COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2017/CON/lab/00068

BETWEEN:

BRANDLY MORTIMER ROBERTS

PLAINTIFF

V.

PERFECT LUCK EMPLOYER (No. 1) LIMITED

DEFENDANT

Before: The Honourable Mr. Justice Keith Thompson

Appearances: Mr. Obie Ferguson Esq. for the Plaintiff

Mrs. Viola Major for the Defendant

Dates of Hearing: 10th October, 2018

02nd April, 2019

16th & 17th April, 2019

Employment Law:

Substantial Merits of the case: - Termination of Employment Contract – Unfair Dismissal - Termination for Cause - Industrial Agreement

[1] This is an action in which the plaintiff seeks compensation for the termination of her contract of employment. The action was commenced by specially Indorsed Writ filed November 13th, 2017. A defence was filed August 03rd, 2018. An Amended Specially Indorsed Writ was filed July 17th, 2018. The amendment corrected the corporate name of the Defendant. The Statement of Claim and Defence are set out below respectively.

"STATEMENT OF CLAIM

1. **The Defendant is a company incorporated and existing under the Laws of the Commonwealth of the Bahamas and company in business therein as an Hotelier.**

2. **At all mentioned times the Plaintiff was employed by the Defendant having commenced her employment sometime on or about the year 2004.**

3. **The Plaintiff continued to be employed by the Defendant until January 12th, 2017 when the Defendant unfairly terminated the Plaintiff's contract of employment her right not to be unfairly terminated as provided by Section 34 of the Employment Act 2001 and failed to give the Plaintiff notice of termination or payment in lieu of notice.**

4. **The Defendant breached paragraph 4 of the progressive discipline documentation.**

5. **At termination the Plaintiff's job title was Front Desk Manager and she earned a salary of $620.00. The Plaintiff was also enrolled in the Defendant's group medical plan.**

6. **The Plaintiff supervised approximately 15 persons.**

7. **The Defendant suspended the Plaintiff without pay for 5 days contrary to the Plaintiff's contract of employment.**

8. The Plaintiff was a member of the Bahamas Hotel Managerial Association, a registered trade union for all supervisors and managerial employees in the Defendant's employ.

9. At termination the Defendant paid the Plaintiff in respect of 3 Public Holidays worked being Christmas Day 2016, Boxing Day, 2017 and New Year's Day 2017 but failed and refused to pay the Plaintiff in respect of Majority Rule Day, 2017 when the Plaintiff worked.

10. The Plaintiff's terms and condition of employment is embodied into an industrial agreement between the Defendant and the Plaintiff's union (B.H.M.A.)

11. As a result of the Defendant's unfair dismissal and breach of the Plaintiff's contract of employment the Plaintiff has suffered loss and damages.

PARTICULARS OF SPECIAL DAMAGES

12. Calculated in accordance with the provisions of the Employment Act 2001 relative to unfair dismissal.

Basic Award - 52 weeks at $620.00 per week	- $32,240.00
Compensation Award - 26 wks. at $620. Per wks.	- $16,120.00
Vacation pay – 4 weeks	- $ 2,480.00
Meals at $20.00 per day	- $ 5,200.00
Suspension pay for 5 days	- $ 620.00
Group medical Ins. (to be assessed)	_____
Total:	$56,660.00

13. **The Plaintiff further claims interest at 10% on the said sum pursuant to section three (3) of the Civil Procedure (Award) of Interest Act, 1992 on such sum as are found to be due and owing from the breach until final payment.**

14. **And the Plaintiff claims:**

    1. **The total sum of $56,660.00**
    2. **Damages**
    3. **Cost**
    4. **Interest**
    5. **Such further or other relief as the Court deems just.**

DEFENCE

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1. Paragraph 1 of the Statement of Claim is admitted, save insofar as it states that the Defendant is in business as a Hotelier. The Defendant avers that it conducts business as an employer for persons who work at the Melia Nassau Beach, a hotel located in Nassau, The Bahamas.

2. As it relates to paragraph 2 of the Statement of Claim, the Defendant admits that it employed the Plaintiff but denies that the Plaintiff commenced her employment with the Defendant on or about the year 2004. The Defendant avers that the Plaintiff commenced employment with the Defendant on the 27th September, 2016, the Plaintiff was employed by different employers responsible for the

employment of persons working at the Melia Nassau Beach and its predecessor hotels which occupied the same premises.

3. As it relates to paragraph 3 of the Statement of Claim it is denied that the Plaintiff was unfairly terminated as alleged, or at all, and the Plaintiff is put to strict proof thereof. The Defendant admits that the Plaintiff was not given notice of termination or payment in lieu of notice. The Defendant avers that the Plaintiff was summarily dismissed in accordance with **Section 29** of the Employment Act, and was therefore not entitled to notice of termination or payment in lieu of notice.

4. Paragraph 4 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

5. Paragraph 5 of the Statement of Claim is admitted, save that the Defendant avers that the Plaintiff earned a salary of $621.00 per week.

6. The Defendant makes no admissions as to paragraph 6 of the Statement of Claim and the Plaintiff is put to strict proof thereof.

7. As it relates to paragraph 7 of the Statement of Claim, it is admitted that the Plaintiff was suspended without pay for 5 days. The Defendant denies that the said suspension was contrary to the Plaintiff's contract of employment and the Plaintiff is put to strict proof thereof.

8. As it relates to paragraph 8 of the Statement of Claim, the Defendant has not knowledge of whether or not the Plaintiff was a member of

the said union save that the Plaintiff's job title fell within a category positions covered by the defined bargaining unit.

9. Paragraph 9 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

10. As it relates to paragraph 10 of the Statement of Claim, the Defendant admits that such terms and conditions of an expired industrial agreement between the Defendant and the Bahamas Hotel Managerial Association as were necessary for the business efficacy of the employee contract were incorporated into the Plaintiff's contract of employment.

11. Paragraph 11 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

12. The Defendant denies that the Plaintiff is entitled to the sums claimed in paragraphs 12, 13 and 14 of the Statement of Claim.

13. Save insofar as is hereinbefore expressly admitted or not admitted the First and Second Defendants deny each and every allegation of fact contained in the Statement of Claim as if the same were set out herein and specifically traversed seriatim.

[2] The Plaintiff executed a witness statement which was filed March 19th, 2019.

FACTS:

[3] The Plaintiff commenced employment in or about 2004 by different employers, who at times were responsible for hiring persons to work at the Melia Nassau Beach and its predecessors who occupied the same premises. The Defendant herein is

but one of those employers. However, there appears to be no issue of the continuation of employment of the Plaintiff.

[4] At the time of the termination, the Plaintiff's job title was that of Front Desk Manager and she was earning some $620.00 per week. She claims that she was also enrolled in the Defendant's group medical plan.

[5] The Plaintiff also claims that at the material time she was a member of the Bahamas Hotel Managerial Association, a registered trade union for all supervisory and managerial employees of the Defendant.

[6] It is further alleged that the terms and conditions of the Plaintiff's contract of employment were embodied in an industrial agreement made between the Defendant and the Bahamas Hotel Managerial Association.

[[7] The Plaintiff says that she supervised approximately fifteen (15) persons and her job duties included among other things to oversee front desk staff, which included making sure that staff properly checked in and checked out guests and to generally oversee the operations and ensure that company policies and procedures were adhered to.

[8] The genesis of the termination came about as a result of allegations against the Plaintiff in relation to a distressed Air Canada Flight. Of special interest are paragraphs 7 – 15 of the Plaintiff's Witness Statement.

> **" 7. The defendant from time to time had requests from airlines who were experiencing flight issues (distressed flights) to accommodate passengers and crew on short notice.**
>
> **8. When I arrived at work on the 8th day of January, 2017 for the 4 p.m. to 12 midnight shift my co-worker Lakeshia Symonette**

informed me that there was a request from Air Canada (who had a distressed flight). She also told me that the numbers had not been confirmed and that Air Canada was liaising with Andrea in the reservation department.

9. Kera Rolle obtained the information regarding the request from the other agents who said that they will be making some money because Air Canada flight is an upsell to (all inclusive) AI. Later that evening a representative from Air Canada called to confirm the number and I then added reservations in the system to accommodate the request. I assumed that because they indicated that all persons would be receiving meals and no alcohol beverages that it was an all- inclusive (AI).

10. I subsequently notified all relevant departments (restaurants and housekeeping). When I spoke to Kera she asked me if she could get my upsell because she knew I would not be able to receive the upsell. I told her that in order for her to receive it she would have to sign in at my terminal and my desk and she did so. I did not know that this would create a problem because I was not aware that I could only give my upsell to another person if that person was on duty.

11. As a result of the incident the Defendant suspended me without pay for five days in breach of the relevant provisions of the industrial agreement.

12. The defendant terminated my contract of employment without reference to the relevant provisions of the industrial agreement thereby breaching my contract of employment.

13. During my employment with the defendant I was never reprimanded or warned about my job performance. I just became aware of the documents listed below when they were shown to me by my attorney (who had been provided the same by the defendant's attorney).

- **Personal action from (PAF) dated January 16, 2017**
- **Separation pay calculation dated 25/01/2017**
- **Punch list report**
- **Internal Audit Review dated January 9, 2017**

14. Before termination I worked four public holidays namely Christmas Day, 2016, Boxing Day 2017, New Year's Day 2017 and Majority Rule Day 2017. At termination the defendant paid me in respect of the first three holidays but failed and refused to pay me in respect of the Majority Rule Day.

15. As a result of the defendants unfair/wrongful termination of my contract of employment I have suffered loss and damage as particularized in my Statement of Claim."

[9] The Plaintiff claims that she was unfairly dismissed as a result by the Defendant's breach of her contract of employment.

[10] The Defendant denies that it breached the contract of employment as alleged or at all and says that the Plaintiff was summarily dismissed and therefore not entitled to any notice of termination or payment in lieu of notice.

[11] The Plaintiff did agree that her termination date was incorrectly stated as being January 12th, 2017 instead of January 16th, 2017.

CROSS-EXAMINATION:

[12] Under cross-examination the Plaintiff explained the various booking options available at the Defendant's property. There were varying rates dependent upon which package/option was chosen. A regular room with an island view was cheaper than a suite with an ocean view. For corporate clients there were two options, the European plan and the all-inclusive plan. The all-inclusive covered food, alcoholic and non-alcoholic beverages and the European only covered accommodations.

[13] There was also the option of an upsell which provides for a guest to have any category of room, which included meals. There was also a room upsell and a food upsell. The Plaintiff wasn't too sure whether an agent could get a commission on both a room upsell and a food upsell. As a Front Desk Manager, the Plaintiff admitted that she could not earn a commission.

[14] The Melia Hotel had a system called the "OPERA SYSTEM". With this system, every employee has his/her own profile in the system, which required a user name and password for access. This system contains all of the information on bookings and other information.

[15] In order to make changes one must do so under their own profile. On the day in question, the Plaintiff worked the 4 – 12 shift during which time a number of persons checked in from a distressed Air Canada Flight. The Plaintiff confirmed that out of the approximately fifteen (15) persons she supervised one of them was a Kera Charlesetta.

[16] On January 8th, 2017 during the Plaintiff's shift Kera was behind the front desk despite the fact that she was not scheduled to work on that day.

[17] The Plaintiff was not aware of any special form or permission which was needed if an employee wanted to come on to the property on their day off. The Plaintiff admitted that she never asked Kera why she was on property and at the front desk on her day off.

[18] The Plaintiff confirmed that she checked in the Air Canada guests when they arrived. She also confirmed that none of the guests requested an upgrade. If more rooms were needed then all the Plaintiff would have had to do was to duplicate and add the additional rooms. However, what she did was to convert the rooms to "ALL INCLUSIVE".

[19] By upgrading the rooms the guests would then receive a greater benefit by receiving meals and drinks but no alcoholic beverages. When asked how the restaurant would know that they were not to receive alcoholic drinks the Plaintiff said she remembered calling around and she "MAY HAVE TOLD THEM'.

[20] In one instance, the Plaintiff said that they would give vouchers and then she revised and said they only gave bands. Then she added that they may have given vouchers to spring breakers. She added that in certain situations the guests would come with their vouchers from the airline and the vouchers would say what the guests were to receive. If the vouchers said meals the guests received an all-inclusive band and from that band the restaurants would know that they were not to receive alcoholic drinks unless the guests were going to pay for the alcoholic drinks themselves. They would pay on check out.

[21] The Plaintiff agreed that the airline paid the bill as if they had approved the alcoholic drinks.

[22] The Plaintiff was directed to Tab 1 of the agreed bundle of documents, which was a series of e-mails in reference to the booking. At page 5 there was an e-mail dated January 08th, 2017 which came from one Donna Sherman to Reservations,

Nassau and copied to Gregory Tai and Jenessa Ferguson. The subject of the e-mail was "ROOM RESERVATIONS FOR AIR CANADA PASSENGER DIVERTED AC 1524/08 Jan GGTNAS".

[23] The e-mail was as follows:

> "Hello Andrea,
>
> As per our telephone conversation this P.M. This is to confirm that we will need rooms for 57 Passengers and 5 Crew Members. Please include meals. We will not be responsible for Alcoholic Beverage. We will issue our usual Hotel Vouchers to the Passengers.
>
> Thank you for your assistance.
>
> Regards
> Donna."

[24] The Plaintiff did not advise Air Canada that they could not get an all- inclusive plan. The booking became an upsell after the Plaintiff made it an all-inclusive booking. She admitted that for any additional rooms she would simply have to duplicate. The Plaintiff said that the all- inclusive was the correct band.

[25] Counsel for the Defendant pointed the Plaintiff to paragraph 10 of her witness statement, which in essence is an admission that the Plaintiff allowed Kera to use her platform to access the system and put an upsell in Kera's name.

[26] On the 11th January 2017 the Plaintiff was interviewed by Security Officer Ian McQueen and subsequently suspended for five (5) days. At Tab 3 of the agreed bundle of documents is a Security Department Statement Form comprising three

pages, which the Plaintiff confirmed signing. On the first page the Plaintiff confirmed that she duplicated the booking in the Opera System.

[27] The Plaintiff's further evidence in regard to the document at Tab 3 is that Mr. McQueen tore up her statement three (3) times and she told him that what he had written down was not what she said and she took the position that the last sentence was not correct. She signed the statement she said because she thought he knew what he was doing.

[28] She went on to explain that she had had an incident earlier that year where Kera came up to her and gave her funds. She was shocked because she didn't know her. Subsequent to that, she saw Kera in the Mall at Christmas time and Kera gave her funds for her gift. She wasn't expecting anything from Kera. However, she admitted still signing the document which she said was the wrong thing to do.

[29] The Plaintiff further admitted that the only thing she requested to be changed in her statement was that; "she didn't expect anything in return."

[30] The Plaintiff while still on suspension sent a text message to co-workers. This was also discussed in the meeting of January 16th, 2017. The message was; **"life is a circle be careful what you say and do."** However, the Plaintiff explained that when the message was sent she was angry.

[31] Having denied ever being reprimanded for any infractions, the Plaintiff was shown a progressive disciplinary form which she had signed.

The reprimand was:

"Brandly gave an employee discount to a former employee"

[32] There was yet another progressive disciplinary form. However, she disagreed with the second form and did not sign that one.

RE-EXAMINATION:

[33] Under re-examination, counsel asked the Plaintiff if anyone accompanied her to the meeting of January 16th, 2017 and she said no.

CASE FOR THE DEFENDANT:

EVIDENCE OF BERGIT GODET-McKENZIE:

[34] Ms. Godet filed a Witness Statement on April 01st, 2019 and a Supplemental Witness Statement on the 11th day of April, 2019. Both are set out below.

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2017

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PLAINTIFF

AND

PERFECT LUCK EMPLOYER (NO. 1) LIMITED

DEFENDANT

Witness Statement of Bergit Godet-McKenzie

I, **Bergit Godet-McKenzie**, of the Western District of the Island of New Providence, in the Commonwealth of The Bahamas, say as follows:-

1. I work at the Meliã Nassau Beach All Inclusive Hotel located in Cable Beach, on the Island of New Providence in the Commonwealth of the Bahamas ("Meliã). I am the Human Resources Director and have held this post since June, 2016.

2. I am familiar with the Plaintiff, Brandly Mortimer Roberts, she is a former employee of the Defendant. Her employment was terminated on the 16th January, 2017.

3. Ms. Roberts commenced employment with the Defendant on the 27th September, 2016. Our records in the Human Resources Department reflect that, prior to the 27th September, 2016, Ms. Roberts was employed by different employers responsible for the employment of persons working at the Meliã and its predecessor hotels which occupied the same premises.

4. At the time of her termination of her employment, Ms. Roberts held the job title of Front Desk Manager. Her responsibilities included managing the front desk team members to ensure an efficient and smooth operations for producing excellent guest satisfaction.

5. On the 8th January, 2017, Air Canada made a large group booking for a number of passengers and crew members from a distressed flight, who required accommodation for one night. The reservation was made for all of the rooms to be booked on the European Plan (rooms only), and for guests to be provided with meal vouchers. At Meliã, we offer two options for corporate bookings, the European Plan and the All-Inclusive Plan. The European Plan is a less expensive rate, as it only includes the room. The All-Inclusive Plan attracts a more expensive rate, as it includes the room, meals, and beverages (both alcoholic and non-alcoholic).

6. The term 'distressed flight' describes a situation where an airline has a flight which is not going to take place as scheduled, and they book rooms to provide overnight accommodation for all of the passengers and crew members.

7. Sometime between the 8th January, 2017 and the 11th January, 2017, it came to the attention of the management at Meliã that on the 8th January, 2017, Ms. Roberts used the Opera system profile of another employee, Charlesetta "Kera" Rolle, to post multiple upsells into the Opera system. The upsells posted by Ms. Roberts gave persons on the Air Canada booking an upgrade from the European Plan to the All-Inclusive Plan, which includes meals, non-alcoholic beverages, and alcoholic beverages. Ms. Rolle was not on duty at the time that the posting was made.

8. The Opera system is a computer system which is used throughout the property to assist with the management and operation of the resort. Every department has access to the Opera system, and each employee has an individual Opera username and password which is used to access their individual Opera profile. It is a violation of company policy for an employee to access and make entries in the Opera system using the profile of another employee.

9. An upsell occurs when a Reservation Agent or Front Desk Agent persuades a customer to buy something additional or more expensive than originally booked, i.e. a particular type of room, and/or plan. This is done with the consent of the guest, as the guest is required to pay the difference in price between original booking and the new booking. The upsell may be done over the phone, by email, or at check-in when the guest arrives. The agent who makes the upsell, whether they be a Reservation Agent or a Front Desk Agent, receives a commission of a percentage of the value of the upsell.

10. An investigation was conducted into the incident. As a part of the investigation, the Finance Department conducted an internal audit, which included an audit of the Opera system. The results of the audit are contained in a report prepared by Tinisha Smith, which I received and reviewed. The audit confirms that on Sunday, 8th January, 2017, upsells were posted from Ms. Rolle's profile, upgrading distressed passengers from the Air Canada booking to All-Inclusive, contrary to the client's booking request.

11. Having regard to the fact that Air Canada specifically booked the rooms under the European Plan, the only way for a legitimate upsell to take place for any of the rooms under the booking, is if an individual passenger at check-in agreed to an upgrade from the European Plan to the All-Inclusive Plan. The individual passenger would then be required to sign a consent form and pay for the upsell at check-in. This was not done. A review of the schedule confirmed that Ms. Rolle was not on duty, and further enquiries revealed that Ms. Roberts had entered the posting. A copy of the Internal Audit Review is located at Tab of the Non-Agreed Bundle of Documents.

12. Additionally, the security department met with Ms. Roberts and with several of her colleagues, individually. The meeting with Ms. Roberts took place on the 11th January, 2017, and security officer Ian McQueen recorded a written statement from her outlining her account of the matter, which I received and reviewed. In her statement, Ms. Roberts states that Ms. Rolle came in to do something for her niece, and while she was there, Ms. Rolle told her that she wanted the upsell, and logged into her profile so that Ms. Roberts could enter the upsell on it. Ms. Roberts stated that after the Air Canada guests checked in, she posted six (6) upsells using Ms. Rolle's profile, so that Ms. Rolle could receive the commission.

Ms. Roberts also stated, "As a manager, I do not get commissions on the upsells and I knew if I gave it to Kera she would give me a portion of the commission." At the end of her statement, she sought to change her statement slightly by stating, "I want to clarify that Kera would not directly give me a portion of the commission she receives but that she would return the favour with a friendly gesture, like a small cash token at a later date." A copy of Ms. Roberts' statement is contained at Tab 3 of the Agreed Bundle of Documents.

13. After Ms. Roberts provided her written statement, the decision was made to suspend Ms. Roberts for five (5) days, to return to Human Resources on the 16th January, 2017 at 11:00am.

14. Suspension without pay is a form of discipline permitted under Ms. Roberts contract of employment.

15. The last formal Industrial Agreement between the Bahamas Hotel Managerial Association and Cable Beach Resorts Ltd. (former employer of Meliã workers) expired on the 27th November, 2012. Notwithstanding the expiry of the agreement, the terms of the Industrial Agreement are followed as the terms of contract for individual employees. All provisions in relation to holiday pay, insurance contributions, disciplinary actions, sick leave, vacation, maternity leave, compassionate leave etc, are followed.

16. This includes the entirety of Clause 12, which covers discipline and discharge and permits the following measures of disciplinary action: verbal warnings; written reprimands; suspension without pay; immediate dismissal.

17. Ms. Roberts returned from suspension on the 16th January, 2017, and a return from suspension meeting was held with Ms. Roberts. I was present at the meeting along with Zezinho De Brito, the former Front Office Manager and Ms. Roberts' immediate supervisor; and Cyprianna Major, then Human Resources Manager.

18. At the commencement of the meeting, the suspension documentation as read over to Ms. Roberts and explained to her. We explained that the purpose of the meeting was to first determine whether or not the suspension was warranted, and that if the suspension was not warranted, it would be rescinded. We further explained that if the suspension was warranted, the suspension would stand and the next step would be to determine whether or not she would be allowed to return to work, or be further suspended, or discharged.

19. During the meeting I asked Ms. Roberts if she agreed with the suspension, her response was that she understood that what she did, by giving Ms. Rolle the upsell and posting under her account, was wrong. We went over Ms. Roberts' written statement, and I asked her if there was anything she wished to add or change about her statement, she stated that, just because she gave Ms. Rolle the upsell, did not mean that she expected anything in return.

20. I found it hard to believe Ms. Robert's claim that she did not expect anything in return from Ms. Rolle. I pointed out to her that Ms. Rolle was not supposed to be on property, and that instead of addressing Ms. Rolle's presence at work whilst off duty, she allowed Ms. Rolle to sign into Opera so that she could post an upsell on Ms. Rolle's account which would allow Ms. Rolle to be compensated with a commission. I also pointed out that there were other front desk associates working on the shift, and if it was a justifiable upsell, then the commission

should have gone to one of them. Ms. Roberts could not explain why Ms. Rolle was on property whilst off duty, but indicated that she overheard Ms. Rolle speaking with another associate and she thinks Ms. Rolle was there to change money for her niece. Ms. Roberts again repeated that she asked Ms. Rolle to sign in so that she could get the commission from the upsell, but that just because she gave it to her, did not mean she expected something form her in return.

21. I asked Ms. Roberts if she was aware that as a Front Desk Manager, she is not able to receive commission from an upsell. She confirmed that, yes, she was aware of that.

22. Ms. Roberts claimed that all she did was duplicate the reservation that Andrea Bochard had already put in the Opera system. However, the reservation entered by Andrea was for European Plan rooms, not All-Inclusive rooms. I asked Ms. Roberts who she thought would pay for the upsell, and whether she thought the airline would pay for it, to which she did not respond.

23. At one point during meeting, Ms. Roberts stated that she recognized her mistake, had learned from it, and would continue to learn from it but that there was nothing she could do about it.

24. During the meeting, we also raised with Ms. Roberts information we had received, that during her suspension, she had sent a text message to several of her Front Desk agents, which they considered to be threatening. When asked about it, Ms. Roberts confirmed that she had sent a text stating, 'life is a cycle be careful what you say and do', to several of her staff members. She stated that she had sent it in anger. I advised Ms. Roberts it was unacceptable for a manager to

send a message like that to her staff members, as the message could be, and was, perceived as a threat.

25. We also spoke to Andréa Bochard, the agent who communicated with the representative from Air Canada and made the initial booking. Ms. Bochard confirmed that she reserved the rooms for Air Canada under the European Plan, not under the All-Inclusive Plan. A copy of the email communication concerning the booking is contained at Tab 1 of the Agreed Bundle of Documents.

26. At the conclusion of the meeting, we asked Ms. Roberts to step outside while we discussed the action to be taken. We determined that the suspension was warranted, and that her actions warranted the termination of her employment.

27. As a result, Ms. Roberts was terminated from employment, effective the 16th January, 2017.

28. We determined that Ms. Roberts' actions were dishonest and constituted a major breach of discipline in that (i) the upsell was not made at the request of either Air Canada or the individual guests at check-in; (ii) Ms. Roberts used the Opera system profile of another employee; and (iii) as a Manager, Ms. Roberts was not entitled to a commission, and her actions were done with the expectation that Ms. Rolle would give her a portion of the commission received.

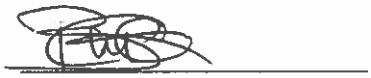
29. After the termination of her employment, Ms. Roberts was issued with a cheque in the amount of $580.20, which represented payment owed to her for three lieu days owed to her for holidays that she worked along with payment owed to her for her accrued vacation. A copy of the cheque is located at Tab 6 of the Agreed Bundle of Documents. A copy of the Separation Pay Calculation which shows the

breakdown of her final pay is located at Tab 4 of the Non-Agreed Bundle of Documents.

30. Employees are provided with one (1) duty meal per shift at the employee cafeteria. The value of the meal is approximately $3.00 per meal.

STATEMENT OF TRUTH

The contents of this witness statement are true and correct to the best of my knowledge, information, and belief.



Bergit Godet-McKenzie

29th March 2019

Date

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BETWEEN

BRANDLY MORTIMER ROBERTS **PLAINTIFF**

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PERFECT LUCK EMPLOYER (NO. 1) LIMITED **DEFENDANT**

Supplemental Witness Statement of Bergit Godet-McKenzie

I, **Bergit Godet-McKenzie**, of the Western District of the Island of New Providence, in the Commonwealth of The Bahamas, say as follows:-

1. Further to paragraph 29 of my first witness statement, the three holidays for which Ms. Roberts was owed lieu days were Christmas 2016, New Year's Day 2017 and Majority Rule Day 2017. The public observances of these holidays occurred on Monday 25th December 2016, Monday 2nd January, 2017 and Tuesday, 10th January, 2017, respectively. Ms. Roberts reported to work on each

of these days. These are the only three public holidays that Ms. Roberts worked for which lieu days were owed to her.

2. Ms. Roberts did not work on Wednesday, 27th December, 2016, which was the date on which the public holiday of Boxing Day 2016 was observed. Nor did Ms. Roberts work on Boxing Day 2017, as she was no longer employed by the Defendant at that time.

3. The days which were worked by Ms. Roberts during the period from the 24th December, 2016 to the 11th January, 2017 are reflected in the Punch List Report for her for that time period. A copy of the Punch List Report is located at Tab 3 of the Non-Agreed Bundle of Documents.

4. The employee personnel files for the Defendant's employees are kept under the care and control of the Human Resources Department, of which I am the Director. I have reviewed the personnel file for Ms. Roberts and note that Ms. Roberts was issued with at least four (4) written warnings prior to the incident of the 8th January, 2017.

5. The date of correction on the first Progressive Discipline Documentation is noted as the 25th March, 2010. This written warning was issued because Ms. Roberts granted the employee discount rate to a former employee without authorization. The Progressive Discipline Documentation is signed by Ms. Roberts.

6. The date of correction of the second Progressive Discipline Documentation is the 10th November, 2014. This second written warning was issued because Ms. Roberts refused to assist a guest after being asked twice. Ms. Roberts refused to sign the Progressive Discipline Documentation, however it was signed on behalf of Human Resources by Cyprianna Major, whose signature I am familiar with, having worked with her for approximately eleven (11) months.

7. The date of correction of the third Progressive Discipline Documentation is the 18th December, 2014. This third written warning was issued because Mr. Cartwright, the then Senior General Cashier, discovered Ms. Roberts safety deposit box key. Ms. Roberts refused to sign the Progressive Discipline Documentation, however it was signed on behalf of Human Resources by Cyprianna Major.

8. The date of correction of the fourth Progressive Discipline Documentation is the 4th December, 2015. This fourth written warning was issued because Ms. Roberts created a reservation in her own name, then changed the name on the reservation to that of another guest, in violation of the company's procedures to have reservations booked in the name of beneficiaries via the website. Ms. Roberts refused to sign the Progressive Discipline Documentation, however it was signed on behalf of Human Resources by Cyprianna Major.

9. Copies of the Progressive Discipline Documentation for each infraction are located at Tabs 1-4 of the Defendant's Supplemental Bundle of Agreed Documents and Non-Agreed Documents.

STATEMENT OF TRUTH

The contents of this witness statement are true and correct to the best of my knowledge, information, and belief.

Bergit Godet-McKenzie

April 10 2019

Date

[35] Counsel made reference to paragraph 29 of the McKenzie Witness Statement, in particular the fact that the Plaintiff was issued a cheque in the amount of $580.20,

which represented payment owed to the Plaintiff for three (3) lieu days for holidays on which she would have worked along with payment owed to her for accrued vacation. There is a separation pay calculation sheet at tab 4 of the non-agreed bundle of documents reflecting the payment and marked EX. "B.G.M. 1"

[36] Counsel had three additional questions arising out of the evidence given earlier during the trial. The first question was whether the witness could advise as to when Crystal Palace closed. The witness was not certain but believed it was around October, 2014. The second question was whether passengers from a distressed flight are provided with bands for the European Plan or all inclusive? The answer was the European Plan. The third question was what was the practice for obtaining meals? The answer was that guests would be given a wrist band and then go to the restaurant to get their meals and upon check out there would be a reconciliation.

CROSS-EXAMINATION:

[37] According to Ms. McKenzie, a wrist band is provided for the European Plan and upon checking out a reconciliation is done of the account and the guests would pay personally for anything not included in the plan.

[38] Ms. McKenzie confirmed that the Plaintiff was one of those employees who was transferred and retained her employment. There was no issue on the part of the defendant with continuity of employment.

[39] There was also confirmation that the Plaintiff was required to report to Ms. McKenzie's office on January 16th, 2017 where a meeting was held. Present at

the meeting was the Plaintiff, Ms. McKenzie, Cyprianna Major and Mr. De Brito. There was no union rep and no request was made for one by the Plaintiff.

[40] The witness was asked if she was aware that in meetings such as that of January 16th, 2017 a union rep ought to have been informed. She answered yes and no. She was then directed to paragraphs 15 and 16 of her witness statement.

> **15. "The last formal Industrial Agreement between The Bahamas Hotel Managerial Association and Cable Beach Resorts Ltd (former employer of Melia workers) expired on 27th November, 2012. Notwithstanding, the expiry of the agreement, the terms of the Industrial Agreement are followed as the terms of contract for individual employees. All provisions in relation to holiday pay, insurance contributions, disciplinary actions, sick leave, vacation, maternity leave, compassionate leave etc. are followed."**
>
> **16. This includes the entirety of Clause 12, which covers disciplinary and discharge and permits the following measures of disciplinary action; verbal warnings; written reprimands; suspension without pay; immediate dismissal."**

[41] Ms. McKenzie agreed that there is no infraction termed "dishonesty" in Clause 12.3. She also agreed that Section 12.4 was not complied with neither was Clause 12.4. (2), (3) or (4). In fact she said the infraction was a major breach. Ms. McKenzie confirmed that they did not comply with Section 12.6. No notification was given to any union representative. She answered yes and no when asked if Clause 13 was intended to be a part of the grievance procedure.

[42] She confirmed knowing Mr. Russell who she identified as one of the representatives of the union and they had a mutually respective relationship. She did not contact Mr. Russell and the Plaintiff never asked for him to be present. There was confirmation that the Plaintiff was suspended without pay from the 11th – 16th January.

[43] The Plaintiff was owed for three days and a cheque was offered to her after she was terminated. Ms. McKenzie was directed to tab 1 of the non-agreed bundle, "the Internal Audit Review". She did not provide a copy to the Plaintiff but says they dismissed it. The Plaintiff would not have seen the Personnel Action Form at tab 2 of the same bundle nor the Paid List Report at tab 3 and the Separation Pay Calculation Form.

[44] Counsel for the Plaintiff asked Ms. McKenzie whether there was a policy that once an infraction was committed, after one (1) year they are removed. The answer was that they are not removed, but are simply inactive. Ms. McKenzie couldn't say if the Defendant suffered any financial loss as a result of the upsell, but said that the airline refuted the cheque. She also was not certain if the hotel actually paid the commission to Kera, she could not recall getting a statement from Kera. She did however get a report from accounts but did not recall a commission being paid to Kera.

[45] There is no other managerial agreement with the union. Ms. McKenzie confirmed that other staff participated in upsells. She explained that the Plaintiff was dishonest when she signed into someone else's account who wasn't scheduled to work just for that employee to get the commission.

RE-EXAMINATION:

[46] Under re-examination Ms. McKenzie confirmed that the termination date was January 16th, 2017. The suspension document was also clarified. What was also clarified was the fact that only some of the clauses of the expired Industrial Agreement were followed.

[47] Ms. McKenzie went on to explain that some of the clauses which weren't used were;

1. Access on property;
2. Access to members;
3. Requests to meet on property;
4. The facilitation of the deduction of union dues;
5. Representation during disciplinary matters.

[48] Ms. McKenzie also clarified the fact that the clause of notification to the association was not a clause that they continued.

[49] The provision permitting suspension without pay continued. There was an investigation by finance prior to January 11th, 2017 and the findings were enshrined in one of the documents in one of the bundles but she didn't recall which bundle.

[50] Ms. McKenzie confirmed that putting the reason of "dishonesty" on the forms from January 11th, 2017 was how it was done but they only found her to be dishonest

on January 16th, 2017. Parts of the Industrial Agreement came back into existence in March 2017.

THE LAW:

[51] The Plaintiff claims to have been unfairly dismissed. The Statement of Claim is set out above. The claim seems to be hung on an industrial (collective) agreement by the Plaintiff.

THE INDUSTRIAL/COLLECTIVE AGREEMENT ("The Agreement"]

[52] The agreement expired on 27th November, 2012 and no new agreement was entered into thereafter. Mr. Ferguson made much a do about the agreement and in particular clause 12. The Defendant suspended the Plaintiff without pay for five (5) days. In looking at the agreement clause 12.6 (Discipline and Discharge) provides;

> **"Where a major breach is alleged, Management may suspend the employee from duty without pay for investigation purposes for a period not more than 5 working days and the charge has been provided to the satisfaction of management, the Director of Human Resources will inform the Association of its decision to do one of the following;**
>
> **a). Dismiss the employee immediately if, in the view of the Hotel's management the circumstances justify such action; or**

b). Suspend the employee with pay for a further period of not more than fifteen (15) working days."

[53] One can understand why Ms. McKenzie answered "Yes and No" when asked if certain things were done pursuant to clause 12 e.g. "notifying the association and having a representative present."

[54] The Employment Act and the Industrial Relations Act were both amended April 04th, 2017. In the Industrial Relations Amendment Act it provides;

"10. AMENDMENT OF SECTION 51 OF THE PRINCIPAL ACT:

Section 51 of the Principal Act is amended by the insertion immediately after Sub-section (1) of the following sub-section (1A):

(1A) The terms and conditions of a registered agreement shall <u>where applicable</u>, be deemed to be terms and conditions of the individual contract of employment of the workers comprised from time to time in the bargaining unit to which the registered agreement relates."

[55] However, when we say that the terms and conditions of the collective agreement, upon expiration shall become the terms and conditions of the individual contracts employment of the employees it must be understood that all terms will not be possible/reasonable or operable to be subsumed into the individual contracts. It says "where applicable"

[56] The words "Collective" and "individual contracts of employment" carry specific meanings. Statutory interpretation dictates that in the first instance we use the literal rule and if the result is an absurdity then we move on to the next tool/or rule of interpretation.

[57] It is my considered opinion that clauses or parts of clauses such as having a union rep present would not carry over into the individual contracts. There is no longer that relationship between a union and the employer, thus no representative, in keeping with the amendment when it says; **"WHERE APPLICABLE."**

[58] The Plaintiff was terminated prior to the amendments, thus the amendments are not applicable in this instance. Collective in my opinion means that you are dealing with the union and likewise "individual contracts of employment" means that you are only dealing with the individual employee. There is then privity of contract as between the employer and the employee, with the individual contract of employment, as there was no union. The union is a stranger or outsider and cannot interfere in any way with the individual contractual arrangement between the employer and employee, save and except those clauses or parts of claims which would be operable or applicable in the circumstances.

[59] When the Plaintiff says in the statement of claim at paragraph 10 that "The Plaintiff's terms and conditions are embodied into an industrial agreement between the Defendant and the Plaintiff's union (B.H.M.A.) that is a fallacy as no such contractual arrangement existed at the time of the termination.

THE ISSUE OF DISHONESTY:

[60] Mr. Ferguson put certain questions to Ms. McKenzie about how the disciplinary forms were prepared. He asked why was dishonesty put on the suspension form. His view was that the Defendant had made up its mind on dishonesty at that point. I am of the view that the proper position is that dishonesty is suspected and that is what is being investigated.

THE INVESTIGATION:

[61] Based on the evidence, it would appear that a thorough investigation was carried out in this matter. There was information as to how the upsell was processed. This was not only ascertained from the Plaintiff in the interview but also from the internal investigation by the Defendant. The Plaintiff was only terminated after the return from suspension interview. She had an opportunity to explain her actions and did so, if I may say, honestly. However, it is obvious that the Defendant considered what was done to be a major breach of contract.

[62] The events which led to the Plaintiff's termination resulted in another employee being put in a position to benefit when she was not entitled to. In fact that employee was not even scheduled to be at work when she was allowed by the Plaintiff to access the Defendant's computer system to upgrade a transaction referred to as an "upsell". The Plaintiff admitted that she committed a wrong.

BREACH OF THE OBLIGATION OF MUTUAL TRUST AND COINFIDENCE:

[63] There is a mutual duty to maintain mutual trust and confidence as between an employer and employee. In the book **"EMPLOYMENT LAW" by Gwyneth Pitt at**

page 70 under the rubric **"DUTY TO MAINTAIN MUTUAL TRUST AND CONFIDENCE"** it states;

> **"In recent years it has become established that it is an implied term of contract that neither side should act in such a way as to damage the mutual trust and confidence which ought to subsist between them in order for the contract to be carried out properly. This development has taken place entirely in the context of unfair dismissal where the employee has argued that he has been constructively dismissed, an argument which depends on the employer having committed a fundamental breach of contract. For example in ROBINSON V CROMPTON PARKINSON [1978] ICR 401 an employee of many years' standing and good character was accused of theft. He was acquitted and asked for an apology. It was refused and he left claiming unfair dismissal. The EAT stated that there was a duty of mutual trust and confidence which could be breached in these sorts of circumstances, although on the facts there was no breach in this case."**

[64] I would be hard-pressed to say that on the facts of the instant case, that there was no breach on the part of the Plaintiff.

[65] The evidence shows that the Plaintiff was only terminated after a thorough investigation and after the Plaintiff had an opportunity to address the allegations made against her by the Defendant.

[66] The Plaintiff claims unfair dismissal under Sections 34-40 of The Employment Act 2001 (The Act"). A proper starting point would be section 33 of the Act which provides;

"An employer shall provide 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."

[67] It is clear from the evidence that the exception in section 33 did not come into play as the Defendant carried out a proper and thorough investigation thereby affording itself the opportunity to discover certain information contained in its computer system which was shared with the Plaintiff upon her return from suspension. It was then that the Plaintiff had the opportunity to speak on her own behalf and address the allegations being made against her.

[68] In the case of YVETTE FERGUSON V BMP LIMITED D/B/A/ CRYSTAL PALACE CASINO file No. IT/NES/2010 as Vice President Thompson (as I then was) of the Industrial Tribunal, the appeal of which was upheld in The Court of Appeal in IndTri App No.116 of 2012 I stated;

"Secondly, some basic elements of fair procedure are so vital to the process whereby the employer forms a view of the facts that a failure to observe them is virtually bound to make the dismissal unfair. In this category, comes the natural justice-type requirement of giving an opportunity to respond before the decision is taken. In the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct FULLY and FAIRLY (my emphasis) and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

[69] The above speaks to allowing the Plaintiff to speak and defend herself or offer an explanation or mitigation. The evidence clearly shows that the Plaintiff had such an opportunity.

[70] Therefore, the Defendant was well within its legal right to terminate without notice pursuant to section 33 of the Act, having concluded after its full and fair investigation and after the Plaintiff had the opportunity to speak on her own behalf. She was summarily dismissed due to committing a major breach of her contract of employment.

[71] The Plaintiff was terminated for dishonesty which happens to be (c) in section 32, as one of the acts of misconduct.

Section 32 provides:

> **"Subject to provisions in the relevant contract of employment misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following -**
>
> **a. theft;**
>
> **b. fraudulent offences;**
>
> **c. dishonesty;**
>
> **d. gross insubordination or insolence;**
>
> **e. gross indecency;**

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

g. gross negligence;

h. incompetence;

i. gross misconduct.

[72] In the instant matter, the Plaintiff is claiming unfair dismissal and filed a specially indorsed Writ of Summons, July 17th, 2018. The Statement of Claim however in my view fails to meet the threshold as set out in the case of EDEN BUTLER V ISLAND HOTEL COMPANY LIMITED(T/A Atlantis Paradise Island) SCC iv. App & CAUS No. 210 of 2017 wherein Mr. Justice Evans JA. (Actg.) said at paragraph 32;

> **"As is evident from the amended statement of claim the appellant provided no particulars of his claim for unfair dismissal. A plaintiff must complete a statement of claim in which are set out the allegations of facts they intend to prove. In the aggregate those allegations of fact if proven at trial, must suffice to give rise in law to the relief being claimed. The Plaintiff would have to prove sufficient detail in the claim so that the defendant knows what the allegations of facts are, otherwise, that person cannot defend. The nature and extent of particulars depend on the nature of the claim. If, for example, trespass is alleged in the claim, the allegation of fact must make the claim out. Similarly, for breach of contract, the claim will set out the material terms of the contract and the details of the alleged breach."**

[73] In my opinion the Statement of Claim in the instant matter has not risen to the required standard.

[74] In light of the evidence therefore and in all of the circumstances, the Plaintiff's Specially Indorsed Writ of Summons is hereby dismissed with costs to the Defendant to be taxed if not agreed.

This is the Decision of the Court.

Dated this 18th day of September 2020.

Keith H. Thompson

Justice