

COMMONWEALTH OF THE BAHAMAS
INDUSTRIAL TRIBUNAL
NASSAU

IT / NES / 71 of 2017

In The Matter of the Industrial Relations Act

CECILIA J. CASH

Applicant

and

THE GRAYCLIFF COMPANY LIMITED
(trading as Graycliff Hotel & Restaurant)

Respondent

DECISION

Decision delivered by Her Honour Simone Fitzcharles, Vice President

The Dispute

A trade dispute for wrongful and unfair dismissal was referred by the Minister of Labour to the Industrial Tribunal on 7 July 2017 for a determination. By an Originating Application filed on 10 October 2017, Cecilia Jane Cash brought her claim against The Graycliff Company Limited (trading as Graycliff Hotel & Restaurant) ("GCL") when she was summarily dismissed from its employ. For the alleged wrongs, Ms Cash submitted that GCL is liable to pay her damages in the amount of \$71,446.50 comprised of notice pay, National Insurance contributions, bonus, commissions, meal allowances and compensatory damages. In answer, GCL's defence is that its summary dismissal of Ms Cash was justified on the basis of her incompetence or gross inadequacy in the performance of her job functions.

The Factual Matrix

1. GCL hired Ms Cash as an Event Coordinator in 2014. Her salary was \$500 per week and she was to work full-time at 40 hours per week. It is undisputed that GCL terminated Ms Cash's employment on 3 May 2017, without notice or pay in lieu of notice. There was no written contract of employment between the parties. In fact, overall the documentary evidence in this case was sparse, which oriented the matter towards a battle of whose word is best believed.

MS CASH

2. The Applicant was the sole witness in support of her claim. Ms Cash gave her account of the events as follows. Her employment commenced on 19 August 2014 and for several months she was paid in cash. She states that National Insurance payments were not paid by GCL for her first year.
3. She received a letter of warning from GCL on 17 October 2014 while she was still on probation. The letter informed her that her probation would be extended an additional 90 days. She complained she was given no written job description, no written policies or procedures and no training specifically to deal with her position. She was not introduced to the staff or given an organizational chart so that she could know to whom she should report and become familiar with the chain of command. Ms Cash said that she recalled receiving only 1 written warning from GCL. When she received it, she stated that she apologized and offered to resign but that offer was not accepted. She was still on probation at that stage.
4. In her written evidence Ms Cash complained about the conduct of Enrico Garzaroli, Roberta Garzaroli and Mr Laing, and about the job performance of Gregory Cooper, Jason Fernander and Srikanth Sarangi. She also said that Group and Wedding Business “more than doubled during [her] management” and she had “many commendations from numerous clients”.
5. Ms Cash said that on 15 February 2017 she applied for vacation leave which was approved by Mrs Garzaroli, one of the owners and managers at GCL. She says that she informed all staff members she was going on vacation a month in advance. At the time, Ms Cash was preparing 3 group events and these were scheduled to take place in her absence. Ms Cash indicated that Mrs Garzaroli asked her, as was customary, to copy Mrs Garzaroli, Mr Laing (Maitre d’) and Accounts with all email correspondence between the clients and Ms Cash, in relation to any events she was in the course of preparing. Ms Cash stated that she copied the emails to the 3 persons as requested and she placed copies of Banquet Event Orders (containing details about what specific clients ordered from GCL and about their events) in three areas of the Kitchen and one in the Bar area. Mrs Garzaroli also instructed Ms Cash to print the emails outlining the menus, beverages and particulars for each event. Ms Cash said she printed the emails and placed them on her (Ms Cash’s) desk “ready and waiting” in a folder bearing Mrs Garzaroli’s name. She said that this was a usual practice and all food and beverage managers, accounts and directors knew the white folder.
6. Ms Cash said that on 12th April 2017 she reminded Mrs Garzaroli that she (Mrs Garzaroli) asked to meet with her to discuss the details of the 3 group events which were going to take place while Ms Cash was on vacation. She testified that Mrs Garzaroli put off the meeting until “later” because she had to organize some airplane catering. Ms Cash said at the end of the day 6:00 pm Mrs Garzaroli was still busy so she left work without meeting her.

7. On Thursday 13 April Ms Cash said she could not attend work because her water tank at home had burst and there was water pouring in her house. She had to call a plumber and organize to get it fixed. As a result she could not attend work that day. She testified that she telephoned work and reported that she could not make it in because of a "utility emergency".
 8. Ms Cash said she did not "have an opportunity to meet with Mrs Garzaroli" because the next day was Good Friday. Mrs Garzaroli called Ms Cash and asked her whether she had left her "undone". Ms Cash said that she denied it and directed Mrs Garzaroli to the folder on Ms Cash's desk. She then testified Mrs Garzaroli told her she would "take a look" and let her know. She stated that Mrs Garzaroli did not communicate further so she thought she was satisfied. At the trial Ms Cash produced some emails with one Tinika Saunders from Cacique International concerning the planning of an event called 'Ultimate Software ERM'. Apparently this was one of the events Ms Cash was planning at the time. Ms Cash produced the emails to show that she had copied all key personnel with her conversations to the client to show she shared with such key persons at GCL the details of the plans for events before she left. The emails covered 2 days – 6 and 7 April 2017. There were none produced beyond those dates, and Ms Cash's last day at work before vacation was 12 April 2017.
 9. Ms Cash testified that when she returned to work on 3 May 2017 Mr Fernander met with her and said, "The Garzaroli's have finally gotten their way." He then handed her a letter by which her employment was terminated. She read the letter, signed it to acknowledge receipt and expressed that she did not expect to be there forever because she did not "own a cliff". She said that they could fire her if they wish but the details in the letter are untrue. She also asked for remuneration but was told there was none for her and she was directed to see a lawyer. The letter expressed that her dismissal was with immediate effect and on the basis of her "numerous failings" in her job performance. It referred to the recent event and stated she disregarded communicating the details of the events she booked. It cited gross inadequacy in her performance.
- GCL**
10. The evidence for GCL was presented by three witnesses – Jason Fernander (Human Resources Manager), Srikanth Sarangi (Financial Controller) and Anthony Laing (Maitre D').
 11. Mr Fernander's evidence in chief was that he hired Ms Cash based on her expressed experience in Event Coordination. When he offered the position to her, he informed her of her duties. He also said that there was a job description in the advertisement which GCL published in a newspaper which Ms Cash answered. When she was interviewed, Ms Cash requested a salary of \$350 per week. However, Mr Fernander said he explained to her the

responsibilities and attention to detail necessary for the job. He offered her \$500 on this basis and he said Ms Cash agreed to the responsibilities and the higher salary.

12. He testified that Ms Cash was responsible for creation and maintenance of a company newsletter and mailing list, coordination of all group events - weddings, dinner parties, group functions, outside talent arrangement (musicians, dancers, all vendor services required for weddings or group events), menu creation / printing of selected individual menus, inter-departmental communication of event details and responsibilities and generating new ideas to attract business.
13. Mr Fernander stated that Ms Cash's failings started almost immediately which resulted in the extension of her probation. He did not produce the letter by which he communicated the extension to Ms Cash, but it formed a part of Ms Cash's evidence. The letter from Mr Fernander to Ms Cash was dated October 17 2014 and stated that GCL was extending Ms Cash's probation for a further 90 days "due to the slow pace" at which she "acclimated" herself to her duties as event coordinator. It stated 3 areas of concern (but said that the concerns were not limited to those), which were "planning and executing of special events, i.e. Jazz Thursday, menu fiasco with the Sysco event, general event bookings / scheduling." The letter indicated that she had not performed the required task of creating and maintaining a Graycliff mailing list and drafting a newsletter, responsibilities which were communicated to her from the date of her employment. The final line asked Ms Cash to understand that the letter was to be taken constructively as it was intended to assist her in "understanding and fulfilling [her] job description."
14. Mr Fernander's evidence was that he sat in countless disciplinary meetings with Ms Cash discussing the manner in which she performed her duties in not spell checking her written communications and menus she presented to clients, not following credit card procedures, failing to coordinate and communicate with other department heads resulting in a bad experience for the events. He said he eventually removed some of Ms Cash's duties to lessen her workload. This, he thought would help her performance to improve, so that it would avoid her dismissal. According to him, this paring down of her responsibilities did not help her job performance. When asked why he did not terminate her employment, he stated it was because he had "more heart than head" and did not wish to see her lose her position.
15. A particular problem Mr Fernander stated GCL experienced with Ms Cash was in fulfilling her responsibility to prepare in advance of events a credit card authorization form to authorize deposits or the payment by guests at the end of the events. He said when it was not done, GCL often had "charge backs" by guests who declined the charges. With no agreement GCL was not authorized to charge customers' credit cards. He indicated that GCL spent many man hours reconciling these matters in their accounts department. He said

that this mistake caused GCL to incur bank charges and it lost revenue which amounted to thousands of dollars.

16. Mr Fernander testified that the decision to dismiss Ms Cash came after she failed to complete a physical hand-over (or "handshake") of information in relation to events she was coordinating. A decision was not made to terminate Ms Cash's employment until there was no effort by her to reschedule. He said that the handshake was a requirement for every event which included a face-to-face meeting and hand-off of files with key persons handling the event. Ms Cash was required to meet with various managers to ensure they had all of the final details for events. In this particular instance, she was to meet with Mrs Garzaroli to inform her about arrangements for events which were to take place while Ms Cash was on vacation. When shown Ms Cash's emails on the Ultimate Software ERM, he stated that those were simply routine day-to-day emails showing plans as they developed. That was different from the requirement for a face-to-face meeting to hand over final details of events before she left for vacation.
17. When Ms Cash returned from vacation, Mr Fernander said that he made the decision to terminate her employment when her explanation was less than satisfactory. On Ms Cash's final day at GCL Mr Fernander said that he enquired of her why she did not do the appointed hand over and she explained that she did not do so because she had a "utility emergency". He stated he further enquired why she had not done the hand-over of information after the emergency had been dealt with. He said Ms Cash responded that she had not left the country for one week after she had started her vacation so if the company needed any information from her it should have reached out to her. He said he checked with Mrs Garzaroli and may have called Roberta Garzaroli (Director of Marketing for GCL) to ensure they agreed with his decision. He indicated the Garzarolis agreed with his decision. He then terminated Ms Cash's employment.
18. He stated that he did not find out what the details of the emergency were until the Labour Board conciliation hearing. In cross examination, when Mr Fernander was asked whether he knew that Ms Cash and Mrs Garzaroli had spoken after her emergency, and Mrs Garzaroli told Ms Cash that she would read the material left on Ms Cash's desk and get back to her. He answered that he could not say that such a conversation did not happen. However, he said Mrs Garzaroli complained she could not find the information on Ms Cash's desk and that Ms Cash had not come in for the "handshake". He recalled that after his call with Ms Cash some days went by and having spoken to both Mr Laing and Mr Bowe, both holding Maitre D' positions, he realized that Ms Cash had not communicated with anyone else either. He said Mrs Garzaroli was getting agitated and that the hand over did not occur up to the time of the 3 events Ms Cash had arranged.

19. Mr Fernander said Ms Cash "failed tremendously with the execution of her responsibility which resulted in many situations not beneficial for the success of GCL. He explained viva voce that he could not locate Ms Cash's file and was therefore only able to produce letters and emails to demonstrate Ms Cash's inefficiencies which he sourced and printed from his computer. His allegations were therefore not significantly supported by documents. In testimony, he ventured reasons as to why he put very little in writing in relation to Ms Cash's performance. Firstly, he said that he likes "to keep staff files light". Secondly, that Ms Cash's file was discarded or misplaced in an office reshuffling and thirdly, that GCL's culture was not one of putting things in writing. He said that not having written evidence is one of his greatest failings.
20. Mr Sarangi, the Financial Controller, testified next. He explained the procedure of how Ms Cash as Event Coordinator was to prepare the Banquet Event Orders (so that details of the events could be recorded) and a credit card charge slip for deposits and charges remaining at the end of functions. He reiterated that she failed in some cases to carry out these functions and described the results of having to deal with the failures. He said sometimes she would charge a client's credit card but did not pass that information on to the cashier, so the cashier would end up charging the customer's card again. It meant credit had to be adjusted and returned to the customer. He said this happened often enough that the bank decreased GCL's rating and increased its commission on credit card transactions because of complaints from cardholders. He said this happened with First Caribbean Bank's charge back department. No documentary evidence was produced to substantiate these statements.
21. Mr Sarangi had some issues with the language as English is not his first, but the Tribunal found him overall to be credible. Where he differed with Ms Cash and Mr Fernander, the Tribunal preferred Mr Sarangi's testimony.
22. Mr Laing then testified and confirmed that with Ms Cash they "had a lot of hiccups but she was a nice person." He had numerous times reported Ms Cash's errors. He gave examples of incidents. He could not recall the names of the functions or groups, but remembered the numbers in the parties and other details. He generally described how there were incidences where groups walked into GCL's premises and said they had made reservations with Ms Cash, and he would know nothing about it. He would then try to find out as much as he could about what the clients had ordered so that the event could go on without the customers knowing that Ms Cash had confirmed the event without letting the Maitre D' know anything in advance. He said when that happened Mrs Garzaroli would be looking through the papers to try to ascertain what was arranged so that they could make it happen. He said sometimes when this happened, they would have to work the staff extra hard, they would have to give complimentary drinks and other items to smooth things over. They would have to hurriedly prepare food to satisfy the guests. He testified that

sometimes he would not receive the credit card authorizations and Banquet Event Order forms from Ms Cash and those times were problematic.

23. Mr Laing recounted one of the events which took place when Ms Cash was on vacation just before her employment was terminated in 2017. He said the party booked “just walked inside the door and no one” knew “a thing about it.” He said Ms Cash who had arranged the event was not on the property but on vacation. He recalled he had another party of 18 to 20 persons in which the opposite happened. He prepared the menu and when the party did not show up, he questioned Ms Cash about it. She then told him the party had cancelled. In another incident, he testified 12 persons walked in to have dinner in the wine cellar but Ms Cash told him nothing about it. He indicated Ms Cash forgot to communicate with him for these events. When the parties arrived, they said they dealt with Ms Cash to make the arrangements. He recalled other incidents where Ms Cash booked the wrong food for clients, sometimes food to which they were allergic, amongst other mistakes.
24. Mr Laing said Mr Fernander was “very nice sweeping things under the rug” for Ms Cash, “not putting things in black and white”. He said he needed the information about events to do his work, whether he received it in face-to-face meetings or in an email. It was Ms Cash’s responsibility to see that he, Mr Garzaroli and the Executive Chef got the Banquet Event Order and to post copies on a notice board for others, according to Mr Laing.
25. Mr Laing confirmed that Graycliff gives no formal training to staff but that he tries to work personally with any of his staff members who are lacking.
26. The Tribunal found Mr Laing to be a forthright witness.

RESPONDENT’S EXAMPLES OF INCOMPETENCE

27. The documented incidents for which GCL complained of Ms Cash’s job performance were as follows:

HANSEN PUBLICITY REJECTION

- (1) Mr Fernander produced a letter dated 25 March 2015 in which he complained about the manner in which Ms Cash handled an information request made by one Ms Kristine Hansen who wanted to write an article about GCL in her magazine. Mr Fernander said he was disappointed that Ms Cash ignored Ms Hanson’s initial request and then exacerbated the problem by her subsequent decision to decline the information request and article. In cross-examination Ms Cash was asked whether Roberta Garzaroli expressed to her disappointment that Ms Cash failed in her duty to respond to Ms Hansen’s requests. Ms Cash responded that she did, but Ms Cash told her also that those were Ms Garzaroli’s instructions to her. However, she earlier testified that Ms

Garzaroli asked her to filter marketing emails on her behalf because Ms Garzaroli did not wish to receive all of them herself. The result was apparently that the opportunity for Graycliff to get publicity was lost. When counsel for GCL put to Ms Cash that she caused GCL to "lose a valuable client" she did not deny a loss. Rather, her response was "She was not a client of Graycliff." This letter of 25 March 2015 was an office copy only and was not signed by Ms Cash to acknowledge receipt.

TRIP ADVISOR NEGATIVITY

- (2) An email was sent by Roberta Garzaroli to Ms Cash on 17 June 2015. By this email Ms Garzaroli forwarded to Ms Cash and other managers a negative Trip Advisor review which was posted online about GCL and Ms Cash. The writer (one Fran Black) warned readers not to get married at GCL and not to use Cecile Cash as an event planner. She described the event of her wedding dinner for which she stated she had pre-paid. The customer was upset that GCL served cocktails during her reception which she and her husband did not approve. At the end of the night the couple received a bill for "extras" but did not pay it before leaving the property. Ms Black wrote that the next day GCL sent the police to "harass" them "into paying" the outstanding bill. The writer specifically accused Ms Cash of "trying to make side deals" with them which Ms Cash didn't want disclosed to "her boss". The review said that Cecile Cash "lies, cheats, steals and also doesn't care" and that she wanted the customer to give her "\$1,000 cash for a cake for 49 people". In Ms Garzaroli's email of the review to Ms Cash, which was also copied to Mr Fernander, Mr Garzaroli, Mrs Garzaroli, Mr Sarangi and Mr Laing, she indicated she did not know why the customer did not sign an agreement. This was one of GCL's main complaints about Ms Cash – that in organizing events she did not get the prospective customers to sign appropriate agreements so that GCL could collect on funds from retained deposits for cancellations, or in this case, "extras" billed at the end of an event. Ms Cash's viva voce testimony about this incident was that an agreement was signed, but the clients' credit card had declined on the night of the event when GCL attempted to collect the funds due and owing. Mr Sarangi testified that a Credit Card Authorization was not signed and GCL suffered a charge back from the bank because the cardholders disputed the charge. He said that he could not produce documents because GCL does not keep clients' personal documentation for that long.
- (3) Ms Cash seemed to have volunteered to go with Mr Fernander to confront the clients to pay the bill before they left the island the next day. It is possible that may be why she was targeted by the writer of the review. Given the facts behind the complaint, the writer of the same appeared to be motivated partly by her angst at being tracked down by Ms Cash to pay a bill that she and her husband owed. The review contained many accusations which were not substantiated, but such reviews do affect the reputation of businesses. Mr Laing confirmed that "every day clients complain on Trip Advisor. You treat people the best and they complain." Although the Tribunal believes that the

customers who were involved in this incident had a case of 'sour grapes', I found compelling the evidence of Mr Sarangi coupled with the email from Roberta Garzaroli in which they indicated that an agreement was not signed. It was Ms Cash's responsibility as the Event Coordinator to get the agreement authorizing a credit card deduction signed so that these customers' cards could be billed.

ST LUCIA JAZZ FESTIVAL MISTAKES

- (4) Roberta Garzaroli sent an email to Ms Cash on 18 December 2015 which was copied to Mr Fernander and Mr and Mrs Garzaroli. This was the last produced in a series of messages concerning the organization of an event. The tone of the email was angry and frustrated. Ms Garzaroli charged Ms Cash with not reading her messages or paying sufficient attention. She had asked Ms Cash to assist with organizing certain aspects of an event called the St Lucia Jazz Festival. She stated, "Attention to detail is a major part of your job...and I am not surprised now dealing with you for this one simple event why things go wrong....Beside the fact that you did not read what I sent you earlier which has aggravated me to no end, I CANNOT send these docs to the woman to sign...The Event agreement document is BLANK!!!! Not to mention that it is the original one which I edited for you before you were to send it to the drp woman...so it's wrong!" Ms Garzaroli then indicated she would take over the preparation of the documentation because Ms Cash could not seem "to get [her] act together". Earlier in the chain of communications, Ms Garzaroli admonished Ms Cash also for getting some of the details wrong in the paperwork such as the customer's name and the agreed bar arrangement. At the trial, Ms Cash's responses in relation to this incident were very evasive under cross-examination. When asked about her involvement with the event and whether she was responsible for preparing the agreement for the client, she gave several different answers. Only when she was taken to the email she agreed its contents were true but said her actions were an error and not incompetence. She admitted that she probably did not check the agreement before sending it to Ms Garzaroli.

NISSAN COUNCIL DINNERS CANCELLATION LOSS

- (5) There was in Mr Fernander's bundle of documents a letter from him to Ms Cash dated 3 August 2016, in which he expressed dissatisfaction with Ms Cash's performance of her duties. It stated that GCL had reprimanded Ms Cash on many occasions and that she had promised improvement which did not occur. The letter discussed an event called the Nissan Council Management Group Dinners. According to Mr Fernander, Ms Cash failed to obtain "the required documentation and deposits" for this event, which "cost the company to lose revenue" because they could not charge the customers a penalty for cancelling the event at the last minute. Mr Fernander explained viva voce that if there was no non-refundable deposit initially taken and no corresponding agreement that any cancellations would result in the retention of that deposit, the company would suffer losses for eleventh-hour cancellations. He said it was Ms Cash's job to get the

appropriate credit card authorization and/or deposit agreement done so that the initial deposit could be in hand by GCL prior to the event. GCL's Financial Controller produced no evidence of lost revenue for any of the events or in relation to any of the complaints against Ms Cash. However, based on the events described it was reasonable to conclude that some loss would have occurred based upon the facts given.

- (6) The 3 August 2016 letter went on to state that Ms Cash had been warned "multiple times that no party or event can be confirmed until the agreement is signed and a deposit received along with a payment schedule and a credit card authorization form for charges." It was stated to be a final warning and there would be an expectation that Ms Cash would tender her resignation if there were any further dereliction of duty. This letter was an unsigned copy printed from a computer. GCL produced no other documentation to substantiate its claims that Ms Cash caused the company to lose revenue or even to show that the Nissan group had actually booked and cancelled. When asked whether she actually submitted the required documents for the Nissan Council Dinners, she merely said that she did not recall. The letter produced did not bear her signature in acknowledgement of its receipt. Mr Fernander's recollection of the event was sketchy and no other witness for GCL testified about the details of this event. The Tribunal believes it is rather important to a claim of this sort for an employer to show that a warning letter which threatened termination of employment for a further breach was received by the employee concerned. This is so particularly since the next letter to Ms Cash was one terminating her employment in the following year.

ON INCOMPETENCE, RECEIPT OF WARNINGS

- (7) In cross examination when asked whether she received the written warning of 3 August 2016, Ms Cash did not deny it. She did not say, "No, Graycliff never gave me such a letter." Instead, her response was, "I do not recall at this present time." Ms Cash responded that she could not recall what occurred with Nissan Council, although she remembered they were a client. She confirmed she was not saying that there wasn't a problem, only that she could not remember. When it was suggested to her that she received two written warnings, she said that there were "a number of verbal communications regarding events" but she could only recall one written warning. She further accepted that she received as much as 6 verbal warnings for different events.
- (8) Counsel for GCL put to Ms Cash that it was because of her incompetence on the job that things went wrong. Ms Cash answered, "Not completely. I would not take all of the responsibility." She did not deny that she was partially to blame for when things went wrong with work. Her responses were somewhat evasive concerning whether it was her duty to submit required documentation and deposits for events. When asked she merely responded that at the time when she started at Graycliff "there was a discussion regarding that." She was apparently given training or information as to when a deposit

is required and for whom one is required. She admitted this. When asked whether she was given several chances to correct her behaviour, Ms Cash responded that the verbal discussions she had were not one of the same. They were different. However, this is an acknowledgement that she had verbal discussions to correct various mistakes she committed at GCL. When asked whether she was cautioned or warned on more than one occasion by someone who is a supervisor or senior to her in the company, she responded that each time something went wrong there was a discussion. She said it wasn't called "incompetency. We dealt with the problem." She admitted she was spoken to over years and said that she corrected her errors. She said there were numerous discussions and when it was put to her that it was her responsibility to ensure accounts had the documents they needed she responded, "And they would have it." In other words she accepted that it was her responsibility. She accepted that a chain of errors can amount to incompetence but stated that she never had such a chain of errors.

- (9) Mr Fernander was questioned whether Ms Cash received a written job description, a written contract of employment, any written material to direct her on how to correct her mistakes, and any written manual concerning her job functions. He admitted these items were not furnished in writing to Ms Cash. When asked whether she received any training he indicated that he did some of the training and also said Mr Sarangi was qualified and trained Ms Cash on the accounting issues. However, when Mr Sarangi was questioned about his training of Ms Cash he denied it. He said he was only responsible for his department. Indeed, there was no evidence of written policies or a grievance procedure to which an employee on Ms Cash's level could have resort.

Wrongful Dismissal

28. Wrongful dismissal is the termination of a contract of employment without notice and without justification for withholding notice. As observed by Adderley JA in *Curtis-Rolle v. Doctors Hospital (Bahamas) Ltd* SCCivApp No. 149 of 2012, there are two tests for wrongful summary dismissal – a common law test and a test embodied in the Employment Act (the "EA"). The choice of tests is dependent upon how the dispute is pleaded, according to Milton Evans J (as he then was) in *Garvey v Cable Beach Resorts Ltd(d/b/a Sheraton Nassau Beach Resort* [2014] 3 BHS J No. 36. In this dispute, the Applicant has pleaded a part of her claim based on section 32 and 33 of the EA, and the test for wrongful summary dismissal is to be found in section 31 through 33 of the EA. Those sections provide:

"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...

"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 –

...(h) incompetence.

“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.”

29. A roadmap for the required analysis was set out by the Court of Appeal in *Eden Butler v Island Hotel Company Limited*¹:

“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 Court 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 question of whether the belief was reasonable will inevitably depend on the evidence available and the efforts made by way of investigation to ascertain the true facts. The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case. It must not be overlooked however, that the employer is not required to prove that the employee committed the offence but rather must show that they held an honest and reasonable belief in the guilt of the employee.”

30. Ms Cash was hired by GCL to coordinate events at the premises of the employer. Although it is undisputed Ms Cash received no written job description, the Tribunal accepts that the evidence supports that essential features of her core responsibilities were to negotiate with prospective clients, prepare documents relevant to events which clients wished to stage at GCL’s premises, and to share that documentation with key persons such as any supervisor involved with the event, the relevant Maitre D’, Mr Garzaroli who was in charge of the wines and relevant chefs, and to generally see events through to the end. Ms Cash had to be in place to ensure that these key tasks were performed for events she organized. The sharing of documentation with key persons, prior to an event was fundamental to her duties, for if she did not do so, there was credible testimony that the delivery of services to the clients could go wrong, but even if rescued, could be quite challenging and generate unplanned expenses, embarrassment, reputational damage and inconvenience for GCL. The fundamental interests of the employer could be adversely affected.

31. In this case, GCL asserts that Ms Cash’s employment was terminated summarily because she did not show up at work to complete an essential hand over of information to Mrs Garzaroli. The employer says that she was incompetent and did not show up to perform an essential part of her duties suggestive of negligence. Indeed, the Respondent had regard to a history of incidents in which Ms Cash made errors. She admitted things would go wrong and there would be meetings to correct those issues. She admits she received verbal warnings but tended in testimony to bury them in the euphemism, “discussions”. The Tribunal believes the evidence was overwhelming that the employer believed that Ms Cash was not up to the mark

¹ SCCivApp & CAIS No. 210 of 2017 at paragraphs 30 and 31.

in terms of her capability to execute her job functions. All witnesses for the Respondent consistently testified about the errors Ms Cash made and the effects of those on the company. It is remarkable, too, that Ms Cash was not at all surprised that she was going to be dismissed. She seemed to know what Mr Fernander was going to do when he called her into his office. She testified that he said, "The Garzaroli's have finally gotten their way." Her response was, "No problem, I don't own a cliff so I did not expect that my time here would be forever." She said he handed her the dismissal letter and asked her to read it over and sign it. She read it and said that the matters stated in it were untrue. She was not interviewed in the presence of Mrs Garzaroli before her dismissal.

32. Although paper was not produced in relation to some of the incidents, the Tribunal was adequately convinced that there were sufficient mistakes on Ms Cash's part as described by the witnesses to satisfy GCL reasonably and honestly that she could not perform the job to the company's satisfaction.
33. Could the employer legitimately consider a history of acts on the part of the employee in order to come to a decision to terminate her employment? I believe the answer is yes. In *Pepper v Webb* [1969] 2 All ER 216 there was a history of complaints of incidents involving an employee's insouciance and inefficiency from time to time. Such history was taken into consideration by the employer and the court. The complaints culminated in the final incident which led to the employee's summary dismissal. The court upheld that dismissal on the basis that the employee refused to do the very tasks he had been hired to perform.
34. In relation to the incident which occurred with the failure to complete the hand-over procedures during April 2017, the employer appeared to see this as another instance in which Ms Cash failed to perform to satisfaction. Mr Fernander said he spoke to Mrs Garzaroli, he was directly involved in trying to get in contact with Ms Cash, he did not understand why Ms Cash did not in the days after the Good Friday holiday, attempt to reschedule the hand-over process prior to the time the events were supposed to take place. He and Mr Laing testified about the difficulties experienced because of the failure to hand over. Although Ms Cash testified that she was instructed by Ms Garzaroli that when Ms Garzaroli checked her folder she would get back to her, Ms Cash appeared not to have told this to Mr Fernander in the final meeting with him. Mr Fernander through direct questioning sought to learn the reason why Ms Cash did not appear to hand over. These were his efforts to ascertain the true facts. On the basis of Ms Cash's response to him, Mr Fernander believed she did not appear because she had a "utility emergency" and GCL was not satisfied with her explanation as it did not preclude Ms Cash from setting up a meeting for after she had diffused the emergency. The employer honestly and reasonably, based on the facts before it, believed that Ms Cash committed the act for which her employment was terminated.

35. In the circumstances, the Tribunal finds that the Respondent's summary dismissal of the Applicant was not wrongful. However, the fairness of the process is a separate issue which requires separate consideration.

Unfair Dismissal

36. Unfair dismissal is a statute-based cause of action laid down in the EA. Sections 34 and 35 of the EA are the starting point. Those sections provide:

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

"35. Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case."

37. In accordance with sections 44 through 47 a Tribunal can make a basic award and a compensatory award to an employee who successfully claims he has been unfairly dismissed by his employer. The basic award is calculated at the rate of 3 weeks' pay for every complete year of employment. The compensatory award is such amount as the Tribunal believes is just and equitable having regard to loss that the employer's dismissal has caused the employee to suffer.

38. The essential factor in judging unfair dismissal, in accordance with *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, 24-25, is the reasonableness of the employer's conduct. This consideration must be applied in analyzing the reason for dismissal and the procedural aspects. Whether the actions of the employer fell within the range of reasonable responses is to be ascertained.

39. The Applicant has put an argument that the reason contained in the dismissal letter – incompetence and gross inadequacy – are inadmissible reasons in accordance with section 37 of the EA. Section 37 applies to dismissal on the basis of redundancy. It envisages a situation where the employee in question is selected to be dismissed for redundancy where there are other employees in the same category but who have not been dismissed. If an employee in that situation is selected to be dismissed for an inadmissible reason, that dismissal shall be unfair. The Tribunal has considered this submission in light of the definition of redundancy at section 27 of the EA and does not concur that in this case Ms Cash has been selected for dismissal pursuant to the provisions of section 37.

40. Based on the facts of this matter, Ms Cash argues there were no written guidelines, manuals or even a written job description presented to the employee so that she could have that writing to refer to when she needed guidance on how to perform her duties.

While she agreed there were discussions about how to correct her errors and there was some training on when to take deposits and for whom they were to be taken, there was scant evidence of any training by the accounts department where Ms Cash appeared to have most of her performance issues. It appears, however, when mistakes were made, Ms Cash's performance was regularly reviewed in the many discussions she admitted she had with her supervisors.

41. Mr Fernander testified that Ms Cash, during her job interview, assured him she could perform the tasks associated with the Event Coordinator position at GCL. He stated that if she did not assure him of the same, he would not have hired her. So what should the employer's expectation be? In *Mackey-Bethel v Canadian Imperial Bank of Commerce* [1993] BHS J. No. 8, in the context of an unfair dismissal claim brought by an injured worker who was said to be incompetent by the employer, Hall J (as he then was) stated:

"...[T]he contract of employment is such that the employee is expected to perform his duties at the requisite level of skill and efficiency. Whatever social argument may be advanced for the degree of concern an employer should exhibit towards a potential or actual employee who's in some way handicapped, in law, an employer (such as the Bank here) is a place of business, not an institution dispensing charity, and it does have the right to insist on a certain standard of performance from all its employees."

42. In *Harmer v Cornelius*, 6 W.R. 749, the principle was stated thus:

"The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability. When a skilled labourer, artisan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes."

43. While some degree of support and guidance is reasonable for an employer to give an employee for the proper performance of his work, the Tribunal does not believe that the reasonable employer should have to instruct an employee on how to do matters the employee assured the employer he was competent to do from the outset of the relationship. Moreover, it is doubtful that any training was necessary for Ms Cash to take arrange a meeting to discuss upcoming events as was her responsibility. Since both sides admitted to having numerous discussions about job performance, this illustrates that Ms Cash received some support in this regard.
44. Was the process of the dismissal fair? Due to its own poor record keeping, the Respondent could not prove that Ms Cash received more than one written warning – and that was at the start of her employment during her probation. In particular, it was important that GCL could not satisfactorily demonstrate that Ms Cash received the 2016 letter of warning which threatened to terminate her employment if there was any further breach. She did, however, testify she received at least 6 verbal warnings. Seen through the looking-glass of fairness and what the reasonable employer would do in today's world of work, Ms Cash

should have received at least a written warning prior to this last incident, in which it was fairly set out that she could lose her position if she committed another infraction.

45. Can it be said that it was incumbent on Mr Fernander to interview Ms Cash in the presence of Mrs Garzaroli? Would a reasonable employer have done so? Based on the evidence of Ms Cash and Mr Fernander (as Mrs Garzaroli did not give evidence), the Tribunal believes it would have been fair and reasonable to do so. In *Bahamasair Holdings Ltd v Omar Ferguson* SCCivApp No. 16 of 2016 and *Newbold v Commonwealth Building Supplies Ltd* [2013] 1 BHS J No 37 the concept of a fair and reasonable investigation, respectively, were discussed. Both pronouncements endorsed the procedure of giving the employee who was in danger of being dismissed an opportunity to be heard and to face the person who complained about his behavior. If Mr Fernander had arranged that meeting, he could have investigated exactly what occurred in the conversation between Mrs. Garzaroli and Ms Cash. If Mrs Garzaroli promised to call Ms Cash if she was needed, then it would not have been in the range of reasonable responses to dismiss Ms Cash without notice. While it is uncertain whether such a meeting would have prevented Ms Cash's dismissal, considering the facts, it may have caused the employer to pay her notice, or give her a lighter penalty or it may have saved her job.
46. Would fairness have prompted the reasonable employer to design a grievance procedure for his employees? Indeed, this is something that was lacking at GCL. It was unfair that Ms Cash had no resort at GCL to a predictable or established procedure by which discipline of employees would be handled. Reasonably, this would have aided both Ms Cash and Mr Fernander, the latter of whom gave the Tribunal unconvincing platitudes of liking to "keep staff files light", having "more head than heart" amongst others. The Tribunal believes that the lack of a predictable grievance procedure in this case was unfair to Ms Cash.
47. In the round, the Tribunal finds that Ms Cash was unfairly dismissed, particularly in relation to the lack of delivery of warning letters, especially one expressing that if Ms Cash continued to make the errors she made, she would be dismissed. The Tribunal also finds for unfair dismissal on the basis of a failure to have a meeting between Ms Cash and Mrs Garzaroli before Ms Cash's dismissal, as they were the two key persons around whom the dismissal and events leading to it revolved. The Tribunal believes that a reasonable employer would at the very minimum of modern human resources management practice, would have ensured that these two things happen. Thirdly, a grievance procedure would have created certainty for the employee and the employer in this case, and would have been reasonably fair.
48. While the Tribunal is minded to give the basic award, the compensatory award (the maximum of which by the EA is 24 months for managers) will be reduced due to the Applicant's contribution to her dismissal. In relation to the Applicant's claims for commission, meal allowance and accrued bonus, there was no evidence adduced to

substantiate these items or reveal the basis on which they are calculated either viva voce at trial or in the witness statements. As the twin pillars of recovery are pleading and proof, the Tribunal has not awarded these claims.

49. During the trial the Tribunal requested that the Respondent provide proof that National Insurance contributions were paid for the Applicant, and the information was promised by the Respondent, who then failed to produce it. Ms Cash is now claiming payment by the Respondent of her National Insurance contributions for the period from August 2014 through July 2015 and the Tribunal is minded to grant her an order to that effect.

50. The Tribunal therefore makes the following award to the Applicant:

Basic Award.....\$ 3,000.00
(3 weeks' pay x 2 years)

Compensatory Award.....\$21,666.70
(10 months' pay)

National Insurance payments for
52 weeks from August 2014 to July 2015\$ 2,420.60

TOTAL: \$27,087.30

51. In relation to the issue of awarding costs, the Tribunal has no specified power to do so either under the Industrial Relations Act or under the Industrial Relations (Tribunal Procedure) Rules, 2010.

52. It is hereby ordered that the Respondent shall pay the Applicant the sum of Twenty-seven thousand and Eighty-seven dollars and Thirty cents (B\$27,087.30) with interest at the rate of 10% per annum from the date of this decision until payment.

THIS IS THE DECISION OF THE TRIBUNAL.

Dated this 28th day of February A.D. 2020

Simone Fitzcharles
Vice President