COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2012/CLE/GEN/FP/00186

BETWEEN

DION HANNA
Plaintiff

AND

FEDEX BAHAMAS LIMITED
Defendant

BEFORE	The Honourable Mrs. Justice Estelle Gray Evans
APPEARANCES:	Mr Jacy Whittaker for the plaintiff
	Mr Martin Lundy II for the defendant
HEARING DATES:	2013: December 17
CLOSING SUBMISSIONS:	2014: 28 March; 1 May

JUDGMENT

Gray Evans, J.

1. This is a claim for wrongful dismissal.

2. The plaintiff is a former employee of the defendant company, having served the defendant in various capacities in its New Providence, Grand Bahama and Abaco operations since 1988. He was summarily dismissed by the defendant on or about 23 April 2012.

3. The defendant is and was at all material times a courier of goods carrying on business throughout the Commonwealth of The Bahamas,as well as internationally.

4. The facts leading up to the commencement of this action were gleaned from the witness statements of the plaintiff as well as thewitnesses for the defendant: Vic Colon, Senior Security

Specialist for the defendant's parent company, FedEX LAC Corporate Security, Kennel Mondesir, the defendant's Senior Manager for the Bahamas, Barbados, St Thomas and St Croix; and Shawn Mahoney, the defendant's District Service Assurance Manager.

5. The plaintiff commenced employment with the defendant company in New Providence in 1988. Sometime in 1999 he relocated to the defendant's Freeport office and at the time of his termination in 2012, he was either Operations Manager (his evidence) or Station Manager(the defendant's evidence). In any event he was in charge of the defendant's operations in Grand Bahama and Abaco.At the time of his dismissal he had been in the defendant's employ for approximately 24 years.

6. During his tenure with the defendant the plaintiff and his team received a number of accolades in recognition of, inter alia, outstanding service to the defendant company, the most recent being a Purple Promise Honourable Mention Certificate in July 2007.

7. The plaintiff also received a number of warning letters from the defendant for various infractions, the most recent before the events that led up to his dismissal was in August 2007 when he received a warning letter citing leadership failure. The plaintiff was also suspended for a period in 1999, prior to his relocation to Grand Bahama.

8. Sometime during the first quarter of 2012,Mr Mahoney conducted training with the staff in the defendant's Freeport office for its newly implemented Control Self-Monitoring program. Mr Mahoney returned to the Freeport office in April 2012 to conducta validation audit assessment of the defendant's Freeport operations.

9. In his witness statement filed 27 September 2013, Mr Mahoney stated, inter alia:

> "On the 3rd – 5th of April 2012, I returned to FedEx's Freeport Office to conduct a Validation Audit Assessment. In the course of my investigation, I discovered discrepancies with fuel receipts signed by the plaintiff and missing Vehicle Inspection Report (VIR) documentation.
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> When fuelling a FedEx vehicle, an employee is required to complete VIR and Field Activity Management Information System (FAMIS) time card (#23 fueling) which should indicate the number of the vehicle used. Upon completion of post-trip activities, employees are required to attach a pink fuel receipt and VIR to their respective time card. I found no FAMIS time cards with fuel receipts of VIRs upon completion of the Validation Audit Assessment.
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> On 16 February 2012, the plaintiff fueled a vehicle rented by the defendant twice in the amount of $67.00 and $7.01 respectively and on the same day, another employee of the defendant appears to have credited fuel for the same rental vehicle in the amount of $56.83.
>
> Furthermore, the Fuel Assessment Report indicated that the plaintiff credited fuel to FedEx's account on three occasions: 11th February 2012; 3rd and 10th March 2012 respectively on Saturdays on which the defendant is non-operational.
>
> Another irregularity was the plaintiff's credit of fuel to unauthorized vehicles without Mileage Expense reports.
>
> In view of the foregoing irregularities/discrepancies, I reported the matter to the FedEx Security Division."

10. On 4 April 2012, the plaintiff was placed on investigative suspension, with pay.

11. On that same date, the plaintiff participated in an interview with Mr Vic Colon who, in his witness statement filed 3 October 2013, states, inter alia:

1) I conducted a recorded interview with the plaintiff on 4th April 2012 at the Radisson Convention Hall in Freeport, Grand Bahama.

2) Prior to the interview, the plaintiff indicated that he wanted to record the interview with his FedEx issued blackberry device. In response, I stated that all devices must remain off during the Security interview with the exception of the Security approved recording device.

3) The plaintiff indicated that he could not trust the Security recording device as Security may skew or compromise the recording and he refused to continue without first speaking with his Senior Manager, Mr Kennel Mondesir.

4) In view of the plaintiff's insistence on meeting with Mr Mondesir, the interview was briefly postponed in order to allow the plaintiff to speak with Mr Mondesir.

5) After meeting with Mr Mondesir, the plaintiff agreed to continue with the recorded interview.

6) At the outset of the interview, I read the interview preamble to the plaintiff. I confirmed the location, date and time of the interview, and the plaintiff's name and employee number. I also confirmed that the plaintiff was aware that the interview was recorded.

7) I advised the plaintiff that the interview is voluntary and that he may leave at any time. I asked whether *"...anything [was] promised to [him] to speak to [me] today"* and whether *"...[he was]... coerced ...[or] ....forced [into attending and participating into the interview]"*. The plaintiff replied negatively to both questions.

8) I then asked the plaintiff to describe the refueling process.

The Re-fuelling Process

9) The plaintiff advised that when a courier requires fuel while en route, he/she would visit Freeport Jet Wash to refuel the vehicle.

10) Upon arrival at the gas station, the gas attendant would record the licence number of the vehicle and approach the cashier with the relevant vehicle and pump number. The cashier would then open or release the pump. Thereafter, the driver of the vehicle is required to attend the cashier's window where he would be required to sign for the gas credit on a triplicate receipt. A pink receipt is given to the driver who is to staple it to his/her daily time card.

11) The plaintiff further advised that every thirty days, Freeport Jet Wash would then send the defendant's Freeport Office corresponding yellow receipts which the Freeport office would then cross reference with the pink receipts and subsequently remit same to the FedEx's Headquarters in Memphis, Tennessee for payment.

Fuel Receipt Discrepancies

12) During the course of the interview, the plaintiff admitted that he "*...fell down in being as frugal as [he] should [have] be[en]...*" when cross referencing the yellow slips with the pink slips. The plaintiff also admitted to failing to secure the respective Vehicle Inspection Reports and that there was "*...some inconsistencies...*" after losing several people and subsequently hiring new employees.

13) I asked the plaintiff if it was possible for a FedEx Employee to attend Freeport Jet Wash in a private vehicle (i.e. one not bearing FedEx insignia) with a view to charging gas to the FedEx account. The plaintiff advised that this was possible and that he had refueled his personal vehicle without ever lodging mileage expenses with his Manager when he used his vehicle to undertake various tasks for FedEx. I also asked the plaintiff how he would gauge or assess the amount of gas he used when he would refuel his personal vehicle with FedEx. The plaintiff admitted that he did not and that he had refueled his personal vehicle beyond the amount of fuel he would have actually used. He attributed this again to *"...bad judgment"*.

14) When questioned about his failure to lodge expense reports, the plaintiff advised that *"it was a flaw of his..."* despite the fact that Mr Mondesir continually *"...fuss[ed] [him] about it..."* The plaintiff proceeded to list a number of self-funded tasks he undertook for FedEx, which prompted me to ask the plaintiff whether he felt that he should refuel his personal vehicle because he had self-funded various business related expenses. The plaintiff however indicated that this was not his position.

15) Ultimately, the plaintiff acknowledged his failure to lodge expense reports and that he had approved various receipts without prior scrutiny of those receipts. He considered this failure to cross reference gas receipts as "*improper*" and an incident where he exercised "*bad judgment*" and one where he allowed himself to get into a "*comfort zone*". He also admitted that it was contrary to *"...proper business etiquette and practice..."*

16) During the interview, I asked the plaintiff whether he was aware of anyone using any of the FedEx vehicle's for personal use. The plaintiff indicated that he used the vehicle at various times before to undertake personal errands and that in the event that he was en route on FedEx business in a FedEx vehicle, he would stop and conduct personal business. The plaintiff also advised that he was aware of other employees using the FedEx vehicle for personal use with his approval.

12. Following that interview the plaintiff was informed of a recommendation for his immediate termination with cause and he was eventually terminated by the defendant on 23 April 2012.

13. Mr Mondesir speaks to this at paragraphs 18 through 21 of his aforesaid witness statement as follows:

> "18. On 16th April 2012, I advised the plaintiff that the investigation and Vic Colon's interview uncovered numerous exceptions to FedEx Express Policies and Procedures on his part which could no longer be tolerated. I advised further that his admissions undermined and irreparably deteriorated the trust invested in him by the defendant.
>
> 19. I informed the plaintiff of the recommendation of FedEx's Upper Management for his immediate termination with cause which provided no compensation for him. I also informed him that FedEx offered him, instead, its Deed of Release which contains compensation upon separation. I then provided Mr Hanna with the Deed of Release and he refused to sign it.
>
> 20. I advised the plaintiff that FedEx Express feels that the violations warrant his termination. I handed the plaintiff the termination letter which he read in my presence and refused to sign.
>
> 21. On 23rd April 2012, the plaintiff was terminated with immediate effect."

14. Along with the aforesaid deed of release, the plaintiff was also offered the sum of $38,500.00 as part of his separation from the defendant company. The plaintiff refused to accept that sum.

15. The aforesaid termination letter, which was in fact an inter-office memorandum, was signed by Mr Mondesir and in addition to setting out the grounds for the plaintiff's summary dismissal, also included the following provision:

> "If you feel this action is unfair, you may first hold an open and frank discussion with your immediate manager to attempt to resolve your concern or problem. You may also pursue this under the Guaranteed Fair Treatment Procedure, P5-5 (copy attached). To enter the GFTP at Step 1 you must send a written request within five (5) calendar days of this letter the perceived unfair action to your Manager, Sr. Manager or Managing Director, Jeff Thornton, at 701 Waterford Way, Suite 1000, Miami, Fl 33126. You must copy our Human Resources Advisor, Linka Cabral-Gonzalez and, your letter should contain the

following three (3) elements: (1) statement of facts, (2) why you feel the action was unfair (3) what you want to happen as a result of this GFTP.

If you have any questions, you may contact your Human Resource Advisor, Linka Cabral-Gonzalez at 786-388-4624."

16. There is no evidence that the plaintiff took advantage of the guaranteed fair treatment procedure referred to in the aforesaid memorandum or that he contacted his human resource advisor with any questions.

17. However, the plaintiff commenced this action on 17 May 2012 by a generally indorsed writ of summons in which he claims against the defendant the sum of $76,500.00 representing one month's basic pay in lieu of notice and one month's basic pay for each year he worked for the defendant in accordance with Section 29(1)(c) of the Employment Act, chapter 321A, Statute Laws of The Bahamas ("the Employment Act"). Further or alternatively, the plaintiff claims damages for unfair dismissal and/or wrongful dismissal. The plaintiff also claims aggravated and exemplary damages by reason of the conduct of the defendant, interest on the sums claimed pursuant to sections 2 and 3 of the Civil Procedure (Award of Interest) Act, 1992, costs and such further and/or other relief as to the Court may seem just.

18. The defendant denies the plaintiff's claim and in its amended defence filed 9 September 2013 avers that the plaintiff was "justifiably terminated for cause".

19. It is accepted that an employer has the right to terminate an employee's employment by giving proper notice (or payment in lieu thereof) and failure to do so is, at common law, a wrongful dismissal,except, of course, the employee is dismissed summarily for cause.

20. The law in The Bahamas with regard to summary dismissal is set out in Part VIII, sections 31 through 33 of the Employment Act.

21. Section 31 of the Employment Act provides 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; provided that such employee is entitled to receive previously earned pay.

22. Section 32 of the Employment Act sets out examples of the type of conduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer. The list, which is not exhaustive, includes:

a. Theft;
b. Fraudulent offences;
c. Dishonesty
d. Gross insubordination or insolence;
e. Breach of confidentiality;
f. Gross negligence;
g. Incompetence;
h. Gross misconduct.

23. Section 33 of the Employment Act provides that an employer must prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probabilities 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 investigation was otherwise unwarranted.

24. The burden is on the employer to show that the employee was lawfully terminated.

25. In the case of Walker v Candid Security Limited [2011] 1 BHS J No. 77, CA, Allen, P, delivering the judgment of the Court opined at paragraph 14 thereof that the test to be applied in determining whether a dismissal is justified is the common law test laid down by Lord Jauncey of Tullichettlein Neary v Dean of Westminister [1999] IRLR 28 and cited with approval in Steven Kent Jervis and KST Investments Ltd. V John Skinner [2011] UKPC 2, as follows:

> "That conduct amounting to gross misconduct justifying 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."

26. In Neary et al v. Dean of Westminister *supra*, Lord Jauncey of Tullichettle expressed the following view:

> "Whether particular misconduct justifies summary dismissal is a question of fact. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-à-vis the employer must all be considered in determining the extent of the duty of trust and the seriousness of any breach thereof."
>
> See also: Clouston& Co. Limited v Corry [1906] A.C. 122.

27. Further, in determining whether the employee was dismissed for just cause, a judge must determine whether the employer acted reasonably: See British Home Stores Ltd. v Burchell(1978) IRLR 379 IRLR 1996in whichguidelines for consideration of a case of summary dismissal were given in the form of the following questions:

(i) Did the employer believe, as distinct from merely suspecting, that misconduct had occurred?

(ii) Was that a reasonable belief in the light of what was known to the employer at the time?

(iii) Was it a belief arrived at after as much investigation as was reasonable in the circumstances?And

(iv) Was it reasonable to dismiss having regard to the gravity of the misconduct which the employer believed had occurred?

28. In this case the plaintiff alleges that he was wrongfully dismissed in that he was not given notice of his termination or pay in lieu thereof, while the defendant contends that the plaintiff was summarily dismissed for gross misconduct.

29. Gross misconduct is defined as "conduct which fatally undermines the relationship of trust and confidence that exists between the employer and employee":Stroud's Judicial Dictionary 5th Edition; and, what is conduct which justifies dismissal without notice is a question of fact and degree in all cases. See Baster v London and County Printing [1899] 1 Q.B. 901; Henry v Mount Gay Distilleries [1999] UKPC 39.

30. It is clear from the aforesaid inter-office memorandum that theactions or "numerous misconduct, managerial and Leadership exceptions by" the plaintiffon which the defendant relied to justify the plaintiff's summary dismissal were as follows:

(i) The unauthorized use of Company assets and the Company charge account;

(ii) Failure to ensure proper cash handling procedures as per FedEx International Profit Manual;

(iii) Failure to maintain policy mandated FedEx vehicle maintenance program and to ensure that mandatory training for all employees was completed.

Which actions the defendant says showed "gross misconduct and a complete disregard for FedEx expressed policies and procedures"; was a breach of trust which compromised the plaintiff's integrity and severely inhibited his ability to function as a FedEx Manager going forward.

31. In addition to the aforesaid reasons, in its defence, the defendant also included in the "particulars of the plaintiff's breach of conduct"a number of the plaintiff's past conduct for which he had been disciplined and or had received warning letters, the last one prior to the circumstances that led up to his termination, being in 2007. However, I agree with counsel for the plaintiff that in light of the reasons stated in the aforesaid inter-office memorandum the plaintiff'spast behavior ought not to be taken into account by this Court when determining whether the defendant's summary dismissal of the plaintiff was lawful, particularly, as submitted by counsel for the plaintiff, the defendant had not warned the plaintiff that such "cumulative" actions might lead, or, in my view, had led, to his summary termination.

32. In my judgment, then, the issues for my consideration are:

a. Whether or not the plaintiff was in fact guilty of the behavior which the defendant, in the aforesaid inter-office memorandum, alleges as gross misconduct?and if so,

b. Whether such behavior was sufficiently grave to warrant the plaintiff being dismissed summarily?

33. I have already set out the facts relied on by the defendant as gleaned from the statements of its witnesses.

34. The plaintiff's evidence-in-chief was set out in his witness statement filed 1 October 2013, in which he states, so far as relevant to the issues to be determined, as follows::

1) I was hired as a full time employee of the defendant company in 1988 as a Courier. I initially worked for the defendant company at its locations in Nassau, Bahamas.

2) I was promoted to and worked as a Sales Account Executive with the defendant company from 1994 to 1996. While in this position I was awarded for outstanding performance at both the district and regional levels.

3) I was asked and agreed to a transfer to the Freeport, Grand Bahama office in 1999 in the position of Station Manager. I had previously managed the Freeport office from Nassau.

4) During my first few months, the average amount of outbound packages increased daily from more than 50 packages to more than 160 packages; and inbound packages increased from more than 43 packages to more than 130 packages daily. The number of routes was also increased to 3.

5) I negotiated with officials at the Grand Bahama airport services to have the defendant company offload and load its own packages which saved the defendant company USD$2,030.00 monthly.

6) During the period of 2002 to 2004, I actively participated in making an agreement with a pharmaceutical company that increased the outbound packages by 120 daily. I serviced this customer personally without hiring any additional staff. The defendant company's profits were exceeded during the said period by $1.5 million dollars.

7) In 2004, after the devastation of hurricanes Francis and Jeanne, I implemented the use of a 40' trailer which caused the defendant company's Freeport Office to resume services more quickly than anticipated.

8) After the hurricanes, the defendant company restricted its fulltime employees to 7 hour work days, and restricted overtime. The defendant company advised that any loss of staff would not be replaced and if absolutely necessary, only part time employment would be considered. I and my remaining staff had to perform the extra duties.

9) As a result of the defendant company's adjustment in staffing policy, I was forced to take on a full courier's route and front desk duties in addition to performing my managerial duties. I worked 7:30 am to 7:30 pm from Monday to Saturday to maintain the demand for services.

10) I was aware that since the down turn in the economy, the defendant company had been terminating long term, high-paid managers throughout the Caribbean. I subjected myself to these working conditions and demands to ensure that the Freeport office remained profitable and that my job was secure.

11) I was informed by senior management that locations such as Freeport could be run by a local international Operations Specialist at a third of manager's salary and supervised from Nassau for at least 3 years. This would result in a significant savings for the defendant company.

12) On or about March 4, 2012 Mr Shawn Mahoney visited the Freeport office to carry out a newly implemented monthly audit that was previously conducted annually. During this visit he voiced that there would be *"some serious changes coming down the pipeline"*. He referred to the stagnant economy and possible cut backs and changes to reduce daily operational costs.

13) I presented two gas receipts to Mr Shawn Mahoney for fuel for my vehicle which I was, at the time, using for company purposes due to the fact that the company vehicle was out of service.

14) Mr Shawn Mahoney immediately got on his mobile phone and begun an animated conversation. When he realized that I was watching him, he continued his conversation outside.

15) The following week my Senior Manager, Mr Kenny Mondesir, a security specialist Mr Vic Colon and Mr Shawn Mahoney were in Freeport and met with me.

16) On April 4, 2012, I received a phone call from a senior manager advising me that I was being placed on "*Investigative Suspension*". This call was followed up by an inter-office memorandum. I was advised to come into the Freeport office early to receive a letter; that I was no longer allowed on the defendant company's property; and that I would be contacted later that day by Mr Vic Colon, Security Specialist of the defendant company.

17) Later that day I met with Mr Vic Colon and Mr Kenny Mondesir at the Our Lucaya Hotel. During this meeting I was forced to give a recorded statement and not allowed to leave until I was dismissed.

18) On April 16, 2012, I received a call from my senior manager to review the defendant company's offer for a mutual separation.

19) At the time that the defendant company terminated my employment with them, I was earning an annual salary of $76,296.00. The defendant company offered me $38,500.00 as final settlement and requested I sign a Deed of Release.

20) On April 23, 2012, I was served an official letter of termination citing numerous misconduct, managerial and leadership exceptions allegedly performed by me and deficiencies.

21) I deny all the allegations made against me in the defendant company's termination letter.

22) Additionally, I deny the particulars of the alleged breach of contract as stated by the defendant company:

a) *Unauthorized use of the company's fuel credit*:

I deny this claim. The use of the company's fuel credit (which were two (2) in total), occurred during a time when a FedEx delivery van was down for six (6) weeks awaiting the arrival of a new transmission. I made the judgment call that it would be more cost effective to the company to use my personal vehicle instead of paying for a rental car. I brought this to the auditor's attention at the beginning of the audit with the explanation given above.

b) *Failure to monitor and secure company assets, namely vehicle:*

I deny this claim on the grounds that I daily assessed the resources made available to me by the defendant company and I utilized them efficiently. The defendant company's Head Office was delinquent in providing security cameras to monitor company vehicles parked at the property after hours. I had on many occasions formally and informally requested to have them installed. This occurred during my thirteen (13) years tenure in Freeport.

c) ...

d) ...

e) ...

f) ...

g) *Failure to comply with vehicle inspection report requirements:*

For well into three years and possibly more, I had been working a route, in addition to carrying out my regular duties as a manager. This was mainly because of the Freeport and Abaco operations negative volume impact, due to the tough economic times we have been facing. We had made all of the possible cost-cutting measures we could think of, including turning off lights and air-conditions once the couriers went on the road daily and in the evenings. Overtime was non-existent and all full time employees were reduced to working a maximum of 35 hours a week and part-time employees 20 hours a week. To continue operations and maintain our reputation of quality service, I took on the additional workload. This was also done in aid of meeting my target and making bonus.

h) ...

i) *Failure to comply with cash handling procedures:*

I was informed by Shawn Mahoney, the Auditor, was the real reason for his visit. He advised me that it was believed that one of my employees was misappropriating funds. As far as I know to date, no funds were found missing or mishandled.

j) ...

k) ...

l) *Failure to ensure that employees received proper training prior to commencement of work; and*

FedEx repeatedly and very effectively informs their lower-line managers that hiring and training are the ultimate responsibility of the Senior Manager. In this regard, an applicant may be approved by myself but still require the approval of the Senior Manager. The Freeport branch had two employees that were efficiently trained and certified in all the areas required and I was instructed by the Senior Manager to terminate their employment with the defendant company in early January, and further instructed to fill their positions. I was pressured to get this done as soon as possible and not to follow the customary vetting process as the Senior Manager wanted this done and to schedule them to full hours even though it would be out of line with the business plan/model.

23) I have been in continuous employment with the defendant company for twenty-four (24) years and in a managerial position for fifteen (15) years in accordance with my contract of employment and attended work daily.

24) I have provided twenty-four (24) years of dedicated service to the defendant company, during which I have never received a poor performance review. My last five (5) reviews exceeded the defendant company's expectation.

25) That during my employment with the defendant company I received the following accolades: [the plaintiff listed a number of awards in his name from the defendant]

26) I believe the facts stated in this witness statement are true.

35. Counsel for the plaintiff noted, and I agree, that most of counsel for the defendant's cross-examination of the plaintiff was irrelevant to the issue at hand.

36. However, between cross-examination and re-examination, the plaintiff for the most part simply re-stated his evidence in chief or confirmed the evidence of the defendant's witnesses.

37. In regard to the interview with Mr Colon, the plaintiff said that he "immediately perceived, to understand that if [he] did not go along with the interview that he would be terminated. That [Mr Colon] made it very clear to [him]. That [he] had a choice, either do the interview or be subject to termination by them." He said he felt forced to participate in the interview.

38. In regard to refueling his wife's vehicleusing the defendant's fuel charge account, the plaintiff said that, in fact, the vehicle was owned by him but usually driven by his wife and, at the time,it was cheaper for him to use that vehicle than to rent a vehicle to do the defendant's deliveries; that the defendant knew that after serving for some 16 years he would not take or misuse the company's moneys or take advantage of the situation; that he was "running routes" because it was really "not feasible to put a full-time courier in position". He admitted that every week Shawn [Mahoney] would tell him that he had to stop going on the road; that it was too much for him to be "doing that", but he felt that he had to do what he was doing because of the staff shortage.

39. The plaintiff disagreed with counsel for the defendant's suggestion that it was dishonest of him to fill up his wife's car without lodging a mileage expense report.

40. The defendant contends that the plaintiff by the aforesaid alleged actions of gross misconduct committed several fundamental breaches of his contract of employment and or had acted in several respects repugnant to the fundamental interests of the defendant, who was, therefore, entitled, under section 31 of the Employment Act, to summarily dismiss the plaintiff without severance pay or notice.

41. The aforesaid alleged misconduct resulted from firstly the report of an audit assessment conducted by Mr Mahoney and secondly from an interview of the plaintiff by Mr Colon during the course of the defendant's investigation. That interview was recorded and a copy of the audio

version, as well a written transcript thereof, wasincluded amongst the defendant's documentary evidence.

42. The plaintiff alleges that he was coerced into participating in the interview. However, when asked by Mr Colon during the interview if he was being coerced or forced to participate therein, the plaintiff responded: "I did not even know you were coming."

43. It appears from the audio version of the interview that the conversationmay have begun a bit tentatively but seems to have proceeded amicably, as the plaintiff could be heard laughing on a couple of occasions.

44. What is noteworthy, however, is that during that interview, the plaintiff made the following admissions:

a. That there were times when he used the defendant's fuel charge account to fuel his personal vehicle because he had been "moving around FedEx things", without lodging expense or mileage reports, and that in doing so he exercised "bad judgment".

b. Not submitting expense or mileage reports in contravention of the defendant's cash handling procedures; that that was not "proper business etiquette and business practice"; and it was "improper" that he did so.

c. That prior to 2011 there "may have been irregularities" with regards to gas receipts on occasions when he "might have used his personal vehicle".

d. That he only fueled his personal vehicle when he was using it to "do work for FedEx".

e. That he never gauged how much fuel he had used when doing work for the defendant; he simply "topped off" his tank. That that too was "bad judgment" on his part.

f. That although he did not know how many times he would have fueled his vehicle from the defendant's charge account, he would not say "it was more than ten", but he would say that "less than five was a possibility".

g. That he had not reconciled the defendant's fuel charge account since September 2011, due to the extra work he had to do because of the staff shortage.

h. That he "fell down" in being "as frugal" as he should have been with verifying charges to the defendant's fuel charge account by cross referencing the vendor's copy with the defendant's copy of the receipts, although he had sent off the invoices to the defendant's office in Memphis for payment.

i. That he had "fallen down on the job" with respect to the vehicle inspection reports (VIRs) for at least two vehicles, one driven by him and another used by the airport staff, since September 2011, although he acknowledged the importance of such reports being completed and this his failure to provide them was a breach of the defendant's policies.

j. That there were times when he used the defendant's vehicle to conduct his personal business.

k. That there were times when he permitted other employees to use the defendant's vehicle for their personal business.

45. From the foregoing, I have no difficulty in answering the first three questions in the test laid down in British Home Stores Ltd -v- Burchell ("the Burchell test) in the affirmative.

46. The defendant became aware of the irregularities with the receipts for fuel charged to its account at Freeport Jet Wash. Mr Mahoney confronted the plaintiff. The plaintiff admitted that he had used the defendant's charge account to purchase fuel for his personal vehicle. Indeed, at

the time he produced two recent receipts as evidence thereof. The plaintiff also admitted to not having completed VIRs for several months prior to the discovery by Mr Mahoney during the audit assessment exercise. Although he offered excuses for his aforesaid conduct, during his interview with Mr Colon, the plaintiff admitted that such conduct was due to "bad judgment" on his part and "contrary to proper business etiquette and practice".

47. Clearly, therefore, the defendant had reason to believe, as distinct from merely suspecting that the misconduct of which the plaintiff was accused had, in fact, occurred and that, in light of what was known to the defendant at the time, including the plaintiff's aforesaid admissions, such belief was reasonable and was arrived at after an investigation (i.e. the aforesaid interview with Mr Colon):See British Home Stores Ltd -v- Burchell *supra.*

48. I, therefore, find that the plaintiff was indeed guilty of the misconduct attributed to him by the defendant in the aforesaid inter-office memorandum terminating the plaintiff's employment summarily.

49. So, was the aforesaid misconduct sufficiently grave to warrant the plaintiff being dismissed summarily or as posed in the Burchell test: Was it reasonable for the defendant to dismiss the plaintiff having regard to the gravity of the misconduct which the employer believed had occurred?

50. In answering that question, I am mindful that the issue is not whether this Court would have dismissed the plaintiff in the circumstances which the employer believed, or, as it turned out the plaintiff admitted, had occurred, but whether "dismissal was within the range of options open to a reasonable employer in light of that belief", and, I add, admission. See also Iceland Frozen Pools Ltd v Jones [1982] UKEAT 62-82-2907 and Williams v Morton Salt (Bahamas) Ltd. [2007] BHS J. No. 7.

51. Amongstthe defendant's documentary evidence is its 2-5 Acceptable Conduct Policy which includes, under the sub-heading: "Misconduct", a list, not all-inclusive or in any particular order, of violations which may result in severe disciplinary action up to and including terminationfor employees. Included in that list, inter alia, are the following:

(i) unauthorized use of company facilities, assets or systems;

(ii) violation of corporate safety regulation including, inter alia, failure to ensure subordinates attend required safety training; and

(iii) leadership failure of a member of management.

52. As I understand the plaintiff's evidence, he was saving the defendant money by using his own vehicle and fueling it from the defendant's fuel charge account. He said that the fueling occurred at a time when the defendant's vehicle was not working and he had to use his own vehicle to do the defendant's business; that it was less expensive than renting a vehicle. On another occasion he admitted "in hindsight and if you look, I guess at proper business etiquette and business practice it's improper that I did that, that's bad judgment and hindsight is 20/20". He also admitted to using the defendant's vehicle for personal business; if he was out making deliveries in the vehicle and had to take care of some personal business he would do so. He disagreed with counsel for the defendant's suggestion that that too was bad judgment as he was of the view that as manager he had the "leverage to do that". On the other hand, while he agreed "100 per cent" with counsel for the defendant that it was clear that the defendant had an issue with employees using any of its materials and assets for personal use, the plaintiff nevertheless disagreed that his admitted use of the company's vehicle for his personal business was improper.

53. Clearly, from the plaintiff's evidence and the arguments of his counsel, neither of them saw anything wrong with the plaintiff using the defendant's charge account to fuel his personal vehicle without proper authority and, in any event, they say, it was not sufficiently grave to warrant the plaintiff being dismissed summarily.

54. Indeed, counsel for the plaintiff submits that there was no serious misconduct identified in the termination letter, "not even sufficient misconduct to justify disciplinary action, let alone serious misconduct such as dishonesty and corruption".

55. I disagree. In my view, the plaintiff's unauthorized use of the defendant's charge account to fuel his personal vehicle was dishonest.

56. I also disagree with counsel for the plaintiff's submission that none of the actions which the defendant deems to be gross misconduct can be considered "willful and or deliberate conduct calculated to destroy or seriously damage the trust and confidence between the parties".

57. To my mind, the unauthorized use, alone, of the defendant's fuel charge account by the plaintiff on more than one occasion, regardless of the reason, was, in my view, sufficient to seriously damage the trust and confidence which the defendant may have had in the plaintiff. Although the plaintiff said that he used the fuel charge account to re-fuel his personal vehicle when using the same for the defendant's business, he admitted that he did not complete a mileage expense report, in accordance with the defendant's policy therefor. He also admitted that did he not merely replenish fuel he had used. Instead, he "topped off" his tank, regardless of the amount of fuel he had actually used. That is dishonest or, as counsel for the defendant put it: "stealing from the till".

58. I also disagree with counsel for the plaintiff's submission that the plaintiff's conduct of which the defendant complains is nothing more than carelessness on his part. By his own admission, the plaintiff says he exercised "bad judgment" in some of his decisions; that he had "fallen down on the job" with respect to the VIRs, although he was aware of the importance of such reports being completed and that his failure to do so was in breach of the defendant's policies. That sounds like an admission of negligence to me.

59. In any event, the defendant's 2-5 Acceptable Conduct Policy with which the plaintiff admitted he was familiar, clearly states that the acts of misconduct of which the plaintiff is accused, and to which he has admitted, were amongst those which "may result in severe disciplinary action up to and including termination for employees".

60. So, whilst the defendant's 2-5 Acceptable Conduct Policy allowed for the imposition of a less severe disciplinary action, I am unable to find, in the circumstances, that the plaintiff's dismissal was not within the range of options open to a reasonable employer, nor am I able to find that the defendant's action in dismissing the plaintiff summarily was unreasonable.

61. In that regard I accept the defendant's evidence that the plaintiff's actions, as set out in the aforesaid inter-office memorandum terminating his employment, compromised his integrity and severely inhibited his ability to function as a Manager with the defendant company and that such misconduct so undermined the trust and confidence which is inherent in the plaintiff's contract of employment with the defendant that the defendant should no longer be required to retain the plaintiff in its employment.

62. For the foregoing reasons,I find that the plaintiff was not wrongfully dismissed.

63. In the result, the plaintiff's claim is dismissed with costs to be paid by the plaintiff to the defendant, to be taxed if not agreed.

64. It is regrettable that the plaintiff finds himself in the position he is in after 24 years of service with the defendant, but the authorities are clear that longevity of service is no bar to summary dismissal as a sufficiently grave single act can result in summary dismissal. See Henry v Mount Gay Distilleries Limited (Barbados) [1999] UKPC 39; Laws v London Chronicle*supra*.

65. I have read all of the arguments put forward by counsel for both sides, as well as the authorities cited, and the fact that I may not have specifically referred to each one of them herein does not mean that I have not considered them and I am grateful to counsel for their assistance in that regard.

DELIVERED this 3rd day of November A.D. 2014

Estelle G. Gray Evans
Justice