

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHLTAP2022/0001

BETWEEN:

JACOB JAMES

Appellant

and

**RUBIS WEST INDIES
(Formerly TEXACO West Indies Limited)**

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Eddy D. Ventose

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Lawrence Daniels for the Appellant
Mr. Clement Bird for the Respondent

2024: October 1;
December 10.

Appeal against Industrial Court's decision – Unfair dismissal – Award of damages – Award of damages reduced by 90% - Whether appellant significantly contributed to his unfair dismissal thereby justifying the award of damages being reduced by 90% - Whether the Industrial Court erred in considering matters not foreshadowed by the respondent in dismissing the appellant when it reduced the award of damages by 90%

The appellant was employed by the respondent since 1983. The respondent carries on the business of supplying fuel to aircrafts at the V.C. Bird International Airport in Antigua (the "Airport"). On 30th January 2006, the appellant was told by the manager that there was a complaint about him concerning the respondent's fuel and the manager asked him to leave the office and go home pending investigations. The appellant stated his innocence but left

the compound as ordered by the manager. In a letter of the same date, the respondent informed the appellant that his services were suspended with pay pending investigations concerning an incident which occurred on 28th January 2006, involving the unauthorised taking of diesel belonging to the respondent (the "Incident"). The appellant was also informed that the respondent would advise him of the outcome of the investigations as soon as they were concluded.

By letter dated 1st February 2006 (the "Dismissal Letter"), the appellant was dismissed by the respondent from the position of Supervisor of Crew Chief. In the Letter, he was informed that his services were terminated effective immediately for gross misconduct as a result of the Incident. The Letter gave further details of the Incident and stated that on 28th January 2006 at approximately 10:20PM, a security guard named Ms. Janice Constance observed that the appellant was using a hose belonging to the respondent to wash away diesel from the ground after putting diesel into his private vehicle. The Dismissal Letter continued that the respondent's investigations revealed that 11.4 gallons of diesel were taken by the appellant without the authorisation of the respondent and without any reasonable explanation from the appellant on the unauthorised taking of the diesel.

On 18th January 2012, the appellant brought proceedings in the Industrial Court against the respondent alleging that he was wrongfully and/or unfairly dismissed from his employment and that he was entitled to compensation. The appellant stated that the respondent never investigated the matter and that he was never given an opportunity to put his case before anyone prior to his dismissal by the respondent. As a result, the appellant claimed that the respondent was in breach of the employment contract which resulted in him suffering loss of earnings and incurring expenses and costs.

In a judgment dated 4th June 2021 the Industrial Court accepted that there was a breach of natural justice because no investigations were undertaken by the respondent, no specific allegations were put to the appellant nor was he given any particulars of what was alleged against him, and the appellant was not given an opportunity at any hearing to defend himself. It was also noted that the only eyewitness, a security officer who allegedly witnessed the appellant stealing the diesel, was not called as a witness for the respondent. The Industrial Court thus held that there was insufficient evidence to prove that the appellant was guilty of misconduct. Further, by reason of its breach of the principles of natural justice and good industrial relations, the Court found that the respondent acted unreasonably in dismissing the appellant and the appellant was therefore entitled to compensation.

In determining the award of compensation, the Industrial Court considered whether the appellant was blameworthy and effectively contributed to his unfair dismissal. The Industrial Court thought it a significant factor that at trial, the appellant admitted that he was in charge of the respondent's compound at the Airport. The Court found that there was evidence before them that the appellant was in breach of several of the terms implied in his contract of employment and in breach of his fiduciary relationship with the employer. The Industrial Court then concluded that because the appellant was in breach of several implied terms of his employment contract, he was blameworthy and contributed significantly to his unfair dismissal. The Court then apportioned the extent of his contribution to his unfair dismissal to be 90 per cent.

Being dissatisfied with the Industrial Court's decision, the appellant appealed. The sole issue that arose on the appeal was whether the Industrial Court erred in considering matters not foreshadowed by the respondent in dismissing the appellant, for example, a breach by the appellant of several implied terms in his contract of employment such as the fiduciary relationship, in arriving at its conclusion on the blameworthiness of the appellant to underpin the apportionment of damages.

Held: allowing the appeal, setting aside the order at paragraph [44] of the Industrial Court's judgment dated 4th June 2021 and ordering that the respondent pay the appellant the sum of \$220,500.00, being the amount assessed by the Industrial Court at paragraph [43] of its judgment, with interest on that sum from 4th June 2021 until payment, that:

1. An employer cannot rely on conduct that did not form part of the reason for dismissal as the basis for a reduction in the award of damages. This is especially so when these specific allegations would not have been relied upon by the employer and so would not have been put to the employee for him to make representations in response. An employer therefore must show that the conduct of the employee contributed to his dismissal and that conduct must have formed part of the basis of, or reasons for, the dismissal of the employee.
2. In determining whether to reduce an award of damages for unfair dismissal by an appropriate percentage, it is helpful for a court or Tribunal to consider: (i) whether there is a finding by the Tribunal that there was conduct of the employee in connection with the unfair dismissal which was culpable or blameworthy; (ii) whether there is a finding that the unfair dismissal was caused or contributed to some extent by the conduct of the employee concerned; and (iii) whether there is a finding that it was just and equitable to reduce the assessment of the employee's loss by the relevant percentage. There must be a finding by the Tribunal or court that the unfair dismissal was caused or contributed to some extent by the conduct which informed the employee's dismissal. A lack of this finding is necessarily fatal to any attempt to reduce the compensation or award to any employee for unfair dismissal.

Nelson v British Broadcasting Corporation (No. 2) [1979] IRLR 346 applied.

3. On the facts, there was no evidence at the hearing before the Industrial Court that the appellant had taken the respondent's diesel without authorisation. The Industrial Court noted that without the critical eyewitness, it was deprived of potentially useful evidence to assist it with its findings of fact. Consequently, the Industrial Court could have made no such finding that the appellant was guilty of improper conduct that warranted his dismissal, and that this blameworthy conduct contributed to his dismissal. The Industrial Court's finding that the appellant breached the implied terms of his employment contract and breached his fiduciary relationship with his employer, played no part in the respondent's decision to dismiss the appellant. The Dismissal Letter made it clear that the appellant was being terminated owing to the incident concerning the unauthorised taking of diesel belonging to the respondent. From all accounts, the allegation of breach of implied terms would have first arisen

in the Industrial Court's judgment and the appellant would not have had an opportunity to answer same. Since the conduct of breaching implied terms neither contributed to nor caused the appellant's dismissal, the Industrial Court erred by using this conduct as a basis for reducing the damages payable to the appellant by 90 per cent.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal against the decision of the Industrial Court dated 4th June 2021 in which the Industrial Court found that the appellant was unfairly dismissed by the respondent but reduced the award of damages to him by 90 per cent because it found that the appellant was blameworthy and contributed significantly to his unfair dismissal.

Background

- [2] The appellant was employed by the respondent since 1983. On 1st February 2006, he was dismissed by the respondent from the position of Supervisor of Crew Chief. The respondent carries on the business of supplying fuel to aircrafts at the V.C. Bird International Airport in Antigua (the "Airport"). The appellant was paid a monthly salary of \$9,000.00 and was given six weeks' vacation per calendar year. The appellant stated that on 30th January 2006, he was told by the manager words to the following effect, "I had a complaint about you concerning the company's fuel, so I am asking you to leave the office and go home pending investigations". The appellant replied that he was innocent of any allegation and left the compound as ordered by the manager.
- [3] In a letter dated 30th January 2006, the respondent wrote to the appellant informing him that his services with the respondent were suspended with pay pending investigations concerning an incident which occurred on Saturday, 28th January 2006, involving the unauthorised taking of diesel belonging to the respondent. The appellant was also informed that the respondent would advise him of the outcome of the investigations as soon as they were concluded.

- [4] Approximately two days later, the respondent sent the appellant another letter dated 1st February 2006 signed by the Human Resources Manager informing him that his services with the respondent company were terminated effective immediately for gross misconduct as a result of an incident which occurred on 28th January 2006 involving the appellant's unauthorised taking of diesel belonging to the respondent (the "Dismissal Letter"). In the Dismissal Letter, the appellant was informed that on 28th January 2006 at approximately 10:20PM, a security guard named Ms. Janice Constance observed that the appellant was using a hose belonging to the respondent and water washing away diesel from the ground after putting diesel into his private vehicle with registration number BUS 234 that was parked on the outside of the fence surrounding the Airport's aviation terminal. The Dismissal Letter continued that the respondent's investigations revealed that 11.4 gallons of diesel were taken by the appellant without the authorisation of the respondent and without any reasonable explanation from the appellant on the unauthorised taking of the diesel. The Letter continued by stating that the appellant disconnected the hose from the nozzle to gain access to the diesel which was secured by lock and key.
- [5] The appellant, on 18th January 2012, brought proceedings in the Industrial Court of Antigua and Barbuda against the respondent in which it was stated that the issues between the parties were as follows: (1) whether or not the appellant was wrongfully and/or unfairly dismissed from his employment; (2) whether or not the appellant was entitled to compensation for wrongful and/or unfair dismissal; (3) whether or not the appellant was entitled to compensation for the respondent's failure to give him notice and unpaid vacation leave; and (4) whether or not the appellant was entitled to vacation pay.
- [6] The appellant stated that he was never paid any notice pay and that he had accumulated one week holiday pay in lieu thereof. The appellant also stated that the respondent never investigated the matter, no one asked him questions and that he never appeared before any person on any disciplinary matter. The appellant asserted that the matter was never reported or investigated by the police and that he was

never given an opportunity to put his case before anyone before his dismissal by the respondent.

- [7] As a result of the foregoing, the appellant claimed that the respondent was in breach of the employment contract with the appellant which resulted in him suffering loss of earnings and incurring expenses and costs.

The Decision of the Industrial Court

- [8] The Industrial Court heard the appellant's claim on 19th March 2014 and delivered its decision on 4th June 2021; over seven years later. No reasons were provided by the Industrial Court to explain this extraordinary delay in rendering its decision. The Industrial Court examined the evidence of the appellant as stated above and the evidence of the respondent. Before the Industrial Court, the respondent claimed that, first, the appellant was guilty of misconduct in relation to his employment that was so serious, that the employer could not reasonably be expected to take any course other than dismissal; and, second, it acted in accordance with the best industrial relations principles and practices and in accordance with section C59 of the **Labour Code of Antigua and Barbuda** (the "**Labour Code**").¹

- [9] The Industrial Court at paragraphs [18] and [30] accepted that there was a breach of natural justice because: (1) no investigations were undertaken by the respondent; (2) no specific allegations were put to the appellant nor was he given any particulars of what was alleged against him; and (3) the appellant was not given an opportunity at any hearing to defend himself. It was also noted that the only eyewitness, a security officer who allegedly witnessed the appellant stealing the diesel, was not called as a witness for the respondent.

- [10] The Industrial Court considered its decision in **Humphrey Michael Blackburn v LIAT (1974) Ltd**² where the employer was held to have unfairly dismissed the

¹ Cap 27 of the Revised Laws of Antigua and Barbuda.

² Ref. No 54 of 2013.

employee because the employer did not afford the employee an opportunity to defend himself before his dismissal. However, the Industrial Court accepted that the employee was guilty of misconduct which could have potentially justified his summary dismissal. This misconduct included making offensive statements about the employer, its management teams and one of its senior managers. As a result of this misconduct, the Industrial Court held that the employee had contributed to his dismissal by 65 per cent.

[11] The Industrial Court then held at paragraph 35(a) that there was insufficient evidence to prove that the appellant was guilty of misconduct. The respondent had therefore failed to discharge its evidential burden of establishing the required factual basis in accordance with section C58(1) of the **Labour Code**. The Industrial Court also held at paragraph 35(b) that by reason of its breach of the principles of natural justice and the principles and practices of good industrial relations, the respondent acted unreasonably in dismissing the appellant. The respondent had failed to establish reasonableness in accordance with section C58(2) of the **Labour Code**. The Industrial Court therefore concluded at paragraph 36 that it was constrained to declare that the appellant was unfairly dismissed and was entitled to compensation.

[12] In determining the award of compensation to which the appellant was entitled, the Industrial Court explained that section 10(3) of the **Industrial Court Act**³ required it to “act in accordance with equity, good conscience and the substantial merits of the case” before it and that ultimately it was required to make an award that it considered to be “fair and just”.⁴ In this regard, the Industrial Court explained that it would consider whether the appellant was blameworthy and effectively contributed to his unfair dismissal, continuing that it found the submission of counsel for the respondent regarding the fiduciary relationship between the appellant and the respondent most persuasive. The Industrial Court thought it a significant factor that at trial, the

³ Cap 214 of the Revised Laws of Antigua and Barbuda.

⁴ See paragraph 37 of the Industrial Court’s judgment.

appellant admitted that he was in charge of the respondent's compound at the Airport.⁵

- [13] The Industrial Court explained its views on the issue of the "fiduciary relationship" as follows:

"39. As pointed out by Learned Counsel, in the Craig Joseph case this Court has previously affirmed the existence of a fiduciary relationship of trust and confidence between an employer and his employee. That relationship was expressed by Lord Jauncy in *Neary v Dean of Westminster* (1999) I.R.L.R. 288 as follows:

"It has long been recognized that there exists between master and servant a fiduciary relationship of trust and confidence".

40. There are several terms implied by law in every contract of employment. These include one for mutual trust and confidence. In addition, each employee has an obligation to exercise reasonable skill, care and competence in discharging his responsibilities and duties. Further, the implied terms include one imposing an obligation on each employee to cooperate with his employer in safeguarding and accounting for the latter's property.

41. On the evidence before us, we conclude that, being "in charge" in his capacity as Crew Chief, the Employee was in breach of several of the terms implied in his contract of employment. These terms imposed duties and responsibilities on the Employee, the breach of which were manifested in several ways. including:

- (a) His apparent wanton disregard for and disinterest in the preservation of the Employer's property;
- (b) His failure to exercise reasonable care of and account for the Employer's property under his direct control;
- (c) His refusal to cooperate with his superior Mr. Joseph, the Aviation Superintendent, in an examination of and inquiry into the state of affairs;"

- [14] The Industrial Court then concluded at paragraph 42 that because the appellant was in breach of several terms implied in his contract of employment, the appellant was blameworthy and contributed significantly to his unfair dismissal and that it would

⁵ See paragraph 38 of the Industrial Court's judgment.

apportion the extent of the appellant's contribution to his unfair dismissal to be 90 per cent.

Grounds of Appeal

[15] The appellant lodged eight grounds of appeal in his notice of appeal filed on 1st March 2022. At the hearing of the appeal, counsel for the appellant indicated that he would only be pursuing the last ground of appeal (at 4(h) of the notice of appeal), namely, that the Industrial Court fell into error in finding that the appellant was blameworthy and contributed significantly to his dismissal and that it would apportion the extent of the appellant's contribution to be 90 per cent.

[16] The sole issue that arises in this appeal is whether the Industrial Court erred in considering matters not foreshadowed by the respondent in dismissing the appellant, for example, a breach by the appellant of several implied terms in his contract of employment such as the fiduciary relationship, in arriving at its conclusion on the blameworthiness of the appellant to underpin the apportionment of damages.

The Appellant's Submissions

[17] In submissions filed on 21st March 2022, the appellant argues that a finding of 100 per cent contributory conduct is an unusual finding (albeit a permissible one) but that that in exceptional cases the court may make a deduction of 100 per cent but this is very rarely done if at all. The appellant also submits that the first point is that the appellant's conduct must fall into the category that is capable of being blameworthy. The appellant contends that in relation to a compensatory award, such conduct must cause or contribute to the appellant's dismissal, rather than its fairness or unfairness and that such conduct need not amount to gross misconduct. The appellant submits that a court should first assess the question of contributory fault. The appellant also submits that the allegation that 11.4 gallons of diesel belonging to the respondent was unaccounted for is denied by the appellant.

- [18] The appellant then cites the following decisions where the Industrial Court made reductions for blameworthiness by the employee. In **James v LIAT (1974) Ltd**,⁶ where the employee used the employer's car without authorisation, it was held that the employee contributed to his dismissal and the contribution was determined to be 20 per cent. In **Ira Looby v West Indies Oil Company Ltd**,⁷ the Industrial Court found that the employee must bear a portion of responsibility for his actions which led to his dismissal and made a deduction of 30 per cent of damages awarded. In **Alexander Hughes v Antigua Brewery Limited**,⁸ the damages awarded to the employee had been reduced by 30 per cent on account of his responsibility for the dismissal. Consequently, the appellant submits that the Industrial Court failed to set out the legal basis for the reduction in damages by 90 per cent.

The Respondent's Submissions

- [19] The respondent submits that the Industrial Court has the power to reduce an award of damages to an employee for unfair dismissal but that the issue in this case is whether in doing so, the Industrial Court exercised its discretion properly. The respondent also submits that the Industrial Court had proper regard to the following factors in reducing the award of the appellant by 90 per cent: (1) the appellant was in charge of the compound at the Airport; (2) a fiduciary relationship of trust and confidence existed between the appellant and the respondent; (3) the appellant had an obligation to exercise reasonable skill, care and competence in discharging his duties and responsibilities; (4) the appellant had an obligation to cooperate with the respondent to safeguard and account for its property; (5) the appellant exhibited "wanton disregard" for and disinterest in the preservation of the respondent's property; (6) the appellant failed to exercise reasonable care of and account for the respondent's property, which was under his control; and (7) the appellant refused to cooperate with his superior, the Aviation Superintendent, when called on to examine and inquire into the state of affairs.

⁶ Ref. No. 36 of 1996.

⁷ Ref. No. 14 of 2012.

⁸ Ref. No. 35 of 2002.

Conclusions

- [20] As mentioned above, the issue is whether the Industrial Court erred in reducing the award of damages to the appellant by 90 per cent because of its finding that the appellant breached his fiduciary duty to the respondent in circumstances where the sole basis for the dismissal of the appellant by the employer was for gross misconduct for the unauthorised taking of diesel belonging to the respondent.
- [21] In **Hughes**, the employee, who was employed as a mechanic in the maintenance department of the employer, was dismissed by the employer for sleeping on the job. It was alleged that the employee was found sleeping on the job on previous occasions as was given a warning letter on one of those occasions. The Industrial Court found that the employee had his eyes closed while at the steering wheel of the truck while it was being loaded with refuse to be taken to a disposal site. It further noted that it was not unreasonable for the employer to assume that he was asleep in those circumstances when he had been found sleeping on the job on two previous occasions. Consequently, the Industrial Court held that the employee contributed to his dismissal, and this was assessed at 50 per cent. It is to be noted that the conduct that formed the basis for the contribution was no different from the reasons given by the employer for dismissing the employee.
- [22] In **Looby**, the employee was dismissed by the employer because he “punched out” a colleague’s timecard which was expressly prohibited by the employer in the Employee Handbook. The Industrial Court accepted that while the employee exercised bad judgement, the act in question was not one that went to the employee’s competence or to the execution of his duties, nor did it demonstrate disregard of a fundamental part of his duty.⁹ The Industrial Court held that the employer acted unreasonably when they determined that management had lost the trust and confidence in the employee and in its decision to summarily dismiss the employee. Consequently, it held that the employee was unfairly dismissed and was entitled to

⁹ Supra n. 7 at paragraph 47.

compensation.¹⁰ The Industrial Court found that the employee must bear a portion of the responsibility for his actions that led to his dismissal and that in the circumstances, his responsibility was assessed to be 30 per cent. Again, the conduct to which the Industrial Court referred was the employee's action that led to his dismissal by the employer and no other.

[23] As mentioned above, in **Blackburn v LIAT (1974) Ltd**,¹¹ the Industrial Court held that the employee contributed significantly to his dismissal and that that contribution was assessed at 65 per cent. Mr. Blackburn appealed to this Court against the finding that his compensation should be reduced by 65 per cent. This Court allowed the appeal setting aside the decision of the Industrial Court that the employee contributed 65 per cent to his dismissal. On further appeal to the Judicial Committee of the Privy Council, the Board accepted that the Industrial Court had the power to admit the transcripts and audio recordings after trial, which formed the basis of the evidence of his statements that led to his dismissal and the Industrial Court's finding that the employee contributed 65 per cent to dismissal. Neither the Court of Appeal nor the Privy Council opined on that finding by the Industrial Court, which was subsequently reinstated by the Privy Council when it allowed the appeal from the decision of this Court.

[24] In **James v LIAT (1974) Ltd**, the employee was dismissed for using the employer's vehicle without authorisation and was involved in an accident while driving the vehicle. The Industrial Court accepted that the accident was not the cause of the dismissal. The employer and the employee were in discussions amicably to terminate their relationship by negotiating a package, but negotiations broke down and the employee was subsequently dismissed. The Industrial Court noted that the employee's failure to obtain authorisation to use the vehicle must be looked at in the light of the evidence that employees did use the employer's vehicles without authorisation and did so when on the employer's business or when their vehicle was

¹⁰ Supra n. 7 at paragraph 48.

¹¹ [2020] UKPC 9.

not serviceable as in the case of Mr. James. The Industrial Court also noted that the employee was on the employer's business at the time of the accident and the accident did not result from the employee's alcoholic state or any proven fault on his part.

[25] The dismissal of the employee was consequently held to be unfair. The Industrial Court held at paragraph 40 that in using the employer's vehicle without authorisation, the employee contributed to the dismissal and that his contribution was assessed at 20 per cent so that the amount of the award of compensation would be accordingly reduced. The reason for the reduction in the award based on the employee's contribution to his dismissal was directly related to his action that caused his unfair dismissal – in this case using the employer's vehicle without authorisation.

[26] While the decisions of the Industrial Court considered so far have not had to discuss whether conduct which did not form part of the basis for the dismissal of the employee could nonetheless be considered in determining whether it contributed to the dismissal, the answer seems self-evident. How can conduct which the employer did not think of as deserving dismissal be the basis for reducing the award of damages the employee should receive for unfair dismissal? In my view, the employer must show that the conduct of the employee contributed to his dismissal and that conduct must have formed part of the basis of or reasons for the dismissal of the employee. If for example, in the instant case, it was proven that the appellant had taken the respondent's diesel without authorisation, the fact that his dismissal was unfair for failure by the employer to comply with the rules of natural justice would not preclude the Industrial Court in finding that he had contributed to his dismissal, thereby reducing the award of damages by an appropriate percentage.

[27] In **Nelson v British Broadcasting Corporation (No. 2)**,¹² the Court of Appeal of England and Wales considered that in cases of contribution it is necessary to ask the following: (1) whether there is a finding by the Tribunal that there was conduct of the

¹² [1979] IRLR 346.

employee in connection with the unfair dismissal which was culpable or blameworthy; (2) whether there is a finding that the unfair dismissal was caused or contributed to some extent by the conduct of the employee concerned; and (3) whether there is a finding that it was just and equitable to reduce the assessment of the employee's loss by the relevant percentage. While these questions arise directly in consideration of paragraph 19(3) of Schedule 1 to the Trade Union and Labour Relations Act 1974 which gives an express power to the Industrial Tribunal (where it finds that the matters to which the complaint relates were to any extent caused or contributed to by any action of the employee in connection with those matters), to reduce an employee's assessment if the Tribunal considers it just and equitable to do so, the principles stated therein can also be applied in this case dealing with whether the appellant contributed to his dismissal. The Court of Appeal of England and Wales' second point is important, namely, that there must be a finding that the unfair dismissal was caused or contributed to some extent by the conduct which informed the employee's dismissal. A lack of this finding is necessarily fatal to any attempt to reduce the compensation or award to any employee for unfair dismissal.

- [28] There was no evidence at the hearing before the Industrial Court that the appellant had taken the respondent's diesel without authorisation. The Industrial Court noted at paragraph [25] that without the critical eyewitness, it was deprived of potentially useful evidence to assist it with its findings of fact. Consequently, the Industrial Court could have made no such findings on its own to determine whether the conduct of the appellant was such that it could be said that he was guilty of improper conduct that warranted his dismissal and that consequently that blameworthy conduct contributed to his dismissal. The blameworthy conduct that the Industrial Court outlined at paragraph [41] of its ruling played no part in the decision of the respondent to dismiss the appellant. The reason for the appellant's dismissal was stated clearly by the respondent in the Dismissal Letter, namely, that the respondent's investigations revealed that 11.4 gallons of diesel were taken by the appellant without the authorisation of the respondent and without any reasonable explanation from the appellant on the unauthorised taking of the diesel.

[29] An employer cannot rely on conduct that did not form part of the reason for dismissal as the basis for a reduction in the award of damages where the tribunal has made a finding that the employee has been unfairly dismissed. This is especially so when these specific allegations would not have been relied upon by the employer and so would not have been put to employee such that he or she would not have had an opportunity to make representations in response. Indeed, from all accounts, the first time that these would have arisen in the Industrial Court's judgment and again the appellant would not have had an opportunity to make any representations in his defence.

[30] The conduct relied on for that purpose must have contributed to or caused the dismissal of the employee. As stated above, in the Dismissal Letter the respondent terminated the employment of the appellant effective immediately for gross misconduct because of an incident which occurred on 28th January 2006 involving the appellant's unauthorised taking of diesel belonging to the respondent. The Industrial Court erred in finding that the appellant contributed 90 per cent to his dismissal for reasons found in paragraph [41] of its ruling (that the appellant breached his fiduciary duty to the respondent) which were not part of the reasons given by the respondent for dismissing the appellant in the Dismissal Letter.

Disposition

[31] Accordingly, I would allow the appeal against the decision of the Industrial Court, set aside the order at paragraph [44] of the ruling and order that the respondent pay the appellant the sum of \$220,500.00, being the amount assessed by the Industrial Court at paragraph [43]. The respondent shall pay interest on that sum from 4th June 2021 until payment.

[32] I am grateful for the assistance provided by learned counsel.

I concur.

Vicki Ann Ellis
Justice of Appeal

I concur.

Trevor M. Ward
Justice of Appeal

By the Court

Chief Registrar