COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2019/CLE/LAB/00006

BETWEEN:

STERLYN SMITH

PLAINTIFF

AND

RON FRAZIER
(D.B.A RON'S ELECTRIC MOTORS)

DEFENDANT

AND

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2019/CLE/LAB/00007

BETWEEN:

SHAVADO SMITH

PLAINTIFF

AND

RON FRAZIER
(D.B.A. RON'S ELECTRIC MOTORS)

DEFENDANT

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Mr. Dennis Williams for the Plaintiffs
	Ms. Darrell Taylor for the Defendants
Hearing Dates:	3, 6, 9 December 2021; closing written submissions April 2024

RULING

KLEIN J.

Employment— Employees of automobile repair business—termination of employee based on allegation of stealing—Claim for unfair and wrongful dismissal—Unfair Dismissal—Unfair and Wrongful Dismissal—Burden of Proof as between employer and employee in unfair dismissal claims—Effect on claim—Compensation for Unfair Dismissal—

Principles relating to Wrongful Dismissal—Damages—Evidence—Summary Dismissal— Employment Act, Sections 31, 32 and 33—Constructive Dismissal—Evidence.

Practice and Procedure—Pleadings—Constructive Dismissal—Inconsistency between pleadings and evidence—Abandonment of Employment

INTRODUCTION AND BACKGROUND

Introduction

1. The plaintiffs in these proceedings, brothers Sterlyn and Shavado Smith, assert claims for unfair and unlawful dismissal stemming from a series of events over the span of a weekend that led to their dismissal in 2017 from an electrical motor repair shop, Ron's Electric Motors ("REM"), owned by the defendant.

2. The claims arise out of common facts and the actions were consolidated by Order of Stewart J. on 28 October 2019. The brothers worked in a family-owned and operated business, and the defendant is their brother-in-law. For ease of exposition, Sterlyn will be referred to as the "first plaintiff" and Shavado as the "second plaintiff" (collectively the plaintiffs).

Background

3. The events leading up to their termination and the circumstances under which they departed the business are not altogether clear. But it appears that allegations of stealing items from the shop were made against one or more of the employees. A staff meeting called to discuss these issues escalated into a heated and acrimonious exchange between the plaintiffs and the defendant, during which the defendant allegedly fired both plaintiffs and told them to leave the shop. Matters became even more heated, with allegations of threats of violence and a narrowly-averted physical altercation, resulting in the plaintiffs exiting the shop and not returning.

4. Sometime later, the plaintiffs filed writs of summons (as amended on 26 March 2019) claiming wrongful and unfair dismissal. The defendant pleaded that the brothers were dismissed for "*acts of gross insubordination*", in the case of the first plaintiff for "*stealing from the Defendant's business*" and, in the case of the second defendant, for "*assaulting the Defendant during a staff meeting*". At trial, however, the defendant's primary case was that the plaintiffs abandoned their jobs.

The Claims

5. The statements of claim were relatively short and mirrored each other, but for the particulars of loss and damages. The plaintiffs claimed damages for wrongful and/or unfair dismissal under the *Employment Act 2001* ("the EA") and in breach of their contract of employment (para. 3 of both statements of claim). The claims were particularized (as set out in

the first's plaintiff's claim) as follows, with minor variations and parallel numbering in both claims:

> "7. Failure to pay statutory Notice Pay and Payment Notice Pay and/or;
>
> 8. Failure to pay Statutory Notice Pay and Payment In lieu of Notice and/or Termination Pay in accordance with the Employment Act.
>
> 9. Additionally, and/or alternatively, the Defendant has breached its agreement to pay the Plaintiff's Statutory Notice Pay and Payment In lieu of Notice and/or Termination Pay in accordance with the Employment Act.
>
> 10. Abusive language during the course of the contract of employment and at the time of termination which no reasonable person could bear by the Defendant to the Plaintiff.
>
> 11. Failure to provide evidence of accusations of wrongdoing and/or failure to give any reasonable reasons for the wrongful/unfair dismissal at any time
>
> 12. By the Defendant's wrongful and or unfair dismissal, and breach of the Plaintiff's contract of employment, their [*sic*] the statutory and common law duty to the Plaintiff, the Plaintiff has suffered loss and damage."

6. As a result, the plaintiffs claimed: (i) statutory payment for unfair/wrongful dismissal and/or notice pay for wrongful dismissal; and (ii) and/or 'termination pay' (in accordance with Section 29 of the *EA 2001*).

7. The only significant difference between the claims is the particulars of loss and damages. The first plaintiff was employed with the defendant from about February of 1999. He held a supervisory position at the time of dismissal and earned $900.00 per week. He claimed as follows:

"(1)	Pay in lieu of Notice	$ 3,900.00
(2)	Notice Pay	46,800.00
(3)	Vacation Pay	3,900.00
	Total amount owing	$54,600.00"

8. The second plaintiff was employed from about February 2001 as a technician, and earned $750.00 per week. He claimed the following losses and damages:

"(1)	Two (2) Weeks' Notice Pay in lieu of Notice	$ 1,600.00
(2)	Twenty-four (24) Weeks' Notice for services	19,600.00
(3)	Vacation Pay	3,200.00
	Total amount owing	$24,000.00"

Defence

9. By way of defence filed 17 April 2019, the defendant generally denied the plaintiffs' claims. He asserted that they were summarily dismissed for gross insubordination, consisting of

stealing in the one case and assault in the other case. In other words, the pleaded defence was that the plaintiffs were dismissed for cause although, as mentioned, the defendant also contended that the plaintiffs abandoned their jobs.

ANALYSIS AND DISCUSSION

Facts and Issues

10. The plaintiffs filed statements of facts and issues in which they identified the main issues for the determination of the Court as follows:

(i) Whether at the time of the dismissals the defendant held a reasonable belief that the plaintiffs were guilty of any act (i.e., alleged theft or assault) that would justify summary dismissal;

(ii) Whether the defendant conducted a reasonable investigation into the matters alleged before summarily dismissing the plaintiffs; and

(iii) Whether the defendant's conduct amounted to constructive dismissal in all the circumstances.

11. In written submissions lodged with the court, the defendant identified the main issues as:

(i) Whether the plaintiffs abandoned their jobs and, alternatively, if they were dismissed, whether they were dismissed for cause.

The Evidence

Plaintiffs

12. The plaintiffs both filed witness statements and gave sworn evidence in support of their cases, on which they were cross-examined. The main elements of their evidence is summarized below.

First Plaintiff

13. The first plaintiff was employed at Ron's Electric Motors from February 1999 and held a supervisory post at the time of his dismissal. On Friday, 3 February 2017, there was an incident at the shop involving the defendant's nephew (Jermaine Stubbs or "Jay"), which involved allegations of stealing some items from the store. It appears that a mechanic, known only as "Froggie", who works at the rear of the shop, saw Jermaine (who is also an employee) throw something over the fence. Froggie alerted the defendant, who came to the store and confronted his nephew. The defendant then proceeded to "beat" Jermaine with a stick and brought him inside the workshop with the items recovered from behind the fence. These were said to include copper and lead wires and bearings.

14. The material included wires that the first plaintiff was preparing for a job, and he said he questioned how Jermaine got "his" wires. The defendant questioned him about the items and later showed him surveillance footage from that afternoon. That footage showed him and Kenny inside the workshop for the most part, but he explained that at some point he stepped outside, and it must have been then that Jermaine moved the items off his desk.

15. The matter rested there until Monday morning, when the defendant summoned the staff and once again pulled up the surveillance tape. This time, the defendant alleged that Jermaine admitted that it was the first plaintiff who had put him up to the theft. The defendant confronted the first plaintiff about this, indicating that the footage showed him depositing something in the area where Jermaine had stashed the material. The first plaintiff said that this was a drink bottle. The defendant then pressured the first plaintiff to accept responsibility for putting Jermaine up to the theft, and tried to get him to sign something to that effect. When the first plaintiff refused, he was told in profane language that he was fired and to get out, which led to a vitriolic exchange between him and the defendant. The second plaintiff then had an exchange with the defendant, which quickly escalated into an argument, and "rushed" towards the defendant after the latter reached for an object where his firearm was normally kept. He was held back by the first plaintiff and other employees, and after this the brothers left the establishment. The first plaintiff did not return to the shop, except for one occasion and that was to collect a National Insurance form.

16. During cross-examination, it was suggested to the first plaintiff that he was a part of the stealing ring, and that the activities were to supply a side-business operated by the brothers in direct competition with the defendant's. There was also a suggestion, based upon an allegation in the defendant's witness statement and the evidence of other witnesses that the first plaintiff admitted at the 3 February (Friday) meeting that he either stole the items, or directed Jermaine to remove the material. He denied both allegations. In re-examination, he indicated that of the nine to ten persons present at the Friday meeting, the persons called as witnesses for the defendant were all family members of the defendant, save for Stanley, whom he described as the defendant's "gofer".

Second Plaintiff

17. The second plaintiff described the incident on Friday 3 February as a "commotion" at the business. He observed the defendant "beating his nephew with a stick" as punishment for the removal of materials from the business. The defendant then brought Jermaine inside and started "slapping" him and repeatedly asked him who told him to steal the wires. It was then that Jermaine pointed to the first plaintiff, who emphatically denied that he had any involvement.

18. He also related that the following Monday, the defendant tried to pressure the first plaintiff to sign some papers, which he refused to do. This escalated into name calling and derogatory comments, which "aggravated" all the employees. The defendant then fired the first plaintiff, and then fired him after he made some comments, and said that he would "kill" him (or words to that

effect). As the defendant appeared to be reaching for what he thought was a weapon, the second plaintiff lunged at him, but was restrained by the first plaintiff and others, and the brothers left after this incident.

19. During cross-examination, the second plaintiff admitted that he advanced towards the defendant after being told he was fired. But this was to defend himself as it appeared that the defendant was reaching for his "12-gauge shotgun", which was usually kept under the desk. However, he did not physically assault the defendant, as his brother and others intervened, and the plaintiffs then left the shop.

20. He was also asked about whether he had a business licence for the repair of electrical motors and generators. He admitted that he obtained a business licence in 2014 for that kind of business, but it was a home business operated after work hours to make side money. It was also suggested to him that he abandoned his job and was never fired. He maintained that he was fired.

The Defendant

21. The defendant's witnesses included himself, Jermaine Stubbs (his nephew), Nicholas Frazier (son), Kevin Johnson (nephew) and Stanley Moss, all employees. Their evidence is summarized below.

Ron Frazier

22. In his witness statement, the defendant indicated that on Friday 3 February 2017, after he received the information from Froggie, he returned to his shop and confronted his nephew Jermaine. He said Jermaine admitted to stealing the items and upon hearing this he "*hit my nephew and reprimanded him for stealing from me*". However, he was of the opinion that "*my nephew Jay had only been employed for eight months as an apprentice and he did not have sufficient knowledge to know that the cut copper wire and other items he stole had to be used on an identical engine because the data is specific to each engine*." The items were retrieved from behind the fence and the defendant confronted the staff and asked them if "*anyone knew who stole the items and who Jay was stealing them for*". He stated that the first plaintiff admitted that it was him, and afterwards he released the staff and had a private conversation with the first plaintiff and the defendant's wife (the first plaintiff's sister) in the back, where the first plaintiff once again admitted to the theft and agreed to a deal whereby he would keep his job but forfeit seniority.

23. At the Monday morning staff meeting, however, when he was warning the staff about stealing, the first defendant resiled from his earlier position and denied any role in the stealing, which led to a verbal exchange between them. In the meantime, the second plaintiff was pacing back and forth and walked toward him "in an aggressive manner" and he picked up a "flash light" to defend himself. However, the other employees intervened and "*kept us apart from fighting*". He says that after the incident, he called the police. In his witness statement he stated:

> "25. Sterlyn and Shavado left the shop and never returned. They both abandoned their jobs.
> 26. I never dismissed any of them. They abandoned their post and never returned to the job."

24. In cross-examination, he was challenged on the point that his witness statement and his oral evidence that the brothers abandoned their jobs were inconsistent with the pleadings that the plaintiffs were summarily dismissed for insubordination and theft. He maintained on the witness stand that "*I never fired anyone, they walked off the job*". He admitted that there were 14-16 cameras in total around the facility, including inside the shop which would have captured the activity inside the workshop, but denied that he intentionally excluded the surveillance from inside the workshop. He indicated in re-examination that the defences relating to dismissal for cause were filed by the lawyers. He also denied that he threatened to kill the second defendant or was reaching for a gun during the meeting on 6 February 2017.

Jermaine Stubbs

25. In his witness statement, Jermaine stated that he told the first plaintiff that he needed "*some extra money in addition to his paycheck*" and that he made an arrangement with the brothers that "*if I can get bearings and seals they can deal with it*", which he understood to mean that they would pay him for any items stolen. He said that the first time he did this "Boomer" (apparently the nickname for the second plaintiff) came to the house and paid him for the items. As to the incident in February 2017, he alleged that the first plaintiff asked him to collect some items that were in a "brown bag" by the winding machine and put it in his (the first plaintiff's) car. He admitted to throwing some items over the fence, with the intention of later transferring them to the first plaintiff's car. However, about 15 minutes later, the defendant showed up and told him that someone saw him toss the items over the fence and directed him to retrieve them. He was taken into the shop with the items, where he fingered the first plaintiff as the person who induced him to do it.

26. He was cross-examined about being hit by the defendant, which he admitted occurred, and questioned why that incident was omitted from his witness statement. He indicated that he was embarrassed by it and did not "remember" to include it. He also revealed that the winding machine from which he allegedly collected the brown paper bag with the material was inside the shop, and that there was another set of items outside. It was put to him that this was another inconsistency with his witness statement, as he never mentioned that there were two sets of items. He admitted that this information was also omitted from his witness statement, and that he did not remember to include this.

Nicholas Frazier, Kevin Johnson and Stanley Moss

27. As mentioned, Nicholas Frazier is the son of the defendant, and was employed at the shop since 2015. Kevin Johnson is the defendant's nephew, and he was employed in 2015. Stanley Moss is another employee and was employed in 2012. They all submitted very short witness statements. All three recalled the confrontation on Friday 3 February 2017, when the defendant questioned Jermaine about the items, and their evidence was that the first plaintiff either indicated

that he told Jermaine to take the items or that he took the items himself. However, a resolution of the matter was deferred to Monday morning. They all indicated that during the meeting on Monday, the defendant questioned the first plaintiff about the items stolen. During this meeting, the second plaintiff was pacing back and forth, and there was an exchange between the defendant and him, which led to the second plaintiff advancing towards the defendant. A physical confrontation was averted, however, because the other employees intervened. During this exchange, Johnson said that the defendant reached for something that looked like a "Baygon can".

28. During cross-examination, Frazier admitted that at one point he went to take material to the garbage at the back, but that he never saw the first defendant take any material to the garbage, and neither did he see him deposit anything there in the surveillance video.

29. In cross-examination, Johnson was challenged on the inconsistency in his oral testimony, during which he said that Jermaine moved the material, and his witness statement which indicated that it was the first defendant who admitting to moving the materials. He confirmed that the "Baygon" can which the defendant is said to have reached for to defend himself is near where he kept his weapon. Moss was challenged on the inconsistency between his version of events, which was that Jermaine threw the items over the fence and Johnson's, which was that Sterlyn threw the material over the fence. He answered that the events of that day were "*mixed up*", but he stood by his witness statement.

Video footage

30. The court viewed two video clips taken from the security surveillance footage at the business. The first was of employee movements in an area at the back of the shop along the boundary fence, which adjourns an open area where cars park and which is also used by pedestrians. The video clip, which is just under 30 minutes long (much of it not showing any relevant activity) purports to capture two events of interest: (i) it shows the person identified as the first plaintiff apparently tossing an item near the garbage receptacle or on a pile inside the fence at about 4:28 p.m.; and (ii) it shows the person identified as Jermaine wrapping something in plastic wrap in the same area at about 4:50 p.m., which was tossed over the fence into the vacant area several minutes later. There is no audio and the picture quality is poor.

31. The second video depicts a frame of about 10 minutes of the meeting of 6 February 2017 (9:19 a.m. to 9:29 a.m.). Again, there is no audio track on the recording and no clear sequence of events. It starts with the meeting already in progress. The clip shows the defendant sitting in a chair engaged in a verbal exchange with someone, who is off-camera for much of the clip, and who is identified as the first plaintiff. At about 7 minutes in, it shows the second plaintiff getting into a verbal exchange and advancing toward the defendant who had gotten up from his chair and retrieved an object near the desk. The other employees walk between the men and restrain the second plaintiff. More words are exchanged and the second plaintiff lunged at the defendant, but was restrained by the first defendant and others. Immediately after this, the brothers departed through the office door.

The Law

Summary Dismissal

32. An employer has a right 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."

33. 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."

34. Section 33 then sets out how any "misconduct" is to be proved:

> "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."

35. A dismissal in contravention of any of these provisions renders the dismissal unlawful, and may also constitute wrongful dismissal at common law. 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."

36. In **Jervis et al. v Skinner** [2011] UKPC 2, the Privy Council reiterated that the test at common law for wrongful dismissal was (per Lord Clarke):

> "…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 mast should no longer be required to retain the servant in his employment."

Unfair dismissal

37. The concept of unfair dismissal and the remedies provided are purely statutory rights created by the *EA*. Sections 34 and 35 provide as follows:

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

38. Sections 36 to 40 of the EA set out specific situations that are deemed instances of unfair dismissal including redundancy, 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. The instances in which unfair dismissal may arise are not limited to those in the statute, however, as was recognized 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)."

39. The court in **Omar Ferguson** observed, *inter alia*:

(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.

40. Section 35 of the EA requires the court to determine a claim for unfair dismissal in accordance with the "*substantial merits of the case*". This requires a factual inquiry based on all the circumstances of the case (see **Lloyd McQueen v Airport Authority** [2017/CLE/gen/00123], 22 May 2024; **Cartwright v US Airway** [2016] 1 BHS J. No. 96. In **Cartwright**, Isaacs, JA, stated that the duty of the judge in determining a matter in accordance with the substantial merits of the case, was to "*look at the case in the round, at all the circumstances of the case, and arrive at a decision based on the substantive merits of the case*."

41. The phrase "*in accordance with equity and the substantial merits of the case*" is a protean one, but in essence the employer's actions are assessed for reasonableness. This is borne out by a number of local cases and cases decided under the UK *Employment Rights Act* (which is admittedly different in some material ways from the provisions of the *EA*), but the principles relating to reasonableness and the question of unfair dismissal being determined on the substantive merits of the case are similar.

42. In **Turner (appellant) v. East Midlands Trains Ltd. (respondent) [2013] IRLR 107,** the court indicated that in determining whether an employer has acted as the hypothetical reasonable employer would do, regard must be had to the nature and consequences of the allegations. The court considered that if the impact of a dismissal for misconduct would 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 would harm the reputation of the employee, "*a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation*."

43. 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."

44. 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 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>Discussion</u>

Inconsistency between pleadings and evidence

45. Before I deal with the claims for wrongful/unfair dismissal, there is an anterior issue of some importance that must be examined. As indicated, one of the issues that arose during trial is the inconsistency between the pleaded case and the written and oral evidence relating to the alleged grounds for the termination of the brothers. The pleaded grounds are that the brothers were summarily terminated for cause. However, the evidence in the witness statement filed by the defendant, which he maintained at trial, was that they were not fired but abandoned their employment.

46. In cross-examination by Mr. Williams, Mr. Frazier was taken to his defence and asked the following:

> "Q: [*Reading para. 4 of Defence*] The Plaintiff was summarily dismissed for committing an act of gross insubordination, namely stealing from the Defendant's business. Are you still maintaining that you never fired Sterlyn Smith?
>
> A: I never fired him.
>
> Q: So, this defence is not your defence? This is an incorrect statement. Is this defence an incorrect statement at paragraph 4?

> A: Yes sir."

47. In written closing submissions, counsel for the defendant put the matter into stark focus with the following submission:

> "6. [H]aving regard to the material facts in the cases at bar, and the inferences that could be logically drawn from those facts, in our submission, we say that the real issue for determination in this dispute is whether the Plaintiffs were wrongly and/or unfairly dismissed as alleged by them or at all, or whether they abandoned their jobs and did not return as alleged by the Defendant.
> […]
>
> 21. The Defendant's primary position which has not been controverted by cross-examination is that the Plaintiffs abandoned their post and never returned to the job…. We therefore reiterate that on the evidence before the Court, the Plaintiffs were not wrongly and/or unfairly dismissed by the Defendant, notwithstanding that their respective conduct toward the Defendant warranted summary dismissal."

The role of pleadings

48. The centrality of pleadings to the determination of a legal dispute hardly needs any explication. In **Loveridge v. Healey [**2004] EWCA Civ 173, Lord Phillips MR adverted to the much quoted observation by Lord Woolf MR in **McPhilemy v Times Newspapers** [1993] 3 All ER 775, that:

> "Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties."

Lord Phillips continued as follows:

> "It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, is it in the interest of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

49. In my judgment, having regard to the pleadings, the totality of the evidence and arguments presented, the defendant is to be held to the defence asserted in his pleadings. Abandonment of employment was never pleaded, and neither did the defendant apply for leave to amend at any of the case management hearings or during the course of the trial. The witness statement of the defendant filed 22 November 2021 averred that the plaintiffs "abandoned" their jobs, which was

clearly inconsistent with the Defence filed 17 April 2019, but no attempt was made to amend. The positive defence was always that the plaintiffs were summarily terminated for cause. The bulk of the defendant's evidence was also directed at establishing that the items were stolen and that the meeting of 6 February 2017 terminated with the attempted assault on the defendant by the second plaintiff.

50. I therefore find it perplexing that the defendant treated with the case for summary dismissal as if it were a hypothetical, when in fact it was the defendant's pleaded case. For example, it was argued in written submissions that plaintiffs were *not* dismissed "*notwithstanding that their conduct …warranted summary dismissal*". It was further contended that the plaintiffs' conduct made them eligible for summary dismissal under various subparagraphs of s. 32, such as (a), (c), (d) and (i), when in fact they had been dismissed for gross insubordination (32(d)). The plaintiffs were entitled to rely on the pleaded defence for the purpose of putting their case.

Abandonment of job

51. The defendant referred to a number of authorities to shore up its case for abandonment, in particular **London Transport Executive v Clarke** [1981] ICR 355 (at pg. 368) where Lord Clarke said:

> "If a worker walks out of his job and does not thereafter claim to be entitled to resume work, then he repudiates his contract and the employer accepts that repudiation by taking no action to affirm the contract. No question of unfair dismissal can arise unless the worker claims he was constructively dismissed."

52. The defendant further submits that the plaintiffs abandoned their job after "*an unfortunate turn of events which occurred at the staff meeting on Monday 8th (sic) February 2017*". However, when the question was put to the second defendant in cross-examination as to whether he abandoned his job he retorted "*…18 years of work at $750 weekly, why would I do such a thing*?" The defendant also argues in support of the said abandonment that the plaintiffs did not make any "*overt conciliatory moves…to protect their many years of service and other benefits*." This is not strictly correct, since in an affidavit put before the Court the defendant relates that the plaintiffs did take the matter before the Industrial Tribunal, which he says was unsuccessful on their part, although no evidence of the proceedings nor the outcome were ever put before the court.

53. I therefore consider that the issue of abandonment was never properly raised as a defence and that the plaintiffs therefore did not have a chance to properly address it. However, for completeness, in my judgment it was not made out in any event. This was not a case of employees voluntarily leaving to take up alternative employment, or absconding, or going off indefinitely without anything being said to their employer. Their departure was clearly linked to specific events, which they said ended in their termination. The defendant suggested that the plaintiffs left to get started in a rival business, since Plaintiff No. 2 "*shortly thereafter admitted to getting his own business licence to practice*". But this is not correct, as the affidavit of the defendant reveals that the Business Licence in this regard existed since 2014.

Constructive Dismissal

54. The next issue that arises for consideration is whether or not the plaintiffs have set up an alternative claim for constructive dismissal. The defendant argues that the plaintiffs did not make any direct mention of being constructively dismissed in their pleadings, although the point was taken in their submissions. However, the statement of claim asserts that the defendant breached the contract of employment by engaging in "…*abusive language during the course of the contract of employment and at the time of termination which no reasonable person could bear*". Further, the reply contained similar allegations that in the meeting the defendant "…*in his normal mode of operating, used verbal, abusive and obscene language which no reasonable person could bear*…". Both plaintiffs in their witness statements also alleged that the defendant was verbally abusive during their employment.

55. Counsel for the plaintiffs relied on the leading case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, where Lord Denning set out the law regarding constructive dismissal as follows:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all and alternatively he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be significantly serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

56. As I perceived the argument, it appears that the plaintiffs are implicitly seeking to rely on what is called the "last straw" situation in constructive dismissal, where a series of events or behavior are said to have breached the implied obligation of trust and confidence between employer with the last action of the employer leading to the plaintiff's leaving (see **Lewis v. Motorworld Garages Ltd.** [1985] ICR 157).

57. Counsel for the defendant directed a significant portion of her closing arguments towards "debunking" the constructive dismissal argument, and made four principal points in that regard: (i) that the plaintiffs' constructive dismissal argument contradicts their "*unequivocal allegations that they were both directly terminated by the Defendants*"; (ii) that there are no particulars of any incidents or specific occasions of abusive language to assist the court in determining whether the defendant's conduct as a whole constituted a significant breach going to the root of the contract; (iii) that there is an inference that the plaintiffs had an alternative motive for their departure; and

(iv) that there was no evidence that the defendant was made aware of his objectionable conduct and afforded an opportunity to correct it.

58. I do not think there is any merit in the first point, as there is no inconsistency between pleading summary dismissal and pleading constructive dismissal in the alternative. Further, this is an improbable argument for the defendant to make, since it is the defendant who asserted that the plaintiffs abandoned their jobs. It is trite that one of the defences to a claim of job abandonment is constructive dismissal. I also do not think there is any evidential basis for the inference that the plaintiffs left to pursue their own business. As indicated, the defendant's own evidence was that the second plaintiff held a licence for a similar business from 2014, and if that were the motivation for leaving, surely they could have left sooner.

59. I accept, however, that there is merit in the other points. A pleading of constructive dismissal should set out chronologically the details of the facts relied on and how they come together to establish the legal case for constructive dismissal. That was not done, and there were only generic references to the use of abusive language. Furthermore, the second plaintiff in his witness statement admitted that he also used profanities directed against the defendant. Indeed, in the environment of a workshop such as this it would be unsurprising if the language was not always genteel. I also accept that there is no evidence that the plaintiffs at any point objected to the defendant's conduct, and provided an opportunity for this to be rectified. I therefore do not find that constructive dismissal has been properly pleaded or established.

Claims for wrongful/unfair dismissal

60. I deal first with the claim for wrongful dismissal. Although, the plaintiffs stated in their claims that the defendant breached their contract of employment, it seems clear that the claim is really for wrongful dismissal under the *EA*. The defendant admitted that both plaintiffs were employed under contracts of employment in his defence, but the terms of the contracts were not pleaded and the plaintiffs did not rely on the breach of any particular term. What they did claim was failure of the defendant to pay statutory notice pay and payment in lieu of notice ("PILON").

61. As mentioned, wrongful dismissal may occur when there is a purported summary dismissal for cause where none has been established. The plaintiffs allege, *inter alia*, that the defendant failed to provide "*evidence of wrong doing*" and failed to give any "*reasonable reason for the wrongful/unfair dismissal at any time*." In other words, they claim that the alleged causes for which they were dismissed were not established.

62. Pursuant to the test set out at 31 and 33, an employer who seeks to establish that an employee has been lawfully dismissed must establish 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*" (see, also, **Simmonds v Johnson**).

63. In **Island Hotel Company Ltd. v Shakera Isaacs-Sawyer** (IndTrbApp No. 88 of 2018, unrept.), Longley J. stated that for an investigation to be considered reasonable, it:

> "…must enable the employer to ascertain the true facts on which he can make an informed decision to support a honest belief on reasonable grounds that the employee committed the act of misconduct; it must be within reason, full and fair; that would normally involve where it is necessary an account of the incident from as many eye witnesses or persons in the know as possible yet at the same time giving the employee an opportunity to be heard and to respond to the gathered information and complaint."

First Plaintiff: allegations of theft

64. The defendant submitted that the evidence showed that [para. 12] "*…the Defendant formed an honest and reasonable belief on a balance of probability that Plaintiff No. 1…had committed an act of misconduct, namely stealing from him, an act which according to s. 32(a), (c), and (i) of the Employment Act would justify summary dismissal."*

65. I am not of the view that the totality of the evidence supports the defendant's belief. Firstly, as mentioned, the video of the alleged event is grainy and without sound, and is not conclusive of anything. At best, it shows the person identified as the first defendant depositing something near the fence (he says it was a can), and the person identified as Jermaine later wrapping something and tossing it over the fence. It is impossible to tell what was deposited and whether what was wrapped up by Jermaine was the same item deposited by Sterlyn. Further, at various points, the video shows several of the workers congregating outside in the area where the material was thrown over the fence, which means that persons other than the first plaintiff and Jermaine had access to that area.

66. Secondly, the direct evidence said to support this belief is not altogether consistent and its reliability may be questioned. The first plaintiff denied that he stole anything or that he admitted to doing so in front of the staff or at all. Of the other witnesses who said they heard the first plaintiff confess to having stolen the items or having procured the stealing of them, the accounts are disparate and there are some obvious discrepancies. Nicholas Frazier said that "*Sterlyn said it was his stuff wrapped up*"; Kevin Johnson said "*I heard when Sterlyn said that he took the materials*"; and Stanley Moss said he heard Sterlyn say "*he let 'Jay'…put them over the fence for him*". Later, under cross-examination, Moss said that it was getting late and the day was "mixed up". Further, Jermaine Stubbs corrected his witness statement to reflect that it was the second plaintiff and not the first plaintiff who collected items from him during the earlier incident when items were allegedly removed.

67. Thirdly, Jermaine Stubbs admitted to stealing the items, although he later implicated the first plaintiff. But this was after the defendant "beat" him with a stick and later slapped him. Further, Nicholas is the defendant's son and Jermaine and Kevin are his nephews. In my view, the court is entitled to bear in mind when considering the evidence of family members, friends or

even employees of a party, that unconscious bias may creep in because of personal allegiance or interests. In such circumstances, the court has to carefully evaluate what weight is to be given to such evidence. I do not think any of the witnesses were intentionally trying to mislead the court, but it cannot be said that the defendant's witnesses were completely disinterested in the outcome of the matter.

68. Apart from this, and as had been discussed, the defendant's primary case at trial was that he did not fire the plaintiffs and that they had abandoned their jobs. This directly undermines the claim that he could have held a reasonable belief that the first plaintiff was guilty of the conduct that underpinned his summary dismissal.

69. It is clear, also, that no reasonable investigation was conducted. Apart from the brief confrontation and questioning on the evening of Friday 3 February 2017, there was no further investigation, and the meeting of Monday could not be described as part of any reasonable investigation. Notably, in an affidavit filed with the Court, the defendant indicated, for example, that he did a search of the Business Licence section *after* the action was filed against him and discovered that the second plaintiff had a business licence, namely Smith's Electrical Motors and Generator, which was apparently opened from 2014. It will be recalled that the operation of a rival business was relied on as part of the reason for the suspicion for the theft. But this was only being checked several years after the dismissal/departure of the plaintiffs, and then for the purposes of litigation.

70. It has to be remembered also that, at the time of the dismissal of the plaintiffs, the defendant's impressions were constituted by the events of the afternoon of the 3 February and the surveillance tape, and the contemporaneous events of the Monday meeting. These issues were not yet elucidated by any evidence or accounts from the other employees. However, even if the defendant reasonably believed on a balance of probabilities that the first plaintiff committed the misconduct in question at the time he was dismissed (and for reasons already given this is not plausible), the defendant clearly did not conduct any reasonable investigation to ascertain whether his beliefs were justified.

71. For all of these reasons, I therefore find that the first plaintiff was summarily and wrongfully dismissed.

Second Plaintiff: allegations of assault

73. In the case of the second plaintiff, the defendant asserted that [14] "…*the Defendant had a rational basis to form an honest and reasonable belief on a balance of probability that Plaintiff No. 2 has committed an act of misconduct which constituted a fundamental breach of contract of employment, or which was repugnant to the fundamental interest of himself, as the employer. [This]…constituted misconduct and amounted to gross insubordination or insolence; or gross misconduct contrary to s. 32(d) and (i) of the Employment Act."*

74. The short clip of the video of the meeting of 8 February 2017 did not do very much to support the case of the defendant. It was, in fact, generally consistent with the accounts of the plaintiffs. As mentioned, the second plaintiff admitted in his witness statement and during cross-examination that he lunged towards the defendant after being fired, but he maintained that this was a defensive measure.

75. In written submissions, Ms. Taylor, drawing an analogy with the concept of assault in the law of torts, contended that the plaintiff's lunging towards the defendant "*in an aggressive manner…put him in fear of an imminent battery*". It was said that this constituted an "*egregious assault on the Defendant…in the presence of staff…and constituted misconduct and amounted to gross insubordination or insolence; or gross misconduct*" contrary to section 32 of the EA.

76. In my view, it is not necessary to delve into a discussion of whether anything less than physical violence might be classified as "assault" for the purpose of coming within any of the classes of conduct set out at s. 32. I am certainly of the view that aggressive and intimidating behavior stopping short of physical contact may fairly come within one or more of those classes, and may constitute "gross insubordination" (see, for example, **Debbie Isaacs v Steiner SPA Resorts** [2002] BHS J. No. 127, where the Industrial Tribunal found that the applicant's action of pointing her finger, while telling her employer to get a life was conduct that was sufficiently serious to justify summary dismissal).

77. However, I have serious doubts that the defendant could, on a balance of probability, have reasonably believed that the first plaintiff was being dismissed for the conduct attributed in the pleadings at the time of his dismissal or departure. Firstly, this belief is subject to the same impediment mentioned in the case of the first plaintiff, which was that the defendant staunchly denies firing any of the plaintiffs. Secondly, even on the defendant's own evidence, the brothers exited the shop after the second defendant lunged at him but was restrained, and nothing else happened. The plaintiffs' evidence is that the defendant had already told them that they had been "fired", and if the second plaintiff's actions occurred after that, it plainly could not have been the reason for his dismissal.

78. Even if reliance is being placed on this event, it is again clear that there was no investigation done to determine the first plaintiff's intent, i.e., whether he acted in self-defence to avert any threat to himself as he maintained or otherwise. In this regard, there was evidence from the defendant's witnesses that the defendant was reaching for an object (described by one witness as a Baygon can, and by the defendant as a search light) in the area where he was known to keep a weapon. The second plaintiff's evidence was that the defendant had said "*Shut up before I kill you in here*", after he admittedly cursed at him, although the defendant denied saying this.

79. In the circumstances, the defendant's assertion that he reasonably believed on a balance of probabilities that he was terminating the second plaintiff for assault is not plausible having regard to the sequence of events. I am therefore of the view that the second defendant was also wrongfully dismissed.

Unfair Dismissal

80. As discussed, 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*" (see **Omar Archer**). This is to be determined by reference to the circumstances known to the employer at the time and having regard to the "*substantial merits*" of the case, which includes elements of natural justice. This imports the test of an objective assessment by the tribunal/court based on all the facts of the case. There is, however, an onus on the employer to satisfy the tribunal/court that it acted reasonably in dismissing the plaintiff when the dismissal is based on alleged misconduct.

81. For reasons given in the discussion relating to wrongful dismissal, I am not of the view that the defendant's decision to dismiss the plaintiffs was reasonable at the time when the dismissal took place. The dismissals were rash and impromptu, made during a contentious and confrontational meeting with staff. No proper investigation was conducted into the allegations of stealing in respect of the first plaintiff, nor was he given an opportunity to respond to the allegations, based on all the material that was known to the employer. The allegations constituted a potential criminal complaint, and therefore necessitated a level of care in the investigation of that complaint.

82. As to the allegations of assault, it is not disputed that such behavior might constitute reasonable grounds for summary dismissal. On the evidence led, however, the second plaintiff was fired before the conduct took place, therefore it could not have been the reason for his dismissal.

Damages

83. The measure of damages for wrongful dismissal 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 or payment in lieu of such notice ("PILON"), and the actual time of termination. To this must be added 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; **Dean v. Bahamas Power & Light** [2024] UKPC 20.

84. 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 more favourable contractual rights (**Dean v. Bahamas Power & Light).** However, there is nothing on the facts of this case to take it outside the s. 29 assessment, as the claim is based on the EA.

85. According to the evidence, which was not challenged, the first plaintiff held a supervisory position, which means he would come within section 29(1)(c). The effect of that section is that he would be entitled to 52 weeks' notice pay in total ($46,800.00), plus claimed vacation pay of $3,900.00. This totals $50,700.00.

86. The second plaintiff would fall within section 29(1)(b) and would be entitled to 26 weeks' notice pay ($19,500.00), plus claimed vacation of $3,200.00. This totals $22,700.00.

Unfair dismissal

87. Damages for unfair dismissal provide for a basic award of up to 18 months' pay for an ordinary worker and up to 24 months' pay for a person holding a supervisory position, plus a compensatory award considered "*just and equitable*" in the circumstances, assessed with regard to the losses sustained by the employee caused by his dismissal. However, from these amounts must be deducted any payments made by the employer in relation to dismissal (e.g., PILON).

88. In the case of the first plaintiff, 24 months' pay would amount to $86,000.00, from which must be deducted $46,800.00 ($39,600.00). In the case of the second plaintiff, 18 months' pay would be equal to $54,000.00, from which must be deducted $19,500.00 ($34,500.00). There are no consequential losses claimed by the plaintiffs, and therefore the court does not consider that a compensatory award is required.

CONCLUSION AND DISPOSITION

89. In conclusion, and for the reasons given above, I find that the plaintiffs have been unfairly and wrongfully dismissed, and would award damages as follows: (i) in the case of the first plaintiff, $46,800.00 for wrongful dismissal, $39,600.00 for unfair dismissal, and $3,900.00 in accrued vacation entitlement (total **$90,300.00**); and (ii) the second plaintiff, $19,500.00 for wrongful dismissal, $34,500.00 for unfair dismissal and accrued vacation entitlement of $3,200.00 (total **$57,200.00**). The applicable statutory interest rate under the Civil Procedure (Rate of Interest) Rules 2008 will apply to the award from the date of judgment until payment.

90. I also order costs to be paid to the plaintiffs by the defendant, to be taxed if not agreed.

Klein J,

2 May 2025