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THE BROADER APPLICATION OF UNFAIR DISMISSAL

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Upon the enactment of the Employment Act 2001 (the "EA") the doctrine of unfair dismissal was introduced into the legislative framework of employment law within The Bahamas. However, the prevailing view within the legal community was that the applicability of the doctrine was narrow in scope. This view arose from the fact that sections 36 to 40 of the EA ("the sections") provide a list of specific examples of unfair dismissal. Accordingly, the thought was that as the relief is a strictly statutory one, unfair dismissal must be limited only to the examples specifically referenced in the legislation.

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This prevailing view, however, failed to take into account the potentially wide implications of section 35 of the EA, which provides:

> *"Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case."*

The first challenge to the prevailing view of the doctrine's scope went largely unnoticed. In 2004, in the case of *Michael and another v. Pinder's Custom Brokerage,* the Industrial Tribunal issued a decision that, even though the employee's conduct warranted summary dismissal and the dismissal was therefore not wrongful, it was nevertheless unfair having regard to the circumstances. In reaching this determination the Tribunal suggested, for the first time in any reported decision, that section 35 of the EA had very wide and general application in the context of any dismissal, even where done justifiably with cause.

The full impact of this decision was not appreciated until 2013, when the Court of Appeal in *B.M.P Limited D/B/A Crystal Palace Casino v. Ferguson,* held that the specific instances of unfair dismissal set out in the sections are merely examples of situations in which a dismissal would be unfair, but are not exhaustive. It held further that where a claim of unfair dismissal is brought, a determination must be made in accordance with the substantial merits of the case.

While claims of unfair dismissal were rather rare in the past, the Court of Appeal's decision appears to have significantly altered this landscape. There now appears to be a proliferation of cases advancing claims under this doctrine. The reason for claimants embracing the concept of unfair dismissal is not hard to understand. Firstly, whereas claims relating to wrongful dismissal are relatively clear-cut and objective, claims of unfair dismissal involve matters of process, which can be more subjective and less straightforward. Secondly, unfair dismissal claims may be sustainable even where an employer has paid the employee

the contractually agreed or statutory compensation for termination or has properly terminated the employee summarily.

The only consideration with respect to a claim for unfair dismissal is whether the employee was treated fairly in the dismissal process. For example, in the usual course, an employer would be justified in terminating an employee for theft. However if an employee could establish that theft was prevalent in the workplace and the employer knew of instances of other employees stealing but did not terminate them, it may be arguable that the particular dismissal is unfair. In less extreme examples, an unfair dismissal could arise where an employer puts in place a system of progressive discipline leading to termination but fails to sufficiently follow the process.

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In the Supreme Court case of *Cherrelle Cartwright v US Airways*, in which this firm represented the employer, an employee was summarily dismissed due to a repeated number of disciplinary defaults. The employee argued that the employer had failed to properly follow its progressive disciplinary procedure and that, accordingly, the dismissal was unfair. Justice Ian Winder accepted that, having regard to the Court of Appeal's decision in *B.M.P Limited D/B/A Crystal Palace Casino v. Ferguson,* the statutory doctrine of unfair dismissal had relatively wide application.

However, upon considering the evidence, Justice Winder was satisfied that the procedure conducted by the employer in effecting the dismissal was in accordance with the grievance procedure put in place. Further, Justice Winder accepted that the employee had herself fully participated in the grievance procedure. This case is subject to appeal and there is the possibility that the doctrine of unfair dismissal will be further clarified later this year when the appeal is heard.

The court's broad interpretation of the unfair dismissal doctrine may create some challenges for employers. Employers must ensure that:

- employees are dealt with fairly in relation to each other; and
- proper mechanisms are put in place and followed in relation to employee discipline and dismissal.

Additionally, employers have an overriding obligation to ensure that an employee's dismissal is "fair" given all of the surrounding circumstances. Unfortunately, what is fair or unfair will depend upon the particular facts of a case. Fortunately, however, *Cherrelle Cartwright v US Airways* suggests that a common sense approach will prevail and that employers will not be expected to be perfect but rather just perform reasonably in the circumstances.

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