**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**COMMON LAW AND EQUITY DIVISION**

**2017/CLE/gen/00147**

**BETWEEN**

**KIM MCDEIGAN**

**Plaintiff**

**AND**

**THE BAHAMAS CO-OPERATIVE LEAGUE INSURANCE BROKERAGE LTD.**

**Defendant**

| | |
|---|---|
| **Before:** | The Honourable Madam Justice Tara Cooper Burnside (Ag) |
| **Appearances:** | Kahlil Parker and Roberta Quant for the Plaintiff<br>Ashley Williams for the Defendant |
| **Hearing Dates:** | 22 January 2021, 12 – 18 February 2021, 31 March 2021 |
| **Further Submissions: (in writing)** | 16 April 2021 |

**Employment Law –Wrongful Dismissal - Unfair Dismissal – Section 34 of the Employment Act**

## JUDGMENT

## INTRODUCTION

[1] On 14 February 2017 the Plaintiff brought these proceedings by Writ of Summons, claiming breach of contract and that she was wrongfully and unfairly dismissed.

[2] In her Statement of Claim filed 8 March 2017, the Plaintiff asserts the Defendant had no legitimate grounds upon which to dismiss her, summarily or otherwise. Further, the Plaintiff alleges that the Defendant failed to conduct any or any reasonable investigation into the charges made against her, and that she was neither presented with the said

charges to answer, nor was she presented with or afforded an opportunity to rebut the evidence upon which the Defendant based its decision to dismiss her. Additionally, in her Statement of Claim the Plaintiff sought an injunction to prevent the Defendant from publishing a notice in the local newspaper in respect of her termination, alleging that to do so would constitute a breach of the implied term of trust and confidence by the Defendant.

[3] In its Defence filed 24 March 2017, the Defendant denies that the Plaintiff was wrongfully or unfairly dismissed and avers that it conducted a reasonable investigation into its operations which revealed that it had sustained significant financial and reputational risks directly attributable to the Plaintiff's performance in her role as Manager. Further, the Defendant contends that the findings of its investigations were clearly articulated to the Plaintiff, and she was provided with an opportunity to respond to them.

[4] Prior to the trial, the Plaintiff sought an injunction to restrain the Defendant from, among other things, publicizing the fact of her dismissal in the local newspaper. An *ex parte* interim injunction was granted with a returnable date and subsequently discharged on 8 March 2017. In discharging the injunction, Charles J held: (1) The intended publication could not be considered defamatory as it is routinely done to protect Companies and their customers from liability. (2) In any event, damages would be an adequate remedy for the Plaintiff should she succeed at trial of her action. If damages would not be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted; however strong the plaintiff's claim appeared at that stage.

[5] The trial was conducted electronically, using the Zoom platform, and recorded.

[6] At the trial, the Plaintiff gave evidence on her own behalf and Hilton Bowleg, Larry Collie and Williams Knowles Jr gave evidence on behalf of the Defendant.

[7] There was also documentary evidence before the Court, all of which was contained in an Agreed Bundle of Documents.

## GENERAL BACKGROUND AND EVIDENCE

[8] The Defendant is an insurance broker and the Plaintiff was formerly employed by the Defendant in a managerial capacity.

[9] The Plaintiff's employment commenced on 1 June 2015 and the express terms of her contract of employment were recorded in a letter dated 19 May 2015 issued by the Defendant. Insofar as they are relevant, those terms are set forth below:

> "Dear Ms. McDeigan,
>
> **Employment Offer**
>
> We are pleased to offer you the position of Insurance Brokerage Manager of the Bahamas Co-operative League Insurance Brokerage Limited.
>
> **Normal Working Hours** Monday through Friday
> 9:00 a.m. to 5:00 p.m.

| | |
|---|---|
| **Salary** | \$47,000 p.a. (forty- seven thousand dollars per annum) Paid on the $10^{th}$ and the $25^{th}$ of each month |
| **Employment Benefits** | Contributory Health Insurance (2/3 BCLIBL& 1/3 Employee)<br>Contributory Pension (10% of your salary is paid by the Insurance Brokerage Limited and 5% is paid b you on a monthly basis)<br>Uniforms (issued every 2 years)<br>Vacation — 3 weeks after one year of employment<br>7 Casual Days |
| **Meal Break** | One hour entitlement for lunch |
| **Sick Leave** | Eligible for up to twenty (20) working days at full pay |
| **Probationary Period** | 6 months (an interim performance review will be conducted at 3 Months and at the end of the probationary period). **During this time any party reserves the right to terminate the contract of employment.** |
| **Resignation Notice** the **Required** | One month's notice is required in the event employee decides to resign |
| **Reporting Responsibility** | The General Manager of the Bahamas Co-operative League Limited and the Board of the Bahamas Co-operative League Insurance Brokerage Agency. |
| **Employment to commence** | June 1st, 2015 |
| **Additional Terms** | As stated in the attached job description and as assigned by Management |

Please indicate your understanding and acceptance of this Employment Offer inclusive of the terms stated above and those indicated in the attached job description, by signing and dating this document and the attached copy. The Personnel Policy is also attached to this offer."

[10] In December 2016 the Defendant undertook an evaluation of the Plaintiff's performance for the period June 2016 to December 2016. The feedback set forth in the Performance Evaluation Report dated 9 December 2016 was generally positive; and at the end of that Report the Appraiser stated *"Ms. McDeigan has done an excellent job in moving the agency in the right direction. It is expected that the agency will see further growth in the upcoming year."*

[11] The majority of the share capital of the Defendant is The Bahamas Co-operative League Limited (the "**League**").

[12] Sometime prior to the Plaintiff's evaluation, issues arose between the League and the Defendant; and by a letter dated 13 June 2016, the board of directors of the League requested the board of directors of the Defendant to transfer/convey to the League, the administrative offices of the Defendant (together with its contents).

[13] The Defendant did not immediately comply with that request and in or about 17 January 2017, the League, in its capacity as majority shareholder, determined to (i) discharge the Defendant's board of directors serving at that time and (ii) appoint an interim board of directors in their place. Hilton Bowleg was the Chairman of the interim board.

[14] Upon their appointment, the interim board of directors set out to investigate the operations of the Defendant. Further, on 18 January 2017, the Plaintiff was required to take vacation leave for a period of two weeks.

[15] On 2 February 2017, the date of her return from vacation, the Defendant suspended the Plaintiff from work. A letter of suspension was provided to the Plaintiff in the following terms:

> "Dear Ms. McDeigan
>
> **<u>RE: Suspension of employment</u>**
>
> The Board of the Bahamas Co-operative League Insurance Brokerage Limited has determined that there are some anomalies within the Bahamas Co-operative League Insurance Brokerage Limited. In light of this determination, it is necessary to conduct a further investigation of the operation.
>
> Please be advised that effective today, Thursday February 2, 2017 your employment with the Bahamas Co-operative League Insurance Brokerage Limited has been suspended for the period February 2, 2017 to February 9, 2017 pending a further Investigation of the operation.
>
> Sincerely
>
> Sharon Rahming
> Secretary"

[16] On 10 February 2017, when the Plaintiff returned to work after the completion of her suspension, the Defendant terminated her employment. The letter of termination provided to the Plaintiff was in the following terms:

> "Dear Ms. McDeigan
>
> **RE: Termination of employment**
>
> On the 2nd February 2017, you were suspended with pay for the period 2nd February to 9th February 2017. The reason for your suspension was due to the Inadequacy of your responses at a meeting held on the 2nd instant in which the following allegations were brought to your attention, namely:
>
> 1. Failure to dispatch payments to BCLIBL partners—The last payment issued to Security & General Insurance Company was September 2016 and the last payment issued to Star General Insurance Agents & Brokers was April 2016. This situation places the clients and the Bahamas Co-operative League Insurance Brokerage at serious financial risk. In addition, the professional reputation of The Bahamas Co-operative League Insurance Brokerage Limited was placed at risk.
>
> 2. A review of communication from Security & General Insurance Company also indicates that there are instances of serious discrepancies between the records of the Bahamas Co-operative League Insurance Brokerage Limited and the Security & General Insurance Company which placed the clients and BCLIBL at considerable Financial and Liability risks. The clients are reflected in the Power Broker system as being up to date with their premium payments, however, they are listed as being delinquent at Security and General Insurance Company. The company has indicated in some cases they would not issue renewal notices due to the account status of the clients.
>
> 3. There is no proper record or files of the Temporary employees of the Insurance Brokerage. In addition, no Employment files were located for any of the temporary employees or yourself. It was also determined that no National Insurance contributions were made on behalf of the Temporary employees of the Insurance Brokerage. This is a violation of the National Insurance Act
>
> Further, the suspension was necessary to allow a reasonable investigation into the aforesaid matters. Having completed our reasonable investigation, we have concluded that your conduct falls within Group 2 of the offences outlined in the Personnel Policy Handbook of The Bahamas Co-Operative League Limited and its Wholly Owned Subsidiaries ('Employee Manual').
>
> The specific misconduct which our reasonable Investigation revealed and which is listed in the Employee Manual are as follows:
>
> a. Stealing company equipment or the personal property of fellow employees;
> b. Willful neglect of duties.

As a result of our reasonable investigation, it has been determined that your contract of employment with the Bahamas Co-Operative League insurance Brokerage Limited shall be terminated with immediate effect.

We kindly ask that you immediately return to The Bahamas Co-operative League Insurance Brokerage Limited all property, equipment, records, correspondence, documents, files and other information (whether originals, copies or extracts) belonging to The Bahamas Co-operative League Insurance Brokerage Limited.

Sincerely

Hilton Bowleg
Chairman"

**Plaintiff's evidence**

[17] The evidence of the Plaintiff is derived from her witness statement and the affidavits previously sworn by her, the contents of which she confirmed to be true in the first paragraph of her witness statement. The first paragraph of the Plaintiff's witness statement also *"confirms"* the contents of her Statement of Claim, which, contrary to Order 18, rule 6, contains not only a summary of the material facts upon which the Plaintiff relies but also much of the *evidence* by which those facts are to be proved. It also contains arguments and submissions but there was no objection by the Counsel for the Defendant.

[18] In summary, the Plaintiff's evidence is that she was not paid for the period of her suspension from 2 February 2017 to 9 February 2017, although the termination letter purports that she was suspended "with pay". Further, although her termination letter suggests that she was suspended because of the inadequacy of her responses at a meeting held on 2 February 2017 (the "**2 February meeting**"), the Plaintiff's evidence is that the suspension letter had been drafted before the meeting took place. The Plaintiff also gave evidence that the said meeting was unfair because she had not been provided with any previous notice of the meeting or any of the Defendant's concerns regarding its operations and management. She also testified that she had not been informed of the changes which had occurred in the composition of the Defendant's board.

[19] According to the evidence of the Plaintiff, it was apparent to her at the 2 February meeting that the Defendant was "seeking to put substantive and detailed questions" to her and she told them it would have been fair to have given her notice of the meeting and an opportunity to address the questions. In her words, the Defendant conducted "a trial by ambush" although she did her best to answer the questions put to her. She stated that those questions related to, among other things, payment issues with Security & General Insurance Co, Ltd ("**Security & General**").

[20] The following paragraphs of the Plaintiff's witness statement nicely encapsulates the Plaintiff's complaint against the Defendant:

> "8. The Defendant's letter dated the 2nd day of February A.D. 2017delivered to me at the conclusion of the said meeting, did not suggest that I was under investigation or that I was being charged with any infraction. It stated that the Defendant had "determined" that there were "some anomalies" within the company and that it was therefore necessary to conduct a further investigation of "the operation". By its letter to me, dated the 10th day of February A.D. 201714, the Defendant dishonestly and self-servingly stated that the reason for my suspension "was due to the inadequacy of your responses at a meeting held on the 2nd instant in which the following allegations were brought to your attention...". As noted with respect to the Defendant's suspension letter, dated the 2nd day of February A.D. 2017, there was no reference therein to "inadequacy of[my] responses", furthermore the transcript of the said meeting also demonstrates that there was no suggestion to me that I was being suspended due to the alleged inadequacy of my responses. The Defendant at all material times maintained that I was suspended pursuant to its desire to conduct further investigations of its operations.
>
> 9. In its said letter of termination, dated the 10th day of February A.D. 2017, the Defendant refers to three purported "allegations" allegedly brought to my attention. Firstly, a purported failure to dispatch payments to the Defendant's "partners", with respect to which I maintain my position, stated hereinabove, that I adequately addressed and explained the issues raised with respect thereto as best I could in the circumstances of the said meeting, having been afforded no notice of the said meeting, the subject matter to be discussed therein, or access to my files to prepare an informed response. Furthermore, the Defendant's said interim insurance Board, neither at the said meeting or in their disclosures in this action, demonstrated that they were privy to any information that the Defendant's previous Board was not privy to. I was not advised that there was any fresh allegation regarding the Defendant's relationship with its "partners" that occasioned my suspension or termination. The Defendant's previous Board were fully aware of the issues we were having with S&G and Star General Insurance Agents & Brokers Ltd., and at no time suggested that I was at fault with respect thereto. I reject any attempt by the Defendant to base its decision to terminate me upon stale allegations, particularly without

affording me an opportunity to address them in light of the new Board's apparent differing interpretation of these historical facts.

10. The Defendant has failed to demonstrate any credible financial risk to which it was exposed in its relationship with S&G and how that would have been attributable to my performance in the period since the Defendant's interim insurance Board took over or otherwise. Again, the Defendant's previous Board were fully aware of the issues the Defendant was having with S&G and at no point suggested that this was attributable to my performance. The S&G matter was stale and, at best, related to a difference in view and approach between the previous Board and the new Board, for which I could not reasonably be blamed. Had the Defendant's new Board established its desired protocols and policies I would have complied with the same and they then would have been in a position to reasonably and fairly assess my performance on an informed basis. What appears from the said letter of termination, and the Defendant's conduct of this litigation, is that the Defendant has taken historical statements made by S&G and others as indisputable fact, and arbitrarily disregarded any explanation or rebuttal thereof notwithstanding the fact that the Defendant's previous Board did not share the same view. My responses to the questions posed to me were wholly ignored.

11. The third allegation referred to by the Defendant in its said letter of termination relates to the purported absence of "proper record or files of the Temporary employees of the Insurance Brokerage". As I advised the Defendant, at the said meeting, the relevant files were present and accounted for when I was forcibly removed and excluded from my office. Had the Defendant put questions to me before excluding me from the workplace, I may then have reasonably faced questions about my inability to produce the said documents. However, I cannot account for what happened in the Defendant's offices during my forced exclusion therefrom, by means of forced vacation and suspension. In the circumstances, I reject any suggestion that I misplaced or otherwise failed to properly maintain the said records. Furthermore, there is absolutely no evidence suggesting, or tending to suggest, the ludicrous proposition that I "stole company equipment or the personal property of fellow employees." It was never suggested or put to me that I "stole" the records in question, whether properly considered equipment a not, or any other property of the Defendant. I find this allegation oppressive and abusive in the circumstances, as it is based on no reasonable or credible evidence. While the records may in fact be

missing, as alleged by the Defendant, I had nothing to do with their disappearance. Furthermore, the records in question were not "the personal property of fellow employees", as the records belonged to the Defendant. It was not suggested or put to me, in the said meeting or otherwise, that I "stole" any property belonging to my fellow employees, and I adamantly reject this slanderous allegation.

12. The Defendant could not claim to have conducted a "reasonable investigation" with respect to the said allegations as they were never put to me as charges against me for my response, and the allegations with respect to stealing were never raised with me at all. The Defendant appears to believe that merely calling its investigation "reasonable" is sufficient to satisfy my due process and statutory rights. That is not so. I was terminated before having been afforded a right to be heard in response to the charges against me. The Defendant also purported to terminate me based on stale purported allegations, relating to matters which the previous Board were fully aware of and which represented legitimate disputes between the Defendant and companies with whom it did business prior to my employment with the company. There was no evidence before the Defendant that I had demonstrated a "willful neglect of duties". For that reasonably to have been the case the Defendant would have to demonstrate that I deliberately failed to do something that I was required to do or was asked to do by the Board. The Defendant did not suggest or put to me that I had refused to discharge, or willfully neglected, my duties and nothing produced by the Defendant herein demonstrated that I had deliberately or willfully neglected my duties. The Defendant failed, by its letter of termination, to reasonably articulate any specific duties in question, which I am alleged to have willfully neglected. It is not enough for the Defendant's new Board to have preferred things to have been done differently. Furthermore, I received only, and overwhelmingly, positive ratings on my Performance Evaluation conducted by the Defendant, issued to me and dated the 9th day of December A.D. 2016.

13. The facts and evidence before the Court herein demonstrate that not only was there no reasonable or lawful basis for the Defendant to terminate my services, but there was equally no reasonable or-lawful basis for my summary dismissal without pay. The absence of a reasonable investigation and any semblance of due process demonstrates that my dismissal was unfair and I seek the full statutory amount of compensation payable in the circumstances.

14. The Defendant not only unfairly dismissed me but set about to damage and destroy my future employment prospects through an oppressive and unreasonable national advertisement campaign with respect to notice of my dismissal in local daily newspapers. The said published public notices were neither reasonable, necessary, nor proportionate as there was no suggestion by the Defendant, nor was there any credible risk, that I had been or would in the future purport to conduct business on behalf of the Defendant. I was not a travelling salesperson, or insurance broker, for the Defendant, I was its General Manager stationed in its offices. The general public had no legitimate interest in news of my separation from the Defendant, as I posed no credible threat to the public or the Defendant. The Defendant did not issue a nationwide advertisement with news of my employment, and I believe the Defendant's decision to publish news of my separation from the company was malicious, particularly insofar as it was disproportionate, served no reasonable, lawful, or commercial purpose, and was abusive and oppressive. The Defendant's said nationwide publication has had a continued damaging effect on my future employment prospects and I have had to answer repeated questions regarding the same and I have been called a "thief" and other disparaging names based upon the said notices published by the Defendant along with my photograph. I am presently unemployed and the Defendant's injury to my professional reputation and employment prospects continues to impact my efforts to secure employment commensurate with my experience and expertise in the insurance industry or otherwise."

**Defendant's evidence**

*Hilton Bowleg*

[21] Hilton Bowleg gave evidence in his capacity as the interim Chairman of the Defendant. He testified that the Plaintiff, as manager, was responsible for the day-to-day operations of the Defendant and its staff.

[22] He further testified that an extraordinary meeting was convened by the Defendant on 17 January 2017, at which the appointment of the then sitting board of directors was revoked and an interim board (of which he was Chairman) was appointed. He stated that upon assuming office, the interim board attended the offices of the Defendant on 18 January 2017 to conduct an assessment of its operation to ascertain the reason for the failure of the Defendant to carry out the following directives given to it by the League: (i) the transfer of administrative building and its effects to the League and (ii) transfer of funds held by the Defendant into a captive insurance company in compliance with a directive of the Insurance Commission of The Bahamas.

[23] Mr Bowleg testified that during the initial assessment carried out on 18 January 2017, the Plaintiff was questioned regarding her failure to perform the said directives and she failed or refused to provide the interim board with any meaningful assistance. According to Mr Bowleg, the Plaintiff was defensive and obstructive and as such, the interim board determined that "she should be placed on two weeks' vacation leave to allow a full operations assessment to take place".

[24] Mr Bowleg testified that while the Plaintiff was on vacation leave, he and Mr Collie intercepted calls that had been placed to the Plaintiff by a representative of Security and General Insurance Co. Ltd, an insurer with whom the Defendant had a brokerage agreement and discovered that several of the Defendant's members who had obtained insurance through the Defendant did not have insurance coverage because of the Defendant's failure to comply with the formal requirements to obtain such coverage. In addition, it was discovered that the Defendant had failed on several occasions to remit enough premiums to Security and General for insurance policies to remain in force, even though the relevant premiums had been paid, the responsibility for which was the Plaintiff's.

[25] In his evidence, Mr Bowleg stated that the interim board became aware of correspondence from Security & General which documented Security & General's frustration with the Plaintiff and their attempt to rectify the problems. Mr Bowleg referred to a letter dated 6 July 2016 (the "**Security & General letter**") issued by Terrence Rollins, the General Manger of Security & General to Reece Chipman, the Chairman of the Defendant's board of directors at that time. The terms of that letter are as follows:

> "July 6, 2016
>
> Reese Chipman
> Chairman
> Bahamas Co-operative League Insurance Brokerage Ltd.
> Nassau, Bahamas
>
> **Concerns with BCLIB's Administration**
>
> Dear Mr. Chipman,
>
> We wish to bring to your attention some concerns we have with the operational management of your agency:
>
> *Underwriting issues:*
>
> **Late Reporting**
> Bordereaux which are due by the 12th of each month, are constantly being submitted several weeks late. There is also concern at the increasing

frequency with which bordereaux are being revised, after initial submission. This creates additional administrative work and is indicative that the Initial reports are inadequately or poorly prepared.

**Incomplete Reporting &/or errors**

Supporting documents (eg Proposal Forms etc), that we require to process transactions, do not accompany the bordereau detailing the business written as required. This in turn forces S&G's entry process to be deferred until a file is complete. Some policies are also reported with incorrect commission rates, despite the agency agreement clearly denoting what rates are allowed.

**Lack of Support/Cooperation**

Numerous phone calls and emails we made seeking assistance with compliance matters, urgent questions and other pending issues over operational management, have gone unanswered. There was also an occasion when a valued client had to visit the office of S&G as a last resort, after he was unable to receive assistance from BCLIB! Clearly, this does little for client confidence and brand image.

*Accounting Issues:*

**Non-payment of Longstanding Receivables**

There are a number of years' old policies with outstanding balances that BCLIB has promised to address some time ago but has stubbornly failed to clear. These policies present longstanding receivables as it is too late to cancel. Some of these polices date back to 2013 and the total funds owed on them is approximately $20k.

**Failure to agree & provide Premium Finance Forms**

Policies reported on a bordereaux should be paid in full unless Premium Finance has been agreed, in which case a deposit is required and the completed tri-party Finance Agreement should be submitted to us. However this is not the case and it isn't until the bordereaux payment is submitted when it is realized that financing terms were offered to clients but the forms not submitted to S&G for prior approval.

**Over-refunding Cancellation Credits**

There are some policies cancelled per the bordereaux where a full credit is being allowed even though there is an outstanding balance on the policy. It is inappropriate to give BCLIB a full credit when there are unpaid premiums. Any outstanding balance must firstly be cleared and only then if there are funds remaining may BCLIB return them to a client.

I am sorry to have to write to you in this manner, but it is apparent that an improvement in housekeeping and administrative discipline is required.

Me and my team are at your disposal to go over these issues with you, and so far as is possible, to render some assistance and guidance.

Yours sincerely

Terence Rollins
General Manager"

[26] Mr Bowleg testified that the Plaintiff displayed an attitude of denial and complacency like the one described in the Security & General letter when the interim board sought her assistance on 18 January in its initial assessment of the Defendant's operations upon assuming office. He also testified that the Plaintiff failed to properly maintain accounts which it brokered with Nagico Insurance (Bahamas Limited ("**Nagico**") and that because of this, Nagico threatened that it would cancel the policies brokered by the Defendant and discontinue doing business with the Defendant. He stated that due to the nature of the allegations made by Security & General and Nagico, the interim board decided to suspend the Plaintiff with pay to allow for further investigations in accordance with the Defendant's Policy Handbook, and the Plaintiff was informed accordingly.

[27] With respect to the events which took place after the Plaintiff was suspended, Mr Bowleg stated as follows:

"13. That during the period in which the Plaintiff was placed on paid suspension me [sic] and other members of the interim Board further investigated the operations of the Defendant Company and the performance of the Plaintiff in her capacity as Manager.

14. As part of our investigation we asked the Financial Controller of the Defendant Company, Mr. William Knowles Jr. (`Mr. Knowles') to conduct an accounting of the various bordereaux and to liaise with both Security and General and Nagico to determine the extent of the financial risk the Defendant Company was exposed to.

15. Other discrepancies which were also uncovered during the Plaintiff's suspension, included the following:

(1) That the employee files of the persons subordinate to the Plaintiff could not be found;

(2) That National Insurance contributions payable to the National Insurance Board (`NIB`) in respect to the temporary employees of the Defendant Company were never paid;

(3) A company cell phone valued at around $500.00 which was provided to the Plaintiff by the Defendant Company could not be produced upon request;

(4) The Plaintiff entered into an agency agreement with an External Insurer, without the prior approval of its Board of Directors; further opening the Defendant Company to liability;

(5) Several premiums paid to the Defendant Company were personally paid to the Plaintiff as evidenced by discovered receipts, however those premiums (or only a portion thereof) were paid to the Defendant Company's insurers.

16. That because of the findings of the Board, it was determined that the Plaintiff's actions and/or behaviour were severe enough to allow a departure from the disciplinary procedure as outlined in its Policy Handbook. The Plaintiff was therefore summarily dismissed on the 10th February 2017, for one or more of the grounds for doing so pursuant to the Policy Handbook of the Defendant Company and the laws of The Bahamas as the Defendant Company had enough evidence to prove that the Plaintiff had directly contributed exposed to both the financial and reputational risk the Defendant Company was and remains exposed to.

17. Prior to the Plaintiff being summarily dismissed, on her return to work on the 9th February 2017, the interim Board directly addressed her on all its concerns discovered from its investigations and provided her with an opportunity to respond. Despite having an opportunity to address the interim Board on its findings, the Plaintiff failed and/or refused to participate in any meaningful discourse. She instead chose to display the same wanton attitude of denial and complacency which exposed the Defendant Company to both reputational and financial risk.

18. The interim Board of the Defendant Company reasonably believed as a result of its investigations that the Plaintiff had committed gross misconduct thereby fundamentally breaching her contract of employment as she acted in a manner repugnant to the fundamental interests of the Defendant Company. As such, the employment relationship had to come to an end as the interim Board no longer had any trust and confidence in her ability to adequately perform the tasks assigned to her.

19. That the financial and reputational risks to which the Defendant Company has become exposed still exist and several initiatives which it had planned to undertake now have to be postponed.

20. Further, the Defendant Company continues to have to exert tremendous effect to repair its relationship with its members and its Insurers which were severed during the Plaintiff's tenure. Notwithstanding our effort, the reality is, some of these relationships cannot be repaired."

*Larry Collie*

[28] Larry Collie gave evidence in his capacity as the Defendant's interim Treasurer. His evidence generally corroborated the evidence provided by Mr Bowleg regarding the circumstances surrounding the appointment of the interim board, the Plaintiff's suspension from work and the matters discovered during the Plaintiff's suspension in relation to employee files, the non-payment of NIB contributions for temporary employees, the Plaintiff's cell phone, the Plaintiff's entering into an agreement with an external provider without proper board approval and premium payments paid directly to the Plaintiff but not paid to the Defendant's insurers.

[29] Mr Collie testified that because of those discoveries, the Defendant determined that the Plaintiff's actions and/or behaviour warranted the Defendant to "bypass its disciplinary procedure as outlined in its Policy Handbook" and the Plaintiff was summarily dismissed. He further testified in his witness statement as follows:

"17. Prior to the Plaintiff being summarily dismissed, on the 9th February, 2017, when she returned to work from her suspension, the interim Board directly addressed her on all its concerns which arose as a result of its investigation and provided her with an opportunity to respond, despite having enough opportunity to address the interim Board on its finding, the Plaintiff failed and/or refused to participate in any meaningful discourse.

18. When the Plaintiff was summarily dismissed, the interim Board of the Defendant Company reasonably believed as a result of its investigations that the Plaintiff had committed gross misconduct thereby committing a fundamental breach of her contract of employment or acted in a manner repugnant to the fundamental interests of the Defendant Company. As such, the employment relationship had to come to an end as the interim Board no longer had any trust and confidence in her ability to adequately perform the tasks assigned to her.

19. That the financial and reputational risks to which the Defendant Company has become exposed still exist and serval initiative which it would like to undertake now has to be held in abeyance. [If this is a quote, perhaps "have" should remain.

20. Further, the Defendant Company continues to have to exert tremendous effort with its members and its Insurers to repair the relationships which were severed during the Plaintiff's tenure."

*William Knowles Jr*

[30] William Knowles gave evidence in his capacity as the Defendant's Financial Controller. For the most part his witness statement is substantially the same as that of Mr Collie. However, unlike Mr Bowleg and Mr Knowles, he stated in his witness statement that the Plaintiff was required to take a two-week vacation on 18 January 2017 "to allow the interim Board to conduct an investigation into the failure of both the Plaintiff and the immediate past Board to follow directives given to them by the parent company and the majority shareholder of the Defendant Company." Additionally, he stated that the Plaintiff was suspended "to allow an investigation into her conduct relating to the day to day operations and management of the Defendant Company". This Court notes, however, that there is no evidence of any directives issued to the Plaintiff by the League. Moreover, there is nothing in the suspension letter which suggests that the purpose of the suspension was to investigate the *Plaintiff's* conduct; it merely speaks to "anomalies" within the Defendant.

[31] Like Mr Collie, Mr Knowles generally corroborated Mr Bowleg's evidence regarding the issues raised by Security & General and Nagico. He testified that while the Plaintiff was on suspension, he and other members of the interim board of directors investigated the operations of the Defendant, after which it was determined that "in certain cases insufficient premiums had been paid by the Defendant Company to its relevant insurers or, where premiums were remitted it was done so, with insufficient documentation making it impossible for the Defendant company's insurers to process the same". Additionally, Mr Knowles corroborated the evidence provided by Mr Bowleg regarding the matters discovered during the Plaintiff's suspension in relation to employee files, the non-payment of NIB contributions for temporary employees, the Plaintiff's cell phone, the Plaintiff's entering into an agreement with an external provider without proper board approval and premium payments paid directly to the Plaintiff but not paid to the Defendant's insurers.

**ANALYSIS AND DISCUSSION**

***Was the Plaintiff wrongfully dismissed?***

[32] Pursuant to section 31 of the Employment Act, an employer may summarily dismiss an employee 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.

[33] There is no rigid definition of the misconduct sufficient to warrant summary dismissal. Summary dismissal is justifiable where the employee has conducted herself in a manner which so undermines the trust and confidence essential to the employment relationship that the employer should no longer be required to retain her. This principle was enunciated by Lord Jauncey of Tullichettle in ***Neary v Dean of Westminster*** (1999) 1RLR 289 and adopted with approval in by the English Employment Appeal Tribunal in British ***Bakeries Limited v Mr M I O'Brien*** 2002 WL 820105 (2002), an authority cited by Mr Parker. Examples of misconduct which will justify summary dismissal are set forth in section 32 of the Employment Act and include, theft, dishonesty, incompetence and gross negligence. However, that list is not exhaustive.

[34] In ***McCormack v Hamilton Academical Football Club Ltd*** 2011 WL 5105577 (2011), [2012] IRLR 108, Lord Emsile considered the type of conduct that could warrant a summary dismissal. He stated:

> "7 The general law regarding summary dismissal is not in doubt. As recorded by the Lord Ordinary at paragraphs 71–74 of his opinion, that remedy is warranted only where an employee's conduct amounts to '... a repudiation of the fundamental terms of the contract' and makes 'the continuance of the contract of service impossible': *Pepper v Webb* [1969] 1 WLR 514, per Harman LJ at 517; *Wilson v Racher* [1974] ICR 428, per Edmund Davies LJ at 517. There is no fixed rule as to the degree of misconduct required to undermine the mutual trust and confidence on which the whole contract of employment hinges, and this accordingly raises a classic 'jury question' in the particular circumstances of a given case: *Clouston & Co Ltd v Corry* [1906] AC 122; cf *Malik v BCCI [1998] AC 20.*
>
> 8 On the authorities, however, summary dismissal has to be regarded as an exceptional remedy calling for substantial justification. It will not readily be sustained for misconduct which only peripherally affects the performance of core duties under the relevant employment contract. To bring summary dismissal into play, repudiatory conduct must be so serious as to strike at the foundation of the employer/employee relationship, and for practical purposes to make its continuance impossible. It is, furthermore, a remedy which must normally be exercised as soon as a sufficiently serious episode or course of misconduct comes to the employer's attention.

**Delay and inaction at that point carry with them an obvious risk that the employer will be held to have passed from his option to accept the repudiation and, conditionally or otherwise, to have affirmed the contract instead. Alternatively, the passage of time without effective action may serve to negate any genuine causal link between misconduct and dismissal. Either way, in our view, summary dismissal having the appearance of an afterthought will stand little chance of being upheld.**"

(my emphasis)

[35] In seeking to justify a summary dismissal it is well established the employer must demonstrate that he honestly believed on reasonable grounds that the employee committed the misconduct of which it complained. This test is now statutorily enshrined in section 33 of the Employment Act, which requires an employer to show (i) 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 (ii) that he had conducted a reasonable investigation of such misconduct or otherwise, such an investigation was unwarranted. Proof of the misconduct is not required.

[36] The application of the test under section 33 of the Employment Act was considered by the Court of Appeal in ***Island Hotel v Shikera Isaacs Sawyer*** IndTribApp. No. 88 of 2018 *(unreported),* an appeal of a decision of the Vice President of the Industrial Tribunal. The issue before the Industrial Tribunal was whether the employer had reasonable grounds for believing that the employee had committed the acts of misconduct violating an express company policy. The Tribunal found that, by denying the employee's request for a review where persons on her level could speak on her behalf, the employer did not conduct a reasonable investigation and the employee was wrongfully dismissed as a result.

[37] On appeal by the employer, that decision of the Industrial Tribunal was set aside. Longley Pin delivering the judgment of the Court of Appeal, stated after consideration of the authorities:

> "26. The question therefore is not proof of guilt of misconduct although if that can be established it would justify summary dismissal. The burden, however, is not that a high. All that an employer has to show is that it had an honest belief based on reasonable grounds that the employee had committed the misconduct in question. Once that is established it matters not whether the employee had in fact committed or was guilty of the misconduct alleged.
>
> 27. To the extent the Vice President was of the view that proof of guilt of the alleged misconduct was necessary to justify dismissal on the ground of

misconduct she erred in law. It betrays a fundamental misunderstanding of the law.

...

28. However, exactly what the Vice President meant in paragraph 111 of her judgement is unclear notwithstanding her later reference to the proper test. In any event she appears to have based her decision on the finding: **"that the respondent did not conduct a reasonable investigation, in that the applicant was not afforded the review as requested."**

...

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

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

[38] For the present purposes, this Court must therefore determine (i) whether the Defendant honestly and reasonably believed at the time of the Plaintiff's dismissal that the Plaintiff, on a balance of probability, stole company equipment or the personal property of fellow employees and/or wilfully neglected her duties, and (ii) whether a reasonable investigation had been carried out.

<u>Theft allegation</u>

[39] Mr Bowleg and Mr Collie both gave evidence in respect of Defendant's allegation of theft against the Plaintiff while under cross examination by Mr Parker. Mr Bowleg's evidence is below:

"A. When you talk about company property, she was asked to present the company phone, that was given to her. That never was retrieved, so again, that is company property.

Q. Stealing, there was no suggestion that she stole the company property. The premise in all of the documentation, is that the phone was broken?

A. But she never presented the phone, sir.

Q. She never presented the broken phone?

A. I never laid my eyes on the broken phone.

Q. Where is it that she was asked to produce the broken phone?

A. If you look at me, Mr. Collie asked that question, sir."

[40] Further, Mr Collies evidence was as follows:

"Q. You have no evidence that Ms McDeigan stole anything; isn't that correct, Mr Collie?

A. I disagree, sir.

Q. She didn't steal company equipment?

A. She did, sir.

Q. She did not steal personal property of fellow employees.

A. No, she did not.

Q. For the sake – what company property did you say she stole?

A. Well, I will give you one example of company property. The telephone that was issued to her, when was asked to return the same, she said, it was damaged and thrown away; that was unacceptable, as far as the company was concerned. And with respect to that, she was asked to return it; therefore, she deprived the company of its property and that is considered stealing.

...

Q. I put it to you, Mr. Collie, that you never once said to her, we are accusing you of stealing this phone?

A. No, I never put it to her like that. I asked her a specific question with respect to the company phone. I told her, her explanation was unacceptable, and required the return of the company property, which was the cellular phone."

[41] Having considered the evidence of the Plaintiff, Mr Bowleg and Mr Collie, this Court is of the view that the Defendant did not, at the time of the Plaintiff's dismissal, hold an honest and reasonable belief, based on a reasonable investigation, that, on a balance of probability, the Plaintiff stole company equipment or the personal property of her follow employees as alleged in the termination letter.

First, Mr Collie ultimately conceded that the Defendant did not inform the Plaintiff that she was being accused of stealing the company-issued mobile phone. Second, the Plaintiff's evidence, which I prefer, was that the phone had been broken and thrown away and this was admittedly explained by the Plaintiff to the Defendant. It was unreasonable for the Defendant to request the return of the phone when the Plaintiff had already stated it was broken and had been thrown away, and no evidence to support a reasonable belief by the Defendant that the Plaintiff had stolen the phone.

[42] In its termination letter the Defendant specifically refers to the matters relating to Security & General, the failure to keep proper records for temporary employees and the failure to pay national insurance contributions for such employees.

[43] On the material before the Court, it is evident that the Defendant was experiencing some challenges in its operations at the time of the Plaintiff's dismissal. Security & General had complained to the Defendant in writing and, as the Plaintiff admitted in her evidence, certain national insurance contributions of the Defendant's temporary employees had not been paid.

[44] With respect to Security & General, I find that the issues between the Defendant and Security and General had been ongoing for a period prior to the Plaintiff's dismissal. This is evident from the Security General letter, which was issued approximately seven months prior to the date the Plaintiff was dismissed. In that letter Mr Rollins referred to the *"Non-payment of **Longstanding** Receivables"* and stated that there were *"a number of **years' old policies** with outstanding balances that [the Defendant] had promised to address **some time ago**"*. He also stated that some of those policies were in place from the year 2013, i.e. before the employment of the Plaintiff.

[45] An email dated 12 August 2016 (the "**12 August email**") from Mr Rollins to Mr Chipman is also telling. It stated:

> *"Mr Chipman*
>
> ***For months now**, we have been having problems with the agency."* I have written to you previously citing specific challenges but I am far from satisfied that matter [sic] are being taken seriously.
>
> Last Friday, we met with the manager of the agency to discuss a way forward to resolve matters-In particular receivables. I made it very clear,

> that any policy not being totally cleared of payment delinquency must be specified with date and reason. The spreadsheet supplied last evening, supposedly representing the reconciliation, does not do that to our satisfaction and again, we are being asked to accept a short payment.
>
> One is given the impression of complacency, and of just 'going through the motions' to stall as a tactic while buying time.
>
> In that same meeting, your manager also asserted that we had not met a price match commitment on seven motor enquiries. When I queried the details of them (they appeared to me, to be examples of minimum $600 premium comprehensive policies) your manager was absolutely adamant that they were third party motor cases. Upon investigation, they proved, as suspected, to have been comprehensive cases and thus, the minimum premiums should have and did prevail, and S&G acted correctly.
>
> We appear to be mired in a mind-set of denial and complacency that is damaging to both our interests."

[46] Neither the Security & General letter nor the 12 August email was addressed to the Plaintiff; rather, they were addressed to former Chairman of the Defendant's board to whom the Plaintiff reported (i.e. Mr Chipman) and who six months later favourably evaluated the Plaintiff's performance of her duties in December 2016.

[47] Additionally, according to the evidence of the Plaintiff, which this Court accepts, she and Mr Chipman had discussed the issues raised by Security & General letter and there were efforts to address them. She also stated that she was not aware of the 12 August email. The Plaintiff's evidence in this regard while under cross-examination by Mr Williams was as follows:

> "Q. Was this letter [the Security & General letter] ever raised with you by Mr. Chipman or otherwise?
>
> A. Yes, it has [sic].
>
> Q. And what was discussed about it?
>
> A. We worked on resolving the issues raised. There was a customer service rep, Lachelle Moxey, who was responsible for the bordereaux, who actually was the cause of this letter, and we worked through it, and she eventually was terminated because nothing had improved.

Q. Turning over to the e-mail, from Mr. Rollins to Mr. Chipman, August 12th; was this discussed with you by Mr. Chipman, this e-mail?

...

A. No, it was not.

Q. It is your position that the termination of Ms. Lachelle, would have addressed these concerns?

A. That is correct."

[48] With respect to the Temporary Employee files and national insurance contributions, Mr Bowleg gave evidence while under cross-examination as follows:

"Q. Lets go back to the termination letter, for a moment.

...

Q. Are you there, Mr. Bowleg?

A. Still here.

Q. Now, you recite -- the third thing you recite, is there is no proper record of the temporary employees of the insurance brokerage. In addition, no employee files were located. It was also determined that no national insurance contributions were made on behalf of the employees, which is a violation of the National Insurance Act. I put it to you, Mr. Bowleg, that in the circumstances, the best that you can say is, that you were unable to locate the files; you cannot say there were no files.

A. We did not locate them. We could not find the files.

Q. There is a difference saying, there are no files, and we found no files. I am putting it to you that, the most you can say is, that you found no files?

A. No files located.

Q. I also put it to you that, you cannot -- you failed to establish that was at the responsibility, or failing of the plaintiff?

A. Mr. Parker, I would say to you, being the leader of downstairs for her employees, she should have records of all her employee files, just giving an example, I work in the area, I have easy access to my

employee files. I have some 300 employees, I would have access to.

Q. I put it to you that, the same was true to Ms. McDeigan, when she was forcibly sent on vacation, and the files went missing in her absence?

A. I cannot say that.

Q. You say in the letter; it was also determined that no National Insurance contributions were made on behalf of the temporary employees, of the National Insurance Brokerage. Were you aware, up until, I think, it was for -- give me one second. Let me get the date. Prior to May, 2016, Mr. Williams –

A. Williams [sic] Knowles.

Q. Yes, Williams [sic] Knowles was responsible for paying NIB on behalf of the defendant company, up until 2016?

A. I was not up to date with who pays what, but I know the manager normally signs off on the documents. I know we have Mr. Williams [sic] here.

Q. Yes, we will ask Mr. Williams [sic] when the time comes. My point to you, were you aware that it was Mr. Knowles' responsibility, up until May, 2016, to deal with that?

A. I was not aware, no, sir."

[49] When Mr Knowles was cross-examined about the national insurance contributions for temporary employees, I found him to be somewhat defensive and not very interested in providing assistance to the Court. In any event, I am not persuaded that the Plaintiff's failure to pay national insurance contributions for temporary employees in the circumstances of this case is sufficient, in and of itself, to warrant summary dismissal.

[50] Finally, although not specifically raised in the termination letter, as indicated above, the witnesses for the Defendant alleged that the numerous Nagico insurance policies were at risk of being cancelled because the Plaintiff failed to properly maintain those accounts and that Nagico threatened to discontinue doing business with the Defendant as a result. In support of its claim, the Defendant relied on numerous letters issued by Nagico on 11 January 2017 (collectively the "**Nagico letters**").

[51] Although each Nagico letter was issued to a different person, their substance was essentially the same. The form of each letter is as follows:

> "Date
>
> **30 Day NOTICE OF CANCELLATION**
>
> Name
> Address
>
> Dear [ ],
>
> **Re: [Motor/Home] Policy No. xxx**
>
> We have reviewed your [Motor/Home] insurance file and note that requested documents have not been submitted. It order for the insurance contract to continue to exist full details of the risk to be insured is required.
>
> Please let this serve as your notification that we will need the submission of the below documents on or before 11th February 2017.
>
> - xxx
> - xxx
>
> Unfortunately, if we are unable to receive the documentation by the designated time we will have to commence the cancellation process for these policies.
>
> We trust you understand our position and should you have any queries please contact your agent.
>
> Kind regards
>
> Kimberley Hope DIP CII
> Agency Administrator
>
> cc: Kim McDeigan, Bahamas Co-Operative League Insurance Brokerage Ltd."

[52] Mr Williams cross-examined the Plaintiff about the Nagico letters. Her evidence in this regard is below:

> "Q. Now, I want to take you to the Nagico letters. Now, you had said to my learned friend, that you had not seen these letters; correct?
>
> A. That is correct.

Q. But for the edification of the Court, could you give your response, to what is being conveyed by Nagico, to the insurers [sic], by these letters; and how that works into the context of what the defendant company was doing?

A. Can you repeat that, please?

Q. I am trying. I am asking you to explain. These letters are presented, and I want you to put them into context, of the relationship between Nagico and the BCBIL, and Nagico and the insured. Tell the Court what Nagico is saying here, and how that relates to the broad picture?

A. Nagico is saying that if the stated documents are not presented, the policy would be cancelled. Nagico had an agreement with BCLIBL, that these documents were not required, if we, at the time, were moving a client from one insurer to the next. It was agreed by Kimberly Hope, that they would not be required. But now seeing the letters, obviously, it was not upheld.

Q. What would the advantage, if any, have been, not requiring this information; why would Nagico have it?

A. It would be more business coming in. It would have been easier for the client to come in to renew, and switch over, rather than having to furnish more documents, complete a proposal form. It would have been faster, and it would have been enabled Nagico to expand their business.

Q. And how long had that been the position, before these letters?

A. From inception, when they came into the agency agreement, which would have been approximately August, 2016.

Q. Assuming, as these letters suggest, that Nagico had changed its position, you having been copied on these letters; what would have been the next step?

A. The next step would be, to reach out to Nagico, asking them to -- why would they just abruptly change their position, and also contacting the clients, asking that they bring such documents in.

Q. You say, that would have resolved the issue?

A. Yes, it would have.

Q. Were you at anytime, asked about this situation with Nagico, and these documents?

A. Never."

[53] According to Mr Bowleg, the Plaintiff's conduct caused the Defendant to be financially exposed to Security & General and Nagico. Further, during his re-examination, Collie stated: *"Nagico and other insurance companies, have sent e-mails and letters to the League, with respect to neglect of certain information, that they warranted [sic] to cover members. And it left the League in a serious liability"*. However, those were bald assertions, and no evidence was led to substantiate them.

[54] The Defendant's witnesses also alleged that the Plaintiff signed an agency agreement with BESSO Limited, an external Insurer, without the required approval of the Defendant's board of directors and personally accepted several premiums which were not paid to the Defendant's insurers. However, no evidence was let to show that board approval was required for the Plaintiff to enter into the agreement, which was not made by deed, or that she personally accepted premiums which could not be accounted for.

[55] The witnesses for the Defendant insist that a reasonable investigation into the misconduct alleged against the Defendant was carried out but this is vehemently denied by the Plaintiff. However, it is clear on the evidence that the Plaintiff did not participate in any investigation conducted by the Defendant during the period 2 February 2017 to 9 February 2017 when she was suspended. Based on the evidence, save for when the Defendant required the Plaintiff to take two weeks' vacation leave on 18 January 2017, the only engagement between the parties took place on 2 February 2017, the date when she was suspended and on 10 February 2017, the date when she was dismissed.

[56] According to the Defendant's own evidence no specific allegations were put to the Plaintiff during the meeting which took place on 2 February 2017. Furthermore, the contemporaneous evidence by way of the suspension letter demonstrates that during this time, the subject of the interim Board's investigation was certain "anomalies in within the Defendant", rather than the conduct of the Plaintiff. This connotes a general inquiry into the Defendant's operations.

[57] Additionally, it is clear on the evidence that the Defendant met with the Plaintiff on 10 February 2017 for the primary purpose of dismissing the Plaintiff, and that no meaningful investigation took place on that date. I accept the evidence of the Plaintiff when she says that she was not aware of the 12 August email and was not questioned about the Nagico letters.

[58] Having considered the evidence of the Plaintiff and the Defendant and with respect to the allegation that the Plaintiff wilfully neglected her duties and assessed the witnesses, this Court is of the view that that the Defendant did not honestly and reasonably believe at

the time of the Plaintiff's dismissal that, on a balance of probability, she had stolen company equipment or the personal property of her fellow employees as alleged in the termination letter.

[59] In all the circumstances and bearing in mind the Plaintiff's earlier favourable review, I am not satisfied that the Defendant, at the time of the Plaintiff's dismissal held an honest and reasonable belief, based on a reasonable investigation, that the Plaintiff, on a balance of probability, had wilfully neglected her duties. I find that the Plaintiff was wrongfully dismissed.

[60] Under section 29(1)(b) of the Employment Act, supervisory/ managerial employee who has been employed for twelve months or more is entitled to receive (i) one month's notice or one month's basic pay in lieu of notice and (ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to twenty-four weeks. As the Plaintiff earned an annual salary of $47,000.00 this sum is calculated as follows:

| | | |
|---|---|---|
| one month's pay in lieu of notice | $ | 3,916.67 |
| One month's pay *pro rata* for each year of employment [1 June 2015 to 1 June 2016 (3,916.67) plus 2 June 2016 to 10 February 2017 (2,725.57)] | $ | 6,642.24 |
| TOTAL | $ | **10,558.91** |

***Was the Plaintiff unfairly dismissed?***

[61] An unfair dismissal claim is primarily based on procedure. Pursuant to sections 34 and 35 of the Employment Act, every employee shall have a right not to be unfairly dismissed by his employer and whether a dismissal was fair or unfair shall be determined in accordance with the substantial merits of the case. This means that I must fully consider all the circumstances based on the evidence and determine whether, in the circumstances prevailing, the dismissal of the Plaintiff was unfair.

[62] In delivering the decision of the Court of Appeal in ***Bahamasair v Omar Ferguson*** SccivApp No. 16 of 2016 (unreported) Crane-Scott JA provided helpful guidance on what is required by an employer to ensure that a dismissal is not unfair. She stated:

> "At the very minimum, an employer's duty under section 34 to act fairly would require the employer to adhere to the *audi alteram partem* rule of natural justice: that most cherished principle of procedural fairness which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him. We hasten to add that the right to be heard does not require the employer to conduct a full blown hearing, but may be satisfied by giving an employee

an opportunity before a decision is made, to make representation (whether in writing or in person) to the employer as to why he should not in the circumstances be terminated."

[63] In the present case, I am not satisfied that the Plaintiff was confronted with the allegations set forth in her termination letter and provided with an opportunity to make representations to the Defendant as to why she should not be dismissed before the decision was taken to dismiss her. As indicated by Crane-Scott JA in ***Omar Ferguson v Bahamasair***, the rules of natural justice are based on procedural fairness and require that no man should be condemned, punished or dismissed without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him.

[64] In addition to its failure to provide the Plaintiff with an opportunity to make representations prior to her dismissal, the Defendant publicised the fact of the Plaintiff's dismissal in the local newspaper, despite her fierce opposition. The publication which Mr Parker describes as "a gratuitous nationwide ad campaign" contained a photograph of the Plaintiff and stated:

> "The Bahamas Cooperative League Insurance Brokerage Limited (BCLIBL) wishes to advise its Clients and the General Public that MS KIM MCDEIGAN IS NO LONGER EMPLOYED WITH BCLIBL and is therefore NOT AUTHORIZED TO CONDUCT BUSINESS on its behalf."

[65] The uncontroverted evidence of the Plaintiff, which this Court accepts, is that her work did not involve "going out on behalf of the Defendant's to collect monies" and there is no evidence to show that the publication was otherwise justifiable. As such, I find that the circumstances of the Plaintiff's case did not warrant such action.

[66] As indicated above, the Plaintiff was vigorously opposed to the Defendant publicising her dismissal and had obtained an interim injunction to prevent the Defendant from doing so but it was subsequently discharged.

[67] In her witness statement, the Plaintiff stated that the publication has had a "continued damaging effect" on her further employment prospects and she has repeatedly had to answer questions about it.

[68] Although the Defendant's publication of the Plaintiff's dismissal occurred *after* the dismissal had actually taken place, the question of whether a dismissal was fair or unfair must be determined in accordance with the substantial merits of the case, and the discretion conferred on the Court in this respect is broad. A claim of unfair dismissal is primarily focused on procedure and there is sufficient connection in this case between the Defendant's act of dismissal and its act of publication for the latter to be regarded as part of the dismissal process.

[69] In all the circumstances, when I view the manner of the Plaintiff's dismissal in the light of the substantial merits of the case and bearing in mind my finding that the publication was unwarranted, I am of the view that the Plaintiff's dismissal was unfair.

[70] Pursuant to section 45 of the Employment Act, an award of compensation for unfair dismissal shall consist of a basic award and a compensatory award, which is intended to compensate the employee for financial losses suffered because of the unfair dismissal. Both awards may be subject to various increases or deductions.

[71] The compensatory award is such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee because of the dismissal and insofar as such loss is attributable to actions of the employer. It is intended to compensate the employee rather than punish the employer or benefit an employee out of sympathy. Further, neither party should gain a windfall.

[72] The calculation of an award for unfair dismissal is provided for in sections 46 and 47 of the Employment Act as follows:

> "**46.** (1) Subject to the following provisions of this section, the amount of the basic award shall be the amount calculated by reference to the date the employee was dismissed by starting on that date and reckoning backwards the number of complete years of employment falling within that period, and allowing three weeks' pay for each year of employment.
>
> (2) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall, except in a case where the dismissal was by reason of redundancy, reduce the amount of the basic award by such proportion as it considers just and equitable having regard to that finding.
>
> (3) Where the Tribunal finds that the complainant has refused an offer by the employer which if accepted would have the effect of reinstating or re-engaging the complainant in his employment in all respects as if he had not been dismissed, the Tribunal shall not make an award.
>
> (4) Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given), other than conduct taken into account by virtue of subsection (3), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

(5) The amount of the basic award shall be reduced or, as the case may be, be further reduced, by the amount of any payment, made by the employer to the employee on the ground that the dismissal was by reason of redundancy, whether in pursuance of Part VI or otherwise.

**47.** (1) Subject to section 48, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) Such loss shall be taken to include -- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal; and (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer no account shall be taken of any pressure which, by calling, organising, procuring or financing a strike or other industrial action, or threatening to so do, was exercised on the employer to dismiss the employee, and that question shall be determined as if no such pressure had been exercised.

(4) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

(5) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy, whether in pursuance of Part VI or otherwise, exceeds the amount of the basic award which would be payable but for subsection (4) of section 46 that excess shall go to reduce the amount of the compensatory award."

[73] Pursuant to section 48 of the Employment Act, the level of compensation that may be awarded is capped at twenty-four months' pay in the case of a supervisory or managerial employee.

[74] The Plaintiff, as a managerial employee, earned an annual salary of $47,000 and the unchallenged evidence is that the Plaintiff has been unemployed since the date of her termination (i.e. 10 February 2017) despite her efforts to find employment. It is the view of this Court that the Plaintiff is entitled to the basic award (calculated in accordance with section 46(1)) and a compensatory award in the circumstances. The compensatory award

must be just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal, including the loss of benefits which she might reasonably have expected to receive but for the dismissal. Therefore, the Plaintiff's loss of salary, the short duration of her tenure (i.e. less than two years) and the chance that she might have ceased to be employed by the Defendant in any event, are included among the circumstances to which this Court is required to have regard in calculating the compensatory award. I grant the following basic and compensatory awards accordingly:

| | | |
|---|---|---|
| <u>Basic award</u><br>Three weeks weeks' pay for each completed year of employment (1 completed year) | $ | 2,711.54 |
| Compensatory award | $ | 15,000.00 |
| TOTAL | $ | **<u>17,711.54</u>** |

***Did the Defendant unlawfully withhold the Plaintiff's salary for the period 1– 10 February 2017, when she was suspended?***

[75] No evidence was presented by the Defendant to controvert the Plaintiff's claim that she was, in fact, not paid for the period 1 February 2017 to 10 February 2017, during which the Defendant purported to suspend her "with pay". Moreover, in paragraph 13 of its Defence, the Defendant admits that the Plaintiff was not paid for this period.

[76] In addition, it is noted by this Court that there is no provision in the Plaintiff's contract of employment or the Defendant's Policy Handbook by which the Defendant was permitted to suspend the Plaintiff without pay and she was entitled to be paid accordingly. Indeed, Mr Bowleg admitted as such while under cross-examination by Mr Parker when he stated:

> "Q. But for completeness sake, you also failed to you [sic] pay Ms. McDeigan's salary from the 1st of February to the 10th of February December [sic], despite the fact she was supposed to be on suspension with pay?
>
> A. We approved that. You can have a conversation with Mr. Knowles. She was entitled to pay, the board did say that."

[77] I find that the Plaintiff is entitled to be paid the sum of $1,874.67 for the period Wednesday, 1 February 2017 to Friday, 10 February 2017, which is the period and sum claimed in the Statement of Claim as amended by Counsel for the Plaintiff on his feet at trial with leave of the Court, which period and sum was not challenged by the Defendant.

***Is the Plaintiff entitled to damages against the Defendant for breach of trust and confidence by reason of the Defendant's publication of notice of the Plaintiff's termination in the local newspaper***

[78] The Plaintiff alleges that the Defendant conducted a national publication campaign regarding the parties' separation and thereby damaged the Plaintiff's future employment prospects. Mr Parker submitted that the Defendant's publication of the Plaintiff's dismissal was "harsh, unreasonable, disproportionate, and oppressive behaviour" which "is unacceptable in today's digital and global economy and falls below the standards required by, and stands in breach of, the implied term of trust and confidence in the contract between the parties".

[79] To support the Plaintiff's position, Mr Parker commended to the Court the principles enunciated by the House of Lords in ***Malik v BCCI SA*** [1998] HL 20, where Lord Nicholls of Birkenhead, at p. 37, stated:

> "Employers may be under no common law obligation, through the medium of the implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."

[80] Mr Parker submitted that it was reasonably foreseeable that a gratuitous nationwide ad campaign regarding the parties' separation, featuring the Plaintiff's image, would damage the Plaintiff's future employment prospects, particularly where the Defendant's said ad campaign only commenced after the discharge of the Plaintiff's interlocutory injunction, in which application she highlighted the potential harm she faced.

[81] On this basis, Mr Parker submitted that the Plaintiff ought to receive the full compensatory award for unfair dismissal, i.e. twenty-four months' pay to cover the period of her unemployment from February 2017 through to February 2019, in addition to

damages for breach of the implied term of trust and confidence reflecting her continued unemployment from February 2019 to the date of judgment herein.

[82] I asked Counsel to address the Court as to whether the implied duty of trust and confidence survived termination of the employment contract. On the Plaintiff's behalf, Mr Parker referred the Court to the comments of Lord Steyn in ***Johnson v Unisys Ltd*** [2001] UKHL 13. That case concerned an employee who had been dismissed in a manner that caused him to suffer a psychological illness which prevented him from obtaining alternative work. In delivering his judgment, Lord Steyn in stated as follows:

> "**26** *Inapplicability to termination.* Counsel for the employers also argued that the implied obligation of trust and confidence is restricted to unacceptable conduct by the employer during the relationship. It is a legalistic point. It ignores the purpose of the obligation. The implied obligation aims to ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship. In my view this argument ought not to be accepted.
>
> **27** *Floodgates.* Counsel for the employers further submitted that in virtually every case there could be a claim based on the manner of dismissal. He said there would be an enormous proliferation of claims in the county court. These predictions are too alarmist. In *Mahmud's case* [1998] AC 20, 39H it was held that the mere fact of dismissal could not of itself handicap an employee in the labour market. On the other hand, if the employer acts in a harsh and oppressive manner that inflicts unnecessary and substantial financial damage on the employee there is no principled reason why an employee should not put forward a claim for such loss. I would therefore reject the floodgates argument."

Further discussion regarding ***Johnson v Unisys Ltd*** is below.

[83] Mr Parker also commended to the Court the decision of the House of Lords in ***Spring v Guardian Assurance PLC et al*** [1994] 3 WLR 354 where Lord Goff of Chieveley stated:

> "Where the relationship between the parties is that of employer and employee, the duty of care could be expressed as arising from an implied term of the contract of employment, i.e. that, if a reference is supplied by the employer for the employee, due care and skill will be exercised by him in its preparation. Such a term may be implied despite the absence of any legal obligation on the employer to provide a reference (as I understand to have been accepted by the parties in the present case), and may be expressed to apply even after the employee has left his employment with the employer. But in the present case this adds nothing to the duty of care

which arises under the *Hedley Byrne* principle, and so may be applicable as a tortious duty, either where there is no contract between the parties, or concurrently with a contractual duty to the same effect."

However, that case is easily distinguishable as the issue under consideration was the well-known duty of care owed by an employer who provides a reference in respect of a former employee. I did not find it helpful in the circumstances.

*Duty of trust and confidence*

[84] It is well-established that a contract of employment is subject to an implied term, by operation of law, that an employer must not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence which must exist between the employer and the employee.

[85] In his judgment in ***Johnson v Unisys Ltd*** Lord Steyn described the implied obligation of trust and confidence as an "overarching obligation implied by law as an incident of the contract of employment." The remaining members of the House of Lords (i.e., Lords Hoffman, Bingham of Cornhill, Nicholls of Birkenhead and Millet) did not disagree this formulation. However, they decided that the obligation of trust and confidence <u>does not</u> extend to the exercise of a power of dismissal.

[86] In his judgment, Lord Hoffman stated:

> "**45** In this case, Mr Johnson says likewise that his psychiatric injury is a consequence of a breach of the implied term of trust and confidence, which required Unisys to treat him fairly in the procedures for dismissal. He says that implied term now fills the gap which Lord Shaw of Dunfermline perceived and regretted in *Addis's case*, at pp 504-505, by creating a breach of contract additional to the dismissal itself.
>
> **46** **<u>It may be a matter of words, but I rather doubt whether the term of trust and confidence should be pressed so far.</u>** In the way it has always been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated. If one is looking for an implied term, I think a more elegant solution is McLachlin J's implication of a separate term that the power of dismissal will be exercised fairly and in good faith. But the result would be the same as that for which Mr Johnson contends by invoking the implied term of trust and confidence."

[87] The statements made by Lord Millet in his judgment are also instructive. He stated:

> "78 **<u>I agree with Lord Hoffmann that it would not have been appropriate to found the right on the implied term of trust and confidence which is now generally imported into the contract of employment. This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them. But this is an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship. The implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration. Moreover, manipulating it for such a purpose would be unrealistic.</u>** An employer who summarily dismisses an employee usually does so because, rightly or wrongly, he no longer has any trust or confidence in him, and the real issue is: whose fault is that? That is why reinstatement or re-engagement is effected in only a tiny proportion of the cases that come before the industrial tribunals."

[88] Unlike Lord Steyn, the majority of the House of Lords considered that Mr Johnson's claim was apt to be considered within the statutory framework of unfair dismissal. In this regard, Lord Hoffman stated:

> "**51** In 1968 the Royal Commission on Trade Unions and Employers' Associations under Lord Donovan recommended a statutory system of remedies for unfair dismissal. The recommendation was accepted by the government and given effect in the Industrial Relations Act 1971. Unfair dismissal was a wholly new statutory concept with new statutory remedies. Exclusive jurisdiction to hear complaints and give remedies was conferred upon the newly created National Industrial Relations Court. Although the 1971 Act was repealed by the Trade Union and Labour Relations Act 1974, the unfair dismissal provisions were re-enacted and, as subsequently amended, are consolidated in <u>Part X</u> of the Employment Rights Act 1996. The jurisdiction is now exercised by employment tribunals and forms part of the fabric of English employment law.
>
> **52** Section 94(1) of the 1996 Act provides that "An employee has the right not to be unfairly dismissed by his employer". The Act contains elaborate provisions dealing with what counts as dismissal and with the concept of unfairness, which may relate to the substantive reason for dismissal or (as in this case) the procedure adopted. Over the past 30 years, the appellate courts have developed a substantial body of case law on these matters.
>
> ...
>
> **55** In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal.

Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award..."

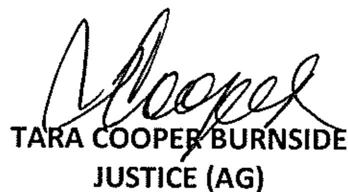
[89] Having considered the facts of the instant case, I adopt the reasoning articulated by Lord Hoffmann in ***Johnson v Unisys Ltd***. An unfair dismissal claim is concerned with the manner and procedure of the dismissal and I am not persuaded that an application of the implied term of trust and confidence so as to encompass the way an employee is dismissed can satisfactorily coexist with the statutory right not to be unfairly dismissed.

[90] As indicated above, by sections 46 to 48 of the Employment Act, Parliament has elaborately prescribed the compensation to be awarded in respect of an unfair dismissal, with the level of compensation capped at twenty-four months' pay in the case of a supervisory or managerial employee. In the result, I am of the view that it would fly in the face of the unfair dismissal statutory framework to grant in this case an award of damages for breach of the implied term of trust and confidence in addition to a compensatory award. The Plaintiffs claim for damages in this respect is therefore denied.

[91] In summary, I grant judgment in favour of the Plaintiff in the aggregate sum of $30,145.12 comprising 10,558.91 for wrongful dismissal, 17,711.54 for unfair dismissal and $1,874.67 in respect of the Plaintiff's unpaid salary for the period 1 February 2017 to 10 February 2017. The Plaintiff shall have her costs, to be taxed if not agreed.

[92] Finally, I am grateful to counsel for all their assistance in this matter, both oral and written, and apologise for the fact that this judgment is delivered far later than I intended.

**DATED** the 18th day of August, 2022



**TARA COOPER BURNSIDE**
**JUSTICE (AG)**