

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Division
Claim No. COM/lab/00048 of 2016

BETWEEN:

BERNARD COOPER

PLAINTIFF

AND

THE ISLAND HOTEL LIMITED

DEFENDANT

Before: The Hon. Mr. Justice Loren Klein
Appearances: Mr. Obie Ferguson for the Plaintiff
Mrs. Viola Major for the Defendant
Hearing dates: 15, 16 October 2020 (Submissions September 2021)

RULING

Writ of Summons—Claim for Unfair/Wrongful Dismissal—Plaintiff terminated as beverage cashier manager without notice or payment in lieu of notice (“PILON”)—Alleged grounds of gross misconduct and dishonesty—Plaintiff allegedly authorizing bartender with missing float that he could repay missing funds contrary to Hotel policy, and placing blame on other managers—Sections 36-40 of Employment Act—Whether dismissal unfair—Breach of Natural Justice—Reasonable Investigation—Pleadings—Allegation of facts constituting unfair dismissal pleaded in Reply—Whether sufficient pleading—Summary Dismissal—Gross misconduct and dishonesty—Whether conduct amount to gross misconduct such as justify summary dismissal—Whether fundamental breach of contract or repugnant to fundamental interests of employer—Evidence—Inconsistencies—Passage of time—Remedies—Compensatory Damages—Permissible heads of loss

INTRODUCTION AND BACKGROUND

1. This is a claim for unfair and/or wrongful dismissal arising out of the Plaintiff’s summary dismissal from his employment as a food and beverage cashier manager at the Atlantis Resort on Paradise Island (“Atlantis”). The named defendant is The Island Hotel Company Ltd., the entity that operates the Atlantis Resort, but the defendant will be referred to as “Atlantis” or “the Hotel”.
2. What is unusual about this case is that the Plaintiff’s dismissal for “*gross misconduct and dishonesty*” was not rooted in any direct breach or dereliction of duty by him. It was for allegedly advising a bartender who failed to deposit the earnings from one of his shifts that he could simply “drop” the missing deposit in the cashier’s box to make good the deficit. This was said to be contrary to company policy and procedure (the said misconduct) and further that he was dishonest by blaming other managers for advising the bartender (the dishonesty). Strikingly, no disciplinary proceedings were taken against the errant bartender at the time the Plaintiff was dismissed.

Factual and procedural background

3. The Plaintiff was employed by the Hotel as a Food and Beverage Cashier Manager in the Finance Department for approximately two years at the time of the incident. His role included supervising, managing and auditing cashier and bartenders including overseeing float counts and ensuring compliance with company policy in this regard.

3. The events out of which this claim arises go back quite a number of years. On 22 March 2014, the Plaintiff and Ms. Mizpah Rolle (“MR”), a senior human resources manager, were tasked with counting the float of Robert Cartwright (“RC”), a bartender/cashier at the Bimini Road Restaurant (“Bimini Road”). The request arose after a cashier from the general cashier department circulated an email on 21 March 2014 to several managers indicating that RC had missed his deposit for 15 March 2014.

4. When the Plaintiff and MR attended to conduct the audit during the late afternoon, RC did not have his float box key with him, and was allowed to leave to retrieve it. The count took place after his return later that evening in the general cashier’s department. His float box was found to contain \$1.00 and some change over the float amount (which was apparently \$500.00). However, the missing deposit, which was \$462.00, was not accounted for. After the count, RC and the Plaintiff walked back to Bimini Road together.

5. It appears that on 23 March 2014, RC had the missing deposit “dropped” in the cashiers’ box in a sealed envelope labelled with his name and the date of the shift to which it related. The core allegation against the Plaintiff is that during the walk back to the Bimini Road following the audit, he advised RC that it was permissible to return the missing deposit to the general cashier department, which was contrary to the Hotel’s policy, and that he subsequently lied about that and attributed blame to other managers. The Plaintiff denied both allegations in a series of meetings to discuss the issue, but he was suspended on 26 March 2014 while management purportedly carried out an investigation. He was summarily dismissed on 28 March 2014 when he returned to work.

6. The Plaintiff commenced this action by specially indorsed Writ of Summons filed 18 July 2016 claiming “unfair and/or wrongful” dismissal. The operative paragraph of the SOC pleaded that the Plaintiff was unfairly and/or wrongfully terminated “*without notice or payment in lieu of such notice*”. As a result, the Plaintiff claimed statutory damages for unfair dismissal in the amount of \$58,772.08 (composed of a basic award of \$3,217.62 and a compensatory award of \$55,772.08), as well as general damages and other relief for wrongful dismissal.

7. It appears that the Plaintiff entered judgment in default of Defence on 8 September 2016, and a notice of appointment of assessment of damages was filed 18 October 2016. However, the Plaintiff later consented to the filing of a defence by the Defendant and for the matter to proceed to trial.

8. The material part of the Defendant’s Defence stated:

“[T]he Plaintiff’s employment was terminated on the grounds of gross misconduct and gross dishonesty in regards to his role in a missing deposit. The plaintiff failed to take responsibility for his role in the missing deposit and instead placed blame on various managers.

[T]he plaintiff continued to place blame on other managers until confronted with all of the parties concerned. As result it was discovered that the plaintiff had falsely placed the blamed for the missing deposit on the various managers. Accordingly, the Defendant terminated the plaintiff’s employment as it could no longer repose any trust and confidence in him.”

9. The hearing took place by Zoom, and the Court was assisted by the following documents: (i) a bundle of witness statements containing five statements (described below); (ii) an agreed bundle of evidential documents; (iii) a bundle of pleadings; (iv) written opening submissions and authorities from both sides; and (v) a loose bundle of supplemental documents from the Plaintiff. The Court was later provided with closing submissions and authorities from the parties and the transcripts and Zoom recordings of the hearings. All of the material has been reviewed, although it has not been necessary to refer to all of it in the Ruling.

The Evidence

10. On behalf of the Plaintiff, the court received two witness statements from the Plaintiff himself, a main statement on 17 July 2020 and a supplemental witness statement on 7 August 2020, and a witness statement from RC filed 2 October 2018. They both gave live evidence and were cross-examined.

Bernard Cooper

11. The Plaintiff’s evidence in summary, as contained in his witness statement, was as follows. On Saturday, 22 March 2014, he read an email (copied to all the relevant managers but sent out on 21 March) that there was a shortage of funds from a missing deposit from RC, a bartender at Bimini Road. Later that afternoon, at some point after 6:00 p.m., he and MR were directed by the Director of Restaurants, Monique Wszolek (“MW”) to conduct an audit of RC’s float box. They met Clifton Martin (“CM”), the manager of Bimini Road, at the restaurant when they attended to conduct the audit. RC did not have the keys to his float (which he was advised was a breach of the Hotel’s policy) but he was allowed by CM to return home to retrieve the key. The audit was conducted at some point after 8:30 p.m. by MR in the General Cashier’s Office and witnessed by the Plaintiff. The float box had \$1 and some change over the float amount.

12. The Plaintiff related that while walking back to Bimini Road, RC mentioned that he was advised to pay back the missing deposit, which he had discussed with CM. The Plaintiff told him it “*was not a common practice and an investigation is required when funds are unaccounted for*”, but said that if his manager had given authorization for it, then it was okay. When they returned to the restaurant, he met MW there, who informed him that she had sent an email to Olivia Mortimer (“OM”), the Senior Director of Labour Relations for Food & Beverage, to get her instructions on

how to proceed. He said he recommended that RC would have to be suspended pending an investigation, but this was not done. Later that evening (about 9:50 p.m.), the Plaintiff sent an email to the managers concerned advising them that the audit had been conducted and of the result.

13. The following morning (23 March 2014), which was a Sunday, he met MR at the General Cashiering Department and they ran into Mrs. Natassia Cartwright (the wife of RC, who was also a Food and Beverage cashier at the Hotel). She informed them that she had made the deposit in the “drop box” for RC. Later that morning, the Plaintiff received an email (addressed to him and three other managers and copied to two assistant managers) in respect of RC stating: “*Please suspend for theft...*”. He replied to this email indicating that a deposit had been made to satisfy the shortage and was placed in a marked envelope that was “*dropped as of March 15th, 2014*”.

14. There were some back-and-forth emails between the Plaintiff and OM, copied to the other managers, concerning the issue. OM questioned how the matter could be settled as “they” (presumably herself and other managers) only became aware of the missing deposit on 22 March. The Plaintiff “*tried to explain the matter*” in his reply and advised that CM had discovered the discrepancy and discussed it with RC, who had taken responsibility for the missing funds and indicated that he would pay it back in full.

15. The email from the Plaintiff was sent to OM, MW, MR (and two other managers, who are not significant for these proceedings) and copied to CM and Estella Walkes (“EW”), the Plaintiff’s direct supervisor. It read as follows:

“After Mr. Clifton Martin had discovered the discrepancy with the deposit, he noted that he spoke with the employee who stated that he will take responsibility for the deposit and have the cash paid in full. He went on to say that today is his flex day, however, he will allow his wife who is also a F&B Cashier to come into the department and make the deposit. He was further advised that when the envelope is dropped, it has to be label [*sic*] correctly i.e. department name, his name and as of March 15-2014 which is the date in question. To this end, his wife came into the department and made the full deposit to satisfied [*sic*] the shortage.”

16. The following day (24 March) he was summoned to OM’s office and in the presence of CW and MR, OM stated that the Plaintiff “*would get in trouble*” because he knew better. He said he explained that as far as he was aware, RC had discussed the matter with his manager, CM, and that they had come to an understanding to pay the money back. So if any manager was at fault, it was CM. He was told by OM that she had hired CM for his “swag and finesse” and that she had heard that the Plaintiff was a “smart ass”. He also stated that OM said words to the effect that “*all managers involved were to be suspended*” if she could not get to the bottom of who gave RC permission to return the funds. OM instructed the managers to report to the Investigations Department to give statements about the matter, which they did.

17. Later that day, they were summoned back into the Office of OM for a meeting, during which she telephoned Bimini Road and had the manager put RC on the phone, listening in by speaker phone. She told RC that “*he was in the clear now but you and I will have a conversation*

later” but asked him “*Who told you to pay the money back?*” According to the Plaintiff’s account, the reply to her question and subsequent exchange was as follows:

“Mr. Cartwright replied ‘what is the guy name again from the General Cashier Department’? Mrs. Mortimer asked, ‘who you mean Bernard?’ Mr. Cartwright said ‘is that his name? Bernard? When I heard my name I said ‘me’? Mr. Cartwright replied ‘no not you’. At this time, Mrs. Mortimer ended the call.”

18. The following day he reported for work and spoke with EW, who had just returned from vacation and apprised her of the situation. During that meeting, EW received a call from OM, who apparently told EW that the Plaintiff needed to “*take full responsibility for the incident*”. After the call, he was summoned into the Office of OM, along with EM, who was instructed by OM to sign a “suspension form” in relation to him. He was then told to go see the Vice-President of Finance, Douglas Jensen (“DJ”), who signed the form and requested him to counter sign.

19. He said he had another meeting the following day (although this appears to have taken place two days later on the 28 March 2014) with DJ, OM, and EW, during which OM formally read the terms of his suspension and asked if he had anything to say. He remonstrated that he alone was being disciplined, and it was unfair as the other managers were not even being questioned. Further, even the employee who was actually suspected of theft was not being questioned or disciplined. At this point, OM said to him that he was called into the meeting to take full responsibility for the incident, for which he would have been “*pardoned*”. However, when he replied that he had “*no intention of accepting fault because I did nothing wrong*” she became upset. He was then asked to sit outside the Office for a few minutes while the group deliberated, and a few minutes later they informed him that a decision was taken to terminate his employment. He was escorted to retrieve his belongings and then left the property.

The supplemental witness statement

20. The Plaintiff filed a supplemental witness statement, apparently to fill in some additional details of what happened on 22 March while they waited for RC to return from home with his keys to the float box. He indicated that when RC left to retrieve his keys, there was a discussion between CM, MR and himself about the incident. During this discussion, MR told “*him*” (in live evidence this was clarified as a reference to CM) that the funds would have to be replaced and the envelope labelled with RC’s name, the date in question and the name of the restaurant. CM said he was not sure of the policy or procedure as it related to matters involving allegations of theft. During that meeting, CM called MW, who said that once the float was counted she would give directions on how to proceed in the matter.

21. He also said that CM indicated that RC had approached him about 5 p.m. on the 22 March 2014 and related that he had been informed by the Food and Beverage Cashier Manager that the deposit was missing, and that he could be in trouble if it could not be explained. He related that CM asked RC what would normally be done in such situations, and RC indicated that he could

just replace the funds. Based on this assurance that this could be done, CM is said to have given RC instructions to go ahead and pay the money back.

22. Two weeks after the Plaintiff's termination, and after he had not heard anything from the Hotel, he contacted them and was informed that a "severance package" was ready. When he arrived to pick it up, he received a cheque for \$326.00 and was told that there was another cheque to follow, but that he should "*get this one out of the way first and we will deal with the next cheque.*" The second cheque never materialized, however, and he then realized he had been duped.

Robert Cartwright

23. In his witness statement, RC indicated that the incident with the float occurred when he worked the 4:30 p.m. to 12:30 a.m. shift on 15 March 2014 at Bimini Road. He said that at the end of his shift he counted the take, which was \$462.20. This was placed in an envelope and then he counted his float, which rounded off to just over \$500.00. He dropped his float in the safety box but left the money in the envelope on the counter when he went to make a telephone call and then simply forgot about it. He was off for a few days following that incident and could not recall whether he had deposited the funds. When he returned to work, he checked with the cashier's officer to confirm the position and was told he had not made the deposit, and that he needed to talk to his manager CM about it. He said he spoke to CM on 22 March 2014 before his shift, who told him that "*he was new to the system and didn't know how to deal with the situation.*" He said he indicated to CM that he was just going to pay back the funds.

24. RC confirmed the float count process and said that after the incident he walked back to the restaurant with the Plaintiff and told him he was going to pay the money back, and that he had discussed the matter with CM. He also confirmed that his wife delivered the money to the cashier's office on 23 March 2014, because Sunday was his fixed day off and he would be off premises. He confirmed in his witness statement that the Plaintiff never told him to make the payment. As put in his witness statement at para. 8:

"After making the payment, I thought that everything would be cleared up. At no point did I tell anyone that Bernard Cooper advised me to make the payment. He never told me anything. I had asked Mr. Martin and Mr. Antoine Higgs for advice on the matter. Mr. Martin said he was new and couldn't really say anything about procedure. After I told Mr. Higgs, he said 'I guess you can do that and see what happens from there'. I only mentioned to Bernard what I had already planned to do. He never told me to do it; in fact he gave me a lecture on Company Policy."

25. He also recalled the phone call incident on 24 March 2014 when he was put on speaker phone, but he said he never gave OM a name or implicated anyone. He said that OM mentioned Bernard's name, but he could not recall the conversation further because the phone hung up abruptly.

26. RC's witness statement ended with the following statement:

“When I was told Bernard was fired I was shocked, I really couldn’t believe it because he really did nothing wrong. I took full responsibility for not making the drop when it should have been made and I paid it back because I wanted to make things right.”

27. The Defendant called three witnesses in support of its case: Mizpah Rolle, Clifton Martin and Carlton Russell. I should indicate for completeness, considering the many references to OM and the pivotal role she played in the process, that the Defendant also filed a witness statement from OM. However, it appears she was no longer employed by the Defendant at the time of the trial and was not called as a witness, so her evidence had to be disregarded.

Mizpah Rolle

28. MR began her written evidence by summarizing the process followed by bartenders/cashiers at Atlantis. She indicated that:

“3. When a bartender/cashier reports to work, they come to the Food & Beverage Cashier’s Office located in Royal Atlantis. They collect their float which is located in a safety deposit box, and get change if needed. They then go to their post to conduct their duties. At the end of each shift, they return the float to the safety deposit box and use a deposit envelope to deposit any funds collected during their shift. If they have not collected any funds, the deposit envelope is still submitted, but the “due back” section of the envelope is filled out.”

29. She confirmed the events surrounding the audit. She indicated that she notified CM that RC did not have his key for the float, and that CM allowed RC to go home to get his key. She performed the float count and sealed the box. She did not work on Sunday, 23 March 2014, but when she returned on Monday, 24 March 2014, she saw the emails. This was said to be the first time she became aware of the missing deposit and the apparent understanding that RC would return the funds. She denied that she suggested to RC that he or his wife could return the funds in a sealed envelope, because as far as she was aware “...*the decision to allow an employee to return missing funds would have to come from a senior level. A decision of that nature must also come through human resources.*”

30. She also recalled the meeting held in the Office of OM a few days later, at which everyone was allowed to give their account of what happened. She indicated that at the end of that meeting, OM called the Restaurant and asked RC (when he was put on the phone) who gave him permission to return the missing funds, and “*Robert stated that Bernard gave him permission to do.*”

Clifton Martin

31. CM was an Assistant Restaurant Manager at Bimini Road when the incident occurred. He testified that he was initially informed about the discrepancy with the deposit by email sent 21 March 2014 from Demiko Sands, a Restaurant Manager, although he did not receive the email until Saturday, 22 March. He spoke to his Director, MW, about the matter, who indicated that managers would be deployed to do an audit at the restaurant (BC and MR). He confirmed that he

was present at the audit and gave RC permission to leave work to retrieve his key. He indicated that RC did state that he would pay back the money. But he denied telling RC it was okay to do so, and neither did he give advice to RC on the matter because *“I did not know the policy and procedure relating to writing up deposit envelopes, nor did I know the policy and procedure relating to missing deposits and paying back shortages.”*

32. In his live evidence, CM recalled the meeting in OM’s office attended by himself, the Plaintiff, MR and DW. The central issue discussed was who authorized the re-payment of the missing deposit. CM denied he told RC to pay the deposit back. He also disputed the allegation in the email from the Plaintiff stating that he (CM) had advised RC to pay back the money. He described the process leading up to telephone call to RC at Bimini Road as follows:

- A: Yes, the question was who gave authorization to pay the deposit at that time. And each manager was given an opportunity to state what would have occurred in relation to the incident. I denied telling Robert that he can pay the deposit back. [...] And he [BC] gave his version, and Mizpah gave her version of the incident. After each one of us gave a statement on what occurred, and not being able to admit to telling Robert to pay the deposit back, Ms. Mortimer at the time indicated that she was willing to suspend all managers present or involved in this incident.”
- Q: So the threat ...she levied applied to Robert as well as to you and every other person in the room?
- A: She referred to the managers. She said “managers”. That would be myself, Bernard and Mizpah. Because she said ‘I need the truth. It seems like no one is telling the truth. And not to tell the truth is a breach of company policy’.”

33. It was against this backdrop that the phone call was made, and CM stated that Antoineez Higgs, the manager at Bimini Road, was asked to put RC on the phone, which was on speaker. It was then that RC admitted, in response to the question from OM, that BC told him to pay the deposit back.

34. He was cross-examined as to why neither his incident report dated 24 March 2014 nor his witness statement (settled in 2018) mentioned anything about the meeting in the Office of OM on 24 March 2014, considering its significance. He explained that he was only asked about the incident involving RC and the Plaintiff, not about the meeting itself, and thus did not include details of the meeting in his report.

Carlton Russell

35. Carlton Russell was Vice-President of Hotel Operations and Food & Beverage for the Cove and Reef Towers when the incident occurred in 2014. He was the chairman of the Review Board that upheld Cooper’s termination on his appeal, heard on 25 August 2014. His evidence is not therefore directly relevant to what transpired with respect to the handling of the incident relating to the float and the missing deposit, although it provides some insight into the Defendant’s investigation and handling of the matter post-termination.

36. He indicated that based on statements given by “various witnesses” (it was never indicated who these witnesses were), the Plaintiff had failed to comply with “Standard Operating Procedures” in relation to missing deposits and float counts, in that he had advised an employee with a missing deposit that he could simply fill out the deposit envelope and “drop” the deposit. After hearing evidence, CR indicated that the Board was of the view that “*Mr. Cooper’s actions were inappropriate and contrary to the Standard Operating Procedures, which amounted to a fundamental breach of his contract*”. They therefore upheld the decision to summarily dismiss him.

37. In cross-examination, he was questioned as to whether there was a formal transcript of the hearing before the Review Board and pressed as to what conduct was relied on to constitute the specific breach. He testified that the board relied on oral statements and incident reports, and that there was no formal transcript of the meeting. He also indicated that the breach of standard operating procedure was the failure to suspend the bartender (RC) pending investigation. He was questioned about the investigation:

- Q: Okay...Did you, was there an investigation...do you know whether there was an investigation?
- A: To my understanding I think that’s where the breach for the standard operating procedure came into play. In matters like this there should be, employee should have been suspended pending investigation and that did not happen at that time.
- Q: So...
- Court: What did not happen, Mr. Russell? [...]
- A: An investigation.
- Court: So your answer to the question Mr. Ferguson asked you is no, then?
- A: It’s no.
- Q: Fine. ...So if there’s been no investigation...on what basis did you make a finding that the dismissal in this incident was justified? [...]
- A: I recall the statements given by the witness that Bernard Cooper had failed to comply with standard operating procedures with respect to missing deposit and float count. Again in this case, the operating procedure would have been to suspend the employee pending investigation.

38. In re-examination, in response to a question as to whether his reference to a failure to conduct an investigation concerned the Plaintiff or the bartender involved, CR said it was the bartender. This prompted an extensive back and forth between counsel for the parties that forced the intervention of the Court.

- Court: The question I just asked, Mr. Russell, was whether or not, when you were asked, whether or not there was an investigation prior to the disciplinary action taking place it was in reference to Mr. Cooper who is the plaintiff.
- A: Yes, there would have been an investigation, that’s where all of the...statements came into play.... They would have been the statements that we would have reviewed in the review

board meeting and based on the contents of that evidence we upheld the ...decision of termination.”

39. I did not find CR’s evidence on this point credible, but I will have more to say on this later.

Analysis of Evidence

40. The evidence led revealed major inconsistencies on the main issue of who authorized the return of the missing funds. During cross-examination, counsel for the Defendant questioned the Plaintiff rigorously on the alleged inconsistency in his main and supplemental witness statements as to who authorized the pay-back. It was suggested that he changed his story later at the meeting of 24 March in OM’s office to indicate that MR had done so, as set out in his supplemental witness statement, when he had initially implicated CM.

41. Admittedly, the Plaintiff struggled to clarify his position under cross-examination and repeatedly indicated that he be “*permitted to explain*”, which was left to be done during re-examination by his counsel (although the matter does not appear to have been further picked up by his counsel). But I am not of the view that there was any inconsistency between his initial witness statement and the supplemental statement. In his initial statement, he indicated that CM discovered the discrepancy with the deposit and “*spoke with Mr. Cartwright who advised that he (CM) would take responsibility for the missing funds and have it paid in full*”. He said further that Mr. Cartwright had had “*discussions with his manager Mr. Martin and that they had come to an agreement that he [RC] pay the funds back.*”

42. In cross examination, he was asked this:

Q: I am suggesting to you that what you say in paragraph one of your [supplemental] witness statement is essentially that Mizpah Rolle gave the permission for Robert Cartwright to return the missing funds?

A: That’s not what this imply [sic], no.”

43. He then went on to explain that the reference in the 24 March meeting to MR giving “the directive” for RC to return the missing funds was not a reference to “*...any statement made directly from Mizpah to Robert Cartwright.*” He also clarified that there was a difference between MR telling CM (as he related in his supplemental witness statement) that the “*funds have to be replaced*” and MR saying it was okay for RC to return the funds.

Q: And when you say Mizpah told him that the funds have to be replaced are you saying that Mizpah was saying that Clifton should replace the funds?

A: No.

Q: Are you saying that Mizpah was saying that the funds would have to be replaced by Robert Cartwright?

A: Yes.

44. RC was consistent in denying that BC gave him permission to pay back the funds, but there was some inconsistency in his position as to who actually advised him (if anyone). He maintained that he made the decision, after speaking with CM and a fellow bartender Antoine Higgs (“AH”), although in live evidence he indicated that the bartender whom he received advice from was a “Sherand” (phonetically spelled for the stenographer). In cross-examination, RC was asked about the telephone call from OM during the meeting of 24 March 2014 to clarify who gave authorization. He recalled the conversation, but said he did not recall implicating the Plaintiff. In his witness statement he said that it was OM who mentioned Bernard’s name, and “*I really can’t recall the conversation from that point because the phone hung up abruptly*”.

45. In closing submissions, the Defendant branded the reference to the additional names mentioned by RC as advisors as an attempt to introduce brand new information, which it says was “*highly suspicious*”, as these persons were not included in his incident report of 24 March 2014, nor the witness statement in October 2018. In point of fact, this was not entirely correct, as RC did indicate that he spoke to Antoine Higgs in his witness statement.

46. MR was cross-examined on the incident involving the telephone call from OM’s office to clarify who gave authorization to pay the funds back. She said this meeting took place a few days after her return to work on 24 March, but indicated that she might have been mistaken because of the passage of time (the meeting was actually on the 24 March). She was asked the basis on which she was able to identify that it was RC on the other end of the phone, and she indicated that OM called the manager (Antoine Higgs) and he put RC on the phone, who allegedly said to OM that it was BC who advised him to pay the money back. As indicated, CM omitted any mention of the 24 March meeting and the telephone call in his witness statement, but in live evidence he also confirmed that RC indicated that it was the Plaintiff who told him to pay the deposit back on the call.

My conclusions on the evidence

47. With respect to the main issue in contention, this is a “*he said/she said*” scenario, and it is difficult for the Court to make any accurate findings as to what actually occurred at that meeting. In closing submissions, the Defendant submitted that there was evidence from three sources indicating that the Plaintiff told RC to return the missing funds: (i) the witness statement of MR; (ii) *viva voce* evidence of CM; and (iii) the summary of evidence used by the Review Board at its hearing. The Defendant also argued that the evidence of RC was “*inherently unreliable*” because he gave evidence at trial which contradicted what he said in his witness statement, and that he admitted that he had difficulty recalling events which had taken place nearly 7 years ago at the time of trial.

48. Conversely, the Plaintiff contended that the evidence of CM was suspect, as he seemed to have only recalled the meeting of the 24 March (clearly the most significant meeting in these proceedings) as an afterthought, and admitted that OM had basically threatened the managers. Furthermore, MR’s evidence was said to be unreliable as she was unsure about the date of the

meeting and had misrepresented the time at which she became aware of the missing deposit. It was also submitted that the evidence given by MR and CM was somewhat under duress, as they were concerned for their jobs having regard to the approach taken by OM.

49. I think that these are valid criticisms on both sides. The witness statement of CM was admittedly minimalist, but I do not accept that he would not have been aware (or made aware by counsel) of the significance of the meeting of the 24 March for the purpose of giving formal evidence for trial. I also do not accept that MR became aware of the missing deposit for the first time on 24 March, as she stated. MR was copied into the same email that the Plaintiff and CM received (sent on the 21 March), and it is not plausible that she would not have been clued in by either MW (who directed her to assist with the audit), or the Plaintiff or CM during the conversations on the fringes of the audit. Further, the Plaintiff related that she (MR) was there on the morning of 23 March and was told by the wife of RC that the drop had been made. In her statement, MR said that she did not work that Sunday (23 March), but the matter was not clarified during examination, so I will leave it there.

50. Notwithstanding the omissions and the inconsistencies in the evidence, I do not believe that any of the witnesses was deliberately trying to mislead the court. In this regard, I have in mind the principle that discrepancies in witness evidence, especially when significant time has elapsed since the events in question, do not necessarily indicate untruthfulness. Human memory is inherently unreliable and sometimes honest witnesses may provide conflicting or inaccurate accounts without intending to deceive (see the leading case of **Gestmin SGPS S.A. v Credit Suisse (JK) Ltd. and Another** [2013] EWHC 3560 (Comm), per Leggatt J., as he then was). As indicated in that same case, the process of civil litigation also “*subjects the memories of witnesses to powerful biases*”, such as where a party may have a tie of loyalty (e.g., an employment relationship) to a party to the proceedings, or more “subtle influences” which include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute (para. 19, **Gestmin**). As a result, judges are urged to balance witnesses’ recollections of what was said in meetings and conversations with “*findings on inferences drawn from the documentary evidence and known or probable facts*” (para. 22, **Gestmin**).

51. Generally, I found that the Plaintiff was a credible witness and did not shirk from admitting difficult questions put to him in cross-examination. I also did not find MR’s evidence unreliable, although she admitted in cross-examination that the date of the meeting (and obviously other details) had dimmed with the passage of time. RC’s evidence was at times evasive and contained other minor discrepancies, but I assessed this as an attempt to not lay blame anywhere else for his mistake (which he owned up to). CM never satisfactorily explained the omission of the 24 March meeting in his witness statement, but again I did not find him to be unreliable.

52. My overall assessment of the evidence is that RC clearly had discussions with other persons, including CM and the Plaintiff (and maybe others) concerning the issue of his missing deposit and what to do. That would be expected in the circumstances he was facing. It was not unreasonable for the Plaintiff to come to a conclusion that RC may have gotten permission/agreed

the position with his manager (CM), and to have been under the impression that he was so advised. Much is said of the fact that the Plaintiff ought to have known better, while CM was not exonerated for his apparent lack of knowledge of procedure. In fact, the Plaintiff was only employed for two years at the time of incident and CM for one year, so there was not much difference in seniority.

53. I also believe that a discussion was had between the Plaintiff, MR and CM about the matter and that MR, who was vastly experienced with some 32 years at the time, may well have indicated generally what the “policy” or “procedure” was regarding such matters. She was the one who indicated, in her witness statement, that it was possible for monies to be paid back in the circumstances, once the authorization at the proper level of management was obtained.

54. There is another dimension which adds some unrealness to this matter—and I will pick this up in the discussion below—and that is that this entire matter proceeded on the basis that the Plaintiff’s advice to RC (even assuming *ad arguendo* it was given) was responsible for the breach by RC in returning the missing funds. RC admitted that he made the decision to return the missing money as he wanted to “make it right”. This was done before any conversation was had with BC. It also has to be remembered that RC had been employed at Atlantis from 2007, some five years before BC was employed, so he “knew the ropes”. Further, it has been glossed over that RC’s wife was also a cashier in the General Cashier’s Department, who obviously would have been familiar with whatever procedure applied to “dropping” deposits and could just as easily have advised him.

55. The upshot of all of this is that there is, in my view, no clear evidence that the Plaintiff advised RC to make the payment. The Plaintiff and RC consistently denied that RC implicated the Plaintiff in the telephone call of 24 March 2014, and I do not find the evidence of the Defendant’s witnesses (MR and CM) sufficiently reliable or cogent, having regard to the passage of time and the tenor of that meeting, to support a contrary finding. In my view, the Plaintiff, quite understandably, may have been under the impression that CM had advised RC to pay the money back based on what RC told him, keeping in mind that CM was RC’s direct line manager. His evidence was also that while MR indicated generally what might be done by RC (or someone in his position) in such a situation, she herself never directly advised RC to do anything. So it cannot reasonably be said that he attempted to attribute blame to MR. On a balance of probabilities, and for the reasons expressed above, I do not find that the Plaintiff advised RC to return the missing funds or lied about it, although I believe that he was aware of RC’s intention to pay the money back and thought RC had management’s blessings to do so.

The Law

Unfair dismissal

56. The concept of unfair dismissal and the remedies provided are purely statutory rights created under the *Employment Act 2002* (“EA” or the “Act”). 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.”

57. Sections 36 to 40 of the EA set out specific situations that are deemed instances of unfair dismissal, including dismissal relating to (i) trade union membership; (ii) redundancy; (iii) pregnancy; (iv) replacement workers and (v) industrial action. The instances in which unfair dismissal may arise are not limited to the statutory categories, however, as recognized by the Court of Appeal (“CA”) in **Omar Ferguson v Bahamasair Holdings Ltd. (SCCivApp No. 16 of 2016)**. In **Omar Ferguson**, the CA observed, *inter alia*:

- (i) that an employee instituting an action based on termination of his employment might claim both unfair and wrongful dismissal;
- (ii) 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;
- (iii) 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
- (iv) 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.

58. 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 (**Omar Ferguson, Cartwright v US Airways** [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.*”

59. 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. However, the principles relating to reasonableness and the question of unfair dismissal being determined on the substantive merits of the case are similar.

60. 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.”

61. This was approved and applied in the **Omar Ferguson** case, where CA 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.”

Wrongful & Summary Dismissal

62. 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 (i.e., a repudiatory breach). Wrongful dismissal might also be constituted where an employer summarily terminates an employee without notice or with inadequate notice, and there is insufficient cause to justify the dismissal. The EA contains specific provisions regulating summary dismissal, with the effect that the breach of any of these may ground a claim for wrongful dismissal based on the Act (as opposed to a common law action).

63. 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 master should no longer be required to retain the servant in his employment.”

64. In **Island Hotel Company Ltd. v John Fox**, IndTribApp No. 54 of 2017, the Court of Appeal summarized the principles as follows:

“50. [It] is trite law that in order to mount a successful claim for wrongful dismissal two hurdles must be cleared. Firstly, an applicant must show that the employer did in fact terminate the contract without notice or with inadequate notice and secondly that the employer was not justified in doing so....

51. In wrongful dismissal, the paramount principle is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract. As such, the Tribunal was required to consider whether the nature of the breach alleged constituted a fundamental breach. It was then necessary to consider whether there was sufficient evidence so as to lead the appellant to have an honest and reasonable belief that the respondent had committed the misconduct in question.”

65. 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 in the Jamaica Court of Appeal 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

66. An employer has a right at common law and under the EA to summarily dismiss an employee for cause. The statutory provisions dealing with summary dismissal are contained in Part VIII of the EA, ss. 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.”

67. Section 32 sets out a non-exhaustive list of conduct that may constitute a fundamental breach of contract, or which 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.”

68. 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.”

69. A dismissal in contravention of any of these provisions renders the dismissal wrongful, 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 **Simmons 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 unwarranted in the circumstances, a reasonable investigation is required to demonstrate an honest and reasonable belief of guilt.”

DISCUSSION AND ANALYSIS

70. There were no agreed statement of issues, but the issues identified by the parties for the consideration of the Court generally overlapped (although “3” and “4” only appeared in the Plaintiff’s list). I summarize them below as follows:

1. Whether the Defendant reasonably and honestly believed that the Plaintiff advised another employee, Robert Cartwright, that he could pay back a deposit by placing the funds in a deposit envelope, marking it and “dropping” the deposit;
2. Whether the Defendant carried out a reasonable investigation of the alleged misconduct;
3. Whether the alleged misconduct of the Plaintiff amounted to gross misconduct and/or gross dishonesty?

4. Whether the Plaintiff committed a fundamental breach of his contract of employment or acted in a manner repugnant to the fundamental interest of the Defendant;
5. Was the Plaintiff's termination from his employment wrongful and/or unfair;
6. Is the Plaintiff entitled to claim damages from the Defendant, as set out in the Writ or otherwise.

Claim for unfair dismissal

The pleading point

71. I deal first with the claim for unfair dismissal. The Defendant submitted that the issue of unfair dismissal does not even arise for consideration because the claim has not been properly pleaded, citing **Eden Butler v Island Hotel Company Ltd (t/a Atlantis Paradise Island)**, (SCCivApp & CAIS No. 210 of 2017). In that case, the CA dismissed the appellant's appeal claiming unfair and/or wrongful dismissal, partly on the grounds that the appellant had failed to provide particulars of claim for unfair dismissal. The CA said in part that:

"32. As is evident from the amended statement of claim the appellant provided no particulars of his claim for unfair dismissal. A plaintiff must complete a statement of claim in which are set out the allegations of fact they intended to prove."

72. The Defendant contended as follows:

"14. As in *Eden Butler*, the Plaintiff in the instant case has not condescended to plead any particulars which relate to unfair dismissal. The Plaintiff provided no detail from which the Defendant, or for that matter the Court, could know what the allegation is that is being made. It is submitted that it is not sufficient for the Plaintiff to plead that he has been unfairly dismissed. The plaintiff ought to have set out in the Statement of Claim the details of the alleged unfairness. Neither the Defendant nor the Court can simply speculate on the nature of the claim being made."

73. It is true that the plaintiff did not plead any facts relating to his unfair dismissal claim in the SOC. But I do not accept that the Plaintiff did not provide sufficient details to enable the Defendant or the Court to know the gist of the allegation that was being made with respect to the claim for unfair dismissal.

74. The Plaintiff pleaded that he was "*unfairly and/or wrongfully terminated on March 28th 2014*". The Defendant denied that the plaintiff was unfairly or wrongfully terminated and pleaded in the affirmative that: "*...the Plaintiff's employment was terminated on the grounds of gross misconduct and gross dishonesty in regards to his role in a missing deposit.*" In his Reply, the Plaintiff pleaded that "*the Defendant's employees and/or agents conducted their inquiry into the matter in a way that was unfairly prejudicial to the Defendant and showed a desire to have the Plaintiff wrongfully/unfairly terminated*". The Plaintiff therefore alleged that the inquiry or investigation was conducted in a manner that was prejudicial (unfair) to him and that the Defendant may have had an ulterior motive to have him fired.

75. It is clearly a desirable practice that the facts relevant to any claim should be pleaded in the SOC. Exceptionally, however, they can be in a Reply or subsequent pleading (see **Busch v Stevens** [1962] 1 All ER 412, per Lawton J. at p. 416), so long as they do not raise any allegation of fact or claim inconsistent with the previous pleading (R.S.C., Ord. 18, r. 10) (**Herbert and Another v Vaughn and Ors.** [1972] 1 WLR 1128. In **Busch v Stevens**, Lawton J. said:

“As one of the objects of the modern rules of pleading is to inform the court what it is being asked to try, it seems to me to be a matter of indifference to the court whether the issue of acknowledgement is raised in the first pleading or the last—but it is a matter of concern to the parties that the cost of litigation should be kept down; and if costs can be kept down by making a reply unnecessary, so much the better.”

76. Secondly, in my view, closing submissions at trial is not the place to take objections to any alleged deficiencies or irregularities in pleadings. The Defendant pleaded to the case as was framed. There was no request for “*further and better particulars*” of the claim or details of the case, as the terminology is used in the modern Civil Procedure Rules. Furthermore, the Defendant could have sought leave to file a rejoinder to the plaintiff’s reply, for which the plaintiff could have been saddled with costs for failure to plead its case in its SOC, rendering subsequent pleadings and applications necessary.

77. I therefore find that there is a sufficiently pleaded claim in relation to unfair dismissal.

78. Before leaving this point, however, I should mention that I have also found instructive the statement of principle by the UK Court of Appeal in **Trustees of the William Jones’s Schools Foundation v Parry** [2018] ICR 1807, although I stress it was not necessary to place any reliance on this case in coming to my conclusion, since I found as a matter of fact that there were sufficient particulars of pleadings when the SOC and Reply are taken together.

79. That case was concerned with a claim form presented to an employment tribunal, citing unfair dismissal and arrears of wages against the respondent school. In response to the box in the CPR Forms for starting a claim before an Employment Tribunal [Form ET1] inviting details of the claim, the claimant’s solicitors attached a separate document which mistakenly gave the particulars of a different case. One of the issues that arose for the consideration of the Court of Appeal was whether the claim form was one that could “*sensibly be responded to*”. The UK *Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations* (SI 2014/271), provides (Rule 12(1)(b)) for a claim to be submitted to an employment judge for assessment if, *inter alia*, it was “*in a form which cannot sensibly be responded to or is otherwise an abuse of process*” and for the claim, or part of it, to be rejected if the judge considers that the claim came within that description.

80. This is what Bean LJ (with whom the other Justices agreed) had to say about the finding by the Employment Appeal Tribunal that the claim was not in a form that could have been sensibly responded to, a passage which is worth setting out in some detail.

“30. Elisabeth Laing J, as already noted, held that an employment judge looking at this ET1 could only have concluded that the respondent school “would have had no idea of the basis on which the claimant was making either of her claims.” With respect, I entirely disagree. The school knew perfectly well that, as the ET1 states, she had been employed by them as director of dance from 1 September 1996 onwards. They also knew, although the ET1 did not state this, that her employment in that capacity had been terminated on 31 August 2015 and that she had been re-engaged as head of dance the next day. Their case was that a dismissal was a genuine redundancy. Her case was that it was not. (No separate argument was advanced before us relating to the claim for arrears of wages.)

31. The school could and in my view should have filed an ET3 [response] stating something on these lines: ‘The claimant was dismissed on 31 August 2015 on the grounds of redundancy, which in the circumstances the respondent acted reasonably in treating as sufficient reasons for dismissal.’ Either side could then have been directed to give further details of their case. But at least proceedings would have been properly launched. Employment tribunals should do their best not to place artificial barriers in the way of genuine claims.

32. I should add that, in holding that a sensible response could have been given to this claim, I am not laying down a general rule that the respondent to a claim in an employment tribunal must always be treated, for the purpose of rule 12(1)(b), as having detailed knowledge of everything that has occurred between the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else’s case, the ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1, the employer can sensibly respond, for example: (a) ‘the claimant was not dismissed; she resigned on [date X]’; or (b) ‘the claimant was dismissed on [date X] on the grounds of gross misconduct, which in the circumstances the respondent acted reasonably in treating as sufficient reasons for dismissal.’ ”

Merits of unfair dismissal point

81. As indicated, the Defendant did not address any arguments to the merits of the claim for unfair dismissal. As far as I understand the arguments, the Plaintiff makes two main submissions in respect of the unfair dismissal claim: (i) that insofar as s. 35 of the EA requires the Court to determine the matter on the “substantial merits” of the case, the Defendant relied on a breach of a policy/procedure that was unspecified, and the dismissal was therefore unreasonable; and (ii) that the investigation carried out was not reasonable.

Alleged breach of a policy that was not clearly captured or understood

82. As to the first, the Plaintiff disputes that there was any clear policy or procedure for dealing with a missing deposit, or what should be done in those circumstances. For example, it was pointed out that CM, a manager, specifically indicated that he was not aware of the policy relating to how such a matter should be handled. Further, it appeared that only MR (an employee with 32 years’

experience at the time of the incident) was aware of the procedure to deal with a missing deposit—which she set out at paragraph 10 of her witness statement.

Reasonable investigation

83. The Plaintiff submitted that no investigation took place and that the suspension was a façade, as the decision to terminate him was taken following the preliminary meetings and inquiries immediately following the incident and which preceded the suspension. Further, it was submitted that whatever investigation was said to have taken place was not reasonable and was “prejudicial” to the Plaintiff. This was because, firstly, several persons whom RC alleged he spoke to (assistant manager Antoine Higgs, and Sharon Thompson, apparently the cashier who notified him of the missing deposit) were not a part of the process and were not required to submit incident reports for consideration. In fact, the Plaintiff submitted that RC was not made to do an incident report until 28 March 2014, *after* the plaintiff had in fact been terminated. He relied further on the point that no disciplinary proceedings were taken against RC, at least not up to the time the Plaintiff was suspended and dismissed. This was said to call into question the fairness of the proceedings and whether RC may have been given favourable treatment by the Defendant for evidence against the Plaintiff.

84. Secondly, it was submitted that the Defendant did not disclose to the Plaintiff the findings of any investigation, and as such he was not given a chance to respond before a decision was made to terminate him (**Sean Miller v Bahamas Power and Light Company Ltd.** [2018] COM/lab/00039, where the Court said that a reasonable investigation must give “*the employee an opportunity to be heard and to respond to the gathered information and complaint*”).

Court’s discussion and determination

85. In unfair dismissal cases where the employee’s conduct is said to be the reason for the dismissal, the UK cases apply the threefold test stated in **British Home Stores Ltd. v Burchell** [1980] ICR 303 to determine whether the dismissal is fair in accordance with the “*substantial merits of the case*”. The test is as follows:

- (a) Whether the employer believed that the employee was guilty of the matter complained of;
- (b) Whether there were reasonable grounds on which to sustain that belief;
- (c) Whether the employee had carried out an investigation into the matter that was reasonable in the circumstances of the case when it formed the belief that there were reasonable grounds for dismissing the plaintiff.

86. This test is equally apposite in the context of unfair dismissal under the Act (see, *inter alia*, **Omar Ferguson, Graham v Secretary of State for Work and Pensions (Jobcentre Plus)** [2012] IRLR 7598 [at 46]). The overarching test is that of reasonableness, which does not require

conclusive proof of the misconduct, but only a reasonable belief justifiably held by the employer based on its investigation.

(a) *Belief of employee's guilt*

87. There is little doubt that the Defendant held a genuine belief in the matters listed in its dismissal form (see below) for dismissing the Plaintiff. It asserted and believed that the Plaintiff had breached policy and procedure and had lied about it and sought to place blame elsewhere. So this first test is satisfied.

(b) *Whether reasonable grounds on which to base belief*

88. The reason given for the suspension and subsequent dismissal of the Plaintiff was that he was guilty of “*gross misconduct and gross dishonesty*” in “*arranging*” with RC for him or his wife to repay the missing deposit of \$462.26, apparently in breach of company policy, and that instead of taking responsibility for it, he tried to place the blame on others. The Plaintiff disputed that there was any clearly established policy or procedure. For one, it was not clear at the time of his dismissal whether the Hotel’s policy prohibited an employee paying back missing funds under any circumstances, or whether it could only be authorized by senior management and human resources. It seems the latter was the case. The Defendant asserted in its written submissions that “*As per the evidence of Mizpah Rolle, the decision to allow an employee to simply return missing funds would have to come from a senior level and must also be made in conjunction with human resources.*” [Emphasis supplied.]

89. Except for that brief statement by MR, none of the Defendant’s other witnesses was able to explain what the policy or procedure was that the Plaintiff allegedly breached. CM explained that he was new and did not know the policy, notwithstanding that he had been employed for a year at the time of the incident. When he was pressed in cross-examination about this issue, he said that he did not “*see where he [the Plaintiff] breached any company policy*”, but he was only referring to what was said in the meeting of 24 March 2014, which he thought was a dishonest statement by the Plaintiff. When pressed about the documentation on the procedures which the Plaintiff is alleged to have breached, CR, who chaired the review process, said that “*I recall the statements given by the witnesses that Bernard Cooper had failed to comply with standard operating procedures with respect to missing deposit and float counts.*” In other words, he simply accepted at face value that some policy had been breached.

90. In its written submissions, the Defendant submitted:

“Having regard to both the information it had before it regarding the Plaintiff (i) advising Mr. Cartwright to simply return the missing deposit, and (ii) lying about having given that advice, and having regard to the Plaintiff’s position of responsibility in an area that details [sic] with the Defendant’s funds, the Defendant’s decision to summarily dismiss the Plaintiff was well within the range of reasonable responses. The Plaintiff’s contract of employment made clear that serious misconduct could lead to termination without notice or payment in lieu of notice. Additionally, the

Defendant's Employee Handbook, which the Plaintiff acknowledged receipt of, made clear that failure to strictly observe all Company policies and control procedure generally or specifically is a conduct violation which could lead to termination."

91. The Employee Handbook ("*Handbook*"), which the Plaintiff signed on 6 February 2012, provides (at pg. 32) a "non-exhaustive" list of some 35 conduct violations which are said to be subject to disciplinary action, including termination. The violation apparently relied on was para. 35, which states as follows:

"35. Failure to strictly observe all Company policies and control procedure generally or specifically."

The Contract of Employment ("Contract"), which by para. 19 is said to take precedence if there is a conflict between the Contract and the Handbook, lists 10 violations which are said to justify summary dismissal (see discussion further below).

92. In closing submissions, the Defendant asserted that "*The Plaintiff himself acknowledged that he, as a Food and Beverage Cashier Manager/Audit, did not have the ability to give an employee permission to replace the missing funds.*" The defendant referred to the cross-examination of BC, where he said as follows:

Q: No, Mr. Cooper, sorry...my question is, if you a food and beverage cashier manager audit, which was your job title?...

A: Yes.

Q: ...if somebody in that position were to advised (*sic*) an employee who held the position of bartender cashier that he could simply repay missing funds then that food and beverage cashier manager audit would be in breach of company policy?

A: Yes.

Q: Now taking it further Mr. Cooper, would you agree with me that if you had advised Robert Cartwright that he could repay the missing funds that would be a breach of company policy?

A: Yes.

93. Later in cross-examination he was also asked whether the actions of which he was accused (but denied) could have amounted to dishonesty. The exchange was as follows:

Q: Mr. Cooper, would you agree with me that if you had given Robert Cartwright the advice the he could repay the missing funds and then subsequently when questioned about it you lied about having given that advice and instead sought to place the blame on others that (*sic*) that would be dishonest?

A: I agree."

94. The Defendant seems to rely on these passage as admissions by the Plaintiff to the alleged breaches. I am of the view, however, that if anything, they demonstrate his credibility. For example, he accepted that, as a food and beverage cashier manager audit, that he was not at a managerial level that could authorize an employee to return missing funds (not that such funds

could outright not be returned), and that if he lied about certain things that would be dishonest. There is plainly nothing objectionable about those admissions, bearing in mind that his evidence was always that he committed neither.

95. More importantly, this evidence has to be construed against specific allegations stated in his dismissal form:

“Gross Misconduct/Gross Dishonesty”: On Saturday March 2014 Audit sent an e-mail concerning the missing deposit for Robert Cartwright in the amount of \$462.20. He went to the General Cashiers office to have his float counted, and while walking back to the restaurant, you arrange [sic] with him to have him or his wife drop the deposit. Instead of taking responsibility for this, you proceed [sic] to place blame on various managers until face [sic] with all parties concerned and it was discovered that you made arrangements with Mr. Cartwright.” [Emphasis supplied.]

96. Against this factual matrix, I have great difficulty in accepting that there were reasonable grounds for the Defendant to hold the belief that the Plaintiff had violated company policy and procedure. Firstly, there is considerable uncertainty as to exactly what procedure or policy he allegedly violated, and the conduct that constituted the violation. Secondly, the conduct or misconduct that is attributed to the Plaintiff has been variously described as follows: (i) that he “*told*” RC to replace the deposit (see summary of events which the Defendant submitted was an accurate abstract of the evidence); (ii) that he gave RC “*permission to repay the funds*” (see witness statement of Mizpah Rolle); (iii) that he “*advised*” RC that he could simply fill out the deposit envelope and drop the deposit (witness statement of Carlton Russell); and (iv) that he “*arranged with him [RC] to have him or his wife drop the deposit*” (see suspension form dated 26 March and dismissal form dated 28 March 2014).

97. Third, as noted above, the formal charge against him, as contained in the suspension and dismissal form, was that he “*arranged*” with the Cartwrights to have the money paid back. One does not need to condescend to any fine semantical or legal analysis to understand that “*arranging*” something connotes some positive act or action beyond merely advising to procure a certain result. The giving of advice, even wrong advice, does not procure any result, as advice can be freely given and ignored. In point of fact, RC maintained all along that he made the decision to repay the funds himself. So it is difficult to know on what basis the Defendant could reasonably have held the belief that the Plaintiff *arranged* to have the money paid back. In my judgment, the Defendant did not hold a reasonable belief at the time that the Plaintiff was terminated that he “*arranged*” with the Cartwrights to have the deposit paid back.

(c) Reasonable investigation

98. In **Island Hotel Company Ltd. v Shikera Isaacs-Sawyer** (IndTrbApp No. 88 of 2018, unrep.), Longley JA 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 an honest belief on reasonable grounds that the employee committed the act of misconduct; it must be within reason, full and fair; that would normally involve where it is 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.”

99. The Plaintiff’s Contract of Employment provides as follows with regard to suspension:

“15. The Company shall have the right to suspend you pending investigation or otherwise without pay up to a maximum period of fourteen (14) days for breach of any of the rules of conduct of policy as set out in the Employee Handbook.”

There is therefore no dispute that the Plaintiff’s contract permitted his suspension pending without pay during an investigation into alleged breaches. But the ability to suspend is for the sole purpose of conducting an investigation.

100. In my judgment, the Defendant entirely failed to conduct a reasonable investigation (or perhaps any investigation) during the Plaintiff’s suspension. This much appears plain on the Defendant’s own evidence. The Plaintiff was suspended on the 26 March 2014 after the meeting with OM and EW, and on his return to work was summoned into a “*return from suspension*” meeting during which the allegations were again made and he was subsequently terminated. It is never stated that the results of any investigations conducted during his suspension were put to the Plaintiff, and that he was allowed a reasonable opportunity or any opportunity to respond. Further, there is no record that any investigation with any findings had been conducted, one would have expected, by the investigations department.

101. Further, there were persons from whom accounts were not obtained who would have been material witnesses, or persons to interview in conducting any reasonable investigation into this matter. The notable example is that RC himself, who was central to this whole process, was only asked to do an incident report *after* BC had been dismissed. Significantly, the person who actually made the deposit on RC’s behalf, his wife and also an employee of Atlantis, was never questioned or made to file any incident report. The deposit said to be in violation of the Hotel’s policy was made by her. If the allegation was that the Plaintiff had arranged with RC and his wife for the money to be repaid, then the wife was also a material witness as to her knowledge or understanding of what that “*arrangement*” was. This was not a matter of her testifying against her husband; but of her testifying in the investigation of the charges against the Plaintiff.

102. Finally, I did not find the evidence of CR that an investigation took place credible. I think he was right to say initially that “*it did not happen*”, although he later tried to rehabilitate the position by saying this was a reference to the bartender. In fact, when the Court grasped the nettle and put the question to him directly, his evidence was that the “statements” reviewed by the Review Board constituted the record of investigation. Statements are not in and of themselves record of an investigation, although they may be considered during the investigation process. But

there is absolutely nothing to indicate that an investigation was done while the Plaintiff was suspended and any conclusion arrived at one way or another.

103. It is established by the case law that a breach of natural justice or failure to conduct a reasonable and fair investigation may constitute unfair dismissal. Having regard to my finding that there was no proper or any investigation, I conclude that the Plaintiff was unfairly dismissed.

104. I cannot say that the investigation was motivated by ulterior motives to dismiss the Plaintiff or that there was any bad blood between him and OM that might have been a factor—as claimed by the Plaintiff—as these issues were not pursued during trial. But it is clear that OM drove the process that led to the Plaintiff’s suspension and almost immediate dismissal, and it is unfortunate that she was not available to be cross-examined and questioned.

Wrongful dismissal

105. The Court has already made certain findings of fact on the evidence and discussed several of the issues raised for consideration in the unfair dismissal claim. These will not be repeated. As indicated, the Plaintiff merely pleaded that he was “*unfairly/wrongfully dismissed without notice and without payment in lieu of notice*”, which is indicative that the Plaintiff is claiming wrongful dismissal in accordance with the Act.

106. I have already indicated that although the standard of proof is the civil balance of probabilities, in cases of summary dismissal the court will require persuasive and convincing evidence (see **Cable & Wireless v Hill**). Further, the Plaintiff cited **Jupiter General Insurance Co. Ltd. v Ardeshir Bomanji Shrott** (1937) 3 All ER 67, for the principle that summary dismissal was a strong measure only justified in the most exceptional circumstances.

107. The Defendant stressed that the test under s. 33 in determining whether a summary dismissal is justified is not whether the Plaintiff is guilty of the alleged conduct, but whether the employer can show that they honestly and reasonably believed on a balance of probability that the employee had committed the conduct. It also submitted that the Court should not substitute its view as to whether it would have dismissed the employee in the circumstances alleged, but only whether the dismissal was in the range of reasonable options. The Defendant cited **Cordial Walker v Candid Security Limited** (SSCivApp No. 55 of 2010), in which the CA endorsed the leading UK case on the “Band of Reasonable Responses” test as follows:

“15. In determining whether the employee was dismissed for just cause, a judge must determine whether the employer acted reasonably (See *British Home Stores Ltd. v Burchell* [1980] I.C.R. Indeed, that case appears to be the precedent for section 33 of the Employment Act (above) which provides that it is for the employer to prove on a balance of probabilities that he acted reasonably in summarily dismissing an employee.”

Whether alleged misconduct amounting to gross misconduct and/or gross dishonesty

108. The courts have repeatedly emphasized that the degree of misconduct required to justify summary dismissal is fact-sensitive and the court must consider all the circumstances of the case, including the nature of the employment, the specific conduct in question and the context in which it occurred (**Laws v London Chronical (Indicator Newspapers) Ltd.** [1959] EWCA Civ. J0422-2; **Wilson v Racher** [1974] ICR 428, CA).

109. The EA and the case law identify gross misconduct and dishonesty as types of conduct that may fundamentally undermine the mutual trust and confidence in the employment relationship. But it is clear that simply labelling conduct as “gross misconduct” or “gross dishonesty” does not make it so. The court must still consider whether the conduct is sufficiently serious to amount to a repudiatory breach of contract.

110. The Plaintiff contends, firstly, that there is no evidence of any gross misconduct or gross dishonesty. As already discussed, the Plaintiff’s acts were said to be a breach of the Hotel’s policies and control procedures, a policy which it appeared nobody knew and which was not set out anywhere. The Plaintiff also points out that in fact, the actual terms of his Contract (as opposed to the matters set out in the Handbook) only set out 10 grounds on which the company could terminate his employment without notice or payment in lieu of notice, and neither misconduct nor dishonesty is included. It is useful to set out the material part of para. 16 of the Contract:

“16. **Termination of Employment**

[...]

(d) The Company may terminate your employment without notice or payment in lieu of notice in the event of serious misconduct in the course of your duties, including but not limited to:

- (i) Stealing and/or receiving or guest’, Company’s, or other Employees’ property;
- (ii) Violent acts committed on the Company’s premises or the premises or property of any affiliate or subsidiary of the Company;
- (iii) Conviction of any crime;
- (iv) Persistent tardiness;
- (i) Being under the influence of alcohol or drugs;
- (ii) Swiping in or out for another employee;
- (iii) Being party to or otherwise involved in the sale or purchase or attempted sale or purchase of drugs on the Company’s premises;
- (iv) Possession or use of drugs;
- (v) Gross insubordination.
- (vi) Neglect of duty.”

111. I do not accept the Plaintiff’s argument that the failure of the Contract to list dishonesty or misconduct means that the Plaintiff could not have been summarily terminated for those reasons. Firstly, the list at paragraph 16 is not intended to be exhaustive. Secondly, the EA stipulates that gross misconduct and dishonesty are reasons for summary dismissal, and the Plaintiff relies on the EA to claim wrongful dismissal based on his summary dismissal. However, it is a point that can be taken in opposition to the Defendant’s argument that the Plaintiff’s conduct went to the root of the contract.

112. As to the claim of dishonesty, the Plaintiff's view is that whatever was said at the meeting was under threat by OM to suspend all of the managers involved in the matter, which may have provided some motivation for other persons to "throw him under the bus", so to speak. So that evidence is inherently unreliable. Further, not all of the persons who were present at the meeting were asked to give statements to clarify what actually occurred. But he maintains that he never dishonestly represented the situation.

113. The Defendant contends that when one looks at the "information" which the Defendant had before it in March 2014, the Defendant had reason to believe that the Plaintiff had advised RC to return the deposit and then lied about giving that advice. Therefore, it is submitted that the summary dismissal was justified.

Court's conclusions

114. As indicated, what amounts to gross misconduct depends on the facts of the case. In **Dr. Caroline Jane Ardon v Sussex Partnership HNS Foundation Trust** [2018] EWHC 3157 (QB), Mr. Justice Jacobs summarized the law related to gross misconduct as follows [79]:

"78. (9) The concept of "gross misconduct" in the employment law context connotes misconduct which justifies summary dismissal, and which therefore amounts to a repudiatory breach of contract. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Gross misconduct may include, but is not limited to, dishonesty or intentional wrongdoing, for example: conduct which is seriously inconsistent with the employee's duties to his employer; or conduct which is of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment, and give the employer the right to discharge him. The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence. See *Adesokan v Sainsbury's Supermarket Ltd.* [2017] EWCA Civ 22 paras [21]- [23] (Elias LJ). Very considerable negligence, historically summarized as "gross negligence" is therefore required for a finding of gross misconduct: *Sandwell & West Birmingham Hospital NHS Trust* UKEAT/0032/09 at [112]- [113].

115. In **Adesokan v Sainsbury Supermarkets Ltd.** (cited above) the CA said that the question for the judge was whether the negligent dereliction of duty was so "*grave and weighty*" as to amount to a justification for summary dismissal. In that case, the Human Resources Partner of a chain of supermarkets had failed to correct an email which had been sent out to the stores by a Regional Operations Manager, and which incorrectly portrayed an exercise to obtain feedback from staff on their level of engagement, which risked compromising the result. The Court of Appeal upheld the finding of the trial judge that the act justified summary dismissal, but primarily on the grounds that its appellate functions did not allow it to interfere with a decision which was within the bounds of reasonable disagreement. However, Lord Justice Elias said [at 25]:

“It is not a question of this court simply asking whether it would have held the misconduct to be gross. Having said that, in my judgment the parameters available to a judge in a case of this kind is limited; it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer’s policies constitutes such a grave act of misconduct as to justify summary dismissal.” [Emphasis supplied.]

116. The question of whether the evidence is capable of supporting a charge of gross misconduct is an issue of law for the court, and it is accepted that the Court will not substitute its views into that process. In my judgment, the facts relied on to dismiss the Plaintiff are a far cry from the “grave and weighty” kind of conduct which the courts have traditionally held amounts to gross misconduct, so as to justify summary dismissal. This was not an intentional decision to undermine or act contrary to the employer’s policies and, as the Plaintiff has been at great pains to explain, in fact there is uncertainty as to what policy or procedure was breached, or the specific conduct of the Plaintiff which is said to have constituted the breach.

117. I therefore do not accept that the employer acted reasonably in characterizing the Plaintiff’s conduct as “gross misconduct” or “gross” dishonesty, and neither in deciding that dismissal was the appropriate punishment.

Whether a fundamental breach of contract or act repugnant to employer’s interest

118. In my view, the Defendant has a difficult task in submitting that the alleged misconduct was a fundamental breach of contract or repugnant to the interest of the employer. For one, as mentioned, the Defendant did not think it fit to include “misconduct” and “dishonesty” in the list of behaviors in the Plaintiff’s contract which it considered would amount to a repudiatory breach and attract the sanction of summary dismissal. I accept that the list is not exhaustive, but it was clearly intended to signal the matters that the defendant Employer considered were so fundamentally averse to its interest as to summarily bring the employment relationship to an end.

119. Secondly, there was no evidence of how the acts were said to be likely to destroy or seriously damage the relationship of trust and confidence between the Plaintiff and the Defendant. The Plaintiff was a F&B Cashier Manager, and it appears his duties were mainly concerned with the general supervision of cashiers and bartenders, for whom he held no line responsibility. Even assuming that he had advised RC to repay the money (and this was denied), the impact on the Defendant’s business was that it would have recovered money that it was owed as a result of the Plaintiff’s action.

120. There was an allegation that such advice prevented the Defendant from taking disciplinary action against RC, but with respect, that is a *non-sequiter*. Even if the money had been paid back, it was clear that RC had committed an infraction for which disciplinary charges could have still been preferred. The fact that no disciplinary charges were pursued against him at that point (or for that matter his wife, who worked in the cashier’s department and made the unauthorized deposit) is striking, in the context of the disciplinary action taken against the Plaintiff.

121. The allegations as to the Plaintiff being dishonest about what had transpired have already been considered. But a further dimension to this is that RC accepted his responsibility for replacing the missing deposit and indicated that he formed the intention to do so before he spoke to the Plaintiff. In those circumstances, the question about who advised him was a false predicate, as he assumes he acted on advice when he acted of his own volition.

122. In my view, there was no fundamental breach of the Plaintiff's Contract (the terms of the Contract itself negates this) and no misconduct so antithetical to the interests of the Defendant as to call for summary dismissal. In, the circumstances, I find that the Plaintiff's summary dismissal was wrongful.

Remedies

Unfair dismissal

123. The EA provide for damages for unfair dismissal to be awarded under two heads: (a) a basic award (which is calculated based on the arithmetical formula of three weeks' pay for each completed year of service) [s. 46]; and (b) a compensatory award based on the amount the Court considers "*just and equitable in the circumstances having regard to the loss sustained by the complainant in consequence of that dismissal in so far as that loss is attributable to action taken by the employer*" [s. 47]. Such losses include (a) any expenses reasonably incurred by the complainant in consequence of the dismissal; (b) subject to subsection 3 (which is not applicable), loss of any benefit which he might have reasonably been expected to have had but for the dismissal.

(a) Basic award

124. In its "alternative submissions" on remedies (if the Court were to find that the Plaintiff was unfairly dismissed), the Defendant did not dispute that the Plaintiff would be entitled to six weeks' pay under this head, which is 6 x \$536.27 per week (**\$3,217.62**).

(b) Compensatory award

125. However, the Defendant disputes the claim for the sum of \$55,772.00 for compensatory damages of 104 weeks' salary. It was never explained why the 104 weeks was used, although it appears that this represents the statutory cap for a managerial employee (24 months or 104 weeks, for a weekly paid person).

126. The Defendant submits that this claim is unsustainable, as the Plaintiff has not adduced any evidence of any losses actually sustained by him, or the value of the same. It relies on the principle that a compensatory award for unfair dismissal is not a bonus but is intended to compensate for actual losses sustained, and that the burden of proof lies with the person claiming loss. The Defendant cited two cases from the UK Employment Appeal Tribunal: **Simrad Limited v Ms.**

Geraldine Scott [Appeal No. EAT/474/96], and **Barley and Others v Amey Roadstone Corporation Ltd.** (No. 2) [1978] I.C.R. 190.

127. In **Simard Limited**, the EAT outlined the proper approach to be taken in the calculation of a compensatory award as follows (based on s. 74(1) of the UK Employment Protection (Consolidation Act) 1978, which is in *pari materia* to s. 47(1)) [pg. 3, Westlaw Reprint]:

“The process is a three-stage one, requiring, initially, factual quantification of losses claimed; secondly, but equally importantly, the extent to which any or all of those losses are attributable to the dismissal or action taken by the employer, which is usually the same thing, the word “attributable” implying that there has to be a direct and natural link between the losses claimed and the conduct of the employer in dismissing, on the basis that the dismissal is the *causa causans* of the particular loss and not that it simply arises by reason of a *causa sine qua non*, i.e., but for the dismissal the loss would not have arisen. If that is the only connection, the loss is too remote. The third part of the assessment in terms of the reference to the phrase “just and equitable” requires a Tribunal to look at the conclusions they draw from the first two questions and determine whether, in all the circumstances, it remains reasonable to make the relevant award.”

128. In **Barley and Others v Amey Roadstead Corporation**, the EAT stated:

“It seems to us that it must be the case, once unfair dismissal has been established, that the onus of proof in relation to loss, and anything which it is necessary to prove in order to establish loss, lies upon the claimant. We agree with the industrial tribunal in that respect. We also agree that it is wrong for industrial tribunals in that situation to speculate, to guess, or to indulge in conjecture.”

129. I accept the principle that a compensatory award is intended to compensate for loss actually suffered, and it is not to penalize the employer for its action. In this regard, Plaintiff did not provide any evidence of his employment status or earning capacity after his dismissal by the Defendant. There was no indication as to how long he remained unemployed after his dismissal, whether and when he was able to find new employment, and any other matters that might have caused him to incur additional expenses stemming from his dismissal. However, in addition to the claimed 104 weeks’ salary, he also made a claim for damages for loss of medical insurance, to be assessed.

130. The Defendants rejected the claim for damages of loss of medical insurance on the basis that medical insurance is a “non-convertible benefit” for which the Plaintiff cannot receive compensation in damages. I do not agree. Comparative cases from the UK Employment Tribunal and EAT indicate that permissible heads of loss for unfair dismissal routinely include compensation for loss of pecuniary benefits, including medical insurance (which is treated as a fringe benefit) which an employee would reasonably have been expected to receive if not for their unfair dismissal (see, **Shove v Downs Surgical Plc** [1984] ICR 532, **Mr. KT Foo v iOffice Ltd and Mighty Visage Studios Ltd.** [ET, Case No. 2305654/2023]). In such cases, the valuation of the loss of insurance is normally assessed by equating it to the costs to the employer of providing the insurance cover during the applicable notice period.

131. Furthermore, it must be remembered that in providing the statutory claim of unfair dismissal and the associated remedies, Parliament was creating a *sui generis* right and remedy that did not depend on common law principles. As was said by Lord Hoffman explaining the unfair dismissal system in the UK (on which the unfair dismissal provisions in the EA are patterned) in **Malloch v Aberdeen Corporation** [1971] 1 WLR 1581:

“54. ...The remedy adopted by Parliament was not intended to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy or general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering new statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount.”

132. In **Triggs v GAB Robins (UK) Ltd.** [2008] EWCA Civ 17, Lord Justice Rimer, in the UK Court of Appeal said:

“12. Employment tribunals have an exclusive jurisdiction to hear and adjudicate upon claims for unfair dismissal. No such claim can be brought before the ordinary civil courts, although claims for wrongful dismissal (dismissal in breach of the terms of the employment contract) can of course be so brought. A successful claim before a tribunal for unfair dismissal entitles the employee to a basic award and a compensatory award (section 118 of the ERA). The former is a matter of arithmetical calculation. Subject to a statutory cap on the maximum award, the assessment of the latter is governed by section 123 of the ERA.” [Section 123(1) is in similar form to s. 47(1) of the EA.]

133. As discussed, in **Omar Ferguson v Bahamasair Holdings Ltd. (SCCivApp No. 16 of 2016)**, the Court of Appeal held that a claim for unfair dismissal may also be instituted before the Supreme Court. That has led to conflated claims for unfair and wrongful dismissal before the Supreme Court. But it does not diminish the unique nature of the statutory relief and remedies provided for unfair dismissal.

134. In the circumstances of this case, and in relation to the test under s. 47, I accept that the plaintiff suffered some loss that was caused by his unfair dismissal and attributable to the conduct of the employer, and that it would be just and equitable to award compensation in the circumstances. For example, the Review Board Request Form in the Agreed Bundle, which the Plaintiff signed on 30 July 2014, indicates that he was seeking reinstatement to the Company, which suggests that he had not yet found alternative employment at that point.

135. As I am unable to ascertain on the material before me whether the claim for 104 weeks' salary refers to actual losses by the Plaintiff and because the SOC clearly foreshadowed some losses that would be subject to assessment, I will refer the matter to a Registrar for an assessment of: (i) loss of wages caused by the dismissal; (ii) loss of medical insurance (for the one-month period during which the Plaintiff would have been entitled to notice); (iii) the pay due for the period of suspension; and (iv) any other pecuniary losses. This assessment is of course subject to the statutory cap at the proviso to s. 48(1), which in the case of a managerial employee is 24 month's pay. I would also direct that the Registrar in conducting the assessment have regard to the guidance given by the Court of Appeal in **The Gaming Board of the Bahamas v. Kayla Ward et. al.** [SCCivApp No. 120 of 2024] (see paras. 47-52).

Wrongful (Summary) Dismissal

136. The EA provides (at s. 29) for the minimum periods of notice or PILON to be given to lawfully terminate the contract of an employee. These also serve as the measure of damages when a claimant/plaintiff establishes that he or she has been summarily dismissed contrary to ss. 31-33. That provides for an employee who holds a supervisory or management position (there is no dispute that the Plaintiff was a manager) to receive: (i) one month's salary in lieu of notice and (ii) one's month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks. BC was a manager and had been employed for two years, so this works out to 3 months' salary: \$2,145.08 x 3 **(\$ 6,435.24)**. That is the sum I will award for wrongful dismissal.

CONCLUSION AND DISPOSITION

137. For the foregoing reasons, I therefore find that the Plaintiff has been unfairly and wrongfully dismissed without notice of payment in lieu of notice, and I make the awards set out above, subject to an assessment of damages for unfair dismissal.

138. Costs are awarded to the Plaintiff to be taxed if not agreed, with interest to run on the sums awarded and to be assessed at the rate of 5% percent from the date of the Writ and from the date of Judgment until payment at the applicable statutory civil interest rate.

Klein, J.



25 September 2025