of the casino, which captured the video of some of the circumstances of the incident, but did not include any audio as to what was being said.

7. The evidence included a memo report prepared by Ms. Rolle, an Assistant Manager at the appellant. In that memo, Ms. Rolle records what Mr. Scott Burch (“Mr. Burch”), a guest at the hotel, told her and what Ms. Toote told her about the incident. The memo reads as follows :

> **“I am the above named employee of the Atlantis Resort. I have been employed Here for 3 months. My duties include but are not limited to supervision of Employees in the various Beverage outlets. On Saturday May 4, 2019 I Reported to work for the 10-7pm shift. Sometime around 11:10am I was Holding briefing when Manager Karen approached me and told me that a guest Wanted to speak with me. I went to a male Caucasian who appeared very vexed And upset and asked him what was the issue. He then said that he was playing at The slots between zones 1 and 2 where he was approached by a**

shot female Cocktail server who had short bleached hair. He stated that he asked her for a Bacardi and coke and she told him that she works on tips. She left and came Back with the drink on her tray and stood with the drink for a few minutes. He stated that he felt in his pocket and realized that he had placed the funds he had In the machine. He stated that he explained to her that he had just put all his Money in the slot machine but the Server still did not give him the drink. He then Told her to forget about it after realizing that she was refusing to give him the Drink. He further stated that the Server walked away with the drink on the tray. "The Guest stated that he was shocked at the service as he comes here twice a Year for two weeks and spends lots of money. I then expressed sincere apologies

And offered to get the drink for the guest. He declined the offer and went to the Beach with his family after I reassured him that this should not have happened. I went immediately to find Server Winifred Toote based on the description given By the guest. I asked her if she had any issues with a guest and she then stated That she had an Issue with a guest just before roll call. I asked her to explain And she told me that she was In her zone and had a gentleman who ordered a "Rum & Coke and then asked her what the procedure was. She said that she "Told the guest that she works on tips. She said he agreed and then she went to get the drink and when she got back she said —your rum and coke Sir and she Stood and waited with the drink still on the tray and the guest did not tip her. She stated that the guest said he did not have any change and she told him that There were several machines around and she would be able to make change For him. Winifred said that guest then said forget it and then she left the area With the drink on her tray. I pointed out to Winifred that she was wrong and I Then notified Director Sean Cartwright who instructed me to give Security a Report. The guest was identified as Scott Burch of room 16-804. This statement is true and correct."

8. Mr. Burch, was never called to give evidence and in its investigation, the respondent did not have any opportunity to question Mr. Burch. Nor was Mr. Burch asked to comment on

Ms. Toote's version of the incident in question, nor was he interviewed by anyone other than Ms. Rolle.

9. After the trial, the Chief Justice made the following findings as a result of the evidence led. He said:

> **"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.**
>
> **…**
>
> **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.**
>
> **…**
>
> **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**

<u>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."</u> [Emphasis added]

10. The Chief Justice then considered the evidence. In his Judgment, he said:

> **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. <u>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.</u> 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. <u>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.</u> 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:

> **"A. YOU GET EYE CONTACT WITH THE GUEST. YOU SERVE THE DRINK. AND WISH THEM GOOD LUCK. Q. OKAY. 19 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

<u>would have been recorded in the Rolle Report which was a contemporaneous document prepared on the same day as the incident.</u>

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.

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

11. The Chief Justice then considered the claims. He said:

"(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.

…

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. 36

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 37 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 39 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 <u>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.</u> 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. <u>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.</u>" [Emphasis added]

12. He then awarded damages as set out in paragraph 1 above. The amount of the award is not the subject of this appeal.

13. The appellant challenges that decision on the following grounds:

"1. The Learned Judge erred in law and fact when he determined that the Respondent was Unfairly Dismissed because the Appellant failed to conduct a reasonable investigation into the matter and as a result, the Respondent was entitled to damages for Eighteen (18) months in the amount of Fifteen Thousand Four

Hundred and Eighty Dollars ($15,480.00). The Learned Judge erred in arriving at the aforementioned conclusion in light of the fact that the Respondent did not plead any particulars of how or why the Appellant's investigation into her conduct was improper and the Respondent further failed to present any evidence in her Witness Statement and during her viva voce testimony relative to the same. Moreover, there was no evidence presented at the hearing which supports the Learned Judge's finding, that if the Appellant had made the further inquiries as suggested, the outcome of the investigation would have been different.

2. The Learned Judge erred in law and fact when he accepted (at paragraphs 55 - 56 of the written Ruling) that during the course of the investigation the Respondent failed to provide the Appellant with her version of what occurred because she was "somewhat overwhelmed and confused by what transpired and felt uncomfortable in those meeting", but nevertheless found that the Respondent was Unfairly dismissed. If the Learned Judge found as a fact, that the Respondent failed to provide the Appellant with her version of what transpired, then the Learned Judge ought to have considered whether the investigation conducted by the Appellant was reasonable in light of the facts known at the time of the investigation which were only provided by Mr. Burch. The Learned Judge, therefore, erred in law when he went on to consider the explanation given by the Respondent at trial and not what actually occurred during the investigation.

3. The Learned Judge further erred in law and fact when, after having accepted that the Respondent failed to provide the Appellant with an explanation of what transpired, made the concurrent and competing finding (at paragraphs 68-69 of the written Ruling) that during the investigation (suspension and termination meetings) the Respondent gave her account of what transpired. These findings contradict the express viva voce evidence of the Respondent that she did not provide her version of what transpired in the suspension and termination meetings. Moreover, if the Learned Judge now accepted that the Respondent gave her version of what transpired

during the suspension and termination meetings then the Learned Judge was bound to accept the evidence of the Appellant's witnesses who were the only parties to give evidence of what the Respondent said in those meetings. The Respondent gave no evidence of what she allegedly told the Appellant in the suspension and termination meetings during the hearing of this matter.

4. The Learned Judge erred in law and in fact in arriving at his own conclusions about the surveillance footage as opposed to considering whether it was reasonable for the Appellant, subsequent to watching the surveillance footage and having heard the explanation provided by the Respondent, to form an honest and reasonable belief that (1) the Respondent did not give the drink to Mr. Burch immediately upon approaching him and waited for 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 was unprofessional and rude in her dealings with Mr. Burch. The Learned Judge based his conclusion about the surveillance footage, and what was said in the same, on the sole testimony of the Respondent given at trial and not on the evidence which the Appellant possessed at the time of the Respondent's dismissal."

14. Before considering the grounds, it is, in my view, helpful to set out some settled jurisprudence.

15. The appellant has asserted that it had the right to summarily dismiss Ms Toote on the ground of misconduct. Sections 31 to 33 of the Employment Act 2002 CH. 321A "(the Employment Act") provide:

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

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

32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the

employer shall include (but shall not be limited to) the following —

(a) theft;

(b) fraudulent offences;

(c) dishonesty;

(d) gross insubordination or insolence;

(e) gross indecency:

(f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;

(g) gross negligence;

(h) incompetence;

(i) gross misconduct.

33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal <u>and that he had conducted a reasonable investigation of such misconduct</u> except where such an investigation was otherwise unwarranted." [Emphasis added]

16. In **Kendra Thomas-Long v The National Commission for Self Help Limited** CV 2019-0058, Kokaram J of the High Court of Trinidad and Tobago said:

> **"1. The summary dismissal of an employee is a traumatic event. For the employer, in most cases, such dismissal represents a breakdown in trust and confidence and the culmination of an unproductive working relationship. For the employee, a summary dismissal may represent more than just lost wages but a social stigma and loss of self-esteem. For very good reason the disciplining of an employee ought to be progressive with a dismissal being an option of last resort. In these types of relational disputes, open communication and conciliatory approaches should feature in the management of the relationship between employer and employee."**

17. Before an employer can summarily dismiss an employee, that employer must show that:

> "33. …**he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted.**"

18. What is a reasonable investigation is fact sensitive, but the test has been set out in **British Home Stores Ltd v Burchell** [1978] IRLR 378 cited with approval by the UK Supreme Court as recently as 2018 in **Reilly v Sandwell Metropolitan Borough Council** [2018] IRLR 558 where it said:

> **"[19] The proper approach to the inquiry under what is now subsections (4) has long been regarded to have been set out in the judgment of the EAT (Arnold J presiding) in British Home Stores Ltd v Burchell (Note)[1980] ICR 303. In the present case Elias LJ described it as the "classic formulation of the employer's obligation in misconduct cases". In the passage of the judgment at p 304 frequently cited, the EAT, through Arnold J, held that the tribunal had to be satisfied first that the employer believed that the employee was guilty of misconduct; second that it had reasonable grounds to sustain its belief; and third that, prior to forming its belief, it had carried out a reasonable amount of investigation into the matter."**

19. Whether a dismissal is unfair or not unfair must be determined "**in accordance with the substantial merits of the case**." Sections 34-35 of the Employment Act provides:

> **"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."[Emphasis added]**

20. Where an employer does not have the right to summarily dismiss an employee, that employee's summary dismissal cannot be fair.

21. I now proceed to consider the grounds of appeal.

Ground 1: The Learned Judge erred in law and fact when he determined that the Respondent was Unfairly Dismissed because the Appellant failed to conduct a reasonable investigation into the matter and as a result, the Respondent was entitled to damages for Eighteen (18) months in the amount of Fifteen Thousand Four Hundred and Eighty Dollars ($15,480.00). The Learned Judge erred in arriving at the aforementioned conclusion in light of the fact that the Respondent did not plead any particulars of how or why the Appellant's investigation into her conduct was improper and the Respondent further failed to present any evidence in her Witness Statement and during her viva voce testimony relative to the same. Moreover, there was no evidence presented at the hearing which supports the Learned Judge's finding, that if the Appellant had made the further inquiries as suggested, the outcome of the investigation would have been different.

22. In my judgment, the pleading point cannot be sustained. The respondent did plead in paragraph 2 of the Statement of Claim that she was 'unfairly dismissed'. If the appellant was embarrassed by the lack of particularity, it could easily have sought further and better particulars of that plea. It is not difficult to understand why the Chief Justice found that the investigation in all the circumstances was not reasonable. In paragraphs 136 and 137 of his judgment, the Chief Justice said:

> **"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."**

23. It is difficult to see how the investigation could be reasonable when the appellant never asked Mr. Burch to comment on Ms. Toote's version of what had happened. The appellant's decision was based on the finding that Ms. Toote "refused" to give Mr. Burch the drink. At least that is what Ms. Rolle said that Mr. Burch said. It may well be that if Mr. Burch was confronted with what Ms. Toote had said, he may have acknowledged that it was not correct that Ms. Toote "refused" to give him the drink or that she "denied" him the drink as Ms. Rolle had reported that he had said. There was no evidence that Mr. Burch had left the hotel and was unavailable to have Ms. Toote's version of what happened put to him. I agree with the Chief Justice that a reasonable investigation, which would result in a reasonable decision to summarily dismiss, would have required a further inquiry of Mr. Burch as to the circumstances regarding what Ms. Toote said. As Bain J said in **Newbold v Commonwealth Building Supplies** [2013] 1 BHS J No. 37:

> **"51. 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.**"

24. Of course, there may be cases where it is not reasonable or practical for an employee to confront a complainant, for example, if the complainant is unavailable. However, the investigators, in this case, did not confront Mr. Burch with Ms. Toote's explanation of what happened. This, in my judgment, is a major omission which made the investigation unreasonable.

25. The appellant suggests that there is no basis for determining that a further investigation would have made a difference. I do not agree. The appellant could not reasonably come to the conclusion that Ms. Toote refused to give him a drink based on Ms. Toote's version of events. The appellant was obliged to put Ms. Toote's version to Mr. Burch.

26. This ground fails.

27. Grounds two and three can be considered together.

Ground 2: The Learned Judge erred in law and fact when he accepted (at paragraphs 55 - 56 of the written Ruling) that during the course of the investigation the Respondent failed to provide the Appellant with her version of what occurred because she was "somewhat overwhelmed and confused by what transpired and felt uncomfortable in those meeting", but nevertheless found that the Respondent was Unfairly dismissed. If the Learned Judge found as a fact, that the Respondent failed to provide the Appellant with her version of what transpired, then the Learned Judge ought to have considered

whether the investigation conducted by the Appellant was reasonable in light of the facts known at the time of the investigation which were only provided by Mr. Burch. The Learned Judge, therefore, erred in law when he went on to consider the explanation given by the Respondent at trial and not what actually occurred during the investigation. Ground 3: The Learned Judge further erred in law and fact when, after having accepted that the Respondent failed to provide the Appellant with an explanation of what transpired, made the concurrent and competing finding (at paragraphs 68-69 of the written Ruling) that during the investigation (suspension and termination meetings) the Respondent gave her account of what transpired. These findings contradict the express viva voce evidence of the Respondent that she did not provide her version of what transpired in the suspension and termination meetings. Moreover, if the Learned Judge now accepted that the Respondent gave her version of what transpired during the suspension and termination meetings then the Learned Judge was bound to accept the evidence of the Appellant's witnesses who were the only parties to give evidence of what the Respondent said in those meetings. The Respondent gave no evidence of what she allegedly told the Appellant in the suspension and termination meetings during the hearing of this matter.

28. The essence of these grounds are that as Ms. Toote failed to give an explanation as to what transpired with Mr. Burch during her meetings with the appellant's representatives, the Chief Justice erred in finding that there was no reasonable explanation and that the dismissal was unfair.

29. I do not accept that that is a proper reading of the Chief Justice's finding at paragraphs 55 and 56 or paragraphs 68 and 69, which are recited at paragraphs 9 and 10, respectively.. Ms. Toote did explain to the appellant's representatives what occurred. It was recorded in the minutes prepared by Ms. Rolle and the minutes of the meeting with Mr. Adderley.

30. I have already referred to Ms. Rolle's memo of 4 May 2019 in paragraph 7 of this Judgment.

31. In another memo adduced by the appellant at the trial, it records:

> **"Toote- The guest asked if the drinks were comp and I said yes. "how does it work here" so when the guest said this, I thought it best to mention I work on tips. He ordered rum and coke. I got the order, I had it on the tray and said "sir your drink is here" so he started looking for probably tip money and then he said sorry I don't have any change-and I said I can assist with changing the money. He said "just take it away, if I have to beg for it. I was going to tip you but if I have to beg for it take it away. After I threw the drink in the garbage."**

32. The Chief Justice was not bound to accept the evidence of the appellant's witnesses given at the trial. The Chief Justice had the benefit of the contemporaneous memos prepared at the time of the incident and the investigation. The Chief Justice also found Ms. Toote to have been a truthful witness.

33. As I said with respect to ground one, it was the failure to put to Mr. Burch the respondent's version of what happened and failure to give Ms. Toote the opportunity to ask Mr. Burch questions as to what happened and relying only on Ms. Rolle's version of what Mr. Burch told her that made the investigation unreasonable. Indeed, no other person spoke to Mr. Burch other than Ms. Rolle and the appellant acted simply on Ms. Rolle's memo of what Mr. Burch told her.

34. In my view, these grounds also fail.

Ground 4: The Learned Judge erred in law and in fact in arriving at his own conclusions about the surveillance footage as opposed to considering whether it was reasonable for the Appellant, subsequent to watching the surveillance footage and having heard the explanation provided by the Respondent, to form an honest and reasonable belief that (1) the Respondent did not give the drink to Mr. Burch immediately upon approaching him and waited for 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 was unprofessional and rude in her dealings with Mr. Burch. The Learned Judge based his conclusion about the surveillance footage, and what was said in the same, on the sole testimony of the Respondent given at trial and not on the evidence which the Appellant possessed at the time of the Respondent's dismissal.

35. The essence of this complaint is that the Chief Justice erred in substituting his view of what the tape showed as opposed to finding that the appellant's view is one that a reasonable employer could determine.

36. In my judgment, the critical question is whether the appellant, as a reasonable employer, on the evidence that it had could come to the determination that Ms. Toote refused to give or denied Mr. Burch the drink because he did not give her a tip. That was the basis of the summary dismissal. In my judgment, there is an important distinction between "**refusing to give the customer a drink**" and waiting with the drink on the tray when the customer is searching for money to give a tip. It was the customer who told her to take the drink away, not her refusing to give him the drink.

37. The Chief Justice found on the evidence that the appellant could not reasonably have determined that Ms. Toote refused to give Mr. Burch the drink.

38. I have considered the same evidence and agree with the Chief Justice in his finding. Whilst Ms. Toote's behaviour may well have resulted in some disciplinary action (Ms. Toote admitted that she was wrong), in my judgment, no reasonable employer could have come

to the conclusion that summary dismissal of an employee of over 30 years was a reasonable response to that incident. Not every infraction by an employee warrants summary dismissal.

39. To justify a summary dismissal, the employee's breach must go to the root of the contract and constitute a fundamental breach of his employment contract. 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 an employer to have an honest and reasonable belief that the employee had committed the misconduct in question. That honest and reasonable belief can only be formed after a reasonable investigation. Summary dismissal must be within the range of reasonable responses that an employer could make in the circumstances.

40. Dismissal for an isolated incident of misconduct will rarely be fair, although, in some circumstances, the incident will be sufficiently serious to justify dismissal for a first offence. This is particularly so where the misconduct involves an act of dishonesty or demonstrates a complete disregard for the interest of the employer or fellow employees. Generally, dismissal for misconduct will only be a reasonable sanction if the employee had committed earlier acts of misconduct and has been warned that further incidents may lead to dismissal. There is no evidence of that in this case. As the High Court of Trinidad & Tobago said, "**the disciplining of an employee ought to be progressive with a dismissal being an option of last resort".**

41. I agree with the Chief Justice that having regard to the substantial merits of the case, the summary dismissal was unfair. In my judgment, the appeal must be dismissed and the decision of the Chief Justice affirmed. Cost of the appeal to the respondent, fit for two Counsel, to be taxed if not agreed.

____

The Honourable Sir Michael Barnett, P

42. I agree.

____

The Honourable Mr. Justice Evans, JA

Concurring judgment delivered by The Honourable Madam Justice Crane - Scott, JA:

43. I have read in draft the Judgment prepared by the learned President, with which I completely agree. I merely wish to add the following observations in further support of the decision we have all taken, which is to dismiss the appeal and affirm the learned Chief Justice's finding that Ms. Toote was unfairly dismissed.

44. In its Amended Notice of Appeal filed on 1 June 2023, the appellant identified 4 grounds of appeal, all seeking to attack, in various ways, the learned Chief Justice's finding that Ms. Toote had been unfairly dismissed.

45. My observations relate to ground 1, which essentially seeks to impugn the rejection by the Chief Justice of the appellant's Defence and his conclusion that Ms. Toote was unfairly dismissed.

46. As I see it, insofar as the appellant suggests that Ms. Toote ought to have both pleaded and adduced evidence to establish that the appellant's investigation was unreasonable, ground 1 is clearly misconceived. It is trite that based on its pleaded Defence, it was the appellant (as Ms. Toote's employer) and <u>*not*</u> Ms. Toote who bore the evidential burden at trial of proving that the statutory standards for summarily dismissing Ms. Toote had been met.

47. The parties' pleadings and respective assertions are already reproduced in the President's draft, and I do not need to reproduce them here. The pleadings clearly establish that when examining the appellant's Defence on the one hand and Ms. Toote's claims on the other, the learned Chief Justice had necessarily to consider: (i) the requirements of Part VIII of the Employment Act to determine whether the appellant (as the employer) had met the standards for summarily dismissing Ms. Toote; along with (ii) Ms. Toote's claim under section 35 of the Employment Act that she had been unfairly dismissed.

48. The authorities show that where an employer seeks to justify the dismissal of an employee on the basis of the employee's misconduct, the case is to be considered "in the round" with the court or tribunal undertaking the necessary factual inquiries in line with the dictates of the applicable statutory provisions. In England, the factual inquiry is undertaken in accordance with section 98 of Part X (Unfair Dismissal) of the Employment Rights Act, 1996; whereas in The Bahamas, the court's inquiry is regulated by the provisions of Part VIII (Summary Dismissal) and Part IX (Unfair Dismissal) of the Employment Act. In this regard, see the English Employment Appeal Tribunal decisions of **British Home Stores Ltd v. Burchell,** [1978] IRLR 378; **A v. B,** [2013] IRLR 405; and **Salford Royal NHS Foundation Trust v. Roldan,** [2010] IRLR 72, a decision of the England and Wales (Court of Appeal (Civil Division) on appeal from the EAT. Also see the Bahamas Court of Appeal decisions in **Eden Butler v. Island Hotel Company Limited (Trading as Atlantis Paradise Island)** SCCivApp. No. 210 of 2017; and **Paul F. Major v. First Caribbean International Bank (Bahamas) Limited** SCCivApp. No.77 of 2021.

49. As clearly appears from his comprehensive Judgment, the learned Chief Justice examined the appellant's assertion that Ms. Toote had been summarily dismissed for gross misconduct. After examining the particulars of Ms. Toote's alleged misconduct (and doubtless aware of section 33 of the Act), the Chief Justice conducted a detailed review of the evidence as to the nature and extent of the investigation which had been conducted prior to Ms. Toote's suspension and termination.

50. At paragraph 148 he found as a fact that the appellant "**had not conducted a reasonable and proper investigation into the incident between Ms. Toote and Mr. Burch."** At paragraph 149 the learned Chief Justice addressed the appellant's pleaded assertion that Ms. Toote had been accorded natural justice and that it had acted in good faith. He found as a fact that based on her own evidence, **"Ms. Toote was not denied natural justice throughout the process of dealing with her and Mr. Burch."**

51. After rejecting the appellant's assertion that it had conducted a reasonable investigation into the incident and its pleaded assertion that Ms. Toote's dismissal had been conducted in line with Part VIII of the Act, the learned Chief Justice examined the circumstances of Ms. Toote's dismissal in the round. As appears from paragraph 151 of the judgment he obviously adverted to the statutory test laid down in section 35 of the Employment Act before ultimately concluding that Ms. Toote's dismissal had been unfair.

52. As the primary judge of fact in this case, the learned Chief Justice was both required and entitled to make the findings of fact, which he did in relation to (i) whether the appellant had met the statutory standards for summarily dismissing Ms. Toote and (ii) further, whether having regard to the substantial merits of the case, her dismissal had been unfair. As the judgment amply demonstrates, before reaching his ultimate conclusion, the Chief Justice painstakingly examined the testimony of the witnesses, including the video footage which the appellant had put into evidence. I agree with the President that ground 1 has no merit. There is no basis on which we can properly interfere with the Chief Justice's primary findings of fact.

53. I agree with the learned President's treatment of the remaining grounds and have nothing further to add. The appeal must be dismissed.

____

The Hon. Madam Justice Crane-Scott, JA