COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp. No. 249 of 2016

B E T W E E N

FREDERICK FERGUSON

Appellant

AND

ISLAND HOTEL COMPANY LIMITED

Respondents

BEFORE: **The Honourable Sir Hartman Longley, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Sir Michael Barnett, JA (Actg)

APPEARANCES **Mr. Kahlil Parker, Counsel for the Appellant**
Mr. Ferron Bethell, Counsel for the Respondent

DATES: **28 June 2018; 26 September 2018**

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Civil Appeal – Industrial Tribunal – Employment law – Employment Act Sections 31-33 - Wrongful Dismissal – Gross Negligence- Summary Dismissal

The appellant had been in the employ of the respondent since July, 1980. He was promoted to the position of Director of Casino Cage Operations in December 2008 and was responsible for the cage of the casino where the gaming chips were kept and distributed. On the 19th June, 2009 a shortage in chips valued at $5,000 was detected and a full count of the inventory was conducted at the satellite casinos located at Cove and Seaglass. The count revealed that the inventory at the Cove was short by $50,000.00 and at Seaglass by $10,000.00. The appellant was summarily dismissed some two months thereafter following an investigation and Notice of Unsatisfactory Performance. He filed a

dispute for wrongful dismissal in the Industrial Tribunal which was dismissed. He now appeals the Tribunal's Decision.

Held: appeal allowed, appellant is entitled to the monies he would have received under section 29 of the Employment Act.

In our judgment, for an investigation which leads to termination to be reasonable an employee must be confronted with the employer's belief that he was guilty of the misconduct and given an opportunity to explain his conduct and show why the proposed disciplinary action is not warranted. This point was made by this court in **Bahamasair Holdings Ltd v Omar Ferguson** SCCivApp No. 16 of 2016 in the context of a claim for unfair dismissal where this court noted with approval the statement by Stephen Isaacs J (as he then was) that "the failure to give an employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of the case a denial of natural justice and therefore unfair."

In this case the appellant was never given the opportunity before he was dismissed of answering the allegation of gross negligence being made against him. It was not done during the two months period between the date of the incident and the suspension notice nor was it done during the one day suspension. Such an investigation cannot be regarded as reasonable as a matter of law.

In our judgment, in order to be summarily dismissed on the ground of gross negligence the respondent had to honestly and reasonably believe that the appellant himself was personally grossly negligent in his own conduct. It was not sufficient for the respondent to believe that the appellant was collectively 'negligent' with all persons in the casino cage operations and such collective negligence led to the loss of the chips. The appellant must be personally "grossly negligent".

No Tribunal could have properly found that the respondent held an honest belief in the appellant's "gross negligence" on that evidence. We accept that "gross negligence" is an expression that is difficult to construe, but it indicates conduct substantially more serious, culpable and grievous than simple negligence or bad judgment.

Adesokan v Sainsbury Supermarkets Ltd [2017] EWCA Civ 22 considered

Bahamasair Holdings Ltd v Omar Ferguson SCCivApp No. 16 of 2016 applied

Marex Financial Ltd v Creative Finance Ltd [2014] 1 All E.R. (Comm) 122 considered

Newbold v Commonwealth Building Supplies Ltd [2013] 1 BHS J No 37 mentioned

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, JA (Actg.):

1. This is an appeal by Frederick Ferguson ("the appellant") against the decision of the President of the Industrial Tribunal dismissing his claim that he was wrongfully dismissed by Island Hotel Company Limited ("the respondent").

2. The appellant had been in the employ of the respondent since July, 1980. In December, 2008 he was promoted to the position of Director of Casino Cage Operations. The record does not reflect that prior to his promotion in December 2008, he was the subject of any disciplinary action or complaint.

3. As Director of Casino Cage Operations he was responsible for the cage of the casino where the gaming chips are kept and distributed. The organizational chart shows that there were four (4) managers reporting to the appellant, twenty (20) supervisors reporting to him through their managers and fifty nine (59) cashiers and clerks reporting to the Director through their supervisors and managers. The appellant as Director then reported to the Senior Vice President of Finance, who at the material time was Mr. David Bruce Thompson.

4. On the 19th June, 2009 a Cage Cashier for the satellite casino at the Cove advised that he detected a shortage in chips valued at $5,000.00 each when filling a request from the games tables. As a result of that shortage experienced by the Cashier a full count of the inventory was conducted at the satellite casinos located at Cove and Seaglass. The count revealed that the inventory at the Cove was short by $50,000.00 and at Seaglass by $10,000.00.

5. On the 21st June, 2009 the appellant prepared a written report outlining his knowledge of what happened on the 19th June, 2009. Nothing in the record indicates that the appellant was told that he was under investigation or that he was suspected of any culpability in the loss. This perhaps is not surprising as the respondents were still carrying out their own investigation to ascertain what happened and what caused the loss. No doubt however, he must have appreciated that as the Director of Casino Cage Operations his duties as Director would have been under scrutiny with respect to the lost chips.

6. On the 18th August, 2009 the appellant received an "Official Notice of Unsatisfactory Performance". The Notice indicated that he was suspended for one day. Not because of misconduct, unsatisfactory work or violation of any rule of conduct, but because of "gross negligence". The particulars in the Notice simply said;

7.

a. "In accordance, with Mr. Ferguson's primary duties as Director of Casino Cage, he failed to exercise proper judgment and fiduciary responsibility regarding control procedures in the management of cage operations which resulted in a loss to the company in the amount of sixty thousand Dollars ($60,000.00).

8. The notice referred to "see attached report" but that was omitted.

9. After receiving the suspension, the appellant was not asked to explain or give account for any complaint being made against him.

10. The following day, the appellant received another "Official Notice of Unsatisfactory Performance". The infraction was again "gross negligence".

11. The particulars on that report were identical to the particulars on the notice issued the day before. This notice also had the notation "Please see attached". But this time there was in fact a report attached to this notice. It said:

> **"Cage Management was negligent with regard to monitoring the inventory level of chips and cash which comprised the assets of the Cage held at Seaglass and The Cove.**
>
> - **Cage Management was negligent with regards to enforcing the policies and procedures in effect to ensure the safe custody of the chips and cash held at Seaglass and The Cove.**
>
> - **Cashiers and Supervisors were negligent in the performance of their duties by not conducting a full count of the inventory at the beginning of the shift when the float was being issued, nor at the end of the shift when the close out procedure was being completed."**

12. That notice was a discharge notice. The appellant was summarily dismissed.

13. It is not without significance that the attached report was not specific to the appellant. It simply said that "Cage Management was negligent..." and "Cashiers and Supervisors were negligent…" It is not readily apparent that the report found the appellant as Director was negligent. It simply refers to "Cage Management" as being negligent and there were four managers. It also refers to "Cashiers and Supervisors" as being negligent. It is not clear that the appellant as Director was included in the term 'Cage Management'. If the appellant was part of 'Cage Management' then it is unclear why the Senior Vice President to whom he reported was not also a part of "Cage Management".

14. It is also significant that the attached report describes the culpable conduct as "negligent" and not "gross negligent". The notice itself refers to the conduct as "gross negligence".

15. In addition, a review of the notices themselves shows that the notices in the particulars did not say that the appellant was guilty of gross negligence. The notices said that the appellant "failed to exercise proper judgment" and "failed to exercise fiduciary responsibility".

16. Those particulars did not say that the appellant as Director was grossly negligent in his performance as Director.

17. It is settled law that the burden is on the respondent to show that it was entitled to summarily dismiss the appellant.

18. Sections 31 to 33 of the Employment Act provides:

> **31. An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer: Provided that such employee shall be entitled to receive previously earned pay.**
>
> **32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following —**
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> **(a) theft;**
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> **(b) fraudulent offences;**
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> **(c) dishonesty;**
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> **(d) gross insubordination or insolence;**
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> **(e) gross indecency:**
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> **(f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;**
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> **(g) gross negligence;**
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> **(h) incompetence;**
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> **(i) gross misconduct.**

> **33. <u>An employer shall prove</u> for the purposes of any proceedings before the Tribunal <u>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</u> and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted. [Emphasis added]**

19. The respondent case is that;

> **"The Appellant in the instant case had brought a statutory claim (as opposed to a common law claim) for wrongful dismissal seeking compensation under section 29 of the Act. In the premises, it was incumbent upon the learned President to ensure that the Respondent had proved that an investigation has been conducted in accordance with section 33 of the Employment Act and that the respondent honestly and reasonably believed on a balance of probability that the Appellant had committed the misconduct in question to wit: gross negligence."**

20. In short, it is asserted that the respondent, having conducted a reasonable investigation formed the honest and reasonable belief that the appellant was guilty of gross negligence. The Tribunal having found that the respondent reasonably held that belief this appellate court should not interfere with that decision.

21. The Tribunal in fact held:

> **"273. The Tribunal's view is that by virtue of the terms and conditions of the Applicant's Contract of Employment, specifically Clause 10, which provides the appropriate process to be followed, the Applicant had constructive knowledge that once suspended under the Major Breach Provisions an investigation would automatically ensue. Therefore, there was no need for him to be formally advised and Section 33 of the Employment Act, 2001 only places the burden on the employer to be satisfied "that he conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted."**
>
> **274. Furthermore, it is the view of the Tribunal that the Respondents, on the evidence, appeared to conduct a reasonable investigation over a period of approximately two months before terminating the Applicant. The evidence of Mr. Allan Pinder under cross-**

examination revealed that the Respondents interviewed thirteen Cage Supervisors, seven Cashiers, three Shift Managers and a team of investigators including Mr. Rory Saunders, Director of Casino Security, Mr. Phillip Johnson, and Assistant Director of Casino Director.

275. The Tribunal accepts that the decision of the Respondent at this time to terminate the Applicant on the 19th of August, 2009 in accordance with the Major Breach Provisions of the employee handbook was as result of the Respondent believing that the investigation confirmed the Major Breach by the Applicant."

22. With respect, we do not agree that the Tribunal could have properly held that the evidence disclosed that after a reasonable investigation the respondent held an honest and reasonable belief that the appellant was guilty of gross negligence. The respondent's own evidence as disclosed in the document produced at the time of dismissal showed otherwise.

23. Firstly, as a matter of law the investigation cannot be regarded as reasonable. Under the Employee Handbook which forms part of the terms of the appellant's employment it is provided that:

> **"the employee will be suspended without pay for a period of four(4) working days during which time, an investigation will be carried out. Management reserves the right to further extend the period of suspension pending investigation without pay to ten days**
>
> **Should the investigation confirm the major breach by the employee the following should occur;**
>
> **A further suspension of the employee without pay for a reasonable period; or**
>
> **Termination of the employee.**

24. The appellant was suspended for one day. The evidence does not disclose that any investigation took place during that day he was suspended. He was terminated the following day and was never given any opportunity to answer any charges that the respondent may have had about his conduct. The fact is the suspension was a façade and the decision to terminate was made before any suspension took place. The decision to terminate was made after the investigation that took place following the incident and before the suspension. In our judgment, where an employer does not comply with its own disciplinary rules as to an investigation into misconduct, that investigation can hardly be regarded as reasonable.

25. In our judgment, for an investigation which leads to termination to be reasonable, an employee must be confronted with the employer's belief that he was guilty of the misconduct and given an opportunity to explain his conduct and show why the proposed disciplinary action is not warranted. This point was made by this court in **Bahamasair Holdings Ltd v Omar Ferguson** SCCivApp No. 16 of 2016 in the context of a claim for unfair dismissal where this court noted with approval the statement by Stephen Isaacs J (as he then was) that "the failure to give an employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of the case a denial of natural justice and therefore unfair." The point was also made by Bain J in **Newbold v Commonwealth Building Supplies Ltd** [2013] 1 BHS J No 37 where at paragraph 51 she said:

> **"The Courts have to consider what is a reasonable investigation. The person conducting the investigation has to ensure that the person being investigated is given full particulars of the complaint and is given the opportunity to confront the complainant."**

26. In that case the court held that the plaintiff was wrongfully dismissed as the defendant's investigation was not reasonable as the employee was not given an opportunity to confront the person making the allegation against him.

27. In this case the appellant was never given the opportunity before he was dismissed of answering the allegation of gross negligence being made against him. It was not done during the two months period between the date of the incident and the suspension notice nor was it done during the one day suspension. Such an investigation cannot be regarded as reasonable as a matter of law.

28. We have noted that in paragraph 347 of her Ruling the President stated:

> **"347. The Tribunal finds that the internal disciplinary procedures which formed a part of the Applicant's contract of employment were followed in accordance with the processes outlined in the Employee Handbook. Therefore, the question of natural justice does not arise but has been briefly addressed in the circumstances of this case."**

29. This simply cannot be substantiated by the evidence. The handbook stated that "The employee will be suspended without pay for a period not to exceed four (4) working days during which time an investigation will be carried out". No investigation was carried out during the one day suspension. This is not an arid technical point. By way of the suspension an employee is given notice that a complaint has been made against him and he would then know the nature of the complaint and what is being investigated. He would expect that during that investigation he

would be able to answer the complaint being made before any decision is made. This was not done and the investigation was not reasonable.

30. In paragraph 348 the Tribunal said:

> "**348. The evidence reflected that the investigators had conducted interviews with and took statements from thirteen members of the staff and throughout the process that is before, during and after the investigation was performed, that the Applicant would have obviously been made aware of the complaint, as the person responsible for the area in question and had the knowledge that an investigation was ongoing from time of the incident. Two days after the incident took place, the Applicant provided an "Incident Report" to the Respondent's Company. The provision of this report indicates that be had knowledge that an investigation was pending. The Applicant was able to represent to the Respondent's Company his version of what his thoughts were as to what had happened. This report was handed over to the Company before he was formally called into an interview by a team of investigators to discuss the matter in July, 2009. The Tribunal is of the view that this interview afforded an opportunity to the Applicant to respond to the complaints orally and in writing as the Director of Cage Operations, which he did, thereby he was given an opportunity to be heard.**

31. With respect, the interview in July 2009 did not give the appellant any opportunity to respond to an allegation of gross negligence which was not made until August 18th 2009.

32. Secondly, the respondent's own investigation, such that it was, did not find that the appellant was "grossly" negligent. It simply found that management collectively was 'negligent'.

33. In her ruling the president of the Tribunal held:

> **"300. It is the view of the Tribunal that as Director of Cage Operations, Mr Ferguson had overall responsibility for ensuring that the policies were adhered to or enforced by his direct reports/staff. Mr. Ferguson himself mentioned that his findings were that the cage supervisors assigned to facilitate cashiering functions at the Cove and Seaglass were grossly negligent of the execution of their duties and further noted that the inability of the supervisor to enforce the tamperproof bag policy was no doubt unacceptable and represented another**

violation of company policy with regard to the use of securing assets in tamperproof bags.

301. Mr. Ferguson's explanation in evidence was that he did not need to second guess his supervisors. However, the Tribunal is of the view that he ought to have taken some steps to supervise his supervisors and take responsibility with respect to properly ensuring that Company policies were adhered to by his staff. Mr. Ferguson's evidence indicates that he didn't think he had to take any responsibility for their actions and in so doing he was in fact negligent, especially in view of the fact that Mr. Ferguson admitted in evidence that he himself was aware of the policy at the main bank but however admits that they are not the same at the Cove and Seaglass and seeks to place all responsibility upon his staff for being grossly negligent and their actions unacceptable.

34. In our judgment in order to be summarily dismissed on the ground of gross negligence the respondent had to honestly and reasonably believe that the appellant himself was personally grossly negligent in his own conduct. It was not sufficient for the respondent to believe that the appellant was collectively 'negligent' with all persons in the casino cage operations and such collective negligence led to the loss of the chips. The appellant must be personally "grossly negligent".

35. The respondent's own report did not find that the appellant was "grossly negligent". The respondent relies on section 32 of the Employment Act. That Act does not state that mere 'negligence' is a basis for summary dismissal. It requires that negligence to be 'gross'.

36. The report to the respondent's own notice did not describe the Appellant's conduct as gross negligence. As pointed out earlier the particulars in the two notices simply said that the appellant "failed to exercise proper judgment" and "failed to exercise fiduciary responsibility". That is not a finding of gross negligence. Nor was it a finding that was ever put to the appellant for an explanation or response.

37. No Tribunal could have properly found that the respondent held an honest belief in the appellant's "gross negligence" on that evidence. We accept that "gross negligence" is an expression that is difficult to construe, but it indicates conduct substantially more serious, culpable and grievous than simple negligence or bad judgment.

38. Although said in the context of an exclusion clause which indemnified an employee for loss arising out of his negligence unless that negligence was "gross" the court in **Marex Financial Ltd v Creative Finance Ltd** [2014] 1 All E.R. (comm)122 at paragraph 67 said:

> **"gross negligence means something different than negligence. It connotes in my opinion a want of care that is more fundamental than a failure to exercise reasonable care. The difference between the two concepts is one of degree".**

39. In **Adesokan v Sainsbury Supermarkets Ltd** [2017] EWCA Civ 22, the court had to consider whether a senior employee's failure to rectify a situation or alert more senior management of a breach of company policy was gross negligence that was tantamount to gross misconduct which warranted summary dismissal. The employee was aware of an email sent by another employee containing an improper message and in clear breach of serious company policy. He did nothing to correct the message. Although the court in that case on the facts said that the failure was gross negligence amounting to gross misconduct the English Court of Appeal said,

> "**it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employers policies constitutes such a grave act of misconduct as to justify summary dismissal**".

40. It is our judgement that the President erred in law when she found that the evidence established that the respondent held and honest and reasonable belief that the Appellant was guilty of "gross negligence" and that it formed that view after a reasonable investigation into the facts.

41. The appeal is allowed and the appellant is entitled to the monies he would have received under section 29 of the Employment Act.

The Honourable Sir Michael Barnett, JA (Actg)

The Honourable Sir Hartman Longley, P

The Honourable Mr. Justice Isaacs, JA