

**COMMONWEALTH OF THE BAHAMAS
INDUSTRIAL TRIBUNAL**

IT/NES/104/2018

New Providence

In The Matter Of the Industrial Relations Act Chapter 321

AND

In the Matter of the Industrial Relations (Tribunal Procedure) Rules, 2010.

BETWEEN:

PRECIOUS PAYNE

APPLICANT

VS.

THE BAHAMAS TELECOMMUNICATION COMPANY LIMITED

RESPONDENT

Appearances: Mr. Wayne Munroe along with Regina Bonaby on behalf of the Applicant
Mr. Raynard Rigby on behalf of the Respondent

Before: Her Honour, Vice President Marilyn L. Meeres

DECISION

Background

1. This is a claim for wrongful and unfair dismissal as set out in the Originating Application filed by the Applicant on the 17th October, A. D. 2018 and the Report of a Trade Dispute filed herein.

2. The matter commenced on the 30th September, 2019 when the Applicant identified her witness statement filed herein. A copy of the same is set out below.

COMMONWEALTH OF THE BAHAMAS

IT/NES/104/2018

INDUSTRIAL TRIBUNAL

NASSAU

In the matter of the Industrial Relations Act Chapter 321

AND

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PRECIOUS PAYNE

Applicant

v.

BAHAMAS TELECOMMUNICATION COMPANY LIMITED

Respondent

WITNESS STATEMENT OF PRECIOUS PAYNE

I, PRECIOUS PAYNE, of No. 18 Rocky Pine Road, of the Western District, on the Island of New Providence, one of the Islands in the Commonwealth of The Bahamas, **MAKE OATH AND SAY** as follows:

1. That I commenced employment with Bahamas Telecommunication Company Limited ("BTC" or "the Company") on 22nd May, 2006. At the time of my dismissal, I served as Senior Associate- Information Technology Service Desk and had been employed by the Company for a period of eleven (11) years.

2. As Senior Associate – Information Technology Service Desk, at the time of my dismissal, I reported to Mr. Mark Gilbert, who was the Manager with responsibility for the Information Technology Service Desk.
3. On 24th March 2016, Mr. Mark Gilbert ("Mr. Gilbert"), Manager – Information Technology Service Desk, via email, issued me a written reprimand purportedly for insubordination in accordance with Article 21.5 (1) of the Industrial Agreement between BTC and The Bahamas Communications and Public Officers Union registered on 16th March, 2016 ("the Industrial Agreement"). Mr. Gilbert alleged that I committed the following disciplinary infractions:
 - (a) eating/drinking items at my desk;
 - (b) leaving liquids on my desk overnight; and
 - (c) leaving my desk continuously throughout the day.
4. Following receipt of this reprimand, I replied by an email message to Mr. Gilbert on the same date refuting those allegations. While I acknowledged that I had a cup of tea at my desk daily, I stated that most of my colleagues did the same. To my knowledge, no other employee was reprimanded over having a cup of tea at their desk while working. Further, I stated that my desk was always left neat and tidy at the close of the work day and that I only leave my work station when it is absolutely necessary (for example, going to the bathroom). I then requested that the written reprimand be rescinded as it was unjustified. Mr. Gilbert, however, refused to do so.
5. On 8th April, 2016, Mr. Gilbert, by letter, issued me a second written reprimand in accordance with Article 21.5 (1) of the Industrial Agreement purportedly due to my refusal to sign my 2015/2016 Performance Evaluation. Mr. Gilbert warned that failure to comply with any 'job related instructions' could result in a suspension of my services as an employee of the Company.
6. On 18th April, 2016, I wrote a letter to Mr. Gilbert denying all allegations which formed the basis of both the first and second reprimands. Further, I contended that the alleged

actions did not warrant a finding of insubordination in accordance with Article 21.5 (I) of the Industrial Agreement. Mr. Gilbert, however, also declined to rescind the second reprimand that was issued to me without justification.

7. On that same day, I wrote Mr. Gilbert an additional letter dated 18th April, 2016 to address the series of events which led to me not signing my 2015/2016 Performance Evaluation. I also highlighted areas cited where I unequivocally disapproved of the rankings given to me in the Performance Evaluation.
8. On 18th July, 2016, Mr. Gilbert, by way of a third written reprimand informed me that based on my response to an earlier email message sent by him to me on 15th July 2016, *"you will not carry out your job function as stated and discussed on a number of occasions."* Mr. Gilbert also stated that the third written reprimand was issued for insubordination in accordance with Article 21.5 (I) of the Industrial Agreement.
9. On 18th July, 2016, I wrote to Mr. Gilbert seeking clarification of some concerns outlined in Mr. Gilbert's email message dated 18th July, 2016. I wrote that, as no other member of the IT Service Desk team had ever been warned or reprimanded not to touch a user's laptop directly or not to assist a user at all when they come to the department for assistance, I was being unfairly singled out by Mr. Gilbert. Further, as Mr. Gilbert indicated that there were numerous complaints from members of the PC support team, he should have provided me with documented evidence of these complaints and concerns. Mr. Gilbert, however, never provided me with the documented evidence I requested.
10. On 23rd June 2017, Mr. Gilbert, by letter, issued me a fourth reprimand for insubordination in accordance with Article 21.5 (I) of the Industrial Agreement due to me allegedly not staying at my desk and answering service desk calls.
11. On that same day, Mr. Gilbert, by another letter, issued me a fifth written reprimand in accordance with Article 21.5 (I) of the Industrial Agreement as a result of numerous complaints allegedly coming from users who called the service desk and were

dissatisfied with my assistance and/or the manner in which they were spoken to and treated. According to Mr. Gilbert, Mrs. Patricia Longley forwarded a written complaint relative to my behaviour.

12. Further on that day, Mr. Gilbert issued me a sixth reprimand by another letter in accordance with Article 21.5 (i) of the Industrial Agreement due to numerous complaints about me allegedly being logged into the system, but not providing any response or any timely response to requests by users for assistance.

13. In total, Mr. Gilbert issued three reprimand letters to me on the same day. It is my belief that each reprimand was 'trumped up' and unjustified. Additionally, I believe that they were issued for the sole purpose of accumulating a sufficient number of reprimands in order to summarily dismiss me as an employee of the Company.

14. Nevertheless, I wrote a letter to Mr. Gilbert dated 26th June, 2017 to address the fourth, fifth and sixth written letters of reprimand, stating that the issuance of three reprimands in one day was extremely excessive. I also accused Mr. Gilbert of singling me out despite there being three persons manning the IT Service Desk. Further, I provided an explanation for each reprimand in turn. Mr. Gilbert, however, refused to rescind any of the reprimands.

15. On 19th September, 2017, the Company, by letter, gave me an ultimatum to either enroll in its Employee Assistance Program ("EAP") to receive professional assistance as a final intervention or face termination.

16. By a letter dated 21st September, 2017, I informed the Company that I would not accede to the Company's request because, among other things, the Industrial Agreement did not authorize the Company to require an employee to participate or enroll in the EAP. Additionally, I was not an employee with a substance abuse problem. I further contended that I had continued to perform my job to the best of my abilities, always above satisfactory performance, despite working in a hostile working environment.

17. On 6th October, 2017, the Company, by letter, acknowledged that it gave me an ultimatum to participate in the EAP or face termination. The Company then advised that since I had informed them that I would not accede to their request, my services as an employee of the Company would be terminated in accordance with Article 21.5 (i) of the Industrial Agreement effective immediately.
18. By an additional letter dated 6th October, 2017, the Company advised me that they had decided to rescind my termination letter issued earlier that same day. I was informed that my services would be alternatively 'suspended with pay'. However, I was advised that my return to work was conditional on my full compliance with the EAP. Further, should I not provide my consent to enroll in the EAP by 20th October, 2017, the Company would have no other alternative than to terminate my services.
19. Although the second letter dated 6th October, 2017 stated I was 'suspended with pay', I was not, in fact, paid by the Company during the period 6th - 20th October, 2017.
20. I refused to provide my consent by 20th October, 2017 as requested. As I earlier stated, the Industrial Agreement did not authorize the Company to direct me to enter into the EAP. Further, I was not an employee with a substance abuse problem.
21. Sometime after 20th October, 2017, the Company advised me by a telephone call that I was dismissed as an employee and that I could collect my final paycheck.
22. By a letter dated 24th October, 2017, I was formally advised that the Company had made a decision to uphold the disciplinary action of terminating my services effective immediately in accordance with Article 21.5 (i) of the Industrial Agreement.
23. I did not receive the dismissal letter, however, until weeks after 24th October, 2017.

STATEMENT OF TRUTH

The contents of this Witness Statement are true and correct to the best of my knowledge, information and belief.

Dated this 15th day of August, A.D., 2019



PRECIOUS PAYNE

3. Under cross-examination the Applicant states that Mr. Mark Gilbert was her Supervisor at the time of her dismissal. She described their relationship as being strained and unproductive, as well as toxic. It was not that way at the beginning but it was never a good relationship. She feels that she followed Mr. Gilbert's request that she inform him of when she was leaving her desk. She admits having received written reprimands for eating at her desk, drinking at her desk, leaving liquids at her desk overnight and leaving her desk continuously throughout the day.

4. She says she admitted to having a cup of tea at her desk and it was her opinion that she should not have to report to her Supervisor when she took bathroom breaks. She also admits that she knew the complaints were considered major breaches.
5. She also agrees that she received another reprimand for failing to sign a Performance Evaluation after being asked by her Supervisor repeatedly to sign the same. She also admits this was despite the numerous complaints.
6. This matter was adjourned on several occasions as the Applicant constantly changed her Counsel. The matter then continued on the 17th February, 2021 with new Counsel for both parties.
7. The Applicant remembers an incident with a Miss Wallace who made a complaint against her. She was Vice President of Human Resources. She denies that she was disrespectful and uncooperative.
8. The Applicant also denies being rude to Patricia Longley or Jonathan Ford. She recalls being in Grievance Hearings along with Mr. Dino Rolle, Shop Steward regarding these complaints. Six (6) reprimands were addressed and Five (5) of those were upheld.

9. She also states that she was not aware that the Union had appealed her termination until two (2) months later.

10. The Applicant also agrees that she was offered the opportunity to attend Counselling Sessions as an option to being terminated which she refused as she thought they were for drugs or substance abuse.

11. Finally, the Applicant agrees that she was paid all of the funds she was entitled to be paid arising from her termination.

12. The Applicant closed and the Respondent called Valerie Wallace as its first witness. She identified her witness statement filed herein. A copy of the same is set out below.

Respondent's Witness
Witness Statement of Valarie Wallace

COMMONWEALTH OF THE BAHAMAS

IT/NS/104/2018

INDUSTRIAL TRIBUNAL

In the Matter Of the Industrial Relations Act, Chapter 321

AND In the Matter of the Industrial Relations (Tribunal Procedure) Rules, 2010

BETWEEN:

PRECIOUS PAYNE

Applicant

AND



THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Respondent

WITNESS STATEMENT OF VALARIE WALLACE

I, VALARIE WALLACE, of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY AS FOLLOWS:

1. I am presently the Vice President of Human Resources at The Bahamas Telecommunications Company (hereinafter "BTC") in its Human Resources Department. In my role I deal with Industrial Relations, HR Shared Services, Health & Safety and Employee Engagement. I have been employed with BTC for 31 years.
2. On 25th May, 2017 I telephoned the Service Desk for assistance with resetting my password. The reset of my password was urgent at that time because I needed to access PeopleSoft (HRIS). Ms. Payne answered my call and did not provide me with any assistance. She told me to hold on and went on another call. I was able to overhear her conversation because she was on a personal mobile call. At the end of her call she came on the phone line and I told her she was engaged in a personal call for all that time and left me on the line where I was able to listen in on her call for approximately 25 minutes. She responded by telling me that she was now off and she would get someone to assist

me. To attend to my call would have taken Ms. Payne about 5-7 minutes. It was clear to me that Ms. Payne had no intention to assist me and she refused to carry out her duties to provide service to me as an internal partner. As I still had Ms. Payne on the line, I phoned her manager and asked him to come to my office. Mr. Gilbert was able to witness this poor experience I encountered with Ms. Payne.

3. Ms. Payne's service on that occasion was not at the level expected of BTC. She was rude and uncooperative and her overall behaviour was distasteful.
4. The service provided by Ms. Payne has certainly been the worse that I have experienced from a Service Desk agent in BTC.
5. I am satisfied based on my years in human resources that on this occasion Ms. Payne blatantly refused to carry out a reasonable instruction/request to assist me and violated the Company's policy and thereby she committed a major breach under Article 21.5(I) of the Industrial Agreement between BTC and the BCPOU.
6. I was also present at an appeal hearing held on the 19th July, 2017. This hearing arose because Ms. Payne appealed the reprimands. My attendance was short lived based on the complaint that I made against Ms. Payne. In such a circumstance, I had to absent myself from the appeal hearing to allow due process and a fair hearing.
7. The contents of this witness statement are true and correct to the best of my knowledge, information and belief.

DATED the 3rd day of June, 2019


.....
VALARIE WALLACE

13. Under cross-examination this witness states that the Applicant never rectified the situation nor did she transfer her to any other agent who would have been able to assist her.
14. The Respondent then called Mark Gilbert who identified his witness statement filed herein. A copy of the same is set out below.

Respondent's Witness
Witness Statement of Mark Gilbert

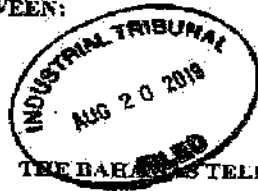
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PRECIOUS PAYNE

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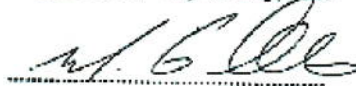
WITNESS STATEMENT OF MARK GILBERT

I, MARK GILBERT, of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY AS FOLLOWS:

1. I am an employee of the Defendant Company (hereinafter "BTC or "the Company") and have been employed with the Company for the past 39 years. Over the course of my career at BTC I spent approximately 25 years in the IT Department and served as Manager for 2 years at the Service Desk. I was Ms. Payne's Manager for 2 years.
2. At the time of Ms. Payne's termination from BTC she was stationed at the Service Desk.
3. Ms. Payne's job description required her to service IT related calls/complaints from other BTC employees as well as from customers of BTC. Her role was to take all necessary steps to trouble shoot IT related issues and where appropriate to solve them. Her job description is marked as "Exhibit-1".

4. At the time of Ms. Payne's employment, BTC had a policy of how an employee should protect the Company's computers. Ms. Payne regularly abused and violated this policy. A copy of BTC's Computer "working" environment policy is marked as "Exhibit-2".
5. During my time as Ms. Payne's supervisor, I had to reprimand her for several infractions that were committed. These were communicated to her by letters dated 18th July, 2016 and 23rd July, 2017. Copies of my letters dated 18th July, 2016 and 23rd June, 2017 are attached hereto and marked as "Exhibit-3".
6. The events that led to the three reprimands on 23rd June, 2017 related to the poor level of service that Ms. Payne provided to Valerie Wallace, Patricia Longley and Jonathan Ford. The incidents did not all occur on 23rd June, 2017; but that was the date when I received their formal complaints and therefore had the basis to reprimand Ms. Payne.
7. Upon receipt of the reprimands, Ms. Payne responded to them and sent me letters setting out her answers to the allegations. Copies of her letters dated 18th April, 2016 18th July, 2016 and 26th June, 2017 are attached hereto as "Exhibit-4". Upon my receipt of the letters from Ms. Payne I met with her and shared with her my concerns and told her that the matters will be elevated to the HR department.
8. Since Ms. Payne was assigned to the Service Desk I had many challenges with her work attitude and she repeatedly defied reasonable job related instructions that fell within her job description and duties. This undoubtedly made it difficult to manage the expectations of the department.
9. The department had a total of three employees and Ms. Payne was not a supportive worker and a team player.
10. I can attest to the fact that over the years that I worked with Ms. Payne she proved challenging. Her behaviour was not courteous and she was generally difficult to deal with.
11. The contents of this witness statement are true and correct to the best of my knowledge, information and belief.

DATED the 14th day of May, 2019



MARK GILBERT

15. On cross-examination the witness says he had no need to discipline other staff because they never ate or drank at their desks.

16. With reference to the reprimand about the Applicant not signing her Performance Appraisal it was not spelt out because at the time the Applicant was aware of the situation. This reprimand was not rescinded to his knowledge. The final reprimand was written ten (10) days after it occurred because a written complaint had not yet been received.

17. The witness denies that the Applicant received all the reprimands because she declined and informed Human Resources of a sexual harassment complaint.

18. The Respondent's next witness was Nikia Forbes who identified her witness statement filed herein. A copy of the same is set out below.

Respondent's Witness
Witness Statement of Nikia Forbes

COMMONWEALTH OF THE BAHAMAS
INDUSTRIAL TRIBUNAL

IT/NES/104/2018

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BETWEEN:



PRECIOUS PAYNE

Applicant

AND

THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Respondent

WITNESS STATEMENT OF NIKIA FORBES

I, NIKIA FORBES, of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY AS FOLLOWS:

1. I am a Manager in the Human Resources and Training Department at The Bahamas Telecommunications Company (hereinafter "BTC"). In my role I deal with HR Shared Services, Industrial Relations, Health and Safety and Engagement. I have been employed with BTC for six (6) years.
2. I am familiar with the Applicant, Ms. Payne and was present at two appeal hearings involving the various infractions that she received. The purpose of the hearings was to conduct an investigation into the infractions and to afford Ms. Payne with an opportunity to put her version of the facts. At the meetings, the attendees had the benefit of copies of the infractions as well as copies of Ms. Payne's responses. The persons who made the allegations were also able to attend the meetings if Ms. Payne insisted on asking them any questions.

3. The two meetings were also necessary to comply with the grievance procedure set out in the Industrial Agreement between BTC and the BCPOU. The Agreement sets out in Article 9 the complaints and grievance procedures and the HR department had to ensure that the procedure was strictly followed. In Ms. Payne's case she was at the stage 4 process and hence the Union representation was vital.
4. The meetings, which were held on the 19th July and 28th August, 2017, were chaired by BTC's HR Department. The meetings were called to also comply with Article 21.11 of the Industrial Agreement between BTC and the BCPOU. The HR department also made sure that the Union was notified of the meetings and therefore allowed for representatives of the Union to be in attendance.
5. I attended the appeal hearing held on the 19th July, 2017. The hearing was to determine if there was any basis for the reprimands that were issued to Ms. Payne. My role was to provide a summary of the meeting and assist with recommendations for consideration. After the hearing, I wrote two reports dated 23rd August, 2017 and 1st September, 2017 with input from Ms. Pauline Curry and submitted them to my superiors, Mrs. Valerie Wallace and Pauline Curry. Copies of the reports dated 23rd August, 2017 and 1st September, 2017 are marked respectively as "Exhibit-1" and "Exhibit-2".
6. I wish to highlight that the report dated 1st September, 2017 resulted from a meeting held with Ms. Payne and her Union representatives on 28th August, 2017. The meeting was earlier scheduled, but the Union by letter dated 11th August, 2017 sought a later date, which was accommodated by BTC. A copy of the letter dated 11th August, 2017 from Bernard Evans, (then) President of the BCPOU is attached as "Exhibit 3".
7. The purpose of the meeting on 28th August, 2017 was to further discuss with Ms. Payne the seriousness of the infractions that she had committed and to offer her a chance to explain her behaviour. This was the final stage in the grievance process. It was also at this meeting that a psychological evaluation or assessment was discussed with her to address her poor behavioral history at the Company. The Union did not oppose this suggestion and tried during the meeting to convince Ms. Payne to recognize the value of the assessment. The assessment was intended to assist her in understanding that her behaviour required improvement and that it was imperative for the development of a harmonious working environment.
8. At the meeting it was also shared with Ms. Payne that the Industrial Agreement allows for an employee to be terminated if five (5) infractions were committed within a period of 12 months from the previous infraction. She intimated that she understood this but maintained that she did nothing wrong.

9. Given my years at BTC I am satisfied that the two meetings allowed for a proper and thorough investigation to be conducted into Mr. Payne's behavior and the infractions levied against her. All of the facts were shared and discussed, and Ms. Payne had ample opportunity to explain her conduct and behaviour.
10. After these meetings and receipt of the reports, the HR senior executive decided that it was the best course to terminate Ms. Payne in light of the infractions that she received.
11. It seems reasonable in the circumstances for BTC to terminate the Applicant primarily because she was not willing to recognise that her pattern of behavior and poor performance required improvement.
12. The contents of this witness statement are true and correct to the best of my knowledge, information and belief.

DATED the 26th day of April, 2019.



NIKIA FORBES



19. Under cross-examination the witness says the Applicant would have received verbal warnings before the reprimand was issued as is required by the Union Agreement.
20. She described the process involved in an Appeal by the Union. She also states that Valerie Wallace was in attendance at the meeting but she did not take a part in the decision making process.

21. The next witness for the Respondent was Helena Ferguson who identified her witness statement filed herein. A copy of the same is set out below.

Respondent's Witness
Witness Statement of Helena Ferguson

COMMONWEALTH OF THE BAHAMAS
INDUSTRIAL TRIBUNAL.

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BETWEEN



PRECIOUS PAYNE

Applicant

AND

THE BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

Respondent

WITNESS STATEMENT OF HELENE FERGUSON

I, HELENE FERGUSON, of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY AS FOLLOWS:

1. I am presently the Director of the People Division at The Bahamas Telecommunications Company (hereinafter "BTC"). I have been employed with BTC since 11th October, 1982. As the Director, I largely have oversight of all aspects of BTC's human resources matters, which include engagements and terminations.
2. I am fully aware of the issues surrounding Precious Payne and the events that led to her termination on 24th October, 2017.
3. Ms. Payne was initially employed as a temporary worker for a period of 6 months on 31st May, 2006. On 13th June, 2006 she was offered full time employment in the position of Assistant Customer Service Representative in the Customer Services Department. During the course of her employment at BTC she also served in the Enterprise & Residential Sales Department.

4. In my review of Ms. Payne's HR file, I note that I wrote to her on several occasions in respect of various infractions that she committed. I specifically refer to a letter of reprimand dated 1st October, 2008 arising from her behaviour and loud outbursts. She was also suspended on 27th October, 2011 for erasing a note in the Attendance Register. These matters did not form part of the decision in relation to her termination in October 2017. Copies of my letters dated 1st October, 2008 and 27th October, 2011 are marked as "Exhibit-1".
5. On 22nd May, 2014 Ms. Payne was transferred to the Service Desk under the management of Mark Gilbert. The Service Desk is responsible for receiving, responding to and resolving ticketed complaints from BTC's internal staff that are reported to the IT Service Desk.
6. I am also aware that Ms. Payne was given three reprimands on 23rd June, 2017, which amounted to a total of 6 reprimands over the course of her employment at BTC. Clause 21.8(d) of the Industrial Agreement between BTC and the BCPOU allows for dismissal of employment on the fifth occurrence of a minor breach. Clause 21.5(l) allows for dismissal after the third occurrence of a major breach relating to an employee's deliberate refusal to carry out a reasonable job-related instruction that is within the scope of her contract of service. The three reprimands on 23rd June, 2017 as well as the reprimands on the 3rd April, 2016 and the 18th July, 2016 meant that Ms. Payne had committed 5 infractions. Copies of the Industrial Agreement and the referenced letters are marked respectively as "Exhibit-2" and "Exhibit-3".
7. Ms. Payne generally always wrote in response to the reprimands that she received. Copies of Ms. Payne's letters/memoranda dated 24th March, 2016, 18th April, 2016, 18th July, 2016 and 26th June, 2017 in response to the five reprimands are collectively marked as "Exhibit-4".
8. Under BTC's grievance procedure, Ms. Payne elected to appeal the decision to issue to her the reprimands. She attended an appeal hearing on 19th July, 2017 along with her Union representative. Five of the 6 reprimands, which were the focus of the appeal, were upheld. I received a memorandum of the appeal hearing from Pauline Curry, who was the senior manager in HR. A copy of the memorandum dated 1st September, 2017 is marked as "Exhibit-5".
9. Based on the nature of the reprimands and the appeal hearing, on 6th October, 2017 BTC made a decision to terminate Ms. Payne's employment. Subsequently, Ms. Payne appealed the termination and the CEO of BTC decided to rescind the termination and instead suspended Ms. Payne on the condition that she attend to have a psychological evaluation under BTC's Employee Assistance Program ("EAP"). Copies of the

termination and suspension letters both dated 6th October, 2017 are collectively marked as "Exhibit-6".

10. The request to have Ms. Payne participate in BTC's EAP was to assist her. The EAP is not limited to employees who have substance abuse. BTC's EAP allows for broader support to that set out in the Industrial Agreement. On numerous occasions in the past, BTC facilitated its employees to attend counselling sessions for a myriad of reasons including behavioural patterns, grief and stress counselling and family/domestic issues. All of these fall within the scope of the EAP, which is fully paid by BTC.
11. Given the pattern of behaviour that Ms. Payne displayed over the years, it was thought that her attending counselling sessions would aid in her performance and improve her attitude. This was a reasonable request by a caring employer and was not intended to stigmatize Ms. Payne in any way.
12. Due to Ms. Payne's refusal to attend the counselling sessions, BTC elected to dismiss her effective the 24th October, 2017. A copy of the termination letter dated 24th October, 2017 is marked as "Exhibit-7".
13. Ms. Payne was paid all benefits up to the date of the termination (24th October, 2017), which included her Christmas bonus and salary as well as her deferred pension entitlement.
14. Based on my over 30 years' experience in human resources, I am satisfied that BTC acted fairly and allowed due process in the matter with Ms. Payne. It is also my opinion that the general behaviour that she displayed and that led to the 5 reprimands which were upheld on appeal justified her termination. They were matters where she violated the Company's Policies and Regulations and acted in disregard to the mandate that was to carry out reasonable job-related instructions within the scope of her contract and the services she was engaged to perform.
15. The contents of this witness statement are true and correct to the best of my knowledge, information and belief.

DATED the 3rd day of June, 2019


HELENE FERGUSON

22. Under cross-examination she says the Applicant was offered assistance with the Employee Assistance Program which was produced out of what started as a substance abuse program back in the 1980's. However, it was later recognized that many of the employees needed external assistance for issues very different than just being confined to substance abuse. At no time was the Applicant ever directed to undertake a substance abuse program, nor was there any indication from her Managers or colleagues that she had a substance abuse problem.

23. She states that the reprimand for appraisal was rescinded as the Industrial Agreement states that in case of minor infractions if there are no reoccurrences within a twelve (12) month period the reprimands are expunged from the employee's file. That is not the case, however, for major breaches.

24. On re-examination the witness says at no time, as far as she is aware, did the organization ever ask the Applicant to take a medical test? She was asked to access the program to deal with an external expert who would advise both the Applicant and the company regarding the basis for what the company observed to be a pattern of disruptive behaviour.

25. The matter was then adjourned for the Respondent to call its final witness who was not forthcoming. The Respondent therefore closed and both parties were invited to provide written submission.

THE LAW

26. Section 31 of the Employment Act, 2001 provides:

31. **An employer may summarily dismiss an employee without pay or notice when employee has committed a fundamental breach of his contract of the employment or has acted in a manner repugnant to their fundamental interest of the employer.**

27. Section 32 of the Act states:

32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following —
- (a) theft;
 - (b) fraudulent offences;
 - (c) dishonesty;
 - (d) gross insubordination or insolence;
 - (e) gross indecency;
 - (f) breach of confidentiality, provided that this ground shall not include a report made to a law enforcement agency or to a government regulatory department or agency;
 - (g) gross negligence;
 - (h) incompetence;
 - (i) gross misconduct..

28. Section 33 of the Act states:

33. An employer shall prove for the purpose of any proceedings before the Tribunal that he honestly and reasonably believed on the balance of probability that the employee, had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an Investigation was otherwise unwarranted”.

29. Section 34 of The Act states:

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

30. Section 35 of the Act states:

35. Subject to Section 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.

31. Section 36 of the Act states:

36. (1) For the purposes of this Part, the dismissal of
An employee by an employer shall be regarded as having
Been unfair if the reason for it (or, if more than one, the
Principal reason) was the employee—
(a) was, or proposed to become, a member of an
Independent trade union;
(b) had taken, or proposed to take, part at any
appropriate time in the activities of an
independent trade union; or
(c) was not a member of any trade union, or of a
particular trade union, or of one of a number of
particular trade unions, or had refused or proposed
To refuse to become a remain a member.

(2) Any reason by virtue of which a dismissal is to be regarded
as unfair in consequence of subsection (1) is in this Part
referred to as an "inadmissible reason".

(3) In subsection (1) "appropriate time" in relation to an
Employee

Taken part in the activities of a trade union, means time
which either-

(a) is outside his working hours; or

(b) is a time within his working hours at which, in accordance
with prior arrangements agreed with or consent given by his
employer, it is permissible for him to take part in those
activities, and in this subsection "working hours; in relation to
an employee, means any time when, in accordance with his
contract of employment, he is required to be at work.

(4) In this section, unless the context otherwise requires, reference to a trade union include references to branch or section of a trade union.

32. In the case of ***Kayla Ward et al v The Gaming Board of The Bahamas [2017] CLE/gen/01506***, the Honourable Madam Justice Indra Charles set out the law on wrongful dismissal at Par 82 to 85.

82. Wrongful dismissal is based on contract law. A helpful meaning is provided by the learned authors of Halsbury's Law of England, 4th ed vol.16 at para.302 wherein it is stated that:

'A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term of which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: *Hopkins vs Wanostrocht* (1861) 2 F& F 368; namely:

(i) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed wither before the expiration of that fixed period or without the requisite notice, as the vase may be (*Williams v Byrne* (1873) 7 Ad & E1 177); and (ii) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily: *Baillie v Kell* (1838) 4 Bing NC 638.

83. In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

84. Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.

85. A claim for wrongful dismissal is based on common law principles. It is not a statutory claim under the Act. At common law, the normal remedy for wrongful dismissal is for the innocent party to bring an action for damages: *Selwyn's Law employment*, 10th Edn. Para.16:15"

33. Unfair dismissal standards are set out in various authorities. In ***Polkey v A. E. Dayton Services Ltd. [1988] 1 A.C. 344. H.L*** Lord Mackey stated:

"If the employer could reasonably have concluded, in the light of circumstances known to him at the time of dismissal, that consultation or warning would be utterly useless, he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirements of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."

34. In the case of ***Ingrid Patrice Higgs v Island Hotel Company Limited No.1642 of 2011***, the learned President said at 305.

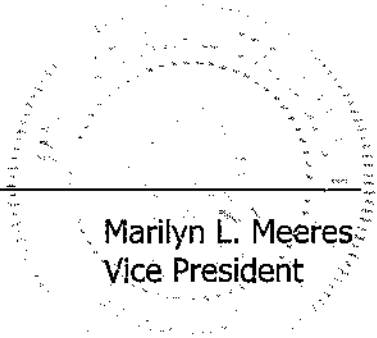
"It would follow that in summarily dismissing an employee, the prudent approach that should be taken by an employer in determining whether an employee has been guilty of misconduct tantamount to a fundamental breach of his contract of employment should follow the provisions of section 33 of the Employment Act in order that a Defence might be sustained should the employee subsequently pursue a claim for wrongful or unfair dismissal..."

35. The Court is satisfied from the evidence given that the Respondent held a reasonable investigation and that the Applicant was given sufficient opportunity to respond to the claims against her. It is also of the opinion that the Respondent followed procedure as required by the Industrial Agreement.

36. On the Applicant's own admission she was aware of the breaches and aware of the fact that these were major breaches for which she could have been dismissed.

37. In the circumstances the Tribunal rules that the Applicant has not provided sufficient evidence to prove that she was either wrongfully or unfairly dismissed and that her termination was reasonable and lawful. The Originating Application herein is therefore **DISMISSED**.

**THIS IS THE JUDGMENT OF THE TRIBUNAL
DATED THIS 13th DAY OF MAY A. D. 2021**



Marilyn L. Meeres
Vice President