COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp. No. 166 of 2019

B E T W E E N

FREEPORT AGGREGATES LIMITED

Appellant

AND

CARLTON CHATELAIN

Respondent

BEFORE:	**The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Jones, JA** **The Honourable Mr. Justice Evans, JA**
APPEARANCES:	**Mr. Gregory Moss for the Appellant** **Mr. Carlson Shurland QC with Ms. LaShona Knowles for the Respondent**
DATES:	**8 June, 2021; 20 July, 2021; 9 September, 2021; 30 September, 2021; 25 November, 2021; 9 February, 2022; 21 March, 2022; 12 April, 2022**

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Industrial Tribunal Appeal – Wrongful Dismissal – Summary Dismissal - Appeal from Tribunal's findings and award – Alternative defences – Whether employee deemed to have voluntarily resigned in accordance with Employee Handbook – Whether Tribunal erred in failing to find that the employee had been summarily dismissed – Whether Tribunal erred in failing to find that the employee had repudiated the employment contract when he absented himself from work for 2 months – Sections 31, 32 and 33 Employment Act – Section 64(3) Industrial Relations Act.

The respondent was employed in October 2007 as an hourly-paid Tyre Repair man/Truck Driver. As a Tyre Repair man, he was responsible for repairing the tyres for all the Appellant's equipment, including the payloader, pickup truck and forklift. When performing duties as a Truck Driver he

drove the ready-mixed (concrete) truck, the front-end loader, the pick-loader, the pit-haul truck, the ship-loader and the tractor-trailer.

In addition to driving the concrete truck, the respondent and other truck drivers were periodically required to chip concrete out of the trucks as otherwise, the concrete would build-up and encrust the drum.

On or about mid-September 2017 the respondent had turned up for work and found the Tyre shop closed. He was told that there was no tyre repair work for him to do but he was asked to chip concrete from the ready-mix concrete trucks. He refused to chip concrete from the trucks and had been sent home. The following day he had called-in to work and had again been told that the only available work was chipping the concrete trucks. He told his Supervisor he didn't feel safe chipping concrete and told the Supervisor to call him when they had other work for him to do to which the Supervisor said "okay'.

There was no further communication between the Appellant or the respondent. The respondent reported the matter to the Labour Department and at the first conciliation meeting held on 22 January, 2018, the appellant served him with a Termination Notice and Termination letter, (both dated 20 November 2017) terminating his employment with effect from 20 November 2017. At the date when the appellant issued the Termination Notice and letter in November, the respondent had not returned to work for approximately 2 months.

In his Originating Application the respondent claimed notice pay, severance pay, and vacation pay.

In its Defence, the appellant made alternative claims. It claimed: (i) that the respondent's employment had terminated by agreement pursuant to a provision in the company's Employee Handbook which stipulated that an employee who did not report to work for 3 consecutive days was deemed to have voluntarily resigned; (ii) that the appellant was entitled to accept the respondent's repudiatory breach and did so by issuing the Termination notice; and (iii) alternatively, that the respondent had been summarily dismissed for cause, namely his unexplained absence from work for 2 months.

In its written decision handed down on 15 August 2019, the Industrial Tribunal found that the respondent had been wrongfully dismissed and awarded him vacation pay, termination pay-in-lieu of notice and interest thereon until payment in full.

The employer appealed citing numerous grounds.

Held: Notwithstanding the Tribunal's error of law, the appeal is dismissed pursuant to this Court's powers under section 64(3) of the Industrial Relations Act since we consider that no substantial miscarriage of justice has actually occurred. In the result, the Tribunal's decision that the respondent was wrongfully dismissed is affirmed together with the awards which it made to the

respondent for vacation pay, termination pay-in-lieu of notice and interest thereon until payment in full. There is no order as to costs.

Despite correctly adverting to the standard for summary dismissal set out in the Employment Act, the Vice-President, however, proceeded to analyze FAL's defence under section 33 using four factors discussed in the English EAT appeal of *Meakin v. Liverpool City Council Leisure Services Directorate [2001] WL 1423031*. Regrettably, this is where the Vice-President took a wrong turn and erred in law.

Meakin is obviously distinguishable from the circumstances of this case. It is not a wrongful dismissal case but instead involved a claim for unfair dismissal pursuant to section 98 of the English Employment Rights Act, 1996. In *Meakin*, the EAT noted that the employment tribunal had adopted the guidelines suggested by the EAT in *British Home Stores Ltd v. Burchell (1978) IRLR 379* as approved and expanded by the Court of Appeal in *Weddel v. Teper (1980) IRLR 1996*. The guidance in those English authorities is based on the wording of section 98 of the English Act and cannot assist in elucidation of the law of summary dismissal in The Bahamas or in the proper approach to sections 31, 32 and 33 of our Employment Act.

To determine whether the appellant was (as it claimed) entitled to summarily dismiss the respondent, what the Vice-President ought to have done was to consider for purposes of section 31 whether the misconduct for which the employee was dismissed was such that it amounted to a fundamental breach of his contract of employment or was repugnant to the employer's fundamental interests. Having made that initial determination of fact, she then had to determine whether the employer had met the requirements set out in section 33 for effecting the employee's summary dismissal.

We are satisfied that despite having utilized the wrong test, the Vice-President's ultimate conclusion at page 29 of her written decision that the respondent did not commit a fundamental breach of the employment contract or act in a manner that was repugnant to the appellant's fundamental interests was clearly correct. Given the evidence, which was adduced before the Tribunal, we are unable to say that a reasonable tribunal properly applying the law would not have reached the same conclusion.

British Home Stores Ltd v. Burchell (1978) IRLR 379; mentioned
British Leyland U.K. Ltd v. Ashraf, [1978] ICR 979; mentioned
Cantor Fitzgerald International v. Lee Callaghan et al [1999] 2 All ER 441 ; applied
Curtis-Rolle v. Doctors Hospital (Bahamas) Limited, SCCivApp No. 149 of 2012; mentioned
Eloise Shantel Curtis-Rolle v. Doctors Hospital (Bahamas) Limited, SCCivApp No. 149 of 2012; mentioned
Igbo v. Johnson Matthey Chemicals Ltd, [1986] IRLR 215; mentioned
Martin v. Glynwed Distribution Ltd, [1983] ICR 511; considered
Meakin v. Liverpool City Council Leisure Services Directorate [2001] WL 1423031; considered

Rodgers v. Bahamas Electricity Corporation, [2000] BHS J. No. 271; considered
W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823; considered
Weddel v. Teper (1980) IRLR 1996; mentioned

JUDGMENT

Decision delivered by The Hon. Madam Justice Crane-Scott, JA

Introduction and Background

1. This is an appeal by the Appellant ("FAL") against a written Decision of the Honourable Helen J. Almorales-Jones, Vice-President of the Industrial Tribunal handed down on 15 August, 2019 in which she found that the Respondent (Mr. Chatelain) had been wrongfully dismissed and ordered FAL to pay him the sum of $14,856.54 representing vacation pay and Notice/Termination pay plus interest at the rate of 8 % per annum from the date of the award until payment in full.

2. FAL asks that we set aside the Tribunal's decision in its entirety and that we dismiss Mr. Chatelain's Originating Application before the Tribunal.

3. After hearing the contending submissions, we took time to consider our decision.

4. We have dismissed the appeal. The detailed reasons for our decision appear below.

Background

5. On 22 January 2018 Mr. Chatelain (who had not returned to work at FAL since mid-September of 2017) was personally served with a Termination Notice and Termination letter, (both dated 20 November 2017) terminating his employment with effect from 20 November 2017.

6. The relevant portions of the Termination Notice stated:

> **"TERMINATION NOTICE**
>
> **Charlton Chatelain** **11/20/2017**
> **EMPLOYEE** **DATE**
>
> **You are hereby given this written notification as an official termination for the offence listed below:**
> **…**

X – *Unexcused absence*

…

Other: Termination for cause: Mr. Chatelain has not contacted the FAL office or Supervisor since Tuesday October 17th of 2017. It has been Twenty-Four (24) business days since Mr. Chatelain has phoned, texted, or email the FAL Office or Supervisor. Mr. Chatelain has Voluntarily Resigned as per FAL Employee Handbook – REPORTING YOUR ABSENCE: *"Employees who do not report to work or call or speak to his/her Supervisor regarding the absence for three (3) consecutive days will be considered to have voluntarily resigned and their employment will be recognized by the Company as having been terminated."*

Comments: Termination date: November 20, 2017. Vacation Pay less National Insurance has been drafted and is ready for pick-up in Employee's personal folder. Cheque Number 08770 in the amount of $615.70."

7. Mr. Chatelain had started work with FAL on 15 October 2007 as an hourly-paid Tyre Repair man/Truck Driver. As a Tyre Repair man, he was responsible for repairing the tyres for all the Employer's equipment, including the payloader, pickup truck and forklift. When performing duties as a Truck Driver he drove the ready-mixed (concrete) truck, the front-end loader, the pick-loader, the pit-haul truck, the ship-loader and the tractor-trailer.

8. In addition to driving the concrete truck, Mr. Chatelain and other truck drivers were periodically required by FAL to chip concrete out of the trucks as otherwise, the concrete would build-up and encrust the drum.

9. The first time he was required to chip concrete from a truck was on a Saturday in the year 2008. Mr. Chatelain told the Tribunal that the day after he had chipped concrete he had woken up with a congested chest and nostrils. He did not go to a doctor but believed his condition had been caused by the concrete dust. On returning to work the following Monday, he said he did not complain to FAL and that it did not cross his mind to inform his supervisor about the incident. Under cross-examination, Mr. Chatelain agreed that FAL had provided workers with "off-the-shelf" disposable masks to be thrown away after one use.

10. Both parties accepted that the company held weekly safety meetings with its employees and that during those meetings everyone had the opportunity to raise safety concerns. Under cross-examination, Mr. Chatelain could not recall if he had ever brought up any safety concerns he had about chipping concrete. For its part, FAL's General Manager, Mr. Marcus Callahan,

testified that to his certain knowledge, Mr. Chatelain had never once presented any safety concerns about chipping concrete from the drums of the concrete trucks.

11. The issue regarding the dangers of chipping concrete was disposed of at page 12 of her written Decision where the learned Vice-President made the following findings of fact:

> **"The evidence shows that the Applicant did not report any *health concerns* to the Respondent after he experienced symptoms the day after he chipped concrete from a truck.**
>
> **He also did not formally complain to the Respondent about any *dangers* he believed chipping concrete from the truck using a jackhammer, with only a fan and a dust mask for protection, posed to his health and safety."**

12. As will shortly become apparent, in making these findings, the learned Vice-President effectively disposed of Mr. Chatelain's assertion that he had been terminated for refusing to do dangerous work outside the scope of his employment.

13. The following excerpts from the parties' pleadings speak for themselves.

14. In his Originating Application, Mr. Chatelain sought a money award, namely, compensation if he were found to have been wrongfully/unfairly dismissed. At paragraphs 11 and 12 of the application, he made the following claims and assertions:

> **"11. Please explain the grounds for your application below. It will be helpful to the Tribunal if you can give details of the reason for your application. You will be able to amplify them at the hearing:**
>
> **Notice Pay for 11 years**
> **Severance Pay for 11 years**
> **Vacation Pay**
>
> **$27, 06.00 (sic)**
>
> **12. If you wish to state what in your opinion was the reason for your dismissal, please do so here:**
>
> **My refusal to perform work outside of my scope of work.**
>
> **Refusal to perform dangerous work."**

15. In its filed Defence, FAL appears to have acknowledged that Mr. Chatelain had been dismissed. The Defence further specified *the reasons* for Mr. Chatelain's dismissal and identified *the grounds* on which FAL would resist his claim for wrongful dismissal. At paragraphs 4 and 5 FAL stated:

> **"4. (a) Was the Applicant dismissed? Yes/No:- Yes**
> **(b) If Yes, what was the reason for the dismissal?: Unauthorized absence from work, Refusal to obey lawful directions.**
>
> **5. Give below sufficient particulars to show the grounds on which you intend to resist the application. It will be helpful to the Tribunal if you give details of your reasons for resisting it; you will be able to add to them at the Tribunal's hearing. (Continue on reverse if there is insufficient space below).**
>
> **(1) Refused to obey lawful order to chip concrete away from barrel of concrete truck.**
>
> **(2) Voluntary Resignation by staying away from work for approximately two (2) months without permission contrary to the provisions of the employee Handbook which provides that: "Employees who do not report to work or call or speak to his/her supervisor regarding absence for three (3) consecutive days will be considered to have voluntarily resigned and their employment will be recognized by the company as having been terminated".**
>
> **(3) Alternatively, termination of employment for unauthorized absence from work for approximately two (2) months."**

16. Between pages 1 through 13 of her written Decision, the learned Vice-President outlined, *inter alia*, the evidence regarding the reason for Mr. Chatelain's refusal to work on 19 September 2017 and the conflicting testimony surrounding his failure to return to work thereafter.

17. At page 14 the Vice-President examined what she considered to be the first issue for her determination. This was whether FAL owed Mr. Chatelain vacation pay. She examined the evidence for and against his claim for vacation pay and said:

> **"The Termination Notice stated that the Applicant's termination date was the 20th November, 2017. However, a Notice of dismissal is not effective until the employer communicates it to the employee (which was the 22nd January, 2018 in this case).**
>
> **The Tribunal assesses the Applicant's pro-rated Vacation entitlement from the 30th July 2017 to the 22nd January, 2018 at $924.09 = 177 days, divided by 365 days in a year = 0.48, multiplied by $1,905.60 (3 weeks' Vacation pay, $15.88 per hour x 40 hours per week = $635.20 x 3 weeks) =.**
>
> **Deducting $36.04 (3.9% of $924.09) for the Applicant's National Insurance contributions and the $615.70 the Respondent paid the Applicant, the Tribunal finds that the Applicant has proved on a balance of probabilities, that the Respondent owes him a balance of $272.35 for Vacation pay."**

18. Between pages 15 through 21 the Vice-President then examined the second issue she found to have arisen for her consideration. This was whether Mr. Chatelain's actions and/or conduct amounted to a resignation or an abandonment of his job.

19. At page 21, the Vice-President dismissed FAL's defence that Mr. Chatelain had voluntarily resigned or had abandoned his job by staying away from work for approximately two (2) months without permission contrary to the provisions of the Employee Handbook. After considering case law on the test for resignation or job abandonment at common law, the Vice-President found:

> **"I find that the Respondent has failed to prove, on a balance of probabilities, that the Applicant's words and/or actions evinced his intention to not be bound by the terms and conditions of his employment or not to return to his job. It was therefore unreasonable for the Respondent to consider the Applicant's words and/or conduct a resignation or job abandonment."**

20. Finally, between pages 21 through 29 of her decision, the Vice-President turned her attention to the third issue, and considered whether FAL had wrongfully dismissed Mr. Chatelain as he claimed; or whether FAL had established its right to summarily dismiss him for cause in accordance with Part VIII of the Employment Act, Ch. 321A. At page 29 she found:

> **"I find that the Respondent has failed to prove on a balance of probabilities, that its decision to summarily dismiss the Applicant was reasonable in the circumstances of this case.**
>
> **The Tribunal finds that the Respondent did not meet its burden under section 33 of the Act, so summary dismissal of the Applicant not within the range of options open to the Respondent as the Applicant did not commit a fundamental breach of the employment contract or act in a manner that was repugnant to the Respondent's interests." [Emphasis added]**

21. FAL is displeased with the entirety of the Vice-President's Decision. In its Notice of Appeal, it relies on 50 grounds of appeal, all of which attack various aspects of the learned Vice-President's decision and suggest what she ought to have found. At the hearing, Mr. Moss explained that properly understood, there were only 23 substantive grounds as some of the 50 grounds had merely suggested what the Tribunal *ought to have found*. This brings us to the grounds.

The Grounds of Appeal

22. As indicated, FAL's grounds are exceedingly lengthy. Many of the grounds raised the same issues and overlapped, suggesting what the learned Vice-President ought to have held. It would be counterproductive to reproduce them here. Fortunately, Counsel for FAL, Mr. Moss, helpfully distilled the matters requiring our consideration on the appeal to 3 issues as follows:

> 1. Whether the Vice-President erred by failing to consider properly or at all the issue of deemed voluntary resignation which arose under the employment contract by virtue of the Employee Handbook which expressly provided that: *"Employees who do not report to work or call or speak to his/her supervisor regarding absence for three (3) consecutive days will be considered to have voluntarily resigned and their employment will be recognized by the company as having been terminated"*? *(Grounds 1-50)*
>
> 2. Whether the Vice-President's conclusion that FAL had failed to meet the burden under section 33 of the Employment Act to summarily dismiss Mr. Chatelain was erroneous and plainly wrong?" *(Grounds 1-50)*
>
> 3. Whether the Vice-President failed to consider whether Mr. Chatelain's failure to return to work for 2 months constituted a repudiation of his contract which FAL was entitled to accept and did accept by issuance of the Termination Notice and letter? *(Grounds 1-50)*

23. We turn now to examine the issues. For reasons which will become apparent, we will deal with Issues 1 and 3 before we consider Issue 2:

The Employee Handbook and the Deemed Voluntary Resignation issue - (Grounds 1-50)

24. Lying at the heart of this issue is FAL's complaint that the learned Vice-President erred in not giving effect to FAL's claim that Mr. Chatelain's employment terminated by agreement pursuant to the following provision in the company's Employee Handbook which governed his terms and conditions:

> **"Employees who do not report to work or call or speak to his/her supervisor regarding absence for three (3) consecutive days will be considered to have voluntarily resigned and their employment will be recognized by the company as having been terminated."**

25. As we understand Mr. Moss's submission, it is made in support of its complaint that the Vice-President's finding on page 21 of her decision that Mr. Chatelain had proved, on a balance of probabilities, that he had been dismissed by FAL on the 22nd January 2018 was erroneous in law and plainly wrong.

26. Mr. Moss suggests that the learned Vice-President ought to have held that by way of its Termination Notice dated 20 November 2017, FAL had "recognized" Mr. Chatelain as having resigned his employment on or about 24 September 2017 pursuant to the deemed resignation provision of FAL's Employee Handbook. In short, the argument is that under the terms of his employment contract Mr. Chatelain ought to have been regarded as having voluntarily resigned as distinct from being dismissed.

27. In support of his submission, Mr. Moss relied on a decision of the Bahamas Industrial Tribunal in **Rodgers v. Bahamas Electricity Corporation,** [2000] BHS J. No. 271 which he claimed is on all fours with what transpired in relation to Mr. Chatelain. He suggested that the Vice-President's attempt to distinguish **Rodgers** was erroneous and plainly wrong.

28. At page 17 of her written Decision, the Vice-President explained why **Rodgers** was distinguishable and did not apply. She said:

> **"The Respondent's counsel cited *Rodgers v. Bahamas Electricity Corporation*…., in which an Industrial Agreement provided that *"an employee who accumulates 5 consecutive working days of unauthorized absences will be considered as having resigned his/her position"* and the employee (a Linesman Mate) was injured on the job and didn't want to work around electricity. A doctor cleared the employee to return to**

> **work as long as he performed light duties in an air-conditioned truck or in the office. For 7 days, his Supervisor forced him to do regular line work. He then discontinued working. He was later told that he would perform the duties of a truck driver. His employer summarily dismissed him for not reporting to work for 14 consecutive working days and not advising his Supervisor of the reason for his absence. President Harrison Lockhart found that the termination was "merely declaratory in effect" and only confirmed that the employer regarded the employee has having resigned from his employment because of his unauthorized absences from work and said-**
>
> > **"Even if this Tribunal accepts the evidence of the Applicant that the Respondent in requiring him to perform linesman duties…was not adhering to medical advice as regards his special needs and requirements, it was absolutely no excuse for the applicant to absent himself without giving a prompt explanation to the Respondent."**
>
> **However, in the instant case both the Respondent's Production Manager and General Manager knew the reason for the Applicant's absence from work – he did not want to chip concrete from the trucks and his Supervisor had said *okay* when the Applicant asked him to call him when he had other work for him to do. The Applicant therefore did not owe the Respondent any explanation for his absence from work."**

29. In response, Counsel for Mr. Chatelain, Mr. Shurland, QC submitted that the learned Vice President's interpretation of the law on the issue of voluntary resignation by an employee is correct and cannot be faulted. He relied on a dictum of Sir John Donaldson in the English Court of Appeal decision in **Martin v. Glynwed Distribution Ltd**, [1983] ICR 51 that whatever the respective actions of the employer and employee at the time when the contract was terminated, the real issue which had to be determined was who ended the contract.

30. In **Martin**, the Court of Appeal quashed the EAT's decision which had overturned the industrial tribunal's finding that Martin had resigned and had not been unfairly dismissed. In quashing the EAT's decision, the Court of Appeal stated that whether the employee had resigned or been dismissed was a pure finding of fact. It reiterated that the EAT's appellate jurisdiction is limited to questions of law and could not interfere with the industrial tribunal's finding that the employee had not been dismissed.

31. As we understand his argument, Mr. Shurland submits that no error of law is disclosed in the learned Vice-President's written decision in relation to the resignation issue. Relying on **Martin**, he says that the question whether Mr. Chatelain had resigned or been dismissed was

a question of fact for determination by the learned Vice-President. He urges us not to interfere with the learned Vice-President's primary findings of fact.

32. In rebuttal, Mr. Moss says that **Martin** is distinguishable on the basis that it was based on the definition of "dismissal" and "dismiss" in section 55 of the English Employment Protection (Consolidation) Act, 1978 which has no equivalent in the Bahamas Employment Act, Ch. 321A.

33. We have considered the contending submissions. While we accept that the Bahamas Employment Act contains no corresponding definition of "dismissal" or "dismiss", this does not mean that the decision in **Martin** is unhelpful to us in considering this appeal. Notwithstanding the absence from the Bahamas Employment Act of a definition of "dismissal" or "dismiss", the 'trade dispute' in this case was always about the circumstances surrounding how Mr. Chatelain's contract of employment came to an end.

34. It is difficult to see how having initially pleaded in its Defence that Mr. Chatelain had been dismissed, FAL could have sustained its arguments that he had instead resigned. As the English Court of Appeal clearly said in **Martin**, that question is one of fact.

35. As we see it, FAL's submission that the learned Vice-President erred by failing to consider properly or at all the issue of Mr. Chatelain's deemed voluntary resignation which arose under the employment contract by virtue of the Employee Handbook cannot be sustained.

36. As clearly appears between pages 15 through 21 of her written decision the learned Vice-President considered the question whether Mr. Chatelain's actions amounted to a resignation or abandonment of his job. After adverting to the closing submissions, the case law on the subject and the facts as she found them, at pages 19-21, the Vice-President made the following primary findings of fact:

> **"The Respondent could have construed the Applicant's refusal to chip concrete from the truck as insubordination, but it clearly did not evince any intention by the Applicant to no longer work for the Respondent as a Truck Driver/Tyre Repairman.**
>
> **…….**
>
> **The evidence does not show that the Applicant just up and left work on Tuesday, 19th September 2017 for no valid reason, but because his Supervisor told him to go home if he was not going to chip concrete from the truck because that was the only work they had to do that day.**

I believe that the Applicant did not return to work thereafter because the following day (Wednesday) his Supervisor told him he only had trucks to chip; he again refused to do it; he told the Supervisor to call him when he had other work for him to do; and his Supervisor said, okay, but never called him back.

I do not believe the Respondent's evidence that the Applicant absented himself from work for about 2 months after his Supervisor told him he could return to work when he was ready to chip concrete from the trucks.

Even if this was true, the Respondent sending the Applicant home until he was prepared to chip concrete from the trucks would constitute an indefinite suspension of his employment or a constructive dismissal (if the Applicant could prove, on a balance of probabilities that the Respondent breached its common law or statutory duty to provide and maintain a safe system or forced him to work under intolerable work conditions).

……..

The Respondent knew full well that the Applicant wanted to do other work and only objected to chipping concrete out of the truck. The fact that the Applicant called his Supervisor the following day and asked him if they had any other work for him to do indicated that he wished to continue working for the Respondent.

…..

In the instant case, the *Termination Notice* purported to terminate the Applicant for *not reporting to work for 3 consecutive days or calling to speak to his Supervisor regarding his absence,* which the Handbook expressly provided will be considered as the employee voluntarily resigning and their employment will be recognized by the Company as having been terminated.

If the Respondent could reasonably have construed the Applicant's refusal to follow his Supervisor's request that he chip concrete from the truck *or* his absence from work for some 2 months as a repudiation of the employment contract, it did not take any steps to show that it accepted the repudiation of the employment contract and consider the contract as ended until it prepared a Termination Notice and Termination letter on the 20th November, 2017. However, it did not give it to the Applicant until the conciliation meeting at the Department of

Labour (presumably at the first meeting held on the 22nd January, 2018).

I believe that a reasonable person would not have considered the Applicant's refusal to chip concrete from a truck; leaving work after his Supervisor told him to go home if he was not going to do it because he didn't have anything else for him to do; telephoning his Supervisor the following day; again refusing to chip concrete from a truck; telling his Supervisor to call him when he had other work for him to do; and not returning to work for 9 weeks; as demonstrating a clear and unequivocal intention to resign from his job *or* to no longer be bound by the terms of the employment contract." [Emphasis added]

37. Based on the above extracts from the Vice-President's decision, it is impossible for FAL to convince us that she failed to consider the deemed resignation clause contained in the Employee Handbook. She expressly adverted to it in her decision and after outlining the circumstances surrounding Mr. Chatelain's absence from work and how his contract of employment ended, she implicitly explained why she would not give effect to it.

38. We have considered the Industrial Tribunal decision in **Rodgers** which Mr. Moss laid over for our consideration. In our view, the case is distinguishable on the facts from what occurred here. The only similarity between **Rodgers** and this case is that there was also in place (as here) a deemed retirement clause which formed part of the employee's employment contract and which provided that *"an employee who accumulates five (5) consecutive working days of unauthorized absences will be considered as having resigned his/her position."*

39. That, however, is where any similarity with Mr. Chatelain's case ends.

40. In **Rodgers**, after examining the evidence surrounding the circumstances in which the employee's employment had come to an end, Vice-President Harrison gave effect to the deemed retirement provision in the Industrial Agreement, being satisfied (as he found) that even if the employer was not adhering to medical advice as regards Rodgers' special needs and requirements, there was no excuse for Rodgers absenting himself from work without giving a prompt explanation to his employer.

41. As V-P Lockhart also found, Rodgers could easily have contacted Mrs. Villiemae Black, the Employee Relations Officer and registered his complaints with her; or for that matter, registered the complaints with his Supervisor, Mr. Wayne Farquharson or the Assistant General Manager, Mr. Kevin Basden. What is most notable from **Rodgers** is that notwithstanding the deemed resignation stipulation at Clause 16.14 of the Industrial

Agreement, a factual enquiry was nonetheless undertaken by the Tribunal to determine its applicability in the circumstances of the case. In **Rodgers,** the V-P expressly found that the employee had absented himself from work without excuse and had failed to alert the employer about his complaints for 14 consecutive days. The facts of this case are entirely different.

42. As we see it, the learned Vice-President was clearly correct not to have given effect to the deemed resignation clause in the Employee Handbook. Properly understood, the clause could only reasonably have been intended as a provision which would enable FAL, *in the appropriate circumstances*, to treat an employee's unexplained absence from work for 3 consecutive days as a repudiation of the employment contract enabling it to "recognize" the absence as a voluntary resignation.

43. As the Tribunal in this case reasonably found, FAL knew **"full well"** why Mr. Chatelain had not returned to work. He had refused to chip concrete on two consecutive days in mid-September 2017 and had told his Supervisor to call him when they had other work for him to do and FAL said "okay". Thereafter, FAL did nothing about the 'standoff' which had obviously arisen between themselves and Mr. Chatelain until they served him with the Termination Notice on 22 January 2018.

44. The learned Vice-President was entitled to make these primary findings of fact as to how Mr. Chatelain's contract of employment had come to an end, and to determine whether he had been dismissed or had voluntarily resigned in accordance with the Handbook. She did so and concluded that he had been dismissed. There is no error of law here. We are unable to interfere with her findings of fact. The deemed voluntary resignation issue (and the grounds which support it) have absolutely no merit and are, accordingly, dismissed.

45. We should add that we have found it unnecessary to discuss the two authorities cited to us between paragraphs 64 through 83 of Mr. Moss's Supplemental Submissions in relation to termination by agreement, specifically, **British Leyland U.K. Ltd v. Ashraf,** [1978] ICR 979 and **Igbo v. Johnson Matthey Chemicals Ltd,** [1986] IRLR 215. The submission is really an attempt to invite us to review the Tribunal's findings of fact under the guise of a question of law. That we cannot do.

The Repudiation issue - (Grounds 1-50)

46. This issue (and its associated grounds) raises a connected question involving the law of repudiatory breach. Mr. Moss submits that the Vice-President failed to consider whether Mr. Chatelain's failure to return to work after 2 consecutive months constituted a repudiation by him of his employment contract which FAL was entitled to accept and did accept when it issued its Termination Notice and letter in November 2017.

47. For his part, Mr. Shurland supports the learned Vice-President's conclusion that Mr. Chatelain's words and actions did not amount to repudiation of his employment contract with FAL; and submits that the Tribunal's decision that he was dismissed by FAL is correct.

48. The law relating to repudiatory breach, affirmation and waiver within the setting of employment contracts is found in the oft-cited dictum of Browne-Wilkinson J in the EAT decision in **W.E. Cox Toner (International) Ltd v. Crook** [1981] ICR 823. Writing for the EAT, Browne-Wilkinson J explained:

> **"Although we were not referred to cases outside the field of employment law, our own researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v. Robles* [1969] 1 W.L.R. 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract [1981] ICR 823 at 829. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation…..such further performance does not prejudice his right subsequently to accept the repudiation." [Emphasis added]**

49. In a subsequent decision of the English Court of Appeal in **Cantor Fitzgerald International v. Lee Callaghan et al** [1999] 2 All ER 441, the Court had occasion to consider the issues of repudiatory breach, affirmation and waiver within the context of the respondents employment contracts. After examining the statement of the law in **W. E. Cox Toner**, at page 423 Lord Justice Judge explained that ultimately, **"the question is one, not of law, but of fact."**

50. As we have already observed in our discussion in respect of the voluntary resignation issue, the Vice-President in this case found that Mr. Chatelain had expressly refused to chip concrete

on two consecutive days in mid-September 2017 and had told his Supervisor to call him when they had other work for him and FAL said "okay". Thereafter, at page 20 of her decision the Vice-President addressed the possibility of a repudiatory breach and expressly found that even if FAL could reasonably have construed Mr. Chatelain's refusal to chip concrete as a repudiation of his employment contract, FAL took no steps to show that it accepted the repudiation and that it regarded the contract as ended until it prepared a Termination Notice and letter on 20 November 2017. As the Vice-President also found, FAL only served Mr. Chatelain with the Termination Notice and letter at the conciliation meeting on 22 January 2018 at the Department of Labour.

51. In short, in this case a virtual standoff between the parties took place in the period between mid-September 2017 when Mr. Chatelain refused to chip concrete and 22 January 2018 when FAL purported to dismiss him for refusing to chip concrete from its trucks and for staying away from work for 2 months. As the Tribunal found, FAL knew why Mr. Chatelain had refused to chip concrete yet did nothing to either affirm the contract or to treat the contract as repudiated and at an end. Furthermore, given the time which had elapsed since Mr. Chatelain first refused to chip concrete from its trucks and when it took steps to terminate him, it was altogether too late for FAL (as they sought to do on 22 January 2018 when they served him with the Termination Notice) to seek to accept the alleged repudiation and to end the contract on that basis.

52. What is more, and as the Vice-President specifically found, nothing in what Mr. Chatelain had said and done ought reasonably to have been taken as evincing an intention on his part not to return to his job.

53. At page 21 of her decision the learned Vice-President disposed of the several matters which had arisen for her consideration, with the following final conclusions of fact:

> **"I find that the Respondent has failed to prove, on a balance of probabilities, that the Applicant's words and/or actions evinced his intention not to be bound by the terms and conditions of his employment or not to return to his job. It was therefore unreasonable for the Respondent to consider the Applicant's words and/or conduct a resignation or job abandonment."**

54. As we have just noted, the Vice-President adverted to the possibility of repudiatory breach and made the required findings of fact. We are unable to say the Vice-President's findings were such that no reasonable tribunal could have reached the same conclusion. In short, there is no way we can properly interfere with her findings of fact. The repudiation issue and its associated grounds are without merit and are also dismissed.

55. We turn finally to consider the third issue identified by Mr. Moss which is the correctness (or otherwise) of the Vice-President's conclusion that Mr. Chatelain was wrongfully dismissed.

Was the Tribunal's finding that FAL failed meet the requirements for Summary Dismissal under Section 33 of the Employment Act wrong in law? - (Grounds 1-50)

56. Based on the filed pleadings, the Vice-President necessarily had to consider: (a) Mr. Chatelain's claim that he had been wrongfully terminated without being given the minimum period of notice or pay-in-lieu of notice mandated by section 21(1) of the Employment Act; and (b) FAL's defence that it had summarily dismissed Mr. Chatelain for what it considered a fundamental breach of his contract of employment, namely, his unauthorized absence from work for approximately 2 months. FAL's defence required her to determine whether it had met the standards for summary dismissal set out in Part VIII of the Employment Act.

57. At page 22 of her decision, the Vice-President examined Mr. Chatelain's claim for Notice pay and found that he had proved that he had been terminated by FAL on 22 January 2018 and had not been given the minimum notice or pay-in-lieu of notice mandated by section 29.

58. She then turned her attention between pages 22 through 29 to a consideration of FAL's defence that it had just cause to summarily dismiss Mr. Chatelain. At page 22 she adverted to Part VIII (Summary Dismissal) of the Employment Act and more specifically, to sections 31, 32 and 33 respectively. She observed that the Act contains no comprehensive indication as to what conduct amounts to a fundamental breach of a contract of employment or is repugnant to the fundamental interests of the employer, but that examples of such misconduct are provided in section 32.

59. On page 23, the Vice-President adverted to the observations of this Court (differently constituted) in the case of **Eloise Shantel Curtis-Rolle v. Doctors Hospital (Bahamas) Limited,** SCCivApp No. 149 of 2012 that where statutory provisions exist, case law can only provide a guide as to the possible meaning and interpretation to be given to the statutory provisions.

60. She correctly adverted to section 33 of the Act, noting that the burden rested on FAL to prove on the balance of probabilities that it honestly and reasonably believed that at the time it dismissed him, Mr. Chatelain had committed the misconduct in question and that it had conducted a reasonable investigation of such misconduct, except where such an investigation was otherwise unwarranted.

61. Despite correctly adverting to the standard for summary dismissal set out in the Employment Act, the Vice-President, however, proceeded to analyze FAL's defence under section 33 using

the four factors discussed in the English EAT appeal of **Meakin v. Liverpool City Council Leisure Services Directorate** [2001] WL 1423031. Regrettably, this is where the Vice-President took a wrong turn and erred in law.

62. **Meakin** is obviously distinguishable from the circumstances of this case. It is not a wrongful dismissal case but instead involved a claim for unfair dismissal pursuant to section 98 of the English Employment Rights Act, 1996. In **Meakin**, the EAT noted that the employment tribunal had adopted the guidelines suggested by the EAT in **British Home Stores Ltd v. Burchell** (1978) IRLR 379 as approved and expanded by the Court of Appeal in **Weddel v. Teper** (1980) IRLR 1996. The guidance in these English authorities is based on the wording of section 98 of the English Act and cannot assist in elucidation of the law of summary dismissal in The Bahamas or in the proper approach to sections 31, 32 and 33 of our Employment Act.

63. To determine whether FAL was (as it claimed) entitled to summarily dismiss Mr. Chatelain, what the Vice-President ought to have done was to consider for purposes of section 31 whether the misconduct for which Mr. Chatelain was dismissed was such that it amounted to a fundamental breach of his contract of employment or was repugnant to FAL's fundamental interests. In this regard see paras 28 and 29 of **Curtis-Rolle v. Doctors Hospital (Bahamas) Limited,** SCCivApp No. 149 of 2012.

64. Having made that initial determination of fact, the Vice-President then had to determine whether FAL (as the employer) had met the requirements set out in section 33 for effecting its employee's summary dismissal.

65. By erroneously adverting to the tests in **Meakin** and conducting her factual inquiry along those lines, the learned Vice-President clearly utilized the wrong test. However, while she may have employed the wrong test, at page 25 of her decision, she expressly found that at the time FAL purported to terminate Mr. Chatelain on the 20 November 2017, FAL was well aware that he did not want to chip concrete from the trucks, and that he had not simply absented himself from work without permission or that his absence was unexcused. As she also found, Mr. Chatelain had remained away from work for almost 2 months on the understanding that FAL would call him when it had other work for him to do.

66. In the face of those findings of fact, we are satisfied that despite having utilized the wrong test, the Vice-President's ultimate conclusion at page 29 of her written decision that Mr. Chatelain did not commit a fundamental breach of the employment contract or act in a manner that was repugnant to FAL's fundamental interests was clearly correct. FAL was well aware why Mr. Chatelain had refused to chip concrete. As the Tribunal found, FAL's understanding with Mr. Chatelain was that FAL would call him when it had other work for him to do. On those facts,

it was impossible for the Tribunal to have found that his conduct in remaining away from work for almost 2 months had so fundamentally undermined the trust and confidence inherent in his employment with the company that it was entitled to summarily dismiss him. Given the evidence which was adduced before the Tribunal, we are unable to say that a reasonable tribunal properly applying the law would not have reached the same conclusion.

67. In the circumstances, notwithstanding that the point might have been decided in FAL's favour, we are satisfied that the appeal should be dismissed, since we consider that no substantial miscarriage of justice has actually occurred.

Disposition and Order

68. Notwithstanding the Tribunal's error of law, FAL's appeal is dismissed pursuant to this Court's powers under section 64(3) of the Industrial Relations Act, Ch. 321 as no substantial miscarriage of justice has actually occurred.

69. In the result, the Tribunal's decision is affirmed together with the awards which were made to Mr. Chatelain for vacation pay, termination pay-in-lieu of notice and interest thereon until payment in full.

70. There is no order as to costs.

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The Honourable Madam Justice Crane-Scott, JA

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The Honourable Mr. Justice Jones, JA

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The Honourable Mr. Justice Evans, JA