

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCV2025/001
BB Civil Magisterial Appeal No 0016 of 2021

BETWEEN

MASSY STORES (BARBADOS) LTD
(formerly Super Centre Limited)

APPELLANT

AND

MERTON FORDE

RESPONDENT

Before:

Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Jamadar
Mme Justice Ononaiwu
Mr Justice Eboe-Osuji

Date of Judgment: 13 November 2025

Appearances

Mr Michael J Koeiman and Ms Ashlea Edwards for the Appellant

Mr M Tariq Khan and Ms Mechelle C Forde for the Respondent

Summary dismissal – termination without notice – unauthorised taking of company goods – contextual approach – humanising patina – reasonableness – fairness – dismissal of appeal.

SUMMARY

Massy Stores (Barbados) Ltd, the Appellant, appealed to the Caribbean Court of Justice ('CCJ') against the decision of the Court of Appeal which upheld a Magistrate's finding that Mr Merton Forde, the Respondent, was wrongfully dismissed from his employment with the company. Mr

Forde started working with the company in 1977 and he was summarily dismissed in December 2021 for the unauthorised taking of the company's property, that is to say, condemned rice. The letter of dismissal stated that Mr Forde was dismissed on two grounds: (i) substandard work performance, and (ii) failure to comply with and enforce the company's rules, regulations, policies and procedures.

At the time of the incident, Mr Forde had served Massy Stores, and its predecessor, Supercentre, for 35 years. He worked as the Back Door Receiving Supervisor with responsibility to ensure that goods were not moved through the back door, contrary to the company's policy. A sign which prohibited this unauthorised removal was posted on the door in the back door area and warned of disciplinary action for its violation. Contrary to the policy, on the day in question, Mr Forde sent a subordinate to place in Mr Forde's car a bag containing condemned rice taken from the employer's store. The employer placed a camera or cameras which captured the occurrence. A hearing was conducted at which Mr Forde denied the occurrence. He also claimed to have paid for what was taken. At a subsequent hearing, he was summarily dismissed without notice or salary in lieu of notice.

The proceedings in the Magistrate's court revealed that Mr Forde was familiar with the Appellant's policies but did not always follow them. Further, Mr Forde had breached the policies in the past and had been warned but not disciplined. His Worship Mr Wayne Clarke, the Magistrate, determined that the summary dismissal of Mr Forde by the Appellant had been disproportionate, and thus wrongful. The Magistrate recognised that at common law, summary dismissal allows for the dismissal of an employee without notice in instances where the employee has committed a repudiatory breach of an essential term of the employment contract. He considered, however, that this form of dismissal was reserved for the most serious offences and was not warranted in this instance.

The majority of the Court of Appeal (Cumberbatch and Reifer JJA, with Belle JA dissenting) upheld the Magistrate's use of reasonableness as a metric in evaluating Mr Forde's conduct. The majority endorsed the use of a contextual approach to summary dismissal, which recognises that while an employee's conduct may warrant dismissal, it did not automatically justify summary dismissal if other relevant considerations were present. The majority of the Court of Appeal expressed the view that this was consistent with the 'humanising patina approach'.

Rajnauth-Lee J who authored the majority opinion (with which Jamadar, Ononaiwu and Eboe-Osuji JJ agreed) reviewed several Barbadian authorities that confirmed the use of the contextual approach

to reviewing the summary dismissal of an employee. In particular, the majority of this Court noted that in the case of *Ramsay v St James Beach Hotels Services Ltd*, Simmons CJ had pointed out that the social dynamics of labour law exemplified the ability of the common law to respond to changing views, values and conditions of society over time.

Rajnauth-Lee J underscored that the common law was neither static nor immutable, and must remain responsive to the evolving social values of the Barbadian people, and aligned with the constitutional principles of equality, proportionality, and fairness embraced by both the legislature and people of Barbados. These principles place a high value on, and underscore the importance of, the dignity of work and the protection of workers' rights. Accordingly, the majority of the Court was satisfied that the contextual approach adopted by the majority of the Court of Appeal was correct.

Rajnauth-Lee J also considered whether a court ought to take into account the procedural fairness of the dismissal where an employee has been summarily dismissed. The Judge observed that the BS&T Employee's Handbook, issued by the predecessor company, Supercentre, formed part of the contractual framework governing the employment relationship between Mr Forde and Massy Stores. It was noted that the Employee's Handbook, consistent with international employment standards, prescribed an incremental approach to disciplinary action reserving summary dismissal for only the most serious offences. The majority of the Court was satisfied that the disciplinary procedure incorporated into Mr Forde's contract of employment was not followed. The majority concurred with the findings of the Magistrate and majority of the Court of Appeal that the Respondent's actions did not constitute such a serious offence as to warrant summary dismissal.

In addition, the majority of the Court emphasised that a fair hearing was an integral part of the contractual relationship between the parties. In the circumstances, the majority set out briefly some minimum standards of procedural fairness that ought to be implied into the Employee's Handbook, including: (1) the employee's right to be informed of the charge, with sufficient details or particulars to enable a proper understanding of the alleged misconduct; (2) the opportunity for the employee to respond to the allegations; and (3) the conduct of a hearing that permits both the employer and the employee to present evidence and make representations. The degree of formality required in such a hearing will, of course, depend on the particular facts and context of the case.

In conclusion, the majority of the Court examined some of the factors considered by the Court of Appeal, to wit, the nature and minimal value of the goods taken, Mr Forde's long unblemished

service (35 years without being subject to any negative performance appraisals or written reports or warning) and Mr Forde's single act of indiscretion for which he was dismissed. The majority was of the view that even if Mr Forde had taken other goods on previous occasions, he was essentially dismissed for the removal of condemned goods. Given the contextual approach to summary dismissal adopted in Barbados, and the requirement for procedural fairness, the majority was of the view that the actions in question were not sufficiently serious as to warrant Mr Forde's summary dismissal. The majority was therefore of the view that Mr Forde had been wrongfully dismissed.

Eboe-Osuji J contributed a separate opinion, underscoring his full concurrence with the lead judgment. He reasoned that the CCJ should not support the erroneous myth that reasonableness and fairness are not proper considerations in cases of wrongful dismissal decided pursuant to the common law. He reasoned that the common law has always been in a state of evolution. It is therefore entirely appropriate that Barbadian common law, as developed by Barbadian appellate judges, should give value to the considerations of reasonableness and fairness, through the notion of 'humanising patina', in the area law of employment.

The dissenting opinion of Barrow J found that the Magistrate erred in considering the value and nature of the object taken, said to be 'condemned rice', rather than the violation of the policy against unauthorised taking, the importance of which led the employer to installing cameras to suppress it. It was observed that the employee's conduct breached the trust and confidence that was vital to the relationship which was broken between employer and employee. The dissenting judgment found that on the evidence, none of the factors which the Court of Appeal upheld as giving a humanising patina to the misconduct existed or operated and therefore, nothing mitigated the seriousness of the employee's dishonesty.

The appeal was dismissed and the decision of the majority of the Court of Appeal was affirmed. The Court concluded that costs of the appeal were to be paid by Appellant to the Respondent.

Cases referred to:

Alkins v B&B Distribution Ltd BB 2019 CA 20 (CARILAW), (23 July 2019); *Alleyne v Marriotts (Barbados) Ltd* BB 1998 CA 7 (CARILAW), (13 May 1998); *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) (BB), BB 2024 CCJ 1 (CARILAW); *Aspinall v Mid-West Collieries Ltd* [1926] 3 DLR 362; *Bank of Nova Scotia v Comptroller of Inland Revenue* [2025] CCJ [2025] CCJ 13 (AJ); *Bico Ltd v Jones* BB 1996 CA 27 (CARILAW), (2 August 1996); *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339; *Bourne v Almond Resorts Ltd* (BB CA, 11 June 2020); *Brathwaite v Atkins* BB 2019 CA 6 (CARILAW), (27 February 2019); *C*

O Williams Ltd v Dash BB 2010 CA 4 (CARILAW), (15 April 2010); *Campbell v Narine* [2016] CCJ 7 GY, (2016) 88 WIR 319; *Chang v National Housing Trust* (1991) 28 JLR 495; *Clouston & Co Ltd v Corry* [1906] AC 122; *Commissioner of the Guyana Geology and Mines Commission v Diamond Quarry Inc* [2022] CCJ 11 (AJ) GY, (2022) 104 WIR 273; *Donoghue v Stevenson* [1932] AC 562; *Durand v Quaker Oats Co Canada Ltd* (1990) 32 CCEL 63; *Edwards v A-G of Canada* [1930] AC 124; *Federal Supply and Cold Storage Co of South Africa Ltd v Angehrn* (1910) 80 LJPC 1; *Fisher v Minister for Home Affairs* [1980] AC 319; *Henry v Mount Gay Distilleries Ltd* [1999] UKPC J0721-7 (BB); *Jordan v Sol Barbados Ltd* (12 August 2021); *Jupiter General Insurance Co Ltd v Schroff* [1937] 3 All ER 67; *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; *Lovell v Rayside Construction Ltd* BB 2010 CA 2 (CARILAW), (4 March 2010); *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; *Mapp v Lee* BB 2020 CA 8 (CARILAW), (4 December 2020); *Massy Stores (Barbados) Ltd v Forde* (BB CA, 21 July 2023); *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *McKinley v BC Tel* [2001] 2 SCR 161; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Pearce v Foster* (1886) 17 QBD 536; *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY, (2023) 105 WIR 348; *R v Jogee* (2016) 87 WIR 439; *Ramsay v St James Beach Hotels Services Ltd* BB 2002 CA 20 (CARILAW), (26 June 2002); *Rubel Bronze Metal Co v Vos, Re* [1918] 1 KB 315; *Sandy Lane Hotel Co Ltd v Cato* [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW); *Spain v Arnott* (1817) 2 Stark 256, 171 ER 638 at 639; *Turner v Mason* (1845) 14 M & W 112, 153 ER 411.

Legislation referred to:

Barbados – Employment Rights Act 2012, Employment Sexual Harassment (Prevention) Act 2017, National Insurance and Social Security (Benefit) Regulations 1967, CAP 47, Proclamation: Employment Rights Act 2012, SI 2013/56, Severance Payments Act, CAP 355A; **Belize** – Belize Constitution Act, CAP 4; **United Kingdom** – Serious Crime Act 2007.

Treaties and International Sources referred to:

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; International Labour Organization (ILO) Recommendation R166: Termination of Employment Recommendation (68th ILC Session Geneva 22 June 1982); International Labour Organization (ILO), Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer (adopted 22 June 1982 entered into force 23 November 1985) 1412 UNTS 160; UN Economic and Social Council (UNESCO) ‘The Right to Work : General Comment No 18 under Article 6 of the International Covenant on Economic, Social and Cultural Rights’ (6 February 2006) UN Doc E/C12/GC/18; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

Other Sources referred to:

Allen C K, *Law in the Making* (7th edn, Clarendon Press 1964); Grime R P, ‘Two Cultures in the Court of Appeal’ (1969) 32 Mod L Rev 575; Hale M, *History of the Common Law of England: Divided into Twelve Chapters Written by a Learned Hand* (1713); Pound R, ‘Common Law and Legislation’ (1907-1908) 21 Harv L Rev 383; Saunders A, ‘The Caribbean Court of Justice at 20: Decolonising Justice in the Caribbean’ (Public Lecture in Belize, 3 September 2025); White E B,

Essays of E. B. White (Harper & Row Publishers 1977); Wood J C, ‘The Disobedient Servant’ (1959) 22 Mod L Rev 526.

JUDGMENT

Reasons for Judgment:

Rajnauth-Lee J (Jamadar, Ononaiwu and Eboe-Osuji JJ concurring) [1] – [57]

Disposition [58]

Eboe-Osuji J (Rajnauth-Lee, Jamadar and Ononaiwu JJ concurring) [59] – [108]

Dissenting:

Barrow J (dissenting) [109] – [165]

RAJNAUTH-LEE J:

Introduction

[1] Before the Caribbean Court of Justice (‘the Court’) is the appeal of the Appellant, Massy Stores (Barbados) Ltd (formerly Super Centre Ltd). Massy Stores (Barbados) Ltd will be referred to in this judgment as the Appellant, ‘Massy Stores’ or ‘the company’. The majority of the Court of Appeal of Barbados dismissed the appeal filed by Massy Stores against the decision of the Magistrate, His Worship Mr Wayne Clarke. The Magistrate had found that Massy Stores’ summary dismissal of Mr Merton Forde (‘the Respondent’ or ‘Mr Forde’) had been ‘disproportionate’ and thus wrongful.

[2] This appeal presents an opportunity for the Court to examine key principles of employment law as they relate to summary dismissal within the framework of

Barbadian jurisprudence. Specifically, the Court will consider two central issues. The first is whether the majority of the Court of Appeal ought to have adopted the contextual approach to summary dismissal. The second is whether a court ought to take into account the procedural fairness of the dismissal where an employee has been summarily dismissed. For the reasons that follow, the majority of this Court agrees with the conclusion reached by the majority of the Court of Appeal that Mr Forde's summary dismissal was wrongful, and accordingly dismisses the appeal brought by Massy Stores.¹

Background Facts

[3] The facts of this appeal are fairly straightforward and are conveniently set out by the Court of Appeal. Mr Forde was first employed by Super Centre Ltd, in its supermarket operations in 1977. When Massy Stores succeeded Super Centre Ltd, it continued Mr Forde's employment until 21 December 2012 when it summarily dismissed him by letter for 'substandard work performance' and 'failure to comply with and enforce the company rules and regulations, policies and procedures despite verbal warnings'.

[4] The letter of dismissal read as follows:²

21st December 2012

Mr. Merton Forde
401 Pine Avenue
Ruby Park Development
St. Philip

Dear Mr. Forde:

We refer to our recent meetings and discussions regarding the most recent incident concerning the performance of your duties.

¹ We note that, as in *Sandy Lane Hotel Co Ltd v Cato* [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW), the events which gave rise to this appeal took place prior to the commencement of the Employment Rights Act 2012, and accordingly the provisions of that Act did not apply in this case.

² Record of Appeal, 'Respondent's Letter of Dismissal' 1037.

This incident occurred despite verbal warnings regarding, inter alia:-

- (1) Substandard work performance; and
- (2) Failure to comply with and enforce the company's rules, regulations, policies and procedures.

In relation to the most recent incident referred to above, the company investigated the matter and as a result has lost all confidence in your ability to effectively perform your duties, properly supervise the company's employees and to protect the company's assets.

In view of the above, this letter informs you that with immediate effect your contract of employment is terminated.

Yours faithfully,

SUPER CENTRE LTD



Neville Brewster
Managing Director

- [5] At the time of his dismissal, Mr Forde was employed in the position of Back Door Receiving Supervisor earning a monthly salary of approximately BBD4,623.
- [6] The catalyst for this dismissal was Mr Forde's alleged misconduct in instructing a co-worker to remove a bag of 'condemned' rice from the premises of Massy Stores and to place it in Mr Forde's car trunk.
- [7] It was asserted on behalf of Massy Stores that this removal was in breach of the company's policy governing the removal of goods from the premises, (a policy known to Mr Forde), and therefore justified his summary dismissal.
- [8] As part of its investigation of the incident, Massy Stores' management held a meeting with Mr Forde on 18 December 2012, where he was questioned as to the procedure relating to damaged goods. Mr Forde claimed that he gave a reasonable

answer, also asserting that he had receipts for the goods in question that were removed from the premises. At the end of that meeting, Mr Forde was suspended, although the judgment of the Magistrate does not make clear for what period or on what terms.

[9] A second meeting was held on 21 December 2012 at which Mr Forde's employment was terminated. This meeting had been continued by Massy Stores despite the protested absence of Mr Forde's counsel.

[10] Having sought legal advice, Mr Forde commenced an action for wrongful dismissal, alleging that his summary dismissal was without just cause and constituted a breach of contract. He claimed damages in accordance with s45(1) of the Severance Payments Act, Cap 355A. It is noted that there is no appeal from the finding of the Court of Appeal of Barbados on the issue of damages.

Magisterial Proceedings and Decision of the Magistrate

[11] Mr Forde's claim for wrongful dismissal was heard and determined before His Worship Mr Wayne Clarke. It is to be regretted that no transcript of the proceedings before the Magistrate has been made available to the Court.

[12] Under cross-examination before the Magistrate, Mr Forde admitted that he was familiar with the policies and procedures of Massy Stores, some written and some verbal, and that he himself had posted written policies on the back door. He also admitted that one of the policies was for employees to leave through the front door so as to prevent theft and maintain stock control, but that he did not always comply with this.

[13] Moreover, Mr Forde asserted that he had 'psychological ownership' of some of the goods in the storeroom although they legally belonged to Massy Stores. Even though he conceded that the policies relating to non-removal of stock applied also

to damaged stock of Massy Stores, he admitted that he did not follow this policy and took goods ‘when he exercised his judgment’.

[14] Mr Forde admitted that in December 2012 he gave a junior employee some damaged rice to place in a flour bag and to place the flour bag in Mr Forde’s car. This account was confirmed by the evidence of the junior employee.

[15] Some members of the management team also gave evidence, confirming that Mr Forde had previously breached established procedures and had been warned about his conduct. However, at [17],³ the Magistrate found that, similar to the case of *Ramsay v St James Beach Hotels Services Ltd*,⁴ Mr Forde was welcomed back without any disciplinary action despite these breaches. Moreover, the Magistrate found that Mr Forde’s conduct was never formally documented or used as the basis for any adverse report. On the contrary, Mr Forde was publicly commended at the company’s Award Ceremony for his exemplary long service.

[16] ‘The management’s evidence also revealed that there was a prominent sign reading: “Please DO NOT REMOVE items from this area. Any person caught removing items from this table without authorization will face disciplinary action – by order of management.”’⁵ The Magistrate noted, however, that Mr Forde’s action of taking the condemned rice was not considered theft, which warranted instant dismissal (see [19]).⁶

[17] In their view, Mr Forde had committed a breach of company policy by removing damaged stock belonging to Massy Stores for his own purposes. They also testified that there was a subsequent disciplinary meeting with Mr Forde where, even after having been shown video footage of the act, he denied having taken anything from

³ Record of Appeal, ‘Decision of Magistrate Wayne Clarke’ 586.

⁴ [BB 2002 CA 20](#) (CARILAW), (26 June 2002).

⁵ *Massy Stores (Barbados) Ltd v Forde* (BB CA, 21 July 2023) at [45].

⁶ Record of Appeal, ‘Decision of Magistrate Wayne Clarke’ 586.

the storeroom or having instructed anyone to do so. The Magistrate noted at [21]⁷ of his written decision that they established that Mr Forde was telling untruths and that Massy would dismiss him for cause given his previous conduct.

[18] Having examined the evidence and the law, the Magistrate found that the summary dismissal of Mr Forde by Massy Stores had been disproportionate and thus wrongful. He was awarded as compensation severance calculated for his 30 years' service and 12 months' salary in lieu of notice.

The Court of Appeal

[19] On 29 December 2021, Massy Stores appealed the Magistrate's decision. The Notice of Appeal set out five grounds of appeal that included: (i) that the Magistrate erred in law in evaluating the reasonableness of the company's decision to summarily dismiss Mr Forde; (ii) that the Magistrate's decision was against the weight of the evidence in that he relied on 'condonation' by the company; and (iii) that the Magistrate took irrelevant considerations into account in finding that there was an inadequate investigation.

[20] In a judgment delivered on 21 July 2023, the majority of the Court of Appeal (Cumberbatch and Reifer JJA) upheld the Magistrate's finding that Mr Forde's summary dismissal was unjustified and therefore wrongful. The majority endorsed the Magistrate's contextual approach, which drew on the Canadian case of *McKinley v BC Tel*.⁸ This approach recognises that while an employee's conduct may warrant dismissal, it does not automatically justify summary dismissal if other relevant considerations are present. The Court further referenced the Barbadian case of *Bourne v Almond Resorts Ltd*,⁹ noting the 'humanising patina' approach described in *Bourne* as consistent with the principles of Barbadian dismissal law.

⁷ *ibid* 587.

⁸ [2001] 2 SCR 161.

⁹ (BB CA, 11 June 2020).

[21] The minority (Belle JA) was of the view that the Magistrate had arrived at the wrong decision and that Mr Forde's breach involved bad faith, incompetence, and disobedience, deserving of summary dismissal. Belle JA stressed that the stringent requirements of the Employment Rights Act 2012¹⁰ had no place in summary dismissal proceedings at common law.

Appeal to the Caribbean Court of Justice

[22] On 10 February 2025, Massy Stores has appealed to this Court on the following grounds:

- a. The Court of Appeal erred in law by characterising ground (a) of the Appellant's grounds of appeal as a question of fact, giving deference to the court at first instance, rather than characterising the ground as a question of the application of law to a finding of fact;
- b. The Court of Appeal erred in law in identifying and applying the wrong test for wrongful dismissal, applying considerations such as the reasonableness of the employer's conduct and the employee's 'lengthy and unblemished service' rather than whether or not the employee committed a repudiatory breach of the employment contract;
- c. The Court of Appeal erred in law in holding that wilful breach by an employee of a zero-tolerance policy of the employer of which the employee is aware is not just cause for summary dismissal;
- d. The Court of Appeal erred in law in holding that inadequacy of an investigation by an employer into a possible breach of the employment contract by an employee is relevant to a finding of wrongful dismissal and/or could render a dismissal wrongful;

¹⁰ Act 9 of 2012.

- e. The Court of Appeal erred in law in holding that there is an obligation of fairness at common law in a disciplinary hearing such that breach of the obligation could render a dismissal wrongful; and
- f. The Court of Appeal's decision was wrong in law in that it was perverse to uphold the decision of the Magistrate that the respondent was wrongfully dismissed, having held that in coming to his decision, the Magistrate relied upon an irrelevant and unsubstantiated finding of condonation by the Appellant.

[23] Massy Stores seeks an order that the decision of the Court of Appeal which upheld the finding of the Magistrate that the respondent was wrongfully dismissed be set aside.

[24] Before considering the central issues before the Court, however, it is convenient at this stage to look briefly at Ground 1 of the grounds of appeal in which Massy Stores argues that the Court of Appeal erred in law by characterising ground (a) of the grounds of appeal as a question of fact, giving deference to the Magistrate, rather than characterising the ground as a question of the application of law to a finding of fact. We note that by ground (a) of the grounds of appeal before the Court of Appeal, Massy Stores contended that the Magistrate had erred in law in evaluating the reasonableness of their decision to summarily dismiss Mr Forde, having correctly accepted that the company had a 'zero tolerance policy' as it relates to non-saleable dumped items; that, as a matter of law, it was not for the court or the employee to evaluate the wisdom of the employer's procedures; and that Mr Forde's conduct, even apart from the company's policies, was deserving of the greatest censure necessarily justifying dismissal.

[25] We do not agree with Massy Stores that the majority of the Court of Appeal so erred. At [75] the majority had made clear as they began their discussion on the substantive issue of summary dismissal that 'the issue of whether a summary

dismissal [was] lawful or wrongful is essentially a mixed question of law and fact’.

The majority continued:

In such a context, we, as a review tribunal, are tasked mainly with scrutinizing that the court below applied the correct principles of law to a judicious evaluation of the facts.¹¹

[26] Further, at [82]–[83], the majority of the Court of Appeal, having examined the Barbadian jurisprudence on summary dismissal, and having been satisfied that the Magistrate’s adoption of the contextual approach was correct, went on to consider the facts within that framework. We think it important to set out the observations of the majority in this regard:

[82] It is clear to us that the learned Magistrate employed this ‘contextual approach’ in this case, having correctly delineated the law. Whether the circumstances sufficed to warrant a summary dismissal remains essentially a question of fact for the tribunal below- see: *Clouston & Co Ltd v Corry* [1906] AC 122 per Lord James at p. 129.

[83] Our limited role here as a court of review compels us to pay deference to the treatment of the facts by the Magistrate unless he appears to us to have been patently or wholly wrong in this evaluation - see per Burgess JA in *Roger Brathwaite v Paulette Atkins Civ App No 20 of 2016* at para 46.¹²

[27] To reiterate, we see nothing wrong with the principles enunciated by the majority of the Court of Appeal as they relate to Ground 1 of the Grounds of Appeal. Indeed, they align with the views expressed by this Court in *Commissioner of the Guyana Geology and Mines Commission v Diamond Quarry Inc*¹³ as to when an appellate court should reverse a trial court’s findings of fact. The Court noted that judicial findings of fact are often based on the evidence given in court and the cogency and credibility of witnesses who give that evidence. Accordingly, an appellate court ought to be reluctant to differ from the trial judge who had the advantage of observing and evaluating the witnesses.¹⁴

¹¹ *Massy Stores* (n 5) at [75].

¹² *ibid.*

¹³ [2022] CCJ 11 (AJ) GY, (2022) 104 WIR 273.

¹⁴ See also *Campbell v Narine* [2016] CCJ 7 (GY), (2016) 88 WIR 319; *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY, (2023) 105 WIR 348 and *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) (BB), BB 2024 CCJ 1 (CARILAW)

Issue 1 – Whether the Majority of the Court of Appeal Ought to have Adopted the Contextual Approach to Summary Dismissal?

The Common Law Rule of Summary Dismissal

[28] The common law rule of summary dismissal empowers an employer to dismiss an employee without notice, where the employee has committed a repudiatory breach of the employment contract such that it evinces disregard for an essential term of the contract. In the case of *Laws v London Chronicle (Indicator Newspapers) Ltd*¹⁵ Lord Evershed MR considered whether one act of disobedience or misconduct could justify dismissal. He was of the view that in order to meet that threshold, the disobedience or misconduct would have to be of a grave and serious character. He thought that one act of disobedience or misconduct could justify dismissal only if it is of a nature which goes to show that the servant is repudiating the contract, or one of its essential conditions. He stated:¹⁶

...[S]ince a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be-if summary dismissal is claimed to be justifiable-whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

[29] Mr Koeiman, Counsel for the Appellant, submitted that the test for wrongful dismissal was a simple one. If an employer dismisses an employee without notice, the employer is in breach of contract and guilty of wrongful dismissal unless at the time of the dismissal the employee was guilty of a fundamental breach of contract, in which case there was just cause to dismiss. Mr Koeiman further submitted that previous authorities had accepted the draconian nature of the sanction of dismissal

and the scholarly analysis by Burgess J of the role of appellate courts in reversing findings of fact, and of apex appellate courts in treating with concurrent findings of fact.

¹⁵ [1959] 1 WLR 698.

¹⁶ *ibid* at 700.

at common law. Accordingly, he argued that the correct authorities do no more than establish the logically high threshold that conduct must usually reach before it may be considered repudiatory and so establish just cause for dismissal. It is important to note that Mr Koeiman contended that no question of reasonableness applied. Indeed, the employer at common law could even rely on just cause discovered only after dismissal.¹⁷ On the issue of reasonableness, Mr Koeiman emphasised that there is at common law no obligation to act reasonably in coming to the decision to dismiss. The only question was the objective one of just cause existing at the time of dismissal.

- [30] Mr Koeiman also highlighted what he perceived to be a disquieting tension between the established principles of contract law – underpinning the employer/employee relationship as derived from the law of the United Kingdom – and the evolving concepts of implied procedural fairness and reasonableness as developed in Canadian jurisprudence. He contended that the Barbadian Court of Appeal had erred in adopting the Canadian approach which, he argued, was legally unsound. In light of these submissions, it is both necessary and appropriate for this Court to undertake a careful examination of the Barbadian jurisprudence on summary dismissal.

The Barbados Jurisprudence on Summary Dismissal

- [31] In the judgment of the Court of Appeal, the majority, although expressing ‘disappointment at the seeming instinctual recourse to Canadian authorities’ by the Magistrate, nevertheless noted that those Canadian authorities were not substantially different in principle from Barbadian authorities.
- [32] Thereafter, the majority looked closely at the Barbadian jurisprudence on summary dismissal and highlighted ‘the scholarly discourse’ of Simmons CJ in the 2002 Court of Appeal judgment of *Ramsay v St James Beach Hotels Services Ltd*.¹⁸ In

¹⁷ Massy Stores Barbados Ltd, ‘Submissions on behalf of the Appellant’, Submission in *Massy Stores Barbados Ltd v Forde*, BB Civil Magisterial Appeal No 0016 of 2021, 1 May 2025, 738 at [23]–[25], and the case of *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, cited in the footnote.

¹⁸ *Ramsay* (n 4).

Ramsay, the Appellant had been summarily dismissed for making a vulgar threat to her supervisor. At [14], Simmons CJ made some very important points about the changing views, values and conditions of society over time. In our view, it is important to set out [14] in full:

[14] This second submission is of a different quality from the first. It invokes the question: What conduct justifies summary dismissal? Summary dismissal is dismissal without notice. Either party to the individual contract of employment may treat the contract as at an end if the other commits a breach striking at the root of the contract. It is always a question of degree whether conduct goes to the root of the contract or not. (*Henry v. Mount Gay Distilleries Ltd* Privy Council Appeal No. 43 of 1998). And it is worth remembering that conduct that was held to justify summary dismissal in one case at one point of legal history may not necessarily have the same consequence today. The familiar phrase of the law that “each case depends upon its own facts” is especially apposite in this area of the common law. The social dynamics of Labour Law exemplify in a stark way the ability of the common law to respond to changing views, values and conditions of society over time. The changes have been more than just changes in the nomenclature and notions of master and servant. They have been attitudinal also.

[33] In addition, at [38], Simmons CJ laid down what can be considered the contextual approach in cases of wrongful dismissal. He noted that judges had warned that each case of alleged wrongful dismissal has to be adjudicated in the context of its own particular facts. In conclusion, Simmons CJ observed at [45] and [46] as follows:

[45] It is of considerable importance in the factual context of this case that, after being on suspension for 5 days, the appellant returned to work and did work until her ultimate dismissal on March 19. During this period of resumed duty, there is no evidence that the relations between the employer and employee deteriorated in any way or at all to show that it was impossible to continue the employer/employee relationship.

[46] Having regard to the foregoing observations, the appellant's long continuous employment with the respondent or its predecessors in title and the fact that the conduct complained of was an isolated act of misconduct, it is our judgment that such misconduct was certainly worthy of the sternest censure. But we do not accept that it justified summary dismissal. If dismissal was necessary then reasonable notice or payment in lieu thereof should have been given.

[34] In *Bico Ltd v Jones*,¹⁹ the Court of Appeal of Barbados, in a judgment dated 2 August 1996, upheld the Magistrate’s decision that Mr Jones had been wrongfully dismissed. The Magistrate found that Mr Jones had engaged in what can only be described as multiple acts of sexual harassment involving three young women employees of Bico. Nevertheless, she concluded that while his conduct warranted firm disciplinary action, summary dismissal was an excessively severe response. In reaching this decision, the Magistrate considered, among other things, Mr Jones’s long-standing service, loyalty to the company, and previously unblemished record. The Court of Appeal affirmed the Magistrate’s decision and dismissed Bico’s appeal. Given the seriousness with which sexual harassment in the workplace is now treated in Barbados and in other jurisdictions in the Caribbean region, we think it important to note that the type of misconduct displayed in *Bico*—described by the Court of Appeal as ‘consisting of sexual harassment or other unwelcome or unpleasant behaviour of a sexual nature’—would almost certainly warrant summary dismissal today.²⁰

[35] In *Bourne*²¹ the Court of Appeal of Barbados considered the harsh consequences of summary dismissal and described the appropriate approach of the court as a ‘more humanizing patina’. In this case, Ms Bourne, a cook at the Respondent’s hotel, was searched by the Chief of Security, and found to be in possession of a bag containing items, namely, onions. Ms Bourne’s explanation as to why she had taken the items, was that this would be one less item to buy in the supermarket. She was summarily dismissed. She filed a claim alleging that she had been wrongfully dismissed, but the Magistrate held that Ms Bourne had been lawfully dismissed for just cause.

[36] The Court of Appeal in a judgment dated 11 June 2020 and delivered by Cumberbatch JA upheld the Magistrate’s decision, and emphasised²² that summary dismissal was most detrimental to the employee for not only was the employee

¹⁹ BB 1996 CA 27 (CARILAW), (2 August 1996).

²⁰ See the Employment Sexual Harassment (Prevention) Act 2017 of Barbados passed to make provision for the protection of employees from sexual harassment in the workplace. See also the ‘CCJ/RJLSC Harassment Policy’ (Rev 2024).

²¹ *Bourne* (n 9).

²² See *Bourne* (n 9) at [14].

given no notice or payment in lieu of such notice, but the employee dismissed for gross misconduct was disentitled from making a claim for unemployment benefit under the national social security scheme²³ and from making a claim for a severance payment under the relevant legislation.²⁴ The Court of Appeal continued: ‘*Given the undeniably harsh consequences of summary dismissal, the law has at times sought to bring a more humanizing patina to bear on the process.*’²⁵ Citing *Ramsay* and *Bico*, the Court of Appeal reinforced that the overarching consideration appeared to be whether a summary dismissal is justified in all the circumstances.²⁶ It is interesting to note that the majority of the Court of Appeal in the instant case expressed the view that the ‘humanizing patina’ approach appeared to be consistent with Barbadian dismissal law.

- [37] In *Alkins v B&B Distribution Ltd*²⁷ the key issue concerned the summary dismissal of Mr Alkins for dishonest actions that had damaged the relationship that B&B Distribution had with a customer and had tarnished its reputation. In the judgment of the Court of Appeal delivered on 23 July 2019, Burgess JA gave a comprehensive overview of the law of summary dismissal in Barbados. At [48] Burgess JA summarised the considerations to which a court should have regard in determining whether an employee’s dismissal was lawful. Burgess JA noted that these considerations were not exhaustive. They included: (i) the character of the contract; (ii) the number of the wrongful acts or assertions; (iii) the weight of those wrongful acts or assertions; (iv) the intentions indicated by such acts and words; (v) the deliberation or otherwise with which they are committed or uttered; (vi) current social conditions; (vii) the nature and degree of the misconduct; (viii) the nature of the business; (ix) the position of the employee; (x) whether there was a reasonable excuse for the employee’s disobedience; and (xi) whether summary dismissal was a proportional sanction; and (xii) the overall circumstances of the case.

²³ See the National Insurance and Social Security (Benefit) Regulations 1967, Cap 47, r 51(1)(f).

²⁴ See the Severance Payments Act, Cap 355A, s 4(2).

²⁵ *Bourne* (n 9) at [15] (emphasis added).

²⁶ *ibid.*

²⁷ BB 2019 CA 20 (CARILAW), (23 July 2019).

- [38] At [61], Burgess JA also observed that there were other circumstances which ought to be taken into account in the court's balancing exercise. These included the following: (i) The fact that the act of the appellant resulted from a spontaneous opportunity and was not a premeditated plan to extract some financial gain; (ii) The fact that the appellant's conduct did not amount to a serious form of fraud; (iii) The fact that the act was the appellant's first act of misconduct; (iv) The fact that the act was not a serious breach of duty nor a serious criminal offence; and (v) The fact that the appellant was an employee of B&B Ltd. for twelve years with an unblemished record.
- [39] In *Alkins*, Burgess JA further noted that the Barbados Court of Appeal in *Lovell v Rayside Construction Ltd*²⁸ cited with approval what Iacobucci J in *McKinley v BC Tel*²⁹ termed 'the principle of proportionality' which required that '[a]n effective balance must be struck between the severity of an employee's misconduct and the sanction imposed'.³⁰
- [40] Having examined the relevant Barbadian cases, the Court has posed these critical questions: *Is the common law of summary dismissal in Barbados, static, fixed and immutable, forever tethered to the antiquated principles of master and servant? What is the common law in Barbados in 2025 as far as summary dismissal is concerned?* (emphasis added) It bears repeating that Simmons CJ in *Ramsay*³¹ acknowledged that the social dynamics of labour law exemplified in a stark way the ability of the common law to respond to changing views, values and conditions of society over time. He stressed that the changes have been more than just changes in the nomenclature and notions of master and servant. They have been attitudinal also.

²⁸ BB 2010 CA 2 (CARILAW), (4 March 2010).

²⁹ *McKinley* (n 8).

³⁰ *ibid* at [53].

³¹ *Ramsay* (n 4).

- [41] Moreover, in *McEwan v Attorney General of Guyana*,³² this Court struck down colonial-era laws criminalising cross-dressing emphasising the need for legal norms to evolve in step with contemporary understandings of fundamental rights. The Court in *McEwan* referenced its judgment in *Nervais v R*³³ where it had been observed that with regard to general savings clauses, colonial laws were caught in a time warp, immune to the evolving understandings and effects of applicable fundamental rights. The Court in *McEwan* reaffirmed that the law must be dynamic, not static.³⁴
- [42] Additionally, in *Lucas v Chief Education Officer*³⁵ Wit J delivered a masterful judgment, underscoring that s 2 of the Belize Constitution³⁶ extended an invitation to legal practitioners to assist the courts in their endeavour and inherent duty to mould and develop the common law in order to make it more just, fair and consistent with constitutional standards. He emphasised that the common law was never static, and being judge-made, must be re-made, adapted and developed by judges to align with principles of justice, fairness, and constitutional standards.
- [43] It follows that the common law, being neither static nor immutable, must remain responsive to the evolving social values of the Barbadian people, and aligned with the constitutional principles of equality, proportionality, and fairness embraced by both the legislature and people of Barbados.³⁷ These principles place a high value on, and underscore the importance of, the dignity of work and the protection of workers' rights. In light of this, we are satisfied that the contextual approach adopted by the majority of the Court of Appeal in the present appeal was correct.

³² [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332.

³³ [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178.

³⁴ See *McEwan* (n 32) at [40]–[41].

³⁵ [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100, at [180]–[182].

³⁶ Section 2 of the Belize Constitution Act, CAP 4 provides that any law, written or unwritten, that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

³⁷ See also Adrian Saunders, former President of the Caribbean Court of Justice 'The Caribbean Court of Justice at 20: Decolonising Justice in the Caribbean' (Public Lecture in Belize, 3 September 2025).

Issue 2 – Whether a Court Ought to take into Account the Procedural Fairness of the Dismissal where an Employee has been Summarily Dismissed?

[44] The parties appearing before us, and in particular Mr Koeiman, counsel for Massy Stores, accepted that the BS&T Employee’s Handbook (‘the Handbook’), used by the predecessor company, Supercentre, formed part of the contractual framework governing the employment relationship between Mr Forde and Massy Stores. It is clear that the Handbook was in evidence before the Magistrate who noted at [21] of his decision,³⁸ that the Employment Manual—under the section titled Discipline and Disciplinary Action—permits dismissal on a first occurrence in cases of the most serious offences.

[45] At p 22 of the Handbook, under the heading, Discipline and Disciplinary Action, the section reads as follows:

Improper conduct and consistent and persistent poor performance will result in disciplinary action up to and including termination. In confronting the issue, management will give the guilty party a verbal warning. If the problem recurs, the employee will be given a written warning, a copy of which will be placed on their employee file. Depending on the circumstances, failure to improve will result in the issue of a second written warning. If after verbal and written warnings the problem persist, the employee’s services will be terminated. For the most serious offences, management may dismiss the employee for the first occurrence.

...

Employees who are also members of a bargaining unit have a right to union representation in disciplinary meetings and hearings.³⁹

[46] In *Sandy Lane Hotel Co Ltd v Cato*⁴⁰ this Court agreed with the conclusion of the Barbados Court of Appeal that the employees in that case had been wrongfully dismissed on the ground that it was not lawful for them to be dismissed without Sandy Lane following the disciplinary process incorporated into the employees’ contracts. The Court also noted that the common law implies into every contract of

³⁸ Record of Appeal, ‘Decision of Magistrate Wayne Clarke’ 587.

³⁹ Record of Appeal, ‘BS&T Employee’s Handbook’ 1052.

⁴⁰ [2022] CCJ 8 (AJ) BB, BB 2022 CCJ 2 (CARILAW).

employment a term of ‘mutual trust and confidence’ to ensure that employees are treated fairly and that employers do not conduct themselves in a manner that destroys or seriously damages the relationship of confidence and trust between employer and employee. The Court thus held that *Sandy Lane* not only breached the express terms in its own Rules by sending home the employees, who had given a combined total of almost 30 years’ service, with the bare minimum of one week’s notice, but it also breached the implied term of mutual trust and confidence.

[47] The Court has also considered International Labour Organisation Recommendation No 166 – Termination of Employment Recommendation.⁴¹ Clause 1 provides that the provisions of this Recommendation may be implemented through national laws or regulations, collective agreements, workplace rules, arbitration awards, or court decisions. This indicates that the Recommendation is intended to guide judiciaries as well. Clauses 7 to 13 outline certain best practices and international standards for employers contemplating the termination of an employment contract, emphasising the importance of issuing appropriate written warnings to the employee prior to termination. These clauses also underscore the principles of procedural fairness.

[48] It is evident that the Handbook, consistent with international employment standards, prescribes an incremental approach to disciplinary action, reserving summary dismissal for only the most serious offences. Both the Magistrate and the majority of the Court of Appeal were of the view that the taking of the condemned goods, that is, condemned rice, did not constitute such a serious offence as to warrant summary dismissal. In the circumstances of this case, we see no reason to interfere with this finding. Accordingly, the incremental approach to discipline outlined in the Handbook ought to have been followed in the present case.

[49] It is clear that the disciplinary procedure incorporated into Mr Forde’s contract of employment with Massy Stores was not followed. Indeed, as Mr Khan has rightly submitted, Massy Stores failed to produce to the Magistrate any written warnings

⁴¹ ILO Recommendation R166: Termination of Employment Recommendation (68th ILC Session Geneva 22 June 1982).

relating to the alleged misconduct, as expressly required by the terms of the Handbook. In these circumstances, it was not lawful for Mr Forde to be dismissed without adherence to the disciplinary framework that the company had specifically incorporated into his contract. Accordingly, the Court is of the view that Mr Forde's dismissal was not procedurally fair. Massy Stores has not only breached the express terms of its own Handbook, but it has also breached the implied term of mutual trust and confidence, previously affirmed by this Court in *Sandy Lane*.

[50] It is also important to underscore that the right to a fair hearing was an integral part of the contractual relationship between these parties. In the circumstances, and having regard to the international standards previously discussed, the Court considers it appropriate to set out briefly certain minimum standards of procedural fairness that ought to be implied into p 22 of the Handbook. These include: (1) the employee's right to be informed of the charge, with sufficient details or particulars to enable a proper understanding of the alleged misconduct; (2) the opportunity for the employee to respond to the allegations; and (3) the conduct of a hearing that permits both the employer and the employee to present evidence and make representations. The degree of formality required in such a hearing will, of course, depend on the particular facts and context of the case.

[51] We wish to make one final observation regarding the requirement of procedural fairness in summary dismissal proceedings. As previously mentioned, Belle JA emphasised that the stringent requirements of the Employment Rights Act⁴² had no place in summary dismissal proceedings at common law. Under the Act, employees are entitled to protection against unfair dismissal⁴³ with the elements of fairness articulated in s 29. However, although these proceedings were not initiated under the Employment Rights Act,⁴⁴ nothing in the jurisprudence of Barbados precludes this Court from determining that procedural fairness is a relevant consideration in assessing the lawfulness of summary dismissal at common law.

⁴² Employment Rights Act (n 10).

⁴³ *ibid* s 27(1).

⁴⁴ *ibid*.

Factors Considered by the Majority of the Court of Appeal

- [52] In the circumstances, we proceed to examine the factors considered by the majority of the Court of Appeal, and which notably influenced the Magistrate's conclusion that summary dismissal was not warranted in the context of this case. It is important to recall that in *Alkins*, Burgess JA outlined some key considerations to which a court should have regard in determining the lawfulness of an employee's dismissal. These included the nature and gravity of the misconduct, the employee's position; whether summary dismissal constituted a proportionate response; whether the act amounted to a serious breach of duty or a serious criminal offence; the employee's extensive tenure of service, distinguished by an unblemished record.
- [53] In the present case, the majority of the Court of Appeal first considered the nature and minimal value of the goods taken. The majority observed that the Magistrate had taken into account that the rice in question was condemned and held no value to Massy Stores. The Magistrate also found that the rice had no resale value. Indeed, the Magistrate was clearly satisfied that Mr Forde's act of taking condemned goods did not amount to conduct that was so grossly immoral or so serious an offence as to justify his summary dismissal.
- [54] The second factor considered by the majority was Mr Forde's long unblemished service. The Magistrate found that Mr Forde had served the company for 35 years without ever being the subject of any negative performance appraisals or written reports or warnings. In addition, the Magistrate noted the admission into evidence of a letter dated 7 January 2008, issued by the company, which highlighted the company's success and expansion over the years, success attributed to the dedicated service of employees such as Mr Forde. Further, the Magistrate observed that at the company's last Awards Ceremony, Mr Forde was lauded for his exemplary service and dedication.
- [55] The third factor considered by the majority of the Court of Appeal was Mr Forde's single act of indiscretion. As previously noted, the Magistrate found that Mr Forde's act of taking condemned rice did not warrant summary dismissal, and the majority

of the Court of Appeal agreed. In this context, it is important to bear in mind the dissenting opinion of Belle JA who emphasised several considerations, including:

- (1) Mr Forde's supervisory role as a Back Door Receiving Supervisor and the attendant responsibilities;
- (2) His instruction to a junior employee to place the condemned goods in his vehicle, thereby encouraging others in a breach of company policy;
- (3) His initial claim that he had receipts for the rice, which he later retracted; and
- (4) His admission to having previously removed condemned goods based on his own judgment.

Belle JA concluded that such conduct justified summary dismissal. However, for the reasons outlined in this judgment, we respectfully disagree. Even if Mr Forde had taken other goods on previous occasions, he was essentially dismissed for the removal of condemned goods. Given the contextual approach to summary dismissal correctly adopted in Barbados, and the requirement for procedural fairness, we do not regard the actions in question sufficiently serious to warrant Mr Forde's summary dismissal.

- [56] We do not think it necessary to examine the fourth and fifth factors addressed by the majority of the Court of Appeal. The fourth factor related to condonation, and the majority concluded that the Magistrate's written decision disclosed no evidence of condonation. Accordingly, the majority ruled that the Magistrate had taken an irrelevant consideration into account. In the circumstances outlined in this judgment, we are satisfied that the Court of Appeal did not arrive at a decision that was perverse, as argued by the Appellant. We are also satisfied that the question of condonation is immaterial to the outcome of this appeal. The fifth factor concerned the adequacy of the investigation. In light of our earlier analysis and conclusion on procedural fairness, we do not consider it necessary to examine the issue of investigative adequacy further.

[57] In closing, this Court wishes to offer a brief observation on the process of weighing the relevant factors and considerations, and the balancing exercise required to be undertaken by each court. It must be emphasised that the weight attributed to each factor, and the overall balance struck among the relevant factors, will necessarily depend on the particular circumstances of the case before the court.

Disposition

[58] Accordingly, the appeal is dismissed. The decision of the majority of the Court of Appeal is affirmed. The parties, having agreed that the value of the appeal is USD50,000, the Appellant shall pay to the Respondent costs calculated in accordance with r 17.15(2) and sch 2 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024.

EBOE-OSUJI J:

Introduction

[59] I have read in draft the opinion of Justice Rajnauth-Lee. I fully concur with it. I contribute this opinion in that vein.

[60] The Respondent, Merton Forde, had served the Appellant, Massy Stores, a supermarket operator, for 35 years with no serious blemish on his record of employment. Notably, the Appellant and its predecessor in business (Super Centre) had given the Respondent Forde awards and citations as an exemplary employee. On 21 December 2012, just ahead of the Christmas holiday, the Appellant summarily dismissed the Respondent Forde, because he removed a bag of condemned rice through the backdoor where he worked as the receiving supervisor. As the trial Magistrate appeared to have found, the condemned bag of rice had no resale value: it had ‘been written off and consigned to be dumped’.⁴⁵ Also according

⁴⁵ See Record of Appeal, ‘Decision of Magistrate Wayne Clarke’ 588, at [21].

to the trial Magistrate, the Appellant did not consider the conduct of the Respondent as theft.⁴⁶ None of these findings of the Magistrate is contested before this Court. Indeed, in his oral submissions before this Court, counsel for the Appellant Massy Stores was careful to stress that ‘at no time’ had the Appellant alleged theft against the Respondent, nor had the Appellant alleged dishonesty on his part. The matter rather was that he violated strict company policy known to him, which prohibited employees from removing anything from the grocery store, without authorisation, especially through the back door. Mr Forde’s behaviour, the argument goes, was a fundamental breach of the contract of employment, thus repudiatory of the contract.

- [61] The essential arguments of the Respondent’s case are these: (i) the Appellant acted unreasonably in dismissing him summarily for removing through the back door a bag of condemned rice, a valueless item that was destined for the dumpster; and (ii) that attitude of unreasonableness, was compounded by the failure of the employer to give him a fair opportunity to defend himself in an internal disciplinary procedure. In effect, these complaints boil down to an issue that the Appellant had failed to follow its own internal disciplinary procedure outlined as follows in its ‘Employee Handbook’:

Discipline & Disciplinary Action

Improper conduct and consistent and persistent poor performance will result in disciplinary action up to and including termination. *In confronting the issue, management will give the guilty party a verbal warning. If the problem recurs, the employee will be given a written warning, a copy of which will be placed on their employee file. Depending on the circumstances, failure to improve will result in the issue of a second written warning. If after verbal and written warnings the problem persists, the employee’s services will be terminated. For the most serious offences, management may dismiss the employee for the first occurrence.*

⁴⁶ *ibid* 586, at [19].

Suspension without pay as a disciplinary measure can only be invoked in companies where it is contractually possible. In cases where suspension without pay is not contractually possible, a *final*, strongly worded warning will be issued.⁴⁷

[62] Faced with the Respondent's complaints as summarised above, the Appellant contends that (i) the Respondent's summary dismissal was fully justified because he knowingly removed something (the commercial value of which is immaterial) from the store—a conduct he knew to be strictly prohibited by company policy; (ii) the Respondent's case falls to be decided according to common law principles of 'wrongful dismissal', rather than on considerations of 'unfair dismissal' that obtain only by virtue of legislation (specifically the Employment Rights Act) which is inapplicable to the Respondent; and, (iii) in *wrongful dismissal* cases, there is no scope for any inquiry into reasonableness or unfairness.

[63] As a preliminary matter, there is a question whether a company policy against 'the removal of goods' from an employer's premises in order to prevent theft, the violation of which policy will attract 'disciplinary action,'⁴⁸ would be understood by the average person as a policy against the removal of a condemned bag of rice with no commercial value and destined for the rubbish bin, and the violation of which would result in summary dismissal. Even so, there is the further question whether every policy of the employer's election would, in the name of an employee's duty of obedience, qualify as a fundamental term of the contract of employment, the breach of which would result in summary dismissal. Depending on the evidence, this might engage the question of fair notice of the terms of the contract that were brought to the attention of the employee when the contract was signed. These are interesting questions, but I do not resolve them here.

[64] The logic of the argument on behalf of the Appellant suggests, however, that the Appellant would equally have summarily dismissed Mr Forde if what he removed through the back door was a crate of rotten fish. The Appellant's counsel did not

⁴⁷ See Record of Appeal, 'BS&T Employee's Handbook' 1052 (emphasis added).

⁴⁸ See Record of Appeal, 'Decision of Magistrate Wayne Clarke' 586, at [18].

truly rule out that conundrum as the acid test to his theory of the case for the Appellant. He argued, at best, that where it was sufficiently clear that the company policy would encompass the removal of rotten fish without authorisation, then removal of rotten fish would constitute a valid reason for summary dismissal.

[65] In my view, any legal hypothesis whose logic may entail the summary dismissal of a supermarket employee after 35 years of service, because he removed a crate of rotten fish through the back door without authorisation, is a hypothesis that must be handled with extreme caution. The development of equity as a kinder order of remedies owed much to harsh and sterile attitudes of that kind.

[66] To be clear, my drift here is not that the law should warmly embrace employees who violate strict company policies that were soundly motivated, such as a policy that was undoubtedly conceived to prevent theft of valuable items from commercial enterprises. The concern, rather, is that the law should not give warrant to summary dismissal—the ‘capital punishment’ of the workplace—for *every* instance of violation of ‘strict’ company policy. As Simmons CJ once correctly observed in the Court of Appeal of Barbados in an earlier case, misconduct can certainly be ‘worthy of the sternest censure’ but a court of law may ‘not accept that it justified summary dismissal.’⁴⁹

[67] There is risk of serious injustice when calibration and proportionality are precluded from the legal process, such that every violation is punished with the most extreme severity. Research and reflection show that the premise of that outlook, in the context of wrongful dismissal, is ultimately questionable in its correctness.

Wrongful Dismissal Versus Unfair Termination

[68] The Appellant’s case, as presented, proceeded on the basis of a distinction between wrongful dismissal and unfair termination, as two streams of remedies that should not mingle. Nothing of course turns on the alternating terminology of ‘dismissal’ and ‘termination’: they mean the same thing in context. The main difference

⁴⁹ See *Ramsay* (n 4) at [46].

between wrongful dismissal and unfair termination is usually said to be that wrongful dismissal is based on the theory of strict law of contract, involving an inquiry as to whether the impugned conduct of the employee amounts to a breach of a fundamental term of the employment contract resulting in its repudiation, which then entitles the employer to accept that repudiation promptly by way of a reactive summary dismissal of the employee. Unfair termination, for its part, involves dismissal of an employee without objectively satisfactory reasons and without following certain procedures that ensure fair hearing, usually prescribed by legislation, that might have avoided the dismissal. It is often said that wrongful dismissal lies within the domain of the common law, while unfair termination lies within that of statutory law.

- [69] The facts and arguments in this case compel caution, as some obvious fictions come into play. Notably, the contract theory of wrongful dismissal law, anchored on suppositions of a ‘fundamental term’ of a contract and its ‘repudiation’, may not have taken due account of the many instances of employment relationships in which there may be no written contract—such as may possibly be the case with the Respondent’s employment.⁵⁰ How then does one consider violation of an employer’s policy as a ‘fundamental’ or ‘repudiatory’ breach of the contract of employment, if the breach does not directly translate into a failure to perform the basic tasks that the employment entails? Is it satisfactory to revert to the older, pre-contract theory regime, pursuant to which an employment relationship required the ‘servant’ to obey every order of the ‘master’ that was not against the law or hazardous to the safety of the servant?⁵¹ It is notable that in a bid to move away from that notion of ‘master and servant’ mindset, counsel for the Appellant argued that the contract theory is premised on the idea of two equal parties striking a bargain that suits them.

⁵⁰ See Record of Appeal, ‘Decision of Magistrate Wayne Clarke’ 582, at [12].

⁵¹ J C Wood, ‘The Disobedient Servant’ (1959) 22 Mod L Rev 526, 527. See also R P Grime, ‘Two Cultures in the Court of Appeal’ (1969) 32 Mod L Rev 575 generally.

[70] Similarly, the contended dichotomy between ‘wrongful’ and ‘unfair’ dismissal is based on the fiction that two distinct streams of law will operate on the same employment relationship in channels that do not mix. The defining matter of jurisprudence in this appeal is really whether this Court should perpetuate that fiction of watertight compartmentalisation in particular. In my view, it should not. This, as will become clear presently, is because the silent premise of that fiction, is ultimately unsustainable. It rests on the assumed immutability of the common law that has shaped employment law over the centuries.

Summary of Appellant’s Submissions on Reasonableness and Fairness

[71] With impressive confidence, counsel for the Appellant Massy Stores denounced the notions of reasonableness and fairness in wrongful dismissal cases. He urged us to do the same.

[72] ‘[T]he test for wrongful dismissal,’ he argued, ‘is a simple one.’ The simplicity of that test, as I understand him, may be distilled down to the proposition that notice of dismissal is about the only duty that employers owe their employees in the event of dismissal. That perspective is, perhaps, evident in the argument that ‘if an employer dismisses without notice, he/she is in breach of contract unless at the time of dismissal the employee was himself/herself guilty of a fundamental breach of contract, i.e. there was just cause to dismiss.’⁵² Rejecting the notion of reasonableness, counsel argued as follows:

*To the extent that the Court of Appeal found that this test is overlaid by a ‘humanising patina’ this is wrong in law. Previous authorities have accepted the draconian nature of the sanction of dismissal at common law. It is submitted that, properly understood, the [correct] authorities do no more than establish the logically high threshold that conduct must usually reach before it may be considered repudiatory, and so establish just cause for dismissal. No question of reasonableness applies. Indeed, an employer at common law may rely on just cause discovered only after dismissal.*⁵³

⁵² See Massy Stores Barbados Ltd, ‘Submissions on behalf of the Appellant’, Submission in *Massy Stores Barbados Ltd v Forde*, BB Civil Magisterial Appeal No 0016 of 2021, 1 May 2025, 738, at [23].

⁵³ *ibid* 738, at [24] (emphasis added).

[73] In the Appellant’s counsel’s further submission, the notion of fairness suffers the same denunciation as that of reasonableness in wrongful dismissal cases. As he put it:

There is at common law no obligation to act reasonably in coming to the decision to dismiss. The only question is the objective one of just cause existing at the time of dismissal. An employer who fails to conduct a reasonable investigation *runs the risk* that at trial, it is established that there was not in fact just cause. However, *this does not mean that where just cause has been established, the failure to follow a fair procedure or conduct any or any reasonable investigation, is a relevant consideration.*⁵⁴

[74] In a culminating submission, he observed that in ‘a number of decisions in Barbados, there is an uneasy tension between the clear principles of contract law which underpin the legal relationship of employer and employee as derived from the law of the United Kingdom, and concepts of implied procedural fairness and reasonableness as applied in Canada.’⁵⁵ The result of the tension, he observed, ‘has been judicial uncertainty as the judgments contradict themselves. It is not clear to what extent the traditional contractual analysis has been subverted by an amorphous concept of “proportionality”.’⁵⁶ He thus invited this Court to ‘clarify the law on this point, correctly *re-establishing* the distinction between unfair and wrongful dismissal.’⁵⁷

[75] The sum of the Appellant’s counsel’s submissions then boils down to the following propositions as to his understanding of the common law position in relation to wrongful dismissal of an employee: the *established* or ‘traditional’ approach in judicial inquiries arising from the dismissal of an employee is that the only consideration that matters is whether the employer’s termination of the employee is seen as ‘wrongful’ because of the absence (or inadequacy) of notice; but along came the Supreme Court of Canada, notably in *McKinley v BC Tel*,⁵⁸ to reconceptualise the inquiry, bringing into it considerations of reasonableness and

⁵⁴ *ibid* 738, at [25] (emphasis added).

⁵⁵ *ibid* 738, at [26].

⁵⁶ *ibid* 740, at [30].

⁵⁷ *ibid* 740, at [32] (emphasis added).

⁵⁸ *McKinley* (n 8).

fairness; now, there is uncertainty in the case law of Barbados, because some appellate judges have favoured the Canadian approach, while others have favoured the ‘traditional’ common law approach; this Court should ‘re-establish’ the ‘traditional’ common law approach, by holding that it is only the legislature that may make any needed adjustment that includes reasonableness and fairness as relevant considerations in the adjudication of wrongful dismissal cases; since the legislature has done that in relation to unfair termination cases, Courts may not import those considerations into the stream of common law as regards wrongful dismissal.

Reasonableness and Fairness in Common Law

[76] It is, of course, possible that the Appellant’s counsel has over done his suppositions along the way. For one thing, we cannot be too confident that the state of common law of industrial relations in the United Kingdom would permit an employer to summarily dismiss an employee on the facts of this case, on grounds of an intentional act of disobedience. As one commentator summarised that law in 1969:

The day has long fled when a man could be dismissed for mere disobedience or insolence without more. Employment is now treated as a contract and the contractual principle requires that the breach strike at the root of the relationship before the innocent party may rescind.⁵⁹

[77] Indeed, it is possible that what counsel described as ‘the logically high threshold that a conduct [of the employee] must usually reach before it may be considered repudiatory, and so establish just cause for dismissal’ may serve neither the clarity of counsel’s perception of ‘the draconian nature of the sanction of dismissal at common law’ nor the confidence with which he submitted that ‘[n]o question of reasonableness applies’ in inquiries into wrongful dismissal on the basis of common law. At the necessary level of analysis, it is easy to see that ‘the logically high threshold that a conduct must reach’ is one way that the system interposes reasonableness or proportionality to the employer’s own conduct in reaction to that

⁵⁹ See R P Grime, ‘Two Cultures in the Court of Appeal’ (1969) 32 Mod L Rev 575, 577.

of the employee. That the sword of dismissal for cause may ultimately descend upon an (incurable or recalcitrant) employee is no proof that the guiding common law is either draconian or averse to the temperance of reasonableness or fairness.

- [78] More significant, however, is the operation of equity in the employment relationship. Although not often invoked in employment relationships—except in the context of ‘employment equity’ in the modern sense of equality and non-discrimination amongst employees—there is nothing in principle that precludes from the employment relationship, in appropriate cases, the traditional idea of equity following common law to ameliorate its harshness. Such an equitable intervention may no doubt occur through the norms of reasonableness and fairness.

Change and the Common Law

- [79] Since the Appellant’s submissions as summarised above are based on perceptions of the common law, we must then reflect a little on the meaning of common law.
- [80] In a commentary he wrote in March 1956 on the social mores that fostered slavery and segregation in America, E B White, the legendary American writer (and co-author of the famous *Strunk and White on The Elements of Style*) made the following observation on the incidence of ‘common sense’:

I note that one of the arguments in the recent manifesto of Southern Congressmen in support of the doctrine of “separate but equal” was that it had been founded on “common sense.” The sense that is common to one generation is uncommon to the next. Probably the first slave ship, with Negroes lying in chains on its decks, seemed commonsensical to the owners who operated it and to the planters who patronized it. But such a vessel would not be in the realm of common sense today. The only sense that is common, in the long run, is the sense of change⁶⁰

- [81] E B White’s observation on ‘common sense’ is relevant to the development of the common law. It may be recalled that a popular understanding of common law in the

⁶⁰ Elwyn Brooks White, *Essays of E. B. White* (Harper & Row Publishers 1977) 147–148.

legal system that globally shares its name is that it is the organic branch of the law that was articulated by judges, deriving from a people's way of life—that is to say their custom. The imprint of *common sense*, typically expressed in a people's way of life, is thus readily appreciated in the body of common law.

[82] In his famous monograph, aptly titled *Law in the Making*, C K Allen described '[c]ustom, as the raw material of law'⁶¹—the 'natural starting-point' for examination of sources of law.⁶² The phenomenon that custom informs law in its making is not limited to the so-called 'primitive societies,' Allen insisted. It is 'impossible,' he observed, 'to understand the true nature of modern law without some knowledge of its origins in social custom.'⁶³ He, of course, cited Bracton in support of the proposition that the 'roots' of law 'strike deep into the soil of national idea and institutions';⁶⁴ he cited Coke's description of custom as 'one of the main triangles of the laws of England';⁶⁵ and he cited Blackstone's famous description of 'the Common Law of England' as rooted in English customs (national, regional and parochial).⁶⁶

[83] Lord Atkin's famous rendition of the 'neighbour principle' in *Donoghue v Stevenson*,⁶⁷ which is the lynchpin of the law of negligence in common law of torts, is a prime exemplar of that phenomenon. The law that regulates the employment relationship is eminently accounted for in that body of law we call the 'common law' that originated in England. And counsel for Massy Stores urges us to retain versions of principles formulated as part of that body of law in an era when it was entirely acceptable to describe an employment relationship as a 'master and servant' relationship, unmodulated by the modernising influences of our own era.

[84] It is beyond the scope of the present opinion to engage at length with the profound question whether the way of life that fostered the common law that judges

⁶¹ Carleton Kemp Allen, *Law in the Making* (7th edn, Clarendon Press 1964) 65.

⁶² *ibid.*

⁶³ *ibid* 71.

⁶⁴ *ibid.*

⁶⁵ *ibid* 72.

⁶⁶ *ibid.*

⁶⁷ *Donoghue v Stevenson* [1932] AC 562.

articulated in England in that distant era was ever (at its origins) truly representative of the way of life for the average Caribbean society—taking into account the entire demographics of that society at the time—let alone the resulting law that continues to represent that Caribbean society in our own times.

[85] But it is very much a directive question in the case at bar whether the common sense of our own era retains the social relevance of a ‘common law’ principle formulated in England during the 19th and earlier centuries. This Court has in reasoned opinions answered that question in the negative in a series of cases—notably in *McEwan v Attorney General of Guyana*,⁶⁸ and *Nervais v R*.⁶⁹ That question, however, is not unique to the Caribbean society. It is a question that modern British judges constantly ask themselves from generation to generation.

[86] The Judicial Committee of the Privy Council was urged in 1929 to affirm the judgment of the Canadian Supreme Court (then an intermediate appellate court), which held (on the basis of customary preclusion of women at the time from high offices in society) that women were not ‘persons’ qualified to hold office as senators in Canada. In declining that urge, Lord Sankey LC observed:

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms.⁷⁰

[87] More recently, in 1997, the UK House of Lords was urged to follow ‘a case of the highest authority’ that was decided in 1840. In the circumstances of that case, Lord Steyn declined. ‘A century and a half later,’ he said, ‘it is sometimes necessary to consider the force of reasoning in decided cases.’⁷¹ In agreeing with that attitude in *BNS v Comptroller of Inland Revenue* (Saint Lucia), it was observed that ‘it is not always necessary to wait that long. Half that time is amply long for outlooks and

⁶⁸ *McEwan* (n 32).

⁶⁹ *Nervais* (n 33).

⁷⁰ *Edwards v A-G of Canada* [1930] AC 124 at 128.

⁷¹ See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at 371e.

attitudes to change in our fast-paced world.’⁷² So, too, must it be in the area of employment law in Barbados, as it had been in England and Wales.

[88] In the arguments of the Appellant’s counsel, high profile is given to the legal theory that summary dismissal of an employee on grounds of disobedience of the employer’s instructions or policies is a matter of repudiatory breach of contract. Perhaps, counsel had underappreciated the irony that that legal theory is itself emblematic of the evolving character of the common law. For, it is a rational legal construct introduced by English judges as part of their development and reform of the common law. Nothing about the idea was innate to the common law. Professor J C Wood observed as much in a 1959 commentary titled ‘The Disobedient Servant’:

It was not until later in the [19th] century that the idea of breach of contract or repudiation of contract by the servant came to be regarded as the basis of this type of case. ... By the time the rules as to wrongful dismissal came to be reviewed by McCardie J. in *Re Rubel Bronze Metal Co. v. Vos* [[1918] 1 KB 315] the idea of breach of contract was established as a firm basis of the rules. Both McCardie J. in that case and Lord Evershed M.R. in [*Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; [1959] 2 All ER 285] looked back on the older cases and interpreted them as based on acts breaking the contract of service. There is little doubt that this is justifiable rationalisation although it is *equally clear that the earlier judges were thinking in terms of status rather than contract*. Phrases such as “the question really comes to this, whether the master or servant is to have the superior authority” [*Spain v Arnott* (1817) 2 Stark 256, 171 ER 638 at 639 (Lord Ellenborough)] and “wilful disobedience of any lawful order [of the master] is a good cause of discharge,” [*Turner v Mason* (1845) 14 M & W 112, 153 ER 411 at 413 (Parke B)] as well as the exceptions allowed as a defence to the servant: danger to life or person and exposure to infectious disease, underline this point. ...

The [*Laws*] decision itself, in which a servant wilfully disobeyed what was clearly a lawful and superior command, is *contrary to the earliest cases but it reflects the modern approach* to the relationship of master and servant. The bridge between the old and the new approach has been the need for “wilful” disobedience. *The former inquiry whether the authority of the*

⁷² *Bank of Nova Scotia v Comptroller of Inland Revenue* (2025) CCJ [2025] CCJ 13 (AJ) LC at [101].

*master had suffered has changed to the present test whether the act indicates a fundamental breach of the contract of service.*⁷³

- [89] It has similarly been observed that '[r]epudiation is a more modern concept' in employment law, 'originally propounded by Bowen L.J., in *Boston Deep Sea Fishing [and Ice] Co v. Ansell* [(1888) 39 ChD 339 at 365].'⁷⁴
- [90] This all goes, in any event, to show the extent to which employment law had always been progressively fashioned and shaped by judges in their own time. There is no rational basis on which Barbadian judges must be precluded from continuing that process of evolution according to the social sensibilities of their own times and place, in preference, as the Appellant's counsel unabashedly urges, for a historical snapshot of the principles laid down long ago by judges in England who did what they thought appropriate to adjust the law to the needs of their own times and society.

'Humanising Patina'

- [91] A people's ways of life are not always directed by autochthonous impulses. Means of communication and exchange of information in the modern world have significantly increased the stimuli for cross-pollination of customs across borders. Foods, dress codes, arts, games and sundry pastimes, and so on, are regularly adopted in places far away from their places of origin. Ideas, too. Those ideas can be promoted by sensible judgments of the courts of other nations, as the Supreme Court of Canada did in *McKinley*.
- [92] Ideas stemming not only from other states but also from the multilateral ordering of the world—such as through the work of the United Nations, the International Labour Organization, etc—constantly influence national or local cultures. Standards of human rights and those of labour are prime examples of that phenomenon. Those sources of normative stimuli were absent at earlier times when

⁷³ Wood (n 53) 526–527 (emphasis added).

⁷⁴ Grime (n 59) 576.

principles of much of what is thought of as the ‘common law’ were formulated. To be clear, the consideration here is not of the usual discussions amongst international law experts regarding ratification of treaties or the dichotomy between dualism⁷⁵ and monism,⁷⁶ as concerns how international law norms and principles are received within the national order. It is rather that social attitudes in the form of customary practices can indeed be shaped by influences from outside national borders (including ideas and trends from international organisations) even when the national legislature has not formally adopted legislation to domesticate the legal norms expressed in a particular treaty.

- [93] Counsel for the Appellant notably decried the tendency of the Barbadian Court of Appeal to recognise ‘humanising patina’ as a modulating phenomenon in wrongful dismissal cases. In context, the expression can import one of two things. It can import the recognition of the wear and tear and imperfections of life that can form a palpable layer on the very essence of humanity. It is impossible for human beings to live life in a sterile bubble that is completely free of such imperfections. They also mark the employment relationship, such that not every infraction that occurs in the relationship must be accepted as repudiatory of the employment contract. Any infraction must thus be examined in the entire context of the circumstances, to see if it reasonably or fairly warrants the termination of an employment contract. I see nothing wrong with this view. In a 1930s judgment of the Privy Council, Lord Maugham observed that the Chief Justice of the High Court of Bombay ‘was stating a proposition of mere good sense,’ when on the subject of dismissal of an employee for an outbreak of bad temper accompanied by regrettable language, the Chief Justice had observed that ‘*one must apply the standards of men, and not those of angels*, and remember that men are apt to show temper when reprimanded.’⁷⁷

⁷⁵ Dualism is the attitude which tends to reject the application of international treaties within the domestic order if the national legislature has not specifically enacted that treaty as part of national law.

⁷⁶ Monism is the attitude which tends to accept that once a treaty has been adopted at the international stage, such a treaty becomes applicable within the domestic legal order of the states that are parties to that treaty, with no further requirement of the national legislature to enact the treaty into national law.

⁷⁷ See *Jupiter General Insurance Co Ltd v Ardeshir Bomanji Schroff* [1937] 3 All ER 67 at 74 (emphasis added).

[94] In another sense, ‘humanising patina’ can entail what may otherwise be described as elementary considerations of humanity that must matter to a better sense of justice. That is clearly the sense in which Barbadian appellate judges have employed the term. As Cumberbatch JA put it in *Bourne v Almond Resorts Ltd*:

Given the undeniably harsh consequences of [summary] dismissal, the law has at times sought to bring a more humanizing patina to bear on the process.⁷⁸

[95] Those considerations of humanity are no less pressing when justice must be done on the footing of common law, as on that of statutory law. The sentiment is reminiscent of Lord Wilberforce’s famous rejection of ‘the austerity of tabulated legalism’ in the interpretation of constitutional bills of rights.⁷⁹

[96] Those considerations of humanity that infuse the domain of work now enjoy clear recognition in international law and policy, as is evident in relevant international instruments. Those instruments include the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which recognise *the right to work*,⁸⁰ as well as the Convention No 158 of International Labour Organization (ILO) and ILO Recommendation No 166, both of which recognise the *duty of fairness* upon an employer in circumstances of employee termination.⁸¹ [Indeed, that the Appellant itself had adopted practices in the terms of some of the norms outlined in ILO

⁷⁸ *Bourne* (n 9) at [15].

⁷⁹ See *Fisher v Minister for Home Affairs* [1980] AC 319 at 328.

⁸⁰ For present purposes, it suffices to note that art 23(1) of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), recognises for everyone not only ‘the right to work’, but also the right to ‘just and favourable conditions of work and to protection against unemployment.’ Similarly, the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, guarantees everyone the ‘right to work’ (art 6(1)) and the ‘right to ... just and favourable conditions of work’ (art 7).

⁸¹ Amongst other things, the International Labour Organisation (ILO) Convention (No 158) Concerning Termination of Employment at the Initiative of the Employer (adopted 22 June 1982, entered into force 23 November 1985) 1412 UNTS 160, art 4 requires that ‘[t]he employment of a worker shall not be terminated unless there is a *valid reason* for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’ (emphasis added). Article 9(1) of the Convention further empowers courts of law and other recognised umpires ‘to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.’ Undoubtedly, judicial inquiries into the validity of reasons for termination of employment will be informed by the ILO Recommendation 166, which says, amongst other things, that the ‘employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination *only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning*’ (para 7, emphasis added); and that the ‘employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions *and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed*’. (para 8, emphasis added).

Recommendation No 166 goes to show how the norms of reasonableness and fairness have become part of the culture of the Appellant's workplace.]⁸²

[97] According to the United Nations Committee on Economic, Social and Cultural Rights:

The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.⁸³

[98] In a further commentary, the UN Committee on Economic, Social and Cultural Rights recognised that the right to work, as guaranteed in the ICESCR includes 'the right not to be deprived of work unfairly.'⁸⁴

Legislative Changes to Employment Law

[99] In mid-2012, the Parliament of Barbados enacted the Employment Rights Act, implementing the norms of reasonableness and fairness in the termination of employment. Section 27 of the Act provides that an employee who has been continuously employed for a period of not less than one year 'has the right not to be unfairly dismissed by his employer.' And according to s 29, in any inquiry into the fairness or unfairness of a dismissal, the employer must bear the obligation to

⁸² In this regard, the Appellant's Employee Handbook provides for a progressive scheme of disciplinary action, centred around provision of written warnings before termination:

Discipline & Disciplinary Action

Improper conduct and consistent and persistent poor performance will result in disciplinary action up to and including termination. *In confronting the issue, management will give the guilty party a verbal warning. If the problem recurs, the employee will be given a written warning, a copy of which will be placed on their employee file. Depending on the circumstances, failure to improve will result in the issue of a second written warning. If after verbal and written warnings the problem persists, the employee's services will be terminated. For the most serious offences, management may dismiss the employee for the first occurrence.*

Suspension without pay as a disciplinary measure can only be invoked in companies where it is contractually possible. In cases where suspension without pay is not contractually possible, a *final*, strongly worded warning will be issued.' See Record of Appeal, 'BS&T Employee's Handbook' 1052 (emphasis added).

⁸³ See UN Economic and Social Council (UNESCO) 'The Right to Work: General Comment No 18 under Article 6 of the International Covenant on Economic, Social and Cultural Rights' (6 February 2006) UN Doc E/C12/GC/18, para 1.

⁸⁴ *ibid* para 4.

show (a) the principal reason for the dismissal, and (b) that the reason falls within a list of reasons set out in sub-s 2, which includes the conduct of the employee.

[100] But s 29 does not stop there. It provides further in sub-s 4 that where the employer has fulfilled the requirements indicated above, the question whether the dismissal was fair or unfair, in light of the reason shown by the employer, shall depend on (a) whether the employer acted reasonably or unreasonably in treating that reason as compelling the dismissal of the employee; and (b) whether the employer complied with the following rules set out in Pt A of the Fourth Sch to the Act:

- (a) disciplinary action must be applied progressively in relation to a breach of discipline;
- (b) except in the case of gross misconduct, an employee should not be dismissed for his first breach of discipline;
- (c) in relation to breaches of discipline not amounting to gross misconduct
 - (i) an employee should be warned and given a reasonable opportunity to make correction; and
 - (ii) oral or written warnings or both should be utilised before stronger forms of disciplinary action are implemented; and
- (d) where a period of 12 months or more elapses after a written warning is given, any breach of discipline committed before the commencement of that period shall be treated as expunged from the record of the employee.

[101] The Employment Rights Act was proclaimed into operation on 15 April 2013.⁸⁵ Hence, purely by that accident of timing, Mr Forde's fortunes fell outside the protection of the Employment Rights Act, although his employment was terminated on 21 December 2012, approximately half a year after the adoption of the Employment Rights Act.

⁸⁵ See Proclamation: Employment Rights Act 2012, SI 2013/56.

[102] Notwithstanding the developments in the Barbadian employment law so ushered in by the Employment Rights Act, a hermeneutic seal must be maintained, Appellant's counsel seems to argue, between the common law and norms of reasonableness and fairness derived from statute. As he put it, 'the issue is one for Parliament—not judge-made law.'⁸⁶

[103] I am not persuaded. The submission surprisingly suggests an underappreciation of the processes of law reform of the common law. That is more so, when the legislature has even made that alteration to the law, but counsel urges judges to preclude such legislative influences from the adjudication of cases considered as based on the 'common law'. To begin with, the attitude infelicitously presumes fossilisation of common law principles in the outlook of judges (as indicated earlier), stiffening them against further evolution to keep them abreast of the evolving needs of the contemporary society.⁸⁷ The presumption is even more acute not only in its oblivescence of the legislature as part of society but also that the legislature in their work might not inspire the creation of new mores that might influence judges in their own work in relation to the common law.

[104] There is nothing unusual about judges continuing to develop the common law, even in ways that align it to legislation. In *R v Jogee*,⁸⁸ a recent example, the UK Supreme Court revised a principle of common law on the mental element for secondary participation in crimes. In doing so, the Court noted that the revision was also consistent with the provision made by Parliament in a closely related field, when it created (by the Serious Crime Act 2007) new offences of intentionally encouraging or assisting the commission of a crime, and provided that a person is not to be taken to have had that intention merely because of foreseeability. Notably, in *Jogee*, it had been similarly argued that it was not for judges to revise the law as it did; that it

⁸⁶ See *Massy Stores Barbados Ltd*, 'Submissions on behalf of the Appellant', Submission in *Massy Stores Barbados Ltd v Forde*, BB Civil Magisterial Appeal No 0016 of 2021, 1 May 2025, 740, at [31].

⁸⁷ See Roscoe Pound, 'Common Law and Legislation' (1907–1908) 21 *Harv L Rev* 383, 384.

⁸⁸ *R v Jogee* [2016] UKSC 8, (2016) 87 WIR 439.

was for Parliament to do so, given that the principle of law which the Supreme Court had been called upon to revise had been in force for so long.⁸⁹

[105] Just as the work of the judiciary can inspire the work of other branches of government—especially so in relation to legislation that is often the codification of principles of common law—there is nothing in principle that stands against the work of the judiciary being inspired by sensible ideas derived from the work of the other branches of government, as long as such inspirations are solidly in keeping with both the ethos of judicial independence and appropriate respect for the other branches. Notably, in his classic work on the *History of the Common Law*, Sir Matthew Hale noted the influence of legislation on the development of common law:

And doubtless, many of those Things that now obtain as Common Law, had their Original by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; though those Acts are now either not extant, or if extant, were made before Time of Memory; and the Evidence of the Truth hereof will easily appear, for that in many of those old Acts of Parliament that were made before Time of Memory, and are yet extant, we may find many of those Laws enacted which now obtain merely as Common Law, or the General Custom of the Realm: And were the rest of those Laws extant, probably the Footsteps of the Original Institution of many more Laws that now obtain merely as Common Law, or Customary Laws, by immemorial Usage, would appear to have been at first Statute Laws, or Acts of Parliament.⁹⁰

[106] In the same vein, Roscoe Pound argued at a time nearer our own that normative acceptations of legitimacy in sources of law should encourage courts to integrate legislative impulses into the development of the common law in one of two ways: (i) by receiving legislation ‘fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them’; or (ii) by receiving legislation ‘fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of

⁸⁹ See *ibid* at [3].

⁹⁰ Hale *Hist CL* (1713) 3–4.

equal or co-ordinate authority in this respect with judge-made rules upon the same general subject.’⁹¹ Such an approach is more appropriate because ‘[w]e recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will.’⁹² These ideas are entirely consistent with the phenomenon captured in Hale’s historiography of the common law, to the effect that legislation can inspire the development of the common law. There is, therefore, no reason that the principles prescribed in the Employment Rights Act of Barbados must be precluded from influencing the cognate development of the common law.

Conclusion

[107] I do not therefore accept the submissions made on behalf of the Appellant that considerations of reasonableness and fairness are beyond the proper scope of common law adjudication as to the correctness of an employer’s dismissal of an employee. I accept as entirely sound the jurisprudence of the Court of Appeal of Barbados to the effect that those considerations must be allowed in to import a ‘humanising patina’ to the transaction. The Barbadian appellate case law in that regard is perfectly typical of the process of evolution of the common law.

[108] For the foregoing reasons, I concur with Justice Rajnauth-Lee’s dismissal of the appeal, and her reasons for doing so.

BARROW J:

Introduction

[109] The principal issue that arises for determination on this appeal against the magistrate’s decision that Mr Merton Forde (‘the employee’) was wrongfully

⁹¹ Pound (n 87) 385.

⁹² *ibid* 406.

dismissed by his employer, Massy Stores (Barbados) Ltd on 21 December 2012 is as to degree. Misconduct in wrongfully taking the employer's property was established, but the issue remains whether this presented just cause for summary dismissal.

[110] The Court of Appeal upheld, by a majority, the determination by the magistrate that there was wrongful dismissal based upon the contextual and humanising considerations stated by the magistrate. Essentially, these were that the goods taken were 'dumped' goods with no monetary value. That there was no prior act of this nature, and indeed the employee was of good reputation. And that it was a single act of misconduct.

Basic Facts

[111] The following are the core facts that framed the decision of the employer after it had conducted a hearing and was called upon to decide the fate of the employee.

- (a) The employee wrongfully took and carried away through the back door of the employer's business premises, without permission, the employer's property.
- (b) This was in violation of the very rule the employee, as Back Door Supervisor, was entrusted to enforce.
- (c) The employee engaged another subordinate employee to take out the property and put it in the employee's car.
- (d) When confronted, the employee denied the wrongful taking and falsely claimed to have a receipt evidencing that he had purchased the goods but failed to produce one.
- (e) The employee was visually recorded committing the violation.

- (f) The employee never admitted his wrongdoing, apologised, nor expressed contrition.
- (g) The employee never claimed it was an innocent taking nor that it was a trivial lapse of judgment or that he thought it was permitted or implicitly approved.
- (h) The property was repeatedly described as dumped goods, of no capital value etc but, as the magistrate stated, there was no evidence of what the employee took.

The Employee

[112] The employee was employed in the supermarket operation of the employer, begun by its predecessor, since 1977 and dismissed without notice (or summarily) after 25 years' service. The employee was employed at the time as the Back Door Supervisor. He was dismissed because, in breach of the company's policy governing the removal of goods from its premises, he directed a co-worker to remove an item from the premises and place it in his, the employee's car trunk.

[113] There are no notes of evidence before this Court of the proceedings before the magistrate in *Plaint No 420 of 2013*,⁹³ and the information on which the Court relies, is as gathered from the magistrate's written decision⁹⁴ and the summary of the facts provided in the majority decision of the Court of Appeal. It is for this reason that I am unable to say on what basis the magistrate, in an introductory paragraph, identified the property taken as 'damage[d] or condemned rice' and then immediately stated 'Of note no one ever certified including the Defendant's investigating officer what was actually taken given the video footage.'⁹⁵ The matter is of some significance because, as will appear, the magistrate based his

⁹³ Record of Appeal, 'Decision of Magistrate Wayne Clarke' 576 (Commenced 20 March 2013).

⁹⁴ *ibid* (Delivered 1 December 2021).

⁹⁵ *ibid* 577, at [4].

determination as to the justness of termination to an appreciable extent on the lack of value of the property taken.

The Misconduct

[114] As summarised from the judgment of the Court of Appeal, at [40] to [48], in the evidence given before the magistrate⁹⁶ the employee admitted that he was aware of the employer's policies and procedures and that he himself had posted them on the back door. He admitted that one of the policies was for employees to leave through the front door, so as to prevent theft and maintain stock control. He said that he did not always comply with the policy and asserted that he had 'psychological ownership' of some of the goods in the storeroom, although they legally belonged to the employer.

[115] Even though he conceded that the policies relating to non-removal of stock applied also to damaged stock of the employer, the employee admitted that he did not follow this policy and took goods 'when he exercised his judgment.'

[116] The employee admitted that he gave the junior employee some damaged rice to place in a flour bag in December 2012 and instructed that junior to take the bag to his, the employee's, car.

[117] Some members of the management team also gave evidence, establishing that the employee had on previous occasions been in breach of the established procedures and had been warned of his behaviour. The evidence from management also revealed that there was a prominent sign reading:

Please DO NOT REMOVE items from this area. Any person caught removing items from this table without authorization will face disciplinary action -- by order of management.⁹⁷

⁹⁶ It is important to remember this evidence was not given at the disciplinary hearing conducted by the employer on 18 December 2012.

⁹⁷ *Massy Stores* (n 5) at [45].

[118] In the view of management, the employee had committed a breach of company policy by removing damaged stock belonging to the employer for his own purposes. These management employees also testified that there was a subsequent disciplinary meeting with the employee where, even after having been shown video footage of the act, he denied having taken anything from the storeroom or having instructed anyone to do so.

[119] The Court of Appeal quoted the words of the magistrate from [21] of his written decision regarding the employee's response to this material:

‘They established that Mr. Forde was telling untruths and that Massy would dismiss him for cause given his previous conduct.’

[120] In a judgment that earned just criticism for more than its lack of intelligibility, the magistrate went on to hold that the employer's summary dismissal of the employee had been disproportionate and thus wrongful.

The Dismissal

[121] The date of the occurrence does not appear but the Court of Appeal records that ‘as part of its investigation of the incident’⁹⁸ the employer held a meeting with the employee on 18 December 2012, where he was questioned as to the procedure relating to damaged goods. The court records the employee claimed he gave a reasonable answer to this questioning. It is also recorded that he asserted he had receipts for the goods in question that were removed from the premises of the store. At the end of that meeting, the employee was suspended.

[122] A second meeting was held on 21 December 2012, at which the employment was terminated. The court records that the meeting had been continued by the employer

⁹⁸ *ibid* at [37].

despite the protested absence of counsel for the employee. The employer delivered a letter of termination to the employee in the following terms:

Dear Mr. Forde:

We refer to our recent meetings and discussions regarding the most recent incident concerning the performance of your duties.

This incident occurred despite verbal warnings regarding, inter alia:-

- (3) Substandard work performance; and
- (4) Failure to comply with and enforce the company's rules, regulations, policies and procedures.

In relation to the most recent incident referred to above, the company investigated the matter and as a result has lost all confidence in your ability to effectively perform your duties, properly supervise the company's employees and to protect the company's assets.

In view of the above, this letter informs you that with immediate effect your contract of employment is terminated.

Yours faithfully,
SUPER CENTRE LTD

The Court of Appeal Decision

[123] The Court of Appeal began its discussion of the issues⁹⁹ by stating that the issue of whether a summary dismissal is lawful or wrongful is essentially a mixed question of law and fact. It regarded its task as merely scrutinising that the court below applied the correct principles of law to a judicious evaluation of the facts and thought that the magistrate got the legal principles right.

[124] The court identified the 'contextual approach' adopted by the magistrate as contemplating a scenario whereby an employee's misconduct, though it merits

⁹⁹ *ibid* at [75].

dismissal, owing to the presence of other relevant considerations, may not justify a summary dismissal.

[125] In *Bourne v Almond Resorts Ltd*¹⁰⁰ the court had described as the ‘humanizing patina’ that approach, which appeared to be consistent with Barbadian dismissal law. It cited the decision in *Alleyne v Marriotts (Barbados) Ltd*¹⁰¹ where the court opined that it was unable to see that the under-performance of four employees warranted immediate dismissal particularly when regard was had to their long service and the previous unblemished record of the appellants who had given service of 30, 15, 13 and 19 years respectively.

[126] In *Bico Ltd v Jones*¹⁰² the employee had been dismissed summarily for having committed repeated acts of voyeurism against his fellow female employees, who had been forced to use makeshift changing facilities at the workplace. In that case, the court upheld the magistrate’s decision that although the employee’s conduct ‘merited firm discipline, summary dismissal was too harsh a punishment and too strong a measure to be used.’ The court noted that in reaching her conclusion the magistrate made reference to the employee’s years of loyalty and service and his unblemished record.

[127] In *Ramsay v St James Beach Hotels Services Ltd*¹⁰³ the Appellant had been summarily dismissed for making a vulgar threat to her supervisor. In the Court of Appeal Simmons CJ stated:

[I]t is our judgment that such misconduct was certainly worthy of the [harsh]est] censure. But we do not accept that it justified summary dismissal. If dismissal was necessary, then reasonable notice or payment in lieu thereof should have been given.

¹⁰⁰ *Bourne* (n 9).

¹⁰¹ BB 1998 CA 7 (CARILAW), (13 May 1998).

¹⁰² *Bico* (n 19).

¹⁰³ *Ramsay* (n 4) at [46].

[128] In the instant appeal, the Court of Appeal also referred to *Jupiter General Insurance Co Ltd v Shroff*¹⁰⁴ where Lord Maugham [sic] stated ‘the immediate dismissal of an employee is a strong measure’¹⁰⁵ and ‘the test to be applied [in finding whether the misconduct of an employee justifies immediate dismissal varies] with the business and the position held by the employee.’¹⁰⁶ The court also cited *Chang v National Housing Trust*¹⁰⁷ from Jamaica and *Alkins v B&B Distribution Ltd*,¹⁰⁸ *Mapp v Lee*¹⁰⁹ and *Jordan v Sol Barbados Ltd*.¹¹⁰

[129] The Court of Appeal went on at [82] to state:

It is clear to us that the learned magistrate employed this ‘contextual approach’ in this case, having correctly delineated the law. Whether the circumstances sufficed to warrant a summary dismissal remains essentially a question of fact for the tribunal below; see *Clouston & Co Ltd v Corry* [1906] AC 122 per Lord James at p. 129.¹¹¹

[130] The Court of Appeal concluded its statement of the approach it would take by recognising that its limited role as a court of review compelled it to pay deference to the treatment of the facts by the magistrate, unless he appeared to have been patently or wholly wrong in this evaluation and cited Burgess JA in *Brathwaite v Atkins*.¹¹² The factors that the court identified at [84] – [93] that appeared to it, from a perusal of the written judgment, to have significantly influenced the magistrate’s determination that summary dismissal was not warranted in this context were:

- (i) the nature and minimal value of the goods taken
- (ii) the long unblemished service of the employee
- (iii) a single act of indiscretion,
- (iv) condonation, and

¹⁰⁴ *Jupiter General Insurance* (n 77).

¹⁰⁵ *ibid* at 73.

¹⁰⁶ *ibid* at 74.

¹⁰⁷ (1991) 28 JLR 495.

¹⁰⁸ *Alkins* (n 27).

¹⁰⁹ BB 2020 CA 8 (CARILAW), (4 December 2020).

¹¹⁰ (12 August 2021).

¹¹¹ *Massy Stores* (n 5).

¹¹² BB 2019 CA 6 (CARILAW), (27 February 2019).

(v) inadequate investigation

[131] After discussing the five factors, the court found that four of them were properly relied on by the magistrate. On that basis, it concluded that the magistrate was correct in finding that summary dismissal was not justified in law and in fact. It is proposed to follow the approach, in determining this appeal, of reviewing these five factors that the Court of Appeal considered, but before doing so an overarching governing question of law must be addressed.

Who Decides

[132] No clear statement appears that indicates either the magistrate or the Court of Appeal appreciated or proceeded upon the legal premise that the remit of the court in a wrongful dismissal claim is to consider the justness or reasonableness of the employer's decision, at the time the decision needed to be made. And that it is not for the court to decide whether it would have dismissed. And, it is vital in this regard, that the court pays strict attention to the principle that it must not decide the issue of whether the employer should have dismissed based upon evidence, information and argument subsequently provided to the magistrate but not provided to the employer, when full opportunity was given by the employer to provide same.

[133] The proposition as to who is to decide was inchoate in the treatment by the Court of Appeal of the magistrate's decision that the investigation conducted by the employer was insufficient. At [92], the court reproduced (without purporting to divine its full meaning) the magistrate's requirements stated at [48] to [50] of his decision of what comprises an adequate investigation:

48. Any investigation conducted in furtherance of dismissal must be conducted in a professional and intrusive manner. Where is the paper trial (sic) apparent to the investigation pursuant to December 18, 2012? Is there conformity with the dictum of Mason JA in the Lovell v. Rayside hearing? Allegation, Statements, correspondence, reports, disclosure, provision to be

accompany (sic) by a friend, Trade Unionist, Attorney-at-law of choice, right to cross-examine and to call witnesses.

49. Recalling that the Plaintiff was not dismissed immediately by the Defendant as of December 18, 2012, given the specific reasoning of the dismissal letter it could have ... ensured that any error (as canvassed by the Plaintiff) was not an affront to the mechanism of truth. Thus no denial of the access to justice.

Was the Plaintiff procedurally the subject of reconciliation?
Yes.

50. While upholding the law, the spirit of the rules and policies the resultant outcome did not have to be diametrically futile given the Plaintiff's unblemished record. How accordingly could the Defendant have conclusively determined lawful dismissal as of December 21, 2012?

[134] The magistrate did not answer or discuss the question with which that extract ends. To his credit, perhaps, the question at least suggests the magistrate may have adverted to the correct point in time at which the lawfulness of the decision to dismiss should be examined. If so, that flicker did not become candescent. For its part, the Court of Appeal took the discussion no further and concluded that the magistrate could legitimately have added the inadequacy of the investigation to the other factors that militated against a summary dismissal.

[135] Interestingly, the Court of Appeal had discussed at [90] the matter of a fair hearing and had offered the observation that in *C O Williams Ltd v Dash*,¹¹³ Williams JA recited Williams CJ in *Alleyne*¹¹⁴ that:

At common law where the relationship between the parties is governed by a contract of employment, the employer is under no legal duty to provide a fair hearing to an employee before terminating the employment contract. However, an employer who fails to conduct an adequate investigation into an allegation of misconduct against an employee may run the risk of not being able to prove that there was just cause for dismissal.¹¹⁵

¹¹³ BB 2010 CA 4 (CARILAW), (15 April 2010).

¹¹⁴ *Alleyne* (n 101).

¹¹⁵ *Massy Stores* (n 5).

[136] The last sentence points to the heart of the matter – the need for an investigation is to ensure the employer takes action upon the basis of the available evidence. The employer must ensure it obtains available evidence of the facts that may operate in explanation, exculpation, and attenuation, and further, in mitigation if misconduct is made out. It is the obligation of the employer to make a decision that is just, and justice requires the preceding factors to be considered. But, implicit in the requirement is the premise that the determination of the justice or wrongfulness of the employer’s decision must – and can only – be reached by reference to the facts available at the time of decision. The application of this principle must now be reviewed against the factors that the Court of Appeal accepted as the proper bases of the magistrate’s decision.

The Nature and Minimal Value of the Goods Taken

[137] The Court of Appeal gave no consideration to this factor. It appears likely that on the basis, as stated above (at [24]), that an appellate court must pay deference to the treatment of facts by the trial court, in this appeal there was no broad consideration of the evidence of what was involved in the wrongful taking. Literally all that the court did (at [84]) was to reproduce three extracts from the magistrate as to the nature and value of the object. It quoted from the magistrate’s decision at [26]:

Can one objectively conclude that the Plaintiff’s action in taking *condemned goods* was so grossly immoral that he could not be trusted? How does that compare with the taking of saleable goods? (emphasis in the original)

[138] Next, it quoted [29] from the magistrate, which begged to be paraphrased for the sake of intelligibility:

Can one on a balance of probability conclude that historically exceedingly buttressed by empirical written evidence and placed on his personal file or the same being reduced to writing and forming part of a written report of his performance appraisal evidence that the Plaintiff is guilty objectively of serious misconduct, habitual neglect of duty, stark incompetence or engaged in conduct given the condemnation (sic) that his conduct was at the material

time incompatible with his duties as Back Door Supervisor or prejudicial to the Defendant's business in a matter of substance. While not belittling the principle *the goods was (sic) classified as waste fit solely to be dumped*. (emphasis in the original).

[139] Finally, at [31] of the magistrate's treatment was reproduced, where he asked, '[w]hether the Plaintiff's unauthorized single taking of *a condemned item having no resale* (value?) justified dismissal...' (emphasis in the original).

[140] A close review of the evidence and findings raises concerns that the weight given to the nature and value of the property was unjustified. Indeed, this factor was a misleading consideration because the question before the magistrate was the reasonableness of the employer's decision. As quoted above, at [113], the magistrate declared that 'no one ever certified ... what was actually taken...' The magistrate's willingness to accept the employee's statement as to value and nature and to proceed on that footing is not a decision with which there is need to interfere on this appeal, even though the magistrate's own observation shows it to be dubious. The magistrate's acceptance of the purported value and nature of the asported object cannot detract from the principle that the exercise the magistrate was required to perform was to determine the reasonableness or justness of the employer's decision, at the material time, to summarily dismiss. See *Pearce v Foster*.¹¹⁶

[141] The magistrate was, therefore, legally bound to determine what the employer knew and what it should have known. The meeting with the employee, on 18 December 2012, was the perfect occasion for the employee to declare, and prove by producing the object itself, the nature and minimal value of the object he had taken. Instead, as will be discussed below, the employee denied the taking and, therefore, denied himself the opportunity to explain or to pray in mitigation the later-asserted nominal value of the object.

¹¹⁶ (1886) 17 QBD 536.

[142] Regarding the duty of the magistrate to determine the reasonableness of the employer's decision to dismiss, it logically follows that the magistrate was not permitted to rely on assertions of fact and explanations given to him in court by the employee, such as the value and nature of the object. The magistrate was bound to consider what the employer knew at the time. He was bound to consider that the employer did not know and could not consider, at the time, what the magistrate was later told by the employee. The repetition is justified that the magistrate, himself, in his written decision declared that there was no evidence of what the employee took.

[143] In short, the magistrate erred in law in deciding the issue of justification or reasonableness of the dismissal by relying on the factor of the value and nature of the object. This is because, at the time of dismissal, the employee deliberately withheld that information so it was not a factor which the employer could have considered. It is definitive that at the material time, this purported factor was not a consideration available to the employer.

The Value of the Employer's Policy

[144] Beyond that, however, is the unconsidered or little-regarded factor that the action under consideration was a violation of a policy that treated unauthorised and back door removal of the employer's property as stealing – even if not so called. Even if the object removed was purportedly valueless, it was not for the magistrate to decide that the employer's policy had lesser force and its violation was of lesser import, as shown by the decision in *Aspinall v Mid-West Collieries Ltd.*¹¹⁷

[145] A wrongful taking remains wrongful regardless of the value or nature of the object taken. The misappropriation in the instant case is graver because the element of trust is of greater importance in an organisation with multiple employees, where example and copied behaviour are material considerations. Adherence to the policy

¹¹⁷ [1926] 3 DLR 362.

against secret taking and back door removal was demonstrated, by the posted signs, to be fundamental to the employer's operation and business efficacy.

- [146] Therefore, rather than focusing on the purported value of the object taken, the magistrate and Court of Appeal should have looked at the value to the employer, as a store owner, of the policy that was violated. As a matter of common knowledge and common sense, one would think that a store owner who fails to engage personnel or establish a system to prevent its property 'walking off' the premises must be a fool. In a limited sense the magistrate may have been correct: if the removed item was truly valueless, its loss may have been of little moment. What would have to be of great importance, to any reasonable store owner would be the value of adherence to the policy.

Theft?

- [147] No one has called the employee's action theft and any number of reasons for this can be imagined. I do not propose to depart from that protocol of kindness. It is enough that the courts below have decided that the employee was guilty of misconduct and could properly have been terminated, but upon reasonable notice: see Simmons CJ in *Ramsay*. The reason for mentioning theft at this juncture is to recognise the gravity of the employee's action. The inescapable and troubling shade of theft is demonstrated by the close and lengthy consideration the magistrate gave to theft.

- [148] It is a consideration highly pertinent to the reasonableness of the employer's decision to dismiss but it was not considered in the review by the Court of Appeal. It is revealing that the Court of Appeal allowed the employer's appeal against the magistrate's finding that the employer had condoned the employee's conduct. The magistrate dedicated several paragraphs to considering and finding that the wrongful taking could fairly have been regarded as stealing. It was the magistrate's finding of condonation that made him disapply the consequence that would

normally follow such a finding. That consequence was recognised by the magistrate in his treatment immediately preceding his discussion of condonation.

[149] Beginning at [129], the magistrate gave fulsome consideration to theft or stealing or dishonesty or violation of trust, as he variously called it. According to the magistrate, the misconduct of the employee had to be such that ‘it was reasonable for the employer to have lost confidence in the employee’. He accepted that attention must also be paid to the position of the employee in the company, meaning that for senior employees, honesty must not only be inherent, but patent *Federal Supply and Cold Storage Co of South Africa Ltd v Angehrn*.¹¹⁸ The fundamental question to be asked is, whether in all circumstances of the case, a reasonable man placed in the position in which the Defendant was as owner and employer, would conclude that the conduct of the Plaintiff’s taking, demonstrated a character so flawed as to be no longer worthy of trust by the Defendant.

[150] The magistrate also drew from the principles indicated in *Durand v Quaker Oats Co Canada Ltd*¹¹⁹ where Locke JA stated that there is an implied duty of faithfulness and honesty owed by the employee to the employer where breach of such has long been held to be cause for dismissal, given the lack of the confidence and trust which must exist between employee and employer. On the magistrate’s conclusion, the employee’s conduct was distinguishable from these principles. Therefore, the magistrate decided that the behaviour in this case was not incompatible with the relationship of trust and confidence which ought to exist between employer and employee.

[151] As indicated, it was the magistrate’s finding of condonation that made him decide that the consequence that should follow from the wrongful taking should be of a reduced severity. The materiality of this consideration is shown in the employer’s grounds of appeal that it was perverse for the Court of Appeal to uphold the magistrate’s overall decision, which rested upon the finding that there had been

¹¹⁸ (1910) 80 LJPC 1.

¹¹⁹ (1990) 32 CCEL 63 at 70.

condonation, in the face of the Court of Appeal's determination that condonation was irrelevant and unsubstantiated. It seems to me that proper weight must be given to that ground, which is more than mere argument because it was, indeed, the now-rejected finding of condonation that permitted the magistrate to decide that the turpitude of the employee's misconduct was somehow thereby reduced. Since there was no condonation, it follows that at the time of the disciplinary hearing, it was a factor that could not have stood in the way of the employer giving full weight to the gravity of the employee's misconduct when considering whether to summarily dismiss.

Single Act of Indiscretion

[152] In its review of the factors, the Court of Appeal simply reproduces¹²⁰ the magistrate's query:

Whether, having regard to the taking of condemned items, the same being subsumed under variance, the position and duties of the plaintiff as Back Door Receiving Supervisor, such instructions or taking his *amount as a single act amounted to (sic) a repudiation of the Plaintiff's contract, or of an essential term thereof, or evidence an intention to no longer be bound by his employment contract.* (all emphasis in original)

[153] It is surprising that the court failed to catch the manifest inaccuracy of the magistrate's finding that there was only a single act of indiscretion for the employer to consider. That finding was contradicted by the recitation of the facts by the Court of Appeal itself. Thus, as summarised at [114] to [119] above, the Court of Appeal recounted the acknowledgment of the employee that the employer's policy was intended to prevent theft and maintain stock control. The court recorded that the employee stated that he did not always comply with the policy and asserted 'psychological ownership' of some of the goods in the storeroom. The court recorded that the employee also conceded that the policies relating to non-removal of stock applied to damaged stock of the employer. To be clear, the court recorded

¹²⁰ *Massy Stores* (n 5) at [84].

the crucial admission of the employee that he did not follow this policy and that he took goods when he exercised his judgment.

[154] As summarised by the Court of Appeal, members of the employer's management team testified that the employee had on previous occasions been in breach of the established procedure and had been warned of this behaviour. It was in this context that these employees testified to the existence of the prominent sign forbidding the removal of items from the area and warning of the sanction of disciplinary action for its violation.

[155] Confirmation of the facts stated in that evidence as to past violations by the employee was contained in the letter of dismissal of 21 December 2012, reproduced at [122] above. The letter was pellucid in telling the employee (with emphases added) that he was being dismissed summarily in the context of the 'most recent incident concerning the performance of your duties.' ... 'This incident occurred despite verbal warnings regarding ... [2] Failure to comply with and enforce the company's rules, regulations, practices and procedures.'

[156] The letter concluded that as a result of its investigation of the most recent incident, the company had lost all confidence in the ability of the employee effectively to perform his duties, properly supervise the company's employees and to protect the company's assets.

[157] With respect, it is egregious that the courts below utterly failed to consider that the employee was summarily dismissed for misconduct that was absolutely not a single act of indiscretion, by the employee's own admission. The facts, found by the magistrate and accepted as such by the Court of Appeal, totally destroy the debunked factor that the employer should have considered whether it was just to dismiss because of a single act of indiscretion. It ought not to have escaped the courts' consideration that the pilferage situation was of great seriousness to the employer. The testimony of management employees before the magistrate

established that it was known that the employee had been wrongfully taking goods (as he later admitted before the magistrate). This was the situation that drove the employer to install (apparently unbeknownst to the employee) the camera(s) that it used to visually record the employee's unlawful taking. It was the visual recording that enabled the employer to destroy the lie by the employee that he did not take anything.

Long Unblemished Service

[158] Once more, the evidence before the magistrate contradicts his finding that the employee had given long, unblemished service. There is little need to engage with whether this factor can have much weight on a charge as serious as stealing. The instances cited showed it as appropriate to be considered where the misconduct is less grave, such as telling a supervisor that the employee would 'beat she c..t'¹²¹, or failing to provide first class service as hotel employees¹²² etc.

[159] The material cited in the discussion at [153] to [158] above establishes that the service of the employee was far from unblemished. In short, apparently, he was a habitual violator of the employer's rules, as he admitted, and a camera had to be installed to record him in the act and stop him.

[160] Two letters of commendation had been given to the employee over the years, and these were prayed in aid of his virtues. The only virtue these establish is endurance because they were given to mark respectively 30 and 35 years of service and being part of the company's growth and success. No belittlement is intended of the value of long service because continuity of service is a backbone for organisational success as a general matter. However, there was no reference in either letter to any personal merit. Unfortunately for the employee, the virtue he would claim is not indicated in these letters. The record of his service was blemished.

¹²¹ *Ramsay* (n 4).

¹²² *Alleyne* (n 101).

Condonation

[161] The Court of Appeal swiftly discredited the magistrate's finding of condonation in the instant matter. In short, while the magistrate stated that there had been condonation of the employee's behaviour, the Court of Appeal observed that the magistrate's decision disclosed no evidence of condonation and therefore dismissed it as an irrelevant consideration.

Inadequate Investigation

[162] The relevance of the adequacy of investigation has been discussed at [136] to [137] above, where it was clarified that the need for it is to ensure that all material information is discovered and considered by the employer before making its decision. Thus, an employee must be given full opportunity to present to the employer all that they need to know in conducting their investigation. The adequacy of the investigation will often be judged by what it produces. In the instant case, the investigation was revealing on the seminal factor of trust.

[163] As stated by the magistrate,¹²³ untrustworthiness is a factor to be considered in deciding upon disciplinary action. Misconduct may be aggravated where, on top of moderate misconduct, an employee in a position of trust lies to his employer about what he did.¹²⁴ The irony in the instant case is that far from there having been an inadequate investigation to operate in favour of the employee, it was in the course of the investigation that the employee became undone. When challenged about the taking, the employee gave a stark denial. The video recording showed it to be an outright lie that he did not take the goods. The investigation was conclusive that the employee was utterly untrustworthy.

¹²³ Record of Appeal, 'Decision of Magistrate Wayne Clarke' 657, at [137].

¹²⁴ *Aspinall* (n 122).

Conclusion

[164] My review of the context and humanising patina it gives to the employee's misconduct leaves me satisfied that there was no proper basis for attenuating the turpitude of the employee's misconduct. The factors on which the courts relied were incapable of denying the justice of the decision to summarily dismiss. The misconduct was a flagrant violation by the employee of a cardinal rule of the employment policy, compounded by the outright lie as to the breach, which destroyed the foundation of trust and confidence.

[165] I would allow the appeal with costs to the Appellant, here and in the courts below.

Order

[166] The appeal is dismissed. The decision of the majority of the Court of Appeal is affirmed. The parties, having agreed on the value of the appeal, the Appellant shall pay to the Respondent costs equivalent to USD7,500.00.

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ P Jamadar

Mr Justice Jamadar

/s/ C Ononaiwu

Mme Justice Ononaiwu

/s/ C Eboe-Osuji

Mr Justice Eboe-Osuji