COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp. No. 54 of 2017

BETWEEN

ISLAND HOTEL COMPANY LIMITED

APPELLANT

AND

JOHN FOX

RESPONDENT

BEFORE:	**The Honourable Mr. Justice Isaacs, JA** **The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Evans, JA (Actg)**
APPEARANCES:	**Mr. Ferron Bethell, with Ms. Viola Barnett, Counsel for the Appellant** **Mrs. Rionda Godet, with Ms. Narissa Knowles, Counsel for Respondent**
DATES:	**17 May, 2018; 12 July 2018; 26 September 2018**

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Civil Appeal – Industrial Tribunal - Industrial Relations Act – Power of Tribunal to Amend Originating Application - Proper Assessment of Evidence in a Wrongful Dismissal Claim - Rule 3(2) Industrial Relations (Tribunal Procedure) Rule – Wrongful Dismissal – Unfair Dismissal

This is a referral by Minister of a trade dispute reported by the respondent for wrongful dismissal to the Industrial Tribunal for determination. During the course of the hearing before the Tribunal an application was made by the respondent to amend the Originating Application to add unfair dismissal as an alternate claim. The Tribunal purported to grant the amendment notwithstanding objections from the appellant. The Vice President made a finding that the respondent was both wrongfully and unfairly dismissed. However, compensation was awarded only on the basis of unfair dismissal.

The appellant on appeal challenged the jurisdiction of the Tribunal to amend an Originating Application to allow for a dispute different from that which was referred by the Minister. The appellant is seeking to have both findings of wrongful and unfair dismissal set aside.

HELD: Appeal allowed; order that the Industrial Tribunal's decision be set aside in its entirety. Respondent's notice dismissed.

It cannot seriously be disputed that an allegation of wrongful dismissal is a different claim from a claim for unfair dismissal. The claim for wrongful dismissal has its origin in sections 31-33 of the Employment Act Chapter 321 and unfair dismissal in sections 34-48. It is also beyond dispute that the Tribunal in the Bahamas is only empowered to deal with those disputes which have been referred to it by the Minister of Labour pursuant to section 72 or 73 of the IRA. It should also be noted that section 68 (2) is clear that:

> **"(2) A trade dispute may not be reported to the Minister if a period of more than twelve months has elapsed since the dispute first arose, and any dispute not reported within that period shall be deemed to have been determined, so, however, that the Minister may in any case extend such period if he considers it just to do so."**

The cumulative effect of these provisions is that in my view the Tribunal has jurisdiction to hear only those matters referred to it by the Minister. As such a dispute relative to working hours referred by the Minister to the Tribunal cannot be transformed into a Wrongful Dismissal dispute by the Tribunal. It is of fundamental importance therefore, that the Minister is clear as to the precise dispute which he is referring to the Tribunal. This should not be a problem if the

applicant complies with the requirements of section 68(3)(d) which requires that the report of the dispute to the minister be in writing and include every issue relevant to the dispute.

There is nothing in any of the provisions in the IRA or the Employment Act which permits the Tribunal to amend an Originating Application to allow a party to proceed with a claim not approved and referred by the Minister. Further, the Tribunal has no inherent jurisdiction to allow an amendment of a dispute as referred by the Minister. It is also significant that the question of whether the time allotted for bringing a claim should be extended is also solely in the purview of the Minister.

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

The Tribunal fell into error by conflating the requirements to be assessed for wrongful dismissal with those in a case of unfair dismissal where the concern is primarily the process whereby the employer arrived at his decision to terminate.

The learned Vice President clearly failed to consider the effect of the failure of the respondent to comply with the instructions given by his employer. In this regard he fell into error as he neglected to give consideration as to whether the respondent acted in a manner repugnant to the fundamental interests of the employer so as to cause them to lose trust and confidence in him.

Had the learned Vice President applied the proper test to the evidence before him he would have found that based on the admissions made by the respondent the appellant could not be faulted for their decision to terminate the respondent. In these circumstances the learned Vice President's finding that the respondent was wrongfully dismissed cannot be sustained.

B.M.P Limited D/B/A Crystal Palace Casino v Ferguson [2013] 1 BHS J. 135 mentioned

Herry v Dudley Metropolitan Borough Council & Anor [2018] UKEAT/0170/17 mentioned

Keturah Pinder v Windmill Investment Ltd SCCivApp No. 196 of 2015 mentioned

Margo Albury v St. Andrews School Industrial Tribunal No 1370 of 2009 mentioned

SELKENT Bus Co. Ltd v Moore [1996] ICR 836 considered

St Andrews School Limited v Margo Albury IndTribApp No 75 of 2013 mentioned

Yvette Ferguson v B.M.P Three Limited D/D/A Crystal Palace Casino IT/NES/1504/10 mentioned

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JUDGMENT

Judgment delivered by the Honourable Mr. Justice Evans, JA (Actg.):

BACKGROUND

1. This is an appeal from the decision of the Honourable, Mr. Keith Thompson, Vice-President of the Bahamas Industrial Tribunal, wherein it was adjudged that the respondent was wrongfully dismissed and unfairly dismissed and entitled to a Basic Award of $65,790.66 and a Compensatory Award of $15,182.46, plus interest at 10%. No damages were awarded under the common law principle of wrongful dismissal notwithstanding the finding of wrongful dismissal.

2. As per the requirements of Rule 3(2) of the Industrial Relations (Tribunal Procedure) Rules, 2010, ("the Tribunal Rules") the relief sought by the respondent in his Originating Application, pursuant to the referral of the Report of Trade Dispute by the Minister under section 73 of the industrial Relations Act (as amended), ('the IRA") was compensation for wrongful dismissal, and the ground upon which the relief was sought was *"wrongful dismissal on July 27th (the Respondent) was wrongfully terminated for gross misconduct and theft."*

3. It was during the course of the hearing that the respondent's Counsel made application to amend to include an alternative claim of unfair dismissal in the face of protestation from the appellant's then Counsel despite the objection. The learned Vice President allowed the amendment and proceeded to make findings of both wrongful and unfair dismissal but as noted above awarded compensation only for unfair dismissal.

4. The appellant filed a Notice of Motion to appeal on the 21st February, 2017 and the grounds contained therein were as follows:

> **"1. That the learned Vice-President erred in law and acted in excess of his jurisdiction arid/or powers in acceding to the Respondent's application to amend its Originating Application to include a claim for "unfair dismissal" in the alternative. The Tribunal is only empowered to determine the "dispute" referred by the Minister, pursuant to sections 55A and 73 of the Industrial Relations Act (as amended). The dispute referred by the Minister was for as dispute for "wrongful dismissal", which constituted the reference to the Tribunal, and, in the premises, the Tribunal was not empowered to allow the alternate claim of "unfair dismissal".**
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> **2. That the learned Vice-President erred in law and failed to give any adequate or proper reasons for concluding that the Respondent had been *wrongfully dismissed* The learned Vice- President simply predicated his finding of wrongful dismissal on the fact that an instruction issued to the Respondent was not reasonable in the circumstances. This instruction had been issued to the Respondent many months before his dismissal.**
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> **3. That the learned Vice-President erred in law and misdirected himself in finding that the Respondent had also been *unfairly dismissed* because of a "series of flaws" in the alleged investigation. However, no proper reasoning was given in the Judgment as to which "flaws" were material to the finding. Moreover, this finding of the learned Vice-President is perverse in the backdrop of the**

admissions by the Respondent and the overall circumstances leading to the issuance of the instruction.

4. That the learned Vice President misunderstood the evidence and misdirected himself in finding that the Respondent had been unfairly dismissed as a result of a series of flaws in the alleged investigation of the Respondent. The learned Vice-President was overly concerned with proof of the time of Sabrina Rolle's departure from the property, and failed to appreciate that the issue was whether the Respondent had edited her time in disobedience of a directive from his superior.

5. The Respondent admitted in evidence that he had been told that he could not edit time for Sabrina Rolle and yet, despite this directive, he consciously and knowingly edited Sabrina Rolle's hours of work to ensure that she received a full day's pay.

6. The learned Vice President was plainly wrong and erred in finding that unsigned letter set the stage and was the road to the Respondent's termination. Quite the contrary, the unsigned letter was the impetus for the directive being issued to the Respondent to ensure that no one could assert that he was unfairly favouring Sabrina Rolle in the workplace. It was plainly wrong for the learned Vice President to state that instruction to the Respondent not to edit time for Sabrina Rolle had "pre-judged" him and demonstrates that the learned Vice President had misdirected himself as to the proper matters in issue.

7. Further, the learned Vice President was wrong to find that if the Appellant wanted to rely on the unsigned letter they should have produced it. The unsigned letter was not in issue, what was in issue was the instruction issued as a result of the unsigned letter and whether the Respondent had disobeyed that instruction. The Respondent admitted receiving the instruction and the

Respondent admitted that Sabrina Rolle did not swipe out on the day in question and he accordingly edited her time in the system. In the premises, the proper issue for determination was did the Respondent's disobeyance of the instruction constitute a fundamental breach of his contract of employment.

8. The learned Vice President was plainly wrong and misdirected himself in placing undue emphasis on the fact that written statements were taken after the date of termination, and finding that this was "grossly unfair". The dates of the taking of the written statements were irrelevant to the determination of this matter, as the Respondent had been informed in the course of the suspension hearings that Sabrina Rolle did not swipe out in the Kronos system, and that he had put in time for her in disobeyance of the instruction.

9. The learned Vice-President totally misdirected himself as he gave undue and irrelevant consideration to whether an investigation had been carried out anent the unsigned letter, and what time Sabrina Rolle departed work. No investigation was required as the Respondent admitted to receiving the instruction and, further, admitted to editing her time in the system. No investigation could alter these admissions; hence, an investigation was unwarranted as per section 33 of the Employment Act.

10. Further, the learned Vice President erred in law and had no statutory jurisdiction to make a basic award or a compensatory award in favour of the Respondent in the absence of satisfying the preliminary requirements of section 42(1) of the Employment Act which mandated that the Tribunal "shall explain" to the Respondent what orders may be made. It is only after providing such explanation, and no order having been made under section

43, does the Tribunal have jurisdiction to award compensation under sections 46 to48.

11. **Further, the learned Vice President erred in law and misdirected himself in failing to provide any reduction whatsoever to the basic award (as per section 46 (2)) despite the evidence of the Respondent acknowledging receipt of the instruction and admitting to having edited Sabrina Rolle's time.**

12. **Further, the learned Vice President erred in law and was plainly wrong in failing to give a reason as to how he determined the amount of the compensatory award and whether or not the same had been reduced as per section 47(4) having regard to the Respondent's acknowledgment of receipt of the instruction and admitting to having edited Sabrina Rolle's time.**

13. **Any other ground that the Court may deem just and equitable."**

5. The respondent on the 8th March 2017 lodged a respondent's Notice seeking to uphold the Tribunal's Decision on additional grounds as follows:

"I. The Respondent wishes the Honourable Court of Appeal to uphold the Judgment of the Court below that the Respondent herein was wrongfully dismissed for the following additional reasons:

a. That the Appellant was not justified in summarily dismissing the Respondent herein as the Appellant failed to execute its burden, on a balance of probabilities, of proving that its alleged belief of misconduct on the part of the Respondent was supported and sustained by reasonable grounds;

b. That the Appellant was not justified in summarily dismissing the Respondent herein as the Appellant failed to execute its burden, on a balance of probabilities, of proving that it had conducted a

reasonable investigation having regard to all of the facts, resources and avenues available to the Appellant prior to terminating the Respondent.

2. The Respondent wishes the Honourable Court of Appeal to uphold the finding of fact by the Court below that the Respondent may have been disobedient but lacked the element of "willful intention" as to undergird a belief of gross insubordination for the following additional reasons:

a, That it is the Respondent's evidence that at the time of performing the act in question, he did not perceive his actions as inconsistent with the Appellant's request that he not add or fill in time for Sabrina Rolle. The Appellant did not request that the Respondent not insert an 'out' swipe, as is the practice, whenever an employee, due to illness, left the premises after completing more than half of their shift.

b. That it is the Respondent's evidence that at the time of performing the act of adding an 'out' swipe that he was not even contemplating the conversation had with the Appellant's agent almost a whole year earlier;

c. That it is the Respondent's evidence that in by adding the 'out' swipe to KRONOS, he was acting in accordance with his obligations to ensure smooth payroll operations. This is supported by the evidence of the Appellant that a missing out swipe would cause problems if it was not manually corrected.

3. The Respondent wishes the Honourable Court of Appeal to uphold the Judgment of the Court below that the Respondent herein was unfairly dismissed for the following additional reasons:

a. That the Appellant's process of summarily terminating the Respondent was devoid of a reasonable investigation. Rather, the

Appellant's alleged investigation conducted by the Appellant contained many flaws, including the following:

i. That prior to summarily terminating the Respondent, the Appellant failed to interview the source of the instruction which the Respondent was alleged to have breached, Mr. Charles Colebrooke;

ii. That prior to summarily terminating the Respondent, the Appellant failed to interview the object of the instruction which the Respondent was alleged to have breached, Ms. Sabrina Rolle;

iii. That the sole statement collected prior to the Appellant's termination of the Respondent was not timeous. The said statement was collected two (2) weeks after the alleged incident and one (1) day before the Respondent was summarily dismissed;

iv. That the Appellant failed to secure the second sheet of buyout workers for the restaurant for which Ms. Sabrina Rolle was scheduled to work, with the view of determining a more proximate determination as to when Sabrina Rolle left the premises of the Appellant;

v. That the Appellant's dismissal was also procedurally unfair as it denied the Respondent an opportunity to have his version of the incident corroborated, by failing to interview Sabrina Rolle prior to terminating the Respondent.

b. That the Appellant freely admitted in its filed Defence that it did not conduct a reasonable investigation, but rather it engaged in a guestimation of the facts.

c. That summary termination of the Respondent (who served as a twenty-six (26) year veteran and Manager in good standing), in the

absence of a lawful and reasonable instruction, was not in the range of reasonable responses available to the Appellant.

d. That there were more appropriate, albeit still harsh, options available to the Respondent, which more easily fall within the band of reasonable responses, including the following;

i.Counselling;

ii. A written warning;

iii.Suspension

iv. Further Suspension;

v. Dismissal with notice.

AND FURTHER TAKE NOTICE that the Respondent intends to rely on the reasons set out in the aforesaid judgment of His Honour, Mr.Keith Thompson as well as the following grounds, in requesting the Court of Appeal to vary the quantum of the aforesaid judgment:

1. The Respondent wishes the Honourable Court of Appeal to vary the finding of fact by the learned Vice-President that the Appellant's compensatory award amounted to "(i) Four (4) months $3,373.88x 4=$13,495.52" because finding such was wrong. In determining the monthly pay of the Respondent herein, the learned Vice-President failed to take into account material circumstances, such as the true and proper calculation of the Respondent's monthly pay. That is to say, that simply multiplying the weekly pay of the Respondent herein by four (4) weeks is not a true and accurate method as not all months contain exactly four (4) weeks. The learned Hon. Keith Thompson ought to have calculated the monthly pay of the Respondent herein by multiplying the Respondent's weekly pay by fifty-two (52) weeks

and then dividing the same by twelve (12) months. This is the only approach to represent the Respondent's true monthly pay and would results in determining the sum of three thousand six hundred fifty-five dollars and four cents ($3,655.04).

2. **The Respondent wishes the Honourable Court of Appeal to vary the finding of fact by the learned Vice-President that the Appellant's compensatory award amounted to "(ii) .5 of one $3,373.88 ÷ 2 = $1,686.94" because finding such was wrong. In determining the monthly pay of the Respondent herein, the learned Vice President failed to take into account material circumstances, such as the true and proper calculation of the Respondent's monthly pay. That is to say, that simply multiplying the weekly pay of the Respondent herein by four (4) weeks is not a true and accurate method as not all months contain exactly four (4) weeks. The learned Hon. Keith Thompson ought to have calculated the monthly pay of the Respondent herein by multiplying the Respondent's weekly pay by fifty-two (52) weeks and then dividing the same by twelve (12) months. This is the only approach to represent the Respondent true monthly pay and would results in determining the sum of three thousand six hundred fifty-five dollars and four cents ($3,655.04).**

3. **The Respondent wishes the Honourable Court of Appeal to vary the finding of fact by the learned Vice-President that the Appellant's total award amounted to "80,973.12" because finding such was wrong. As a result of paragraphs 1 and 2 immediately above, the learned Vice President failed to take into account material circumstances, such as the true and proper sub-calculation of the Respondent's compensatory award. That is to say, that in calculating the Respondent's Basic Award of $65,790.66 and the true compensatory award of $16,447.68 the**

total award of the Respondent herein would be reflected as $82,238.34, which is still within the statutory limit imposed by Section 48 of the Employment Act.

4. **The Respondent wishes the Honourable Court of Appeal to vary that part of the aforesaid Judgment relating to interest which reads "The award is subject to interest at 10% per centum per annum pursuant to the Civil Procedure Award of Interest Act 1992" to read "The award is subject to interest at 10% per centum per annum between the date when the cause of action arose and the date of Judgment." for the following reasons:**

a. **That in accordance with Section 3 of the Civil Procedure (Award of interest) Act 1992, any Court may if it thinks fit order interest for any part of the period between the date the cause of action arose and the date of judgment;**

b. **That Section 2 (2) (a) of the Civil Procedure (Award of Interest) Act 1992 does not apply to the aforesaid Judgment as the same was not obtained in the Supreme Court."**

The Facts

6. At the time of his termination the respondent was an Assistant Director in the Stewarding Department. He was principally responsible for handling payroll which required him to review the Kronos reports for the department and enter or adjust times, based on what was happening in the operation. This was clearly an important position which was required to be held by someone in whom the Company had imposed confidence and trust.

7. The appellant contends that based on comments made by some of its stewarding employees asserting a perception of favouritism by the respondent towards one Sabrina Rolle, a dish washer in the stewarding department; rumors of a romantic involvement between the respondent and Ms. Rolle; and an unsigned letter (accusing the respondent of theft and being romantically involved with Ms. Rolle), the respondent had been instructed not to edit

or fill in time for Ms. Rolle. This instruction had been issued about a year' before the respondent's termination, and was never challenged by the respondent by way of the appellant's internal grievance procedure or otherwise.

8. There is no dispute between the parties that the instruction had been given to the respondent. The respondent sought to assert at the hearing that it was only a "request" and that he did not take it seriously as Mr. Gillihan had "never written to him about it and in his view it wasn't said in a serious manner". In cross examination the respondent agreed that Mr. Gillihan could give him any instructions which were reasonable and lawful in the course of his duty and not everything was reduced to writing. Additionally, the respondent admitted that receiving a request and an instruction from his senior director are both the same.

9. In the backdrop of the foregoing instruction, it came to the appellant's attention that on 10 July, 2011, the respondent had filled-in time for Sabina Rolle in contravention of the instruction. The uncontested facts are that Ms. Rolle had informed the respondent sometime on the morning of 10 July, 2011, that she was feeling sick and was going home. There was a dispute however as to the actual time Ms. Rolle actually left the premises to go home.

10. The respondent notwithstanding the earlier instructions without confirming what time she left; without requesting that she swipe out; without putting any form of explanation in the Kronos system for Ms. Rolle's failure to swipe out, filled in a departure time in the Kronos system of 3:00 p.m. thereby entitling Ms. Rolle to a full day's pay.

11. It is noteworthy that as noted in paragraph 27 of the Vice President's decision the respondent, when asked in evidence-in-chief to explain why he did not consider his conduct grossly insubordinate in the way he handled Ms. Rolle, stated that he was responsible for payroll and he took her word because he considered her to be an honest employee. This is a most egregious statement as it goes to the heart of dereliction of duty. In the backdrop of the instruction, the respondent was mandated to have one of the other Assistant Directors verify Ms. Rolle's time of departure and enter the same in the Kronos system before he could approve her pay.

12. The respondent was subsequently suspended for an aggregate period of ten (10) days whilst the matter was investigated. He was confronted with results of the investigation and afforded an opportunity to explain himself. The appellant did not accept his explanation and determined that his disobeyance of the instruction was gross misconduct and that the filling-in of time for Ms. Rolle amounted to theft. The respondent was accordingly terminated on 27 July, 2010, for gross misconduct and theft.

13. The respondent invoked a review of his termination and the appellant duly convened a Review Committee to consider whether the termination was justified. The respondent appeared before the Committee at a hearing which lasted 30-45 minutes. The Review Committee upheld the termination.

The Tribunal's Findings

14. The learned Vice-President made three crucial findings in arriving at his decision to award compensation to the respondent in this matter. Firstly, he acceded to an application by Counsel for the respondent during the hearing to be allowed to amend the Originating Application to include a claim for unfair dismissal in the alternative. He did so notwithstanding the objection of the appellant that the respondent was bound by his pleadings.

15. Secondly, the Vice-President found that the respondent was wrongfully dismissed. He did so on what appears to be two bases: (i) that the disobedience was not willful as the respondent's evidence was that he "didn't think it was a serious instruction" and (ii) the instruction not to edit Sabrina Rolle's time was not a reasonable one as there was no investigation as to the source of the unsigned letter. The third finding of importance was that the respondent had been unfairly dismissed. He did so based on his view that there were no proper investigations done prior to termination.

Submissions, Discussions and Findings

Power to Amend

> **"Ground 1. That the learned Vice-President erred in law and acted in excess of his jurisdiction arid/or powers in acceding to the Respondent's application to amend its Originating Application to include a claim for "unfair dismissal" in the alternative. The Tribunal is only empowered to determine the "dispute" referred by the Minister, pursuant to sections 55A and 73 of the Industrial Relations Act (as amended). The dispute referred by the Minister was for as dispute for "wrongful dismissal", which constituted the reference to the Tribunal, and, in the premises, the Tribunal was not empowered to allow the alternate claim of "unfair dismissal".**

16. The first issue of importance is whether the Vice President was empowered to grant an amendment and even if he was were the circumstances appropriate for such an amendment to be made. Mr. Ferron Bethell Counsel for the appellant submits that the Tribunal is a creature of statute and that given the mechanism established by the IRA, the Tribunal has no jurisdiction or power to allow an amendment of the Dispute as referred by the Minister pursuant to section 73 of the IRA. In the premises, the learned Vice President was wrong and acted in excess of his powers in allowing the respondent to amend the Originating Application (which constitutes the relief sought under the referral) to include an alternative claim for unfair dismissal.

17. Mrs. Rhionda Godet Counsel for the respondent submitted that the Industrial Relations Act gives the Tribunal very wide discretionary powers. She referred specifically to section 57 which provides:

> **"57. (1) In the hearing and determination of any matter before it, the Tribunal-**
>
> **(a) shall, so far as it appears to it appropriate, seek to avoid formality in its proceedings;**

(b) shall not be bound by any written law or rule of law relating to the admissibility of evidence in proceedings before courts

(c) shall make such enquires of persons appearing before it and witnesses as it considers appropriate; and

(d) shall otherwise conduct the hearing in such manner as it considers most appropriate for the clarification of the issues before it and generally to the just handling of the proceedings."

Counsel also argued that the provision of section 59(1)(c) is particularly compelling as it provides that the Tribunal has additional powers to inter alia:

"(c) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the dispute or any other matter before it."

18. Mrs. Godet contends that the effect of these provisions is that the Tribunal has a wide range of discretion which is exercised judicially. She posits that pursuant to the statutory provisions, the Tribunal has authority to regulate its own proceedings, and it is this exact power and discretion that permits the Tribunal to determine whether it will accede to a request for amendment, or will itself recommend an amendment. She cited in support of this submission the case of **Margo Albury v St. Andrews School** Industrial Tribunal No 1370 of 2009, in which, President of the Tribunal, His Honour Harrison L. Lockhart (as he was then) at paragraph 3 thereof noted:

"Ex abundante cautela, at the suggestion of the Tribunal, the Applicant amended her application and further alleges that she was unfairly dismissed."

Counsel notes that when the matter was subjected to appeal, in, **St Andrews School Limited v Margo Albury Action** IndTribApp No 75 of 2013, the authority of the learned President to make this suggestion was neither disputed nor questioned in the least.

19. I note here that the learned President in the **St. Andrews** case provided no basis for his authority to amend; and the fact that the issue was not raised in the Court of Appeal hearing is not an indication that this Court has given approval to the same. As far as I am aware this is the first time that this issue is being raised before this Court for a determination.

20. Mrs. Godet further supported her submissions by reference to Paragraph 35 of **Herry v Dudley Metropolitan Borough Council & Anor** [2018] UKEAT/0170/17- wherein, it is noted:

> **"An Employment Tribunal exercises a discretion in deciding whether to grant an amendment. Guidance has been given on the factors to be taken into account are set out in the well-known case of SELKENT Bus Co. Ltd v Moore [1996] ICR 826."**

Mummery P (as he then was) in the Employment Appeal Tribunal (EAT) emphasized that Tribunals should particularly take into account:

> **"...all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it"**

Counsel concludes that there is no question that the Court, considered all the circumstances, and noted that from the first day of the hearing, the respondent had sought leave to amend. She says that it only after hearing both parties on the matter, the Tribunal permitted the amendment.

21. I should note upfront that caution must be exercised when seeking to rely on the English authorities relative to matters of this nature as they are based on Statutes which are not identical to ours. In **Selkent** Mummery P, in dealing with the practice and procedure for amendments before the Tribunal in England noted that the Tribunal must decide whether the proposed amendment would result in pleading a new cause of action. He then stated that:

> **"if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that**

complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, s.67 of the 1978 act."

This indicates that even in The United Kingdom an amendment which results in a new cause of action is treated differently being subject to a time limit and an extension may be required. The position in The Bahamas is completely different. There is no express provision allowing for a new complaint or cause of action to be added by way of amendment to the original Application containing the trade dispute referred by the minister. In the Bahamas the statute provides for the Minister to grant the extension before the trade dispute is referred and the Tribunal has no power to amend the original application.

The Bahamian Legal Regime on Industrial Disputes

22. Section 55 of the IRA sets out the jurisdiction of the Tribunal in the following terms:-

"Jurisdiction of Tribunal

55. The Tribunal shall have jurisdiction-

(a) to hear and determine trade disputes within an essential service or a non-essential service;

(b) to register industrial agreements relating to an essential service or a non-essential service and to hear and determine matters relating to the registration of such agreements; and

(c) to hear and determine any other matter brought before the Tribunal in accordance with this Act".

23. Section 58(1) sets out the powers of the Tribunal in the following terms:

"Powers of Tribunal.

58. (1) The Tribunal may in relation to any matter before it-

(a) remit a dispute, subject to such conditions as the Tribunal may determine, to the parties for further consideration by them with a view to settling or reducing the several issues in dispute;

(b) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction in pursuance of the hearing or determination;

(c) award compensation on complaints brought and proved before the Tribunal by a party for whose benefit the order or award was made regarding any breach or non-observance of an order or award or any term thereof (other than an order or award for the payment of damages or compensation);

(d) dismiss any matter or part of a matter or refrain from further hearing or from determining the matter, if it appears that the matter or part thereof is trivial, or that further proceedings are unnecessary or undesirable in the public interest".

24. Section 59(1) sets out additional powers of the Tribunal in the following terms:

"Additional powers of Tribunal.

59. (1) In addition to the powers conferred on it under the foregoing provisions of this Act the Tribunal may-

(a) proceed to hear and determine any question arising in connection with a dispute in the absence of any party who has been duly summoned to appear before the Tribunal and has failed to do so;

(b) order any person-

(i) who in the opinion of the Tribunal may be affected by an order or award; or

(ii) who in any other case the Tribunal considers it just to be joined as a party, to be joined as a party to the proceedings under consideration on such terms and conditions as the Tribunal may direct;

(c) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the dispute or any other matter before it".

Trade Disputes

25. Section 2 of the IRA defines a "trade dispute" in the following terms:

> **"trade dispute" or "dispute" means any dispute or difference or apprehended dispute or difference between one or more employers and one or more employees, or between one or more employees and one or more other employees, which is connected with the employment or non-employment or the terms or conditions of employment, of any person, and includes a general dispute and a limited dispute;"**

26. The IRA sets up a regime as to how trade disputes are to be resolved and this is set out in several provisions of the Act. Due to the importance of the provisions to the issue we have to determine I set them out in full as follows:

> **"Trade Dispute Procedure.**
>
> **68. (1) Any trade dispute existing or apprehended may, if not otherwise determined, be reported to the Minister-**

(a) by a trade union on behalf of employees in a bargaining unit for which it is recognised as bargaining agent, where the dispute is a general dispute;

(b) by a trade union, on behalf of an employee who is a party to a limited dispute, where such employee was a member in good standing of such union at the time the dispute arose, and whether or not such employee is included in a bargaining unit;

(c) by a trade union of employers on behalf of an employer who is a member of the trade union, where the dispute is between the employer and employees in employment of that employer;

(d) by an employer or an employee, where the dispute is between that employer and that employee (whether alone or jointly with other employees in the employment of that employer).

(2) A trade dispute may not be reported to the Minister if a period of more than twelve months has elapsed since the dispute first arose, and any dispute not reported within that period shall be deemed to have been determined, so, however, that the Minister may in any case extend such period if he considers it just to do so.

(3) A report of a trade dispute shall be made in writing and shall specify-

(a) the parties to the dispute;

(b) the person or persons on behalf of whom the report is made;

(c) the authority to act on behalf of the person desiring the dispute to be reported which the party reporting the dispute claims to have;

(d) every issue relevant to the dispute;

(e) where there is a relevant agreement in being, what action has been taken for dealing with the dispute under that agreement'

(4) Every party reporting a trade dispute shall, without delay, furnish by hand or by registered post a copy of such report to the other party or parties to the dispute.

Action by Minister on Report.

69. (1) The Minister shall consider any dispute reported to him under subsection (1) of section 68 and if, in his opinion, suitable machinery for settling the dispute already exists by virtue of the provisions of any agreement between the parties to the dispute, he may, as soon as is practicable after the receipt of the report, refer the matter for settlement in accordance with those provisions; and where there is a failure to reach a settlement within seven days after such a reference, the party reporting the dispute shall notify the Minister of such failure.

(2) On receipt of a notification under subsection (1), the Minister shall, if it appears to him that the existing machinery for settling the dispute has not been exhausted, so inform the parties in writing and refer the matter back to them for further consideration; and, where there is a failure to reach a settlement within seven days after such a reference, the party reporting the dispute shall notify the Minister of such failure.

(3)Where, on receipt of a report of a dispute under subsection (1) of section 68-

(a) it appears to the Minister that no suitable machinery binding on the parties exists for the settlement of the dispute; or

(b) the Minister does not choose to refer the dispute for settlement under subsection (1) of this section; or

(c) the Minister has referred the dispute for settlement under subsection (1) or (2) of this section and the party reporting the dispute has notified him pursuant to that subsection of a failure to reach a settlement, the Minister shall endeavour to secure, by means of conciliation, a settlement of the dispute within sixteen days after the receipt by him of such report or, in a case to which paragraph (c) of this subsection applies, such a notification as is mentioned in that paragraph, or within such longer period as may be agreed upon by the parties.

Parties to Enter Into Conciliation and to Attend Meetings Called by Minister.

70. (1) For the purposes of assisting the Minister in his endeavour to secure a settlement of a dispute by means of conciliation under subsection (3) of section 69, the parties to the dispute shall enter into conciliation in good faith, and where the Minister serves written notice on the parties concerned requiring them to attend a meeting for that purpose, the parties concerned shall so attend.

70. (2) Any party to a dispute who fails or refuses-

(a) to enter into conciliation in good faith under subsection (1);

(b) to attend a meeting when required to do so by the Minister under subsection (1), shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding five thousand dollars.

Settlements to be Reported to Minister, to be Filed With Tribunal, and to be Binding.

71. (1) Where steps taken by the Minister under section 69 to settle a dispute have resulted in a settlement, the parties to the dispute shall, without delay, transmit to the Minister a copy of the settlement signed by or on behalf of the said parties; and the Minister shall file such copy with the Tribunal.

(2) Any such settlement as aforesaid shall, as from the date thereof or as from such other date as may be specified therein, not being earlier than the date on which the dispute to which the settlement relates arose, be binding on the persons agreeing to the settlement until varied by a valid agreement concluded by or on behalf of those persons.

Minister May Refer Disputes in Essential Services to The Tribunal

72. (1)Where the Minister has endeavoured under subsection (3) of section 69 to secure a settlement of a trade dispute within an essential service and such settlement has not been reached within the period of sixteen days mentioned in that subsection or, as the case may be, any longer period agreed upon by the parties pursuant to that subsection, then the Minister may forthwith upon the expiry of such period refer the dispute to the Tribunal if in his opinion the public interest so requires.

(2) In this section and section 74 "essential service" means any service declared by the Governor-General by order to be an

essential service, so, however, that the services hereafter mentioned in this subsection, that is to say-

(a) the supply of electricity or water to the inhabitants of any town, village or place;

(b) the disposal of sewage or of any other waste product dangerous to the health of the community;

(c) the provision of any hospital service;

(d) any service essential to the safety of aircraft;

(e) the fire service, the telecommunications service, or the prison service, shall be deemed to have been so declared by an order satisfying the requirements of subsections (3) and (4).

(3) The provisions of section 32 of the Interpretation and General Clauses Act shall not apply in relation to any order made by the Governor-General under subsection (2), but instead every such order shall be subject to affirmative resolution of both Houses of Parliament.

(4) In subsection (3) the expression "subject to affirmative resolution of both Houses of Parliament", in relation to an order, means that the order is not to come into operation unless and until approved by a resolution of each of those chambers.

Referral of Disputes In Non-Essential Services To Tribunal.

73. here the Minister has endeavoured under subsection (3) of section 69 to secure a settlement of a trade dispute within a non-essential service and such settlement has not been reached within the period of sixteen days mentioned in that subsection or, as the case may be, any longer period agreed upon by the parties pursuant to that subsection, then the Minister may if, in his opinion the public interest so requires, refer the dispute back to

the parties for further consideration; and where there is a failure to reach a settlement within such reasonable period, after such a reference, as may be determined by the Minister, the party reporting the dispute shall notify the Minister of such failure and the Minister shall forthwith refer the dispute to the Tribunal". [Emphasis added]

27. It is noted that the Tribunal according to section 55(1) has the jurisdiction to deal with those matters brought before it in accordance with the Act. Sections 68-73 then sets out the course which the disputes must take in order to get to the Tribunal. It is clear that the Tribunal in the Bahamas is only empowered to deal with those disputes which have been referred to it by the Minister of Labour pursuant to section 72 or 73 of the IRA. It would follow logically, that unless the dispute which is before the Tribunal got there consistent with the trade dispute procedure, the Tribunal has no jurisdiction to hear the same. It should also be noted that section 68 (2) is clear that:

> **"(2) A trade dispute may not be reported to the Minister if a period of more than twelve months has elapsed since the dispute first arose, and any dispute not reported within that period shall be deemed to have been determined, so, however, that the Minister may in any case extend such period if he considers it just to do so."**

28. The cumulative effect of these provisions is that in my view the Tribunal has jurisdiction to hear only those matters referred to it by the Minister. As such, a dispute relative to working hours referred by the Minister to the Tribunal cannot be transformed into a Wrongful Dismissal dispute by the Tribunal. It is of fundamental importance therefore, that the Minister is clear as to the precise dispute which he is referring to the Tribunal. This should not be a problem if the applicant complies with the requirements of section 68(3) (d) which requires that the report of the dispute to the minister be in writing and include every issue relevant to the dispute.

29. This issue is magnified by the fact that the definition of what is a trade dispute as provided by the Act is so wide. I am given to understand that it is not the practice of the Minister to specify the particular dispute but to refer all the papers to the Tribunal with instructions to

resolve the dispute. If this is in fact so it is not in my view adequate as the conciliation process ought to afford the Minister the opportunity to obtain a good understanding of the nature of the dispute before he refers it to the Tribunal.

30. This issue takes on added significance when the dispute at hand relates to the termination of an employee. The questions arise: Is the referral to be with respect to a general dispute relative to his dismissal? Or must the referral be specific as to whether the dispute is with respect to wrongful dismissal and/or unfair dismissal?

31. It cannot seriously be disputed that a claim of wrongful dismissal is different from a claim for unfair dismissal. The claim for wrongful dismissal has its origin in the common law prior to the passage of the Employment Act Chapter 321A. The Employment Act by sections 31-33 gave statutory status to a claim for wrongful dismissal and the ability to make a claim for unfair dismissal was introduced into our law for the first time in sections 34-48.

32. It is noted that in establishing the ability to make a claim for unfair dismissal the Employment Act not only sets out how unfair dismissal would be determined but also establishes it as a dispute which could be referred to the Tribunal. The Act also indicates the principles by which the Tribunal will be governed in dealing with such a claim. Section 41 provides that:

> **"41. Where, under the Industrial Relations Act, a trade dispute relating to unfair dismissal is referred to the Tribunal such dispute shall be dealt with by the Tribunal as a complaint in accordance with the provisions of this Part"**. [Emphasis added]

The remaining sections then set out the remedies which the Tribunal is empowered to apply and the way in which compensation is to be calculated and awarded. These remedies are completely different to those available on a wrongful dismissal claim.

33. Notwithstanding the foregoing it is noted that the document evidencing the minister's referral of the dispute to the Tribunal has not been produced. What is clear however is that the Originating Application lodged by the respondent with the Tribunal related only to a claim for wrongful dismissal. There is nothing in any of the provisions in the IRA or the

Employment Act which permits the Tribunal to amend an Originating Application to allow a party to proceed with a dispute not approved and referred by the Minister. Further, the Tribunal has no inherent jurisdiction to allow an amendment of a dispute as referred by the Minister so as to result in a new dispute. It is also significant that under the existing legislative scheme in The Bahamas the question of whether the time allotted for reporting a trade dispute should be extended is also solely in the purview of the Minister acting in accordance with s 68(2) of the IRA.

34. The Industrial Relations (Tribunal Procedure) Rules, 2010 set out the procedure to be followed by all participants before the Tribunal. Rule 3 is in the following terms:

> "**3. (1) Where the Minister has referred a dispute to the Industrial Tribunal pursuant to section 76 of the Act, the applicant shall, within fourteen days of receiving notice of the referral, present to the Secretary an originating application in Form A in the Schedule, which shall be signed by the applicant.**
>
> **(2) The originating application shall contain —**
>
> **(a) the name and address of the applicant;**
>
> **(b) the name and address of the respondent;**
>
> **(c) the relief sought; and**
>
> **(d) the grounds; with particulars thereof, on which the relief is sought.**
>
> **(3) Where the judge having carriage of a trade dispute is of the opinion that any of the matters specified under paragraph (2) are not sufficiently particularised in the originating application he may give notice in Form B in the Schedule to that effect to the applicant, stating the reasons for his opinion and requiring the applicant within fourteen days of receipt of the notice, to furnish in writing to the Secretary sufficient particulars in support of the originating application.**

(4) If the requirement under paragraph (3) is not complied with, a tribunal may strike out the whole or part of the originating application.

(5) If a party to the proceedings is represented by counsel or other representative pursuant to section 57(3} of the Act a Brief or skeleton arguments may be submitted by the said counsel or representative to the Secretary of the Tribunal and a copy thereof served on the other parties to the proceedings no later than seven days prior to the commencement of the Hearing.

(6) If an unrepresented party wishes to submit representations in writing for consideration by the Tribunal at the Hearing of the Originating Application he shall present his representations to the Secretary no later than seven days before the commencement of the Hearing and shall at the same time serve a copy thereof on the other parties to the proceedings".

35. Rule 4 then provides that:

"4. Upon receiving an Originating Application, the Secretary shall send to the Respondent -

(a) a copy of the Application;

(b) a copy of any additional particulars required to be furnished by the Applicant; and

(c) a Notice in Form C in the Schedule which, includes information, as appropriate to the case, about the means and time for entering an Appearance and Defence, the consequences of failure to do so, and the right to receive a copy of the Decision".

36. Rules 5 to 8 then makes provision for a discovery process which is intended to clarify and crystalize the issues to be raised by the parties and determined by the Tribunal. Rule 9 then states as follows:

> **"9.(1) The Tribunal may at any time before the Hearing of an Originating Application, on the application of a party made by Notice to the Secretary or of its own motion, determine any issue relating to the entitlement of any party to bring or contest the proceedings to which the Originating Application relates.**
>
> **(2) The Tribunal shall not determine such an issue unless the Secretary has sent notice to each of the parties giving them an opportunity to submit representations in writing and to advance oral argument before the Tribunal".**

37. It is noted that pursuant to section 59 (1) of the IRA the Tribunal has the power to:

> **"(b) order any person-**
>
> **(i) who in the opinion of the Tribunal may be affected by an order or award; or**
>
> **(ii) who in any other case the Tribunal considers it just to be joined as a party, to be joined as a party <u>to the proceedings under consideration</u> on such terms and conditions as the Tribunal may direct;**
>
> **(c) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination <u>of the dispute</u> or any other matter before it". [Emphasis added]**

38. These provisions of the IRA and the Tribunal Rules indicate that the Tribunal has the ability to regulate its proceedings. Rule 12 provides the Tribunal with the power to strike out an Originating Application in specified circumstances but gives no power to amend that Application. This differs from Rule 12(1)(d) which provides that the Tribunal may " *at any*

stage of the proceedings, order to be struck out or ***amended*** *any Notice of Appearance or Defence on the grounds that it is scandalous, frivolous or vexatious".* It is clear that these provisions do not enable the Tribunal to make changes to the Originating Application which result in a new dispute but are intended to facilitate the determination of the dispute before it which has been referred by the Minister.

39. The record in this matter clearly shows that the respondent was terminated on the 27th July, 2010. His Originating Application was filed on the 3rd March 2011 well within the twelve months allotted by the IRA. However, the Originating Application clearly states that the claim was for wrongful dismissal and that compensation was being sought for wrongful dismissal. It is clear from paragraph 17 of the judgment of the Vice President that the application for amendment was made and granted on the 12th March 2015. There is no available document that indicates that the Minister had been requested to, nor that he did extend the time for reporting a dispute connected with the respondent's complaint about being unfairly dismissed. Nor did the Minister refer the same to the Tribunal. It is important to note that neither does the respondent contend that such an extension was ever sought or obtained.

40. In all of the circumstances of this case we find that the learned Vice-President fell into error when he purported to grant leave to amend the Originating Application to add the alternate claim of unfair dismissal. He simply had no jurisdiction to do so and as such the first ground of Appeal must succeed. It would also follow that the Tribunal had no authority to proceed to find that the respondent was unfairly dismissed and award him the sum of $80,973.12 as compensation. In this regard it would follow that the appellant would also succeed on grounds 3 and 4 of the Appeal. We see no need therefore to consider the appellant's submissions with respect to the findings of the Tribunal that the respondent was unfairly dismissed nor Grounds 10 and 11 which deal with the accompanying awards.

Proper Procedure

41. Mr. Bethel further submitted in the alternative that in the event we were of the view that the Tribunal had the power to amend we should find that the proper procedure was not followed. In support of this submission Mr. Bethel submits that if the Tribunal had the

power to amend it would be required to follow the procedure mandated by Rule 9 of the Industrial Relations (Tribunal Procedure) Rules, 2010. Mr. Bethel submits that the purported amendment was not carried out with any regard to the requirements mandated by Rule 9.

42. We agree with Mr. Bethel that the record does not reflect that the Tribunal in purporting to amend the Originating Application had any regard to the requirements of Rule 9. As noted earlier this Rule is in the following terms:-

> **"9.(1) The Tribunal may at any time before the Hearing of an Originating Application, on the application of a party made by Notice to the Secretary or of its own motion, determine any issue relating to the entitlement of any party to bring or contest the proceedings to which the Originating Application relates.**
>
> **(2) The Tribunal shall not determine such an issue unless the Secretary has sent notice to each of the parties giving them an opportunity to submit representations in writing and to advance oral argument before the Tribunal".**

43. The record reflects that Counsel for the respondent made the application orally on her feet during the course of the trial before the Tribunal. There is no evidence that a notice was ever sent by the Secretary to the appellant prior to the hearing of the Originating Application giving them an opportunity to submit in writing any arguments to the Tribunal on this issue. The purported amendment was allowed notwithstanding the objections by the Counsel for the appellant.

44. In the circumstances of this case we are of the view that even if we are wrong in our view that the Tribunal lacked the necessary jurisdiction to grant the amendment the Tribunal failed to follow the requirements of Rule 9. In our view even if the Tribunal could grant the amendment the proper procedure would have been to also grant an adjournment and allow the parties to reformulate their claims and possibly add witnesses if necessary. The fundamental difference in the nature of the two claims and the interest of natural justice in our view ought to have guided the Tribunal to either refuse the application or grant an adjournment along with the purported amendment. In this vein it was not open to the

Tribunal to make findings on the unfair dismissal claim having not given the appellant a proper opportunity to meet that claim which was added during the trial contrary to Rule 9.

Wrongful Dismissal Claim

GROUND 2. That the learned Vice-President erred in law and failed to give any adequate or proper reasons for concluding that the Respondent had been wrongfully dismissed. The learned Vice- President simply predicated his finding of wrongful dismissal on the fact that an instruction issued to the Respondent was not reasonable in the circumstances. This instruction had been issued to the Respondent many months before his dismissal.

45. It is noted that the Vice-President did make a finding that the respondent was wrongfully dismissed. This in my view was the only proper matter before him which he had jurisdiction to determine. However, notwithstanding his finding that the respondent was wrongfully dismissed he did not award any compensation to the respondent for the same. There was no explanation provided for this but we would surmise that it was due to the fact that the amendment which he purported to make was to add unfair dismissal as an alternate claim.

46. The issue which remains for determination then is whether having set aside the Vice President's finding of unfair dismissal and the subsequent award due to the lack of jurisdiction to amend we should give effect to his finding of wrongful dismissal. In this process we will necessarily resolve the issues raised in Grounds 5-9 of the Notice Of Motion. The starting point is that the wrongful dismissal dispute was properly referred to the Tribunal and was duly adjudicated upon as such it is a legitimate finding subject only to our determination as to whether he was wrong in his determination.

47. Mrs. Godet in her written submissions reminded the Court that the right of appeal to the Court of Appeal from a decision of the Tribunal is on a point of law alone, and not on factual issues. She contends that that is what the appellant in this case is seeking to do. Counsel cites the observation made by this Court differently constituted in the case of **St Andrews School Limited v Margo Albury. Action No 75 of 2013** to the effect that

"By section 64(1) of the Industrial Relations Act, an appeal from the Industrial Tribunal to this court lay on a point of law only. Consequently, a finding of fact of the Tribunal can only be impugned by this court if it can be shown that if the Tribunal had correctly directed itself on the law it could not reasonably have reached the conclusion under appeal."

48. The proposition put forward by Mrs. Godet is well known and accepted and was not challenged by the appellant. However, Counsel for the appellant submits that the Vice President fell into error by incorporating elements of unfair dismissal into his purported assessment of whether the respondent was wrongfully dismissed. This he contends is a clear indication that the Vice President did not properly direct himself on the law. We agree.

49. The law with respect to summary dismissal is well settled. Sections 31 to 33 of the Employment Act provides:-

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

32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following —

(a) theft;

(b) fraudulent offences;

(c) dishonesty;

(d) gross insubordination or insolence;

(e) gross indecency:

(f) breach of confidentiality, provided that this ground shall 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.

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".

50. As noted by the Vice President himself it is trite law that in order to mount a successful claim for wrongful dismissal two hurdles must be cleared. Firstly, an applicant must show that the employer did in fact terminate the contract without notice or with inadequate notice and secondly that the employer was not justified in doing so. However, he then goes on to say that "*the question is whether the employer was justified in terminating based on all the circumstances inclusive of the process utilized by the Respondent.*"

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

Tribunal specifically found that the appellant did not have an honest and reasonable belief that the respondent was guilty of gross misconduct.

52. The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case, and where there are admissions by the employee, then the need to make further investigations is manifestly diminished. It is clear that the Tribunal based its decision on its view as to the reasonableness of the investigation. However, whether an investigation is reasonable is a question of law and not fact. As such we are free to determine whether in the circumstances of this case the Tribunal made a proper finding.

53. The Vice President in my view conflated the requirements to be assessed for wrongful dismissal with those in a case of unfair dismissal where the concern is primarily the process whereby the employer arrived at his decision to terminate. At paragraph 201 of his judgement the Vice-President states that *"the applicant has made a claim for wrongful dismissal and unfair dismissal in the alternative. In both instances we must analyse the process."* True to his misconception of what he should have been considering, he then from that paragraph through to paragraph 222 delved into the process the employer utilized to investigate the complaint.

54. The learned Vice President in his assessment of the wrongful dismissal claim referred to the cases of **B.M.P Limited D/B/A Crystal Palace Casino** [2013] 1 BHS J. 135 and **Yvette Ferguson v B.M.P Three Limited D/D/A Crystal Palace Casino** IT/NES/1504/10. Both of these cases dealt primarily with the assessment of the nature of the investigations needed in an unfair dismissal case. The Vice President was of the opinion that there should have been an investigation into the unsigned letter received by the appellant a year prior to the date when the respondent disobeyed the instructions of the appellant.

55. It is evident that the driving force behind the Vice President's views was his position that the appellant was wrong not to have investigated the allegations made in the unsigned letter back in 2009. At paragraph 207 he observes that:

> **"In the instant case, the respondent, immediately upon receiving an unsigned letter making certain allegations against the Applicant took steps to limit the Applicant's authority. What was that decision based on? It was based on the unsigned letter without any kind of investigation whatsoever. There was no knowledge of who produced the letter. Infact Gary Gillihan says that he never even saw the letter."**

56. It is clear that the Vice President did not address himself to the proper consideration as to whether the appellant had an honest and reasonable belief that the respondent was guilty of insubordination on the 10th July 2011. Mrs. Godet submitted that paragraph 215 evidences that he did so. However a close reading of that paragraph in its context does not support that view. At paragraph 214 the Vice President refers to an extract from the appellant's defence before the Tribunal which was in the following terms:

> **"Sometime in September, 2009 Mr. Fox was specifically requested by his Sr.Director Gary Gillihan not to edit/fill time for Sabrina Rolle, an employee whom he managed in his department. This request was given to Mr. Fox following allegations that Mr. Fox was engaged in a relationship with her and had previously edited her time thereby allowing her benefits to which she was not entitled."**

57. This was immediately followed by the words in paragraph 215 as follows:

> **"The words above indicate very strongly that this was only a request. <u>In our view if a proper investigation had been carried out and the Respondent honestly and reasonably believed on a balance of probability that the alleged behavior had taken place then there would have been no problem.</u> However, the Respondent never mentioned an investigation despite saying that the Applicant had previously edited Sabrina's time." [Emphasis added]**

This is, in our view, a reference to the alleged failure to investigate the allegations made in 2009 and not the appellant's investigations which led to the respondent's termination.

58. The evidence before the Tribunal was that it was undisputed that the respondent had been instructed not to edit or fill-in time for Ms. Rolle. It was accepted by all parties that those instructions were not challenged or disputed by the respondent as he was entitled to do by way of the appellant's internal grievance procedure or otherwise. In cross examination the respondent agreed that Mr. Gillihan could give him any instructions which were reasonable and lawful in the course of his duty and not everything was reduced to writing. Additionally, the respondent admitted that receiving a request and an instruction from his senior director are both the same. He further admitted that contrary to those instructions/request he did in fact fill in time for Sabrina Rolle. His only explanation was that he did not think that those instructions were serious as they were not in writing.

59. The position of the appellant was that they were satisfied that he was guilty of gross misconduct and had been responsible for the loss of funds by overpayment so that theft was added. There was some dispute as to whether the time submitted was accurate and whether there was in fact an overpayment. However, what is clear is that the respondent did not verify the time worked prior to inputting the time in the Appellant's Kronos system. His explanation was that he took the word of Ms. Rolle because he considered her to be an honest employee.

60. In our view based on the very admissions made by the respondent the appellant was entitled to hold a reasonable belief that the respondent was guilty of gross misconduct. The investigation which they conducted indicated that Sabrina Rolle had left work early and was not entitled to full pay. Although the respondent disputes this he could not say that he saw her leave and the appellant was entitled to accept the evidence of the persons to whom they spoke.

Was The Penalty Too Severe?

61. Mrs. Godet submitted that there was no sufficient evidence or any at all, for that matter, led by the appellant of any breach of the respondent's fundamental terms of contract for gross insubordination, theft or gross misconduct as alleged. Moreover, there can be no doubt that the Honourable Vice President had properly considered all the relevant matters before him, (including the conduct of the appellant's investigations after the respondent's termination)

before coming to his determination that the respondent had been both wrongfully and unfairly dismissed.

62. Counsel cited in support of her submission the case of **Keturah Pinder and Windmill Investment Ltd,** SCCivApp No. 196 of 2015. In that case, the Court considered the operative test to be:

> **"whether the extent or degree of the Appellant's alleged "misconduct" amounts to gross "insubordination" as described in Section 32 of the Act and if it does, whether it is such as to be incompatible with the continuance of the Employment relationship between the Employee and the Employer, namely, whether the alleged behavior breached the essential condition of her contract of service."**

63. She contends that in the present case the appellant itself was not satisfied that the respondent's alleged misconduct amounted to gross insubordination, as stated in the first suspension, and later on, varied the breach to gross misconduct and theft, under which the respondent was further suspended and then terminated. In this context she submits that the Vice President was right to find that the respondent conduct did not meet the required standard.

64. The learned Vice President at paragraph 220 of his decision observed that:

> **"when we look at the evidence we recall the way in which the instruction was given to the Applicant. It was a very informal kind of casual instruction. The evidence supports the position that the Applicant in the instant action may have been disobedient but lacked the element of 'WILFUL INTENTION." In fact, the Applicant's evidence was that he didn't think it was a serious instruction. We say that the first official notice of unsatisfactory performance for gross insubordination did not meet the required standard."**

65. Section 31 of the Employment 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 of employment or has acted in a manner repugnant to the fundamental interests of the employer:'

Section 32 cites gross misconduct as a form of misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer.

66. At the time of his termination the respondent was an Assistant Director in the Stewarding Department. He was principally responsible for handling payroll which required him to review the Kronos reports for the department and enter or adjust times, based on what was happening in the operation. His was a position of trust which required him to hold the confidence of his employer. The effect of Mr. Gillihan's instruction to the respondent was that he was mandated by the appellant to have one of the other Assistant Directors verify Ms. Rolle's time of departure and enter the same in the Kronos system before he could approve her pay.

67. Contrary to the view held by the Tribunal that the instruction given was a very informal kind of casual instruction the evidence was that there was no complaint and Mr. Gillihan's instructions was obeyed for over a year. It also inconsistent with the assertion by the respondent that he didn't think it was a serious instruction. The evidence of the appellant was that it was important to the organization that the perception of favouritism in the work place be addressed so as to avoid potential disruption in the workplace. The learned Vice President clearly failed to consider the effect of the failure of the respondent to comply with the instructions given by his employer. In this regard he fell into error as he neglected to give consideration as to whether the respondent acted in a manner repugnant to the fundamental interests of the employer so as to cause them to lose trust and confidence in him.

68. In our view had the learned Vice President applied the proper test to the evidence before him he would have found that based on the admissions made by the respondent the appellant could not be faulted for their decision to terminate the respondent. In these

circumstances the learned Vice President's finding that the respondent was wrongfully dismissed cannot be sustained.

Disposition

69. In the circumstances of this case as we have found them, we would allow the Appeal and order that the Tribunal's decision be set aside in its entirety. The respondent's Notice would accordingly also be dismissed.

The Honourable Mr. Justice Evans, JA (Actg)

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA