COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp. No. 71 of 2020

B E T W E E N

BAHAMAS ELECTRICITY CORPORATION

AND

BAHAMAS POWER AND LIGHT COMPANY LIMITED

Appellants

AND

SHERRY JENNIFER BROWN

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Madam Justice Bethell, JA

APPEARANCES: **Mr. Audley Hanna with Mr. Keith Major, Counsel for the Appellants**
Mr. Obie Ferguson, Counsel for the Respondent

DATES: **16 December 2020; 19 January 2021**

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Industrial Tribunal Appeal – Employment law – Unfair Dismissal – Damages – Right to Mitigate

The Respondent was a cashier in the employ of the Appellant. She was terminated after 24 years of service and thereafter filed an Originating Application alleging that her contract of employment had been unfairly terminated; she also made a claim that she be reinstated. The Appellant(s) defense was that the Respondent was justifiably dismissed for gross misconduct. The dispute was referred to the Tribunal for a determination by the Minister of Labour by his Certificate. After hearing the matter the judge found that the Respondent had made out her claim of unfair dismissal and was entitled to damages in the sum of Six Thousand Sixty-seven Dollars and Eighty Cents ($6,067.80). The appellants has appealed the decision on the ground inter alia that "**the learned Vice-President erred in law and misdirected herself in concluding that an alleged failure to permit an employee to mitigate in the context of overwhelming evidence of misconduct could be a sufficient basis for a finding of unfair dismissal in the context of section 34 of the Employment Act where there was otherwise both substantial and procedural fairness of a greater preponderance.**"

Held: appeal allowed; the award made by the Vice-President is set aside. No order is made as to costs.

It is beyond dispute that in all civilized societies that before any penalty is imposed on an individual it is usual that he be given an opportunity to make representations to the body empowered to impose that penalty. It is also trite that in considering the fairness of a dismissal where such procedures have been agreed the employer is required to comply with those procedures.

What is readily evident from the facts of the two cases (**Omar Ferguson** and **Helena McCardy**) relied on by the Vice-President is that the employers in those cases failed to follow the disciplinary procedures which were in place. It was that failure which deprived the employees in those two cases of the opportunity to present items of mitigation. In the present case as found by the Vice-President the procedure put in place was fair and the disciplinary proceedings were conducted fairly. The respondent was fully apprised of the allegations against her and was given the opportunity to respond to the same with the assistance of her Union Representative as well as her attorney.
The Respondent had been provided with adequate means and opportunity to raise issues of mitigation. The Appellants complied fully with the disciplinary procedures as they were required to do. The decision to terminate was not too harsh in the circumstances of this case as the established conduct was egregiously inconsistent with behavior expected from the Respondent as a seasoned employee stationed in a public place as a representative of the Appellants.

Eden Butler v Island Hotel Company Limited SCCivApp No 210 of 2017 considered
Helena McCardy v John Bull IndTribApp. No. 20 of 2019 distinguished
Omar Ferguson v Bahamasair Holdings SCCivApp No 16 of 2016 distinguished

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JUDGMENT

Judgment delivered by The Honourable Mr. Justice Milton Evans, JA:

1. This is an appeal by the Appellants against the decision of Her Honour, Miss Simone Fitzcharles, Vice-President of the Industrial Tribunal ("Vice-President"), given at the trial of this action on the 20th day of May A.D., 2020 (the "Decision") whereby she found that the Respondent had made out her claim of unfair dismissal and was entitled to damages in the sum of Six Thousand Sixty-seven Dollars and Eighty Cents ($6,067.80).

BACKGROUND

2. The background to this appeal can be gleaned from the ruling of the Vice-President and so I set out the relevant portions as follows:

"The Factual Matrix

1. **Ms. Brown worked with BPL from 23 September 1991 through 19 May 2016, making her tenure 24 years, 7 months and 4 weeks. At the time she was dismissed from her post she earned a salary of $3,371.00 per month, she was entitled to vacation and she was enrolled in BPL's employee pension plan. Ms. Brown was a Cashier stationed in an office (the "cashier's cage") shared by 3 workers from BPL, and one worker from the National Insurance Board. The cashier's cage was situated in a room in the Post Office building on East Hill Street.**
2. **It is undisputed that Ms. Brown was a member of the Bahamas Electrical Workers Union ("the Union") and a part of the bargaining unit. The Industrial Agreement between the Bahamas Electricity Corporation (BPL) and the Union which expired on 30 April 2018 governed the employment of the Applicant prior to her dismissal.**
3. **The incidents which led to Ms. Brown's dismissal were captured by BPL on cameras, positioned in and outside of the cashier's cage. The footage showed a male person entering, remaining and interacting primarily with Ms. Brown, then leaving the cashier's cage. The video footage captured activities of those in the cashier's cage on four separate days – 14th, 22nd, 25th and 26th April 2016. The male person was identified in the Respondent's security report and in Ms. Brown's evidence as Kim Ferguson who was a Post Office employee. It was clear that on some occasions Mr. Ferguson accessed the cashier's cage when Ms. Brown gave him such access, and on others, when the entry/exit door was left unlocked by persons working in the cashier's cage.**
4. **In addition to Mr. Ferguson's access to the cashier's cage, the video footage showed that Mr. Ferguson and Ms. Brown engaged in activities of an intimate nature with each other while the other employees worked at their desks. The video footage which documented the activities in the cashier's cage was shown to the Tribunal during the trial. The Respondent produced a written report dated 13" May 2016 (the "Report") which contained the conclusions of Stephen Strachan, the Security Manager of the Respondent, once he had investigated the activities in the cashier's cage on the four days mentioned. In the Report, Mr. Strachan observed:**

> ***"5. ...The male's presence seemed to have no business reason but rather were personal visits to Cashier Sherry Brown. All of them involved activities of inappropriate behavior with sexual connotations between Ms. Brown and the male.***
>
> ***"14. Ms. Sherry Brown, a veteran employee, did nothing to prevent or dissuade the unauthorized entry or presence of Mr. Ferguson in the Corporation's restricted cash intake area. In fact her behavior encouraged quite the opposite and exposed the cage during its operation."***

5. **BPL's complaint against Ms. Brown was gross misconduct comprised of two activities: (1) that she breached BPL's restricted access policies to the cashier's office by allowing an unauthorized person access to the restricted area, and (2) that during such unauthorized access, Ms. Brown engaged on the job in conduct of a lewd or sexual nature with the person who was not authorized to be in the cashier's cage. At the trial under cross-examination Ms. Brown admitted she did the acts for which she was dismissed. Even if she had not done so, the recording of her activities would have dispersed any doubt she performed such acts.**
6. **The policy of BPL concerning access to the cashier's cage was primarily set out in two documents: (1) a Customer Services Memorandum dated 23 April 2007 from Peter W. Rutherford, Assistant General Manager of Customer Services to All Employees of BPL; and (2) a manual on revised Cash Handling Policy and Procedures dated 5 August 2014.**
7. **The relevant portions of the Customer Services Memorandum informed employees of the following:**

> **"Please be advised that in our efforts to improve our operations and the services provided by the cashiers, the following changes are in affect {sic) in the Cashier's Office.**
>
> **1. The Cashier's office is a restricted area whose access will be limited to the following:**
>
> **The General Manager**
>
> **The CFO**
>
> **The AGM Customer Services**

Customer Relations Manager

Security Manager

Security Officers in the discharge of their normal duties only

Cashiers / Cashiers' Supervisors Internal Auditors." [Emphasis added].

8. **The purpose of the Cash Handling Policy and Procedures manual was stated to be "to ensure the conformity of ... the Supervisors, Assistant Supervisors, Cashiers and other employees entrusted with the Corporation's cash intake or receipt thereof' with the revised "procedures, duties and responsibilities." The document was supplementary to the Industrial Agreement and provided "an operating framework." It stated that in "the event that an unspecified transaction or event may occur, the Corporation reserves the right to make a decision to protect the assets of the Corporation." The manual also provided:**

"1. GENERAL OPERATIONAL RULES (CODE OF CONDUCT)

Physical access to the Corporation's cash and cash receipt environment is restricted to authorized Corporation personnel. The entrance and departure of all non-cashiering persons with a business need to access the Cashier's cage is to be logged by the Supervisor..."

"3. SECURITY CAMERAS

The Corporation reserves the right to review the surveillance security cameras at any time..." **[Emphasis added].**

9. **The Assistant General Manager for Customer Services (Mr. Rutherford) made a complaint about unauthorized entry to the cashier's cage. This complaint prompted Mr. Strachan's investigation into the activities in that area. Resultantly, BPL placed Ms. Brown and other BPL workers in the cashier's cage on suspension with 50% pay pending the investigation in accordance with clause 16.11 of the Industrial Agreement. Ms. Brown was placed on suspension for an initial period of 5 days and this was extended by another 10 days as the investigation continued in accordance with clause 16.12(1) (b) of the Industrial Agreement. As a result of the investigation, on 19 May 2016 Ms. Brown's employment was**

terminated for gross misconduct in accordance with clause 16.12(1) (a) of the Industrial Agreement.

10. Based on the evidence, Ms. Brown was not the only BPL worker in the cashier's cage to be punished as a result of the investigation and for their respective roles in the unauthorized access of persons to the cashier's cage. Theresa Lewis, a supervisor was in the office and was aware when Mr. Ferguson accessed the cashier's cage without authorization. She failed to correct the situation. Agnes Smith, was also present on one of the occasions when Mr. Ferguson accessed the area, and apart from this, she conversed with another unauthorized Post Office worker in the area. She failed to correct the situation. Mia Lockhart, a line-staff cashier, was present when Mr. Ferguson entered without authorization, and in a separate incident, a Customs officer had entered the area without authorization to see her on one occasion, but she discouraged him from remaining. Ms. Brown learned from Ms. Astride Bodie, a Union representative, that Theresa Lewis received 10 days' suspension for her role in the unauthorized access and she may have been put to work in another area. She also learned that Agnes Smith was suspended for 10 days without pay and Mia Lockhart was warned."

PROCEEDINGS BEFORE TRIBUNAL

3. The Respondent filed her Originating Application on the 11th August, 2017 wherein she alleged that her contract of employment had been unfairly terminated and she made a claim for reinstatement. The Appellant defended the action on the basis that the Respondent was justifiably and not unfairly dismissed for gross misconduct in accordance with the Industrial Agreement. This dispute was referred to the Tribunal for a determination by the Minister of Labour by his Certificate dated 18 May 2017.

4. The Learned Vice-President set out in her decision a summary of the evidence which was lead before her as follows:

> **"14. Ms. Brown, as the sole witness supporting her claim gave evidence that:**
>
> **(1) She knew the nature of the investigation conducted by BPL into her activities, but she did not know what the result of the investigation was;**
>
> **(2) The issue of her role and the circumstances surrounding the unauthorized entry of Mr. Ferguson was put to her by Mr. Strachan. He also asked her for**

information of what she and Mr. Ferguson did after he gained unauthorized entry to the cashier's office;

(3) She was asked during her meetings with BPL managers whether she wished to say anything further or ask questions, which she declined, except on 4 May to say she did not understand why she was being suspended for 15 days as a result of Fergie being in the cashier's cage and her hugging him. This comment prompted Ms. Johnson to tell her that she (Ms. Brown) knew she did much more than simply hug Mr. Ferguson. Ms. Brown did not respond to this allegation concerning her conduct. The next day she remembered she also lifted her dress. She therefore sought advice from Jennifer Isaacs Dotson;

(4) She committed the conduct for which she was summarily dismissed: (i) As a cashier of long standing she was familiar with the restriction on access policy as set out in the Customer Service Memorandum and the Cash Handling Policy and Procedures manual; (ii) Mr. Ferguson was not authorized to be allowed into the cashier's cage as it was contrary to BPL's policies; (iii) She had a responsibility in determining who had access to the area; (iv) Her conduct with Mr. Ferguson was not professional and fell below the standard of conduct required of her as a longstanding BPL employee;

(5) She had during the investigation, the benefit of Union representation and legal advice, and she was given a recess to consider her position before continuing in interview with Mr. Strachan;

(6) Before the meeting in which BPL dismissed her, she was informed by the Union representative that BPL decided to dismiss her, but the representative was arranging for 537 her to resign instead. She took advice from her lawyer before the meeting in which she was dismissed.

15. At the trial, Ms. Johnson testified:

(1) Ms. Brown was suspended so as to enable BPL to investigate. There was no foregone conclusion that she would be dismissed. The initial investigation revealed that BPL had to widen the scope of the enquiries, so that is why the investigation continued as did the suspension.

(2) The decision to dismiss was made on the basis of the results of the investigation which were communicated to the executive level of BPL by a written report. Ms. Johnson did not get a copy of the report. The Assistant General Manager, Marissa Smith gave Ms. Johnson the instructions to carry out the dismissal.

(3) Prior to suspension, Ms. Brown was informed an investigation was being conducted into gross misconduct. She was not told by Ms. Johnson at that time of suspension what constituted gross misconduct. The definition of gross misconduct was in the Industrial Agreement at Clause 2.13. When the suspension was extended, Ms. Brown was not told at that time of any findings of the investigation. She was informed that the investigation was not complete, so they had to continue with it.

(4) Ms. Johnson said she did not provide to Ms. Brown the findings of the investigation, such as reports of the interviews with her co-workers or video footage. She was not sure whether a person from the executive management of BPL gave the material to Ms. Brown.

(5) No report was prepared by the Post Office worker, Mr. Ferguson.

(6) While Ms. Brown was not given written reports, she was questioned and given a chance to respond in relation to the issues which were mentioned in reports. The letters of 26 April, 4 May and 19 May 2016 did not constitute the entire communication between BPL and Ms. Brown. Questions were put to her that concerned what the investigation was about. She was advised of the nature of the investigation in the meetings BPL had with her and during the question and answer period.

16. Mr. Strachan stated in the trial:

(1) His investigation was based on the video footage he produced in evidence, and the recording equipment was in good working order.

(2) He found that other persons who were not authorized to be in the cashier's cage had access to the area without the assistance of Ms. Brown.

(3) His investigation commenced because he was given information that an unauthorized person was seen in the cashier's cage and he was told to investigate the circumstances surrounding that issue. His remit was not limited so as not to have regard to Ms. Brown's conduct, although he was given no specific names as to who should be investigated. Ms. Brown happened to be a part of the activities investigated. He was charged to look at the reasons for the unauthorized access, why and how the persons were entering and what they did when they entered.

(4) He assumed the NIB worker was authorized because she worked in that space which was shared by NIB and BPL. The footage showed a Customs Officer gaining access and the BPL workers were questioned about that incident. BPL supervisors and other BPL workers had a responsibility for the unauthorized access of persons in the cashier's cage. Ms. Brown made her contribution to giving unauthorized access.

(5) He could not say whether his report of 13 May 2016 was furnished to Ms. Brown. That was the only report he prepared and he gave it to the General Manager once it was prepared. The camera footage of the 4 days recorded showed Mr. Ferguson visited Ms. Brown on all of the occasions he accessed the cashier's cage, whether by an unlocked door or by gaining admission from Ms. Brown. The footage showed that on all of those occasions their behaviour had inappropriate and sexual connotations".

FINDINGS BY THE VICE-PRESIDENT

5. The Vice-President found firstly that since the pleaded cause of action in the matter before her was a claim for unfair dismissal as referred by the Minister and not a complaint against wrongful summary dismissal, the remit of the Tribunal was limited to Unfair Dismissal.

6. In dealing with the substance of the Complaint which resulted in the Respondent's dismissal the Learned Vice-President observed as follows:

> **"21. The parties put in issue the exact character of the activities between Ms. Brown and Mr. Ferguson. While Ms. Brown in her arguments repeatedly stated that she simply displayed "romantic" behavior, BPL in its evidence and arguments contended that Ms. Brown's behavior was**

"lewd" and "inappropriate" with "sexual connotations". The Tribunal has a duty to consider the substantial merits in any unfair dismissal claim. The precise character of the acts committed is a factor to be weighed with others in the balance. Fortunately, the Tribunal has had the benefit of evidence in the witness statement of Ms. Brown, a transcript capturing a majority of the recorded activities which was prepared by the Respondent for the trial and the video footage.

22. **Basically, the footage showed that Ms. Brown on two occasions opened the cage door for Mr. Ferguson and on two occasions, escorted him into the restricted area. On three occasions, Mr. Ferguson accessed the cashier's cage as the door was either left open or unlocked by other workers. Based on the camera footage, Mr. Ferguson's main reason for visiting the cage was to find Ms. Brown for the purposes of chatting closely, groping, kissing, touching intimate parts of the body and Ms. Brown exposed private areas of her body. Ms. Brown's witness statement mentioned she performed similar acts.**

23. **While the Applicant and Mr. Ferguson may or may not have had romantic feelings towards each other, their activities as described in the transcript, recorded electronically and as described by Ms. Brown in her witness statement were clearly of a sexual nature. Whether any such behavior is deemed unacceptably lewd or indecorous amounting to gross misconduct is a matter of context — where and in what circumstances it occurred. The context in this scenario is the workplace in a small office shared by other employees where the acts of Ms. Brown and Mr. Ferguson were performed in the presence of the other employees and/or in the view of BPL via its camera system.**

24. **At law, if historically there has been behavior of an inappropriate sexual nature in the workplace and management has been tolerant of such behaviour, the law will not allow the employer to suddenly change its attitude to the detriment of workers. In that instance, dismissing an employee on the ground of gross misconduct for engaging in similar behavior in the workplace could give rise to a successful claim of unfair dismissal if the employee is not first notified of the change in policy. This was seen in *Dixon***

***Stores Group Ltd v Dwan and Another*, EAT/310/93, a UK Employment Appeal Tribunal case where two managers challenged their dismissal for gross misconduct when they engaged in an act at a Christmas party that was considered unacceptably lewd. Finding the dismissals to be unfair, the Employment Appeal Tribunal found that the employer should have notified all employees of a change in the standard of conduct required of the employees before imposing a penalty on any of them for such acts, which were tolerated in past Christmas events.**

25. In BPL's case, there was no evidence of any prior history or tolerance in the workplace of the behavior engaged in by Ms. Brown. The personal behaviour and deportment of Ms. Brown — her conduct on the job — was called into question by her activities. BPL did not have as one of its major offences, which could attract immediate dismissal, a specific category of indecency or gross indecency, as contained in the Employment Act, but this was not necessary, for in many employment cases where indecorum with sexual overtones is the employee's offence, gross misconduct is often the reason for dismissal. See Dixon's case for example. The Tribunal notes that the specific offences listed in the Industrial Agreement as major was not an exhaustive list of such offences.

26. Taken on its own, the granting of unauthorized access of a prohibited person into the cashier's cage amounted to a violation of BPL's policies or procedures or failure to observe or enforce safety rules or operating procedures, which are minor offences not punishable by dismissal under Clause 16.6 of the Industrial Agreement. This may be why Ms. Brown's colleagues were not dismissed for their respective roles in permitting the unauthorized entry and remaining of persons in the cashier's cage. However, in Ms. Brown's case, there was more involved. The entire conduct was a combination of giving a person who is not a BPL employee unauthorized access in a restricted area for the apparent purpose of engaging in unacceptable behaviour with sexual overtones on several occasions. This was considered by BPL to be gross misconduct punishable by summary dismissal.

27. Perhaps the most risqué or egregious of Ms. Brown's public acts were bending over, spreading her legs and lifting her dress thereby exposing private areas of her body to Mr. Ferguson, but also in the presence of her work colleagues. The Tribunal cannot find it unfair that BPL considered this to be unacceptably lewd, surpassing mere unprofessional behaviour. Additionally, it would not have been unfair to say that the other acts Ms. Brown and Mr. Ferguson performed as were recorded (intimate touching and kissing, for example) were inappropriate in the workplace. In the context of the workplace, even if her activities with Mr. Ferguson were not done in view or in proximity of BPL and co-workers Ms. Brown may still have been subject to a gross misconduct accusation. There have been cases where acts of a sexual nature which were not performed in full view of workers and done after business hours in a darkened office space have been found to be gross misconduct and a dismissal of the employees involved, not unfair. See for example GM Packaging (UK) Ltd v Haslem, UKEAT/0259/13.

28. Therefore, having considered the evidence and the nature of the conduct in question, in the contention between the parties over how Ms. Brown's behavior is to be characterized, I find that BPL's description is more accurate than that of Ms. Brown. Her behavior was of an indecorous sexual nature, performed in such a way that it was fully observed and, based on the demeanour of BPL's witnesses, offensive to the employer as well as having the potential to be offensive and demoralizing to co-workers on BPL's premises. The Tribunal could find no unfairness in how BPL characterized those acts perpetrated on its premises".

7. The Vice-President found that notwithstanding her findings relative to the nature of the conduct of the Respondent as this was a claim for unfair dismissal she was required to have regard to the procedure established for discipline and the extent to which it was followed. She noted that:

> **"18. Section 35 is the section pursuant to which a court may determine whether a dismissal outside the ambit of sections 36 through 40 is fair or unfair. See *BMP Limited d/b/a Crystal Palace Casino v Yvette Ferguson* IndTribApp No 116 of 2012 at paragraph 38.**

19. In noting the way in which some of the arguments have been cast in early submissions, it is imperative to state that any argument concerning sections 31 through 33 of the EA and the concepts of the honest belief of the employer and the reasonableness of the investigation belong to a realm distinct from that of unfair dismissal, albeit some of these factors can sometimes enter an analysis at the compensatory stage. The distinctive characteristics of wrongful dismissal and unfair dismissal have now been discussed in numerous Court of Appeal decisions, one of which is *Eden Butler v Island Hotel Company Limited,* SCCivApp & CAIS No 210 of 2017. In that case Evans JA (Actg, as he then was) demarcated the boundaries of the causes:

> ***"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 to have an honest and reasonable belief that the respondent 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.***
>
> **…**
>
> ***"32. With regard to the alternate claim of damages for unfair dismissal the focus is primarily on the procedure."***

8. The Learned Vice-President was of the view that the disciplinary procedure which was agreed between the parties was a fair one. At paragraph 12 of her decision she noted as follows:

> **"12. The Industrial Agreement set out a detailed procedure in relation to disciplinary procedures, and termination of employment. It included a right to appeal a termination of employment in the event an employee was disgruntled. It also in Clause 17 set out a detailed 5-stage process which employees**

could engage to resolve their employment grievances, including a suspension or dismissal. Upon consideration of the provisions, the Tribunal finds that the procedure set out in the Industrial Agreement on the issues of discipline, grievance handling, termination of employment and appeals was a fair one for both stakeholders - the employer and the employee".

9. In her Decision the Learned Vice-President in paragraphs 30- 48 dealt extensively with what transpired during the investigation and determined that the requirements of Natural Justice were complied with. However, she was of the view that before terminating the Respondent the Appellants ought to have given her "*the opportunity to mitigate".* This finding is reflected in paragraphs 50-52 and 64 of the decision as follows:

> **"50. Once the investigation was completed, Ms. Brown was informed that the finding was that she was culpable of gross misconduct. By the time the dismissal occurred, she had had three opportunities over roughly four weeks to respond, if she could, on the matters put to her. But in the final meeting, BPL's handling of the matter was less than satisfactory. In this meeting, Ms. Brown was not told that the employer was minded to dismiss her for her gross misconduct which was comprised of her acts of granting Mr. Ferguson unauthorized access to the cashier's cage and engaging in lewd acts of a sexual nature with him. If BPL had said this, then invited Ms. Brown to say why she should not be dismissed this procedure would have been superior.**
>
> **51. Did the Applicant have a clear idea of the repercussions of being found culpable of gross misconduct? Yes, adequately so. Although the Industrial Agreement stated plainly that summary dismissal could be a result of gross misconduct, so could suspension of up to 20 days. However, Ms. Brown was directed to clause 16.5 in letters from BPL, which clearly set out the two possible repercussions of gross misconduct. Further, she was able to take legal advice about termination of her employment before she entered the final meeting with BPL.**
>
> **52. The evidence was that Ms. Brown was told she was found culpable and BPL had decided to dismiss her. She was also then handed a termination letter to sign which stated the same, and she was invited to make representations or ask questions. This was Ms. Brown's evidence as to the order of events in the final meeting, which was not gainsaid by the Respondent's witnesses. Since the decision to terminate Ms. Brown's employment had already been made, she was not allowed to say why she should**

not be dismissed — that is — to put her mitigatory points to the employer, so that BPL could consider them before deciding whether to dismiss her. This is a defect in the process which could tip the balance in favour of a finding of unfair dismissal.

…

64. Coming down to the final analysis, Ms. Brown was not given the chance to say why she should not be dismissed before the decision was made. If she had been given that chance, there is, based on an assessment of the case she presented, a single point in mitigation she could have advanced — that of her long service of over 24 years. Having heard BPL's argument and presentation, I have some doubt the employer would have much been convinced by that point in mitigation. BPL felt that Ms. Brown's status as a long-standing employee made her conduct more egregious as BPL expected someone of her years of experience not to breach its trust and confidence in that manner, as the Respondent submitted. Yet, on balance, I cannot say her plea would have failed".

THE APPEAL

10. The Appellants lodged their appeal in this matter on the 1 July 2020 whereby they relied on the following grounds:

> **"1. The learned Vice-President erred in law and misdirected herself in finding that sections 31 through 33 of the Employment Act along with the concepts of the honest belief of the employer and the reasonableness of the investigation are distinct from a claim of unfair dismissal. Rather, the learned Vice President should have considered the case on the basis that section 33's requirements in relation to an honest belief and reasonableness applies to all proceedings before the Industrial Tribunal.**
>
> **2. The learned Vice-President erred in law and misdirected herself in failing to consider properly, or at all, whether or not the dismissal by the Appellants met or exceeded the burden placed on the Appellants as an employer in performing a summary dismissal. Having regard to section 34 of the Employment Act the learned Vice-President was bound to consider whether the Appellants discharged their statutory obligations of having formed an honest and reasonable belief.**
>
> **3. That the learned Vice-President erred in law and misdirected herself in failing to determine that the evidence of the**

misconduct of the Respondent, being duly documented by video recording, were such that a reasonable investigation was in fact unwarranted in this case in the context of section 34 of the Employment Act.

4. That the learned Vice-President erred in law and in fact and misdirected herself in determining at paragraphs 64 and 65 of the Judgment that the Appellants failed to provide the Respondent with an opportunity to mitigate and denied her procedural fairness as this failed to take into account:

a. that the Respondent at all material times was put on notice as to reasons for disciplinary proceedings and the potential outcomes of the same;

b. the abundance of opportunities provided to the Respondent over a period of no less than four (4) weeks to add anything during her interviews in her defence;

c. the election by the Respondent not to avail herself of opportunities to mitigate;

d. the fact that the Respondent had union representation and the benefit of legal advice all throughout her disciplinary process;

e. that to the extent that there was no mitigation by the Respondent that was due to the fact of the Respondent electing not to rather than the Respondent not being provided the opportunity to mitigate;

f. the failure of the Respondent, in the opportunities provided to her to mitigate, to also provide a full, accurate and honest account of her activities at work which led to the derogation of mutual trust and confidence required between the Respondent and the Appellants.

5. That the learned Vice-President erred in law and misdirected herself in concluding that an alleged failure to permit an employee to mitigate in the context of overwhelming evidence of misconduct could be a sufficient basis for a finding of unfair dismissal in the context of section 34 of the Employment Act where there was otherwise both substantial and procedural fairness of a greater preponderance.

6. That the learned Vice-President erred in law and misdirected herself at paragraph 50 of the Judgment in determining that

BPL's conduct at its final meeting with the Respondent was unsatisfactory in that it failed to state certain specifics with respect to why the summary dismissal was necessary and that such specifics would have provided the Respondent to set out reasons why she should not have been dismissed. Such a finding is contrary with the finding also in paragraph 50 of the Judgment that, prior to the final meeting, the Respondent had been provided with at least three opportunities over a three (3) week span to respond to matters which had been put to her. Such a finding by the learned Vice-President, therefore, placed a requirement on the Appellants which is in excess of what is required pursuant to sections 31 through 33 of the Employment Act.

7. That the learned Vice-President erred in law and in fact and misdirected herself in finding that should she award the Respondent a full basic award this would amount to Sixty Thousand Six Hundred and Seventy-eight Dollars (B$60,678.00). In determining the amount that a full basic award would amount to in the Respondent's case, the learned Vice-President failed to apply the proper calculations. Rather, the learned Vice President ought properly to have ascertained the Respondent's weekly salary by dividing her yearly salary by 52 which would have yielded the weekly sum of $777.92. Thereafter, the learned Vice President should have multiplied 560 this weekly salary by three (3) weeks which would have yielded the sum of $2,333.77 which should then have been multiplied by the number of completed years worked. This methodology would have been based upon seventy two weeks' pay, which is less than eighteen (18) months' statutory maximum, pay as the latter is comprised of seventy-eight (78) weeks. Had the learned Vice-President performed the calculation in this manner she would have ascertained a compensation for the basic award in the sum of $56,010.46 as opposed to the statutory maximum of $60,678.00. .

8. Had the learned Vice President calculated the basic award as set out in paragraph 7 above, she could then have gone on to consider whether the Applicant was also entitled to a compensatory award. However, in determining that the basic award in and of itself resulted in the statutory maximum of 18 months' pay, the learned Vice President fell into error by not giving due consideration as to whether the Applicant was entitled to a compensatory award.

9. That the learned Vice-President erred in law and failed to give any adequate or proper reasons for arriving to the compensation awarded to the Respondent, in that the learned Vice-President failed to explicitly indicate whether she granted the Respondent only a full basic award or both a basic and compensatory award, contrary to Rule 11(2) of Industrial Relations (Tribunal Procedure) Rules, 2010.

10. The learned Vice-President erred in law and in fact and misdirected herself in finding that the Respondent was entitled to compensation in the sum of Six Thousand Sixty-seven Dollars and Eighty Cents (B$6,067.80) or at all. A true calculation of ten per centum (10%) of a full basic award, for the reasons stated above, would have been the sum of Five Thousand Six Hundred One Dollars and Five Cents (B$5,601.05). 561

11. In the alternative, the learned Vice-President erred in law and misdirected herself in failing to provide the appropriate reduction of 99% to the award in the Judgment despite the evidence of the Respondent acknowledging her conduct and culpability for her dismissal.

12. In the alternative, the learned Vice-President rather than finding, at paragraph 67 of the Judgment, that the Respondent significantly contributed to the dismissal should have found that the Respondent was the cause of the dismissal such that no compensation should have been awarded in any event.

13. Any other ground that the Court may deem just and equitable.

AND FURTHER TAKE NOTICE that the Appellants intend to rely on the reasons set out in the Judgment, in requesting the Honourable Court of Appeal to uphold the following findings of the learned Vice-President in the Judgment:

1. That the Industrial Agreement effective through 1°' May 2013 to 30" April 2018 (the "Industrial Agreement") between the First Appellant and Bahamas Electrical Workers Union (the union to which the Respondent belonged):

a. governed the employment of the Applicant and;

b. was fair for both the First Appellant and the Respondent in its procedures for handling discipline, grievance handling, termination of employment and appeals.

2. The Appellants were not unfair in considering the behavior of the Respondent to be unacceptably lewd, inappropriate in the workplace and surpassing mere unprofessional behavior.

3. The notification to the Respondent by the Appellants by letters dated 26 April and 4 May 2016 met and exceeded the requirements of the Industrial Agreement; and that the suspension of the Respondent was fair.

4. That the Respondent was sufficiently aware of the issues which the Appellants had disciplined her for; and that the Respondent harboured a desire to conceal the information about her activities at work.

5. That there was no evidence to support a contention that the three requirements of natural justice were not fulfilled".

DISCUSSION

11. I am satisfied that there is no merit in grounds 1-3 of the Notice of Appeal. As noted by the Learned Vice-President the Respondent elected to pursue a claim for Unfair Dismissal as such her remit was thus limited to that claim only. The Vice-President's position was based on decisions from this court by which she is bound. These cases make it clear that it is an error for the Tribunal to embark on a claim not referred by The Minister or listed in the Originating application. See the case of **Helena McCardy v John Bull** IndTribApp. No. 20 of 2019 where Isaacs JA noted as follows:

> **"28. Inasmuch as the dispute was referred on, it seems, the basis of unfair dismissal and the OA listed unfair dismissal as the ground for which relief was sought, it was not competent for VP Meeres to entertain a ground other than that of unfair dismissal. See *First Caribbean International Bank (Bahamas) Ltd. v Byron Miller* IndTribApp. No. 40 of 2018; *Island Hotel Company Limited v. John Fox* IndTribApp. No. 54 of 2017. She failed therefore, to consider the appellant's case as it was advanced from its inception".**

12. It follows that the Vice-President was bound to accept the distinction between wrongful Dismissal claims and those based on Unfair Dismissal. That distinction was clearly set out in **Eden Butler v Island Hotel Company Limited SCCivApp No 210 of 2017** which was cited by the Vice-President in her Decision. These cases referred to in my view set out the legal position and I see no need to revisit that position in this judgment.

13. The grounds which warrant consideration in this appeal are grounds 4, 5 and 6 which deal with the salient finding by the Vice-President that the Respondent was denied the opportunity

to mitigate prior to being terminated. It is this issue, in my view, on which the resolution of this appeal turns.

IS THERE A RIGHT TO MITIGATE?

14. It is beyond dispute that in all civilized societies that before any penalty is imposed on an individual it is usual that he be given an opportunity to make representations to the body empowered to impose that penalty. This is the primary reason that Industrial Agreements have taken on such significance and will inevitably contain a procedure for the disciplinary process. It is also trite that in considering the fairness of a dismissal where such procedures have been agreed the employer is required to comply with those procedures. To this extent there is an expectation that those procedures will provide for the employee to be given an opportunity to be heard before he is terminated. The format which that will take will depend on the terms of the existing agreement.

15. In arriving at her decision the Learned Vice-President referred to two cases from this Court. The first was that of **Omar Ferguson v Bahamasair Holdings** SCCivApp No 16 of 2016. In Court below Stephen Isaacs J at first instance found for the plaintiff and stated: "**37. The failure to give the employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of this case a denial of natural justice and therefore unfair...**" This Court (differently constituted) upheld that finding and expanded as follows:

> **"37. The unfairness of the respondent's dismissal is evident from the following circumstances: he was never given an opportunity to make representation to the appellant on the severity of the decision to terminate him having regard to (i) the fact that he was on long-term disability with no expected date for his return to full employment; (ii) the fact that as he was not actively performing duties at LPIA (as he was on long-term disability) the security clearance from the Airport Authority during that period was not a pressing requirement; (iii) the fact that he had not been found guilty of any misconduct inasmuch as the criminal charges against him were discontinued and he was entitled to the benefit of the presumption of innocence; and (iv) the fact that by terminating him the appellant was depriving him of his long term disability benefit when he had not done anything wrong; was 37 years old and his employment opportunities were diminished because of his long-term disability.**
>
> **38. Furthermore, he was dismissed without being accorded the opportunity to appeal to the Airport Authority requesting a reconsideration of its decision to withdraw his security clearance. The respondent was denied the opportunity to make**

representations to the Airport Authority inviting it not to rescind the security clearance whilst he was on long term disability and that the Airport Authority could revisit the issue in the future if the respondent sought to return to work at the airport".

16. It is important to note however, that in **Omar Ferguson's** case there was a complete failure to observe natural Justice. This is seen from paragraph 7 of the Court of Appeal's decision where it was noted that:

> **"7. The respondent did not receive any prior notice that he was likely to be terminated. He was not suspended prior to termination and the appellant conducted no disciplinary proceedings prior to his dismissal. In short, he was given no opportunity to make representations to the appellant as to why, in the circumstances of his case, the termination of his employment consequent on the withdrawal of his Airport Authority issued security clearance was unreasonable and unfair".**

17. The second case relied on by the Vice-President was the case of **Helena McCardy** where Isaacs JA stated:

> **"33. Had the respondent adhered to its disciplinary procedure, the appellant would have been accorded the opportunity to place before those conducting the hearing mitigating factors which ought to have been considered on her behalf, for example, the alcohol was provided at the function by the respondent, the appellant was an exemplary employee, the appellant readily admitted her guilt and apologised for her actions and her length of service."**

18. What is readily evident from the facts of the two cases relied on by the Vice-President is that the employers in those cases failed to follow the disciplinary procedures which were in place. It was that failure which deprived the employees in those two cases of the opportunity to present items of mitigation. In the present case as found by the Vice-President the procedure put in place was fair and the disciplinary proceedings were conducted fairly. The respondent was fully apprised of the allegations against her and was given the opportunity to respond to the same with the assistance of her Union Representative as well as her attorney.

19. The finding by the Vice-President at paragraph 51 of her decision is important. She noted as follows:

> "**51. <u>Did the Applicant have a clear idea of the repercussions of being found culpable of gross misconduct? Yes, adequately so</u>. Although the Industrial Agreement stated plainly that**

> **summary dismissal could be a result of gross misconduct, so could suspension of up to 20 days. However, Ms. Brown was directed to clause 16.5 in letters from BPL, which clearly set out the two possible repercussions of gross misconduct. Further, she was able to take legal advice about termination of her employment before she entered the final meeting with BPL".** [Emphasis added]

20. The evidence against the Respondent was compelling and it is understandable why she did not pursue a claim for wrongful dismissal. It would have been a baseless claim with no chance of success. In my view faced with the evidence of the video recording it was open to the Respondent to accept responsibility for her actions and "throw herself" on the mercy of her employers. Instead she continued to dispute incontrovertible facts. She had every opportunity to make representations as to why she should not be terminated but failed to avail herself of the same.

21. It is to be noted that the Vice-President at paragraph 61 observed as follows:

> **"61. Lastly, Ms. Brown argues in mitigation that she is a long-standing employee of BPL. <u>This is, amongst the other factors submitted in mitigation, the only one the Tribunal believes is a point which is to be considered a mitigating factor</u>. However, usually in unfair dismissal cases there are other legitimate factors (such as a history of stellar performance, promotions, substantial and <u>early honesty in the investigation, or an apology for the wrongdoing)</u> which, when taken together with long-term employment converge in a convincing case that, if heard by the employer, may have reduced the sanction of dismissal."** [Emphasis added]

22. It is clear however, that the only mitigating factor which the Vice-President found to be applicable was the Respondent's long service of 24 years. The Respondent's tenure and record would have been well known to the Appellants and thus they had that knowledge when arriving at their decision to terminate. At paragraph 64 of her decision the Vice-President noted:

> **"Having heard BPL's argument and presentation, I have some doubt the employer would have much been convinced by that point in mitigation. <u>BPL felt that Ms. Brown's status as a long-standing employee made her conduct more egregious as BPL expected someone of her years of experience not to breach its trust and confidence in that manner,</u> as the Respondent submitted. Yet, on balance, I cannot say her plea would have failed".** [Emphasis added]

23. It is difficult to conceive of any reasonable basis on which it can even be inferred that the Appellants would have considered the status of the Respondent as a long standing employee a mitigating factor having regard to the egregious nature of her conduct and her failure to appreciate the gravity of her infractions. In any event as stated earlier I am satisfied that the Respondent had been provided with adequate means and opportunity to raise issues of mitigation. The Appellants complied fully with the disciplinary procedures as they were required to do. The decision to terminate was not too harsh in the circumstances of this case as the established conduct was egregiously inconsistent with behavior expected from the Respondent as a seasoned employee stationed in a public place as a representative of the Appellants.

24. Mr. Obie Ferguson who appeared for the Respondent sought to argue that the Appellants had failed to provide the Respondent with allegations against her and that this was an additional basis for upholding the Vice-President's decision. However, the Vice-President expressly found that the Respondent was made aware of the allegations and was given the opportunity to respond thereto. The Respondent failed to file a Respondent's notice which would have allowed for a challenge to that finding or any other finding by the Vice-President.

25. Rule 20 of the Court of Appeal Rules provides as follows:

> **"20. (1) A respondent who, not having appealed from the decision of the court below, desires to contend on the appeal that the decision of that court should be varied, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect (Form 4 in Appendix A), specifying the grounds of that contention and the precise form of the order which he proposes to ask the court to make, or to make in the event that the appeal be allowed, as the case may be.**
>
> **(2) A respondent who desires to contend on the appeal that the decision of the court below should be affirmed on grounds other than those relied upon by that court shall give notice to that effect specifying the grounds of that contention.**
>
> **(3) Except with the leave of the court, a respondent shall not be entitled on the hearing of the appeal –**
>
> **(a) to contend that the decision of the court below should be varied upon grounds not specified in a notice given under this rule;**
>
> **(b) to apply for any relief not so specified;**

> **(c) to support the decision of the court below upon any grounds not relied upon by that court or specified in such a notice.**
>
> **(4) Any notice given under this rule (in this part referred to as a respondent's notice shall be filed and a copy thereof shall be served on the appellant, and upon all parties to the proceedings in the court below who are directly affected by the contentions of the respondent, and shall be served within fourteen days after the service of the notice of appeal on the respondent".** [Emphasis added]

26. In all of the circumstances of this case I would allow the Appeal on grounds 4, 5 and 6 and set aside the award made by the Vice-President. Having regard to the determination on those grounds there is obviously no need to consider the remaining grounds relied on by the Appellants. As this is a matter emanating from the Tribunal there can be no order as to costs.

The Honourable Mr. Justice Evans, JA

27. I agree

The Honourable Mr. Justice Isaacs, JA

28. I agree also.

The Honourable Madam Justice Bethell, JA