COMMONWEALTH OF THE BAHAMAS

IT / NES / 50 of 2017

INDUSTRIAL TRIBUNAL

NASSAU

In The Matter of the Industrial Relations Act

SHERRY JENNIFER BROWN

Applicant

and

BAHAMAS ELECTRICITY CORPORATION /
BAHAMAS POWER & LIGHT COMPANY LIMITED

Respondent

DECISION

This Decision is delivered by Her Honour Simone Fitzcharles, Vice President

The Dispute

By an Originating Application filed on 11 August 2017 the Applicant, Sherry Jennifer Brown, claimed that the Respondent, Bahamas Power & Light Company Limited which was formerly called Bahamas Electricity Corporation ("BPL") unfairly dismissed her and breached the Industrial Agreement relevant to her employment. As such, Ms Brown claimed that BPL is liable to reinstate her to her former position and to reimburse her the salary and benefits she would have earned from the date of her dismissal to her reinstatement. BPL defends the action on the basis Ms Brown was justifiably and not unfairly dismissed for gross misconduct in accordance with the Industrial Agreement. This dispute was referred to the Tribunal for a determination by the Minister of Labour by his Certificate dated 18 May 2017.

The Factual Matrix

1. Ms Brown worked with BPL from 23 September 1991 through 19 May 2016, making her tenure 24 years, 7 months and 4 weeks. At the time she was dismissed from her post she earned a salary of $3,371.00 per month, she was entitled to vacation and she was enrolled in BPL's employee pension plan. Ms Brown was a Cashier stationed in an office (the "cashier's cage") shared by 3 workers from BPL, and one worker from the National Insurance Board. The cashier's cage was situated in a room in the Post Office building on East Hill Street.

2. It is undisputed that Ms Brown was a member of the Bahamas Electrical Workers Union ("the Union") and a part of the bargaining unit. The Industrial Agreement between the Bahamas Electricity Corporation (BPL) and the Union which expired on 30 April 2018 governed the employment of the Applicant prior to her dismissal.

3. The incidents which led to Ms Brown's dismissal were captured by BPL on cameras, positioned in and outside of the cashier's cage. The footage showed a male person entering, remaining and interacting primarily with Ms Brown, then leaving the cashier's cage. The video footage captured activities of those in the cashier's cage on four separate days - 14th, 22nd, 25th and 26th April 2016. The male person was identified in the Respondent's security report and in Ms Brown's evidence as Kim Ferguson who was a Post Office employee. It was clear that on some occasions Mr Ferguson accessed the cashier's cage when Ms Brown gave him such access, and on others, when the entry/exit door was left unlocked by persons working in the cashier's cage.

4. In addition to Mr Ferguson's access to the cashier's cage, the video footage showed that Mr Ferguson and Ms Brown engaged in activities of an intimate nature with each other while the other employees worked at their desks. The video footage which documented the activities in the cashier's cage was shown to the Tribunal during the trial. The Respondent produced a written report dated 13th May 2016 (the "Report") which contained the conclusions of Stephen Strachan, the Security Manager of the Respondent, once he had investigated the activities in the cashier's cage on the four days mentioned. In the Report, Mr Strachan observed:

   "5. ...The male's presence seemed to have no business reason but rather were personal visits to Cashier Sherry Brown. All of them involved activities of inappropriate behavior with sexual connotations between Ms Brown and the male.

   "14. Ms Sherry Brown, a veteran employee, did nothing to prevent or dissuade the unauthorized entry or presence of Mr Ferguson in the Corporation's restricted cash intake area. In fact her behavior encouraged quite the opposite and exposed the cage during its operation."

5. BPL's complaint against Ms Brown was gross misconduct comprised of two activities: (1) that she breached BPL's restricted access policies to the cashier's office by allowing an unauthorized person access to the restricted area, and (2) that during such unauthorized access, Ms Brown engaged on the job in conduct of a lewd or sexual nature with the person who was not authorized to be in the cashier's cage. At the trial under cross-examination Ms Brown admitted she did the acts for which she was dismissed. Even if she had not done so, the recording of her activities would have dispersed any doubt she performed such acts.

6. The policy of BPL concerning access to the cashier's cage was primarily set out in two documents: (1) a Customer Services Memorandum dated 23 April 2007 from Peter W. Rutherford, Assistant General Manager of Customer Services to All Employees of BPL; and (2) a manual on revised Cash Handling Policy and Procedures dated 5 August 2014.

7. The relevant portions of the Customer Services Memorandum informed employees of the following:

> **"Please be advised that in our efforts to improve our operations and the services provided by the cashiers, the following changes are in affect (sic) in the Cashier's Office.**
>
> **1. The Cashier's office is a restricted area whose access will be limited to the following:**
>
> **The General Manager**
> **The CFO**
> **The AGM Customer Services**
> **Customer Relations Manager**
> **Security Manager**
> **Security Officers in the discharge of their normal duties only**
> **Cashiers / Cashiers' Supervisors**
> **Internal Auditors."** [Emphasis added].

8. The purpose of the Cash Handling Policy and Procedures manual was stated to be "**to ensure the conformity of ... the Supervisors, Assistant Supervisors, Cashiers and other employees entrusted with the Corporation's cash intake or receipt thereof**" with the revised "**procedures, duties and responsibilities.**" The document was supplementary to the Industrial Agreement and provided "**an operating framework.**" It stated that in "**the event that an unspecified transaction or event may occur, the Corporation reserves the right to make a decision to protect the assets of the Corporation.**" The manual also provided:

> **"1. GENERAL OPERATIONAL RULES (CODE OF CONDUCT)**
> **Physical access to the Corporation's cash and cash receipt environment is restricted to authorized Corporation personnel. The entrance and departure of all non-cashiering persons with a business need to access the Cashier's cage is to be logged by the Supervisor...".**
>
> **"3. SECURITY CAMERAS**
> **The Corporation reserves the right to review the surveillance security cameras at any time...".** [Emphasis added].

9. The Assistant General Manager for Customer Services (Mr Rutherford) made a complaint about unauthorized entry to the cashier's cage. This complaint prompted Mr Strachan's investigation into the activities in that area. Resultantly, BPL placed Ms Brown and other BPL workers in the cashier's cage on suspension with 50% pay pending the investigation in accordance with clause 16.11 of the Industrial Agreement. Ms Brown was placed on

suspension for an initial period of 5 days and this was extended by another 10 days as the investigation continued in accordance with clause 16.12(1)(b) of the Industrial Agreement. As a result of the investigation, on 19 May 2016 Ms Brown's employment was terminated for gross misconduct in accordance with clause 16.12(1)(a) of the Industrial Agreement.

10. Based on the evidence, Ms Brown was not the only BPL worker in the cashier's cage to be punished as a result of the investigation and for their respective roles in the unauthorized access of persons to the cashier's cage. Theresa Lewis, a supervisor was in the office and was aware when Mr Ferguson accessed the cashier's cage without authorization. She failed to correct the situation. Agnes Smith, was also present on one of the occasions when Mr Ferguson accessed the area, and apart from this, she conversed with another unauthorized Post Office worker in the area. She failed to correct the situation. Mia Lockhart, a line-staff cashier, was present when Mr Ferguson entered without authorization, and in a separate incident, a Customs officer had entered the area without authorization to see her on one occasion, but she discouraged him from remaining. Ms Brown learned from Ms Astride Bodie, a Union representative, that Theresa Lewis received 10 days' suspension for her role in the unauthorized access and she may have been put to work in another area. She also learned that Agnes Smith was suspended for 10 days without pay and Mia Lockhart was warned.

Terms of Employment

11. The Industrial Agreement which primarily governed the relationship of employer and employee vis-à-vis Ms Brown and BPL, contained the following salient clauses:

> **"2.13 'GROSS MISCONDUCT' shall mean conduct by the employee of a nature so serious that it constitutes a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer and destroys the employer / employee relationship, and merits summary dismissal without notice or pay in lieu of notice.**
>
> **"CLAUSE 16.0 DISCIPLINE**
>
> **"16.1 Without discipline the Corporation cannot effectively perform the public service for which it has been established. Each case must be weighed on its own merits, but the decision of the Corporation must always be on reasonable grounds and for just or lawful cause.**
>
> **"16.2 Breaches of discipline are classified as either major or minor.**
>
> **"16.3 The Corporation may summarily dismiss from its service or suspend without pay any employee who commits a major breach of discipline. The said suspension without pay would not affect the continuity of employment and other entitlements of the employee concerned, save as provided at Clause 38 (Christmas Bonus).**

"16.5 Although fixed penalties are not established, major breaches of discipline will normally call for suspension or dismissal. Major breaches of discipline include but are not limited to:

...

"(11) Gross Misconduct;

"16.6 Minor breaches of discipline include but are not limited to:

"(5) Violation of the Corporation's policies or procedures;

"(8) Failure to observe or enforce safety rules or operating procedures where the procedures and policies exist ...

"16.11 Where, in the judgment of the Corporation a major breach or four (4) minor breaches of discipline warranting dismissal have been committed by an employee, the Corporation may first suspend the employee from duty with half pay pending further investigation for a period of up to five (5) working days and shall confirm this suspension in writing to the employee and the Union, provided always that the breach does not warrant immediate dismissal.

"16.12 If at the end of the five (5) working days the investigation is not completed, the suspension may be extended for a further period not to exceed twenty (20) working days to complete the investigation.

"(1) Thereafter, the Corporation may:
" (a) Dismiss the employee immediately if in the Corporation's view the circumstances justify such action; or
(b) Suspend the employee without pay for a further period up to but not exceeding twenty (20) working days; or
(c) Return the employee to his duties and compensate the employee for time lost as a result of such suspension or dismissal.

"16.13 No employee shall be dismissed without being afforded an opportunity to be heard and respond to the allegation(s) made against him.

"16.16 Grievances concerning suspension or dismissal of an employee shall commence at the appropriate stage of Grievance Procedure.

"16.17 If upon settlement of the grievance it is found that an employee has been unjustly (or wrongfully) suspended or dismissed, the Corporation shall reinstate and compensate the employee for time lost as a result of such suspension or dismissal and all correspondence relating to the incident shall be removed from the employee's dossier. As is appropriate, a written notification should be placed on the employee's dossier indicating vindication and/or the corrective action undertaken by the Corporation.

"16.18 All employees that are suspended or dismissed shall have the right of appeal. Such appeal will be heard within thirty (30) days of the suspension or dismissal by the Joint Industrial Council (JIC)."

12. The Industrial Agreement set out a detailed procedure in relation to disciplinary procedures, and termination of employment. It included a right to appeal a termination of employment in the event an employee was disgruntled. It also in Clause 17 set out a detailed 5-stage process which employees could engage to resolve their employment grievances, including a suspension or dismissal. Upon consideration of the provisions, the Tribunal finds that the

procedure set out in the Industrial Agreement on the issues of discipline, grievance handling, termination of employment and appeals was a fair one for both stakeholders - the employer and the employee.

Additional Evidence at the Trial

13. In addition to the foregoing facts, each witness made certain key statements during the trial.

14. Ms Brown, as the sole witness supporting her claim gave evidence that:

(1) She knew the nature of the investigation conducted by BPL into her activities, but she did not know what the result of the investigation was;

(2) The issue of her role and the circumstances surrounding the unauthorized entry of Mr Ferguson was put to her by Mr Strachan. He also asked her for information of what she and Mr Ferguson did after he gained unauthorized entry to the cashier's office;

(3) She was asked during her meetings with BPL managers whether she wished to say anything further or ask questions, which she declined, except on 4 May to say she did not understand why she was being suspended for 15 days as a result of Fergie being in the cashier's cage and her hugging him. This comment prompted Ms Johnson to tell her that she (Ms Brown) knew she did much more than simply hug Mr Ferguson. Ms Brown did not respond to this allegation concerning her conduct. The next day she remembered she also lifted her dress. She therefore sought advice from Jennifer Isaacs Dotson;

(4) She committed the conduct for which she was summarily dismissed: (i) As a cashier of long standing she was familiar with the restriction on access policy as set out in the Customer Service Memorandum and the Cash Handling Policy and Procedures manual; (ii) Mr Ferguson was not authorized to be allowed into the cashier's cage as it was contrary to BPL's policies; (iii) She had a responsibility in determining who had access to the area; (iv) Her conduct with Mr Ferguson was not professional and fell below the standard of conduct required of her as a longstanding BPL employee;

(5) She had during the investigation, the benefit of Union representation and legal advice, and she was given a recess to consider her position before continuing in interview with Mr Strachan;

(6) Before the meeting in which BPL dismissed her, she was informed by the Union representative that BPL decided to dismiss her, but the representative was arranging for

her to resign instead. She took advice from her lawyer before the meeting in which she was dismissed.

15. At the trial, Ms Johnson testified:

    (1) Ms Brown was suspended so as to enable BPL to investigate. There was no foregone conclusion that she would be dismissed. The intial investigation revealed that BPL had to widen the scope of the enquiries, so that is why the investigation continued as did the suspension.

    (2) The decision to dismiss was made on the basis of the results of the investigation which were communicated to the executive level of BPL by a written report. Ms Johnson did not get a copy of the report. The Assistant General Manager, Marissa Smith gave Ms Johnson the instructions to carry out the dismissal.

    (3) Prior to suspension, Ms Brown was informed an investigation was being conducted into gross misconduct. She was not told by Ms Johnson at that time of suspension what constituted gross misconduct. The definition of gross misconduct was in the Industrial Agreement at Clause 2.13. When the suspension was extended, Ms Brown was not told at that time of any findings of the investigation. She was informed that the investigation was not complete, so they had to continue with it.

    (4) Ms Johnson said she did not provide to Ms Brown the findings of the investigation, such as reports of the interviews with her co-workers or video footage. She was not sure whether a person from the executive management of BPL gave the material to Ms Brown.

    (5) No report was prepared by the Post Office worker, Mr Ferguson.

    (6) While Ms Brown was not given written reports, she was questioned and given a chance to respond in relation to the issues which were mentioned in reports. The letters of 26 April, 4 May and 19 May 2016 did not constitute the entire communication between BPL and Ms Brown. Questions were put to her that concerned what the investigation was about. She was advised of the nature of the investigation in the meetings BPL had with her and during the question and answer period.

16. Mr Strachan stated in the trial:

    (1) His investigation was based on the video footage he produced in evidence, and the recording equipment was in good working order.

(2) He found that other persons who were not authorized to be in the cashier's cage had access to the area without the assistance of Ms Brown.

(3) His investigation commenced because he was given information that an unauthorized person was seen in the cashier's cage and he was told to investigate the circumstances surrounding that issue. His remit was not limited so as not to have regard to Ms Brown's conduct, although he was given no specific names as to who should be investigated. Ms Brown happened to be a part of the activities investigated. He was charged to look at the reasons for the unauthorized access, why and how the persons were entering and what they did when they entered.

(4) He assumed the NIB worker was authorized because she worked in that space which was shared by NIB and BPL. The footage showed a Customs Officer gaining access and the BPL workers were questioned about that incident. BPL supervisors and other BPL workers had a responsibility for the unauthorized access of persons in the cashier's cage. Ms Brown made her contribution to giving unauthorized access.

(5) He could not say whether his report of 13 May 2016 was furnished to Ms Brown. That was the only report he prepared and he gave it to the General Manager once it was prepared.

(6) The camera footage of the 4 days recorded showed Mr Ferguson visited Ms Brown on all of the occasions he accessed the cashier's cage, whether by an unlocked door or by gaining admission from Ms Brown. The footage showed that on all of those occasions their behaviour had inappropriate and sexual connotations.

Unfair Dismissal

17. Unfair dismissal claims are of different sorts depending on the circumstances. This is the kind of unfair dismissal claim which falls within sections 34 and 35 of the Employment Act (EA). These 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."**

18. Section 35 is the section pursuant to which a court may determine whether a dismissal outside the ambit of sections 36 through 40 is fair or unfair. See ***BMP Limited d/b/a Crystal Palace Casino v Yvette Ferguson*** IndTribApp No 116 of 2012 at paragraph 38.

19. In noting the way in which some of the arguments have been cast in early submissions, it is imperative to state that any argument concerning sections 31 through 33 of the EA and the concepts of the honest belief of the employer and the reasonableness of the investigation belong to a realm distinct from that of unfair dismissal, albeit some of these factors can sometimes enter an analysis at the compensatory stage. The distinctive characteristics of wrongful dismissal and unfair dismissal have now been discussed in numerous Court of Appeal decisions, one of which is ***Eden Butler v Island Hotel Company Limited***, SCCivApp & CAIS No 210 of 2017. In that case Evans JA (Actg, as he then was) demarcated the boundaries of the causes:

> **"30. ...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. It follows then that the Court could only set aside the decision of the respondent to summarily dismiss the appellant if the Court specifically found that the respondent did not have an honest and reasonable belief that the appellant was guilty of gross misconduct.**
>
> ...
>
> **"32. With regard to the alternate claim of damages for unfair dismissal the focus is primarily on the procedure."**

20. Dismissal following procedural unfairness is not the only type of unfair dismissal, but the one alleged in this cause. Since the pleaded cause of action in this matter is unfair dismissal as referred by the Minister and not a complaint against wrongful summary dismissal, the remit of the Tribunal is the former. Further, it has been established the Tribunal may not entertain a trade dispute which has not been referred by the Minister. See ***Island Hotel Company Limited v John Fox*** IndTribApp. No. 54 of 2017.

Romantic or Lewd Behaviour?

21. The parties put in issue the exact character of the activities between Ms Brown and Mr Ferguson. While Ms Brown in her arguments repeatedly stated that she simply displayed "romantic" behavior, BPL in its evidence and arguments contended that Ms Brown's behavior was "lewd" and "inappropriate" with "sexual connotations". The Tribunal has a duty to consider the substantial merits in any unfair dismissal claim. The precise character of the acts committed is a factor to be weighed with others in the balance. Fortunately, the Tribunal has had the benefit of evidence in the witness statement of Ms Brown, a transcript

capturing a majority of the recorded activities which was prepared by the Respondent for the trial and the video footage.

22. Basically, the footage showed that Ms Brown on two occasions opened the cage door for Mr Ferguson and on two occasions, escorted him into the restricted area. On three occasions, Mr Ferguson accessed the cashier's cage as the door was either left open or unlocked by other workers. Based on the camera footage, Mr Ferguson's main reason for visiting the cage was to find Ms Brown for the purposes of chatting closely, groping, kissing, touching intimate parts of the body and Ms Brown exposed private areas of her body. Ms Brown's witness statement mentioned she performed similar acts.

23. While the Applicant and Mr Ferguson may or may not have had romantic feelings towards each other, their activities as described in the transcript, recorded electronically and as described by Ms Brown in her witness statement were clearly of a sexual nature. Whether any such behavior is deemed unacceptably lewd or indecorous amounting to gross misconduct is a matter of context – where and in what circumstances it occurred. The context in this scenario is the workplace in a small office shared by other employees where the acts of Ms Brown and Mr Ferguson were performed in the presence of the other employees and/or in the view of BPL via its camera system.

24. At law, if historically there has been behavior of an inappropriate sexual nature in the workplace and management has been tolerant of such behaviour, the law will not allow the employer to suddenly change its attitude to the detriment of workers. In that instance, dismissing an employee on the ground of gross misconduct for engaging in similar behavior in the workplace could give rise to a successful claim of unfair dismissal if the employee is not first notified of the change in policy. This was seen in ***Dixon Stores Group Ltd v Dwan and Another***, EAT/310/93, a UK Employment Appeal Tribunal case where two managers challenged their dismissal for gross misconduct when they engaged in an act at a Christmas party that was considered unacceptably lewd. Finding the dismissals to be unfair, the Employment Appeal Tribunal found that the employer should have notified all employees of a change in the standard of conduct required of the employees before imposing a penalty on any of them for such acts, which were tolerated in past Christmas events.

25. In BPL's case, there was no evidence of any prior history or tolerance in the workplace of the behavior engaged in by Ms Brown. The personal behaviour and deportment of Ms Brown – her conduct on the job – was called into question by her activities. BPL did not have as one of its major offences, which could attract immediate dismissal, a specific category of indecency or gross indecency, as contained in the Employment Act, but this was not necessary, for in many employment cases where indecorum with sexual overtones is the employee's offence, gross misconduct is often the reason for dismissal. See ***Dixon's***

case for example. The Tribunal notes that the specific offences listed in the Industrial Agreement as major was not an exhaustive list of such offences.

26. Taken on its own, the granting of unauthorized access of a prohibited person into the cashier's cage amounted to a violation of BPL's policies or procedures or failure to observe or enforce safety rules or operating procedures, which are minor offences not punishable by dismissal under Clause 16.6 of the Industrial Agreement. This may be why Ms Brown's colleagues were not dismissed for their respective roles in permitting the unauthorized entry and remaining of persons in the cashier's cage. However, in Ms Brown's case, there was more involved. The entire conduct was a combination of giving a person who is not a BPL employee unauthorized access in a restricted area for the apparent purpose of engaging in unacceptable behaviour with sexual overtones on several occasions. This was considered by BPL to be gross misconduct punishable by summary dismissal.

27. Perhaps the most risqué or egregeious of Ms Brown's public acts were bending over, spreading her legs and lifting her dress thereby exposing private areas of her body to Mr Ferguson, but also in the presence of her work colleagues. The Tribunal cannot find it unfair that BPL considered this to be unacceptably lewd, surpassing mere unprofessional behaviour. Additionally, it would not have been unfair to say that the other acts Ms Brown and Mr Ferguson performed as were recorded (intimate touching and kissing, for example) were inappropriate in the workplace. In the context of the workplace, even if her activities with Mr Ferguson were not done in view or in proximity of BPL and co-workers Ms Brown may still have been subject to a gross misconduct accusation. There have been cases where acts of a sexual nature which were not performed in full view of workers and done after business hours in a darkened office space have been found to be gross misconduct and a dismissal of the employees involved, not unfair. See for example ***GM Packaging (UK) Ltd v Haslem***, UKEAT/0259/13.

28. Therefore, having considered the evidence and the nature of the conduct in question, in the contention between the parties over how Ms Brown's behavior is to be characterized, I find that BPL's description is more accurate than that of Ms Brown. Her behavior was of an indecorous sexual nature, performed in such a way that it was fully observed and, based on the demeanour of BPL's witnesses, offensive to the employer as well as having the potential to be offensive and demoralizing to co-workers on BPL's premises. The Tribunal could find no unfairness in how BPL characterized those acts perpetrated on its premises.

A Fair Procedure

29. The Applicant's argument partially focuses on the issue of procedural unfairness leading up to the dismissal, sufficient to make the dismissal itself unfair. This aspect of unfair dismissal

was discussed in the Court of Appeal's decision in ***McCardy v. John Bull Ltd*** IndTribApp. No 20 of 2019, where Crane-Scott JA stated:

> **"63. Over the years, even in spite of the minimal criteria provided in section 35, the Industrial Tribunal and our courts have had no difficulty determining whether in any given case a dismissal was fair or unfair. Case law in this jurisdiction is replete with instances in which our courts at various levels have, applying the statutory test, conducted the necessary factual inquiry required by the section and either found a dismissal to have been fair or unfair. In the vast majority of cases, a finding of unfairness has invariably involved a finding that some *procedural unfairness* occurred in the *process* which led to the dismissal."**

30. Having found that the disciplinary procedure as agreed amongst the parties was a fair one,[1] the Tribunal has to determine whether a fair procedure was actually followed. Ms Brown complains that BPL did not give her a reason why she was being suspended. However, this is contradicted by the indication in the letters to Ms Brown from BPL of 26 April and 4 May 2016 which stated that Ms Brown was being suspended because an investigation into gross misconduct was being undertaken. This notification met and exceeded the requirements of the procedure set out in clause 16.11 of the Industrial Agreement for suspensions of this nature, which simply required BPL to confirm the suspension in writing to the employee. That procedure did not require that a reason be given for the suspension, although one was advanced by BPL to Ms Brown both on the initial suspension and on the extension of the same. The Tribunal finds that the process of the suspension was fair and did not infringe the agreed, or a fair procedure.

31. Ms Brown also contended that she was not given an opportunity to meet with BPL and hear the allegations against her. Now at the trial under cross-examination, Ms Brown admitted that she met with BPL, and understood the nature of the investigation BPL conducted. Therefore, the Tribunal believes she understood what it was about. Based on the evidence Ms Brown received 3 letters informing her of her initial suspension, extended suspension and dismissal, respectively. The first two letters referred to the allegation of gross misconduct as that which was being investigated. The third letter communicated that the investigation was completed and she was found culpable of gross misconduct. These references to the offence for which Ms Brown was eventually dismissed were somewhat generic. However, the evidence shows that more detail was supplied to Ms Brown in meetings she had with BPL managers.

32. Ms Brown had four face-to-face meetings with BPL managers. Based on the notes of Mr Strachan's interview with Ms Brown and Ms Brown's evidence, he opened the interview by announcing the allegation that he was investigating, namely unauthorized entry into the cashier's cage. Ms Brown was thoroughly questioned about granting unauthorized access to Mr Ferguson and causing him to remain in the cashier's cage. Mr Strachan elicited from Ms

---

[1] See paragraph 12 above.

Brown that (1) she knew the policy which placed on her a responsibility to deny access to persons not working in the cashier's cage; (2) that she might have opened the door for Mr Ferguson to access the cashier's cage on 25 April 2016 when she entertained his presence by conversing with and hugging him and giving him cake; (3) that her supervisor Theresa Lewis knew of Mr Ferguson's presence in the cage; (4) that Mr Ferguson came there on other occasions and it would be her (Ms Brown) or National Insurance who granted access; (5) that her supervisor told the cashiers about the restricted access policy and everyone is aware of it; (6) that Mr Ferguson's purpose for being in the cage was to put up the water bottle, to check on them, or to fix a breaker; and (7) that Mr Ferguson came there to see no one in particular, all of the workers in the cashier's cage. It is apparent Mr Strachan was aware that Ms Brown was not telling the entire truth in relation to Mr Fergsuon's reason for being in the cashier's cage, which was mainly to interact with Ms Brown. His questioning style was to get her to admit in full all of her activities involving Mr Ferguson. Mr Strachan then had the following exchange with Ms Brown:

Mr Strachan: Sherry, all of the cameras are working at the Post Office. Anything you wish to speak to in relation to what I am asking?
Ms Brown: No.

33. Ms Brown stated in her witness statement that the end of this exchange was:

Mr Strachan: So who is it that Fergie come there to see?
Ms Brown: No one in particular, all of us.
Mr Strachan: Well Sherry, is there anything you want to add? Anything at all you want to say?
Ms Brown: I don't understand.
Mr Strachan: Take a minute because remember we have cameras all over that office, all over. So take some time and if you need to go outside with Astride and let her advise you, you can do so.
Ms Brown: [Went outside with Astride Bodie, Union representative, and took advice, then returned].
Mr Strachan: [Repeats his question]
Ms Brown: I have nothing else to say.

34. In a second meeting, which took place after Ms Brown's interview with Mr Strachan, Ms Brown (with Ms Bodie) met with Ms Johnson and Mr Rutherford (Acting General Manager of Customer Service). In this meeting Ms Brown was informed that she was being suspended for 5 days pending an investigation into gross misconduct. She was then given a letter to that effect. So, as it turned out, Ms Brown got particulars of the gross misconduct in her interview before she got the letter stating that this was the matter being investigated. She was told in the meeting that if she was found culpable of the matters being investigated she would be subjected to further disciplinary measures, but if she was exonerated all monies (namely the 50% salary docked during suspension) would be returned and a letter would be placed on her dossier to that effect. Ms Johnson asked Ms Brown if she had any questions or wanted to say anything. Ms Brown responded that she did not. Neither Ms Brown nor Ms Bodie sought clarification on allegations against her or

ask what the matters were of which she might be found culpable. The Tribunal would have expected that if that were a concern, questions would be raised at least at that point. But having gone through the matters with Mr Strachan already, it is not surprising Ms Brown had no questions concerning the allegations.

35. In the third meeting which took place on 4 May 2016, Ms Johnson met with Ms Brown and Ms Bodie to advise Ms Brown that the investigation was not completed so BPL would be extending her suspension pending investigation for 10 days. Ms Johnson gave Ms Brown a written notification to that effect in accordance with the Industrial Agreement, a copy of which she asked Ms Brown to sign. Ms Johnson then asked Ms Brown if she had anything she wished to ask or whether she wanted to say anything. Ms Brown then questioned why she was being suspended for 15 days. She said she knew Mr Ferguson was in the cashier's cage and that she "hugged" him, "but fifteen days?" Here the Tribunal notes that Ms Brown accurately targeted the two matters comprising the allegation of gross misconduct – (1) Mr Ferguson's access to the cashier's cage, and (2) her physical contact with him. Ms Johnson's reply to her was that she (Ms Brown) knew she did much more than hug Mr Ferguson. The allegation Ms Johnson put to Ms Brown suggested two things: (1) BPL was aware of Ms Brown's activities with Mr Ferguson beyond what she disclosed as a hug, and (2) BPL was aware Ms Brown did not tell the whole truth about those activities. After Ms Johnson put this allegation to Ms Brown, Ms Brown did not respond to it, but instead signed the letter and left rather abruptly with the Union representative.

36. Ms Johnson's comment that Ms Brown knew she did "way more" than hug Ferguson exercised the mind of Ms Brown. Her evidence was that the next day she "remembered" she lifted her skirt. Having come to this realization, Ms Brown never reported this detail to her employer. The investigation was still open at that point. In fact, Ms Brown had two weeks within which she could have approached BPL to disclose what she knew she had done. Instead, her evidence was that she took advice about this recollection of her lifting her skirt from Jennifer Isaacs-Dotson.[2] Ms Brown's admitted awareness of her conduct is important, for she would know she had to answer BPL for it. It is difficult to avoid the conclusion that Ms Brown knew her actions with Mr Ferguson were a part of the enquiry and she was concerned about it to the point of taking advice from Ms Dotson. Her chosen response was not to disclose what she did. Nor did she question the allegation.

37. Although I am satisfied the issue of unauthorized access into the cashier's cage was put to Ms Brown with sufficient detail, the issue of what actions she performed with Mr Ferguson after he gained access was obviously put more generally. Is this decisive of an unfair process leading to unfair dismissal?

---

[2] Judicial notice is taken of Ms Dotson's standing in 2016 as a member of the Bahamas Senate and President of the Caribbean Council of Labour.

38. In ***British Home Stores Ltd v Burchell*** [1980] ICR 303 at 308, an unfair dismissal claim, the Employment Appeal Tribunal noted the less satisfactory manner of putting an allegation to an employee in a general way, but showed this did not defeat the purpose. Arnold J viewed the matter in this way:

> **"Where the matter, however, is somewhat less satisfactory is in relation to the nature of the allegation as put to the employee, which of course could only be pursued by question put by the employers to the employee in the guise and with the particularity in which they had been received by the employers from Mrs L who had not in fact, so far as the evidence goes, implicated the employee in any particular dishonest transaction. It is not easy to see that Mrs L could have been in any way compelled (short at any rate of recourse to the criminal law) to give any full explanation of the general nature of her admission of dishonesty (which is where this thing starts) and of a consequential, or at least an associated, implication of the employee. But there it was; the matter was put in general terms, in the same general terms as the employers had it from Mrs L to the employee, and the employee denied it. She denied it in terms of saying "You'll have to prove it," and adopted, not surprisingly in the circumstances, a somewhat "hoity-toity" attitude, and in a sense one might say to oneself, "Who wouldn't?" But the matter was put to her and she was invited to give her explanation."** [Emphasis added].

39. During her first encounter Ms Brown was plainly informed at the outset and questioned at length about the matter of unauthorized entry of a person into the cashier's cage. During that period of questioning Ms Brown got a clear idea that she had breached the access policy as she found BPL knew she had on occasion opened the access door for Mr Ferguson who was not a BPL employee. Further, she was asked questions to elicit what happened once Ferguson entered the cage. She admitted only to some of her activities with Mr Ferguson which were not of a sexual nature, but yet inappropriate and/or prohibited according to BPL's policies. There was an invitation extended by Mr Strachan for Ms Brown to say anything at all which she wished to say. She could have further responded to the issues put to her, she could have disclosed the truth about her conduct with Mr Ferguson after he accessed the cashier's cage, or she could have asked questions if she had any doubts about the allegations being put to her.

40. I am satisfied that in the form of the pointed questions put by Mr Strachan to Ms Brown and the answers elicited in the investigatory interview, combined with the unanswered allegation put to Ms Brown by Ms Johnson on 4 May 2016 as to her conduct, that Ms Brown was sufficiently aware of the issues BPL had with her. Bearing in mind that Ms Brown was interviewed on 26 April, and her conduct with Mr Ferguson occurred on 26, 25, 22 and 14 April, within mere days of the interview, the Tribunal is less inclined to believe that forgetfulness was the cause of her non-disclosure; I find it more likely to be due to a desire on the part of Ms Brown to conceal the information being sought about her activities at work.

41. In ***Newbold v Commonwealth Building Supplies Ltd***, CLE/gen 00621 of 2006, Bain J referred to the three elements which must be present to ensure procedural fairness or compliance with natural justice in a disciplinary proceeding. These were reflected in ***Klarin v Mid Glamorgan Area Health Authority*** [1978] 1 IRLR 215 where, in the context of an unfair dismissal claim the English Employment Appeal Tribunal held:

> **"The failure to call patients to give oral evidence did not render the disciplinary hearing unfair or being contrary to natural justice. There are only three basic requirements of natural justice which have to be complied with during the proceedings of a domestic disciplinary inquiry; firstly, that the person should know the nature of the accusation against him; secondly, that he should be given an opportunity to state his case; and thirdly, that the Tribunal should act in good faith."** [Emphasis added].

42. The Industrial Agreement which primarily governed Ms Brown's employment relationship with BPL stipulated that no employee would be dismissed without getting an opportunity to respond to the allegations against him. This combines the elements of the first and second requirements of natural justice set out in ***Klarin***. By her admission under cross-examination, the first requirement was fulfilled. There has been no allegation or evidence that BPL did not meet the third requirement – that of acting in good faith towards Ms Brown throughout the process.

43. In Ms Brown's case it is clear BPL was her accuser. Any comments made by co-workers of Ms Brown were merely confirmatory of what was seen in BPL's video footage of events in the cashier's cage. Ms Brown therefore faced her accuser in the meetings with BPL managers, Mr Strachan, Mr Rutherford and Ms Johnson who each told her of aspects of her behaviour BPL was investigating and gave her specific opportunities to have her say.

44. If she had any doubts about the allegations against her, Ms Brown had the opportunity to ask Mr Strachan, Ms Johnson and Mr Rutherford to enumerate them in any of the several meetings she had with BPL managers. She did not. At all meetings with BPL, Ms Brown was assisted by the presence of a Union representative. At no time did she state that she did not know or was confused about what the issues or allegations against her were. In fact, contrary to her argument in these proceedings, Ms Brown admitted she knew what issues the investigation concerned (the nature of the investigation). Considering the evidence in the round, Ms Brown could not successfully dispute that she did not know BPL was specifically concerned with the unauthorized entry of Mr Ferguson, the extent of her role in that unauthorized entry and her inappropriate activities with Mr Ferguson once he entered the cashier's cage. I therefore find that she was aware of the matters the Respondent investigated, both during the investigation and up to the time of her dismissal.

45. Ms Brown complains that she was not given a copy of the Report or any interview notes of what her colleagues said to management during the investigation and she did not receive a copy of the video recording.

46. Ought BPL to have given Ms Brown the Report and the notes of her colleagues' interviews as well as the video recording? At first blush this seems unfair because it is material upon which the employer based their decision. But on an objective analysis, if Ms Brown had been given the reports and video recording, she would have seen that she gave Mr Ferguson access into the cashier's cage which she knew and had addressed with BPL. It would also show her indecorous activities with Mr Ferguson when he came into the cage which she knew or "remembered" she had done and had chances to address with BPL prior to her dismissal. So, in reality there was no significant enlightenment for Ms Brown to get by seeing reports or the video recording.

47. In ***Fuller v Lloyds Bank plc*** (1991) IRLR 336, the first instance decision of Mr Justice Knox was upheld by the Employment Appeal Tribunal (EAT) in an unfair dismissal claim. It was stated by Knox J:

> **"...Although it is normally desirable that material upon which a disciplinary investigation is founded and on which any penalties may be based should be made available to the person being disciplined, failure to provide such material is not conclusive of unfair dismissal. Any defect in disciplinary procedure has to be analyzed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair. The question does not alter because the procedural defect was based on a policy adopted by the employers. The motivation of the employers in adopting the policy which led to the procedural defect is not a relevant subject of inquiry".**

48. While BPL could have given these materials to Ms Brown, I do not believe that supplying her with all of those materials was necessary. Without them, her knowledge of the elements of the investigation was adequate to apprise her of the two issues against her. I therefore do not find that this issue causes the dismissal to be unfair.

An Opportunity to Mitigate

49. The Applicant argues that her dismissal was unfair because her conduct did not rise to the level deserving of dismissal. In the context of unfair dismissal, the gist of the argument is that BPL should have allowed her to respond to the allegations against her so that she could put her case, which could have yielded the result of a warning issued to her and not dismissal.

50. Once the investigation was completed, Ms Brown was informed that the finding was that she was culpable of gross misconduct. By the time the dismissal occurred, she had had three opportunities over roughly four weeks to respond, if she could, on the matters put to her. But in the final meeting, BPL's handling of the matter was less than satisfactory. In this meeting, Ms Brown was not told that the employer was minded to dismiss her for her gross misconduct which was comprised of her acts of granting Mr Ferguson unauthorized access to the cashier's cage and engaging in lewd acts of a sexual nature with him. If BPL had said this, then invited Ms Brown to say why she should not be dismissed this procedure would have been superior.

51. Did the Applicant have a clear idea of the repercussions of being found culpable of gross misconduct? Yes, adequately so. Although the Industrial Agreement stated plainly that summary dismissal could be a result of gross misconduct, so could suspension of up to 20 days. However, Ms Brown was directed to clause 16.5 in letters from BPL, which clearly set out the two possible repercussions of gross misconduct. Further, she was able to take legal advice about termination of her employment before she entered the final meeting with BPL.

52. The evidence was that Ms Brown was told she was found culpable and BPL had decided to dismiss her. She was also then handed a termination letter to sign which stated the same, and she was invited to make representations or ask questions. This was Ms Brown's evidence as to the order of events in the final meeting, which was not gainsaid by the Respondent's witnesses. Since the decision to terminate Ms Brown's employment had already been made, she was not allowed to say why she should not be dismissed – that is – to put her mitigatory points to the employer, so that BPL could consider them before deciding whether to dismiss her. This is a defect in the process which could tip the balance in favour of a finding of unfair dismissal.

53. In relation to this issue, what does the law require of an employer? In ***Omar Ferguson v Bahamasair Holdings*** SCCivApp No 16 of 2016 the Court of Appeal set out the manner in which Stephen Isaacs J at first instance identified the applicable principle. He stated:

> **"37. The failure to give the employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of this case a denial of natural justice and therefore unfair...".**

54. Certainly, the facts of that case can readily be distinguished from Ms Brown's case, as amongst other dissimilar factors, it was a dismissal in which the plaintiff was never given an interview or a chance to answer any questions on the issues at hand. But the principle is important to consider here, as in most unfair dismissal claims.

55. A further relevant consideration on mitigation is that if an applicant argues he was not allowed to put his case in mitigation, a court would be expected to look at an applicant's points in mitigation which could have, at the time of the dismissal, convinced the employer to change its mind. The court could then evaluate the strength of those points as part of the substantial merits. Such mitigating factors were shown by the applicant in the ***Omar Ferguson*** case. It is illustrated where Crane-Scott JA stated:

> **"37. The unfairness of the respondent's dismissal is evident from the following circumstances: he was never given an opportunity to make representation to the appellant on the severity of the decision to terminate him having regard to (i) the fact that he was on long-term disability with no expected date for his return to full employment; (ii) the fact that as he was not actively performing duties at LPIA (as he was on long-term disability) the security clearance from the Airport Authority during that period was not a pressing requirement; (iii) the fact that he had not been found guilty of any misconduct inasmuch as the criminal charges against him were discontinued and he was entitled to the benefit of the presumption of innocence; and (iv) the fact that by terminating him the appellant was depriving him of his long term disability benefit when he had not done anything wrong; was 37 years old and his employment opportunities were diminished because of his long-term disability."**

56. The Court of Appeal considered these facts to be sufficiently compelling in response to a decision to dismiss, such that to not allow the plaintiff to state them before the dismissal made the process of that dismissal unfair. Similarly, in the more recent decision of ***Helena McCardy v John Bull Ltd*** IndTribApp No 20 of 2019, an unfair dismissal claim, Isaacs JA reinforced that connection between giving the employee the opportunity to say why "the 'nuclear option' of dismissal" should not be selected by the employer and setting out the compelling mitigating factors demonstrated to the court by the evidence. The learned judge stated:

> **"33. Had the respondent adhered to its disciplinary procedure, the appellant would have been accorded the opportunity to place before those conducting the hearing mitigating factors which ought to have been considered on her behalf, for example, the alcohol was provided at the function by the respondent, the appellant was an exemplary employee, the appellant readily admitted her guilt and apologised for her actions and her length of service."**

57. Did Ms Brown show mitigating factors which, if heard by her employer, should have caused the employer to stay its hand on dismissal and instead to mete out a lesser disciplinary sanction? From the arguments proffered by Ms Brown, the factors in mitigation were:

    (1) The restriction on access to the cashier's cage was a flexible rule because the evidence showed that other persons as well as Mr Ferguson accessed the area both with and without the assistance of Ms Brown.

    (2) The area at the back of the cage was a shared area for all the workers in that area, i.e. Post Office, National Insurance, BPL and Customs.

(3) Ms Brown's behavior with Mr Ferguson was merely romantic, so she should have been warned.

(4) She worked with BPL for 24 ½ years.

58. Taking mitigation points (1) and (2) together, the evidence showed the ingress of workers from Customs, the Post Office (inclusive of Mr Ferguson), National Insurance (who legitimately worked in the area) and BPL (who also worked in that office). From both Mr Strachan and the notes from Theresa Lewis' interview the Tribunal noted that the area is a shared one, but shared by two government departments – BPL and National Insurance. The evidence also showed that as a result of Mr Strachan's investigation, BPL workers apart from Ms Brown (namely supervisors Ms Lewis and Ms Smith, and line-staff employee, Ms Lockhart) were punished for allowing access to those workers from Customs and the Post Office who were not authorized to be in the cashier's cage. BPL enforced its rules of strictures on access to that protected area as set out in the Customer Services Memorandum and the Cash Handling Policy and Procedures manual.[3] Ms Brown was no exception to those punished. On the evidence, the Tribunal is satisfied the office was not shared by Government departments other than BPL and the National Insurance Board.

59. The Tribunal is also satisfied that the rule of access was not flexible as submitted by Ms Brown. Moreover, her admission at trial that Mr Ferguson was not authorized to be in the cashier's cage runs contrary to any argument that the rule was flexible enough to allow him in. It is clear the rule was put in place because the cashier's cage was a sensitive area in that cash and payments to BPL were processed there. The rules were for the protection and security of both the cash handling process and the funds themselves from theft. It is understandable that BPL did not wish to have members of the public (not authorized to be in that area) walk through without restriction for, as Ms Brown admitted under cross examination, such easy access (like the access she gave to Mr Ferguson) compromised the security of the cashier's cage and could lead to theft or losses sustained by BPL.

60. In relation to point (3), the Tribunal dealt with the character of Ms Brown's behavior with Mr Ferguson.[4] No merit is found in the argument that Ms Brown's behaviour was romantic so it wasn't serious enough to dismiss her and she should have been warned not to display it.

61. Lastly, Ms Brown argues in mitigation that she is a long-standing employee of BPL. This is, amongst the other factors submitted in mitigation, the only one the Tribunal believes is a

---

[3] See paragraph 7-8.

[4] See paragraph 21-28.

point which is to be considered a mitigating factor. However, usually in unfair dismissal cases there are other legitimate factors (such as a history of stellar performance, promotions, substantial and early honesty in the investigation, or an apology for the wrongdoing) which, when taken together with long-term employment converge in a convincing case that, if heard by the employer, may have reduced the sanction of dismissal. This was seen in ***Omar Ferguson*** and ***McCardy***. In fact, His Lordship Isaacs JA referred to an authority, ***Debra Braithwaite v First Citizens Bank (Barbados) Limited***, ERT/2018/012 from the Barbadian Employment Rights Tribunal, which is helpful to demonstrate this point. Quite simply the claimant, an employee of the respondent bank processed automatic transfers from the bank's accounts to her personal account in order to pay her legitimate wages which she transferred onward to pay certain fees she owed to the University of the West Indies. By doing so, she infringed the bank's rules against employees processing transactions to their private accounts. She had several meetings with the bank at the end of which she was dismissed.

62. In finding she was unfairly dismissed the Employment Rights Tribunal explained:

> **"28. The Tribunal feels constrained to observe that the decision to dismiss was disproportionate in the circumstances of this case. We say so for the following reasons:**
>
> **(1) When approached on the matter in August 2015 the claimant readily explained what she had done;**
>
> **(2) The claimant pleaded guilty to the charges detailed in the letter of November 11, 2015 at the first Disciplinary Hearing, having first apologized in an email to Celia Cadogan on July 24, 2015...**
>
> **(3) There was no attempt to defraud the bank; and**
>
> **(4) During the claimant's over 28 years employment with the respondent, there had only been one warning letter for an incident in May 2014.**
>
> **29. In the civil justice system, an early admission of guilt or responsibility mitigates against the imposition of the most extreme sanction and The Tribunal urges employers to give recognition to this principle in the adjudication of matters."**

63. Comparing this list from ***Braithwaite***, Ms Brown's case may be sharply contrasted because -

(1) There was no early and complete frankness or admission of guilt by Ms Brown except she said she might have been one of the persons who let Ferguson access the cashier's cage on 25 April and she had, on occasion, done it before. She disclosed nothing of her indecorous conduct and she concealed the extent of such incidents, which occurred more than once until she was caught.

(2) Ms Brown extended no apologies for her breaches although she knew she acted in contravention of the employer's policies and the Industrial Agreement. By repeatedly refusing the opportunities she was given to volunteer information and ask questions, she avoided saying more or facing the issues.

(3) While Ms Braithwaite did not intend to defraud the bank, Ms Brown never declared she did not intend her infringements. No explanation or defence was ever given concerning her behavior. Based on the evidence, the Tribunal can only conclude that unlike Ms Braithwaite, Ms Brown's behavior was fully intended and she had no defence.

(4) It would have been helpful to her case (as it was in ***Braithwaite*** and ***McCardy***) if Ms Brown were able to raise the prima facie case she was a model employee or one with a good work record for her 24 years. If such an argument in mitigation could be put for Ms Brown, she could have applied for the records to be produced by her employer for the trial. No such point was advanced. However, Ms Brown had long-standing employment with BPL and there was no evidence it was other than uneventful until this incident with Mr Ferguson.

64. Coming down to the final analysis, Ms Brown was not given the chance to say why she should not be dismissed before the decision was made. If she had been given that chance, there is, based on an assessment of the case she presented, a single point in mitigation she could have advanced – that of her long service of over 24 years. Having heard BPL's argument and presentation, I have some doubt the employer would have much been convinced by that point in mitigation. BPL felt that Ms Brown's status as a long-standing employee made her conduct more egregious as BPL expected someone of her years of experience not to breach its trust and confidence in that manner, as the Respondent submitted. Yet, on balance, I cannot say her plea would have failed.

65. A denial of Ms Brown's right to argue against a dismissal was a breach of the standard of procedural fairness. No matter how slender her chances may have been to redeem herself or argue to keep her position, she ought to have had the opportunity to say why she should not be dismissed before the dismissal was carried out. Considering the issues, the evidence, the legal arguments and the substantial merits of this case, the Tribunal finds that the Applicant has made out her claim of unfair dismissal for this single reason. The Tribunal also finds that the Applicant's contribution to her dismissal, in all the circumstances of this case, is weighty and any award made to the Applicant shall reflect this finding.

66. Ms Brown has submitted that she would wish to be reinstated and to receive all of the salary and benefits she would have received if her employment had not been terminated. In the circumstances of this case, the Tribunal finds reinstatement or reengagement to be an impracticable remedy by reason of the genuine loss of confidence BPL has in relation to Ms

Brown. The Tribunal notes that no wrongful dismissal suit was brought to challenge BPL's loss of confidence or honest belief Ms Brown committed the impugned conduct. In ***Wood Group Heavy Industrial Turbines Ltd v Crossan*** [1988] IRLR 680, a Scottish Employment Appeal Tribunal decision, it was held that where there was a breakdown of trust and confidence between employer and employee, and the employer had a genuine belief in the guilt of the employee for which he was dismissed, there should only be an order for reengagement in rare cases. The principle is applicable to reinstatements in similar circumstances as well. See SMT Sales & Service Co Ltd v Irwin, EAT 485/79.[5] The Tribunal finds that a basic award and a compensatory award will be more appropriate remedies in these circumstances in accordance with section 45 to 48 of the EA, which provide:

"45. Where the Tribunal makes an award of compensation for unfair dismissal under subsection (2) of section 42 or subsection (2)(a) of section 44 the award shall consist of a basic award calculated in accordance with section 46 and a compensatory award calculated in accordance with section 47.

46.

(1) Subject to the following provisions of this section, the amount of the basic award shall be the amount calculated by reference to the date the employee was dismissed by starting on that date and reckoning backwards the number of complete years of employment falling within that period, and allowing three weeks' pay for each year of employment.

(2) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall, except in a case where the dismissal was by reason of redundancy, reduce the amount of the basic award by such proportion as it considers just and equitable having regard to that finding.

(3) Where the Tribunal finds that the complainant has refused an offer by the employer which if accepted would have the effect of reinstating or re-engaging the complainant in his employment in all respects as if he had not been dismissed, the Tribunal shall not make an award.

(4) where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given), other than conduct taken into account by virtue of subsection (3), was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

(5) The amount of the basic award shall be reduced or, as the case may be, be further reduced, by the amount of any payment, made by the employer to the employee on the ground that the dismissal was by reason of redundancy, whether in pursuance of Part VI or otherwise.

47.

(1) Subject to section 48, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) Such loss shall be taken to include – (a) any expenses reasonably incurred by the complainant in consequence3 of the dismissal; and (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

---

[5] And see Tolley's Employment Law Service/ Unfair Dismissal III – Remedies for Unfair Dismissal/ Reinstatement and reengagement, para [U6004], Lexis Nexis.

(3) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer no account shall be taken of any pressure which, by calling, organizing, procuring or financing a strike or other industrial action, or threatening to so do, was exercised on the employer to dismiss the employee and that question shall be determined as if no such pressure had been exercised.

(4) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding...

48.

(1) The amount of compensation awarded to a person calculated in accordance with section 46 and of a compensatory award to a person calculated in accordance with section 47, shall not exceed eighteen months pay: Provided that where the employee holds a supervisory or managerial position that award shall not exceed twenty-four months pay.

(2) It is hereby declared for the avoidance of doubt that the limit imposed by this section applies to the amount which the Tribunal would, apart from this section otherwise award in respect of the subject matter of the complaint after taking into account any payment made by the respondent to the complainant in respect of that matter and any reduction in the amount of the award required by any written law.

(3) Where the Tribunal considers that any conduct of the complainant after the dismissal was such that it would be just and equitable to reduce the amount of the award to any extent, the Tribunal shall reduce that amount accordingly.

67. Based on the Originating Application, the Applicant set out her monthly salary as $3,371.00. She worked for 24 years. The usual entitlement of an applicant getting a full basic award of 3 weeks for each full year of work. Calculated on Ms Brown's salary it would be 24 years x 3 weeks - $2,528.25 totaling $60,678). The usual entitlement of an applicant to a full compensatory award is calculated as up to 18 months' basic pay. However, when both are awarded, the sum of the basic and compensatory awards shall not exceed 18 months' basic pay. For Ms Brown, the maximum she could get for both awards would be $3,371 x 18 months, which totals $60,678. For both awards where the Tribunal finds that the dismissal was to any extent caused or contributed to by any actions of the complainant it shall reduce the amount of the compensatory award and further reduce the amount of the basic award to any extent accordingly. Based on the circumstances of this case, the Tribunal finds that Ms Brown's actions before her dismissal significantly contributed to her dismissal, to the extent of ninety percent (90%). Therefore, the Tribunal will reduce the award to be granted to the Applicant, so as to grant her a nominal award of $6,067.80.

68. It is hereby ordered that the Respondent shall therefore pay to the Applicant the sum of Six Thousand and Sixty-seven dollars and Eighty cents ($6,067.80) in relation to this unfair dismissal claim.

Basic and Compensatory Award Maximum Cap	
18 months x $3,371.00	$60,678.00
Less 90% contributory reduction	($54,610.20)
TOTAL due to Applicant for Unfair Dismissal	**$ 6,067.80**

69. Subsequent to the date of the termination of Ms Brown's employment, BPL tendered to her payments by two cheques which were dated roughly 9 months after she was dismissed. Ms Brown was offered: (1) Cheque No. 975494 dated 6 February 2017 drawn on the Respondent's account in the amount of $7,094.58 for earned salary as at 19 May 2016, Christmas Bonus, Incentive Bonus and accrued vacation; and (2) Cheque No. 036595 dated 6 February 2017 drawn on the account of Ansbacher (Bahamas) Limited, in the amount of $40,010.09 representing accrued benefits due to Ms Brown from the employee pension scheme. Ms Brown at that time refused to accept any of the payments from BPL, shortly after which she applied to the Minister for reinstatement. The Tribunal observes that from the date of her summary dismissal, and on the basis of the Industrial Agreement and the Employment Act, Ms Brown had become entitled to these payments offered to her by BPL.

THIS IS THE DECISION OF THE TRIBUNAL.

Dated this 20th day of May 2020.

Simone Fitzcharles

Vice President