COMMONWEALTH OF THE BAHAMAS
IN THE SUPREMECOURT
Commercial Law Division
2019/COM/lab/00079

BETWEEN:

SHERNAL BETHELL

Plaintiff

AND

FAMILY GUARDIAN INSURANCE COMPANY LIMITED

Defendant

Before:	The Honourable Mr. Justice Klein
Appearances:	Obie Ferguson KC for the Plaintiff
	Ian-Marie Sawyer, Krystle Saunders for the Defendant
Hearing Dates:	20 January, 22 March 2021

RULING

KLEIN J.

Employment Law—Employment Act 2001—Claim for Unfair/Wrongful Dismissal—Plaintiff a District Manager with Defendant—Summarily dismissed with PILON and severance—Contract provided notice period, but no PILON clause—Unfair dismissal—Failure to be heard—Reasons for dismissal—Whether duty to give reasons—Ex post facto rationalization for termination—Whether notice to be assessed at common law or pursuant to the EA—Breach of performance standards—Whether substantiated—Damages—Witness statement—Witness statement to be account of witness, not the product of legal drafting

INTRODUCTION AND BACKGROUND

1. This is a claim for unfair/wrongful dismissal by a former district manager of the defendant insurance company. She was a rising star and had won a number of performance awards—manager of the year 2017 and runner up in 2018—when a calamitous series of events in 2019 led to her summary dismissal in September of 2019.

2. The defendant employer alleges that the plaintiff was terminated for cause, as a result of myriad management, performance and staffing issues which were raised in several warning letters. The plaintiff believes the real reason was her refusal to rescind a disciplinary memo placed on the file of a subordinate employee whom senior management wanted exonerated. However, the termination letter itself was silent as to the reason.

Essential Factual and Procedural Background

3. The plaintiff was employed by the defendant on 15 September 1997 as a sales representative. She was promoted to staff manager on 1 March 2010, then district manager ("DM") on 14 September 2014, with responsibility for the Chippingham District. She executed a contract on 14 September relating to the DM position, which was superseded by a new DM contract executed 2 October 2018, which took effect 1 January 2019.

4. It appears she was a high-flying employee and manager up until 2019. As an agent, she received the Agent of the Year awards in 1998 and 1999, and received awards as staff manager between 2004 to 2007. She also received the top award as manager of the year for 2017 and runner up in 2018.

5. Things started to fall apart in early 2019. For one, the company was planning to introduce at the beginning of January a new software system, the Oracle Insurance Policy Administration ("OIPA"), which was intended to modernize and automate the accounting system for policies. It was alleged that the plaintiff's district was unprepared for the roll-out of the software, despite significant training efforts. These deficits were laid at her feet.

6. Secondly, there were said to be serious "shortages" (unaccounted for deposits from clients) with respect to agents under her supervision, and allegations that she failed to assist with the auditing of those accounts. There were other management and performance issues raised, in particular that her district had an inordinately high turnover rate, which was attributed to her attitude and management challenges.

7. Further, the plaintiff had run into some roadblocks in trying to discipline a subordinate staff manager, who will simply be called by her initials "SM". Her efforts in this regard were countermanded by the company's senior executives, including the plaintiff's direct line manager, and the issue soured relations between her and the plaintiff that may have played a role in the events leading to her termination.

8. In January 2019 she sought a meeting with senior management in the Human Resources Department to discuss the issues. That was the tip of the iceberg of a series of email correspondence, several meetings, two warning letters (8 July, 30 August 2019), a tumultuous meeting on 18 September 2019, and a "meeting" on 24 September 2019, although the latter was seemingly only for the purpose of presenting her termination letter.

9. She was paid notice and severance pay in the amount of $111,252.43, as well as her outstanding vacation pay ($1,342.48) and commissions said to be owing at that date ($11,399.45), based on the employer's calculations. On 30 October 2019, she filed a Writ with an indorsed statement of claim ("SOC") claiming the sum of $356,863.43 in damages and compensation for unfair and wrongful dismissal (deducting the amount already paid by the defendant).

10. The unfair dismissal claim was rooted in the alleged failure of the defendant to properly hear her before termination, and the wrongful dismissal was based on what was said to be summary

dismissal and insufficient notice pay, in breach of the contract of employment and the terms of the statute. The defendant denied that there was either unfair or wrongful dismissal. They said they issued several warning letters which the plaintiff did not heed, and she was dismissed pursuant to a "*progressive disciplinary process*". In any event, they contended that they paid the requisite notice and severance pay, and all other pecuniary benefits to which the plaintiff was entitled.

11. The Court was assisted with the following documents for the purposes of the trial: (i) a trial bundle containing the pleadings, agreed and non-agreed documents and witness statements; and (ii) trial submissions from both parties. The Court was later provided with comprehensive closing submissions and authorities from the parties and the transcripts of the hearings for the purposes of this Ruling. All of the material has been reviewed, although it has not been necessary to refer to everything.

Evidence

12. The plaintiff provided a witness statement on her behalf. On behalf of the defendant, the Court received witness statements from Dr. Kerry Higgs, Senior Vice-President ("VP"), Administration; Ramona Neeley, VP of Home Services Department; and Tanya Sturrup, Manager II, Business Support, Operations & Home Service. All of the witnesses gave live evidence and were cross-examined.

Shernal Bethel

13. In her witness statement, the plaintiff confirmed her employment details and indicated that at the time of termination she was responsible for administration and supervision of all sales, conservation, collection and services by agents and staff managers in the Chippingham District ("the District"). In September 2012, when she was promoted to DM, the District had some 42 employees, and was the largest in the company.

14. She recounted the progression of her interactions with management leading to her termination in September of 2019. She requested a meeting with Ms. Neely in January of 2019 to address matters relating to SM, in respect of whom she had taken disciplinary action by placing a warning letter on her file in October of 2017 outlining recruitment deficits, and in respect of whom there was a long-running conflict. In May of 2019, she received an email from Dr. Higgs advising her to remove the performance letter from SM's file.

15. She attended a meeting on 9 July 2019 to discuss, *inter alia*, matters relating to accounts of ex-staff members, during which she was presented with a warning letter ("warning letter No. 1"). The preambular paragraph of that letter, which was signed by Ms. Neely, said that the letter:

> "*…summarizes our discussions in the past few months regarding the management of your district with the most recent issue pertaining to your oversight of the shortages under Ms. Milford's staff.*

I am outlining below concerns regarding your leadership in the district which has continued to be below the Company's standards (in areas of agent and turnover, high shortages and high lapses)."

The letter then set out what were considered to be the critical issues as follows: (i) sales agent shortages in the amount of $15,698.43; (ii) policy lapses; and (iii) failure to prepare the District for the OIPA software launch/go-live. It ended with the warning that: "*We are at the stage where your continue performance challenges will result in further disciplinary action including reassignment of duties or termination of service*."

16. She refused to sign this letter. It came as a surprise to her, since there was no verbal or email communication or other correspondence bringing these matters to her attention before the letter was issued. She responded to the letter on 24 July and pointed out that she was disappointed as there "*had been no prevision discussions with me in the past few months regarding the management of my district or performance*".

17. She replied to each of the concerns raised in turn. As to the alleged high shortages, she had taken steps after the shortage was uncovered and the agent and staff manager implicated were immediately terminated. As to the lapses, she indicated that her district was the largest and for this reason always trailed in lapses, but this was countered by the fact that her district had the "highest production". Additionally, some of the issues were system errors attributed to the implementation of the OIPA.

18. As to agent and management turnover, her response was that one staff member requested to be assigned and the staff manager associated with the shortages (Ms. "M") was terminated. In any event, any issues with turnover was due to the agents' or staff managers' "*poor performance*" and personal issues, which were documented on their files. She rejected the assertions that she failed to effectively assist the audit process and provide supporting documentation. She explained that managers like herself could not be held "*wholly responsible for shortages as no matter how many check and balances are in place, you will still have dishonest agents*." On the matter of training for the OIPA, she indicated that her team had not been sufficiently trained, and that she had raised this concern previously with management.

19. The defendant responded with a letter dated 30 August 2019, which itself was a further warning letter. Again, it was under the hand of Ms. Neeley. It replied to her answers, basically dismissing them. It said that previous communications and discussions had been held on the various issues and that there was a "*clear mishandling of the audit*" by her to address the shortages, and that she had "*taken no responsibility for the turnover of agents and staff managers*". It further indicated that "*…your response to my letter has raised even further concerns regarding your leadership ability, as it is evident that you are not prepared to accept responsibility for matters that are very evident and factual*." It concluded that "*presently you are on $488.53 increase, which is the lowest in the Company and below minimum standards thereby warranting a performance memo for below standard performance*".

20. Further emails followed and a meeting was held 18 September 2019 to discuss the outstanding issues, including the situation regarding SM. It appears that the meeting was only to last one hour, as Dr. Higgs had another engagement. The following day the plaintiff followed up with an email seeking some documentation from Ms. Neeley and Dr. Higgs to address the situation relating to SM. This led to scheduling a meeting for 24 September 2019 to discuss "*any outstanding matters*". At that meeting, which was attended by Dr. Higgs and Ms. Neely, she was informed by Dr. Higgs that after discussing the matter with the President of the Company, Glen Ritchie, it appeared that she and Ms. Neely could not get along and they would therefore "*have to part ways*". She was presented with the termination letter.

21. She met with several managers of the defendant on 31 October 2019, post her termination, to discuss obtaining outstanding funds that she considered she was owed, including collection commission, PGF, first-year commissions and conservation report. These documents were left to be sent to her attorneys.

Tanya Sturrup

22. Tanya Sturrup was a Manager II, Business Development and Home Services Department ("HSD"), who was responsible for the training and implementation of the OIPA system. Her witness statement spoke mainly to conducting training in relation to the roll-out of the system and issues associated with its implementation.

23. She says that in 2018 the Company launched a year-long testing and training for the system, which was intended to go live on 1 January 2019. The OIPA platform was a software system that was intended to automate the processing of policies in the following way: premiums collected in respect of policies were inputted on tablets and the info uploaded into the OIPA system, which would then calculate and generate commissions for all agents and DMs.

24. Her team, assisted by trainers from the Oracle Company, provided "extensive training" in the HSD to ensure that all persons using the system were familiar with it. There were nine days of training during June 2018 as well as four separate days of training between 21 August 2018 and 4 July 2019 conducted in connection with the system. During the training phase, it came to light that "*the Plaintiff's district needed additional training because they did not have a grasp of the system and were performing well below standard*." She also stated that it was disappointing that "*the plaintiff did not have a grasp of the system to render assistance or lead her team in working with the system*." As a result, additional training was provided to the District on a one-on-one basis, as this was the "*only district where a special team of officers and managers had to go in to assist the staff with many issues that incurred (sic) due to lack of assistance from the manager*."

25. She related that there were some errors in the calculation of commissions caused by the launch of the OIPA system, and the use of outdated data resulted in an over-payment to the plaintiff of $2,435.41, which was deducted in February 2019. She also provided information as to the what was said to be the Premium Growth Fund ("PGF") entitlements of the plaintiff, which was said to

be $13,525.55 at the time of her termination, the bulk of which was paid during February and March of 2019 (respectively, $3,317.24 and $6,076.99), with the result that only $4,140.32 was said to be owing at the time of termination. That was also paid as part of the termination.

Dr. Kerry Higgs

26. Dr. Higgs was the Senior VP of Administration, which included responsibility for HR. She confirmed the plaintiff's request for a meeting by email on or about 24 January 2019 to update her with respect to a meeting she held with Ms. Neely. During the meeting, she was apparently told that "*the plaintiff and Mrs. Neely were able to resolve the concerns she had*". She also stated that during that meeting the plaintiff raised a concern regarding a staff member, SM, and asked for assistance in dealing with it. She indicated that she would contact SM directly to discuss the issue, had a meeting with the latter on 9 February 2019. She confirmed that as a result of that meeting, she sent an email to the plaintiff on 2 May 2019 relating to the memo which was placed on SM's file, as the latter was of the view that the memo "*was not a true reflection of her performance*".

27. That memo, which was addressed to Ms. Neeley and Ms. Bethel, in material part provided as follows:

> "We have not been able to connect to finalize the discussion on Ms. Mackey although I have been monitoring the matter throughout. I appreciate that things are very hectic and the first quarter has been challenging. I would like to aim to have everything settled hopefully this month- let me know your thoughts please. If everything is going well so far we can leave as is and ensure that the training is taking place and the communication is going well.
>
> In meeting with Ms. Mackey there was a matter that was raised yesterday regarding a memo that was placed on her file. I reviewed the memo and there was a section that would not stand up legally. I would propose that we remove the memo from her file and would like to get input in that regard. In essence, there was a section of the letter that did not apply to her specifically- I think it was a template letter however, the risk is that if there is a performance issue that arise the letter on her file will work against her which would place her at a disadvantage- she was not able to sign off on the letter as a result we have exposure there."

28. After getting no response from the plaintiff on this issue, she eventually decided to send a follow-up email dated 23 July 2019, during which she communicated that she had made a management decision to have the memo removed from SM's file, in particular having regard to the time that had expired and the plaintiff's lack of response to her earlier email on the subject.

29. She then related that in the following months (presumably May to September), the plaintiff had challenges within her district "*which she [Dr. Higgs] kept abreast of*". These included: (i) high shortages amounting to $15,007.62, which dated back to early 2019; (ii) failure to respond and provide information in a timely manner for an audit commissioned relative to the shortages in her district; and (iii) poor attitude toward staff and poor district performances. She was aware of the warning letter issued to the plaintiff, in which she said the plaintiff "*denied all of the allegations*

listed in the warning and stated plainly that she was not taking responsibility for the shortages and performance of her district".

30. She facilitated the meeting of 18 September 2019 with the plaintiff and Ms. Neeley, the purpose of which was to discuss performance issues within the Chippingham District. The plaintiff, however, hijacked the meeting agenda with a discussion about SM. This was a matter which she, Dr. Higgs, considered inconsequential compared to the issues with the District, and in any event she considered the matter closed. She related that the meeting became very confrontational and acrimonious, with the plaintiff making allegations against Ms. Neeley, being disrespectful, and even calling her a liar.

31. After that meeting, "*Senior Management did an assessment and it was evident that there was no progress*" and it was also "*evident that the mutual trust and confidence had ended*". Her statement concluded as follows:

> "47. After the disrespectful and negative attitude displayed by the plaintiff together with the strong disconnect with her immediate supervisor, highest shortages of all the districts combined with serious audit concerns, lack of ownership for district issues, poor district performances and poor performance on the new OIPA Home Service system, a decision was made to terminate the Plaintiff's services."

Ramona Neeley

32. Ramona Neely was VP of the HSD and had direct line responsibility for the plaintiff. As the plaintiff's immediate supervisor, she "*interacted with her on a regular basis*" and held monthly meetings for the plaintiff and other district managers to get updates, deal with concerns and convey management directives.

33. She confirmed the plaintiff's request to her on 19 December 2018 for a meeting after the Christmas holiday to discuss concerns she had, which was set for 2 January 2019. This was to discuss an issue relating to SM, who wanted to retain a recruit that the plaintiff wanted transferred to another staff manager, and which the plaintiff eventually did transfer.

34. She also referred to a trip in March 2019 to the Annual "GAMA" Conference, an international insurance conference which all managers were required to attend and which is intended to promote professional development. She records that during several social events at that conference, the plaintiff appeared "*withdrawn and distant*" and her body language "*was not pleasant and she seemed angry*" and that she (Ms. Neeley) was "*very displeased with her demeanour and/or behavior*".

35. During the February 2019 District Managers' Meeting, she raised an issue about an agent under the supervision of the plaintiff who experienced high shortages and indicated that the plaintiff would need to assist the Internal Audit Department ("IAD") in conducting an audit. To facilitate this process, she volunteered to sit in as acting DM of the District for two weeks to allow

the plaintiff to focus on the audit. However, the plaintiff did not fully cooperate and did not provide the documents and information necessary to facilitate the audit. That audit eventually revealed a shortage of some $15,007.62, which dated back to early 2019. This was a "red flag" and was said to indicate that the plaintiff neglected to monitor and perform the necessary audits in her district.

36. She discussed the audit findings with the plaintiff and the staff manager and agent concerned were terminated. She also indicated to the plaintiff that it would be necessary to give her a warning letter also, as the shortage amount was extraordinary. She confirms sending the performance memo dated 8 July 2019, in which she outlined that issues concerning the District and the plaintiff as manager. She also confirmed that the plaintiff responded to her letter by letter dated 24 July 2019, in which she "*denied all items/issues outlined …and did not take responsibility for the poor performance of her district, especially with regard to the lapse and shortages.*" She responded to this letter by letter dated 30 August 2019, in which she raised other items, and reiterated the issue of her mishandling of audit and the lack of readiness for the launch of the OIPA system.

37. She also indicated that the plaintiff did not fare well in her yearly "360" assessment, which is a performance appraisal method that uses anonymous, confidential feedback on an individual or group from a wide range of sources, including subordinates and peers. The data is collected electronically and compiled into a report and it revealed that the plaintiff's team made "*many comments about her which further concerned me*."

38. Ms. Neely also confirmed the meeting of 18 September, which she said was to discuss the plaintiff's unwillingness to sign the 24 July 2019 letter. She confirmed this meeting was scheduled for one hour, as Dr. Higgs had a following meeting. However, the plaintiff primarily wanted to discuss SM, claiming that she (Ms. Neely) did not support the plaintiff's approach to disciplining SM. Eventually, the focus shifted to Ms. Neely, and the plaintiff was combative and confrontational in her approach, at times calling Ms. Neely a liar. She says that after the meeting, she and Dr. Higgs assessed the situation and it was evident to her that "*mutual trust and confidence had ended between the plaintiff and her*."

39. Her evidence ended with the very same paragraph contained in the Dr. Higgs witness statement as to the reasons for the decision to terminate the plaintiff.

Analysis of Evidence

40. With respect, not very much in this case turns on the written or oral evidence of the witnesses. In fact, at the start of the trial, the parties had indicated that they were prepared to forgo cross-examination and rely on the witness statement as the evidence-in-chief. However, they resiled from this position after the direction of the Court and conducted full cross-examination of all the witnesses. But there were no significant discrepancies in the witness testimony, except for some differences as to the characterization of the plaintiff's posture at the 18 September

meeting and the meaning or effect to be ascribed to certain communications, in particular the numerous emails which passed between the parties.

41. Despite these minor differences, I did not find any of the witnesses unreliable or untruthful. I found the plaintiff to be candid and honest in her testimony and during cross-examination she readily admitted matters potentially unfavourable to her. She admitted for example, that when she had the initial meeting with Ms. Neely in early January, prior to escalating to the requested meeting with SVP Higgs, that she had not disclosed to Ms. Neely that she (the plaintiff) also had a gripe with her. She also conceded, despite not taking the blame for the shortages, that she was ultimately responsible for the managers with those shortages. Critically, when asked about the meeting of 18 September, which the defendants contended was occupied by the plaintiff resurrecting the SM issue, she conceded that "…*the entire meeting was about SM, … she [Dr. Higgs] had to leave to go to another meeting*". She denied being rude or condescending in the meeting or calling Ms. Neely a liar, but did admit that she said in that meeting that a statement made by Ms. Neely "*was untrue*".

42. I also believe that the defendant's witnesses were doing their best to assist the Court by providing reliable information, but in my opinion, their written evidence was heavily lawyered. For example, Ms. Neely gave evidence of her perception of the demeanour of the plaintiff during a conference that was held in March 2019. This was not only irrelevant to any issue raised in the claim, but it was opinion evidence that Ms. Neely was not qualified to give. It seems to me that this was clearly intended as evidence to bolster the suggestion that the plaintiff either had a negative attitude or that she was maladjusted. There could have been any number of legitimate explanations for her appearing withdrawn, and the evidence indicates that she did in fact tell Ms. Neely she was dealing with a personal issue. Further, and as mentioned, the witness statements of Dr. Higgs and Ms. Neely replicated (in the exact verbiage) the reasons for the termination (paras. 35 Neely, 47 Higgs).

43. There are two other passages in their witness statements containing remarkably similar content (para. 33 of Higgs and para. 45 of Neely). For example, both speak to what occurred after the 18 September meeting and both said that "…*it was evident that there was no progress and it was even more evident that the Plaintiff was not open to direction or willing to listen*." They both said that it was evident that mutual trust and confidence had ended. However, and notably, the Higgs witness statement said that after the meeting "*Senior Management*" did an assessment and came to the conclusion that mutual trust and confidence was eroded, while the Neely W/S said that "*Dr. Higgs and I*" did the assessment and concluded that mutual trust and confidence had ended between "*the plaintiff <u>and me</u>*". [Emphasis supplied.]

44. I digress here to note that witness statements are not pleadings and no two witness statements should contain the identical words as first-hand evidence. The witness statement is an opportunity for a witness to give his or her account in his or her own words, not for counsel to put words in the mouth of the witness to suit counsel's argument (see **Interflora Inc. v Marks & Spencer Plc** [2013] EWCA 273 (QB)). The reference to mutual trust and confidence having

ended is clearly lawyer speak, and not the account of lay witnesses, even those possessing some training in human resources and employment matters.

45. There are also other discrepancies. According to the witness statement of Ms. Neely, the purpose of the 18 September meeting was to "*discuss the plaintiff not wanting to sign the warning letter given to her on 24 July 2019*". However, according to Dr. Higgs, the meeting was to "*discuss the warning letter given to the plaintiff…and…performance issues within the Chippingham District*."

46. Fortunately, not very much turns on these discrepancies, as the events and decisions which are key to this matter are all adequately and objectively documented in the contemporaneous letters and other documents. These are the key letter of 8 July 2019 from Ms. Neely to the plaintiff; the plaintiff's reply of the 24 August 2019; the Neely rejoinder of 30 August 2019; the email from Dr. Higgs of 2 May 2019; the meetings of 18 September and 24 September; and the termination letter of 24 September.

47. In my view, the evidence and contemporaneous documents indicate that the plaintiff's district was experiencing some challenges during early 2019. This included the issue with adjusting to the OIPA roll-out, the issue with the shortages, and some challenges regarding disciplining of her subordinate employees with senior managers. Whether or not all of the issues could be properly laid at her feet is a matter that will be discussed below. I will also discuss further down in this Ruling the issue of whether the defendant acted reasonably in treating those reasons (to the extent they constituted the reasons) as sufficient for her dismissal for the purposes of unfair dismissal, or whether they constituted justified grounds for her dismissal for wrongful dismissal.

DISCUSSION AND ANALYSIS

48. According to the plaintiff's synopsis, the issues for determination are as follows:

(i) What are the terms and conditions of the plaintiff's contract of employment;
(ii) Was the plaintiff's contract of employment wrongfully terminated? Was the notice sufficient?
(iii) On the substantial merits of the case, was the plaintiff's contract of employment unfairly terminated?
(iv) What is the effect of sections 34, 35, 47 and 47 of the Employment Act?
(v) Was the plaintiff denied the opportunity of being heard before termination?
(vi) If the plaintiff's contract of employment was wrongfully and unfairly terminated what is the quantum of damages.

49. The defendant identified the following issues:

(i) Was the defendant entitled to terminate the plaintiff's contract?
(ii) Did the defendant unfairly or wrongfully terminate the plaintiff?

a. Are the terms of the contract contrary to the minimum standard as set out by the Employment Act?
b. Were both parties at liberty to sever the contractual agreement?
c. Was the plaintiff given an opportunity to respond to the issues regarding her performance?
d. Was the plaintiff terminated pursuant to the terms of her contract?
e. Is the termination clause in the District Manager's contract a mutually exclusive clause?

(iii) Did the defendant pay to the plaintiff at the time of termination what she was entitled to?

(iv) Is the plaintiff entitled to damages, statutory or otherwise?

50. In my view, the main issues raised by this claim along with sub-issues may be distilled as follows:

Issue 1: Was the plaintiff unfairly dismissed?

(a) What were the reasons for the plaintiff's termination and was she provided with any reasons at the time of termination?

(b) Did the defendant follow a fair procedure in dismissing the plaintiff and in particular was she given a reasonable opportunity to be heard/respond to the issues raised in the warning letters?

Issue 2: Was the plaintiff wrongfully dismissed?

(a) Whether the terms of the plaintiff's employment contract provided for summary termination?

(b) Whether the plaintiff was terminated pursuant to the terms of her contract or whether they were breached?

The Law

51. The law relating to unfair and wrongful dismissal has been comprehensively set out in a number of cases from the Privy Council, Court of Appeal ("CA") and the Supreme Court, including a number of cases from this Court, and does not need to be rehashed in any great detail here. See in this regard, **Ervin Dean v Bahamas Power and Light** [2024] UKPC 20, **Omar Ferguson v Bahamasair Holdings Ltd. (SCCivApp No. 16 of 2016**, and **Elrene Jones v AI Services Ltd. (2020/COM/lab/00012)**. I only propose to review several of the leading principles.

General principles

52. Firstly, it is important to remember that there are fundamental differences between the two remedies (see **Ervin Dean v Bahamas Power and Light** [at 41], **Lloyd McQueen v Airport Authority** (2017CLE/gen/00123), **Elrene Jones v AI Services Ltd.**). For one, unfair dismissal

is purely a statutory remedy created by Parliament under the Employment Act ("the Act" or "EA"), and the remedies are also limited by the Act, which prescribes ceilings for any compensation for unfair dismissal.

53. As a further matter, unfair dismissal is concerned either with the deemed categories of unfair dismissal under the Act or any unfairness going to the process in effecting a dismissal, not the outcome. Thus, an unfair dismissal may not be wrongful and a wrongful dismissal may not be unfair. On the other hand, wrongful dismissal is mainly a breach of contract, which may be a term of the individual employment contract or breach of the minimum notice terms in the Act under s. 29.

54. In **Omar Ferguson**, the CA held that unfair dismissal claims could be pursued either in the Industrial Tribunal, through the trade dispute procedure of the Industrial Relations Act, Ch. 321, or alongside claims for wrongful dismissal in the Supreme Court. As I observed in **Elrene Jones**, this has led to the conjoined (and often conflated) pleading of unfair/unlawful dismissal in virtually every employment claim made in the Supreme Court.

Unfair dismissal

55. Sections 34 and 35 of the Act provides 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."

56. Sections 36 to 40 of the EA set out specific situations that are deemed instances of unfair dismissal. These are dismissals 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, as recognized by the Court of Appeal ("CA") in the **Omar Ferguson** case. There, the CA observed, *inter alia*, that the effect of s. 34 is to create an implied term in every employment contract that an employer's power of dismissal will be "*exercised fairly and in good faith*", and that at the minimum, the employer's duty under s. 34 required adherence to the tenets of natural justice, in particular the *audi alteram partem* rule.

57. 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*."

58. 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.

59. 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."

60. 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

61. Wrongful dismissal occurs where there is a substantive breach of the individual contract of employment 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 Act 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 a breach of the minimum notice periods provided for in the Act. The statutory test in respect of such a dismissal is set out at s. 31 of the Act (see below under Summary Dismissal).

62. 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."

63. 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

64. 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."

65. 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."

66. 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."

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

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

68. As mentioned, and explained above, an employee may claim "wrongful" dismissal either at common law or pursuant to a breach of the minimum standards under the Act (see **Eloise Shantel Curtis-Rolle v. Doctor's Hospital (Bahamas) Ltd**. (SCCivApp No. 149 of 2012) at paragraph 4, per Adderley JA, referring to the Privy Council's decision in **Jervis v Skinner** [2001] UKPC 2. Which of those claims is being asserted and accordingly which test is to be applied depends on how the case is pleaded (**Garvey v. Cable Beach Resorts Limited (d/b/a Sheraton Nassau Beach Resort**) [2014] 3 BHS J, No. 36, Evans J.

UNFAIR DISMISSAL

69. The plaintiff's arguments on unfair and wrongful dismissal are unfortunately somewhat conflated. But as far as I can discern, the unfair dismissal seems to be grounded on two claims: (i) the failure to provide any reasons or any substantive reason at the point of termination; and (ii) the failure to allow the plaintiff a reasonable opportunity to respond.

Reasons for termination

70. The plaintiff argued, firstly, that there is no dispute that no formal reasons were given for the plaintiff's termination. None of the reasons given in the defendants' witness statements or provided in the pleadings were included in the letter of termination. In any event, such reasons as were given were divergent and (my words) all over the place. For example, the reasons parroted in the witness statements of Dr. Higgs and Ms. Neely were as follows: (i) disrespectful and negative attitude displayed by the plaintiff together with the strong discontent with her immediate supervisor; (ii) highest shortage of all districts combined with serious audit concerns;

(iii) lack of ownership for district issues; (iv) poor district performance and poor performance on the OIPA system.

71. The plaintiff contended that the waters were further muddied as follows. The witness statement of Dr. Higgs added that the plaintiff was terminated in accordance with the standards set out in the Employment Act, and the plaintiff was paid the requisite notice and severance pay according to that Act. However, in its amended Defence, the defendant pleaded that the plaintiff was terminated pursuant to Section 6 of her District Manager's Agreement, i.e., apparently for breach of the terms of her contract. In addition, the NIB lay-off/leaving certificate, had engrossed on it as reasons for termination "*loss of confidence*".

72. In addition, in its skeleton argument, the defendant contended that they moved ahead with the termination of the plaintiff having regard to the plaintiff's poor performance issues, breaches of contract, lack of response to the issues and breaches and poor behavior. In her witness statement, and oral evidence, the plaintiff said that at the beginning of the 24 September meeting, Dr. Higgs told her that, after discussing the meeting with the President, Glen Ritchie, it appeared that she and Ms. Neely could not get along. As they needed a harmonious relationship, they would have to "part ways" and terminate her.

73. Counsel for the plaintiff summed up the ambiguity with respect to the reasons in his written submissions by saying that the defendants seemed to have "…*a problem deciding what reason"* the plaintiff was terminated for.

74. Furthermore, such reasons as were given, were clearly supplied after termination. The plaintiff contends that it is not open to the defendant to decide after termination a reasons for termination where "unfair" dismissal has been pleaded. It was further submitted that the reasons for termination should be stated clearly in the letter of termination, and that to provide reasons after the event was in and of itself grounds for unfair dismissal, when analyzed against s. 35 of the EA.

Failure to be heard

75. The plaintiff submits that she was not given an opportunity to be heard in respect of the allegations against her. Even though the defendant's case is that these matters were brought to the plaintiff's attention before she received the warning letter, the plaintiff contends that there had been no previous discussions of these matters and she was not given the opportunity to respond and be heard. She had responded to the 8 July 2019 letter, but her explanations had been cursorily dismissed by the defendant and she was not allowed an opportunity at the meeting of 18 September to address the points she had raised or the other issues.

76. The plaintiff argues further that, even though the defendant attempts to make it appear as if the plaintiff either hijacked the meeting agenda with the SM issue, or wasted valuable time dealing with this issue, in fact it was one of the legitimate agenda issues. That this issue was

validly up for discussion was said to have been confirmed by Dr. Higgs in her email of 23 July in response to the plaintiff's email raising the issue of SM, when she indicated "*let's aim to close these matters out this week*". Further, by email of 12 September 2019, Ms. Neely sent to the plaintiff the 30 August letter (warning letter No. 2), which she said had been "*prepared some time back*" but which had not been sent out because of vacation and issues relating to the recent hurricane (Dorian). But she noted the communication regarding Ms. Mackey and proposed a meeting for the following week (18th) to "*discuss any outstanding matters*".

77. Further, the plaintiff says the evidence is uncontroverted that there was no meeting on the 24 September. In fact, it was a sham. She therefore did not have a proper opportunity to respond to the serious issues and allegations that were raised.

78. The defendant argues that the plaintiff was not unfairly dismissed. They point out (correctly I might add) by reference to the case of **Bahamasair Holdings Ltd. v Omar Ferguson**, that while the law entitles a person to a fair process, it does not entitle them to a favourable outcome. They further contend that there were various issues with the plaintiff's attitude and poor performance leading up to the termination. It was further submitted that the meeting of 16 September provided a second opportunity for the plaintiff to be heard. The defendant submitted that the plaintiff, despite "*understanding the seriousness of the warnings, persisted in discussing a non-priority matter unrelated to the critical issues involving the plaintiff's district and specifically dealing with Shakera Mackey*."

79. They contend further that on the day of termination, the defendant held one last meeting with the plaintiff, and in that meeting the defendant "*explained the reasons for the termination and subsequently presented the termination letter*", hence the reason why the letter begins "*Further to our discussion*". The defendant submits therefore that the plaintiff "*at all times knew the reasons for the termination and again had an opportunity to discuss the reasons with the Defendant*."

Court's discussion and conclusion

80. As discussed above, apart from the known statutory categories, unfair dismissal is an open-textured concept, and in each case the court/tribunal is required to assess whether the employer acted reasonably in effecting the dismissal of the employee against the backdrop of all the known circumstances at the time of dismissal (i.e., in accordance with the substantial merits of the case).

81. The plaintiff's claim, and the arguments of counsel for the plaintiff on the failure to provide the reason or reasons for the dismissal in the termination letter, bring into sharp relief a lacunae in the statutory position regarding unfair dismissal in the Bahamas. That is, unlike the position in the UK, there is no statutory duty on the employer under the EA to provide reasons. As I had cause to note in **Lloyd McQueen**, while the unfair dismissal scheme is obviously patterned on the UK legislation, the EA is minimalistic in its approach and omitted many provisions that are fundamental to the working of the statutory scheme for unfair dismissal in the UK context.

82. For example, under the UK Employment Rights Act 1996 ("ERA 1996") (and under predecessor legislation such as the Trade Union and Labour Relations Act 1974 and The Industrial Relations Act 1971), the statutory duty is/was cast on the employer to first show the reason for the dismissal (or the principal reason if there was more than one) and that the reason comes/came within one of the specified statutory categories of potentially fair reasons (stage one of the test). It is only *after* the employer has demonstrated that that his reasons are potentially fair within the statute, that the tribunal goes on to determine whether the dismissal is fair or unfair "…(*having regard to the reason shown by the employer*")…*in accordance with equity and the substantial merits of the case*" (s. 98 of ERA), which was the second stage. Furthermore, the ERA specifically provides that: "*An employee is to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal"* (s. 92).

83. The position was explained by Lord Justice Griffiths in **Gilham and ors v Kent County Council** (No. 2) 1985 ICR 233 as follows:

> "The hurdle over which the employer has to jump at this stage [stage one] of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees from some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the facts of it the reason could justify the dismissal, then it passes as a substantial reason and the inquiry moves on to [s.98(4)], and the question of reasonableness."

The Bahamian legislation adopted the second stage of the test, but not the first stage or condition-precedent for applying the second stage.

84. Thus, it is clear that in Bahamian law (at least in private law) an employee can be dismissed at any time once the appropriate notice and severance pay are paid, either in accordance with the contract or the statute. As said by the Privy Council in **Ervin Dean v Bahamas Power & Light** (*supra*) "…*at common law, unless otherwise agreed, an employer can terminate an employee's contract by notice for a good reason, a bad reason, or no reason at all*…" [at 42]. Their Lordships accepted, however, that "*the fact that an employee may be dismissed without cause does not, however, cut across the right not to be unfairly dismissed: see sections 34 to 48 of the EA 2001"* [at 42].

85. In my judgment, the adequacy of the reasons given for the dismissal and the circumstances in which the dismissal was effected are important considerations for the purpose of resolving an unfair dismissal claim. For example, how can the employee properly be heard before being dismissed (allegedly for cause) if he or she does not know the reason, or the main reasons, why he or she is being dismissed? It is clear that the Courts of the Bahamas have accepted that the reason for dismissal is an important part of the equation. As the quote set out above from **Omar Ferguson** states:

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

86. The defendant contends that, notwithstanding the lack of a stated reason in the letter of termination, the plaintiff at all times knew the reasons for the termination and had an opportunity to address them with the defendant. With respect, I am unable to accept this.

87. For one, while it is correct that the defendant raised various issues in the warning letters related to management performance and personal issues, in all fairness these could not automatically translate into reasons for her termination. None of the letters indicate that her termination was being contemplated. To be fair to the defendant, it was stated in the 8 July letter that "*continued performance challenges will result in further disciplinary action, including reassignment of duties or termination of service*". But that letter ending by saying that "*you have my continued support in addressing these issues and re-establishing higher standards in your district*" and indeed requested an action plan to address the issues.

88. The 30 August letter encouraged the plaintiff to "*seek and accept opportunities to assist you in addressing your challenges as this will position you to grow and succeed*" and "*…to focus forward and to expend your energies achieving results*." Further, the plaintiff said in oral testimony that after the 18 September meeting, she requested and was promised a further meeting to discuss the outstanding issues. That was not denied by the defendant. We now know that the meeting was only to dismiss her, as the decision had been taken from 18 September.

89. According to the evidence of the plaintiff, the 24 September meeting commenced at 10:00 a.m. and she signed for the letter at 10:06 a.m. The letter was clearly prepared in advance, and the "*further to our discussion*" rider could not logically have been a reference to any discussion immediately preceding its issuance. Strikingly, the defendant's witnesses do not even mention the 24 September meeting in their witness statements. They only referred to it in live evidence when it was raised in cross-examination and in response to questions asked by the Court. During cross-examination, Ms. Neely advanced a plethora of issues that were said to be the reasons for the plaintiff's termination, but conceded that none of these was in the letter. As to the reasons given to the plaintiff before termination, her answer was simply that "*we spoke*".

90. Moreover, even if she is taken to have had knowledge of the reasons, they were far-ranging and diverse, and it would have been difficult to know what was the principal reason or reasons. For example, the initial warning letter pointed out issues with shortages, the audit, OIPA, and staff turnover. The 30 August letter reiterated several of these issues and added that her response to the first warning letter had "*raised even further concerns regarding your leadership ability as it is evident that you are not prepared to accept responsibility for matters that are very evident and factual*". It also referenced the fact that she was on a "*$488.56 increase which is the lowest in the Company and below minimum standards thereby warranting a performance memo for below standard performance*."

91. In cross examination, when pressed as to whether the plaintiff was terminated for the issues raised in the warning letters or pursuant to paragraph 6 of the plaintiff's contract (which provided for several different methods of termination) Ms. Neely's answer was:

> "…Paragraph 6, along with the fact that the plaintiff was not open to my direction or my advice and was not willing to listen. It was also evident that the mutual trust and confidence had ended between the plaintiff and me."

In her written and oral evidence, the plaintiff stated that she was told at the meeting that she would have to "part ways" with the defendant company because she could not get along with Ms. Neely. The defendants did not contradict this.

92. In my judgment, it is rather clear that the panoply of reasons provided for the plaintiff's termination were supplied *ex post facto*. I am precluded from finding that the failure to provide reasons is an automatic case of unfair dismissal, because there is no statutory duty to provide reasons. But the failure to provide reasons is important to the procedural question of fairness in the claim for unfair dismissal. It is difficult, if not impossible, to gauge the reasonableness of the employer's response to the employee's conduct or the reason for dismissal if the Court and the plaintiff himself or herself are left guessing as to the reason or real reason for the dismissal.

93. I will return to this issue below, but the evidence of the defendant did not leave me satisfied on a balance of probabilities as to whether the plaintiff was dismissed for failure to attain performance goals (none were ever clearly identified), alleged management failings (these were explained and contextualized by the plaintiff), breach of her employment contract (the specific breach was never identified or substantiated), or because of the contretemps with her immediate supervisor over SM (which the plaintiff suspects was the true cause). In skeleton argument, counsel for the plaintiff stated:

> "…[W]e submit that the central issue was that relationship that Mrs. Mackey had with the Defendants and the refusal of the Plaintiff in 2019, after being advised to do so by Dr. Higgs ….to rescind a warning memo issued is 2017 which was signed by [SM]…".

94. I accept that the failure to provide reasons, while not an automatic indication of unfair dismissal, translates into an unfair process as the plaintiff was not allowed an opportunity to be heard on the issues for which she was allegedly being terminated. In fact, the tenor of the 30 August letter does not suggest that the defendants were even open or interested in discussing the issues—it remonstrated that the plaintiff did not accept responsibility for matters that were "*evident and factual*". Further, it is to be noted that the defendant decided the plaintiff's fate after the 18 September meeting, so it cannot be pretended that the 24 September meeting was a further opportunity to be heard. At paragraph 8 of its amended defence, the defendant avers that the plaintiff was "*progressively disciplined*" which allowed termination to take place, but there is no evidence adduced to support that claim.

95. I therefore find that the combined factors of failing to provide reasons and the resultant failure to provide a proper procedure for the respondent to be heard before her dismissal, when considered on the substantial merits of the case, amount to an unfair dismissal under the terms of the EA.

WRONGFUL DISMISSAL

96. As far as I can discern, the plaintiff argues three bases for asserting a claim for wrongful dismissal:

(i) that the notice pay was insufficient at common law for an employee with the plaintiff's years and position in the company;
(ii) that the plaintiff was summarily dismissed without any cause being established; and
(iii) that in any event, the plaintiff's contract does not contain a PILON clause and therefore does not permit summary dismissal.

(i) Notice period

97. The plaintiff pleaded at several paragraphs of her SOC that the notice and severance pay of 52 weeks was in breach of her contract and the EA (paras. 19, 21) and insufficient notice pay for an employee in the position of the plaintiff who had worked for the defendant for 22 years. In this regard, she relied on the CA case of **Paula Deveaux v Bank of the Bahamas** (No. 19 of 2006), where the Court confirmed that:

> "The employee, if of the view that he would not be adequately compensated under statute, could pursue his greater rights for larger benefits at common law if he is so minded."

See also, section 4 of the EA, which preserves the ability of the employer and employee to agree more favourable terms. In other words, the statutory provisions are the floor, not the ceiling. She submits further that her claim is made according to common law.

98. In this regard, the plaintiff relies on a number of local and Commonwealth cases for the factors the Court must have regard to in determining what is a reasonable notice period where the notice period has not been established by the contract: **Bardal v Globe & Mail Ltd.**, 24 D.L.R. (29) 140; **William C. Paley v. Gary Knowles** (SCCiv App. No. 21 of 2008, CAIS No. 51 of 2008). These include: the age of the employee; length of service of the employee, responsibilities of the employee; experience status; training; qualifications of the employee; chances of alternative employment; and health of the employee.

99. Based on these factors, the plaintiff claims 24 months would have been a reasonable notice period, and claims salary as well as group medical insurance, group life insurance, and monthly pension for that period.

(ii) Dismissal without cause

100. The plaintiff's basic argument is that she was summarily terminated and that the defendant did not establish cause for any of the potential reasons it advanced for terminating her.

New software system

101. For example, with respect to the OIPA system, the plaintiff submitted that it was recognized that the plaintiff had the district which was by far the largest in the company, and that this training (by the defendant's own admission) did not start until June 2018. This, she says, was insufficient lead-up for a system that was intended to go live in January 2019. Plus, there were numerous emails from persons within her district and other districts flagging-up numerous faults with the system and the associated NewGen tablets, some of which persisted nearly up to the time of her termination.

Staffing issues and turnover

102. As to the staffing issues, the plaintiff contended that the defendant submitted no evidence to show that the plaintiff was in any way responsible for what was said to be the high staff turnover in her district. Firstly, it was pointed out that the plaintiff did not have the ability to hire or fire (without approval) and therefore all of her staff managers and agents were hired by Ms. Neely or other executive managers. The plaintiff further contended that the evidence in the agreed bundle showed that all of the persons recommended for termination by her was as a result of their breaches or unethical behavior. Further, no evidence was presented at trial to confirm the alleged poor attitude to staff. The "360" evaluation represented agents' perception of the management team as a whole, consisting of her and her staff managers, so it was not a simple evaluative assessment of her.

103. Further, while the defendants made heavy weather of the matter relating to SM, whom they described as "*the elephant in the room*", and intimated that she was unduly preoccupied with issues concerning her, the plaintiff contended that the true effect of this was that Ms. Neely and Dr. Higgs usurped her authority to discipline and manage the very staff that she was accused of failing to lead.

The shortage and audit issues

104. As to the shortages, several points were made. Firstly, it was submitted, that the issue of high shortages revolved around two agents, the largest of which was the $15,007.62 by a Ms. Kelly, which the plaintiff subsequently uncovered, after an audit by Ms. Kelly and her staff manager, a Ms. Milford, failed to uncover any irregularities. Secondly, it was submitted that due to challenges with the OIPA system, the plaintiff had to do the process manually, checking clients against policy numbers to resolve the issues. Furthermore, both Ms. Kelly and Ms. Milford were

provided with termination letters from her (which were approved) as soon as the shortages were verified.

105. As to the audit issues, the plaintiff submitted that no conclusive evidence was presented to show that she did not cooperate with the audit department. In fact, the evidence (at Tab 45 of the agreed bundle) shows that she had, although there were logistical challenges obtaining some books from the agents implicated. Next, and importantly, she submitted that pursuant to the company's procedures, the audit function is primarily the responsibility of the staff managers, who are required to submit weekly reports and audit agents twice per year. There are only a few limited instances when the DM becomes involved in the audits, and this is where an agent resigns or is terminated, where a staff manager is working a debit for an extended period of over three months, and when a shortage is discovered by the staff or DM for an agent who is no longer with the company.

Further Performance issues

106. As to the performance issues, which were said to encompass the matter mentioned above, it was submitted that there was no evaluation or performance appraisal of the plaintiff conducted by Ms. Neely since she became the plaintiff's supervisor in 2016. Additionally, it was pointed out that where an employer relies on failure to meet certain performance standards as the cause for summary termination, it must first communicate the standards which are to be achieved to the plaintiff. The plaintiff cited **Boulet v Federated Co-Operatives Limited** [2001] 157 Man. R., where Macauly J. said:

> "The employer must establish the level of job performance required, that the standard was communicated to the employee, suitable instructions and or supervision was given to the employee to meet the standard, the employee was incapable of meeting the standards and that the employee was warned that failure to meet the standard would result in dismissal."

The plaintiff contends that none of these requirements were met in her case, and neither was she specifically warned that her job was in jeopardy.

Breach of contract

107. As to the alleged breach of contract, the defendant contended simply that the plaintiff was terminated pursuant to section 6 of the DM's contract. They never specified which provision was being relied on, as 6.1 provides three different ways in which the Agreement can be terminated, as follows:

> "6.1 This Agreement can be terminated:
>
> I. By either party by giving to the other one (1) months' notice in writing to be delivered in person, sent by electronic mail or mailed to the last known address. At the expiration of such notice, this Agreement shall terminate but without any prejudice to any rights and

liabilities of either party acquired or incurred in relation to any matter or thing done or omitted prior to such termination.

II. At any time by the Company upon the Manager committing a breach of this Agreement, which the Company in its sole discretion deems serious.

III. By failure to consistently meet the minimum standards in the absence of extenuating circumstances. The continuance of this Agreement will require that the manager maintains minimum standards of performance which are determined by the Company to meets its objectives in production, increase, persistency, conservation and collections. Such standards are established at the beginning of each New Year and may vary each year."

108. The defendant also referred to the plaintiff's DM contract, under which the plaintiff agreed to be "responsible and accountable for" a number of matters, with the implication that these were breached:

"i. The administration and supervision of all sales, conservation, collections and service by the agents in her district;
ii. To build and maintain an effective District by providing it with adequate personnel and training, developing and supervising such personnel in order to carry out the objectives established by the company.
iii. To assist the Assistant Vice-President—Home Services Sales in planning desired standards of sales, service and collections performance which leads to the desired profit objectives and to promote harmonious relations between the Field and Corporate Office.
iv. To attain through his/her staff, the mutually established business objectives in production, increase, persistency, conservation and collections [of premiums]
v. To ensure that all funds [including premiums] collected by the district personnel are remitted, banked and correctly recorded in accordance with the Company's accounting procedures.
vi. The administration and supervision of all sales agents, conservation, collections and service by the agent in his/her district.
vii. To attain through his/her staff the mutually established business objectives in production, increase persistency, conservation and collections.
viii. To ensure that all funds collected by the district personnel are remitted, banked and correctly recorded in accordance with the Defendant's accounting procedures."

109. Additionally, the defendant set out a laundry list (some 14 heads) of what it said were breaches of contract in that the plaintiff "failed":

a. to administer and supervise all sales, conservation and collections of premiums and service by the agents in her district;
b. to build and maintain an effective district in order to carry out the objectives of the Defendant;
c. to attain and maintain objectives in production, increase, persistency, conservation and collection of premiums;
d. to demonstrate leadership qualities standards when dealing with issues in the district;

e. to take the advice of the leadership team and not acting in concert with the advice given;
f. to ensure the Defendant's funds were collected in accordance with the procedures;
g. to follow shortage and audit policies and procedures, especially with respect to the agents under her charge;
h. to acknowledge performance shortcomings and deficiencies;
i. to adequately identify and address any deficiencies in the district especially with respect to operations and staff;
j. to adequately resolve issues affecting the district;
k. to ensure, track and address shortages within the district;
l. to adequately and sufficiently deal with her subordinate staff;
m. to seek adequate training and support for herself and subordinate staff for software relative to the district;
n. to be a team player in the district.

110. The plaintiff contends that these breaches were not substantiated and were *ex post facto* rationalizations for the plaintiff's termination. In addition to the arguments directed to the performance issues, she discredits, by way of example, many of the alleged breaches of the duties and responsibilities under the contract. For example, with respect to the duty to provide and train adequate personnel, she actually had no ability to hire any staff, and therefore had to work with whomever management hired. The collection of funds was also something which is done by the agents, under the supervision of their staff managers, which funds were turned over directly to the accounting and front office. In terms of administration and supervision of staff, she had a "*perfect record*" of terminating or (more accurately) recommending the termination of employees for poor performance and those were found guilty of shortages during her tenure as DM from 2012-2019.

(iii) Breach of PILON Clause

111. The plaintiff contends that the defendant further breached the contract by failing to provide the one month's notice required at para. 6.1 (I) for termination of the agreement, as the agreement does not contain a clause for PILON, and none of the alleged breaches to justify summary termination was established.

112. Although I was not addressed in any detail on the law on this point, the position was stated in **Delaney v Staples (trading as De Montfort Recruitment)**]1992] 1 AC 687 as follows [at pg. 693]:

> "The phrase 'payment in lieu of notice' is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories.
>
> (1) An employer gives proper notice of his termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called 'garden leave') there is no breach of contract by the employer. The employment continues until the expiry of the notice; the lump sum payment is simply advance payment of wages.

(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case, if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not payment of wages in the ordinary sense since it is not a payment for work to be done under the contract.

(3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is nor remuneration for work done during the continuance of the employment.

(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended not further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."

113. In the instant case, the plaintiff's contract provided for termination without cause under 6.1 (I), which comes within the first of the **Delaney v Staples** categories, but she was dismissed under the fourth category and, therefore, it is contended that the employer breached the contract.

Court's discussion and conclusions

Notice period

114. As mentioned, s. 29 only sets the "minimum period of notice" (and hence PILON and severance) to be paid by an employer to terminate an employment contract. If the contract specifically provides for a longer period of notice and better severance, the claimant is free to make a claim at common law or under the contract. Section 29 (c) provides that where the employee holds a supervisory or management position (there is no dispute that this is where the plaintiff falls), the notice is:

"(i) one month's notice or one month's basic pay in lieu of notice; and
(ii) one month's basic pay (or partly thereof on a pro rata basis) for each year up to forty-eight weeks.

115. The plaintiff was paid for 52 weeks (or one year's notice), which accords with the statutory minimum for a supervisor. I am therefore not of the opinion that the defendant failed to provide proper notice and severance pay in accordance with the EA.

116. With respect to the claim for insufficient notice at common law, I am constrained to dismiss that claim for two reasons, one procedural and other substantive. Notwithstanding that the plaintiff cited the factors which the court should take into consideration in deciding what reasonable notice at common law, no evidence was led as to any of those factors. Other than pleading the plaintiff's years of employment and position, nothing was put into evidence or submitted about the other personal or professional characteristics of the plaintiff, such as qualifications, chances of alternative employment, health, age, etc., to justify how the claim of 24 months was calculated.

117. In **Bahamas Power and Light Co. Ltd. v Ervin Dean** (SCCiv.App No. 115 of 2021), the Court of Appeal substituted a period of 18 months' notice for the period of 74 months which had been awarded by the judge in the case of a senior manager who had been employed with the defendant for 30 years at the time of his dismissal. This was upheld by the Privy Council on appeal. Even though the notice period at common law is determined based on the factors outlined, using the 30 years = 18 months' notice yardstick, 22 years works out exactly to 12 months.

118. In the circumstances, I conclude that the statutory notice period paid for a supervisor/manager was reasonable notice and severance, even if the common law standards were applied.

Wrongful Dismissal (Dismissal without cause

119. The defendant's case, as pleaded in its amended defence and as argued in closing submissions, is that the plaintiff was terminated pursuant to the terms of her contract, in other words, it was relying on dismissal at common law. I therefore remind myself, as discussed above, that they had to satisfy the Court that there was conduct that would so "*undermine the trust and confidence which is inherent in the particular contract of employment*" that the employer should no longer be required to retain the employee. I also reiterate the principles mentioned above that since summary dismissal is a strong measure, the employer should provide persuasive and cogent evidence of "just cause", notwithstanding that the burden of proof remains the civil balance of probabilities.

120. In my view, the defendant has not satisfied the Court that there was just cause to justify summary dismissal. The contract only provided for termination in three circumstances: (i) by one month's notice for no cause; (ii) at any time as a result of a breach of the Agreement which the company deems "serious"; and (iii) by failure to "consistently" meet the minimum standards, which are identified at the beginning of each year. As indicated, the defendant failed to specify under which of these limbs the plaintiff was terminated.

121. The plaintiff was not terminated with one month's notice, so it cannot be that ground. It is unlikely to be ground (iii), as that only applied where the plaintiff "*consistently*" failed to meet the minimum standards as determined at the beginning of each year, and then only where there were no extenuating circumstances. In the defendant's written skeleton argument, Cl. 6.1 (III) was reproduced by the defendant as "*By failure to meet the minimum standards*…", with the "*consistently*" omitted, which was likely a mistake, but a telling one. As has been noted, the plaintiff did not adduce any evidence of what those "minimum standards" were, and what had occurred could hardly be described as consistent failure. At best, the issues were said to have occurred during the first two quarters of 2019, and she was terminated by September. Further, it cannot be said that there were no extenuating circumstances, as the defendant's witnesses conceded that the OIPA system, as well as other issues, had caused some challenges during the year.

122. So, the plaintiff could only have been terminated for committing a "serious" breach of the Agreement. Notwithstanding that the contract provides for the defendant to determine what constitutes a serious breach in its "sole discretion", this does not permit them to willy-nilly choose what is a serious breach (see **Adesokan v Sainsbury Supermarkets Ltd.** [2017] EWCA Civ 22, where the UK CA said the question is whether the negligent dereliction of duty was so "*grave and weighty*" as to amount to a justification for summary dismissal).

123. As discussed, the defendant already has an uphill battle in satisfying the court that the defendant committed a serious breach of the Agreement, as it never specified what the reasons were for the termination in the first place. In the first warning letter, the only Cl. of the contract which was identified was the following:

> "V. To ensure that all funds collected by the District Personnel are remitted, banked and correctly recorded in accordance with the Company's accounting procedures."

No clause of the Agreement was referred to in the second warning letter.

124. The plaintiff has already put forth reasons why, notwithstanding the shortages found mainly in respect of a single agent ($15,007.62 of the $15. 698.43 shortage) it could not be said that she failed to follow company procedure in this regard, such as to amount to a "serious" breach. The plaintiff referred to the Audit Report conducted by IAD on a debit known as Debit 315 in the plaintiff's district, where the audit team made 10 findings and related recommendations in respect of the shortages, only two of which related to district managers. The bulk of the recommendations related to staff managers.

125. For example, the recommendations from the Audit finding in respect of a shortage of $1,531.73 attributed to an agent, KA, were as follows:

> **Recommendations**

> -Staff managers should ensure that field audits are performed for at least one agent per month. If it is not feasible, spot checks should be at a minimum performed on a bi-weekly basis.
>
> -Staff managers should also be cautious when working debits in the absence of an agent, ensuring that funds are accurately applied when collected.

126. In fact, the Audit report was only parroting the guidance given in the company's policy for Agent Audits, which was produced in the agreed bundle. That provided comprehensive guidance to staff managers in respect of auditing agents. It set out nine steps for a staff manager to take with respect to audit, which included that the staff manager was to "*oversee the activity of the debit when the agent is collecting premiums*". It also required the staff managers to complete one audit on his/her staff each month.

127. Further, notwithstanding the attempts of the defendants to downplay the OIPA issues, it is clear that it also factored into the equation, as this note in the Audit report indicates:

> "Due to the transition to the OIPA system, the Collection Summary obtained for debit 315 has not been updated since the week of 12/17/2018. This being the case, IA deemed it necessary to omit the YTD Collection Rating for this report as the summary would not be a true reflection of the debit's current collections."

It was clear, as the plaintiff contended all along, that some of the issues with respect to the shortage and audit were being hampered by the transition to the OIPA platform, and in the circumstances the defendant could not fairly attribute to the plaintiff and her entire district a lack of ability or capacity to absorb the training.

128. To be sure, the plaintiff had overall management responsibility, but it appears she was being unfairly singled out for these breaches when she had no control over the quality of the staff managers hired, and her efforts to attempt to discipline at least one of them was being thwarted by the very senior managers who wanted her to be accountable for them. In fact, in respect of the agent and staff manager who had the lion's share of the shortages, there were several warnings and letters on file from the plaintiff as to their performance.

129. Before leaving this point, I should also mention that the Audit Report was in the "unagreed bundle", which was referred to and which I indicated to the parties that I would consider *de bene esse*. I reiterate what I said in **Elrene Jones** with respect to a party (often the employer defendant), failing to agree documents, sometimes their own documents, which are otherwise relevant and admissible. There can be no good reason for objecting to such documents, other than to attempt to achieve a leg-up—and I will call it what it is—by suppressing evidence that may be helpful to the other side. This kind of behavior is not to be tolerated in modern litigation, and should not deter a court from having regard to such documents.

130. As to the other suggested grounds, I favour the plaintiff's submissions and explanation. For example, the issues with training for OIPA could not reasonably be laid at the plaintiff's feet.

No evidence was presented to the Court to show that any of the other districts fared better in implementing the programme. The glitches were system-wide, as illustrated by the complaints submitted and the documentary and witness evidence of the defendant. Further, Chippingham was after all the largest district, and it should have come as no surprise that extra or additional training would have been required. As to staff turnover, no evidence was presented to show that the Chippingham District suffered a higher rate of turnovers than any other district, on a per capita basis, let alone that any of the staff departures was directly due to the plaintiff's actions. There were objective and documented reasons for their departure. Finally, an electronically compiled or generated assessment by subordinates is only a management tool, and could hardly be an official evaluative assessment of the performance of the plaintiff. The additional list of 14 breaches, which were obviously conjured up post the plaintiff's termination, also does not assist the defendant. This blunderbuss approach only further muddies the water as to the real reason for the plaintiff's termination.

131. On a balance of probabilities, having regard to the evidence and the submissions, I find that the defendant has not met its burden to satisfy me that it had grounds which were so "*grave and weighty*" as to amount to a justification for summary dismissal. Putting words in the mouths of witnesses to say that that trust and confidence had been lost cannot circumvent that requirement. I therefore find that the plaintiff's summary dismissal was wrongful.

DAMAGES

Unfair dismissal

132. I have found that the plaintiff was unfairly dismissed, and she is therefore entitled to a basic award calculated in accordance with s. 46 of the Act and a compensatory award calculated in accordance with s. 47.

133. The plaintiff claims a basic award of $184,239.20, which is said to be based on 20 months @ $9,211.96 per month. I do not know the basis on which this is being claimed, as the basic award pursuant to s. 46 is a purely arithmetical calculation of three weeks' pay for each year of employment (which equals $6,908.97 x 22 = $151,997.34).

134. According to s. 47, the amount of the compensatory award is such amount as the "Tribunal" (Court) considers just having regard to the loss sustained by the complainant in consequence of his dismissal (insofar as the loss is attributable to action taken by the employer). Such losses are taken to include (a) expenses reasonably incurred by the complainant in consequence of the dismissal; and (b) any loss or benefit which he must be expected to have had but for the dismissal. These are capped, however, and pursuant to s. 48(2) cannot exceed 18 months' pay in respect of an ordinary worker and 24 months' pay in respect of a supervisor.

135. The plaintiff claims compensation in the amount of four months (@ $9,211.96 per month) for a total of $36,847.84. This Court accepted in **Bernard Cooper v The Island Hotel Ltd**

(2016/Com/lab/00048) that a compensatory award is intended to compensate for loss actually suffered and is not to penalize the employer for its action. I reiterate what I said in **Elrene Jones**, that a claim for a compensatory award (unlike the basic award which is automatic) must be supported with evidence of the losses sustained by the plaintiff as a result of the unfair dismissal, and in the absence of such evidence the Court is not in a position to award any compensation. The plaintiff cannot simply have recourse to the statutory maximum or cap of 18 or 24 months, respectively for an ordinary employee or supervisor, and decide to claim that. I therefore am unable to make any award under the claim for compensatory damages.

Wrongful dismissal

136. As noted above, the plaintiff claimed 24 months' salary (24 @ $9,211.96 per month) for a total of $221,082.42 in notice pay, and other pecuniary benefits (group and life medical insurance, and pension earned) calculated for a period of 24 months. I have found that the period of one year (12 months') notice was adequate at common law, and therefore the award of $111,252.00, which was calculated in accordance with 29, and paid by the defendant, is adequate notice and severance.

137. However, as noted, her contract did not contain a PILON clause, and as the Court has found that there was no basis for her summary termination, she would have been entitled to work out the final month (whether on garden leave or otherwise), and entitled to her salary and other pecuniary benefits for that month. The payment in lieu of notice and severance made in accordance with s. 29, is compensation for the breach for summary dismissal, but it is not payment of the wages she would have been contractually entitled to for her final month. She is therefore entitled to her salary for the final month she was entitled to work if the defendant had dismissed her in accordance with the contract and the other pecuniary benefits claimed for that one-month period.

138. Additionally, she claimed she was owed $10,717.16, representing the unpaid PGF Commissions to the end of September 2019, as well as the $2,435.41 which was deducted from her salary at the end of February 2019. In her witness statement, Ms. Sturrup explained that the over-payment was caused by the fact that commissions paid for January 2019 were calculated on premiums collected in December 2018 (because the data loaded into OIPA was for November 2018, which had to be manually corrected) and when the December payment was compared to the January payment, it was "found that some agents were overpaid and some agents were underpaid". With respect to the PGF, she claimed that the plaintiff was owed up to her termination $13, 525.55, which was paid in three cheques. She also stated that when the plaintiff met with her (and others) post termination to enquire about her benefits, she did not express any issues with the calculations.

139. The plaintiff filed a supplemental witness statement in which she attached a spreadsheet of the breakdown of the PGF from the Oracle report. She did not deny receiving the payments made for PGF, but she detailed how the calculations of her PGF from the defendant's printout (which was one of the documents she requested at the meeting of the 31 October to reconcile her entitlements due to system errors, etc.), which showed that she was owed a further $10,717.16. I accept her evidence, and the fact that she may not have indicated any dispute at the meeting of the

31 October 2019 is nothing to the point. She was still at this point seeking further documentation to ascertain the true position. The evidence indicates that the PGF commissions were calculated manually because the system was not accurately accounting for some lapsed policies in the PGF, which clearly had the potential to produce underpayments for the plaintiff (as well as others).

140. Neither did the defendants satisfy me as to how the $2,435.41 deducted from her salary was paid in error. For example, they did not evidence showing that amounts were deducted from the salaries or added to the salaries of others due to the glitch. I will therefore order that the deduction be restored.

CONCLUSION AND DISPOSITION

141. Thus, the total award for unfair and wrongful dismissal would be as follows:

Unfair dismissal

(i)	Basic award (3 weeks' pay @ 22 years)	$151,997.34
(ii)	Compensatory award	$0.00

Wrongful dismissal

(i)	Notice and severance (52 weeks @ 22 years)	$111,252.00 (paid)
(ii)	Group medical insurance ($515.16 p/m x 1 month)	$515.16
(iii)	Group Life ($53.76 p/m x 1 month)	$53.76
(iv)	Pension earned monthly ($511.00 x 1 mth)	$511.00
(v)	PGF owing for 2019	$10,717.16
(vi)	Unauthorized deduction	$2,435.41
	Total damages for unfair and wrongful dismissal	$277,481.83
	Less amount paid in relation to the dismissal per s. 48 ($111,252.00)	**$166, 229.83**

142. 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 a rate of 5% from the date of the Writ and from the date of Judgment until payment at the applicable statutory civil interest rate.

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Klein J.

7 November 2025