BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Magisterial (Civil) Appeal No. 4 of 2015

BETWEEN:

MARCUS ALKINS **Appellant**

AND

B&B DISTRIBUTION LTD. **Respondent**

Before: The Hon. Andrew D. Burgess, Justice of Appeal, the Hon. Margaret A. Reifer and the Hon. William J. Chandler, Justices of Appeal (Acting)

2018: October 10
2019: July 23

Mr. Andrew Pilgrim QC in association with Ms. Kamisha Benjamin and Ms. Rashida Edwards for the Appellant

Mrs. Sherica Mohamed-Cumberbatch in association with Mr. Frank Odle for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] This is an appeal against the decision of Chief Magistrate, Pamela Beckles, as she then was, in which she refused to grant the appellant's wrongful dismissal claim for "Severance Payment, costs and interest on

that sum." The Chief Magistrate's reason for so refusing was that the summary dismissal claimed by the appellant, Mr. Marcus Alkins, against his employer, the respondent, B&B Distribution Ltd. (B&B Ltd.), was "fair and reasonable".

FACTUAL BACKGROUND

[2] Mr. Alkins was employed by B&B Ltd., as a general worker in the Warehouse Department on 13 November 2000. In July 2006, he assumed the position of Delivery Assistant in the Distribution Department. He was later confirmed in this appointment on 17 October 2006. In April 2007, he was furnished with a Bill Employment Guide Receipt Form which set out, *inter alia*, the company's disciplinary policy.

[3] On 24 August 2012, Mr. Alkins was dismissed from his employment. At the time of his dismissal, Mr. Alkins was earning $616.00 per week. During his twelve years of service at B&B Ltd., his disciplinary record only related to absenteeism. He also gave evidence that he has six children.

[4] B&B Ltd., now Banks Distribution Ltd., is a beverage conglomerate, which mainly manufactures and distributes beverages to its various customers. One of B&B Ltd.'s long-standing customers is "The Winning Streak", a casino located in Bridgetown.

[5] On 21 August 2012, an incident occurred at The Winning Streak with Mr. Alkins during the course of his employment with B&B Ltd. This incident ultimately led to his immediate dismissal.

[6] That day, Mr. Alkins and another employee of B&B Ltd., Mr. Jason Carrington, delivered beverages at The Winning Streak. They delivered the beverages into the storeroom of the casino by entering from the Main Road into a side door, which led them to the bar and the storeroom. The casino was a separate area from the bar and the storeroom.

[7] During the course of their delivery, Mr. Alkins found 9 scratch cards on the ground in a public area on the premises of The Winning Streak. Each of the scratch cards was valued at $10.00, thus the total value of the scratch cards was $90.00.

[8] Mr. Alkins' evidence is that before he had put the cards in his pocket, he had asked a few persons at The Winning Streak whether they had dropped the cards, and that they had responded that they had not. On cross-examination however, he admitted that he did not ask any of The Winning Streak's employees whether the cards had belonged to them. According to Mr. Alkins, the cards did not bear any company stamp or name, he was not aware that The Winning Streak sold those types of cards and he did not see the cards on display at the bar.

[9] Later that day, an employee of The Winning Streak, by the name of Carol, contacted Mr. Glen Burnett, the distribution manager of Banks Distribution Ltd., since September 2002. Carol informed Mr. Burnett that there was an incident that occurred at The Winning Streak while some of B&B Ltd.'s employees were delivering products to The Winning Streak and asked him to come there.

[10] Mr. Burnett's evidence is that he went to The Winning Streak on 22 August 2012 and met with Carol. She indicated to him that the person responsible for the scratch cards, when doing the evening reconciliation the day prior, discovered that the reconciliation fell short. This led to a review of the video footage for the day.

[11] Mr. Burnett recounted that he was shown the video footage of 21 August 2012, which revealed that during the course of Mr. Alkins' delivery of the beverages to The Winning Streak, scratch cards had fallen and Mr. Alkins had taken them off the ground.

[12] Mr. Burnett gave an apology on behalf of B&B Ltd. and noted that the owner of The Winning Streak, Mr. Aaron Truss, required compensation for the scratch cards and a written statement to the effect that "Mr. Alkins would not set foot in their establishment on behalf of B&B."

[13] Mr. Burnett returned to B&B Ltd. and indicated to Mr. Alkins that he wanted to have a meeting with him the following day to discuss an incident that occurred the day before, on 21 August 2012. Mr. Burnett invited Mr. Alkins to bring representation.

[14] On 23 August 2012, Mr. Burnett and a supervisor from the Distribution Department met with Mr. Alkins and his representatives to discuss the incident.

[15] At the meeting, Mr. Alkins admitted to taking up the scratch cards without notifying anyone. On cross-examination, Mr. Alkins said that he stayed at The Winning Streak for about two hours after he found the scratch cards and later in the evening when he reached home, he scratched the cards. He also said on cross-examination that he was aware that there was an issue with the cards and he still went home and scratched them.

[16] A copy of the video footage from The Winning Streak was shown to Mr. Alkins, who stated that he was unaware of the ownership of the scratch cards. Mr. Burnett took the view that while Mr. Alkins may have been unaware of the exact ownership of the scratch cards, Mr. Alkins was aware that he was not the owner. Mr. Alkins never denied taking up the scratch cards, quite to the contrary, he stated, “he did what any poor man would do.”

[17] There was no progress in the meeting and the meeting was adjourned to the following day, 24 August 2012. The Human Resources and Industrial Relations Managers, along with Mr. Alkins' representative were invited to attend that meeting.

[18] At this meeting, the video footage was reviewed by Mr. Alkins and his representative. They indicated that they observed that Mr. Alkins took up the scratch cards, but that it was not his intention to do so from the outset. Rather, they said, Mr. Alkins "saw an opportunity".

[19] Mr. Burnett responded that there is an implicit trust relationship between B&B Ltd. and its customers, which by extension, holds true between B&B Ltd.'s employees and its customers. Mr. Burnett explained that management views the act committed by Mr. Alkins as a breach of the trust relationship between B&B Ltd. and The Winning Streak, and an act that has had a negative impact on that relationship.

[20] The meeting culminated in management's decision to terminate Mr. Alkins "with cause", on the basis of their view of the seriousness of his actions in taking property that was not his.

[21] It must be noted that there is a discrepancy in the recollection of the dates of the events. However, it appears that the Chief Magistrate accepted the respondent's version of events as is implied by her finding that it was the

meeting on 24 August 2014 where the appellant was dismissed from his employment. It is to be noted that these factual findings are not the subject of challenge in this appeal.

[22] Mr. Alkins was handed a termination letter dated 24 August 2012 and a National Insurance Certificate. The letter included the following:

> "We find your actions to be dishonest and not in keeping with the conduct which is expected of you as a representative of the company. This incident has damaged the relationship with this customer and has tarnished the reputation of B&B Distribution Limited. Further to this, Management considers this occurrence as a serious breach of trust and as such, your services are therefore terminated with immediate effect."

[23] The representatives present at the meeting indicated that they were referring the matter to the Barbados Workers Union, and they did so.

[24] On 31 August 2012, the management of B&B Ltd. met with the Barbados Workers Union. This meeting constituted an appeal against the management's decision, but there was no change in their decision to terminate Mr. Alkins.

[25] On re-examination, Mr. Alkins stated that he did not deny being given the opportunity to put his side of the incident to management.

[26] Mr. Burnett, on cross-examination, stated that B&B Ltd. considered asking Mr. Alkins to repay the $90.00 and apologise to The Winning Streak. However, he indicated that they felt that the relationship was

fractured to such an extent that they could not trust Mr. Alkins again. He also stated that at the time of their decision, there were no other vacancies in which to place Mr. Alkins.

[27] Mr. Alkins contended that B&B Ltd. did not offer him any severance pay for his twelve years at the company and that during those twelve years there, management could produce nothing in respect of negative reports.

[28] As a consequence of his dismissal, on 9 January 2013, Mr. Alkins commenced a claim in the District 'B' Magistrate's Court against B&B Ltd. for wrongful dismissal and claimed his "Severance Payment, costs and interest on that sum." Mr. Alkins calculated his severance payment at $19,096.00.

DECISION OF MAGISTRATE BECKLES

[29] Then Chief Magistrate Beckles heard the matter on 26 August 2015 and gave reasons for her decision in relation to the summary dismissal of Mr. Alkins from B&B Ltd. At the hearing, Mr. Alkins was the sole witness in support of his case, and B&B Ltd.'s sole witness was Mr. Glen Burnett, the distribution manager.

[30] The Chief Magistrate identified the issue for her determination as "whether or not the Defendant (employer) acted reasonably in treating the Plaintiff (employee) (sic) conduct as sufficient reason for dismissal."

[31] In outlining the law relative to that issue, the Chief Magistrate stated the following:

> "To determine whether or not an employer has acted reasonably in dismissing an employee, the current test is "what would a reasonable employer have done?" There is a band of reasonableness within which one employer may decide to dismiss whilst another might decide not to do so. If the circumstances of the case are such that a reasonable employer might dismiss, the dismissal will be fair though not all employers would take that view. (British Leyland (UK) Ltd. v. Swift [19981] IRLR 456).
>
> A decision on whether the employer acted reasonably is a question of fact - no single factor by itself can be conclusive, and each case will turn on its own peculiar facts and can only be challenged if the decision is perverse. (Iceland Frozen Foods Ltd. v. Jones [1982] IRLR 439)."

[32] The Chief Magistrate emphasised that:

> "It is not the function of the Court to substitute its views and opinions for those of management, but merely to decide if management has acted reasonably, thus the employer must show that he gave the matter a prompt and thorough investigation and that he gave the employee an opportunity to state his case as well as to interview witnesses and collect evidence as far as it is possible to do so - once this is done it is for management to decide what should be done in the circumstances of the case, and provided a fair procedure is adopted, the eventual decision is that of management."

[33] She continued to assert that:

> "An employee (sic) may take into account the fact that the employee has a long record of exemplary conduct (City of Edinburg v. Stephens) but the importance of such mitigating factors is a matter for the employer's discretion. (AEI Cables v. Mchay (sic) [1980] IRLA (sic) 84."

[34] In finding that the decision of the management of B&B Ltd. was reasonable, Chief Magistrate Beckles stated that:

> "…it was not just the act of removing the scratch cards from the Defendant's customer's business which was the dishonesty, but the behavior of the Plaintiff afterwards - he stated that when he was being questioned about the incident, that he had not yet scratch (sic) the cards but did that later when he was at home - if that was the case why not turn over the cards to the Defendant then. It cannot be said that the Plaintiff had not taken any positive step to deceive the Defendant or anyone else - this clearly demonstrated deception on his part."

[35] The Chief Magistrate made the factual finding below:

> "The Plaintiff stated that none of the customer's employees were around when he found the cards and this is why he only asked the patrons in the area if the cards were theirs and never mentioned it to the customer's employees yet on the camera close circuit television, the Plaintiff is seen conversing with three (3) of these employees after incident and therefore could and should have dealt with the situation differently by bringing the matter to the their attention."

[36] Moreover, the Chief Magistrate was of the view that:

> "There is no evidence that the employer did not consider the gravity of the situation, including its effect on the employment generally and the previous history of the employee or that they did not adopt a fair procedure in the investigation of this matter."

[37] Accordingly, the Chief Magistrate dismissed Mr. Alkins' claim for severance payment, costs and interest.

[38] Mr. Alkins has appealed that decision before this Court.

THE APPEAL

Issues in the Appeal

[39] Mr. Alkins filed a notice of appeal on 24 September 2015 titled "Claim No. 4 of 2015". The appellant was first given leave on 19 September 2018 for an extension of time to file the notice of appeal outside of the time limited by ***CPR 62.6***.

[40] Based on the grounds of appeal in the appellant's notice of appeal and the written and oral submissions of counsel on both sides before this Court, two issues arise for our determination. The first is whether the appellant's summary dismissal was justified on an application of the common law principles of summary dismissal. The second is whether the appellant is entitled to severance payment pursuant to **section 45** of the **Severance Payments Act, Cap. 355A**. **(Cap. 355A)**.

[41] These issues arise because, as counsel on all sides agree, the cases and principles on which Chief Magistrate Beckles based her decision were predicated on particular English statutory provisions which introduced unfair dismissal into English employment law and which were designed to determine whether an employee's dismissal was fair or unfair. At the time this case arose before Chief Magistrate Beckles, there were no similar statutory provisions in Barbados. Chief Magistrate Beckles was

therefore bound to decide the case before her on common law principles of summary dismissal and not on the special statute-based principles found in English case law.

[42] Against that backdrop, we turn to dealing with the two issues in this appeal hereafter.

COURT'S ANALYSIS AND CONCLUSIONS

Summary Dismissal-The Law

[43] It is undoubtedly the law at common law that an employer may summarily dismiss an employee with just cause. This notwithstanding, in the English House of Lords case of **Jupiter General Insurance Co. v Schroff [1937] 3 All ER 67** at **73-74**, Lord Maughan added the important judicial recognition "that the immediate dismissal of an employee is a strong measure…" Unsurprisingly, therefore, Lord Evershed MR in the English Court of Appeal case of **Laws v London Chronicle (Indicator Newspapers) Ltd. [1959] 1 WLR 698 (CA)**, explained the severity of the conduct which must be proved in order to justify summary dismissal as follows:

> "…since 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."

[44] In the Privy Council case of **Henry v Mount Gay Distilleries Limited Privy Council Appeal No. 43 of 1998 (Henry)**, Lord Browne-Wilkinson was even more explicit. He stated that:

> "It is well established that summary dismissal is only justifiable where there has been a breach of one or more duties of the employee and such breach constitutes a repudiation of the contract of employment as being inconsistent with the continued employment of the employee. Thus a single act of carelessness or negligence can provide grounds for summary dismissal if the negligence itself or the circumstances surrounding it show that there has been a "deliberate flouting of the essential contractual conditions:" Laws v. London Chronicle Limited [1959] 2 All E.R. 285 at p. 287."

[45] This Court in numerous decisions has distilled principles relative to the changing attitude of the common law towards the kind of employee conduct which would amount to repudiation sufficient to justify summary dismissal. **Eudese Ramsay v St. James Beach Hotels Ltd. Magisterial Appeal No. 4 of 1999** is one such case. In that case, **Simmons CJ**, having regard to the current social conditions, stated as follows:

> "[39] In Re Rubel Bronze and Metal Co. [1918] 1 K.B. 315 at 322, McCardie, J. said:
>
> "In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts and words, the deliberation or otherwise with which they are committed or uttered and on the general circumstances of the case."

> [40] Similarly, Edmund-Davies LJ explained in Wilson v. Racher (supra at p.430 "B"):
>
> "Reported decisions provide useful, but only general guides, each case turning upon its own facts. Many of the decisions which are customarily cited in these cases date from the last century and may be wholly out of accord with current social conditions. What would today be regarded as almost an attitude of Czar-Serf, which is to be found in some of the older cases would, I venture to think, be decided differently today."
>
> [41] However, it seems that it can be confidently asserted that the right to summary dismissal may be exercised where the conduct of the employee is of such a nature and degree as to evince an intention not to be bound by the terms of the contract of employment."

[46] **Lovell v Rayside Construction Limited Magisterial Appeal No. 16 of 2004 (Lovell v Rayside)** is another such decision of this Court. In that case it was noted that:

> "Courts have indicated that an analytical approach should be adopted when considering whether summary dismissal is justified. Because there is no fixed rule defining the degree of misconduct which will justify summary dismissal, each case must be examined on its own particular facts and circumstances and the nature and seriousness of the infraction considered in order to assess whether it is "reconcilable with sustaining the employment relationship"." In relation to an isolated act of misconduct, this court stated that:
>
> "It is only in exceptional circumstances that an employer can summarily dismiss an employee on his committing a single act of misconduct but in determining whether the act is so exceptional as to constitute a wrongful act inconsistent with his

> duty towards his employer as to justify instant dismissal, regard must be had to the nature of the business and the position of the employee."

[47] Two further considerations of surpassing importance have been identified in this Court's decisions as relevant in determining whether summary dismissal would be justified. The first of these emerges from **Chefette Restaurants Ltd v Harvey (Magisterial Appeal No. 8 of 2003)**. It is that, not only must the question be asked as to whether there was a deliberate flouting of the essential contractual conditions by the respondent but also whether there was a reasonable explanation for the disobedience. The second is that, as stated in **Lovell v Rayside** at **para [48]**, even if it be proved that the employee disobeyed a lawful order and had indeed been insolent, the question still is whether the circumstances merited instant dismissal. This Court in **Lovell v Rayside** cited with approval what Iacobucci, J. in **McKinley v. BC Tel et al 200 D.L.R. (4th) 385** termed as "the principle of proportionality", which requires that "An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed".

[48] Thus, having regard to the considerations in the above cases, a court, in determining whether an employee's dismissal was lawful, must have regard to a number of considerations including, but not limited to, (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) 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.

A Caveat

[49] Before turning to the application of the foregoing principles to the dispositive issue in this appeal, namely, whether Mr. Alkins' summary dismissal by B&B Ltd was justified, we consider it important to remind ourselves of the statement of Lord Browne-Wilkinson in **Henry** (cited in **Browne v T. Geddes Grant (Barbados) Ltd**) **Magisterial Appeal No. 5 of 2001** that:

> "The question whether misconduct is such as to justify summary dismissal is a question of fact and degree. As such it is a matter for decision by the trial judge and not by the appellate courts."

[50] As already pointed out, the Chief Magistrate in this case applied wrong law in approaching the question of wrongful dismissal and so in effect did

not answer the question whether the dismissal was justified or not. In those circumstances, it behooves us to exercise the powers conferred on this Court by **section 61** of the **Supreme Court of Judicature Act Cap. 117A** and decide whether or not the summary dismissal was justified on the facts before the Chief Magistrate. Fortunately, neither the Chief Magistrate's findings of facts nor the factual inferences drawn by her in this case are in dispute.

Summary Dismissal - Was it justified?

[51] On the basis of the considerations set out in **paras [47]** and **[48]** above, I turn to determining the issue whether the summary dismissal of Mr. Alkins was justified.

[52] I begin by observing that the foundation of the contract between Mr. Alkins and B&B Ltd. was that Mr. Alkins would provide delivery services to B&B Ltd.'s customers and would be remunerated for these services on a monthly basis by B&B Ltd. An implied term of that contract was the duty of mutual trust and confidence between Mr. Alkins and B&B Ltd. This term contemplated that Mr. Alkins would not steal or otherwise mishandle the property of B&B Ltd. placed under his care, or the property of B&B Ltd.'s customers.

[53] It is the trust and confidence term of the contract which Mr. Alkins admittedly breached when he committed the acts of taking The Winning Streak's scratch cards and scratching them. The commission of these acts, contended B&B Ltd., constituted a breach of so essential a term of their employment contract with Mr. Alkins that summary termination of their employment relationship with Mr. Alkins was justified.

[54] In support of the essentiality of the term breached by Mr. Alkins, Mrs. Mohammed-Cumberbatch, counsel for the respondents, pointed out that freedom was given to delivery employees, such as Mr. Alkins, to move without restriction in property-sensitive areas of the premises of B&B Ltd.'s customers. In those circumstances, she maintained, it is essential that delivery employees be trustworthy and honest in their conduct during the course of their deliveries. Any breach of that trust and honesty, she insisted, was *ipso facto* repudiatory. This was especially so in this case, argued Mrs. Mohammed-Cumberbatch, since Mr. Alkins' acts did not just impact B&B Ltd., but also, as the evidence showed, impaired the relationship between B&B Ltd. and The Winning Streak, one of B&B Ltd.'s long- standing customers.

[55] As has been seen from the cases considered by us above, the essentiality of the term of the contract of employment breached is important, but not

determinative of whether a breach is repudiatory. Determination of whether a term breached is or is not repudiatory involves a balancing exercise having regard to the employee's misconduct in all the circumstances of the case. In this balancing exercise, a number of considerations other than the nature of the term breached must be weighed in the balance.

[56] One such other consideration is the intentions indicated by the breach. In this regard, there is no evidence of what Mr. Alkins' intentions were when he committed the acts, apart from his saying that "he did what any poor man would do." There is no evidence to suggest that the acts of Mr. Alkins were planned, nor intentionally devised to extract financial gain or profit at his employer's expense or, in other words, to steal.

[57] In my view, while the evidence does not show that Mr. Alkins deliberately set out to steal The Winning Streak's scratch cards, there is evidence that he deliberately set out to scratch them, even after gaining knowledge that there was an issue surrounding the cards. However, even in Mr. Alkins' scratching of the cards, I cannot find any evidence to suggest that Mr. Alkins intended to repudiate his contract of employment by his action in scratching the cards.

[58] Another consideration to which I must have regard is the weight of the wrongful acts committed by Mr. Alkins. Here I find persuasion in how Mr. Pilgrim QC characterised Mr. Alkins' acts in his oral arguments before the Court. There he stated that a distinction is to be drawn between someone going into a gambling house, seeing something on the ground and picking it up and it turns out to have a $90.00 value, and going into that establishment, going behind the counter and taking up something with a $90.00 value. I agree with counsel that, even though both acts are acts of dishonesty, only the second act, not the first, is to be considered repudiatory of the contract of employment as a result of the employee's dishonesty.

[59] In my view, also, an employee, such as Mr. Alkins, who finds scratch cards on the floor of an establishment, first asks patrons if they owned the cards and having received no affirmative responses picks them up and proceeds to scratch them, would not be regarded in the current social Barbadian context as committing a breach of his duty of trust and confidence so serious as to merit summary termination of his employment contract. This is not to gainsay, the criminal offence of theft by finding or larceny by finding. However, where the "finder" takes positive steps

to locate the owner, as Mr. Alkins did in this case, the requisite *mens rea* would be deemed lacking for that offence.

[60] It was argued by B&B Ltd., in this case, that Mr. Alkins should have made inquiries of The Winning Streak as to the ownership of the scratch cards, or even that he should have handed them to The Winning Streak in the event that the true owner laid claim to the cards. In my view, this argument is attenuated by the fact that the steps actually taken by Mr. Alkins to locate the owner negate an *animus furandi* in relation to his finding and keeping of the scratch cards even though not so in his subsequent scratching of the cards.

[61] In my judgment, in addition to factors which I have already weighed, other circumstances in this case which ought to be taken into account in my balancing exercise include 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.

[62] Taking these factors into consideration, I am of the view that Mr. Alkins' misconduct was not of such a nature and degree as to amount to a repudiatory breach of his contract of employment with B&B Ltd or was fundamentally or directly inconsistent with his contractual obligations to B&B Ltd. B&B Ltd was therefore not justified in purporting to exercise a right to the summary dismissal of Mr. Alkins. Put simply, I find that Mr. Alkins was wrongfully dismissed.

DAMAGES FOR MR. ALKINS' WRONGFUL DISMISSAL

[63] Having found that Mr. Alkins was wrongfully dismissed, the final question for this Court's determination, is whether Mr. Alkins is entitled to damages.

[64] **Section 45 (1)** of **Cap. 335A** provides as follows:

> "Notwithstanding any rule of law to the contrary, where, in an action brought by an employee against an employer for breach of their contract of employment, the employee claims damages for wrongful dismissal, the court shall, if
>
> > (a) it finds that the employee was wrongfully dismissed, and
> >
> > (b) it is satisfied that, had the employee been dismissed by reason of redundancy or natural disaster, the employer would be liable to pay him a severance payment, assess those damages at an amount not less than such severance payment."

[65] In **Correia Jewelry Store v Forde, Williams CJ** stated:

> "Parliament has enacted these provisions for the assessment of damages for wrongful dismissal in the cases to which they apply i.e. where an action is brought by an employee against an employer in which the employee claims damages for wrongful dismissal. If the Court finds that the employee was wrongfully dismissed and is satisfied that the employer would have been liable to pay him a severance payment had the dismissal been by reason of redundancy or natural disaster, the damages are to be assessed at not less than the severance payment. There can be no justification for not applying the plain language of that section. An employer who wrongfully dismisses its employee cannot lawfully claim that payment of a smaller measure of damages than that which the section prescribes to be payable satisfies its obligations to the employee."

[66] Accordingly, the question which I must confront in approaching **section 45 (1)** of **Cap. 335A** is whether "had the employee been dismissed by reason of redundancy or natural disaster, the employer would be liable to pay him a severance payment".

[67] This Court laid out the conditions that must be satisfied in order for an employee to be entitled to a severance payment in its decision in **Trimart Inc v. Glenda Knight Civil Appeal No. 9 of 2014**. These conditions are:

> "(i) that an "employer"/"employee" relationship existed;
> (ii) that there was continuous employment by the employee for 104 weeks, the requisite period stipulated in section 17(1);
> (iii) dismissal of the employee by his employer; and
> (iv) that that dismissal was because of redundancy."

[68] The appellant has satisfied each of the conditions required to entitle him to a severance payment had he been dismissed by reason of redundancy. Accordingly, Mr. Alkins has completely satisfied **section 45 (1)** of **Cap. 355A**. The Chief Magistrate having found that the appellant's dismissal was not wrongful, was not required to assess damages. There are no figures before the Court to enable the Court to assess those damages.

DISPOSAL

[69] In the premises it is ordered as follows:

1. The appeal is allowed.
2. The respondent shall pay the damages to the appellant within six weeks of today's date, such damages to be agreed, and in default of agreement, to be assessed by the Court.
3. The Respondent shall pay the appellant's costs of the appeal to be assessed if not agreed.

Justice of Appeal

CHANDLER JA (ACTING)

[70] This appeal arises from a finding by the then Chief Magistrate, Ms. Pamela Beckles, that the summary dismissal of Marcus Alkins (the appellant), an employee of B&B Distribution Ltd (the respondent) was fair and reasonable, he having been fired for alleged misconduct.

[71] The grounds of appeal and factual background are excellently reproduced in the decision of my brother **Burgess**, the president of the panel. I cannot usefully add anything to his statement of facts and grounds of appeal.

Let me state at the outset, that I have read the decision of President **Burgess** and agree with his conclusion for slightly different reasons which I shall now set out in my decision. These reasons relate to the evidence which was led in the court below and the analysis of it by the learned Chief Magistrate.

[72] There is one subsidiary point of law which I deem necessary to dispose of before dealing with the substantive issue. The learned Chief Magistrate held that "An employee [sic] may take into account the fact that the employee has a long record of exemplary conduct **(City of Edinburg v Stevens)** but the importance of such mitigating factors is a matter for the employer's discretion." Mr. Andrew Pilgrim QC, counsel for the appellant, submitted that the learned Chief Magistrate misdirected herself

in law when she failed to take into account the mitigating factors in determining whether the decision to summarily dismiss the appellant was reasonable. The mitigating factors which counsel alleged that the learned magistrate failed to consider were that:

1. The act resulted from a spontaneous opportunity, this is in direct contrast to a premeditated or elaborate plan; thus falling on the lower spectrum for theft;

2. The appellant had not intentionally devised a scheme to extract some financial gain or profit at his employers expense and therefore the appellant's conduct was neither tantamount to a serious form of fraud nor explicitly characterised as such;

3. The offence was the first act of misconduct on the part of the appellant as there was no allegation of previous misconduct;

4. The conduct complained of was not a serious breach of duty neither was it a serious criminal offence;

5. The appellant was an employee of the respondent for twelve years with an unblemished record.

[73] Mrs. Sherica Mohammed-Cumberbatch, counsel for the respondent, submitted that, while the case of **AEI Cables Ltd. V McLay [1980] IRLA 84** relied upon by the learned Chief Magistrate, was incorrect, the importance of mitigating factors put forward by the employee is a matter within the sole purview of the employer. In other words "it is for the employer to determine what degree of gravity to assign to mitigating

factors against the background/context of the employee's conduct and the contract of employment."

DISCUSSION

[74] It seems to me that these arguments relate to different stages of the proceedings. In determining whether or not to summarily dismiss an employee, an employer is duty bound to consider all of the facts before him/her including the mitigating factors. Failure to do so results in an abrogation of the rights of the employee. However, when the matter comes before the court hearing an allegation of wrongful dismissal, the court must consider all of the circumstances of the case, including the mitigating factors, in order to determine objectively whether dismissal was wrongful. To decide that these matters are solely for the employer's purview is to fail to apply the law as it relates to wrongful dismissal.

[75] The parties are agreed that the learned Chief Magistrate applied the wrong principles of law. We are empowered to decide whether summary dismissal was justified on the facts found by the learned Chief Magistrate. Whilst the parties have not disputed the factual inferences drawn by the learned Chief Magistrate, in exercising our functions under **section 61** of the **Supreme Court of Judicature Act Cap 117A**, it behoves us to decide whether those inferences were correctly drawn.

THE FINDINGS OF THE CHIEF MAGISTRATE

[76] The learned Chief Magistrate found that "… it was not just the act of removing the scratch cards from the defendant's customer's business which was the dishonesty, but the behaviour [sic] of the plaintiff afterwards - he stated that when he was being questioned about the incident, that he had not yet scratch [sic] the tickets but did that later when he was at home - if that was the case why not turn over the tickets to the defendant then. It cannot be said that the plaintiff had not taken any positive step to deceive the Defendant or anyone else - this clearly demonstrated deception on his part."

The decision that the Appellant's dismissal was justified was posited upon a finding of dishonesty on the part of the Appellant.

ANALYSIS AND DISCUSSION

[77] Whilst the learned Chief Magistrate was at liberty to draw inferences from the evidence, such inferences must flow logically from the evidence led. The learned Chief Magistrate found that deception had been established on the part of the appellant by his behaviour after removing the scratch cards from the customer's premises, namely that he had stated, when questioned about the incident, that he had not yet scratched the cards but did so later when he was at home.

[78] On the issue of the scratching of the cards, the finding of the Chief Magistrate is quite troublesome. The learned Chief Magistrate found "he stated that when he was being questioned about the incident, that he had not yet scratch the tickets but did that later when he got home". This finding must be analysed within the matrix of facts contained in the notes of evidence. The notes of evidence are not sufficiently clear to enable such a finding. The notes of evidence reveal that the appellant said in evidence in chief:

> "I left the premises with the tickets in my pocket. I scratch them later in the evening when I got home. When I got back to the yard I was told that Management wanted to see me… I think Management showed me the video footage before I went home. He told me that he got a complaint about me for stealing. I do not think he mentioned the ticket at the time. I cannot recall if either of us made a reference to what I picked up off the ground. Mr. Burnett told me that this was a complaint about me having stolen… When I saw the video I thought it was about what I had picked up from off the floor."

[79] The appellant continued:

> "I was aware that there was an issue with the tickets and I still went home and scratch them (emphasis added)."

It is this final piece of evidence upon which the learned Chief Magistrate's finding is posited.

[80] It is important to view this evidence in relation to the respondent's evidence in the court below. Mr. Glen Burnett, the respondent's witness,

gave evidence that he was contacted by one Carol of The Winning Streak, about an incident which occurred whilst some of the appellant's employees were delivering products to their establishment. On 22 August 2012, he went to The Winning Streak and was shown a video footage which showed the appellant taking scratch cards from off the ground. The Winning Streak believed that due to the proximity of the scratch card holder, ownership was clearly established.

[81] Mr. Burnett's evidence was that he indicated to the appellant, on his return to the office, that he wanted to have a meeting with him the next day to discuss the incident "occurring on the 21st and he is welcome to bring representation." That meeting took place on the 23rd and he outlined the incident to the appellant. A copy of the footage was obtained on the 23rd and the meeting was recommenced on the 24th.

[82] In these circumstances, it was incumbent upon the learned Chief Magistrate to analyse the totality of the evidence, (having seen the witnesses and having observed their demeanour on the witness stand). A definitive finding that the appellant scratched the cards when he got home, after he was aware that there was an issue with the cards.

[83] The clear inference from Mr. Burnett's evidence is that the appellant knew about the issue of the scratch cards on 23 August 2012.

[84] The respondent's witness gave evidence that he showed the appellant the video three days following the incident. There is no evidence from him that he spoke to the appellant about the cards on the day of the incident. On the evidence, therefore, it was incumbent upon the Chief Magistrate to determine whether the appellant was lying, mistaken or confused. We have not seen or heard these witnesses give evidence and, consequently, have not observed their demeanours to enable us to make such a finding. It is my opinion therefore that the evidence before the court was not without ambivalence. The most natural and logical inference from the evidence, if one accepts the evidence of the respondent's witness is that the appellant scratched the cards before he became aware that there was an issue in relation to them. Accordingly, on the state of the evidence, I am of the view that it could not be inferred with certainty that the appellant knew that there was an issue in relation to the cards when he scratched them.

[85] The learned Chief Magistrate found also that the appellant stated that none of the respondent's employees was around when he found the tickets and this was why he asked the patrons in the area if the tickets were theirs and never mentioned it to the customer's employees. Yet he is seen on the close circuit television conversing with three of the respondent's

employees after the incident. Therefore the learned Chief Magistrate found that the appellant, ought to "have dealt with the situation differently."

[86] The learned Chief Magistrate did not articulate how the appellant ought to have dealt with the situation. I pause to note that it was not suggested to the appellant, in cross-examination, that he ought to have dealt with the situation in any particular manner. In the circumstances, the statement of the learned Chief Magistrate that the appellant ought to have dealt with the situation differently is speculative.

THE FINDING OF DISHONESTY

[87] I am of the view that a finding that the appellant spoke to the employees of The Winning Streak, after finding the tickets and before going home, does not automatically translate into dishonesty. Further, the finding that he spoke to the employees of The Winning Streak, requires an acceptance of the evidence of Mr. Burnett who showed the appellant the video footage on the 24th. The cards were scratched on the 21st. Even if the magistrate felt that the appellant was lying in this regard, that without more, could not amount to dishonesty in the execution of the employment contract. It was still necessary as a matter of law to find an intention permanently to deprive the owner of their property to ground the offence

of theft. The uncontroverted evidence is that the appellant inquired of those present, at the time of finding, whether the scratch cards belonged to them, and the responses were in the negative. That conduct negatives the *mens rea* of theft.

[88] So far we have been dealing with the concept of theft as defined in the area of criminal law, but this matter involves a breach of contract, which is a civil wrong. The burden of proof is on the person alleging theft, but the standard here for breach of contract is the civil standard, of the balance of probabilities. I am of the opinion that the state of the evidence does not lend itself to such a finding.

[89] The issue of whether the appellant had committed theft ought to have been resolved with reference to the appellant's state of mind when he scratched the cards. The plaintiff stated that none of the customer's employees was around when he found the tickets and this is why he only asked the patrons in the area.

[90] The learned Chief Magistrate, having found as a fact that the appellant gave evidence that he had not yet scratched the cards when he was being questioned about the incident, then posed the question, "if that was the case why not turn over the tickets to the defendant then?" Having posed the question, the Chief Magistrate failed to answer it. That question was

not posed to the appellant in the court below and therefore he was not afforded the opportunity to provide an answer. It is not a natural and probable inference from the facts that a failure to turn over the tickets, could be translated into an intention to deceive.

DISHONESTY AND DECEPTION

[91] Dishonesty has not been defined by the learned Chief Magistrate. She has chosen to use the word deception; but deception in what regard? That issue remains unresolved. It was incumbent on the Chief Magistrate to justify her finding that he had breached an essential term of trust and confidence inherent in the contract of employment amounting to a repudiation of the contract.

[92] Deception by itself is not an offence. Neither is it the *mens rea* of theft. Theft requires the intention to appropriate the property of another at the time of taking the property. It was incumbent on the Chief Magistrate therefore to make a finding either of theft or dishonesty in the execution of the contract of employment, and her reasons for her decision do not expressly make such findings.

[93] Notwithstanding my view that the *mens rea* of theft was not specifically made out in the circumstances of this case, it is my view that the appellant knew, or ought reasonably to have known, that the cards were not his.

Having accepted that terms of mutual trust and confidence were implied in his employment contract, the removal of the scratch cards from the respondent's business place, was a violation of the terms of that contract.

ISSUES

[94] Having regard to my findings above, the issues to be determined by this court, are:

1. Whether the conduct of the appellant was sufficient to warrant his summary dismissal by the respondent; and

2. If issue 1 is determined in the negative, whether the respondent is bound to pay damages to the appellant; and

3. What is the quantum of such damages?

THE APPLICABLE LAW

[95] At the date this matter occurred the law of Barbados in relation to wrongful dismissal was based upon the common law. In **Alleyne et al v Marriots (Barbados) Limited, Magisterial Appeal Nos. 13-16 of 1996 (page 3)**, **Sir Denys Williams CJ** said "In Barbados the question whether or not immediate dismissal is justified in a particular case must be answered, not by the application of particular statutory provisions, for there are none, but by the rules of common law." The relevant common law principles have been enunciated in a number of cases. In **Laws v London Chronicle (Indicator Newspapers) Ltd. [1959] 1 WLR 698**

Lord Evershed MR stated that in relation to employment contracts, the "general laws of contract will be applicable". According to that decision, summary dismissal is justified where there is conduct that shows that the servant disregards the essential conditions of the contract.

[96] In **Henry v Mount Gay Distilleries Limited, Privy Council Appeal No. 43 of 1998**, Lord Brown-Wilkinson stated that "summary dismissal is only justifiable where there has been a breach of one or more duties of the employee and such breach constitutes a repudiation of the contract of employment as being inconsistent with the continued employment of the employee. Thus a single act of carelessness or negligence can provide grounds for summary dismissal if the negligence itself or the circumstances surrounding it show that there has been a deliberate flouting of the essential contractual conditions."

[97] In **Eudese Ramsay v St. James Beach Hotels Ltd. Magisterial Appeal No. 4 of 1999** the Court of Appeal set out five criteria, which must be examined in order to determine whether the conduct is such as to warrant summary dismissal. These are (1) the character of the contract, (2) the number and weight of the wrongful acts, (3) the intentions as indicated by the acts or words, (4) the deliberation with which the acts were committed and (5) the general circumstances of the case.

[98] In **Lovell v Rayside Construction Limited Magisterial Appeal No. 16 of 2004**, where the misconduct concerned a single act, two components were deemed relevant to the determination of the soundness of a decision to summarily dismiss. It must be noted that the court there found that only in exceptional circumstances would an isolated act be sufficient to warrant a summary dismissal. The two considerations, as enunciated in that case, were the nature of the business and the position of the employee.

[99] The court in **Chefette Restaurants Ltd. v Harvey (Harvey) (Magisterial Appeal No. 8 of 2003)** stated that, even where there is a deliberate flouting of essential contract conditions, one must determine whether there is a reasonable explanation for the disobedience and secondly whether the circumstances merit instant dismissal.

[100] In, **Holder v Caribbean Air Cargo Ltd., Civil Suit No. 719 of 1983 (Holder)**, the dismissed employee removed a labelled box from the customs department and distributed its contents, which were turkeys and hams among various persons. The court there found that the actions of the employee were such that he converted to his own use property of another, which had been entrusted into the care of his employer. The court held that the instant dismissal would have been justified, as the action would have caused embarrassment to the employer.

[101] Similarly in **Harding v Bootlegger Inn Ltd., Divisional Court No. 128 of 1989 (Harding)** the court was of the view that the removal of possessions from a hotel room by a hotel employee was a grave and serious matter, which undermined the integrity and reputation of the hotel, and was sufficient to repudiate the contract.

[102] Finally for our purposes, the case of **McKinley v BC Tel et al 200 DLR (4th) 385 (McKinley)** states that "an effective balance must be struck between the severity of an employee's misconduct and the sanction imposed." The principle of proportionality must be prioritised in the deliberation of the court.

[103] Our case law indicates that the Barbadian courts have taken the harsh view that dishonesty no matter how small, will amount to a repudiation of the contract of employment. This is in keeping with the English common law decisions.

[104] The Canadian jurisprudence has revisited the English common law position. In **McKinley v BC Tel [2001] 2 S.C.R. 161 2001 SCC 38 (McKinley)** the court, having analysed the English cases concluded that not all acts of dishonesty will be viewed as repudiatory of the contract. The Canadian courts have preferred the principle of proportionality over

the English common law. In **McKinley**, Iacobucci J. opined as follows, under the rubric:

> Applicable Standard for Assessing Whether and in What Circumstances Dishonesty Provides Just Cause
>
> "48 In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> 49 In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.
>
> 50 While ample case law supports this position, as discussed above, a second line of jurisprudence seems to run counter to it, suggesting that dishonest conduct always, irrespective of its surrounding circumstances, amounts to cause for dismissal. However, a closer inspection of these cases reveals that they actually support a contextual approach. As noted, these judgments involved dishonesty that was symptomatic of an overarching, and very serious misconduct. In most cases, the courts were faced with

allegations to the effect that an employee had intentionally devised to extract some financial gain or profit to which he or she was not entitled, at his or her employer's expense. Such conduct was frequently tantamount to a serious form of fraud, and explicitly characterized by the courts as such.

51 This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in **Lake Ontario Portland Cement Co. v. Groner, 1961 CanLII 1 (SCC), [1961] S.C.R. 553**, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

52 This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re* **Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC),**

[1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> This passage was subsequently cited with approval by this Court in **Machtinger v. HOJ Industries Ltd., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986**, at p. 1002, and in *Wallace*, *supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".

54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

55 In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the

> consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.
>
> 56 Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
>
> 57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause."

[105] I am of the view that the Canadian jurisprudence represents a more reasonable approach to modern employer/employee relations and ought to be followed by this jurisdiction. The Canadian courts have recognised that there is a range of behaviour amounting to misconduct but that only the most serious misconduct would result in a repudiation of the contract

of employment. Each case must be decided on its own facts. The actions of the appellant must therefore be tested against the criteria set out in the various cases. These are:

THE CHARACTER OF THE CONTRACT

[106] The appellant was employed by the respondent to deliver its products to the respondent's clients. The appellant was required to enter restricted areas, which were otherwise inaccessible to the public. Both parties are agreed that, in the circumstances, an essential term of this contract was the duty of mutual trust and confidence.

NATURE OF THE BUSINESS AND POSITION HELD

[107] It is acknowledged that the nature of the business requires a level of trust as the delivery service permitted entry into spaces which were otherwise restricted, and that the position which the appellant held therefore was a sensitive one, and as such any deliberate theft, would amount to a repudiation of the contract. In this instance however, it is firmly argued that the scratch cards taken, were not in a restricted place, where ownership was established. There was no deliberate intention to deprive the respondent's client of their property. Further, as far as the context within which the appellant scratched the cards is concerned, there is no

indication that at that point in time, he was aware of the cards' ownership, but merely knew that an issue had arisen in relation to them.

THE NUMBER AND WEIGHT OF WRONGFUL ACTS OR ASSERTIONS

[108] This is the first act of misconduct of this nature. Counsel for the appellant has argued that the misconduct was neither a serious breach of duty nor a serious criminal offence. Summary dismissal was therefore an inappropriate remedy and some alternative form of discipline ought to have been employed. The respondent has argued that this action was a breach of the duty of mutual trust and confidence. Counsel for the appellant argued that the weight of his actions must be less than if he had taken the cards, knowing that they belonged to the respondent's client, from a restricted area. The cards were in a space accessible by the public, and the appellant denied any knowledge of the establishment selling these items. I consider the actions of the appellant to be a breach of the duty of trust and confidence owed to the respondent. The cards were not his and he knew this. His breach of duty however, is mitigated by the fact that he enquired as to the ownership of the cards from patrons of the establishment thus negativing the *mens rea* of theft. This case can be distinguished from **Holder** and **Harding** on the basis that in the latter two

cases there was a clear intention to steal whereas there is no clear evidence here.

WAS THERE A REASONABLE EXPLANATION FOR THE FLOUTING OF THE ESSENTIAL CONTRACT TERM

[109] **Chefette** established that, where there is evidence that there was a flouting of an essential condition, there must be some consideration as to whether there was a reasonable explanation for the disobedience. No reasonable explanation has been proffered by the appellant for his breach of the essential term of mutual trust and confidence. However, his enquiry as to ownership may lead to a reasonable inference that his breach was not deliberate.

INTENTION

[110] As stated previously the facts do not establish that the appellant was aware that the cards belonged to the respondent's client and he did make efforts to find their owner. There is no evidence to contradict his assertion that he was not aware that the respondent's client sold scratch cards. The facts do not establish, on a balance of probabilities, that the appellant intended to breach an essential condition of the contract.

DELIBERATION

[111] The act of the appellant was a spontaneous act. There is no evidence of any planning or premeditation on the part of the appellant.

GENERAL CIRCUMSTANCES/ SOCIAL CONSIDERATIONS

[112] The circumstances in which this incident occurred are not as clear cut as instances of outright theft as in **Holder** and **Harding**. It is indisputable that the appellant's action caused embarrassment to the respondent in its contractual relationship with its client The Winning Streak. It does not appear from the evidence, however, that The Winning Streak discontinued its relationship with the respondent in consequence of the incident.

[113] On the other hand, the appellant was employed by the respondent for about twelve years without any prior incidents of this nature. He was employed as a salesman but also delivered drinks. When told about the incident, he admitted to removing the scratch cards. When one views the facts holistically, it cannot be said that there is clear evidence of an intention by the appellant to repudiate the contract of employment.

PROPORTIONALITY

[114] The concept of proportionality has been set out earlier in this decision in the dictum of Iacobucci J. in **McKinley**. It is worthwhile to repeat the following portion of that dictum here "…An effective balance must be

struck between the severity of an employee's misconduct and the sanction imposed."

[115] The consequence of the appellant's action to the respondent is embarrassment in their business relationship. Mr. Burnett gave evidence that The Winning Streak did not want the appellant back on their premises and required compensation for the cost of the scratch cards. He said that there were no other positions in their employ available to the appellant. On the other hand, the summary dismissal of the appellant has cost him his livelihood and the ability to support himself and his family. The likely social consequence of his termination is embarrassment and the stigma of being considered a thief. What is the impact on his sense of self-worth and identity is not known, it is clear however that it cannot be positive. He readily accepted what he had done and that it would have negatively affected the respondent's relationship with its client. He has offered to pay for the scratch cards.

CONCLUSION

[116] The factual matrix requires the court to balance the aggravating and mitigating factors.

THE AGGRAVATING FACTORS

[117] The appellant took up and kept scratch cards from a public space belonging to his employer's client and scratched them when he got home after work before becoming aware that there was an issue in relation to them. He did not inform his employers of the fact that he had found them. He caused embarrassment to his employers. He breached the essential terms of mutual trust and confidence implied into his contract of employment.

THE MITIGATING FACTORS

[118] When the appellant found the cards he sought to ascertain the ownership of them by asking patrons in the public area if they belonged to them. It is noted here that the respondent argues that he did not ask an employee of The Winning Streak about the cards. However, this is consistent with his evidence that he was unaware that The Winning Streak sold such cards and is inconsistent with the intention to steal. On being made aware of the fact that the cards belonged to The Winning Streak, he immediately acknowledged that he had taken the cards, offered an apology and offered to pay for them. There was therefore clear remorse on his part. This was the appellant's first infraction of this kind in twelve years of employment. It was spontaneous and not premeditated.

THE PENALTY IMPOSED

[119] The appellant was summarily dismissed with no compensation. This was the most severe penalty which could have been imposed in the circumstances. In my opinion, having regard to the mitigating factors, which outweigh the aggravating factors, the summary dismissal of the appellant was disproportionate to the infraction and therefore not justifiable.

DISPOSAL

[120] In the circumstances, I will allow the appeal and substitute a finding that the termination was wrongful in all the circumstances. I concur with **Burgess JA's** disposal of the matter with respect to damages and costs.

Justice of Appeal (Acting)

REIFER JA (ACTING)

[121] I have had the advantage of reading in advance the judgment prepared by my learned brother **Chandler JA (Acting)**. I agree with his opinion as to the disposition of this appeal and there is nothing further which I can usefully add.

Justice of Appeal (Acting)