COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCiv App. No. 8 of 2021

B E T W E E N

POLYMERS INTERNATIONAL LIMITED

Appellant

AND

PHILIP HEPBURN

Respondent

BEFORE:	**The Honourable Sir Michael Barnett, President** **The Honourable Mr. Justice Isaacs, JA** **The Honourable Mr. Justice Evans, JA**
APPEARANCES:	**Mr. Raynard Rigby, with Ms. Ruby Gray, Counsel for the Appellant** **Mr. Harvey Tynes, QC, with Ms. Tanisha Tynes-Cambridge, Counsel for the Respondent**
DATES:	**22 September 2021; 5 October 2021; 18 November 2021**

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Civil Appeal – Industrial Tribunal – Employment law – Employment Act s33 - Wrongful Dismissal – Gross Negligence - Summary Dismissal – Test for summary dismissal - Delay in delivering judgment - Whether the delay in delivering the judgment affected the judge's ability to make proper findings of fact on the evidence- whether the decision of the judge was one that no reasonable judge could have made having regard to the evidence.

The appellant employed the respondent from November 1996 until the time of his termination in July of 2009. At the time of the termination, the respondent was in a supervisory position as a Production Assistant. The events that lead to the termination occurred in the early morning hours on 15 June, 2009 wherein a series of events took place at the appellant's plant in which the appellant estimates it suffered financial loss of approximately $340,677.51. The appellant case was that employees on the shift of which the respondent was the supervisor failed to "charge" the PPS in reactor 3610 causing a loss of product, profit and damage to the appellant's equipment. The appellant conducted an investigation into the events of the morning of loss and thereafter terminated the respondent summarily stating that he failed to provide proper and/or adequate

supervision of the employees on duty on his shift and/or failed to ensure that the Company's Standard Operating Procedures were followed and he failed to satisfactorily perform his duties and functions in a manner as could reasonably be expected of a person with his training and experience.

The respondent brought an action against the respondent for wrongful termination. The judge after hearing the parties gave a written judgment for the respondent almost five years after the oral evidence was given. The appellant now appeals on numerous grounds inter alia that, the "Learned Judge erred in law by placing a high burden on the Appellant to prove the Respondent's guilt, when in fact the Appellant need only prove that at the time of the dismissal of the Respondent, it honestly believed that the Respondent was guilty of gross negligence. The Appellant further submits that if the correct burden of proof was applied the Learned Judge would not have ruled that the Respondent was wrongfully terminated", that "the Learned Judge's delay in the rendering of the Ruling (8th December 2020), some almost 5 years from the completion of the trial, which commenced in October 2015, makes the Ruling in its entirety unsafe. It is clear on a read of the Ruling alongside the evidence led at the trial, that the facts and evidence of the various witnesses were no longer fresh in the Learned Judge's mind, occasioned by her failure to consider and to give sufficient weight to crucial facts" and "that the Learned Judge erred in fact and law, because she failed to weigh all of the evidence presented by both sides fairly, and to apply the relevant law correctly. The Appellant further submits that no reasonable trier of fact would have come to the conclusions that the Learned Judge came to, and therefore the decision in its entirety is unsafe and thereby the appeal should be allowed".

The court heard the parties and reserved its decision.

Held: appeal dismissed.

The Court condensed the issues in this appeal into 3 questions. Firstly, did the judge apply the correct test in determining the appellant's right to summarily dismiss respondent. Secondly, having regard to the proper test, is the judge's evaluation of the evidence safe having regard to the almost five years delay between hearing the evidence and the delivery of the judgment? And thirdly, was the decision of the judge one that no reasonable judge could have made having regard to the evidence.

The Court in answering the first question stated that the proper test is that set out in section 33 of the Employment Act and applies whether the issue is being determined by the Supreme Court or the Industrial Tribunal and further stated that the judge did address her mind to the proper test set out in section 33 of the Act and that notwithstanding the references in paragraphs 56, 57 and 59 (which it sets out in the judgment) the judge did in fact apply the correct test. It said that in those paragraphs (56, 57 and 59) the judge was determining whether the conduct complained of did in fact amount to gross negligence within the meaning of section 32. In applying the correct test the judge found that the appellant did not have an honest belief after a reasonable investigation that the respondent was guilty of gross misconduct or gross negligence.

In answering whether the judge's evaluation of the evidence in coming to her conclusion was safe having regard to the almost five years delay between hearing the evidence and the delivery of the judgment, the Court pointed out that the trial of this matter took place on seven days over a five months period, including the Christmas break. The judge took almost 5 years to deliver her judgment after the evidence. Counsel for the respondent described the delay as "unreasonable" and "unbearable. It then stated that notwithstanding the delay, it is clear that the judge reviewed in detail the evidence which was contained in written witness statements, oral testimony which was taken verbatim by a stenographer and summarized by counsel in their submissions. The Court also acknowledged that it too had the benefit of reviewing that material.

It went on to state that although there was an inexcusable delay in delivering the judgment, that delay did not affect the judge's ability to make those findings of fact on the evidence.

Finally in answering the third question the court considered the cases of **Ferguson v Island Hotel Company Limited [2018] 1 BHS J No 148** and **The Ardent [1997] 2 Lloyds L Rep 547** and said that against the background of those cases the trial judge did not consider the actions of the respondent as constituting grossly negligent conduct and that the appellant did not have reasonable grounds for believing that the conduct amounted to gross negligence. The judge adopted the language of Cairns LJ in **Wilson v Racher** that although the incident on June 15, 2009 was regrettable, it was not a "deliberate flouting of the essential contractual conditions."

The Court concluded that it would be wrong as an appellate court to set aside the judge's finding that the respondent's action did not warrant summary dismissal and that he was wrongfully dismissed. The respondent had been employed for more than 13 years, he had no known history of misconduct or negligence and he was not well that evening a fact known to the appellant. The appellant could not reasonably believe that the respondent's conduct amounted to gross negligence which justified terminating him without notice or compensation in lieu of notice. The conduct could not reasonably lead to the conclusion that the respondent intended or was reckless in not complying with the appellant's rules and indifferent to the appellant's interests.

Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22 applied
Bank St. Petersburgh PJSC v Arkhangelsky [2020] EWCA Civ 408 applied
Carnival Leisure Industries v Zervos [1988] BHS J No 139 considered
Cobham v Frett [2001] 1 W.L.R. 1775 considered
Ferguson v Island Hotel Company Limited [2018] 1 BHS J No 148 considered
Island Hotel Company Limited v Sawyer No 88 of 2018 considered
Jupiter General Insurance Co v Shroff [1937] 3 All. E.R. 67 mentioned
Kaamin v Abbey National PLC [2004] ICR 841 applied
Natwest Markets plc v Bilta (UK) Ltd (in liquidation) [2021] EWCA Civ 680 considered
Princess Hotel v Bahamas Hotel Catering and Allied Workers Union [1985] BHS J No 128 considered
Reid v Reid [2008] CCJ 8 (AJ) applied
The Ardent [1997] 2 Lloyds L Rep 547 considered
Wilson v Racher [1974] ICR 428 mentioned
Yearwood v Commissioner of Police [2004] ICR 1660 mentioned

J U D G M E N T

Judgment by the Honourable Sir Michael Barnett P,

1. This is an appeal by Polymers International Limited ("the appellant") against the judgement by Hanna Adderley J delivered on the 8 December, 2020 whereby she awarded Philip Hepburn ("the respondent"), $45,509.07 as damages for wrongful termination arising out of his dismissal from the employment by the appellant by letter dated 3 July, 2009.

2. The appellant asserts that it was entitled to summarily dismiss the respondent on the ground of gross negligence arising out of an incident which occurred at the appellant's plant on 15 June, 2009. The appellant said that the respondent failed to provide proper and /or adequate supervision of employees on duty and failed to ensure that the appellant's Standard Operating Procedures were followed. The judge rejected the appellant's claim that it was entitled to summarily dismiss the Respondent.

The Facts

3. The appellant operates a plant in Grand Bahamas for the manufacture of product for the plastic and synthetic rubber industry. In his witness statement the Chief Operating Officer of the appellant said:

> "**11. The entire manufacturing process is controlled by a computer system assisted by the employees involved in the production process. This computer system is arranged in an area known as the Control Room.**
>
> **12. Outside of the control room is the Reactor Floor Area which is connected to the computer system and where the employees carry out their basis functions as mandated by the SOPs. <u>The Production Assistant and Operators are expected to monitor the Rector levels and record the temperatures displayed on the computer in accordance with the SOPs. In the event something is wrong, the computer indicates a warning by generating an alarm. The alarm notifies the employees by two (2) methods: an audible alarm which can be heard throughout the entire control room and processing area and a visual alarm which displays on the computer screens and is printed on the alarm printer.</u>** [My Emphasis]

13. The employees are responsible for starting the process, measuring and adding the ingredients, testing and analyzing the production and recording the data generated throughout the process to ensure progress in accordance with the SOPs."

4. The respondent began his employment with the appellant in November, 1996. At the time of his termination he was a Production Assistant, which was a supervisory position, and earned a salary of $45,219.20.

5. On the 15 June, 2009 a catastrophic event took place at the appellant plant. Employees on the shift of which the respondent was the supervisor failed to "charge" the PPS in reactor 3610 causing a loss of product, profit and damage to the appellant's equipment. The loss to the appellant as a result of this catastrophic event was said to be in the region of $340,677.51.

6. The appellant's case was that respondent's responsibility as Production Assistant was to supervise the employees on his shift and to monitor the alarm system which would have alerted him that a breach in procedures had occurred and required him to implement corrective procedures which would have mitigated the loss to the appellant. The appellant in the termination letter said that the respondent

> **"failed to provide proper and/or adequate supervision of the employees on duty on your shift and/or failed to ensure that the Company's Standard Operating Procedures were followed and … failed to satisfactorily perform your duties and functions in a manner as could reasonably be expected of a person with your training and experience"**
> **These breaches and/or failures constitute Major or Serious Infractions under the Company's Revised Disciplinary Procedure and further amount to Gross Negligence in accordance with Section 32(g) of the Employment Act and as such constitute grounds for summary dismissal pursuant to section 31 of the Employment Act."**

7. The respondent description of the events that evening may be found in his witness statement. He said:

> **"80. On the 14th June, 2009 I was scheduled to work the night shift, a 12 hour shift which began at 6:00 p.m. on the 14th June, 2009 and ended at 6:00 on the 15th June, 2009.**
>
> **81. I arrived at the plant around 5:30pm.**
>
> **82. I communicated with the Production Assistant on duly who confirmed that all was well during his shift.**

83. By the time the 6:00p.m shift began we had a full complement of staff on duty and a batch of beads was almost completed in the 3610 reactor.

84. By around 11:00 or 11:30 p.m. the process for the new batch began in the 3610 reactor.

85. Everything was going well until around 4:50 or 5:00 a.m.

86. At this time, the batch in 3610 was out of the critical stage and about 5 hours into dwell.

87. I was between the control room and the office and one of the Assistant Operators, Ashford Knowles, informed me that the temperature on the 3610 reactor was out of control.

88. I wondered why I had not heard an alarm.

89. I immediately checked the console and saw that the temperature was between 208 and 210 degrees.

90. I would also see that there was no agitation.

91. I knew that with the temperature that high and no agitation there was nothing that would be done with the batch.

92. I quickly pressed the Emergency cool down button on the console and telephone Craig.

93. We kept trying to get the agitation to start back but it would start then stop.

94. I told Craig that there was a problem and the temperature in 3610 was out of control.

95. Craig told me to try to manually put water in the reactor to cool it.

96. Antoine Forbes one of the Operators, put on a respirator and went outside to try to open the valve.

97. I opened the door of the control room and could smell styrene, one of the chemicals we used.

98. I could also see styrene residue vaporizing and coming out of the reactor manway and into the plant.

99. It looked like the batch was about to blow out of the reactor.

100. At that point I knew we were in danger and it was dangerous for anyone to try to manually work on the reactor. Even then there was no alarm.

101. The control room had walls that were explosion proof.

102. I told everyone to get inside and close the doors.

103. We did everything we could from the console to cool down the batch and try to get the reactor going.

104. Had we not done this there would have been an explosion and everyone at the plant and in the surrounding neighbourhood could have been killed.

105. It would have led to a chain reaction with other things exploding too.

106. The damage that happened on the 15th June, 2009 was not caused by me nor by the men on duty at the plant.

107. The damage happened because the automated audio alarm system did not work that night.

108. In my 13 and a half years at Polymers the alarm system had always worked and I had grown to depend on it."

8. It is significant that the respondent does not deny that as the Production Assistant he was under an obligation to supervise the employees on his shift and to monitor the production process.

9. The respondent was immediately suspended after the incident. The suspension letter said:

"Dear Mr. Hepburn,

INCIDENT DATED 15th JUNE 2009

Further to our meeting held on Tuesday 16th June 2009, the Company has decided to suspend you on full basic pay pending further investigation into the consequential Incident which occurred on 15th June 2009.

Your suspension will be from today's date and continue until our next meeting to be held on Friday June 26th at 9.30am, in the Administration Office of Polymers International Limited - this meeting requires your attendance. At this meeting you will be advised of what further action is necessary.

Between now and the 26th June, if you feel you wish to add any further information which will assist us in our investigations, please feel free to contact me and we will ensure we provide you every opportunity to do so.

In the meantime if you have any further questions please feel free to contact me."

10. The appellant conducted its own investigation into the events that evening. Interviews were conducted by the Chief Operating Officer and Human Resources Manager with the respondent all employees on the shift. Following that investigation it made the decision to summarily terminate the respondent. In its termination letter dated the 3 July, 2009 it said:

"Dear Mr. Hepburn,

It is my unfortunate duty to inform you that your employment at Polymers International Limited is terminated effective immediately. You are required return to the company by no later than July 7, 2009 any materials, documents, real property, equipment, badges, credentials or any other unnamed thing that you have in your possession whether issued to you or received by you by whatever means. All personal effects in your locker will be retrieved and delivered to you by courier.

The decision to terminate your employment follows an extensive investigation into an incident which occurred in the early hours of the 15th June 2009 while you were on duty as the Production Assistant. As a result of the said investigation it was determined that you failed to provide proper and/or adequate supervision of the employees on duty on your shift and/or failed to ensure that the Company's Standard Operating Procedures were followed and you failed to satisfactorily perform your duties and functions in a manner as could reasonably be expected of a person with your training and experience.

These breaches and/or failures constitute Major or Serious Infractions under the Company's Revised Disciplinary Procedure and further amount to Gross Negligence in accordance with Section 32(g) of the Employment Act and as such constitute grounds for summary dismissal pursuant to section 31 of the Employment Act."

11. The respondent brought an action against the appellant for damages for wrongful termination.

12. In its pleaded defence the appellant stated:

> **"6. The Plaintiff was terminated for breach of his employment contract pursuant to the Defendant's Disciplinary Policy on the grounds that on the evening of the 15th June 2009 he failed to perform or poorly performed his duties as a supervisor. Further and/or alternatively, the Plaintiff was grossly negligent or alternatively, grossly incompetent in that he failed to properly supervise the employees under his direct supervision and the manufacturing process using any or any reasonable or proper skill and care which resulted in a catastrophic event which caused the Defendant to suffer $270,677.51 in damage to its very expensive equipment and approximately $70,000.00 in lost profits.**
>
> **7. Save that the Plaintiff's employment was terminated by letter dated the 3 July 2009 Paragraph 4 of the Statement of Claim is denied. The Defendant avers that the Plaintiff was summarily dismissed in accordance with the Defendant's Disciplinary Policy or alternatively, Section 31 of the Employment Act for the reasons set forth in Paragraph 33 above after a reasonable and thorough investigation and therefore the Plaintiff was not entitled to any notice or compensation as alleged or at all other than his basic pay for the days worked up to the date of termination and any accrued but unused vacation time for which the Plaintiff was paid $4,379.12 on or about the 8 day of July 2009."**

13. A trial of this dispute was heard over seven separate days. Evidence was first taken on the 22 October, 2015 more than 6 years after the incident. It continued on 16, 17, 18 November, 2015, 10 December, 2015 and 22 January, 2016 and 12 February, 2016. Not less than nine witnesses gave evidence. The trial judge reserved her decision.

14. On the 8 December, 2020, almost five years after the last evidence was taken on the 12 February, 2016, the judge delivered her judgement.

15. Her material findings which are relevant to this appeal are as follows:

> **"56. The Defendant has failed to satisfy me that the Plaintiff failed to provide adequate and/or proper supervision of the employees on that shift that night as the evidence shows that the Plaintiff's supervision at best was limited in his duties/responsibilities as described by the Plaintiff and not the duties/responsibilities currently attributed to him by the Defendant.**

57. Moreover, the Defendant's contention in the termination letter that the Plaintiff failed to ensure that the Company's Standard Operating Procedures were followed I find have not been substantiated as the document found at Tab 1, second page in the Defendant's Bundle filed February 10, 2015 makes continuous reference to the duties and roles of the Operator and Assistant Operator during the DWELL stage and not the Production Assistant. Further, throughout the course of the trial, the use of the words Standard Operating Procedures were used interchangeably as sometimes being an oral policy/directive known to all individuals but not in writing and also referred to as a written manual. However, while the Plaintiff states that he did not recall the document shown at the second page at Tab 1 of the Defendant's Bundle of Documents to which the Defendant states came from the Standard Operating Procedure Manual, he agrees that the procedure as outlined in the written document, is the same as what he knew the duties of the Operators and Assistant Operators were during the DWELL stage. To my mind, nothing turns on whether he saw the written document or not as the procedure was the same throughout the process. Therefore, the Defendant has not satisfied me, that on the night of the incident the Plaintiff failed to ensure that the Operator and Assistant Operator followed that one page document to which the Defendant asserts forms a part of its written Standard Operating Procedure Manual. Additionally, while the document at Tab 4 of the Defendant's Bundle of Documents purporting to be the job description of the Production Assistant was neither signed nor dated by the Plaintiff to 'determine if this document was in his purview during his employment, if I was to consider the contents of it as a means to ground the Defendant's justification, I cannot. Upon my reading of the document, I fail to see any of the descriptors as identified by the evidence of Greg Ebelhar and while the portion of the document that speaks to job function states that the list is not all-inclusive I still do not find any express requirement by the Defendant to perform the functions to which the Plaintiff is now alleged of not performing.

58. Additionally, I find that the complaint as found in the termination letter to the Plaintiff in relation to his failure to satisfactorily perform his duties and functions in a manner as could reasonably be expected of a person with his training and experience was not established by way of any evidence Assistant that was before the Court. In finding that the Plaintiff's duties

as Production Assistant was limited to a "problem solver" during the manufacturing process, it is difficult to conclude without any supporting evidence as to what could have been reasonably expected of the Plaintiff to have done during the early hours of June 15, 2009. In fact, I believe that the quick thinking and quick actions of the plaintiff saved that section of the plant and the employees there that morning and that the plaintiff risked his life in so doing.

59. Given the evidence that it is before the Court I cannot agree with the Defendant's assertion that the sum of the inactions and actions above amounted to gross negligence as pleaded or that it amounted to a breach of the fundamental conditions of the employment contract. More so, I use the language of Cairns LJ in Wilson v Racher (supra) that although the incident on June 15, 2009 was regrettable, I do not find that the actions of the Plaintiff on that night was such to show a "deliberate flouting of the essential contractual conditions"."

16. The judge then dealt with the investigation carried out by the Appellant into the incident. She then held:

"72. I have reviewed the evidence adduced and the relevant case law in support of the Defendant to which Counsel for the Defendant submits supports the Defendant's contention that the Defendant conducted a reasonable investigation of the events (i.e. the alleged misconduct) that transpired on June 15, 2009 to which the Defendant held an honest and reasonable belief that the Plaintiff had committed the misconduct in question at the time of the dismissal. However, I find that the Defendant's investigation was not reasonable given the circumstances of the nature of the Defendant business and the evidence the Defendant adduced.

73. I am not satisfied on the evidence that is before the Court in support of the Defendant that at any point during its investigation the allegations advanced by the Defendant were ever put to him and that he was afforded an opportunity to respond. The evidence as to the Plaintiff's suspension was as to conduct an investigation as to the "consequential incident" however, there is no evidence that during the investigation he was advised of the nature of the investigation and the complaint to which the Defendant alleged in relation to him so that he would be able to answer the complaint before any decision was made. More so, while the suspension letters included a proviso

that if the Plaintiff wished to add any further information which could have assisted in the Defendant's investigations to my mind that does not give rise to advising the Plaintiff of the nature of the complaints against him and affording him the opportunity to respond to the specific complaints before a decision was made.

74. Further, as highlighted by the Court of Appeal in Frederick Ferguson v Island Hotel Company Limited IndTribApp. No. 249 of 2016 at paragraphs 38 and 39 the Court of Appeal in finding that the Respondent did not hold a reasonable investigation relied on two English cases in support. In Marex Financial Ltd v Creative Finance Ltd [2014] 1 All E.R. (comm) 122 at paragraph 67 said "gross negligence means something different than negligence. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts is one degree." Also in Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22 the Court of Appeal said "it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employers policies constitutes such grave act of misconduct as to justify summary dismissal."

75. In light of the above, I find that the evidence before the Court does not establish that the Defendant held an honest and reasonable belief that the Plaintiff was guilty of "gross negligence" or the alleged misconduct and that it formed that view after a reasonable investigation into the facts."

17. The judge then found that the Respondent was wrongfully dismissed and awarded the sum of $45,509.07 which would be monies that he would receive pursuant to section 29 of the Employment Act.

18. The Notice of Appeal contains 25 grounds of appeal. However, in his submissions on behalf of the Appellant counsel helpfully summarized them as follows:

"10. The Appellant's submissions in summary in respect of the Appeal are:

(i) The Learned Judge erred in law by placing a high burden on the Appellant to prove the Respondent's guilt, when in fact the Appellant need only prove that at the time of the dismissal of the Respondent, it honestly believed that the Respondent was guilty of gross negligence. The Appellant further submits that if the

correct burden of proof was applied the Learned Judge would not have ruled that the Respondent was wrongfully terminated.

(ii) It is submitted by the Appellant that the Learned Judge fell into serious error of law and fact by failing to give all due consideration that a single act of misconduct or gross negligence, in an appropriate case, is sufficient to warrant summary dismissal and that in the prevailing circumstances, the fact that the Respondent was asleep and his concurrent failure to supervise the manufacturing process and his fellow employees were serious, willful, and obvious acts of misconduct to justify his summary dismissal.

(iii) It is submitted that the Learned Judge's delay in the rendering of the Ruling (8th December 2020), some almost 5 years from the completion of the trial, which commenced in October 2015, makes the Ruling in its entirety unsafe. It is clear on a read of the Ruling alongside the evidence led at the trial, that the facts and evidence of the various witnesses were no longer fresh in the Learned Judge's mind, occasioned by her failure to consider and to give sufficient weight to crucial facts (eg. the fact that the Respondent was asleep on the night of the incident).

(iv) The Appellant submits that there was a direct causal link between the delay and the erroneous findings of fact by the Learned Judge and her finding that the Plaintiff was a credible witness was egregious in the balance.

(v) The Learned Judge committed a fundamental error in law by concluding that the Appellant did not conduct a reasonable investigation of the incident, when the investigation spanned from 16th June, 2009 to 3rd July, 2009 [see pp. 84 & 88. ROC, Vol I]. The Appellant further submits that it is clear from the evidence provided that the Respondent was given ample opportunities to be heard and knew the complaint and the purpose of the investigation.

(vi) It is submitted by the Appellant that the Learned Judge erred in fact and law, because she failed to weigh all of the evidence presented by both sides fairly, and to apply the relevant law correctly. The Appellant further submits that no reasonable trier of fact would have come to the conclusions that the Learned Judge came to, and therefore the decision in its entirety is unsafe and thereby the appeal should be allowed."

19. In my judgment this appeal turns on three grounds;

Firstly, did the judge apply the correct test in determining the appellant's right to summarily dismiss respondent.

Secondly, having regard to the proper test, is the judge's evaluation of the evidence safe having regard to the almost five years delay between hearing the evidence and the delivery of the judgment?

Thirdly, was the decision of the judge one that no reasonable judge could have made having regard to the evidence.

The Correct Test

20. Section 33 of the Employment Act provides:

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

21. Counsel for the respondent submits that this test is not applicable where the issue is being determined by the Supreme Court and not by the Industrial Tribunal. The section specifically refers to "for the purposes of any proceedings before the Tribunal". Counsel submits that as it does not say for the purposes of any proceedings before a "court or the Tribunal", section 33 does not apply to proceedings before the Supreme Court. I doubt that was what was intended by Parliament and it may be inelegant drafting. However, the test set out in section 33 was the test at common law and the test before the courts prior to the coming into force of the Employment Act in 2002.

22. In **Princess Hotel v Bahamas Hotel Catering and Allied Workers Union [1985] BHS J No 128** the Court of Appeal in describing the test for summary dismissal on the ground of theft or dishonesty said:

> **"All that was required of the appellant was that it had reasonable grounds based on facts known to it at the time of the dismissals, which would create in the appellant's mind a reasonable belief that the misappropriation of the appellant's funds by the respective employees was being or had been committed".**

23. Later in **Carnival Leisure Industries v Zervos [1988] BHS J No 139 this court referring to Princess Hotel v BHCAWU** said;

> **"The latter case also reaffirmed the proposition that if the Tribunal was saying that it required proof by the appellant that the respondent had actually committed the misconduct complained of, the Tribunal would indeed be applying a wrong test in law. All that was required to be established was that the appellant had reasonable grounds, based on the facts known to it at the time of the dismissal, which would create in the mind of the appellant a reasonable belief that the misconduct complained of had been committed by the respondent.**

24. In my judgment the proper is that set out in section 33 and this applies whether the issue is being determined by the Supreme Court or the Industrial Tribunal.

Did the judge apply the correct test?

25. At paragraph 7 of her judgement the judge said:

> **"7. In order for the Court to make a determination as to whether the Defendant was entitled on July 3, 2009 to summarily dismiss the Plaintiff pursuant to the Defendant Company's Disciplinary Procedures or alternatively Section 31 of the Act or alternatively his contract of employment for failure to properly supervise the employees under his direct supervision and the manufacturing process on June 15, 2009, the Defendant must prove that it 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 it had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted."**

26. Later at paragraph 12 the judge identified the issues she was considering. She said:

> **"12. The Plaintiff's claim is for wrongful termination and as such the issues to be determined by this Court are:-**
>
> > **a. whether the Defendant was entitled on July 3, 2009 to summarily dismiss the Plaintiff pursuant to the Defendant Company's Disciplinary Procedures or alternatively Section 31 of the Act or alternatively his contract of employment for failure to properly supervise the employees under his direct supervision and the manufacturing process on June 15, 2009;**
> >
> > **b. whether the Defendant 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 it had conducted a reasonable**

> **investigation of such misconduct except where such an investigation was otherwise unwarranted."**

27. It is clear that in (b) the judge had in mind section 33 of the Employment Act and the test described in that section.

28. The judge considered the evidence.

29. Then at paragraph 56 of her the judgment the trial judge said:

> **"56. The Defendant has failed to satisfy me that the Plaintiff failed to provide adequate and/or proper supervision of the employees on that shift that night as the evidence shows that the Plaintiff's supervision at best was limited in his duties/responsibilities as described by the Plaintiff and not the duties/responsibilities currently attributed to him by the Defendant."**

30. Later at paragraph 57 she said:

> **"57. …Therefore, the Defendant has not satisfied me that on the night of the incident the Plaintiff failed to endure that the Operator and Assistant Operator followed that one page document to which the Defendant asserts forms part of its written Standard Operating Procedure Manual."**

31. Ex facie, this appears to be the wrong test. It makes no reference to the honest and reasonable belief of the appellant as employer that the respondent was guilty of gross negligence and in breach of the appellant's Standard Operation Procedure Manual.

32. Applying that test the judge concluded at paragraph 59

> **"59. Given the evidence that it is before the Court I cannot agree with the Defendant's assertion that the sum of the inactions and actions above amounted to gross negligence as pleaded or that it amounted to a breach of the fundamental conditions of the employment contract. More so, I use the language of Cairns LJ in *Wilson v Racher* (supra) that although the incident on June 15, 2009 was regrettable, I do not find that the actions of the Plaintiff on the night was such to show a "deliberate flouting of the essential contractual conditions."**

33. Again it makes no reference to the appellant's honest belief on reasonable grounds that the respondent's action amounted to gross negligence.

34. If the matter stopped there it is arguable that this ground of appeal must succeed. However, in my judgment those paragraphs must be considered in the context of the entire judgment.

35. The judge continues her judgment by considering the issue of a "reasonable investigation". At paragraphs 60 and 61 she said:

> **"60. However, if I am incorrect in my finding above, I find that the Defendant did not conduct a reasonable investigation of such misconduct to justify summarily dismissing the Plaintiff.**
>
> **61. Section 33 of the Act places an obligation on the Employer to prove that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted."**

36. This clearly suggests that she is addressing her mind to the proper test set out in section 33 of the Act. After considering the evidence of the investigation she concludes;

> **"72. I have reviewed the evidence adduced and the relevant case law in support of the Defendant to which Counsel for the Defendant submits supports the Defendant's contention that the Defendant conducted a reasonable investigation of the events (i.e. the alleged misconduct) that transpired on June 15, 2009 to which the Defendant held an honest and reasonable belief that the Plaintiff had committed the misconduct in question at the time of the dismissal. However, I find that the Defendant's investigation was not reasonable given the circumstances of the nature of the Defendant business and the evidence the Defendant adduced.**
>
> **73. I am not satisfied on the evidence that is before the Court in support of the Defendant that at any point during its investigation the allegations advanced by the Defendant were ever put to him and that he was afforded an opportunity to respond. The evidence as to the Plaintiff's suspension was as to conduct an investigation as to the "consequential incident" however, there is no evidence that during the investigation he was advised of the nature of the investigation and the complaint to which the Defendant alleged in relation to him so that he would be able to answer the complaint before any decision was made. More so, while the suspension letters included a proviso that if the Plaintiff wished to add any further information which could have assisted in the Defendant's investigations to my mind that does not give rise to advising the Plaintiff of the nature of the complaints against him and affording him the opportunity**

to respond to the specific complaints before a decision was made.

74. Further, as highlighted by the Court of Appeal in Frederick Ferguson v Island Hotel Company Limited IndTribApp. No. 249 of 2016 at paragraphs 38 and 39 the Court of Appeal in finding that the Respondent did not hold a reasonable investigation relied on two English cases in support. In Marex Financial Ltd v Creative Finance Ltd [2014] 1 All E.R. (comm) 122 at paragraph 67 said "gross negligence means something different than negligence. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts is one degree." Also in Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22 the Court of Appeal said "it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employers policies constitutes such grave act of misconduct as to justify summary dismissal."

75. In light of the above, I find that the evidence before the Court does not establish that the Defendant held an honest and reasonable belief that the Plaintiff was guilty of "gross negligence" or the alleged misconduct and that it formed that view after a reasonable investigation into the facts."

37. The inference is that notwithstanding the references to wrong test earlier, the judge in coming to her final decision that the respondent was wrongfully dismissed did in fact apply the correct test set out in section 33 of the Act.

38. In my judgment, notwithstanding the references in paragraphs 56, 57 and 59 set out earlier the judge did in fact apply the correct test. In my judgment in those paragraphs the judge was determining whether the conduct complained of did in fact amount to gross negligence within the meaning of section 32. In applying the correct test the judge found that the appellant did not have an honest belief after a reasonable investigation that the respondent was guilty of gross misconduct or gross negligence.

39. This brings us to the second question. That is whether the judge's evaluation of the evidence in coming to that conclusion safe having regard to the almost five years delay between hearing the evidence and the delivery of the judgment?

40. As pointed out earlier the trial of this matter took place on seven days over a five months period, including the Christmas break. The judge took almost 5 years to deliver her judgment after the evidence. Counsel for the respondent described the delay as "unreasonable" and "unbearable". The judge herself began her judgment with the statement;

> **"I must apologize profuse for the deal in the delivery of this judgment".**

41. There is no apparent excuse or explanation for this delay.

42. As far back as 2008 in **Reid v Reid [2008] CCJ 8 (AJ),** Justice Adrian Saunders, the now President of the Caribbean Court of Justice, said:

> **"as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."**

43. As recently as last year in **Bank St. Petersburgh PJSC v Arkhangelsky [2020] EWCA Civ 408** Sir Geoffrey Vos C said:

> **"The unwritten rule applicable to both the Business and Property Courts and the Court of Appeal is that judgments should be delivered within 3 months of the hearing"**

44. He continued:

> **"I should conclude on this point by reiterating that the "3-month" general rule should be adhered to even in long and complex cases. Justice delayed is justice denied. The parties to civil, and particularly commercial, litigation are entitled to receive their judgments within a reasonably short period of time. That period should not be longer than 3 months. As has been repeatedly said, any other approach will lead to a loss of public and business confidence in our justice system."**

45. That a judge should take almost 5 years to deliver a judgment is wholly unacceptable. It is a clear breach of a litigant's right to a fair trial within a reasonable time. It is culpable and borders on judicial misconduct.

<u>How should we treat this delay?</u>

46. In **Yearwood v Commissioner of Police [2004] ICR 1660** the English Employment Appeal Tribunal after referring to **Kaamin v Abbey National PLC [2004] ICR 841** said:

> **"In all courts within England and Wales, the obligation is upon judicial officers to produce judgments within three months of the oral hearing, or of the last in a sequence of later submissions. Slightly greater flexibility is given to employment tribunals and the Employment Appeal Tribunal, since they are tripartite judicial bodies, dependent on part-time lay members and sometimes part-time tribunal chairmen and appeal tribunal**

judges. The long stop is three and a half months, beyond which there is delay and it is culpable: see [2004] ICR 841, 847, paras 8 and 9.

63 The principle of law to be obtained was cited by Burton J as follows, at pp 849 and 851:

"13. The state has its duty under article 6 in respect of both a fair trial and there being (and concluding by a judgment) a hearing within a reasonable time. But where an unsuccessful party brings an appeal based upon delay in the delivery of the judgment, the question is whether the party who lost has been deprived of a fair trial by virtue of that delay in judgment-i e such party must show that the result was unsafe as a consequence of the delay (and similarly the successful party will not be deprived of its success, not-withstanding a delay, unless the decision in its favour was unsafe as a result of the delay)."

"15.1. The appellant will need to invite the appellate court to examine the delayed judgment for any sign of error due to faulty recollection. The party impugn-ing a judgment will need to show a material error or omission (if only one, then it would need to be the more significant) or a series of material errors or omissions. Material in this context does not mean material in the sense of an independent ground of appeal i e necessarily central to the decision and indicating an error of law or such error or errors of fact as to amount to perversity, but material in the sense that, taken separately or together, it or they show a real risk that there has been a failure of recollection, so as to establish that the decision is unsafe by virtue of the delay.

"15.2. Such causation is essential. The appeal must not be allowed, just because of the judgment being a delayed one, to degenerate into an impermissible appeal based upon an alleged error or errors of fact, as a result of what Lord Scott called 'trawling' through the judgment. It plainly should not open the door, of itself, to allowing a second bite at the cherry, or certainly to a remission to the employment tribunal for the purpose of allowing a better job to be done by the losing party, second time around. We are satisfied, notwithstanding Lord Scott's use of the words 'probably or even possibly', that, given the consequence for the parties of setting aside the judgment, the appeal tribunal must be satisfied on the balance of probabilities that the unsafeness is due to the delay. If the unsafeness of the decision due to the delay is established, then

that is an independent ground of appeal, and the delay will have infected and rendered unsafe one or more of the bases in law for the tribunal's decision. The error or errors must be due to the delay, and cast doubt upon the decision or part of the decision."

47. More recently, in **Natwest Markets plc v Bilta (UK) Ltd (in liquidation) [2021] EWCA Civ 680** after referring to Sir Geoffrey Vos' judgment in **Bank St PetersburghvPJSC v Arkhangelsky** (op cit) said:

> **"45.We respectfully agree. A delay of the magnitude in the present case, whatever the ex-planation may be, is plainly inexcusable. It should not have happened and should not have been allowed to happen, particularly in a case where there were allegations of dishonesty, and the reputations and future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning".** [Emphasis added]

48. Counsel for the appellant attacks the judge's treatment of the evidence. That attack can be found in paragraphs 82, 86 and 90 of his written submissions. I set them out in full. He said:

> **"1. The failings by the Leaned Judge was egregious in her assessment of the evidence adduced at the trial. The following are just some of the glaring examples:**
>
> **(i) The Learned Judge failed to acknowledge the gravity of the Respondent's actions and inactions and failed to weigh them carefully in deciding whether the Appellant was justified in terminating the Respondent.**
>
> **The Appellant submits that the Judge failed to acknowledge or even consider that there was compelling and unchallenged evidence that the Respondent was not alert and vigilant during the entirety of the shift, and therefore he could not properly perform his supervisory duties. In the Transcript at *page 621 line 1*, when Mr. Antoine Forbes was being cross-examined, he was asked "*In your statement you say that the Plaintiff was sleeping during that shift. Did you tell***

them, Craig and Greg, that the Defendant was sleeping during that shift? **"And Mr. Forbes answered in the affirmative. Also, on page *626 line 8* Mr. Forbes answered to the question asked of him that "*No. The only thing I can say, what I said, the only thing I had to say was that he was snoring."* Also, Mr. Forbes maintained his story through his cross examination and at page *629 line 14* of the Transcripts when he was asked how long the Respondent was sleeping, he answered "*I can say an hour. I can say two hours because at that point in time I can almost say, it was almost in certainty, everyone in the control room was sleeping."***

Also, the Respondent makes it abundantly clear that he was not always vigilant and alert throughout the shift because on *page 511 line 11* of the Transcripts when he was asked who assisted Mr. Baldwin Smith in charging the PPS, he answered at line 12 and stated that "I assume the assistant operator or utility guy." At this point in the night it is possible that the Respondent may have dosed off. As it was stated on page 627 line 32 by Mr. Antoine Forbes while he was being cross examined "*No. That's what happened. As I was telling you, as you said that he was up and alert all day, I was telling you at the time of the charging of the catalyst, Mr. Hepburn had his head down on the side of me on my console…"* Also, on *page 640 line 30* Mr. Forbes stated when being re-examined, that he could not say how long the Respondent was asleep for but that he was in and out of sleep during the shift.

(ii) The Judge also erred in law and fact because she failed to sufficiently consider the fact that the Respondent as a supervisor permitted one of the key persons in the manufacturing process to leave the plant close to a critical time in the manufacturing process and allowed a trainee to take the place and to charge the PPS. The Appellant submits that by permitting Mr. Knowles to leave the plant close to the time he was supposed to perform the crucial task of charging the reactor and permitting a trainee to fill in for him without supervising the trainee or ensuring that he was supervised amounted to a breach not only of his supervisory

duties but was clearly against the fundamental interest of the employer.

On page 365 line 2 of the Transcripts, the Respondent was asked "*So you let Mr. Knowles go home?"* And the Respondent answered in the affirmative. And at line 11 of the aforesaid page the Respondent was asked "*And when Mr. Knowles left, you are saying that the utility operator and the operator were responsible, therefore, for charging the reactors?"* He answered and said: *"That is something we do, yes."*

At page 366 line 9 of the Transcripts the Respondent was asked during cross examination *"Did you explain to Mr. Mackey what he was doing in light of him taking over for Mr. Knowles that night?"* At line 11 the Respondent answered and said *"I called Mr. Mackey upstairs. I said to Mackey, Ash had to step out to get some food. I need you to work with Baldwin Smith until Ash returns."*

On page 366 line 2 of the Transcripts when the Respondent was asked "*Did you supervise what they were doing?"* And the Respondent replied at line 3 that *"No, I didn't. I didn't have to."* Additionally, at page 371 when the Respondent was asked what part of the manufacturing process is the most critical, he answered at line 12 and stated that "*The most important part, from my experience, is when you charge the PPS."*

Also, on page 375 from line 1 through 18 of the Transcripts, during the cross examination of the Respondent, it is made clear that Mackey who was allowed to act as a substitute for the Assistant Operator had only occupied the position for three months and did not have that much experience of the manufacturing process.

Also, at page 785 line 2 of the Transcripts, Mr. Ebelhar stated while being re-examined that *"[Mackey] was not used to [charging the PPS] he was being trained as a utility operator. And the utility operator, as part of their training is to backup the assistant operators whenever somebody leaves the Plant. But he just started on that job, you know, a couple months before. He was not fully trained."*

The aforesaid evidence makes it clear that the Respondent allowed the Assistant Operator to leave during a crucial time in the manufacturing process, and he permitted a trainee to fill in for the Assistant Operator without giving him proper instructions or supervising him.

(iii) The Appellant submits that the Learned Judge erred in facts and law when she failed to acknowledge the Respondent has a general duty to supervise the employees under him and to supervise the manufacturing process, but instead held that his supervisory duties were limited.

On page 21 lines 56 and 57 of the Learned Judge's Ruling she stated that "*56. The Defendant has failed to satisfy me that the Plaintiff failed to provide adequate and/or proper supervision of the employee on that shift that night as the evidence shows that the Plaintiff's supervision at best was limited in his duties/responsibilities as described by the Plaintiff and not the duties/responsibilities currently attributed to him by the Defendant."*

The Appellant submits that the evidence clearly supports that the Respondent in his capacity as Production Assistant had a duty to supervise the employees under him and to supervise the entire manufacturing process to ensure that it ran smoothly.

On page 352 line 16 of the Transcripts the Respondent was asked "*Now at Paragraph of your witness statement this is what you say. 'I understand the role of the Production Assistant to be to oversee the manufacturing process of the Plant, making sure everything went smoothly. And if a problem arose, to deal with it… do you stand by this statement?"* And the Respondent answered in the affirmative.

Also, it was stated by the Respondent on page 454 line 24 of the Transcripts that *"I sit down at the table. There is a table in the back there and basically, I oversee the guys and what they do from there."* It is clear from the aforesaid that the Respondent knew and acknowledged that his duty was to supervise (contrary to the findings of the Learned Judge) the employees under him while they performed their respective

tasks within the plant. The Respondent's use of the word "oversee" is compelling.

Also, on page 487 line 11 of the Transcripts, Mr. Tavaro Hanna was asked "*Your understanding is that the PA's would supervise the shift, correct?"* And Mr. Hanna at line 13 answered in the affirmative.

Also, on page 544 line 9 of the Transcripts it was stated by Ms. Diane Morgan *that "[Production Assistants] main focus was to make sure that the process was carried out properly…".*

The Appellant submits that the Respondent's duty to supervise was not limited but quite broad as he had to supervise all of the employees under him and the entire manufacturing process.

The Leaned Judge's finding that the Respondent did not have to go "foot to foot" behind the staff (see paragraph 51 of the Ruling) fails to acknowledge that the Respondent was the sole supervisor on the Shift with responsibilities to his junior staff members. To take the Judge's conclusion to its logical point means that the Respondent had no part to play and no role in the manufacturing process.

The Judge's finding at paragraph 56 of the Ruling is unsustainable on the totality of the evidence adduced before the Court and further undermines the integrity of the Ruling as she completely failed to assess what "supervision" was to be provided by the Respondent. Even assuming that the Respondent's duty was to provide limited supervision as she found (which is not conceded) the Learned Judge did not assess the evidence to determine whether the Respondent provided and carried out the "limited supervision" on the night in question.

See also the matters raised below of the Judge's errors which further compounds the delay and its causal connection to the erroneous findings and wrong application of the law."

49. And later:

"86. The Appellant submits that the Learned Judge erred in fact in several ways and they are (in part):

a) **The Learned judge failed to acknowledge that the position of Production Supervisor was a supervisory position, and the person who occupies this position is tasked with the responsibility of not only overseeing the manufacturing process but also to ensure that the other employees perform their production functions in accordance with the Standard Operating Procedures (see above at paragraph 80(iii)).**

a) **The Learned Judge erred in fact as she held that that "the only way the error or omission could have been detected that night was if the Plaintiff physically verified each step taken by the responsible employees as they took them or an examination of the batch sheets every time sample was recorded." The Appellant submits that this finding is incorrect, as the error could have been detected early on or even prevented if the Respondent was actually supervising the manufacturing process and ensuring that the other employees properly performed their production functions, or payed attention to the visual console.**

The Appellant further submits that had the Respondent been vigilant and alert and checking the console or ensuring that his team members were checking the console (as they should be) they would have seen visual warnings which would have indicated that something was wrong with the batch, and he would have had adequate time to either cure the defect or dump the batch before any damage could have occurred.

On page 662 line 27 of the Transcripts, Mr. Simms explains that "… You would have to look at the alarm console to see what the alarm is…" Therefore, it is evident that from the aforesaid the visual alarm was functioning on the night the incident occurred, and it informs the person reading the console of the exact problem that is affecting the batch. It is clear that had the operators sitting at the console been watching or were properly supervised by the Respondent and reminded of their role to monitor the console, the visual alarm would have been seen, and the incident avoided.

After the site visit, the Learned Judge took further evidence from the Respondent and during cross examination he confirmed that the visual warning on the console monitor was

working and then changed his answer to "*I assume it was working*" (see page 754 line 18 to 30). More striking, the Respondent confirmed that he did not check the monitors at all during the night shift! (see page 755 line 3)

b) **The Learned Judge erred in fact by failing to acknowledge and consider that the Respondent fell asleep on the night in question. As this was clear from the evidence adduced at the trial (see Transcripts at page 614 line 29 and page 621 line 9).**

The Appellant submits that the Respondent falling asleep while working his shift on the night in question was an inference that was also capable of being made when the Respondent kept saying that he was not feeling well.

Having fallen asleep it was impossible for the Respondent to perform his supervisory duties which either led to, caused or contributed to the incident.

c) **The Learned Judge fell into error as she acknowledged (see paragraph 53 of the Ruling) that there was clear evidence that the PPS was either omitted from the manufacturing process or not properly applied. She found that "<u>on a balance of probabilities, it is reasonable to conclude that the incident was caused by the failure of either Baldwin Smith or Eustice Lettice (aka Mackey) to add the PPS to the batch to charge the reactor</u>". This finding ought to lead to an inference that the Respondent failed in the discharge of his supervisory duties when he delegated the responsibility to Eustice Lettice.**
The Appellant submits it was not open to the Judge to determine who was at fault but rather to determine whether the Appellant had an honest belief that the Respondent failed to discharge his duty on the night in question.

The Learned Judge erred in fact when she held that the Respondent did not have knowledge of the allegations made against him and was not given an opportunity to respond to these allegations. The Appellant submits that the Respondent had knowledge of the allegations made against him, as he was interviewed during the Appellant's investigation of the incident,

and he was advised by his suspension letters to share any further information about the incident. The Appellant further submits that the fact that the Respondent was interviewed during the investigation on multiple occasions (see Witness of Greg Ebelhar) gave him an opportunity to be heard, and infers that he was advised that the investigation was about his conduct on the night of the incident.

50. And then:

> **"90. The Appellant submits that the Learned Judge further erred in fact and law when she held that the Respondent and the Respondent's witnesses are more credible than the Appellant's witnesses. On page 20 line 53 of the Learned Judge's Ruling she stated**
>
> **"I have read the Witness Statements filed herein and considered the totality of the viva voce evidence and the demeanor of the witnesses as they have evidence and I prefer the evidence of the Plaintiff and the Plaintiff's witnesses as I found them to be more credible than the Defendant's witnesses."**
>
> **The Appellant submits that the Learned Judge erred in coming to such a conclusion because based on the facts adduced it is clear that the Respondent was not a credible witness as there were inconsistencies throughout his evidence.**
> **On page 388 of the Transcripts the Respondent acknowledged the existence of the Standard Operation Procedures. On page 388 line 29 of the Transcript the Respondent was asked *"[Mr. Gibson] wasn't following the standard procedures, correct?"* To which the Respondent replied at line 31 "*What happened—yes."* At page 88 line 32 the Respondent was asked *"He didn't follow the standard procedures?"* To which the Respondent replied *"He didn't follow the system that we had in place with acknowledgement."* However, a little further in his cross-examination the Respondent denied ever seeing the Standard Operation Procedures. On page 391 line 32 of the Transcripts the Respondent stated *"I've never seen the standard operating procedure."* And on page 392 line 11 of the Transcripts when the Respondent was *asked "you knew [the Standard Operation Procedure] existed, didn't you?"* He answered, *"No I didn't know it existed."* However, the Respondent again changed his story,**

> **this is evident because on page 392 line 21 when he was asked "*Did you ensure that they read the standard operating procedures?"* The Respondent responded and stated "A copy of this was in the control room. All of the documents was in the control room."**
> **On page 399 of the Transcripts the Respondent stated that there was a verbal Standard Operation Procedure, and there may have been a partial one that existed in 2009, but he could not recall. However, at page 527 to 528 of the Transcripts the Respondent maintains he knows of an unwritten Standard Operation Procedure that changes daily.**
> **At page 392 line 5 – The Respondent said "<u>I wrote the standard operating procedures</u>."**
> **The Appellant submits that the aforesaid proves that the Respondent was not a credible witness, but one whose story was inconsistent and obviously fabricated**."

51. In my judgment the criticism of the judge's findings and/or failure to find are unfair. The criticism in my judgment is an example of "trawling through a judgment" a phrase Lord Scott mentioned in **Cobham v Frett [2001] 1 W.L.R. 1775.**

52. Notwithstanding the delay, it is clear that the judge reviewed in detail the evidence which was contained in written witness statements, oral testimony which was taken verbatim by a stenographer and summarized by counsel in their submissions. We have also had the benefit of reviewing that material.

53. The fact is that the material evidence as to what happened that night is not really disputed. The respondent was the Production Assistant and supervisor of that shift. He was not feeling well that night. He told His supervisor that he was not one hundred percent but was told to go to work and work out of the control room. At the beginning of the shift he was resting and /or sleeping. He had a back injury and that fact was known to the appellant and is not disputed. There is no suggestion that he was impaired for other reasons for example intoxication or illegal substance. There is no suggestion that he was distracted from doing his job for any other reason. There is no suggestion of "deliberate and intentional acts of sleeping at work so as to neglect or evade responsibilities or duties" which is a major or serious infraction under the appellant's disciplinary procedures. The audio alarm was not working and failed to warn persons that a breach of procedure had occurred. The Respondent failed to detect the visual alarm on his monitor which he was under an obligation to constantly monitor. Indeed, neither did Baldwin Smith another employee on the shift who also had a monitor in front of him.

54. There is no direct evidence that he was sleeping between 4:50 am and 5 am when the incident occurred. The appellant in its termination letter did not rely on the provisions in the disciplinary procedure relating to major and serious infractions rely on the sleeping of the respondent.

55. The appellant criticizes the judge for her failure to conclude that the respondent's permission to Ashford Knowles to leave the site for forty five minutes whilst the reactor was being "charged", a critical part of the production process. This is a bit unfair as there were other persons, namely Baldwin Smith and Eustice Lettice who were capable in charging the reactor.

56. The breach was brought to the respondent's attention by other persons on the shift. He took steps to mitigate the damage caused by the breach, but it was too late and the damage was catastrophic.

57. Although there was an inexcusable delay in delivering the judgment, in my judgment that delay did not affect the judge's ability to make those findings of fact on the evidence.

58. In paragraph 53 of her judgment, the judge said:

> **"53. I have read the Witness Statements filed herein and considered the totality of the viva voce evidence and the demeanor of the witnesses as they gave evidence and I prefer the evidence of the Plaintiff and the Plaintiff's witnesses as I found them to be more credible than the Defendant's witnesses. On a balance of probabilities, it is reasonable to conclude that the incident was caused by the failure of either Baldwin Smith or Eustice Lettice (aka Mackey) to add the PPS to the batch to charge the reactor. I have difficulty too with Antoine Forbes being in the clear over this incident. The evidence is, and I accept, that he was sitting at the console and should have been the first person to have visual notice that something was wrong. I am also curious as to why Smith and Lettice (aka Mackey) were not terminated. This state of affairs erodes their credibility as witnesses for the Defendant."**

59. In my judgment the judge was, on the evidence, capable of reasonably coming to those findings.

60. The point was made in **Cobham v Frett**;

> **"Whatever may be the explanation for the delay, this is not a case in which the judge lacked notes of the witnesses' evidence or of counsel's submissions with which to refresh his**

> **recollection. The record of pro-ceedings prepared for their Lordships includes some 47 typescript pages of the judge's notes. Of these nine pages relate to counsel's submissions and the rest to witnesses' evidence. The notes of witnesses' evidence distinguish clearly between evidence in chief, cross-examination, re-examination and answers given in re-sponse to questions by the judge. The text of the notes records some of the linguistic characteristics of the witnesses. There is no reason to doubt their accuracy."**

61. And later:

> **"First, in their Lordships' collective experience, a judge rereading his notes of evidence after the elapse of a considerable period of time can expect, if the notes are of the requisite quality, his impressions of the wit-nesses to be revived by the rereading."**

62. The issue is whether on that evidence the appellant could reasonably hold an honest and reasonable belief that the respondent was guilty of gross negligence which warranted summary dismissal. Or perhaps more accurately, could a judge properly find that the appellant did not have an honest and reasonable belief that the respondent was guilty of gross negligence which warranted summary dismissal.

63. This is not without some challenges.

64. I have considered the judges criticism of the investigation conducted by the appellant. In my judgment the criticism of the investigation is unwarranted.

65. In **Island Hotel Company Limited v Sawyer No 88 of 2018,** the court had to consider whether an investigation was reasonable as the employee was not given a hearing by a Review Board which was a provision as part of the employer's disciplinary procedures. Longley P writing the decision of the Court said:

> **"35. What then is a reasonable investigation? The authorities seem clear. What one gleans from them is that the investigation must enable the employer to ascertain the true facts upon which it can make an informed decision to ground or support an honest belief on reasonable grounds that the employee committed the act of misconduct. It must be within reason, full and fair. That would normally involve where it is considered necessary an account of the incident from as many eye witnesses or persons in the know as possible yet at the same time giving the employee an opportunity to be heard and to respond to the gathered information and complaint.**

> **36. Not everyone need necessarily or should necessarily be interviewed but all persons who can be expected to give an accurate account of the incident and relevant information within reason should be interviewed or asked to give a deposition/account where possible.**

66. In this case an investigation was carried out by the Chief Operating Officer Mr. Ebelhar and the Human resources Manager Ms. Barry. The respondent was interviewed along with other persons who were working on the shift that evening.

67. In paragraphs 72 and 73 of her judgment the judge said:

> **"72. I have reviewed the evidence adduced and the relevant case law in support of the Defendant to which Counsel for the Defendant submits supports the Defendant's contention that the Defendant conducted a reasonable investigation of the events (i.e. the alleged misconduct) that transpired on June 15, 2009 to which the Defendant held an honest and reasonable belief that the Plaintiff had committed the misconduct in question at the time of the dismissal. However, I find that the Defendant's investigation was not reasonable given the circumstances of the nature of the Defendant business and the evidence the Defendant adduced.**
>
> **73. I am not satisfied on the evidence that is before the Court in support of the Defendant that at any point during its investigation the allegations advanced by the Defendant were ever put to him and that he was afforded an opportunity to respond. The evidence as to the Plaintiff's suspension was as to conduct an investigation as to the "consequential incident" however, there is no evidence that during the investigation he was advised of the nature of the investigation and the complaint to which the Defendant alleged in relation to him so that he would be able to answer the complaint before any decision was made. More so, while the suspension letters included a proviso that if the Plaintiff wished to add any further information which could have assisted in the Defendant's investigations to my mind that does not give rise to advising the Plaintiff of the nature of the complaints against him and affording him the opportunity to respond to the specific complaints before a decision was made."**

68. In my judgment, the finding that the investigation was not reasonable is inconsistent with the evidence which we have also had an opportunity to consider. The respondent could have been under no illusion that as the Production Assistant responsible for the shift in which this

catastrophic event and loss to his employer occurred, his behavior and conduct was not the subject critical to inquiry. To suggest that that he did not know why he was suspended and that an investigation into his conduct was being made is not credible.

69. The finding that the investigation was not reasonable also undermines the cogency of the finding that the appellant did not have an honest and reasonable belief that the appellant's conduct warranted his summary dismissal.

70. However, the judge's decision must be looked at in its entirety. Was the decision that the respondent was wrongfully dismissed one that on the evidence no reasonable judge could have made.

71. In its Manual the appellant states:

> **"MAJOR OR SERIOUS INFRACTIONS**
> **These infractions should include but are not limited to the following, and would normally warrant serious disciplinary action including dismissal with or without notice, even for a first infraction, if the circumstances warranted such action:**
>
> **a) Deliberate misuse of, and/or damage to Company property, or the property of any person or firm having legitimate business on Company premises arising through serious carelessness, abuse or neglect.**
> **b) Poor or non performance of duties.**
> **c) Threatening intimidating, coercing, or interfering with the supervision of fellow employees.**
> **d) Inappropriate or indecent conduct.**
> **e) Making false, vicious or malicious statements concerning an employee, or the Company.**
> **f) Unauthorized or uncertified absenteeism (either failing to report to work, or being absent from place of work after reporting), including absences after expiration of sickness certification.**
> **g) Clerical (or similar) errors of consequence arising from serious carelessness or neglect.**
> **h) Failing to obey a legitimate order or otherwise abusing a superior.**
> **i) Deliberate abuse of authority.**
> **j) Breach of smoking regulations.**

k) Unauthorized or unlawful possession of Company property, or the property of any person or firm having legitimate business on Company property.

1) Striking, fighting with physical violence or threatening behavior toward, any employee, or any other person having legitimate business on Company property.

m) Bringing, or attempting to bring, any weapon onto Company property, whether licensed or otherwise. '

n) Vandalism, or deliberate damage, on, or to, Company property.

o) Receiving a conviction in a court of law for using, being in possession of any controlled drug/substance, whether at work or not, and whether on or off Company property.

p) A conviction for a criminal offence committed outside the Company for which the employee receives a term of imprisonment, or a conviction for a criminal offence which makes the employee unacceptable to the Company, other employees or unsuitable for his/her work.

q) Theft of Company property, including clothing or other property issued to the employee for his/her personal use.

r) Being unfit or unsafe through alcohol or through controlled/proprietary/prescribed drug or solvent abuse on Company property, and/or refusing to take a drug or alcohol test when requested to do so.

s) Refusal to consent to a baggage, locker or vehicle inspection (while on Company property) when requested to do so.

t) Breaches of Company Safety Policy whereby very serious first offences should incur summary dismissal.

u) Failure to wear any standard Personal Protective Equipment (e.g. ear defenders, eye protection, safety shoes, overalls) in accordance with the Company Safety Policy.

v) Falsifying any time and attendance recording information, or assisting another employee to do so, and/or claiming wages/salaries or expenses to which the employee is not entitled.

w) Falsifying or deliberately entering incorrect information into any document or electronic system.

x) Deliberate and intentional acts of sleeping at work so as to neglect or evade responsibilities or duties.

y) Persistent short-term, self-certificated absences unsupported by medical evidence, and unresolved through normal sickness absence counseling.
z) Breaches of computer systems security whereby very serious first offences should incur summary dismissal."

It is recognized that the above cannot be an exhaustive list of all possible infractions, and therefore any other acts or omissions, which might reasonably be deemed a breach of discipline, or an infraction against acceptable standards of conduct, should be dealt with accordingly.

72. It is significant that in its termination letter of 3 July, 2009 the appellant did not identify any of the matters listed in a through z as the basis for a finding of "major and serious infractions". The letter said:

> **"The decision to terminate your employment follows an extensive investigation into an incident which occurred in the early hours of the 15th June 2009 while you were on duty as the Production Assistant. As a result of the said investigation it was determined that you failed to provide proper and/or adequate supervision of the employees on duty on your shift and/or failed to ensure that the Company's Standard Operating Procedures were followed and you failed to satisfactorily perform your duties and functions in a manner as could reasonably be expected of a person with your training and experience.**
>
> **These breaches and/or failures constitute Major or Serious Infractions under the Company's Revised Disciplinary Procedure and further amount to Gross Negligence in accordance with Section 32(g) of the Employment Act and as such constitute grounds for summary dismissal pursuant to section 31 of the Employment Act."**

73. More specifically, although major and serious infractions refers to a breach of "Company Safety Policy" there is simply no reference to a breach of the "Company's Standard Operating Procedures". Presumably not every breach of the appellant's Standard Operating Procedures is a major and serious infraction whilst any breach of its Safety Policy would be such an infraction. The letter does not state that the investigation found that the respondent committed "Deliberate misuse of, and/or damage to Company property, or the property of any person or firm having legitimate business on Company premises arising through serious carelessness, abuse or neglect" and mentioned in (a) of Major and Serious Infractions. Further the letter did not state that the investigation found that the respondent had "Deliberate

and intentional acts of sleeping at work so as to neglect or evade responsibilities or duties" which is mention in (x) of Major and Serious Infractions. They were not the basis of his termination.

74. The evidence led did not show that the respondent had a history of neglect or poor performance. He had been employed since 1996 more than 13 years before this horrendous incident. The respondent in his evidence recalled:

> **"58. During the 13 and a half years that I was at Polymers there was only 1 incident other than the 15th June, 2009 incident where I lost a batch.**
>
> **59. I was proud of my record since other Production Assistants lost at least 6 batches cach during the same period.**
>
> **60. It was in 2001 that I lost a batch.**
>
> **61. On that day, the Power Company had done some work on a nearby transformer while a batch was in dwell.**
>
> **62. The power shut off but the generators did not kick in.**
>
> **63. The alarm went off and I called Greg Ebelhar and explained to him what was going on.**
>
> **64. Because the generators did not kick in, the agitator was down, steam was going to the reactor, I had to begin to dump the batch manually.**
>
> **65. Within 15 minutes the batch blew out of the reactor but I was able to save the reactor, the plant and lives.**
>
> **66. Greg Ebelhar praised how I had handled the situation.**
>
> **67. But it was the fact that the alarm had given us almost immediate notice of the problem that enabled me to act quickly.**
>
> **68. The alarm system was maintained by Polymers' I.T. Man, Sean McCrae."**

75. I accept that a single act of gross negligence may be the basis for the summary dismissal of an employees. However as the Privy Council said in **Jupiter General Insurance Co v Shroff [1937] 3 All. E.R. 67** summary dismissal is a strong measure and there needs to be careful consideration of the evidence to determine whether the conduct is such as to amount to a repudiatory breach entitling the employer to dismiss the employee without notice.

76. Did the judge err in not finding that the respondent's actions constituted gross negligence as to justify summary dismissal? Could the respondent's actions that evening be considered gross negligence?

77. The courts have over the years struggled with what conduct constitutes gross negligence. In **Ferguson v Island Hotel Company Limited [2018] 1 BHS J No 148** I said:

> **"37. We accept that "gross negligence" is an expression that is difficult to construe, but it indicates conduct sub-stantially more serious, culpable and grievous than simple negligence or bad judgment.**
>
> **38 Although said in the context of an exclusion clause which indemnified an employee for loss arising out of his negligence unless that negligence was "gross" the court in Marex Financial Ltd v Creative Finance Ltd [2014] 1 All E.R. (comm)122 at paragraph 67 said:**
>
> > **"gross negligence means something different than negligence. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts is one of degree".**
>
> **39 In Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22, the court had to consider whether a senior employee's failure to rectify a situation or alert more senior management of a breach of company policy was gross negligence that was tantamount to gross misconduct which warranted summary dismissal. The employee was aware of an email sent by another employee containing an improper message and in clear breach of serious company policy. He did nothing to correct the message. Although the court in that case on the facts said that the failure was gross negligence amounting to gross misconduct the English Court of Appeal said,**
>
> > **"it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employers policies constitutes such a grave act of misconduct as to justify summary dismissal".**

78. In the context of limitation of liability clause excluding liability for "gross negligence" Mance J (as he then was) said in **The Ardent [1997] 2 Lloyds L Rep 547**

> **"'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to be capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk".**

79. Against that background the trial judge did not consider the actions of the respondent as constituting grossly negligent conduct and that the appellant did not have reasonable grounds for believing that the conduct amounted to gross negligence. The judge adopted the language of Cairns LJ in **Wilson v Racher** that although the incident on June 15, 2009 was regrettable, it was not a "deliberate flouting of the essential contractual conditions."

80. Our role as an appellate court is a limited one. As was said by Elias, LJ in the case of **Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22**:

> **"The question for the judge was, therefore, whether the negligent dereliction of duty in this case was 'so grave and weighty' as to amount to a justification for summary dismissal. The role of this court, however, is more limited. We are conducting a review and can interfere only if the judge's decision was wrong: see CPR 52.11. The determination of the question whether the misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment.**
>
> **The primary facts in this case are not in dispute. It is now well established that where that is the case, <u>when determining whether the judge was wrong in reaching his decision, this court ought not to interfere unless satisfied that the decision of the judge lies outside the bounds on which reasonable disagreement is possible:</u> see Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577 per Clarke LJ paragraphs 16–17; Datec Electronics Holdings Ltd v United Parcels Services Ltd [2007] 1 WLR 1325 per Lord Mance pp.1347–1349; and R (on the application of Sky Blue Sports and Leisure Ltd) v Coventry City Council [2016] EWCA Civ 453, [2016] All ER (D) 120 (May), paragraph 12 per Tomlinson LJ. It is not a question of this court simply asking whether it would have held the misconduct to be gross. Having said that, in my judgment the parameters available to a judge in a case of this kind are limited;**

it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal."

81. Although the matter is not free from doubt, I am satisfied that it would be wrong as an appellate court to set aside the judge's finding that the respondent's action did not warrant summary dismissal and that he was wrongfully dismissed. The respondent had been employed for more than 13 years, he had no known history of misconduct or negligence and he was not well that evening a fact known to the appellant. The appellant could not reasonably believe that the respondent's conduct amounted to gross negligence which justified terminating him without notice or compensation in lieu of notice. The conduct could not reasonably lead to the conclusion that the respondent intended or was reckless in not complying with the appellant's rules and indifferent to the appellant's interests.

82. I would dismiss the appeal.

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The Honourable Sir Michael Barnett, P

83. I agree.

_____

The Honourable Mr. Justice Isaacs, JA

84. I agree, also.

_____

The Honourable Mr. Justice Evans, JA