COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Division
2017/CLE/gen/00123

**BETWEEN:**

**LLOYD MCQUEEN**

**Plaintiff**

**AND**

**THE AIRPORT AUTHORITY**

**Defendant**

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Before: The Honorable Mr. Justice Loren Klein
Appearances: Travette Pyfrom for the Plaintiff
Lakeisha Hanna for the Defendant

Hearing Date: 3rd May 2021

RULING

KLEIN, J.

*Employment—Firefighter employed with Airport Authority—Suspension and termination of employee based on criminal charges in Magistrate's Court—Claim for unfair and wrongful dismissal—Unfair Dismissal—Distinction between Unfair and Wrongful Dismissal—Burden of Proof as between employer and employee in unfair dismissal claims—Expiry of Industrial Agreement under which plaintiff dismissed—Effect on claim—Compensation for Unfair Dismissal—Principles*

*Wrongful Dismissal—Principles—Damages—Consequential losses—Loss of Pension Rights—Loss of Life Insurance—Future loss of earnings--Whether recoverable*

*Practice and Procedure—Evidence—Defendant opting not to call witnesses at trial—Admissibility of documentary evidence—Parties filing separate bundles—Admissibility of documents—Admissibility of extract from Industrial Agreement not included in bundles—Pleadings—Alleged failure to plead a case for unfair dismissal—R.S.C. 1978, Order 18, r. 13—Admissions—General denials*

**INTRODUCTION AND BACKGROUND**

[1] The plaintiff is a firefighter. It is the only profession he has ever known. He had served in the fire department at the Lynden Pindling International Airport from his early 20s and for 30 years when he was summarily terminated in 2016 at the age of 54 by the defendant Authority.

[2] The reason for his termination was that it came to the attention of the defendant in November of 2012 that he had been charged before the magistrate's courts in 2007 with possession of a small quantity of drugs. When confronted with this information, he explained that the charges had been dismissed and that he had been discharged by the court from 2009.

[3] The defendant's executives did not accept this at face value. They demanded proof that the charges were dismissed. When the plaintiff failed to produce any documentation to their satisfaction, he was suspended in December of 2012 on half-pay and subsequently dismissed four years later in September of 2016.

[4] On 22 September 2017, he filed a complaint in the Industrial Tribunal for unfair dismissal. This was withdrawn on 17 May 2018 and the current action was commenced by generally indorsed Writ of Summons filed 7 February 2017, which was amended on 18 July 2018.

*The Pleadings*

[5] It is necessary for the resolution of this matter to set out some of the material pleadings. The statement of claim (filed 28 March 2019) was relatively short and the material paragraphs are as follows:

> "3. On the 24th July 2007, the Defendant was arrested and charged with possession of dangerous drugs.
> 4. On the 9th February 2009, he was discharged.
> 5. By letter dated the 19th December 2012, the Defendant informed the Plaintiff that it was in possession of a document which indicated that the Plaintiff was charged with Possession of Dangerous drugs and that the matter is still pending before the magistrate's court. Consequently, the Plaintiff would be suspended from work at half pay until the case has [*had*] been finalized by the court and a ruling confirmed.
> 6. By the letter referred to in paragraph 5 hereof, the Defendant also advised that the suspension was in accordance with the Airport Authority Staff Management Regulations, Section 29.10 and Article 7, Section 7 (15) of the Industrial Agreement between the Airport
> Authority and the Bahamas Public Services Union.
> 7. Regulation 29.10 provides "*where an employee is formally charged by the police with a criminal offence The Airport Authority may, depending on the nature of the charge:*
>
> > *(a) Suspend the employee with half pay until the case is heard;*
> > *(b) Allow the employee to continue to work until the case is resolved;*
> > *(c ) If an employee after being formally charged is not suspended and is later convicted, but not imprisoned, continuance of his employment will be left at the discretion of the Airport Authority*".
>
> 8. The Plaintiff repeatedly requested from the Defendant proof of the charge referred to in the letter dated December 19, 2012.

9. By letter dated the 12 September 2015 [2016], the Defendant informed the Plaintiff that effective 12 September 2016, his employment with the Defendant will be terminated for "major breaches" of Article 7.
10. By letter dated the 16 November 2016 the Plaintiff wrote to the Defendant and requested a copy of the document on which the Defendant relied to establish the breach which led to the termination of the Plaintiff's employment.
11. The Defendant has failed to disclose the evidence which support its claim that there was a breach of Regulation 29.10 or any breach at all.
12. The Defendant has failed or refused to respond at all.
13. The Defendant unfairly and wrongfully terminated the Plaintiff's employment in breach of the requirements of the Industrial Agreement and the Employment Act.

[6] At paragraph 14 of his statement of claim, the plaintiff set out particulars of his loss and damage as follows:

"PARTICULARS OF LOSS"

(1) Loss of future income $331, 650.
(2) Loss of Pension (calculated in accordance with the Pensions Act 1952)
(3) Loss of gratuity (calculated in accordance with the Pension Act 1952)
(4) Loss of the benefit of Life policies $40,000."

[7] Then at paragraph 15, the plaintiff made the following claims in summary:

"AND THE PLAINTIFF CLAIMS:

(1) The sum of $331,650.00 representing future loss of income.
(2) Loss of the benefit of life policies $40,000.00;
(3) Damages for unfair dismissal;
(4) Gratuity payable in consequences of 30 years of service;
(5) Pension calculated pursuant to the Pension Act 1952."

[8] By its defence (filed 2 April 2019) the defendant denied the plaintiff's claims for unfair and wrongful dismissal. The gist of the defendant's case may be discerned from paragraphs 8 and 12 of its defence, which were in the following terms:

"8. Paragraph 8 is denied. The Defendant requested on several occasions that the Plaintiff bring documentary proof that the said charges had been dismissed. The Defendant had meetings with Plaintiff (*sic*) on 29 November 2012, 11 December 2012 and 19 December 2012. The Defendant requested that the Plaintiff attend the Prosecutor's office of the Magistrate's Court to attain the necessary information. However, on each occasion the Plaintiff was unable to furnish the Defendant with the requisite document and accordingly on the 19 December 2012, the Plaintiff was suspended. Copies of the file notes for the said

> meetings held with the Plaintiff dated 11 December 2012 and 19 December 2012 are hereto exhibited and marked Exhibit AA1".

[9] At paragraph 12, the defendant pleaded as follows:

> "13. Paragraph 13 is denied. The defendant had proper grounds to terminate the Plaintiff's employment. As the Plaintiff had been charged with a serious offence which warranted termination under Article 7 of the Industrial Agreement. The Plaintiff for some 3 years after the documentation was requested has failed/omitted to provide same placing the defendant in the position of having the Plaintiff on suspension for 3 years despite the Plaintiff being given numerous opportunities to have the suspension lifted."

[10] The file note of the meeting of 19 December 2013 relevantly records the following:

> "3. The Assistant Manager read the contents of the letter addressed to Mr. McQueen dated December 19, 2012, which indicated as follows: […]
>
> (b) In accordance with Governing Regulations and Policies (Staff Management Regulations, Section 29.10 and Article 7, Section 7(15) of the Industrial Agreement), Mr. McQueen was being suspended at Half-Salary, effective until his matter was finalized by the Courts and a ruling confirmed.
>
> 4. The Deputy Director also advised Mr. McQueen that further investigations into his matter will be conducted, which will determine, whether or not a decision is reached to terminate or not. In any event, he will be advised of the outcome…."

*Procedural chronology*

[11] It is necessary to recite a little of the procedural history of this matter to provide some context for several collateral issues that arise. As indicated, a generally endorsed writ was filed on 7 February 2017. The plaintiff twice took steps to enter a judgment in default of appearance: first on 3 March 2017 in respect of the original writ and again on 12 November 2018 after the writ was amended to include a claim for wrongful dismissal. The defendant entered an appearance on 19 December 2018. The default judgment was subsequently set aside and directions given for the filing of the statement of claim and defence (Order of K. Thompson J, dated 13 December 2018).

[12] The matter was subsequently referred to a case management conference, which was held on 24 October 2019. It does not appear that any formal Directions Order was drawn up for that hearing, but directions were "agreed" between the parties. Thereafter, lists of documents, witness statements, bundles of documents for trials, and statements of facts and issues were filed pursuant to those directions. Significantly, the parties filed separate bundles of documents: the plaintiff on 5 March 2020 and the defendant on 5 November 2019. Notably, the defendant's bundle was indorsed with the statement that the documents were "*served in compliance with the Order for*

*Directions made by the Honourable Justice Keith Thompson*." Trial dates were set for 1 May 2020 and 2 April 2020 before Thompson J., but these dates were vacated due to the Covid-19 Pandemic. Thompson J. subsequently retired. Up to this point, LaRoda Francis and Co. were instructed on behalf of the defendant.

[13] The matter came before me for a directions hearing on 18 January 2021 and further directions were given for the trial, which was set for 11 March 2021. A notice of change of attorney was filed on 5 January 2021, which resulted in Harry B. Sands, Lobosky and Co. replacing LaRoda Francis and Co. as counsel for the defendant. On the date fixed for the trial, however, counsel for the defendant indicated that she was still not in possession of all the documents and the trial was adjourned to 3 and 14 May 2021. At that directions hearing, counsel for the plaintiff confirmed that she would be relying only on the witness statement ("WS") of the plaintiff himself (Lloyd McQueen, filed 5 March 2020). Counsel for the defendant indicated that the defendant had filed three witness statements and would be relying on them (WS of Gregory Neymour, Deputy Director of Security of the Defendant; WS of Samuel Clarke, Chief Fire Officer; and WS of Mazilee Knowles, Assistant Manager of Human Resources, all filed 19 November 2019).

[14] The trial came on for hearing on 3 May. It was short-circuited, however, as following the cross-examination of the plaintiff, Ms. Hanna indicated to the court that the defendant would not be calling any witnesses. As the transcript records:

> **"Ms. Hanna**: My Lord, the Defendant has made the decision based on the evidence that has been given thus far that it does not intend on calling any witnesses. As it's the Plaintiff's case to prove, the Defendant states that it does not or that it will not call any witnesses and the court will determine the matter based on the evidence that has been given by the plaintiff."

[15] This turn of events naturally took counsel for the plaintiff (and the court, for that matter) by surprise. Ms. Pyfrom remonstrated that as the evidence of the defendant was only admitted subject to cross-examination, it necessarily meant that its witness statements were not admissible. I think this much was common ground. She also contended that the upshot of the defendant's election not to call witnesses was that there was no *viva voce* evidence from the defendant in support of its defence. Counsel also took the point that the plaintiff was entitled to rely (and would be relying) on the rule relating to admissions and general denials (which constituted implied admissions) in support of his case (Ord. 18, r. 13).

*The Evidence*

[16] In summary, the plaintiff's witness statement revealed the following. He was employed by the defendant in 1986 as a firefighter and climbed to the rank of sergeant by 2007, having obtained numerous certificates from local and international bodies in various aspects of firefighting. At the time of his termination, he was earning an annual salary of $30,150.00.

[17] He was called into a meeting in "2010" with officials of the defendant, where he was informed that the defendant had obtained information about him concerning a drug matter that was pending before the courts. (*It appears that the date of this initial meeting is mistaken, as the pleadings and other documents reveal that the first meeting in this regard was on 29 November 2012*.) When questioned, he explained that the incident took place in 2007 and that he had been granted a complete discharge by the court in 2009. He was asked to produce documents to verify his account.

[18] Shortly after the first meeting, he submitted a police record and thought that was the end of the matter. However, he was called into another meeting in December 2012 [11th] at which he was once again confronted with the allegations concerning the charges. He reiterated that the matter was completed and that he was given a discharge but was again requested to produce a letter from the Prosecution section evidencing this.

[19] Within days of that meeting, he produced another police certificate but was unable to procure an order from the court as to the dismissal of the charges. In this regard, he indicated that he attended the Prosecution section and was sent to the magistrate's court, where he paid for a copy of the order and was told to return. After several trips there, he was still unable to obtain a copy of the order because of issues with locating the receipt and the court registry not being able to locate the file. Because of the difficulties with obtaining a copy of the order from the magistrate's court, he produced another police certificate in December 2012. All of these certificates indicated that he had not been charged with any offence.

[20] He was summoned to another meeting on 19 December 2012. At that meeting, an executive of the defendant issued a letter to him which contained, *inter alia*, the following:

> "The Airport Authority has in its possession a document from the Drug Enforcement Unit, dated 28th November 2012, which indicates that you were charged with "Possession of Dangerous Drugs", and that the matter is still pending in the Magistrate's Court. Further, that the matter arose out of an occurrence on 24th July 2007, when you were arrested with another in reference to a small quantity of Dangerous Drugs.
>
> As a result of the charge brought against you, <u>I am directed to advise that you are suspended from work at half-salary, effective December 2012 until your case has been finalized by the courts and a ruling confirmed</u>."

[21] It was also indicated to him at that meeting that the defendant would conduct its own investigation into the matter and get back to him. However, he heard nothing further from the defendant on this point. On 12 September 2016, he was given a letter from the defendant indicating that his employment was terminated, effective that same day, and he would be paid his half salary for the period of his suspension and any accrued vacation pay.

[22] Following his suspension and eventual termination, the plaintiff was forced to accept several low-paying jobs, because the opportunities for employment as a firefighter were limited. He also alleged that as a result of the termination he lost the benefit of life insurance policies he had effected on his wife and four children, as the payments (which he had instructed the defendant to apply from his half salary) were discontinued in early 2016, without any notice to him, and the policies lapsed. He also indicated that he attempted to obtain pension benefits from the National Insurance Board, which were denied because he had not yet reached the age of retirement, which is 65 years.

[23] In cross-examination, counsel for the defendant did not materially challenge any of the assertions in the plaintiff's witness statement regarding the process leading to and the reasons for the plaintiff's termination. He was challenged on his failure to provide the information from the magistrate's court, and reiterated the difficulties he experienced in that regard as set out in his witness statement.

[24] The cross-examination by counsel for the defendant was mainly directed to the question of the losses sustained by the plaintiff and his attempts to mitigate his losses by finding alternative employment. For example, counsel for the defendants asserted that he had suffered no losses from the insurance policies as all of the assured were still alive. Further, the insurance policies were private policies to which the Airport Authority made no contribution. It was also elicited that during the period 2012-2016, the plaintiff worked several part-time jobs as follows: (i) he worked at a wash house during the period of his suspension (2012-2016) for about $50 per day for about six months ($6,000); (ii) during various periods following his termination he worked odd construction jobs for about 8 months at about $350.00 per week ($11,200); and (iii) he obtained a job painting road at about $600 per month for 3-4 months during 2021 ($2,400).

[25] In re-examination, the plaintiff reiterated that equivalent employment as a firefighter was not readily available, as few companies or private entities require the specialized training he had as an airport firefighter. He also revealed that he had not held any permanent jobs since 2016.

**RELEVANT LAW AND LEGAL PRINCIPLES**

Unfair and Wrongful dismissal

*Unfair dismissal*

[26] The concept of unfair dismissal and the remedies provided for it are purely statutory rights created the Employment Act ("EA"). Section 34 provides as follows:

> "34. Every employee has the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer."

[27] Section 35 provides:

> "35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case."

[28] Sections 36 to 40 set out specific situations that are deemed instances of unfair dismissal. These include redundancy (where other persons who are similarly affected are not dismissed), dismissal on the grounds of pregnancy, dismissal of a replacement employee on return of the employee he replaced, or dismissal in connection with a lock-out, strike or other industrial action.

[29] It is clear, however, that the instances of unfair dismissal and what might constitute unfair dismissal are not confined to those enumerated in the statute. As was stated by the Court of Appeal in **Omar Ferguson v Bahamasair Holdings Ltd. (SCCivApp No. 16 of 2016)**:

> "15. Section 35 of the Act provides that subject to sections 36 to 40, for the purposes of Part IX of the Act, the question whether the dismissal of the employee was fair or unfair shall be determined "*in accordance with the substantial merits of the case*".
>
> 16. The meaning of this expression and in particular, how the question whether a dismissal was fair or unfair is to be determined, was judicially considered in *BMP Limited d/b/a Crystal Palace Casino v. Ferguson* [2013] 1 BHS J. 135 (an appeal from a decision of the Industrial Tribunal).
>
> 17. In the course of its decision this Court (differently constituted) explored the broad legislative objectives of Part IX of the Act and the intended meaning of the expression "*in accordance with the substantial merits of the case*" in section 35. Delivering the decision of the Court, Conteh J.A. explained, *inter alia*, that given the diverse circumstances in the workplace that might lead to the dismissal of an employee, the categories of unfair dismissal are not intended to be closed. In short, a claim for unfair dismissal may arise in situations other than those specific instances or "statutory unfair dismissals" described in sections 36 to 40 of the Act. Where such a claim is instituted, section 35 mandates that question whether the dismissal is fair or unfair to be determined following a consideration of "the substantial merits of the case."

[30] **Omar Ferguson** is considered a landmark case in employment and industrial relations law in this jurisdiction, as the Court of Appeal came to several significant holdings, namely:

(i) that the categories of unfair dismissal are not limited to the enumerated categories at ss. 36-40;
(ii) that an employee instituting an action based on termination of his employment might claim both unfair and wrongful dismissal;

(iii) that the claim for unfair dismissal may be instituted before the Supreme Court or the Industrial Tribunal, through the trade dispute procedure of the Industrial Relations Act, Ch. 321;

(iv) that the statutory right not to be unfairly dismissed set out at s. 34 creates an implied statutory term in every employment contract that an employer's power of dismissal will be "*exercised fairly and in good faith*"; and

(v) that an employer's duty under s. 34 would, at the very minimum, require the employer to adhere to the tenets of natural justice, in particular the requirement to honour the *audi alteram partem* rule.

Several of these principles are important for the resolution of this matter.

[31] Section 35 requires the court to determine a claim for unfair dismissal in accordance with the "*substantial merits of the case*". However, the Act does not provide any guidance on the ambit of the phrase. In **Cartwright v US Airway [2016] 1 BHS J. No. 96**, the Court of Appeal considered the meaning of the phrase and endorsed the observations of Langstaff J in **West v Percy Community Centre UKEAT/0101/15 ([2016] ELR 223]**, where the learned Judge was considering a similar phrase under s. 98(4)(b) of the UK Employment Rights Act ("ERA") 1996. Langstaff J. concluded there that the "*statutory question is answered by a factual inquiry*." In the COA Issacs, JA, likewise stated that the duty of the judge in construing that phrase is to "*look at the case in the round, at all the circumstances of the case, and arrive at a decision based on the substantial merits of the case*."

[32] It seems fairly clear that the Bahamian statutory provisions relating to unfair dismissal are patterned on the UK legislation, but there are very obvious differences. In particular, the UK provisions are far more detailed. Under s. 94(1) of the ERA, the *employer* is required to show the reason or principal reason (if more than one) for the dismissal and to demonstrate that it is either a reason falling within subsection (2), or some other substantial reason for dismissal. Subsection (2) defines the kinds of reasons to which subsection 1 applies and includes matters such as misconduct, lack of capability, retirement and redundancy.

[33] Subsection (4), which is the critical provision, provides in relevant part that:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
> (a) […]
> (b) Shall be determined in accordance with equity and the substantial merits of the case."

[34] As revealed by the English cases, the concept of 'reasonableness' of the employer's decision to dismiss permeates the statutory test for unfair dismissal. This has often been abbreviated as the 'range of reasonable responses' ("RORR") test, or 'band of reasonable responses' test (see **Newbound (appellant) v Thames Water Utilities Ltd. (respondent) [2015]**

**IRLR 734 (UK Court of Appeal)**, per Bean LJ; and **Turner (appellant) v East Midlands Trains Ltd. (respondent) [2013] IRLR 107** (UK Court of Appeal). In the latter case, Elias LJ said [at 17] (underlining supplied):

> "17. [T]he band of reasonable responses tests does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate; see *Whitbread plc v Hall* [2001] IRLR 275 CA; and whether pre-dismissal investigation was fair and appropriate; see *Sainsbury's Supermarkets v. Hitt* [2003] IRLR 23 CA.
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> There are two important points to note about this test. The first, as the judgment of Aikens LJ makes clear, is that it must not be confused with the classic *Wednesbury* test adopted in administrative law cases where a court can only interfere with the substantive decision of an administrator only if it is perverse. …
>
> 19. The band of reasonable response is not a subjective test and it is erroneous so to describe it. It provides an objective assessment of the employer's behaviour whilst reminding the employment tribunal that the fact that it would have assessed the case before it differently from the employer does not necessarily mean that the employer has acted unfairly.
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> 20. The second observation is that when determining whether an employer has acted as the hypothetical reasonable employer would do, it will be relevant to have regard to the nature and consequences of the allegations. These are part of the all the circumstances of the case. So if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation."

[35] In **Sillifant v. Powell Duffryn Timber Ltd [1983] IRLR 91 at 92**, Browne-Wilkinson J. said [at 92]:

> "The only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that any procedural failure by the employer renders the dismissal unfair; it is one of the factors to be weighed by the Industrial Tribunal in deciding whether or not the dismissal was reasonable within s. 57(3). The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of dismissal not on the actual consequence of such failure. Thus in the case of a failure to give an opportunity to explain, except in the rare case where a reasonable employer could properly take the view on the facts known to him at the time of dismissal that no explanation or mitigation could alter his decision to dismiss, an Industrial

> Tribunal would be likely to hold that the lack of "equity" inherent in the failure would render the dismissal unfair."

[36] The above passage from **Sillifant v Powell Duffryn Timber Ltd.** was quoted with approval by the Court of Appeal in the **Ferguson** case, and the cardinal principle which has also been applied in this jurisdiction is the "*reasonableness of the employer's decision to dismiss judged at the time the dismissal takes effect*".

*Wrongful Dismissal*

[37] While unfair dismissal is concerned either with the statutory categories of unfair dismissal or procedural breaches, wrongful dismissal occurs when there is a substantive breach of contract. In other words, the primary consideration in wrongful dismissal is whether there has been a breach of contract by the employee that goes to the root of the contract or constitutes a fundamental breach of contract (i.e., a repudiatory breach). Wrongful dismissal might also be constituted where an employer terminates an employee without notice or with inadequate notice, and there is insufficient cause to justify summary dismissal. The EA has now codified statutory criteria relating to summary dismissal, with the effect that the breach of any of these may ground a claim for wrongful dismissal under the Act. I will have more to say about this later in this judgment.

[38] In the case of wrongful dismissal, it is trite that the burden of proof rests on the employer to establish just cause for dismissal. In **Cable and Wireless v Hill and others** (1982) WIR 120, Berridge JA affirmed the finding of the Industrial Tribunal Court that [at 129]:

> "…the burden of proof was on the company to show 'just cause' for dismissing the employees and that since summary dismissal constituted a strong measure, the standard of proof should be strict, persuasive and convincing…notwithstanding…this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content."

*Summary Dismissal*

[39] An employer has a right both at common law and under statute to summarily dismiss an employee for cause. The statutory provisions dealing with summary dismissal are contained in Part VIII of the EA. The relevant provisions are sections 31-33. Section 31 of the Act provides that:

> "An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract or has acted in a manner repugnant to the fundamental interest of the employer:
> Provided that such employee shall be entitled to receive previously earned pay."

[40] Section 32 sets out a non-exhaustive list of conduct that may constitute a fundamental breach of a contract of employment, or may be repugnant to the fundamental interests of the employer. These are:

> "(a) theft;
> (b) fraudulent offences;
> (c) dishonesty;
> (d) gross insubordination or insolence;
> (e) gross indecency
> (f) breach of confidentiality, provided that this ground should 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."

[41] Section 33 then sets out how any "misconduct" is to be proved and provides:

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

[42] The principles and the interrelationship between wrongful and summary dismissal were summarized by Charles J. (as she then was) in *Simmonds v. Johnson Brothers* (d/b/a Little Switzerland) (2018/CLE/gen/01417) as follows [at 29, 21-23]:

> "19. Wrongful dismissal and remedies for wrongful dismissal exist both at common law and under the EA. They exist alongside each other and employees can choose whether they wish to claim under common law or under the Act. […]
> 21. The following circumstances may give rise to an action for wrongful dismissal at common law: (i) dismissal without notice or pay in lieu thereof; (ii) purported summary dismissal for cause where no cause has been proven; (iii) dismissal in breach of disciplinary procedures under the contract; (iv) purported reason for dismissal which is not provided for in the restricted category of reasons in the contract.
> [22] Wrongful dismissal under the EA occurs when the employer fails to give the employee adequate notice of (or pay in lieu thereof) in breach of the provisions for notice in the EA or purported summary dismissal for cause where no cause had been proven.
> [23] Accordingly, the principles that can be distilled with respect to summary dismissal being wrongful dismissal are as follows: (1) the purported summary dismissal not in strict accordance with the provisions of summary dismissal under the EA is wrongful dismissal; (2) In determining whether the employer has lawfully dismissed the employee, the question is whether, in all the circumstances,

> the employer can prove that his belief of the employee' misconduct is honestly and reasonably held. Unless it is warranted in the circumstances, a reasonable investigation is required to demonstrate an honest and reasonable belief of guilt."

*Difference between unfair and wrongful dismissal*

[43] It may therefore be seen immediately that unfair dismissal is distinctly different from wrongful dismissal. As pointed out, unfair dismissal is solely a creature of statute, whereas wrongful dismissal is a common law concept, even though statute has made some encroachment in this field by codifying standards for summary dismissal. Secondly, actions for unfair and wrongful dismissal ultimately require different tests to be applied by the evaluating tribunal. In the case of unfair dismissal, if the dismissal does not come within one of the statutory categories, the tribunal goes on to consider the reasonableness of the employer's reaction to the alleged conduct of the employee based on the "*substantive merits of the case*". This includes an assessment of whether the process utilized by the employer in terminating created unfairness, such as a failure to adhere to natural justice procedures. In the case of wrongful dismissal, the tribunal considers whether the employee actually committed the conduct (or whether the employer reasonably believed he did at the time of dismissal) and hence fundamentally broke the contract. Thus, the focus in unfair dismissal cases is whether the dismissal was unfair, rather than whether it was wrong (see **CA Treganowan (appellant) v. Robert Knee & Co. Ltd. (respondents)** [1975] IRLR 247, per Mr. Justice Phillips).

[44] Another distinguishing factor is the remedies. The primary remedies for unfair dismissal are reinstatement or re-engagement, although in practice these are rarely ordered. What is mainly ordered is statutory compensation under the EA, which consists of a basic award based on length of service (s.45) and a compensatory award (s. 47). Where compensation is ordered, it is not limited to the notice period as in wrongful dismissal, but it is subject to a statutory maximum (s.48). Damages for wrongful dismissal are not capped by the EA, although they are restricted by the normal legal principles that apply to calculating contractual losses and principles of remoteness.

*The Industrial Relations Agreement Point*

[45] After the conclusion of the trial, counsel for the defendant brought to the attention of the court (by letter dated 20 May 2021) that the Industrial Agreement ("IA") relied on by the parties had expired at the time of the plaintiff's dismissal. This "*discovery*" was said to have *"…a significant impact on this matter*". The Industrial Agreement expired on 30 June 2015 (1 July 2011 to 30 June 2015). There was nothing before the Court to indicate that a new IA had been concluded and or registered. The defendant submitted that the effect of this was that the plaintiff's employment relationship with the defendant thereafter fell to be determined solely under the Employment Act and/or at common law.

[46] In my judgment, the expiry of the industrial agreement does not have the "*significant impact*" on the claim for unfair dismissal attributed by counsel for the defendant. I say so for the following reasons. Firstly, as was made clear in **Omar Ferguson**, the issue of whether or not the Industrial Agreement was in force is irrelevant to the question of unfair dismissal, as the right not to be unfairly dismissed is implied into every employment contract by statute. In **Omar Ferguson** (incidentally a case in which counsel for the defendant appeared as junior counsel), a similar point was taken that the industrial agreement was without any effect because of lack of registration, as required by the IRA. The issue was dealt with by the Court of Appeal as follows:

> "51. Counsel for the Respondent, Mr. Butler also relied on *Hutchinson*. He referred to paragraph 21 of *Hutchison* where the Court cited *Robertson and Jackson v. British Gas Corporation* [1983] ICR 351 as authority for the proposition that the terms of a collective agreement which have been expressly or impliedly incorporated into the individual contracts of employment of the employees during its currency, may survive the termination or expiry of the agreement.
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> 52. He submitted that the mere fact that the 2002 industrial agreement had expired and the 2004 agreement had not been registered did not necessarily mean that the disciplinary procedures contained therein were not still in place. Based on *Hutchinson*, Mr. Butler submitted that in such circumstances, an inquiry had to be undertaken by the court to determine whether the parties had expressly agreed that such terms should be incorporated into the individual contracts of employment between the employer and employees concerned; or alternatively, whether there were circumstances from which it could reasonably be inferred that the parties had tacitly agreed to incorporate the terms into the individual contracts of employment with the workers.
>
> 53. We do not think it necessary to consider whether an industrial agreement was or was not in effect at the time when the respondent was dismissed. Nor do we need to determine whether the disciplinary procedures contained in the 2000 industrial agreement were expressly or impliedly incorporated into the respondent's contract of employment with the appellant. In our view, the statutory right conferred by section 34 of the Employment Act on every employee in The Bahamas not to be unfairly dismissed is to be read as having been imported into every contract of employment, an implied statutory term that an employer's power of dismissal will be exercised fairly and in good faith."

[47] Secondly, I am of the view that the defendant's submissions directed to the expiry of the IA are in any event misconceived. The disciplinary proceedings taken against the plaintiff were instituted in 2012, when it was not disputed that the 2011-2015 IA was in force. In fact, the defendants specifically plead in their defence (para. 8), that the plaintiff was suspended in accordance with article 7 of that Agreement, namely 7.15. He remained suspended under those provisions and was eventually terminated pursuant to those provision by letter dated 12 November 2016. His termination was the natural progression of disciplinary action commenced under that

industrial agreement, and necessarily the provisions of that agreement govern the entire proceedings leading to his termination.

[48] If any authority is needed for this proposition—and I hardly think any is, since it is simply an illustration of the doctrine of accrued rights and obligations—a passing reference may be made to **Robertson et. al v British Gas Corporation (supra).** There, the UK Court of Appeal upheld the finding of the trial judge that the plaintiff employees were entitled to arrears of wages pursuant to an incentive bonus scheme under a collective agreement, which had been incorporated into their contract by letters from the employer. This was so even though the claim was made after the bonus scheme under the collective agreement had been terminated by the employers.

*Bundle of documents and admissibility of evidence*

[49] The defendant, having made the strategic decision not to call any witnesses on the basis that the plaintiff had not proved his case, also contended that the documentary evidence submitted by the parties (in their bundles of documents) was inadmissible. As mentioned, this was because the parties filed separate bundles of documents and there was no Directions Order embodying the directions.

[50] Counsel for the plaintiff stated that the bundles had been agreed with previous counsel for the defendant, and that the plaintiff's case was conducted on the basis that the documentary evidence was agreed. The defendant took the point that there was no "proof" that the bundles had been agreed. In this regard, she drew to the court's attention that the plaintiff's bundle of documents, filed 5 March 2020, only contained the plaintiff's List of Documents, and did not incorporate the defendant's List of Documents, even though the latter was filed some months before the plaintiff filed its bundle.

[51] Counsel for the defendant relied on the observations of Lyons J. in **Colco Electric Co. v Gold Circle Co. [20023] BHS J. No. 53** and the Court of Appeal in **Colina Insurance v Enos Gardiner [SCCivApp & CAIS No. 117 of 2015**) in support of the submission that the documents were not admitted into evidence. In *Colco*, Lyons J. set out the approach to the use of bundles of agreed documents, against the provisions of Practice Direction No. 2 (1974-1978) of Sir Leonard Knowles. The relevant part of that practice direction reads as follows:

> "LIST AND BUNDLES OF DOCUMENTS
>
> The attention of members of the Bar is called to Order 24 rule 2 of the Supreme Court Practice, concerning the discovery by parties without order. This rule seems to be observed more in the breach than in the performance.
>
> When the case is set down for hearing, the Plaintiff should deliver to the Clerk of the Judge who is to hear the case at least two bundles of documents. One bundle will contain all the relevant pleadings and documents which have been filed, each page being numbered. Another bundle will contain all the relevant

correspondence and other documents, each page being numbered. All documents should be copied on foolscap and all pages should be of uniform length.

The bundles should be agreed beforehand with other parties, if possible, the Defendant or Defendant's supplying to the Plaintiff those documents which they wish to be included. If any document cannot be agreed, they should be bound in a separate bundle."

A copy of each bundle should be provided for the Judge, for each Counsel appearing in the case, and one copy for witnesses.

Documents which are not included in the bundles will be admitted only in exceptional circumstances."

[52] After setting out the direction, Lyons J. made the following observations:

> "7. Practice Directions are to be followed. The reason for the practice direction speaks of the need for an agreed bundle goes to the "*raison d'etre* of the practice".
> 8. The concept of the bundle of documents was designed to overcome the need to have witnesses come before the court simply to give formal evidence of admissibility of a particular document. The question of what weight to attach to a document is a matter for the Court. Counsel can agree as to whether the documents are tendered by consent as to admissibility alone, or as to accuracy and/or veracity. It is usual to refer to the documents at trial and have them explained by witnesses. In this trial some of the documents were left unexplained, so that I was left with little or no idea what they mean or what their relevance is.
> 9. Documents which counsel consider relevant but his opponent considers not so, or contests the admissibility must be proven in the usual manner—i.e.: through a witness.
> 10. This practice is strictly procedural. It is designed to cut down on the length of trial and assist the court to focus on the relevant evidence.
> 11. The weight which each counsel considers should be placed on the document is a matter to be supported by the evidence adduced at trial. In simple terms, counsel has to take his witnesses to a document and have its importance (or indeed its contents) explained by that witness.
> 12. Time and again, almost without exception, I am presented with a separate bundle from the plaintiff on the one hand, and the defendant on the other. Thus according to the tenor of the Practice Direction, I must treat their bundles as secondary evidence and the contents as inadmissible until tendered in the normal manner through a witness, or as in the case of certain public records, in accordance with the Evidence Act."

[53] In **Colina Insurance Ltd. v Enos Gardiner (SSCivApp & CAIS No. 117 of 2015**), one of the issues was whether the medical records of the deceased, which were contained in the agreed bundle were admissible evidence in a claim by a beneficiary for the deceased's life insurance. The Court of Appeal held that they were, overruling the trial judge that the medical history was

hearsay and inadmissible because no one was called to give (secondary) evidence on it. Disposing of the issue of admissibility, the Court of Appeal said:

> "93. The last line of Practice Direction No. 2 (extracted above) is, however, significant. It strongly suggests that documents in an agreed bundle are already in evidence by agreement, whereas documents not agreed and not contained in the agreed bundle are not in evidence, and will only be admitted in evidence in exceptional circumstances. It therefore seems to us that although Practice Direction No 2 is silent as to whether the documents in an agreed bundle are admitted as evidence of their contents, the position in the Bahamas is no different from that in England or Malaysia. Accordingly, documents in an agreed bundle are admissible at trial as evidence of their contents, unless objection is taken." […]
>
> 96. It seems to us that the inclusion of a document in an agreed bundle in accordance with Supreme Court Practice Directions No. 2 means that it is admitted into evidence before the trial judge by agreement, without the party relying on it having to call a witness to formally introduce it or to authenticate it. That said, it is obvious that while the document is undeniably in evidence by consent, its relevance and significance to the issues-in-dispute will usually only become evident when witnesses who are actually called to testify at the trial are referred to the document and give secondary evidence about its contents."

[54] The observations made by Lyons J. in **Colco** and the Court of Appeal in **Colina Insurance** as to the practicality and economy of filing a single agreed bundle are sage and ought to be followed. But I do not think that one can extrapolate from them a general principle that the filing of separate bundles *ipso jure* means that documents are being contested. There might be many practical reasons why parties file separate bundles, such as where the plaintiff (who normally bears the burden of preparing the trial bundle) does not have all of the documents available at the time of preparing the bundle, or because one party has inferior copies or resources, or to avoid duplication of efforts. Sometimes, the defendant may file a bundle of documentary evidence out of an abundance of caution because the plaintiff is dilatory in filing the trial bundle.

[55] In the instant case, everything points to the conclusion that the bundles were agreed. Firstly, there is nothing to suggest that the defendant ever took any objection to any of the documents in the plaintiff's bundle, and it certainly could not repudiate its bundle. None of the documents was identified in either bundle as not agreed, and I would observe here that the standard directions given for trial is for the parties to indicate by separate tabs in the bundle documents which are not agreed and have to be separately tendered into evidence.

[56] Secondly, counsel for the plaintiff, who was instructed from the inception of the matter on behalf of the plaintiff, indicated to the court that the bundles were agreed with counsel initially instructed for the defendant. In this regard, the court notes that counsel representing the

defendant did not come on record until January 2021, and was not in a position to credibly dispute this.

[57] Thirdly, it appears clearly from the pleadings that the plaintiff prepared his case on the premise that the bundles of documents filed by the parties were agreed documents, as may be discerned from the following paragraphs of his witness statement, in which he refers to the defendant's bundle of documents:

> "31. I am advised by my attorneys that the Defendant's counsel has recently provided (in its Bundle of Documents filed in this action on 5 November 2019), a print-out of the original police report with respect to the 2007 charge against me. The print out bears a stamp date of 17 July 2015. At page 3 of the print out, the narrative states "on 9/2/09 matter was discharged."
> 32. It appears from the above document that the Defendant was aware or had the means of determining that at the time of its decision to terminate my services, there was no evidence to support the allegation that I had a pending charge before the court."

[58] Even in light of this specific averment in the plaintiff's witness statement to a document in the defendant's bundle, on which the plaintiff was obviously placing significant reliance, no objection was raised by counsel then on record for the defendant, nor was any objection taken by replacement counsel until the very day of trial. In this regard, Ms. Pyfrom submitted as follows at trial (pg. 26 of the transcript):

> "And, my Lord, I will say again, because counsel is second counsel on record [for the defendant], when the parties were agreeing these documents the court's order was that the documents were to be agreed. Neither party had any objections to the documents being filed in the form that they have been filed in. Certainly, we did not, the Plaintiff did not, object to the Defendant's bundle of documents and anything that is in it. Now it is not for counsel to come at this stage of the trial and attempt to withdraw that evidence we have already agreed before the court as contained in the bundle of document filed by the Defendant or the documents contained in the Plaintiff's bundle of documents. "

[59] Fourthly, it is notable that the defendant's bundle also contains the pleadings filed in the matter and was therefore obviously intended to be relied on at trial, as the plaintiff's bundle omitted the pleadings. And unlike the bundle containing its list of documents, which was headed "Defendant's List of Documents", the bundle prepared for trial by the defendant was simply headed "Bundle of Documents".

[60] In all the circumstances of this case, I am satisfied that the bundles containing the documentary evidence filed by both parties were agreed in advance and admitted as evidence. However, as there was no explanatory evidence led in respect of those documents, what evidentiary weight (if any) is to be given to any particular document is a matter for the court.

[61] But there is a more fundamental reason of principle why I rejected the last-minute challenge to the admissibility of the trial bundles. And I should add here that nothing that I say is intended to detract from the salutary principle that practice directions ought to be obeyed. The filing of separate bundles is demonstrably not an economical or practical way of conducting a trial, not to mention being at odds with the practice direction. The facts of this case also demonstrate the importance of the parties entering a directions order recording the case management decisions.

[62] However, it would be contrary to the interest of justice and egregiously unfair for one party to prepare and conduct its case on the basis that the bundles that the parties had prepared for trial were agreed and then, having closed its case and released the witness, for the other side to opportunistically challenge the evidence. There was no reason why, during the long history of this matter, counsel for the defendant could not have indicated to the plaintiff's counsel and the court that the defendant did not regard the bundles as agreed evidence. This kind of ambush litigation has no place in the conduct of civil litigation in the modern era. Every party should go into trial knowing the state of the evidence before the court, and in particular what is agreed and what is contested or challenged, so it can prepare its case to meet those evidential challenges and adduce the evidence it considers essential to its case. In fact, it is noted that under the CPR 2022, a party who has filed witness statements and does not intend to call that witness must give notice to the other parties not less than 28 days before trial (CPR 29.8).

**DISCUSSION AND ANALYSIS**

*Unfair dismissal*

[63] The issues which the court must consider in determining whether there was unfair dismissal are as follows: (i) what was the reason (or reasons) for the dismissal; (ii) the relevant circumstances surrounding the dismissal; and (iii) whether the employer acted reasonably in the circumstances in treating that reason as sufficient for dismissing the plaintiff. Before I examine the issues, however, I must deal with several collateral issues raised by counsel for the defendant.

*Burden of proof*

[64] Counsel for the defendant submitted that "*in unfair dismissal claims, the burden is on the plaintiff to prove that he has been unfairly dismissed*", citing **B.M.P Limited D/B/A Crystal Palace Casino v Yvette Ferguson (IndTribApp App. No. 116 of 2012**). To the contrary, counsel for the plaintiff asserted that the "*Employer has the burden of proving that the dismissal was fair and [that] its response was reasonable in the circumstances*."

[65] It struck me as a little odd that experienced counsel in industrial and employment law would fundamentally disagree on what one would have thought was a trite and settled principle. In addition to the case cited, counsel for the defendant relied on the legal maxim 'he who asserts

must prove' in support of her proposition (see s. 82 of the Evidence Act). But while s. 82 is a good starting point, it is clear that the burden with respect to proving any matter or thing may shift or change based on statutory prescription and/or the circumstances of the case. And while the **B.M.P. D/B/A Crystal Palace Casino** case does provide a good overview of what may constitute unfair dismissal and the application of the "*substantial merits of the case*" test, it is no support for the proposition that plaintiff bears the burden of proof.

[66] No doubt part of the reason for the uncertainty lies in the fact that the EA incorporates in minimalistic terms the test from the UK context, with little statutory guidance. On the other hand, the position in the UK relating to unfair dismissal is comprehensively addressed in statute, augmented by an extensive body of case law. There have been many local cases expounding on the "*substantial merits of the case*" approach outlined in s. 35 of the EA, but none frontally confronts the issue of who bears the legal burden of proof in establishing unfair dismissal.

[67] To further complicate matters, the burden of proof in the UK context has shifted with statutory changes. For example, there was a 1974 amendment to the 1971 IRA (continued in later versions of the relevant legislation until repealed in 1996—i.e., s. 6(8) of the First Schedule of the 1974 Act; s. 57(3) of the 1978 EPA)—which initially cast the burden on the employer, as follows:

> "..the determination of the question of whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to the equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

[68] The present formulation contained in s. 98(4) of the ERA, which came into force on 1 October 2006, states in material part as follows:

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

[69] Commenting on this test, the EAT noted as follows in **Secretary of State for Justice (appellant) v. LOWN (respondent) [2016] IRLR 22:**

> "24. The structure of the statutory right thus requires that the ET first make a finding as to whether the employer has established the reasons for his dismissal. That requires a finding as to the collection of facts subjectively operating on the

employer's mind at the relevant time, and as to whether it falls within one of the statutory permissible reasons. It will be having regard to the reasons that the ET will go on to determine whether the dismissal was fair or unfair (the burden of proof is neutral as between the parties). As this stage, the test to be applied is that of the range of reasonable responses of the reasonable employer in the relevant circumstances, including the size and administrative resources of the employer. That question is to be determined in accordance with equity and the substantial merits of the case.

Where the reason for the dismissal relates to the employee's conduct, the ET's task is as laid down (with necessary changes to reflect the amendment to the burden of proof) in *British Home Stores Ltd. v Burchell* [1987] IRLR 379 EAT. That guidance has since been fleshed out by the Court of Appeal, see per Aikens LJ in *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759, in particular paras. 35 and 36:

> '35. ...once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief."

[70] In **Major v First Caribbean International Bank (Bahamas) Ltd. (2022) 100 WIR 1**, the Court of Appeal conducted an extensive analysis of the differences between the statutory framework for unfair dismissal in the UK and Bahamas, drawing on its earlier observations in **BMP Ltd. D/B/A Crystal Palace Casino v. Ferguson [2013] 1 BHS J No. 135** and the **Omar Ferguson** case. It said:

> "[91] Admittedly, the ERA [UK Employment Rights Act] and the BEA [Bahamas Employment Act] contain the identical statutory declaration as to the right of an employee not to be unfairly dismissed. However, in The Bahamas the BEA expressly identifies 5 distinct categories of dismissals which are to be regarded as unfair (the 'statutory dismissals'). See ss 36 through 40 of the BEA. No such provisions are found in the ERA.
>
> [92] Again, in The Bahamas (as s. 35 of the BEA clearly shows) the approach to determining the question whether a dismissal is fair or unfair, is very differently crafted from that in the ERA. In Pt X of the ERA, under the general hearing 'Fairness', the employer is expressly required by s. 98(4) to show (a) the reason (or principal reason) for dismissal; and to further show (b) that the reason provided either falls within s. 98(2) or is some other substantial reason of a kind as would justify the dismissal of an employee holding the position held by the employee in question. …

> [94] In comparison, the BEA contains no equivalent to s. 98. Furthermore, the fairness test in s. 35 (unlike that seen in 98(4) of the ERA contains no reference to 'equity'. In this jurisdiction, the only indications given in the BEA as to what constitutes an unfair dismissal are the 5 categories of 'statutory dismissal' expressly identified in ss. 36 to 40, and the guiding principle for determining the fairness or unfairness of a dismissal contained in s. 35 […]
>
> [95] In *Crystal Palace Casino this Court* (differently constituted) explained that s. 35 operates as the 'touchstone' or the guiding principle by which the fairness or unfairness of any dismissal outside of the provisions of ss. 36-40 is to be determined. It is obvious therefore in The Bahamas there is no statutory duty placed on the employer to give detailed particulars or reasons for an employee's dismissal or to give full particulars in a letter of termination at the time of dismissal.
>
> [96] Despite these differences, Bahamian courts (including the Industrial Tribunal) have had no difficulty resolving unfair dismissal claims falling outside the provisions of ss. 36-40 using the 'substantial merits of the case' approach prescribed in s. 35. (In this regard, see generally the discussion between para [18] through [34] of *Omar Ferguson*.)
>
> [97] <u>It must, however, be observed that read as a whole, both statutes require an employer who is seeking to justify the dismissal to establish, *inter alia*, that he acted reasonably in summarily dismissing his employee</u>. […] "

[71] In the **Omar Ferguson** case, the COA approved the statement by the Judge (Winder J, as he then was) that:

> "30. The question in every case is whether <u>the employer acted reasonably in treating the reason as sufficient for dismissing the plaintiff and it should be answered with reference to the circumstances known to the employer at the time</u>."

[72] As mentioned, the Bahamian statute only reproduces the kernel of what is s. 98(4) of the ERA (as originally enacted in the 1971 IRA), but numerous local cases have generally followed the approach of the UK cases, allowing for any minor differences in the statutory formulation. For example, the word "equity", which appears in the UK provision, is omitted from s. 35, although I hardly think that this omission denotes any difference in meaning. In **Earl v Slater & Wheeler (Airlyne) Ltd. [1973] 1 W.L.R. 145**, it was held that the word "equity" is used in the UK statute not in the technical sense of proceedings in the Chancery Division, but in the broad sense of fairness.

[73] Thus, in the UK, once a dismissal has been established, there are two stages: (i) the reason-setting stage, where the burden is clearly on the employer to produce the fundamental reason for their decision, which must be acceptable under the UK statute (unless the dismissal will be unfair for lack of justification), and (ii) the second stage, where the test is was it reasonable to treat the reason as sufficient.

[74] As stated by the Court of Appeal in **Major**, the burden imposed on the employer in the first stage of the UK test under s. 98(1) is *not* imposed in the Bahamian statutory context, although it stands to reason that in the majority of cases the employer will furnish a reason for the dismissal. The burden of establishing fairness at the second stage is neutral, which seems only logical having regard to the objective factual inquiry that the tribunal/court is required to conduct of both the procedure and the substance of the dismissal. However, where an employer alleges that an employee has engaged in misconduct as the reason for the dismissal, the three factors cited in **Graham v Secretary of State for Work and Pensions (Jobcentre Plus)** (*supra*) come into play: (i) whether the employer carried out an investigation into the matter that was reasonable in the circumstances of the case; (ii) secondly, did the employer believe that the employee was guilty of the matter complained of and (iii) thirdly, did the employer have reasonable grounds for that belief.

[75] I would conclude, therefore, that where the court is resolving unfair dismissal claims falling outside of the provisions of ss. 36-40 (i.e., the statutory categories), the burden of proof is neutral, considering the balancing test the court has to conduct. But it is only logical that both parties must adduce the facts on which they rely to enable the court to conduct its inquiry and come to its conclusions.

[76] However, when an employer asserts the conduct of the employee to justify dismissal (as was the case in **Omar Ferguson**) it stands to reason that the employer must satisfy the tribunal/court that it was reasonable to do, having regard to the process and procedure it undertook leading to the dismissal and the reasons for its belief that the employee was guilty of the misconduct. In other words, the burden must be on the employer to satisfy the tribunal as to its subjective belief and grounds for its belief where the conduct of the employee is in issue. This conclusion is consistent with the statement of the COA in *Major* where, after conducting a comparative analysis of the ERA and the EA, that court stated that "*both statutes require an employer who is seeking to justify the dismissal to establish, inter alia, that he acted reasonably in summarily dismissing his employee.*"

[77] So I do not accept Ms. Hanna's assertion that the burden of proof is on the *employee* to establish that he was unfairly dismissed. In the main, the burden is neutral, and the assessment is conducted on an objective basis by the tribunal/court based on all of the facts. However, the onus is clearly on the employer to satisfy the tribunal/court that it acted reasonably in dismissing the plaintiff when it is relying on the employee's conduct.

*The pleading point*

[78] The second point taken by the defendant is that the plaintiff failed to plead and/or particularize a claim for unfair dismissal. In this regard, reference is made to the Court of Appeal case of **Eden Butler v. Island Hotel Company Ltd. (SCCivApp & CAIS No. 210 of 2017**), to which I will come shortly. The defendant alleges that the "*defendant and the court were not*

*provided any allegations of fact, with any degree of specificity, sufficient to know what case the Defendant was required to meet*".

[79] In particular, reliance was placed on para. 32 of that decision, where Evans JA (Actg.) (as he then was) said:

> "32. With regard to the alternate claim of damages for unfair dismissal the focus is primarily on the procedure. 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 fact 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 provide sufficient detail in the claim so that the defendants does knows what the allegations of fact are; otherwise, that person cannot defend. The nature and extent of particulars depends on the nature of the claim. If, for example, trespass is alleged in the claim, the allegation of fact must make that claim out. Similarly, for breach of contract, the claim would set out the material terms of the contract and details of the alleged breach."

[80] This passage no doubt admirably sets out general principles relating to pleadings. However, as noted by Evans J.A., the "*nature and extent of the particulars depends on the nature of the claim*". In this regard, it has to be borne in mind that "unfair dismissal" is a statutory remedy created by Parliament. It is not a tort or breach of contract with clearly defined elements that have to be established (although a breach of contractual provisions may be evidence of circumstances of unfair dismissal). In fact, the EA provides that a trade dispute relating to unfair dismissal is to be dealt with as a "*complaint*". As indicated by the Court of Appeal in **Omar Ferguson**, unfair dismissal might also give rise to a cause of action for breach of statutory duty. But with the exception of the statutory categories of unfair dismissal, the Act gives little guidance on the circumstances that might give rise to such a breach.

[81] Some criticism might rightly be made of the plaintiff's pleaded case (see further discussion below). I am of the opinion, however, that the plaintiff pleaded sufficient facts and particulars to sustain a case/complaint for unfair dismissal. As I understand the pleadings, his case was that his dismissal was inherently unfair and defective, as there were no charges against him either in 2012 when the employer initially took action to suspend him, or in 2016 when he was eventually terminated, and any reasonable investigation would have revealed that.

[82] Further, even though the plaintiff's pleadings were impeached at trial, no issue was taken by the defendant during the long gestation of this action, nor was there any application for further and better particulars. The defendant not only denied the claims, but positively pleaded that it did not breach the plaintiff's right not to be unfairly dismissed.

*The admissibility of the extract from the IA*

[83] Rather surprisingly, neither the plaintiff nor the defendant included the terms of the IA in their bundles, notwithstanding that its provisions were pleaded by both parties and the plaintiff was suspended and eventually terminated according to its terms. Counsel for the plaintiff laid over an extract from the IA at trial and made references to it during her submissions to the court. The extract bore the stamp of the Registrar of Trade Unions, so I do not think any point was being taken as to its authenticity. However, the defendant argued in closing submissions that as the plaintiff did not "*adduce that contract (i.e., the Industrial Agreement) in evidence*" and because it was not a document that the court could take judicial notice of under s. 79 of the Evidence Act, the court was precluded from considering the IA excerpt as admissible evidence.

[84] It goes without saying that the procedural rules of evidence should be meticulously observed. But while counsel for the defendant might be right to point out that the document was not formally entered into evidence, I am far from persuaded by the contention that the court is precluded from considering it. I regard it as a document that has been sufficiently incorporated by reference in the pleadings to be admissible and form part of the evidence. For example, in **Hitchins and another v. British Coal Refining Processes Ltd. [1963] 2 All ER 191**, the question, in an application to set aside an arbitration award for error on the face of the award, was whether the court could look at the pleadings filed in the arbitration as evidence. The arbitrator had found negligence "*as mentioned*" in certain paragraphs of the counterclaim. The Court held that the pleadings were admissible as evidence because of the reference to the pleadings in the award.

[85] As mentioned, the defendant specifically pleaded article 7 of the Industrial Agreement at para. 12 of its defence and referenced the specific provisions of the IA under which the plaintiff was being suspended in a file note exhibited to its defence. I would therefore hold that the court is not precluded from having regard to the IA, despite the informal manner in which it was produced to the court.

[86] Before leaving this point, I would refer to another principle relating to employment claims (including unfair dismissal), and I stress that I do not place any reliance on it for accepting the IA extract as evidence. As already noted, the rights and remedies relating to unfair dismissal were created by statutory intervention, which included a specified procedure for vindication before the Industrial Tribunal. That Tribunal is not bound by strict rules of evidence in dealing with employment disputes, including unfair dismissal (see s. 57(b)). This informal process was intended to strengthen the inquisitorial and investigative powers of the specialist employment tribunal, no doubt to achieve some equality of arms between powerful employers and weaker employees.

[87] It is now settled in this jurisdiction by the decision of the Court of Appeal in **Omar Ferguson and Major v First Caribbean International Bank (Bahamas) Ltd.**, that unfair dismissal claims may be adjudicated upon in the Supreme Court, as well as in the statutorily prescribed manner before the Industrial Tribunal under s. 41 of the Employment Act, although the debate as to whether unfair dismissal claims were intended to be adjudicated exclusively by

the Industrial Tribunal might not be fully interred (see, the recent decision of the Privy Council in **Williams (Appellant) v. Casepak Company (Grenada) Ltd. (t/a Calabash Hotel) (Respondent) [2022] UKPC 9)**.

[88] But the simple observation here is that this judicially declared choice of forum for prosecuting unfair dismissal claims has resulted in the dichotomous application of procedural rules (including evidentiary rules) in respect of these claims, which can have significant consequences for the plaintiff/claimant depending on the forum in which the claims are pursued. It has been said that when a claimant chooses the Supreme Court as opposed to the Industrial Tribunal as the battlefield to pursue his claim, he is stuck with the procedural rules that apply to that forum (see **Bahamas Power & Light Company Ltd. v. Ervin Dean (SCCivApp No. 115**, of 2021, at [39], where Isaacs J.A. said "…*the respondent elected to do battle in the Supreme Court as opposed to the Industrial Tribunal; and as such, he is required to play by the rules of the Supreme Court*."

[89] This is undoubtedly correct as a matter of general principle. But in creating a specific statutory right and regime for the vindication of such claims, it is reasonable to infer that Parliament intended that the litigants would have the benefit of the informal evidential regime. As said in **Williams**, by reference to the observations of Lord Watson in the case of **Barraclough v Brown [1897] AC 615**, "*The right and the remedy are given uno flatu, and the one cannot be divorced from the other*." As indicated, I do not place any reliance on this observation, as I have accepted the IA as part of the evidence for different reasons. And I certainly do not mean to suggest that the rules of evidence applicable in the SC should be diluted to accommodate employment claims.

*Conclusions on unfair dismissal*

[90] I now turn to look at the question of whether the plaintiff has made good his claim for unfair dismissal. There is no dispute that the reason given for the dismissal of the plaintiff, as pleaded at paragraph 12 of the defendant's defence, was that "*he was charged with a serious offence which warranted termination under Article 7 of the Industrial Agreement*". Thus, the reason was misconduct which amounted to criminal misbehaviour.

[91] As to the relevant circumstances, it is striking to observe that the plaintiff was suspended in late 2012 but not terminated until 2016. The defendant's pleadings suggest that this passage of time was to allow the plaintiff an extended period to provide documentary proof that he had been discharged of the offence, which he failed to do.

[92] In my view, it was not sufficient and certainly not reasonable for the employer to simply leave it to the plaintiff to provide evidence of the fact that the charges against him were dismissed. The cases make it very clear that the employer should undertake appropriate investigations before applying the sanction of dismissal. This applies *a fortiori* where it involves allegations of criminality (see **Turner v East Midlands and A v. B**.)

[93] The circumstances of this case show beyond the pale that the dismissal was unreasonable. It has been noted that the test of the reasonableness of the employer's decision to dismiss is to be assessed at the time at which the dismissal takes effect. What emerges in this case—and which perhaps explains why the defendant went to such great lengths to challenge the admissibility of the bundles—is that the defendant was aware at the time the plaintiff was dismissed that the charges had long been discharged, and were discharged even at the point that the information initially came to the defendant's attention. In fact, the 17 July 2015 print-out discloses that the letter from the Drug Enforcement Unit, dated 28 November 2012, which stated that the matter against the plaintiff "*was still pending in Magistrate's Court*" was itself incorrect, as the charge had been discharged from 2009, which the plaintiff had maintained all along.

[94] I have found that document to be admissible. But even if I were wrong so to hold, there was other evidence from the plaintiff speaking to the defendant's knowledge that the charges had been dismissed well before his suspension. In his witness statement, the plaintiff averred that the defendant had the police printout in their possession (as indicated in their bundle). He was not cross-examined on this averment, and no objection was taken to the contents of his witness statement in this regard. So this stands as uncontroverted evidence before the court on this point, even without the supporting documentary evidence.

[95] In *Omar Ferguson*, the Court of Appeal considered that "…*the fact that he [Ferguson] had not been found guilty of any misconduct inasmuch as the criminal charges against him were discontinued and he was entitled to the benefit of the presumption of innocence*" was one of the circumstances evidencing the unfairness of the respondent's dismissal. The court also cited with approval the observations of Winder J., where he said (remarks which I respectfully endorse):

> "34.A. I must emphatically state for the record that I take special consideration to the sensitivity of the airports security especially in the interest of public safety, but the law provides that a person is deemed to be innocent until proven guilty. This is one of the most fundamental provisions that is inherent in every democratic constitution…".

[96] I would hold without hesitation that in all the circumstances of this case, and having regard to the substantial merits of the case, the plaintiff was unfairly dismissed.

*Wrongful Dismissal*

[97] I now come to examine the claim for wrongful dismissal. The defendant contends that the plaintiff failed to plead a claim at common law, and therefore the plaintiff's claim for wrongful dismissal is restricted to a claim under the Employment Act.

[98] As has been noted, this contention arises because there are two legal tests for wrongful dismissal as a result of unjustified summary dismissal: (i) the traditional test at common law; and (ii) the test established under ss. 31-33 for summary dismissal (see **Eloise Shantel-Curtis Rolle**

**v. Doctors Hospital Bahamas Ltd. No. 149 of 2012**, per Adderley J.A.; and **Jervis et al. v Skinner [2011] UKPC 2** [22], Per Lord Clarke).

[99] In **Garvey v. Cable Beach Resorts Limited (d/b/a Sheraton Nassau Nassau Beach Resort) [2014] 3 BHS J. No. 36**, M. Evans J. summarized the position as follows:

> "32. Justice of Appeal Neville Adderley in the case of *Eloise Shantel-Curtis Rolle v Doctors Hospital Limited* No. 149 of 2012 opined that Section 4 of the Employment Act preserves the Common Law. The learned Justice then went on to say that there are two tests available for Wrongful Summary Dismissal, one under the Common Law and the other under the Employment Act. He cited the Common Law test as that laid down by Lord Jauncey in *Neary v Dean of Westminster* (1999) IRLR 28. Although not cited by Adderley JA, it is common ground that the test under the Act is derived from Sections 31-33 of the Act. It follows therefore that that proper test to utilize would depend on the [*sic*] whether the claim was made under the Common Law or the Act. However, what was not made clear from his comments was whether the remedy would be the same whether the claim was made under the Act or at Common law."

[100] In **Jervis v Skinner**, the PC reiterated that the test at common law was—

> "…correctly stated by Lord Jauncey sitting as the Visitor to Westminster Abbey in *Neary v Dean of Westminster* [1999] IRLR 28, where he said at para. 22:
> 'that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

[101] The test in the EA described at ss. 31 and 33 (which have been set out above), allows an employer to summarily dismiss an employee who has committed a "*fundamental breach of his contract or has acted in a manner repugnant to the fundamental interests of the employer*." To establish this, the employer must prove that "*he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted*."

[102] While it is easy to state the principle that a plaintiff/claimant may allege wrongful dismissal both at common law and under the EA, it is far more difficult in practice to decipher whether a "*claim is made under the Common Law or the Act*". This is because the pleadings in many of these matters do not state with any particularity which claim is being pursued. Thus, the inquiry that the tribunal/court must undertake is determined by having regard to the pleaded claim and the specific type of dismissal that is under consideration (**Major**, at [103]).

[103] In the instant case, it was pleaded at para. 13 of the Statement of Claim that the Defendant "*unfairly and wrongfully terminated the plaintiff's employment in breach of the requirements of*

*the Industrial Agreement and the Employment Act*". Therefore, both Part VIII ("Summary Dismissal") and Part IX ("Unfair Dismissal") of the EA are engaged. Unfortunately, because of the conflated terms in which the unfair/wrongful dismissal claim is pleaded, it is difficult to discern whether the claimant made an election between a common law claim (pursuant to the terms of the IA) or under the EA, since both are asserted.

[104] The provisions of the IA referenced was Section 7.15. That provides as follows:

> "7.15 Where an employee is formally charged by the Police with a criminal offence, the Employer may:
>
> (a) allow the employee to continue to work until the case is resolved;
> (b) suspend the employee with half pay until the case is heard;
> (c) if the employee, after being formally charged is later convicted, but not incarcerated, continuance of his employment will be at the discretion of the Employer;
> (d) if the employee is convicted while under suspension, he may be dismissed.
>
> However, where the employee is suspended with half pay the Employer will apply payment of salary or wages to the employee during the period of suspension such pay as at the date of suspension would be due to him in respect of his accrued vacation."

As will be noticed, these provisions are virtually the same as s. 29.10 of the Staff Management Regulations, which was set out in the plaintiff's statement of claim. However, the plaintiff's specific plea was breach of the IA, not the Regulations.

[105] I would have found, in all the circumstances of this case, that the dismissal of the plaintiff by the defendant Authority was clearly in breach of the disciplinary provisions of the IA. There is no provision under 7.15 which would sanction his termination. Sub-paragraph "b" provides for suspension under the case is resolved, but it is clear that when he was suspended, the case had already been resolved. Secondly, in its defence the defendant pleaded that the plaintiff was charged with a serious offence that warranted termination under art. 7, which sets out "*possession and/or use of narcotics or conviction for dangerous drugs*" as a major breach which may for dismissal. But again, this would not avail the defendant, as it was never proved that the defendant possessed or used narcotics.

[106] However, there is merit in the contention of the defendant that the plaintiff did not plead a claim for contractual breach at common law, as no contractual terms were adduced in respect of the plaintiff other than the IA. There was no allegation or argument as to whether or not the terms of the IA were incorporated, expressly or implicitly, as part of the plaintiff's individual employment contract. As the Court of Appeal made clear in the case of **Hutchinson Lucaya Ltd. v Commonwealth Union of Hotel Services and Allied Union Workers et. al.** [SCCIvApp. No. 61 of 2014]:

> "18. Inexorably, there are no provisions in the Act which speak to the incorporation of the terms of collective industrial agreements into the individual contracts of workers. The law which would therefore apply to that issue is the law of contract and the rule of interpretation.
>
> 19. There is clear authority for the proposition that relevant provisions in an industrial agreement may be expressly or impliedly incorporated in individual contracts, but it is also undeniable that that relevant terms must be those contained in the current collective agreement at the time of incorporation. See **National Coal Board v Galley** [1958] 1 WLR 16."

[107] In any event, as the defendant contended, at the time of his dismissal, the IA had expired. While (as I have found) this had no impact on the statutory claim for unfair dismissal, the position relating to wrongful dismissal at common law requires the plaintiff to establish that the terms of the IA were incorporated into his contract.

[108] Thus, the defendant is right to contend that the wrongful dismissal claim falls to be determined under Part VIII of the EA. This can be dealt with in short shrift, because the defendant admitted that it provided no evidence to satisfy the s. 33 test and conceded wrongful dismissal. This is what is stated in its closing submissions (at para. 66-61):

> "The Defendant has presented no evidence that at the date of dismissal it had an honest and reasonable belief on a balance of probability that the Plaintiff had committed the misconduct in question, therefore the Plaintiff is entitled to damages under Section 29(1) of the Employment Act."

[109] Not only did the defendant fail to discharge the burden of proof laid down by s. 33 of the Act; to the contrary, it adduced positive evidence that it *knew* at the date of dismissal that the charges against the plaintiff had been discharged, and therefore the reason given for suspension and ultimately dismissal could not have been genuine. The other point that I would note is the failure to conduct the reasonable investigation required under s. 33. But I need not elaborate any further on this, as it has already been canvassed in dealing with the unfair dismissal claim.

[110] I am therefore constrained to find that the plaintiff was wrongfully dismissed. I would add further that the circumstances of the plaintiff's "summary" dismissal in 2016 were egregious, if not disingenuous. The plaintiff was a highly trained and certified fireman, who had been with the defendant for 30 years, without any complaint concerning his conduct. In fact there was a commendatory recommendation from the Chief Fire Officer on his file, which was attached to his witness statement. Considering the time that elapsed between when the plaintiff was initially confronted with the information in 2012 and his eventual dismissal in 2016, there was nothing to merit his immediate dismissal (or any dismissal at all).

[111] As mentioned, Ms. Pyfrom also argued that the defendant, in its general denial of several paragraphs of the claims and in calling no evidence in support of its case, must be taken as having

admitted several of the plaintiff's allegations under O. 18, r. 13. However, because of the conclusions I have come to, and the specific concessions made by the defendant, it is not necessary to deal with the admissions point in any detail.

**Damages**

*Unfair dismissal*

[112] As I have found that the plaintiff was unfairly dismissed, he is entitled to be compensated pursuant to ss. 46 and 47. The governing provisions are as follows:

> s. 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.
>
> s. 47(1) Subject to s. 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.
>
> 48(1) The amount of any payment made by the employer to any person calculated in accordance with section 46 and of a compensatory award to a person calculated in accordance with section 47, shall not exceed eighteen months' pay.
>
> Provided that where the employee holds a supervisory or managerial position the award shall not exceed twenty-four months pay.
>
> (2) It is hereby declared for the avoidance of doubt that the limit imposed by this section applies to the amount which the Tribunal would, apart from this section otherwise award in respect of the subject matter of the complaint after taking into account any payment made by the respondent to the complainant in respect of that matter and reduction in the amount of the award required by any written law."

[113] The plaintiff contends that he should be paid the maximum award for unfair dismissal under the EA, having regard to the circumstances of his dismissal. I agree. Counsel for the plaintiff helpfully computed the suggested award in her written submissions. As indicated in his witness statement, the plaintiff's salary at termination was $30,150.00, excluding yearly entitlements, and he had completed 30 years' service. None of these figures was disputed. In calculations, the plaintiff's counsel worked out the compensation as follows: (i) Basic Award at $56,531.70 (1 week's basic pay of 628.13 x 3 (1,884.39) x 30 (completed years) = $56,531.70; (ii) Compensatory Award at the statutory maximum of 24 months' (2 years') = $60,300.00.

[114] I am not certain how the plaintiff's counsel arrived at the figure of $628.13 for 1 week's pay. One week's pay at $30, 150.00 = $579.80 (which is the figure the defendant used in its suggested calculations). However, allowing for the yearly increments of $600.00 (x 2) which were awarded to the plaintiff at termination for the two-year suspension, his yearly salary at the time of termination would have been $31,350.00, yielding a weekly rate of approximately $600.20. That is the multiplier I will use. Therefore, the adjusted calculations for the awards will be as follows: (i) Basic Award (1 week's basic pay of $602.20 x 3 (1,800.60) x 30 = **$54,018.00**); (ii) Compensatory Award at statutory maximum (24 months (2 x) 31,350.00 = **$63,000.00**). This totals **$117, 018.00**.

[115] In granting these awards, I bear in mind that pursuant to s. 47(2), the compensation awarded for unfair dismissal is to compensate the employee and should not be used to penalize a bad employer, or give a gratuitous benefit to an employee for whom the tribunal/court feels sympathy: **Morgans v Alpha Plus Security Ltd.** [2005] ICR 55.

[116] In this regard, counsel for the defendant argued that the plaintiff had a duty to mitigate loss, and at trial he admitted that he obtained several odd jobs, namely doing construction work and some road painting. It is contended by the defendant in closing submissions that he indicated in cross-examination that he made approximately $600.00 per month for 3-4 months for the road painting job ($2,400.00) and about $350.00 per week doing construction work, which equates to $11,200 (for a total of about $14,000.00). I am not sure I agree with the defendant's representations and calculations on this point (see paragraph 24 above, where I set out the plaintiff's testimony on this point).

[117] I accept the principle that the plaintiff should not be compensated for more than the amount of loss sustained as the consequence of his dismissal. But the loss suffered by the plaintiff as a result of his unfair dismissal was the whole amount of lost pay, which was $31,350.00 per annum. I am not able to conclude on the evidence led in cross-examination that the meagre earnings of the plaintiff from his sporadic work would have put him above the $31,350.00 of his lost pay in any one year, to count as double recovery. None of these jobs lasted for long periods and the evidence was not clear at all on the periods when the employment occurred. In my judgment, considering what is just and equitable in the circumstances and having regard to the loss sustained by the claimant as mandated by s. 47(1), I would not make any deductions from the compensatory award. There is also nothing to be deducted under s. 48(2), since the only

payments made to the complainant were his outstanding salary, increments, and accrued vacation benefits. Nothing was paid to him in respect of his dismissal.

*Wrongful dismissal*

[118] The plaintiff has pleaded a number of heads of consequential loss as follows: (i) loss of future wages of $331,650.00; (ii) loss of the benefit of life insurance policies in the amount of $40,000; (iii) gratuity payment in consequences of 30 years of service; and (iv) pensions calculated pursuant to the Pension Act 1952.

[119] The starting point in terms of establishing the measure of damages for breach of contract (harkening back to the classic statement of Parke B in **Robinson v Harman** (1984) 1 Exch 850) is the principle that where a party sustains loss by reason of a breach of contract, he is entitled, so far as money can do, is to be placed in the situation with respect to damages as if the contract had been performed: **Radford v De Froberville** [1978] 1 ALL ER 33 at 40.

[120] A corollary principle, however, is that in the context of an employment contract, damages for wrongful dismissal are assessed applying the "*least burdensome performance*" rule, which means the employer would have been entitled to terminate the contract in the way least burdensome to him. This means that he would have been lawfully able to dismiss the employee on the contractual minimum notice period, or make payment in lieu of notice ("PILON"): **MacKenzie v AA Ltd.** [2021] EWHC 1605 (QB). Thus, in substance, the measure of damages is the sum equivalent to the wages which would have been earned between the time when the contract might lawfully have been terminated by due notice and the actual time of termination, together with any contractual or fringe benefits to which the employee would have been due up to the time of termination or during the requisite notice period: **Silvey v Pendradon plc** [2001] EWCA Civ 784.

[121] In **Betty K Agencies Limited v. Suzanne Fraser,** No. 270 of 2013, the Court of Appeal took the view that the period of notice for terminating an employee or PILON is now statutorily established by s. 29 of the EA. But this must be read subject to s. 4, which permits an employer and employee to agree a longer contractual notice period or PILON as part of the employee's contractual terms (see **Paula Deveaux v The Bank of the Bahamas,** No. 19 of 2006, Court of Appeal; Isaacs JA, in **Bahamas Power and Light Company Limited v. Ervin Dean** [SCCivApp. No. 115 of 2021] [at 31]; and the observations of Lyons J. in **Wells v Snack Food Wholesale** [2006] 1 BHS J. No. 59). However, in the absence of a specific provision in the contract more beneficial than the provisions of s. 29, there is nothing on the facts of this case to take it outside the s. 29 assessment.

[122] The defendant asserts that as there was no evidence before the court that the plaintiff was a supervisor or a manager, he is "entitled" to the maximum under s. 29 (1)(b) of 2 weeks' notice and 24 weeks' severance, for a total of $15,075.00 ($579.81 per week x 26 weeks). The plaintiff was a sergeant at the time of his dismissal, which might connote some supervisory duties. But

the defendant is right to point out that there is nothing before the court to indicate that he was classified as a manager or supervisor. I therefore would accept the formulation used by the defendant to calculate the plaintiff's general entitlement in damages, except that I would substitute the weekly amount of $600.20 x 26 weeks, which amounts to **$15,605.20**.

Claimed heads of compensation

[123] I now come to look at the individual heads under which the plaintiff claims compensation for losses.

*Loss of future wages*

[124] As the plaintiff was not employed on a fixed-term contract, there is no basis on which he can claim as a liquidated sum the amount of wages he would have earned *in futuro* but for the breach of contract (**Marsh v National Autistic Society** [1993] ICR 453). I therefore reject the claim for payment for loss of future wages. It is common ground that the plaintiff was paid and accepted on termination the amount of $67,761.29, which represented his accrued vacation leave, half-salary reimbursement, and the cash lump sum annual increments for two years. This was all that he would have been entitled to by way of salary and pecuniary benefits at the time of dismissal.

*Benefit of life insurance policy*

[125] It is not in dispute that an employee who may be contractually entitled to the benefit of free medical or life insurance under the terms of their contract, or even a contributory scheme, may be entitled to claim the loss of any such benefit if they are lost as a result of the employer's repudiation of the contract by wrongful dismissal.

[126] The defendant argues that the plaintiff suffered no loss in this regard as he admitted (in cross-examination) that all of the assured were alive, and therefore there was no basis on which a claim could be made. The evidence of the plaintiff is not at all clear on the insurance claim. But it appears from his witness statement and documents disclosed in the plaintiff's bundles that he maintained life and medical (sickness and accident) insurance on behalf of his wife and four children in the amount of $10,000 each. It is alleged that these lapsed in "early 2016" because the defendant ceased paying the policy without informing him. However, it appears that these were private insurance policies maintained by the plaintiff and not benefits to which he was entitled by virtue of his contract of employment, or to which the employer was required to contribute.

[127] According to a letter from Family Guardian Insurance in the plaintiff's bundle of documents, the accounts lapsed in January 2013 as a result of non-payment because of the reduction of his salary (by being placed on half-pay). The plaintiff then reduced the coverage in 2014 to reflect the amount being paid under his half-salary, and the last payment from his salary

was made in September 2016. It is therefore clear that these were not insurance benefits to which the plaintiff was entitled as a result of his employment contract. It cannot be doubted that the diminution in his salary no doubt created the situation that led to the eventual lapse of the policies, but as the defendant rightly points out, there was no loss during the relevant period (i.e., the applicable statutory notice period on which he could be terminated) on which he could found a claim.

[128] Having said that, I do not agree with the defendant's contention that the approach to assessing damages for loss of any insurance benefits (if the insurance was one to which the plaintiff was contractually entitled under the terms of his employment and which he lost as a result of the breach of contract) would be assessed simply on the basis of whether or not he suffered a loss. In such cases, the value of such benefits is normally assessed by equating it with the costs to the employer of providing the insurance cover during the relevant notice period (see, **Shove v Downs Surgical Plc.** [1984] ICR 532); **Bahamas Power and Light Company Limited v. Ervin Dean** (*supra*), [95]).

[129] However, for the reasons given above, I must reject the claim for any insurance loss.

*Pension and gratuity*

[130] A more difficult problem arises in relation to the claim for pension/gratuity rights. The defendant contends that the plaintiff has not provided the Court with any evidence as to the amount of his loss for either gratuity or pension. There is merit in this contention.

[131] Firstly, it is not clear from the pleadings which entity would be responsible for the plaintiff's claim for gratuity or pension benefits, even if they arise. For example, there is a letter dated 9 June 2009 from the defendant to the plaintiff indicating that the defendant intended to introduce a contributory pension plan with a private plan administrator, and requiring him to complete the enrolment form. There is no indication as to whether or not this private contributory plan ever materialized or whether the plaintiff subscribed to it. Then, there is Article 8.1 of the extract from the IRA, which provides that the pensions/gratuity benefits of persons who transfer from the public service to the defendant are granted in accordance with the provisions of the Pension Act.

[132] The plaintiff's witness statement indicates that he was employed in 1986, and it might therefore be assumed that he came within the category of employees transferred from the public service, as the court can take judicial notice of the fact that the Airport Authority did not come into existence until 2001. There is correspondence in the plaintiff's bundle to the Pensions Section of the Public Service enquiring as to his pension benefits, which recites that the defendant "advised" that the plaintiff was entitled to a pension. There is not before this court, however, any evidence that the plaintiff would have been entitled to a pension at the time of his termination, or during the relevant notice period. The court can take judicial notice that s. 25 of the Pensions Act provides for eligibility for a gratuity after 10 years of service, where an officer retires before

qualifying for pension. But the statutory provisions relating to the grant of a gratuity are in discretionary terms.

[133] It is not in dispute that the plaintiff completed 30 years of unbroken service with the defendant and was terminated at the age of 54. It may well be that this entitles him to apply for a gratuity under s. 25, but the court does not wish to speculate in that regard. If he is entitled to either gratuity or possible pension benefits under the Act, there is nothing to prevent the plaintiff from continuing to pursue those claims through the regular administrative channels. Regrettably, however, there is no evidence before the court in respect of either claim that would allow the court to find an entitlement as a result of his dismissal. These heads of claims are therefore rejected.

**CONCLUSION**

[134] In conclusion, and for the reasons given above, I find that the plaintiff has been unfairly and wrongfully dismissed, and would award compensation for unfair dismissal in the amount of $117,018.00, as well as damages for wrongful dismissal in the amount of $15,605.20, for a total award of $132,623.20. The applicable statutory interest rate (6.24%) under the Civil Procedure (Rate of Interest) Rules 2008 will apply to the award from the date of judgment until payment.

[135] I also order costs to be paid to the plaintiff by the defendant, to be taxed if not agreed.

Klein, J.

22 May 2024