

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMERCIAL DIVISION**

**2016/COM/lab/00042**

**BETWEEN**

**MELANIE ELIZABETH JOHNSON**

**Plaintiff**

**AND**

**BETHEL BROTHERS MORTICIANS COMPANY LIMITED**

**Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Donovan Gibson and Ms. Palincia Hunter of Munroe & Associates for the Plaintiff  
Mr. Charles Mackay and Ms. Rhchette Godet of Mackay & Moxey for the Defendant

**Hearing Dates:** 23, 24 May 2018

**Employment Law - Wrongful dismissal - Breach of contract – Summary dismissal – Employer terminating Plaintiff’s employment for gross misconduct and breach of confidence – Plaintiff seeking damages for wrongful dismissal – Whether Plaintiff wrongfully dismissed - Sections 29, 31, 32 and 33 of the Employment Act Ch. 321 A of 2001 considered**

The Plaintiff, an Assistant Funeral Director, was summarily dismissed by the Defendant, her former employer, for breach of the Defendant’s General Regulations and/or section 31 of the Employment Act (“the Act”). The Defendant alleged that the Plaintiff’s act of taking a picture of a customized casket (which family members requested to remain anonymous until public viewing) and forwarding it to her husband who posted it on social media before the funeral actually took place, amounted to gross misconduct justifying summary dismissal.

The Plaintiff alleged that her summary dismissal was wrongful and in breach of section 29(1) of the Act. She claimed damages in the sum of \$14,472.00. The Defendant counterclaimed for the sum of \$7,119.73 which they alleged that they had to reimburse to the family of the deceased in order to appease them.

**HELD: Action dismissed with costs to the Defendant in the sum of \$26,950. Damages are awarded to the Defendant on the Counterclaim in the sum of \$7,119.73.**

- (1) Wrongful dismissal, a common law remedy, is based on contract law. Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it.
- (2) Summary dismissal is dismissal without giving the employee any notice or wages in lieu of notice, as the contract requires.
- (3) An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer. Thus, an employer who wishes to summarily terminate an employee's employment must assess whether or not the reason for doing so is sufficiently serious and substantial to justify relying on it to terminate: section 31 of the Act.
- (4) The question whether the misconduct is such to justify summary dismissal is a question of fact and degree to be determined by the Court: see **Henry v Mount Gay Distilleries Limited (Barbados)** [1999] UKPC 39. It is a matter for the trial judge and not the appellate courts: **Clouston & Co. v Corry** [1906] A.C. 122.
- (5) The act of taking of a picture of a customized casket, which the family requested to be kept anonymous (even if the Plaintiff was not aware of the family's request, which this Court did not find), was not of itself, in my opinion, misconduct that could be termed "gross". However, the subsequent act of forwarding it to her husband who posted it on social media amounted to gross misconduct justifying summary dismissal since it undermines the trust and confidence which is inherent or implied in a contract of employment.
- (6) For purposes of whether an employee's conduct has so undermined the trust and confidence which is inherent in a particular contract of employment, one must look at (i) the nature of the conduct; (ii) the circumstances in which the conduct occurred; (iii) the nature of the employer's business; (iv) the position the employee holds in the business; (v) the terms of the contract of employment and (vi) the impact of the employee's conduct on the interests of the employer.
- (7) The issue of damages does not arise for consideration as the Defendant was justified in summarily dismissing the Plaintiff.

## **JUDGMENT**

**CHARLES J:**

### **Introduction**

[1] By all accounts, the late Frank Hanna ("the deceased") was a flamboyant man. Following his demise on 14 April 2016, his family wanted to honour him in like fashion. On or about 16 April 2016, they went to Bethel Brothers Morticians Company Limited ("the Defendant") to retain their services in customizing a casket

with vinyl wrap, epitomizing the wardrobe worn by the deceased when he was alive. The family also wanted the customized casket to be placed in the selection room as opposed to the garage to keep it away from prying eyes. I surmised that the object was for family members and the general public to be enthralled by such a unique casket on the day of public viewing.

- [2] On or about 28 April 2016, Melanie Johnson (“the Plaintiff”), then the Assistant Funeral Manager of the Defendant, took a picture of the casket and forwarded it to her husband, a Funeral Home Manager. Almost immediately, the casket went viral on social media. To put it mildly, the Hanna family was not pleased with the publication. In an effort to appease them, the Defendant absorbed the costs of the funeral along with the costs associated with the customization of the casket.
- [3] Subsequently, by letter dated 2 May 2016, the Defendant terminated the Plaintiff’s employment alleging breach of its General Regulations and/or section 31 of the Employment Act, Chapter 321A of the Statute Laws of The Bahamas (“the Act”) in that the Plaintiff committed a fundamental breach or she acted in a manner repugnant to the fundamental interest of the Defendant. The Defendant also alleged that the Plaintiff’s actions constituted insubordination, breach of confidentiality, gross negligence or gross misconduct and exposed it to liability in the sum of \$7,119.73.
- [4] On 5 May 2016, the daughter and son-in-law of the deceased received a letter from the Plaintiff’s husband admitting that the Plaintiff had taken the photo and apologizing for the distress caused to the family. The letter fell short of admitting that he was the one that posted the picture on social media.
- [5] On 27 May 2016, the Plaintiff sued the Defendant for wrongfully and in breach of section 29(1) of the Act, terminating her employment without the prescribed notice of payment in lieu of notice thereof. She claimed damages in the sum of \$14,472.00.

[6] The Defendant denied that it wrongfully terminated the employment of the Plaintiff and instead, counterclaimed for the sum of \$7,119.73 for loss and damages which it suffered by absorbing certain costs in respect of the funeral and the customization of the casket.

### **The key issue**

[7] The key issue in this claim for damages for wrongful dismissal is whether the conduct of the Plaintiff amounted to gross misconduct to justify summary dismissal.

### **The Law**

#### **Wrongful dismissal**

[8] Wrongful dismissal is based on contract law. A helpful meaning is provided by the learned authors of **Halsbury's Laws of England, 4<sup>th</sup> ed. Vol. 16** at para. 451 where it is stated that "*a wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: Hopkins v Wanostrocht (1861) 2 F & F 368, namely:*

(1) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (**Williams v Byrne (1837) 7 Ad & E1 177**); and

(2) his dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily: **Baillie v Kell (1838) 4 Bing NC 638**.

[9] Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.

[10] A claim for wrongful dismissal is based on common law principles. It is not a statutory claim under the Act. At common law, the normal remedy for wrongful

dismissal is for the innocent party to bring an action for damages: **Selwyn's Law of Employment, 10<sup>th</sup> Edn.** para.16:15.

### **Summary dismissal**

[11] The law relating to summary dismissal is set out in sections 31 to 33 of the Act. Section 31 states that an employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer.

[12] Section 32 of the Act appears to 'codify' the common law with respect to what conduct constitutes a fundamental breach by an employee of his contract of employment. The section enumerates nine categories of misconduct (including dishonesty, gross insubordination or insolence, gross misconduct and breach of confidentiality by an employee) which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer.

[13] Section 33 provides as follows:

**“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.”**

[14] As is manifestly clear from section 31 of the Act, the conduct which may justify summary dismissal of an employee must be such as to amount to a fundamental breach of his contract or is repugnant to the fundamental interests of the employer.

[15] Section 32 of the Act provides a non-exhaustive list of misconduct which may constitute a fundamental breach of a contract or is repugnant to the fundamental interests of the employer. Gross misconduct, pleaded by the Defendant, is one of them. So also, is breach of confidentiality which was also pleaded by the Defendant.

[16] The Act however does not define what conduct, on the part of the employee, will amount to gross misconduct of a kind that could be considered a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer to justify summary dismissal. Therefore, we turn to the common law for assistance.

[17] A helpful definition of “gross misconduct” was formulated by Lord Jauncey of Tullichettle in **Neary v Dean of Westminster** [1999] IRLR 28. He stated thus:

**“That conduct amounting to gross misconduct justifying (summary) dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”**

[18] In **Neary**, it was suggested that the basis of summary dismissal should now lie, not in unrefined ideas of repudiation and acceptance, as the earlier cases suggest, but instead in the more contemporary area of trust and confidence. This celebrated case concerned the summary dismissal of the organist of Westminster Abbey and his wife due to alleged financial irregularities in the operation of certain musical events and the adoption of inappropriate financial methods unknown to the Abbey authorities. Lord Jauncey was appointed as a special commissioner by the Queen to hear their appeal petitions. He determined that summary dismissal was justified.

[19] The term “gross misconduct” warranting summary dismissal has also been considered by our courts on numerous occasions: see the Court of Appeal cases of **Curtis-Rolle v Doctors Hospital (Bahamas) Limited** SCCivApp. Side 2012 No. 149 and **Dorsett v Pictet Bank and Trust Ltd** [2012] 2 BHS J. No. 62. In **Curtis-Rolle**, the appellant, a permanent part-time nurse employed with the respondent, entered into a heated argument with another nurse in the presence of a patient who was, at the time of the argument, waiting to be prepared for surgery. During the altercation, the patient became disgruntled and returned to his room unaccompanied by any member of the nursing staff. The Court held that her

summary dismissal was justified since her actions were repugnant to the respondent's interests and were a fundamental breach of the employment contract.

[20] In the latter case of **Dorsett v Pictet Bank**, the Court of Appeal stated at para 20:

**“Moreover, at common law, conduct which would justify summary dismissal is that which shows a repudiation by the employee of the contract, or of its essential terms, (see *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285, or where such conduct so undermines the trust and confidence essential to such a contractual relationship that an employer should not be required to employ him (see *Neary v Dean of Westminster* [1999] IRLR 288).”**  
[Emphasis added]

[21] Very recently on 17 October 2019, in **Montaigne Cunningham v Island Hotel Company Ltd** SCCivApp. 166 of 2018, our Court of Appeal had to determine whether the summary dismissal of the appellant was justified. Jones JA in delivering the judgment of the Court at paragraph 25 found that the findings of the trial judge amounted to a fundamental breach of contract by the appellant.

[22] Additionally, in **The Jupiter General Insurance Company, Limited v Ardeshir Bomanji Shroff** [1937] Privy Council 67, at page 74, Lord Maugham said:

**“Apart of course from the vital finding that the circumstances justified dismissal, whether the misconduct of the respondent was not such as to interfere with and to prejudice the safe and proper conduct of the business of the company, and therefore to justify immediate dismissal.**

**It must be remembered that the test to be applied must vary with the nature of the business and the position held by the employee, and that decisions in other cases are of little value.**[Emphasis added]

[23] Undoubtedly, the immediate dismissal of an employee is a strong measure for an employer to take.

### **The evidence**

[24] The evidence in this trial came from the Plaintiff and three witnesses called by the Defendant namely Lee Chong, the son-in-law of the deceased, Owen Bethel, the

President of the Defendant Company and Sidney Sawyer, Funeral Director/Embalmer employed by the Defendant.

[25] By contract of employment dated 10 October 2005, the Plaintiff commenced employment with the Defendant on 17 October 2005 as an Assistant Funeral Director. By letter dated 2 May 2016, the Defendant terminated her employment summarily citing unprofessional behaviour not reflective of the image or professional decorum expected by staff as the reason for the termination. The letter went on to explain that the Plaintiff took the photograph of the customized casket of the deceased which went viral on social media causing much distress to the Hanna family and resulted in both embarrassment and financial loss to the Defendant.

[26] The Plaintiff swore a witness statement on 16 February 2018. She stated that it was never explained to her or to any of the staff that the Hanna Family specifically requested that the casket was to remain anonymous until public viewing and, as far as she was aware, there is no company or public policy preventing the Defendant's staff from taking pictures of an empty casket. She further stated that there is no law incorporated in her contract of employment which prohibits the taking of pictures of an empty casket. According to her, it is only unethical to take an unauthorized picture of human remains. She testified that there are thousands of customized caskets posted all over social media and the internet. She also stated that she was on sick leave for two days and, upon returning to work on 28 April 2016, she saw the casket in the selection room. It was uncovered within public view and thus, could have been viewed by visitors. According to her, the casket was in fact viewed by a family member visiting the selection room that morning that the picture was taken. The Plaintiff admitted that she took the picture which she forwarded to her husband. She did not put it on social media.

[27] Mr. Chong testified on behalf of the Defendant. In his witness statement filed on 27 February 2018, he stated that on 22 April 2016, he returned to the Defendant's place of business. In the presence of the Plaintiff and Mrs. Rahming, he expressly



stated to Mr. Christopher Rolle of Digiprint that he wanted the casket to be customized in their private room and not in their garage for complete privacy.

[28] Mr. Chong further explained that his investigations into the matter led him to the conclusion that it was not Digiprint but one of the Defendant's staff who took the picture. The Plaintiff later admitted that she took the picture and forwarded it to her husband.

[29] Mr. Sawyer also testified. He swore a witness statement on 27 February 2018. He is one of the morticians employed by the Defendant. He stated that on 16 April 2016, he met with family members of the deceased when they came to retain their services and make funeral arrangements. The Plaintiff was also present on that day. He said that Mr. Chong spoke with them to ensure that the funeral would be conducted in the most professional manner and his family's privacy would be respected during their time of mourning. He also recalled that Mr. Chong specifically stated that he wanted no social media attention. Mr. Sawyer assured him that they would handle the arrangements professionally.

[30] Mr. Sawyer further stated that the Plaintiff returned to work on 28 April 2016. By then, the casket had already been customized. Later that same day, it was placed in the selection room. Almost instantaneously, the casket went viral on social media. He questioned the staff. When he questioned the Plaintiff, she admitted that she took a photo of the casket and forwarded it to her husband.

[31] Mr. Bethel, the President of the Defendant stated that he did not deal with the family. Mr. Sawyer did but he came into the picture when the casket was posted on social media. He said that the Defendant apologized to the Hanna family for the incident and waived the expenses of the funeral and absorbed certain costs in respect of the funeral. Those costs amounted to \$7,119.73 for which the Defendant counterclaimed. He also stated that the Defendant terminated the Plaintiff's employment in accordance with her contract of employment, she having breached the Company's General Regulations and/or section 31 of the Act.

- [32] It is admitted by the Plaintiff that she took a picture of the casket and forwarded it to her husband (a Funeral Home Director). The Plaintiff did not circulate the picture of the casket on social media. I found as a fact that it was her husband who posted the casket on social media.
- [33] The only dispute relevant to this case is whether the Plaintiff was aware that the family of the deceased specifically requested that the casket was to remain anonymous until public viewing.
- [34] On a balance of probability, I prefer the evidence of Mr. Chong and Mr. Sawyer to that of the Plaintiff. I am of the firm view that the Plaintiff was fully aware that the family requested privacy.
- [35] In any event, she is of the view that there is no law or policy of the Defendant that prohibits the taking of a picture of an empty casket.

### **Discussion**

- [36] Learned Counsel Mr. Gibson appearing for the Plaintiff submitted that there was no fundamental breach of the contract to ground a summary dismissal. He argued that although the Plaintiff took the picture which was circulated on social media prior to the funeral, she was not the one who posted it on social media.
- [37] Mr. Gibson further submitted that there is no express regulation or policy dealing directly with the taking of photos of an empty casket and in considering the issue, it is essential for the Court to determine first of all whether a picture of an empty casket chosen by a family of a deceased person is actually something confidential. He answered that question quite correctly by stating that an empty casket can be purchased by any family and certainly, companies may post pictures of the various caskets sold on their websites.
- [38] Mr. Gibson next submitted that if there were any employee who was negligent, it would have to be Mr. Sawyer who did not inform the staff. He knew that a special

request was made by the family and yet he neglected to inform them. I earlier found that the Plaintiff was well aware of the request by the family.

[39] The Defendant, on the other hand, argued that they were justified in terminating her employment since she committed a fundamental breach of the contract entered into between the parties or that she acted in a manner repugnant to the fundamental interest of the Defendant. They say that the Plaintiff's actions constitute insubordination, breach of confidentiality or gross misconduct and have exposed the Defendant to liability in the sum of \$7,119.73.

[40] Mr. Bethel, in his evidence during cross-examination, stated that there is nothing specific in the Defendant's Regulations that speak to the taking of a photograph of an empty casket. As I understand the Defendant's case, the issue is not so much with the taking of a picture but rather, whether the Plaintiff, in her position as a Director, should have forwarded it to her husband who posted it on social media. The present case could be likened to a case of an employee of a dressmaker, who takes a picture of an exotic bridal dress and send it to a third party who posts it on social media before the wedding actually takes place. Does she need to be told that she should not have done so? Should there be policy regulations or law to deal with such situations? Or is it plain common sense that should guide that employee?

[41] Now, the question to be considered in the present case is whether the conduct of the Plaintiff amounted to gross misconduct which undermines the trust and confidence in the contract of employment with the Defendant that it should no longer require to retain her in its employment?

[42] In **Laws v London Chronicle (Indicator Newspapers) Ltd** [1959] 2 All ER 285, CA, Lord Evershed MR, quoting from the Privy Council judgment of **Clouston & Co. Ltd v Corry** [1906] AC 122 where Lord James said at para 29:

**“Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which may justify dismissal. Of course, there may be misconduct in a**

**servant which will not justify the determination of the contract or service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.”**

- [43] In addition, the question of an employee’s behaviour which warrants a dismissal, especially one which is summary, is a question of fact and degree to be determined by the Court: see **Henry v Mount Gay Distilleries**. In that case, in delivering the opinion of the Board, Lord Browne-Wilkinson said: “*The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such, it is a matter for decision by the trial judge and not by the appellate courts: Clouston & Co. Limited v. Corry [1906] A.C. 122*”. Further, the courts are of the view that such a decision should be based on current attitudes: see Edmund-Davies LJ in **Wilson v Racher** (1974) ICR 428.
- [44] In **Chitty on Contracts**, Vol, 2, 29<sup>th</sup> Edn. (2004), para. 39-176, the learned authors explained the nature of “misconduct” stating that ‘***the general rule is that if the employee does anything which is incompatible with the due or faithful discharge of his duty to the employer, he may be dismissed without notice; the employee’s conduct need not be dishonest, since it is sufficient if it is “conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee.”*** (Emphasis added).
- [45] The learned authors of **Halsbury’s Laws of England**, para. 642, page 436, Vol. 16, 4<sup>th</sup> Edn. opined that “*Misconduct inconsistent with an employee’s proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal...An employee may also be summarily dismissed...if his conduct is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of employer and employee*”: **Edwards v Levy** (1860) 2 F & F 94, 95, per Hill J.

[46] In my opinion, four key principles may be distilled from the above authorities namely: (i) in order to justify summary dismissal, the misconduct must be gross; (ii) a single act of gross misconduct may warrant summary dismissal; (iii) the question of an employee's behaviour which warrants summary is a question of fact and degree to be determined by the Court and (iv) the test to be applied to justify summary dismissal will vary depending on the nature of the business and the position held by the employee.

[47] Learned Counsel Mr. Mackay who appeared for the Defendant correctly submitted that for the purposes of whether an employee's conduct has so undermined the trust and confidence which is inherent in the particular contract of employment, one must look at:

1. The nature of the conduct;
2. The circumstances in which the conduct occurred;
3. The nature of the employer's business;
4. The position the employee holds in the business;
5. The terms of the contract of employment; and
6. The impact of the employee's conduct on the interests of the employer.

[48] According to learned Counsel, the Defendant's business was established in 1943 with the motto "*Service above self.*" When the Plaintiff joined the business, she signed a letter of engagement which in part reads that "*we look forward to your joining the team and your contribution in maintaining the reputation of this establishment as a leader in the field of funeral services.*"

[49] Mr. Mackay submitted that when considering the nature of the Defendant's business, the function of those persons who work in its funeral home as funeral home directors and embalmers, must have a certain set of qualities that are

required by such a sensitive line of work. He said that these employees must possess a strong sense of personal ethics.

[50] Learned Counsel next submitted that the impact that such widespread dissemination of a picture of the casket had, is evidenced by the fact that in order to appease the grieving family of the deceased, the Defendant returned the full amount which was charged. This would not have happened if the picture was not posted on the social media.

[51] Mr. Mackay also submitted that another ground advanced by the Defendant for the summary dismissal of the Plaintiff is the wrongful disclosure of confidential information. In addition to confidentiality being advanced as a ground on which the Plaintiff was dismissed there is a stipulation in the professional code of conduct published by the National Funeral Directors Association that members shall protect confidential information pertaining to deceased or the family of the deceased from disclosure. According to Mr. Mackay and I agree, the Plaintiff displayed unprofessional conduct in what she did and therefore the Defendant was entitled to dismiss her without pay or notice and that the Defendant honestly and reasonably believed that the Plaintiff has committed grave misconduct at the time of her dismissal.

[52] As stated earlier, the Defendant also raised in their pleadings, the issue of breach of confidence. The question to be asked is in what circumstances can an employer rely upon a breakdown in trust and confidence to summarily dismiss an employee? There is no demur that the implied duty of trust and confidence is a mutual one. In the case of **Leach v The Office of Communications** [2012] EWCA Civ 959, the Court of Appeal dealt with employers' use of breakdown in trust and confidence. The court upheld the tribunal's decision that the respondent's decision to summarily dismiss an employee citing a breakdown in trust and confidence after investigating information it had received from the Metropolitan Police relating to child abuse in Cambodia was reasonable in all the circumstances. It further held that if an employer wishes to rely on breakdown in the relationship between

employer and employee to dismiss, in order to justify dismissal, the breakdown in trust must be for a substantial reason. See also **Malik and Mahoud v BCCI** [1998] A.C. 20 where an employee has so conducted himself as to destroy that confidence, an employer is entitled to summarily dismiss that employee.

[53] In the circumstances, I find that the Defendant was justified in summarily dismissing the Plaintiff. What the Plaintiff did was simply wrong and unprofessional resulting in the Defendant no longer having any trust and confidence in the Plaintiff.

[54] In the premises, I will dismiss the Plaintiff's claim with costs to the Defendant. A Bill of Costs was provided to the Court in the sum of \$26,950. I consider it to be reasonable costs to be paid by the Plaintiff to the Defendant.

[55] In addition, the Defendant has counterclaimed for the sum of \$7,119.73 which is substantiated by contemporaneous documentary evidence. Accordingly, I will order that Judgment on the Counterclaim be entered for the Defendant in the sum of \$7,119.73.

**Dated 23<sup>rd</sup> day of October A.D., 2019**

**Indra H. Charles  
Justice**