THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBMCVAP2016/0001

BETWEEN:

ST. KITTS MARRIOTT RESORT

Appellant

and

DEBORAH STEVENS

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Gerard St. C. Farara, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Garth L. Wilkin for the Appellant
Ms. Natasha S. Grey for the Respondent

2020: February 14;
October 30.

Civil Appeal – Employment Law – Wrongful dismissal – Whether magistrate erred in finding that appellant wrongfully dismissed respondent – Appellate court's interference with findings of fact by a lower court – Section 5(2) of the Protection of Employment Act – Reliance on past conduct to justify summary dismissal – Notice of termination – Reasonable notice of termination – Whether in circumstances magistrate erred in finding that respondent was entitled to reasonable notice of termination – Whether common law right of wrongful dismissal abrogated by passage of Protection of Employment Act – Whether magistrate erred in assessment of respondent's income – Section 152 of the Magistrate's Code of Procedure Act – Whether magistrate erred in costs order

The respondent, Ms. Deborah Stevens ("Ms. Stevens") was employed by the appellant, St. Kitts Marriott Resort ("the Hotel") as a cashier and waitress. On 13th June 2014, Ms. Stevens along with her then supervisor, Ms. Andrea Weekes ("Ms. Weekes"), and another employee of the Hotel, were working at the Café Calypso ("the Café") located on the Hotel's premises. During the evening Ms. Weekes' relatives visited the Café and she served them with food and beverages and did not charge them for the items served. Upon being questioned by a security guard about giving away the Hotel's property Ms. Weekes attempted to pay for the items using Ms.

Stevens micros card to access the cash register. Ms. Weekes was summarily dismissed.

Subsequently, the Hotel discovered that Ms. Stevens was the cashier whose micros card was used to process the purported payment for the food and beverages. She was suspended without pay pending further investigation into the matter. On 1st July 2014 Ms. Weekes was called to a meeting with management. During the meeting she was shown video footage of activities in the Café on the evening of the 13th June 2014 and questioned about her role in Ms. Weekes' enterprise. She denied any involvement and explained how her micros card came to be used by Ms. Weekes. At the end of the meeting the Hotel summarily dismissed her. The dismissal was confirmed by a letter dated 4th July 2014 setting out the reasons for her dismissal.

Ms. Stevens filed a claim in the Magistrate's Court against the Hotel claiming damages for wrongful dismissal. The main issues that arose for consideration before the Magistrate were whether Ms. Stevens was wrongfully dismissed, and if so, the amount of compensation to be paid to her. Upon hearing and considering the evidence, the Magistrate delivered her reasons for decision finding that the Hotel owed a duty to Ms. Stevens to make reasonable enquiries and should have investigated the matter properly before terminating Ms. Stevens' employment. Further, that reasonable investigations would have shown that the video footage confirmed Ms. Stevens' version of the events and that there was a practice that supervisors sometimes used the cashier's micros card.

On the issue of damages, the Magistrate decided that Ms. Stevens was not limited to the statutory notice period under the **Protection of Employment Act** ("the Act"). She was entitled to reasonable notice at common law, which the Magistrate found to be three months' notice. The Magistrate also accepted Ms. Stevens' evidence of her salary and arrived at an average monthly salary of $2,964.84. She was awarded damages of $8,794.40, being three months' salary, and costs of $5,000.00.

The Hotel, being dissatisfied with Magistrate's decision, appealed to this Court. The issues that arise to be determined are: (1) whether the Magistrate erred in finding that the Hotel wrongfully dismissed Ms. Stevens; (2) whether in the circumstances of the case the Magistrate erred in finding that Ms. Stevens was entitled to reasonable notice of termination; (3) whether the Magistrate erred in her assessment of Ms. Stevens' income and the assessment of damages; and (4) whether the Magistrate erred in ordering the Hotel to pay costs.

Held: dismissing the appeal, affirming the orders made by the Magistrate and awarding costs of the appeal of $3,333.00 to the respondent, that:

1. The law on the approach to be taken by an appellate court when reviewing the findings of fact by a lower court is well settled. An appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witnesses give their evidence and to assess their demeanor and credibility. To succeed an appellant must satisfy this Court that either the lower court erred in principle in considering the evidence, or that the lower court did not take proper advantage of having seen and heard the witnesses, or that

its findings on the evidence were plainly wrong. Applying these principles, it is clear that there is no basis for this Court to interfere with the Magistrate's findings that Ms. Stevens was not involved in the activities of Ms. Weekes in handing over food and beverages to her relatives, and that Ms. Stevens' conduct in allowing her supervisor to use her micros card was not in the circumstances a sufficiently serious breach of the Hotel's policies and procedures to justify summary dismissal. These are straightforward findings of fact by the Magistrate that she was entitled to make based on her assessment of the evidence before her.

Watt (or Thomas) v Thomas [1947] 1 All ER 582 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** BVIHCVAP2012/0028 (delivered 20th April 2016, unreported applied; **Henry v Mount Gay Distilleries Limited (Barbados)** [1999] UKPC 39 applied; **Ingrid Brantford-Hughes v Golden Years Home for the Elderly** MNILTAP2019/0002 (delivered 26th May 2020, unreported) applied.

2. Section 5(2) of the Act provides that where an employer is relying on past conduct to justify summary dismissal the conduct must have occurred within six months of the dismissal and the employee must have been warned of the consequences of repeating the misconduct. The alleged historical misconduct in this case took place well in excess of six months before the dismissal and should not be considered in assessing whether the dismissal in July 2014 was proper. The historical misconduct should be regarded only as background in the context of the reasons for dismissal.

   Section 5(2) of the **Protection of Employment Act** Cap. 18.27, Revised Laws of Saint Christopher and Nevis, 2017; **Ingrid Brantford-Hughes v Golden Years Home for the Elderly** MNILTAP2019/0002 (delivered 26th May 2020, unreported) applied.

3. The Act introduced into the Federation of Saint Christopher and Nevis the right for an employer or employee to bring a statutory claim for breaches of the Act and related matters. It is a matter of interpretation whether the Act abrogated the existing common law right not to be wrongfully dismissed. The general rule is that a statute should not be construed so as to abolish or restrict a common-law right or remedy in the absence of unequivocal language or necessary implication. There is nothing in the Act that suggests that the common law action for wrongful dismissal, which includes the requirement to give reasonable notice, was abrogated by the passage of the Act in 1986, or by the repeal of the proviso to section 3 of the Act in 2014. The common law action for wrongful dismissal continues to exist in Saint Christopher and Nevis. An employee like Ms. Stevens who was summarily dismissed therefore retains the right to bring a common law action for wrongful dismissal and, if successful, is entitled to damages based on reasonable notice of termination. The Magistrate was correct in awarding damages to Ms. Stevens calculated by reference to the common law principle of reasonable notice. Further, the

Magistrate was also correct in finding that based on Ms. Stevens' term of employment with the Hotel, her age and the fact that she has not been able to find a job for over a year, she was entitled to damages based on three month's salary.

Burrill and another v Schrader and another (1995) 50 WIR 193 applied; **R (Rottman) v Commissioner of Police for the Metropolis** [2002] UKHL 20 considered; **Alicia Sardine-Browne v RBTT Bank** SVGHCV2006/0520 (delivered 13th July 2015, unreported); Section 7 of the **Protection of Employment Act** Cap. 18.27, Revised Laws of Saint Christopher and Nevis, 2017 considered; Section 3 of the **Protection of Employment Act** Cap. 18.27, Revised Laws of Saint Christopher and Nevis, 2017 considered; Section 56 of the **Protection of Employment Act** Cap. 18.27, Revised Laws of Saint Christopher and Nevis, 2017 considered; Section 35 of the **Protection of Employment Act** No. 20 of 2003, Laws of Saint Vincent and the Grenadines considered.

4. It was open to the Hotel, which would have had the complete records of Ms. Stevens' employment, to adduce evidence to refute Ms. Stevens' evidence. However, this was not done. Taking this into account the Court finds that the Magistrate did not err in accepting Ms. Stevens' evidence about her earnings and the Magistrate should not be criticised for accepting the evidence that Ms. Stevens made $2,964.80 per month.

5. The Magistrate has a discretion under section 152 of the **Magistrate's Code of Procedure Act** to award reasonable costs up to $10,000.00. The Magistrate exercised her discretion properly by awarding costs in the amount that she did to the successful party. This appears to be a reasonable amount for a heavily contested trial in the lower court and there is no basis for this Court to interfere with the exercise of the Magistrate's discretion.

   Section 152 of the **Magistrate's Code of Procedure Act** Cap. 3.17, Revised Laws of Saint Christopher and Nevis, 2009 applied.

JUDGMENT

[1] **WEBSTER JA [AG.]**: This is an appeal by St. Kitts Marriott Resort ("the appellant" or "the Hotel") against the judgment of the learned magistrate, Ms. Josephine Mallalieu-Webbe ("the Magistrate") determining that the Hotel had wrongfully dismissed the respondent, Ms. Deborah Stevens ("the respondent" or "Ms. Stevens"), and awarding her $8,816.90 in damages and costs.

Background

[2] Ms. Stevens was employed by the Hotel as a cashier and waitress for 9 years and 6 months since 2004. On 13th June 2014, Ms. Stevens along with her then supervisor, Ms. Andrea Weekes ("Ms. Weekes"), and another employee of the Hotel, were working at the Café Calypso ("the Café") located on the Hotel's premises. On that evening, Ms. Weekes' relatives visited the Café and while there she served them with food and beverages. As Ms. Weekes' relatives were leaving the Hotel, a security guard stopped them in the parking lot and directed them to return the Café because there was a query about their bill. This was because Ms. Weekes was suspected of giving her relatives items from the Cafe. When asked what method of payment was used for the items, the relatives stated that they paid by cash. However, by this time, the Café had stopped processing cash transactions. The security guard then went to Ms. Weekes and requested a receipt for the said items. He observed Ms. Weekes swiping a micros card into the cash register. A receipt was produced which showed that the beverages were paid for with Ms. Weekes' credit card. However, the transaction, as evidenced by the time stamp on the receipt, was entered after the security guard had intercepted the relatives and the items on the receipt did not correspond with the beverages in their possession. Following this incident, the Hotel summarily dismissed Ms. Weekes for fraud and theft.

[3] On 28th June 2014, after the Hotel had discovered that Ms. Stevens was the cashier whose micros card was used to process the purported payment for the food and drinks, she was suspended without pay pending further investigation into the matter. Later, she was called to a meeting with management on 1st July 2014. During the meeting she was shown video footage of activities in the Café on the evening of the 13th June 2014 and questioned about her role in Ms. Weekes' giving away the Hotel's property. She denied any involvement and explained how her micros card came to be used by Ms. Weekes. At the end of the meeting the Hotel summarily dismissed her. The dismissal was confirmed by a letter dated 4th July 2014 which reads:

"Dear Deborah,

Further to the recent disciplinary meeting that you attended on 2nd July (sic) I am writing to confirm that you have been terminated from your employment at the St. Kitts Marriott Resort for the following reasons:

> On Friday, June 13th at approximately 9:15pm you were seen on the camera observing your supervisor, Andrea Weekes, serving ice-cream, assorted beverages and pizza to guests at the Calypso Cafe counter and not accepting payment for these items. The guests were detained in the parking lot by Loss Prevention Officers and could not produce a payment receipt for any of the items and the further told the Loss Prevention Officer that they did not purchase the beverages here at the hotel. You have previously been made aware that you are solely responsible for the use of your MICROS card and the operations and procedures made with your card.

Therefore in line with company policy I regrettably have to terminate your employment with effect from 2nd July 2014.

All outstanding days worked, vacation days if any will be paid to you at the end of the next payroll cycle in June 2014. Service charge will be paid when calculated as it is usually paid a month in arrears.

Deborah, I sincerely regret that your employment with the company has to come to an end and wish you every success in your future endeavors."

[4] In January 2015, Ms. Stevens filed a claim in the Magistrate's Court against the Hotel claiming damages for wrongful dismissal.[1] The main issues that arose for consideration before the Magistrate were whether Ms. Stevens was wrongfully dismissed, and if so, the amount of compensation to be paid to her.

Proceedings in the court below

[5] Ms. Stevens' position before the Magistrate was that at the material time on the night of 13th June 2014, she was very busy clearing tables when she gave Ms. Weekes permission to use her micros card. She said that she was not involved in any way in Ms. Weekes giving food and drinks to her relatives and that the video evidence supported her position. She maintained that when the Café was busy it was the usual practice for supervisors to assist by using the cashier's micros cards to process sales. Further, her actions that night did not amount to serious misconduct and she should not have been summarily dismissed.

[1] Summons to appear filed 22nd January 2015 at page 1 of Record of Appeal filed 11th January 2018.

[6] The Hotel opposed the claim and asserted that Ms. Stevens was lawfully dismissed for serious misconduct for the reasons set out in the termination letter of 2nd July 2014. The Hotel supported its position by reference to its policies and procedures contained in two agreements signed by Ms. Stevens regarding the use of her micros card, namely: (i) the 'Statement of Acknowledgement of Hotel Policies/LSOP' signed on 29th August 2009, by which Ms. Stevens acknowledged that failure to observe the LSOP would constitute a violation of the Hotel's procedures and would lead to disciplinary proceedings,[2] and (ii) the 'Local Standard Operating Procedure' signed on 29th September 2009, which provided that the employee's micros card is non-transferable and that employees are solely responsible for the use of and the transactions made with their cards.[3] The Hotel submitted that by virtue of its policies and procedures an employee should not permit another employee, including supervisors, to use his or her micros card. The Hotel argued further that, since Ms. Stevens had signed the Hotel's policy agreements, she was aware of the policy that a cashier, like herself, was not allowed, under any circumstance, to permit others to use her micros card. The Hotel also denied Ms. Stevens' contention that there was an established practice whereby supervisors would sometimes use another employee's micros cards. Rather, the Hotel argued that when it was busy supervisors would assist by clearing tables and retrieving items out of the refrigerator, or they would write orders by hand and later have them entered in the system by the cashier.

[7] The Magistrate found that the Hotel owed a duty to Ms. Stevens to make reasonable enquiries and should have investigated the matter properly before terminating Ms. Stevens' employment. Further, if they had conducted a proper enquiry, they would have found that the video footage confirmed Ms. Stevens' version of the events that she was busy, back and forth, and not beside Ms. Weekes at the material time. Further, that reasonable investigations would have shown that there was a practice that supervisors sometimes used

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[2] Record of Appeal filed 11th January 2018, page112.
[3] Record of Appeal filed 11th January 2018, pages 110 to 111.

the cashier's micros card. Instead, the Hotel "rushed to judgment" and summarily dismissed Ms. Stevens.[4]

[8] On the issue of damages, the Magistrate decided that Ms. Stevens was not limited to the statutory notice period under the **Protection of Employment Act**,[5] ("the Act"). She was entitled to reasonable notice at common law, which the Magistrate found to be three months' notice having regard to Ms. Stevens' age, length of service and the difficulty in securing alternative employment. The Magistrate also accepted Ms. Stevens' evidence that her salary averaged $1,000.00 per fortnight during the slow season and $2,000.00 per fortnight during the peak season. Ms. Stevens had produced one pay slip for $964.80 for one fortnight period. The Magistrate used this information to arrive at an average monthly salary of $2,964.84 and awarded damages of $8,794.40, being three months' salary. The Magistrate also awarded costs of $5,000.00.

The Appeal

[9] The appellant, being dissatisfied with Magistrate's decision, appealed to this Court. The notice of appeal lists six grounds of appeal:

(i) The Magistrate erred in her finding of fact that the appellant rushed to prejudgment of the respondent and did not conduct a proper investigation of the respondent's explanation and her side of the story. This ruling was unreasonable, cannot be supported having regard to the evidence and a magistrate viewing the circumstances reasonably could not properly have so decided.

(ii) The Magistrate erred in her finding of law as to the required standard of investigation required for an employer to summarily dismiss an employee.

(iii) The Magistrate erred in her findings of law and unreasonably rejected legal evidence affecting the merits of the case in relation to the ruling that the respondent was wrongfully dismissed.

[4] Record of appeal filed 11th January 2018, page 117.
[5] Cap. 18.27, Revised Laws of Saint Christopher and Nevis, 2017.

(iv) The Magistrate erred in her findings of law and unreasonably rejected legal evidence affecting the merits of the case in relation to the ruling that the respondent was entitled to three months' notice of dismissal.

(v) The Magistrate erred in her finding of fact that the respondent was remunerated "$2,000 every two weeks when things were good and when things were slow $1000 or $900 at least." This ruling was unreasonable, cannot be supported having regard to the evidence and a magistrate viewing the circumstances reasonably could not properly have so decided.

(vi) The Magistrate erred in her finding of mixed fact and law that the respondent was entitled to costs.

The first three grounds of appeal overlap, and they deal with the main issue in the appeal, namely, whether the Magistrate erred in finding that the appellant wrongfully dismissed the respondent. The other three issues are whether in the circumstances of the case the Magistrate erred in finding that the respondent was entitled to reasonable notice of termination (ground 4); whether the Magistrate erred in her assessment of damages (ground 5); and whether the Magistrate erred in ordering costs to the respondent (ground 6).

Discussion
Issue 1 (grounds 1, 2 and 3): Whether the Magistrate erred in finding that the appellant wrongfully dismissed the respondent

[10] Ms. Stevens' was employed indefinitely and there was no written contract of employment. Her employment was terminated without notice for serious misconduct. The statute law governing the termination of employment in the Federation of Saint Christopher and Nevis is the **Protection of Employment Act**. Section 5(b) which provides that an employer may terminate the employment of an employee "without notice if the employee is guilty of serious misconduct in or in relation to his or her employment."

[11] Learned counsel for the Hotel, Mr. Garth L. Wilkins, submitted that the Magistrate erred in her finding of fact that the appellant had rushed to prejudgment in respect of respondent; that the Hotel failed to conduct a proper investigation prior to the termination; and erred in finding that Ms. Stevens was wrongfully dismissed. This complaint seeks to challenge the Magistrate's factual findings. The law on the approach to be taken by an appellate court when reviewing the findings of fact by a lower court is settled and routinely applied by this Court. In summary, an appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witness give their evidence and to assess their demeanor and credibility. If authority is needed for this trite point it can be found in the seminal judgment of Lord Thankerton in **Watt (or Thomas) v Thomas**,[6] a decision that has been followed on many occasions by this Court.

[12] The principles in **Watt v Thomas** also apply, with necessary modifications in each case, to findings by the trial court based on inferences drawn from the primary facts. See for example **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**[7] where Blenman JA stated:

> "The Court of Appeal should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong."[8]

[13] In relation to a finding of summary dismissal Lord Browne-Wilkinson commented on the role of an appellate court in **Henry v Mount Gay Distilleries Limited (Barbados)**,[9] an appeal from the Court of Appeal of Barbados to the Privy Council, as follows –

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6 [1947] 1 All ER 582.
7 BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).
8 Ibid at para. 46.
9 [1999] UKPC 39 at para 8.

> "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: Clouston & Co. Limited v. Corry [1906] A.C. 122".

This passage was recently cited with approval by this Court in **Ingrid Brantford-Hughes v Golden Years Home for the Elderly**,[10] an appeal from the Industrial Court of Montserrat.

[14] The cases cited above make the obvious point – that on the issue of the summary dismissal of Ms. Stevens, the Hotel is appealing against findings of fact by the Magistrate. To succeed the Hotel must satisfy this Court that either that the Magistrate erred in principle in considering the evidence, or because it unmistakably appears from the evidence that she has not taken proper advantage of having seen and heard the witnesses, or that her findings on the evidence were plainly wrong. It is not enough for the appellant to say that the Magistrate came to the wrong conclusions or that this Court, reviewing the evidence, should come to different conclusions on the facts.

[15] Applying these principles, I will now review the evidence and the Magistrate's finding that Ms. Stevens was wrongfully dismissed.

Complicity in Ms. Weekes' conduct

[16] The first reason posited by the Hotel for the summary dismissal of Ms. Stevens is that she was complicit in the theft of the Hotel's property in that she was observed on camera beside Ms. Weekes when the latter was giving the drinks and food to the guests. This allegation was rejected by the Magistrate. At page 116 of the Record of Appeal she decided:

> "Court found that there was not enough evidence to show that Deborah was a party to the theft or even knew of the theft. The video footage showed that Deborah was busy back and forth at the time Andrea was handing over drinks to her family. The video footage shows that Deborah is (sic) no where nearby when Andrea hands over the drinks to her family."

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[10] MNILTAP2019/0002 (delivered 26th May 2020, unreported) at para. 32.

This is a straightforward finding of primary fact by the Magistrate based on her assessment of the witnesses and her review of the video footage. There is no basis for this Court to interfere with the Magistrate's finding that Ms. Stevens was not involved in the activities of Ms. Weekes in handing over food and drinks to her relatives. The Magistrate was justified in finding that the Hotel rushed to judgment concerning Ms. Stevens and had they carried out a proper investigation they would have found that there was a high possibility that Ms. Stevens was speaking the truth about not being involved in the handing over of the food and drinks the guests by Ms. Weekes. The allegation is not supported by the evidence and there is no basis for interfering with the Magistrate's findings. This takes care of the first reason in the termination letter for dismissing Ms. Stevens.

Misuse of the micros card

[17] The Hotel's more substantial complaint against the Magistrate's decision is that she erred in not finding that Ms. Stevens' conduct in allowing her supervisor to use her micros card, which use resulted in loss to the company, was a serious breach of the Hotel's policies and procedures of which she (Ms. Stevens) was aware and was sufficiently serious conduct to justify summary dismissal.

[18] In paragraphs 5 and 6 above I set out the Hotel's policy regarding micros cards and the parties' respective positions on the issue. The Magistrate accepted that by signing the policy agreements Ms. Stevens knew she was not supposed to allow other persons to use her card. However, the Magistrate also took into account Ms. Stevens' evidence that there was a practice at the Hotel for supervisors to assist by using the cashiers' micros cards to process sales. Her evidence on this point was supported by other witnesses who were all employees or former employees of the Hotel, namely Vanroy Richardson, Paulette Roberts and Rhesa Wattley. The Magistrate's finding on this issue is at page 118 of the Record of Appeal –

> "The court found that Deborah had signed the policy agreement so she knew she was not supposed to let other persons use her card. However the court did accept that there was a practice where cashiers would allow supervisors to use their cards if the café was very busy.

> The court found that cashiers might well take the risk on busy nights to let their supervisors use their card as it was the very same supervisor responsible for checking them off the shift."

[19] It is apparent from the Magistrate's Reasons for Decision that she considered both sides of the issue of Ms. Stevens' misuse of the micros card. She found Ms. Stevens to be a humble and mature person and accepted her evidence, and that of her witnesses, that there was an established practice by which supervisors sometimes used micros cards of the cashiers "when things are busy". She rejected the evidence of the Hotel's witness, Jennifer Caines, that the system of supervisors using the cashiers' micros cards did not exist. The finding that the system existed was open to the Magistrate on the evidence.

[20] The Magistrate then went on to find, as she was entitled to do, that in view of the established practice of supervisors using the cashiers' micros card when things are busy; the decreased risk of loss because the Café was no longer doing cash transactions; and that Ms. Weekes was Ms. Stevens' supervisor who checked her of the end of the shift, that the misuse of the card in all the circumstances did not amount to serious misconduct sufficient to terminate her employment without notice.

[21] Mr. Wilkins also invited this Court to take into account that the Magistrate failed to take into consideration or failed to give sufficient weight to the evidence that Ms. Stevens had a vast disciplinary record including cash mis-handling, underperformance and unprofessional conduct. It is not surprising that the Magistrate did not attach weight to this evidence. Section 5(2) of the Act provides that where an employer is relying on past conduct to justify summary dismissal the conduct must have occurred within six months of the dismissal and the employee must have been warned of the consequences of repeating the misconduct. The alleged historical misconduct in this case took place well in excess of six months before the dismissal, was not mentioned as a reason for summary dismissal in the termination letter, and should not be considered in assessing whether the dismissal in July 2014 was proper. The

historical misconduct should be regarded only as background in the context of the reasons for dismissal.[11]

[22] In all the circumstances I find that the Magistrate's finding that the summary dismissal of the respondent by the Hotel was wrongful, was a finding of fact based on the evidence and there is no basis for this Court to interfere with the Magistrate's conclusion. The appeal cannot be sustained on this point.

Issue 2 (ground 4): Notice of termination

[23] The Magistrate, having found that Ms. Stevens' employment was wrongfully terminated without notice, awarded damages based on the common law principle of reasonable notice. The Magistrate assessed the damages at three month's salary having regard to Ms. Stevens' age, length of service and difficulty in securing alternative employment. Two issues arise from this award:
(a) Whether an employee is entitled as a matter of law to notice of termination of employment based on the common law principle of reasonable notice or the relevant notice period in section 7 of the Act.
(b) If the dismissed employee is entitled to notice (which the Hotel disputes) whether the Magistrate erred as a matter of fact in calculating the amount of damages.

Applicability of the Act to the appellant's case

[24] Mr. Wilkins submitted that the Magistrate was bound to follow section 7 of the Act and award damages (if any) based on five weeks salary, being the amount in the section applicable to a person in Ms. Stevens' position. Ms. Natasha S. Grey who appeared for Ms. Stevens contended that the Magistrate was correct in awarding damages based on the common law because the Act did not take away the right to such damages. This difference of opinion raises an important point as to how the Act should be applied in Saint Christopher and Nevis.

[11] Supra note 10.

[25] Section 7 of the Act provides that an employer shall give an employee notice of termination of his or her services and sets out the periods of notice depending on the amount of time that the employee worked continuously for the employer. Section 7 is subject to section 5 which provides that an employer may terminate the services of an employee without notice where the employee is guilty of serious misconduct in or in relation to his or her employment.

[26] Section 3 of the Act lists six categories of persons to whom the Act does not apply. None of these categories is relevant to this case. Section 3 in its original form contained the following proviso following the listing of the six exempted categories of employees:

> "Provided however that notwithstanding the provisions of this section, this Act shall apply in all cases except where the benefits to be derived by the employee are more favourable than those provided in the Act, whether or not the more favourable benefits accrue or will accrue by law, custom, contract or any other arrangement." ("the Proviso")

The effect of the Proviso was that stipulations in the Act relating to an employee, such as the notice periods in section 7, were treated as minimum conditions and an employee was entitled to more favourable terms if they were available by law, custom, contract or otherwise. This meant that the principle of reasonable notice at common law would apply to an employee's dismissal and his or her claim for compensation under the Act if it produced a notice period for the affected employee that was greater than the statutory minimum in section 7. Claims for compensation under the Act are dealt with in paragraphs 31-33 below.

[27] In August 2014, the National Assembly amended section 3 by deleting the proviso entirely. The effect of the deletion is that section 7, and the entire Act, must now be read without reference to the stipulations that previously applied by virtue of the Proviso. However, section 60 of the Act provides that:

> "Nothing in this Act is to be interpreted to prevent any employer from providing in respect of any employee terms and conditions more favourable than those required by the Act."

According to Mr. Wilkins the repeal of the Proviso abrogated the common law principle of reasonable notice which no longer applies in Saint Christopher and Nevis, and provision for a longer notice period can be made only by contract pursuant section 60. This, he submitted, is the current state of the law in Saint Christopher and Nevis regarding notice of termination of employment.

Applicability of the common law

[28] Ms. Grey's position was diametrically opposed to Mr. Wilkins. Her position was that the Act did not apply to Ms. Stevens' dismissal. She was summarily dismissed by the Hotel and brought a common law claim for damages for breach of her employment contract.[12] She claimed that Ms. Stevens was wrongfully dismissed and was entitled to damages under the common law based on reasonable notice which in turn depended on all the circumstances of her employment. I agree with her submissions based on the following analysis.

[29] In 1975 the Virgin Islands enacted **The Labour Code Ordinance, 1975** ("the 1975 Code"). The 1975 Code introduced a new form of action known as unfair dismissal and, among other things, remedies for breaches of the Code including the amount of notice that an employee should be given if he or she is unfairly dismissed. The 1975 Code also included a procedure for resolving claims for unfair dismissal by the Labour Commissioner and the Minister of Labour. The relevant provisions of the 1975 Code were considered by the Court of Appeal in 1985 in **Burrill and another v Schrader and another**.[13] A key issue in the appeal was whether the 1975 Code, having created the statutory remedy of unfair dismissal, had abolished the common law action for wrongful dismissal. In delivering the judgment of the Court, Chief Justice Sir Vincent Floissac, with whom Byron JA and Satrohan Singh JA agreed, noted that the common law action for wrongful dismissal predated the 1975 Code and that a statute should not be construed so as to abolish or restrict a

[12] Record of Appeal filed 11th January 2018, page 2.
[13] (1995) 50 WIR 193.

common-law right or remedy in the absence of unequivocal language or necessary implication. The learned Chief Justice stated:

> "A statute or statutory provision should not be given an interpretation whereunder the statute or statutory provision effectively abolishes or restricts an existing common-law right or remedy unless the language and other components of the statutory context unequivocally or by necessary implication signify a legislative intention to abolish or restrict that right."[14]

Lord Hutton made a similar pronouncement in 2002 in the House of Lords decision in **R (Rottman) v Commissioner of Police for the Metropolis** when he said:

> "It is a well-established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication."[15]

[30] It is a matter of interpretation in each case whether new legislation abrogates an existing common law right. The Court of Appeal in **Burrill and another v Schrader and another** decided that the 1975 Code, properly construed, did not abolish the common law remedy of wrongful dismissal and that the two remedies, wrongful dismissal and unfair dismissal, continued to exist side by side. This is what the learned Chief Justice said:

> "At the time of the enactment of the Labour Code, an employee had a common law right not to be wrongfully dismissed. The Labour Code did not abolish that right. The Labour Code merely supplemented that right by a statutory right not to be unfairly dismissed. The statutory right was created by section C55 of the Labour Code … The result is that an employee now has a common law right and a statutory right. The common-law right is based on contract and the statutory right is based on social policy. The provisions of sections C57 and C58 of the Labour Code ensure that the two rights harmoniously co-exist."[16]

[31] I have taken note that the Act in Saint Christopher and Nevis does not create the statutory remedy of unfair dismissal as in the 1975 Code and in labour legislation elsewhere in the Eastern Caribbean.[17] However, what is important

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[14] Ibid at page 197.
[15] [2002] UKHL 20 at para. 53
[16] Supra at page 197
[17] Cap. 27, Antigua and Barbuda Labour Code, Laws of Antigua and Barbuda; Cap. 15.03 Montserrat Labour Code Revised Laws of Monserrat, 2013; the Protection of Employment Act, Saint Vincent and the Grenadines

is that the Act created a remedy for an employee or employer who complains that the provisions of the Act have been contravened in respect of his or her employment. The remedy is contained in Section 56 of the Act which provides that:

> "(1) Any employer or employee … may make a complaint to the Commissioner that the provisions of this Act have been contravened by an employer or employee and in any complaint made to the Commissioner in accordance with this subsection, the employee and employer shall have the right to be represented.
> (2) Upon receipt of a complaint under the preceding subsection, the Commissioner shall forthwith take appropriate steps in accordance with the provisions of the Labour Act, Cap. 18.18 to assist the parties to arrive at a settlement." (emphasis added)

If the Commissioner fails to achieve voluntary adjustment or settlement within 14 days of the receipt of the complaint, he must refer the dispute to the Minister of Labour who will, if necessary, conduct a hearing into the matter. Subsection 8 then provides that

> "Any employer or employee who is dissatisfied with any recommendations or findings given or made under this section may appeal to a judge in chambers who may in addition to any other remedy, order reinstatement of any employee or make any award of compensation."

[32] A similar provision to section 56 appears in section 35 of the **Protection of Employment Act** of Saint Vincent and the Grenadines except that the language in section 35 is mandatory stating that an aggrieved employer or employee "shall" make a complaint to the Commissioner of Labour. Notwithstanding the mandatory language of the section Henry J. in **Alicia Sardine-Browne v RBTT Bank**,[18] following the decision in **Burrill and another v Schrader and another**, found that the Protection of Employment Act did not abolish the common law action for wrongful dismissal and the statutory and the common law actions continued. Therefore, Mrs. Sardine-Browne was not precluded from making a claim in the High Court for wrongful dismissal.

[18] SVGHCV2006/0520 (delivered 13th July 2015, unreported).

[33] The net result of these provisions in the Act is that an aggrieved employee has a statutory remedy, for challenging contraventions of the Act by using the procedures set out therein, and can receive an award of compensation as well as a right to be reinstated. In this case Ms. Stevens was not asserting such a remedy. She made a common law claim for wrongful dismissal.

[34] In the circumstances I am satisfied that the principles articulated by Chief Justice Floissac in **Burrill and another v Schrader and another**[19] apply in Saint Christopher and Nevis. The common law action for wrongful dismissal existed in the twin-island state before the passage of the Act in 1986 and there is nothing in the Act that suggests that this established common law right was abrogated. The repeal of the Proviso in 2014 did not affect the common law action for wrongful dismissal or the requirement for reasonable notice which is a part of the common law. The repeal of the Proviso means that a person claiming compensation or reinstatement under the Act can no longer rely on the principle of reasonable notice and must rely on the statutory periods of notice in section 7. On the other hand, an employee like Ms. Stevens who was summarily dismissed retains the right to bring a common law action for wrongful dismissal and, if successful, is entitled to damages based on reasonable notice of termination.

[35] It is for these reasons that I agree with Ms. Grey's submission that the Magistrate was correct in awarding damages to Ms. Stevens calculated by reference to the common law principle of reasonable notice and not the statutory notice periods in section 7 of the Act. The statutory notice periods apply only when an aggrieved employee files a complaint with the Labour Commissioner which is eventually adjudicated by the Minister of Labour.

[36] To complete the issue of notice I agree with the Magistrate's finding that based on Ms. Stevens' term of employment with the Hotel (almost 10 years), her age and the fact that she has not been able to find a job for over a year, she is entitled to damages based on three month's salary.

[19] Supra fn. 11.

Issue 3 (ground 5): Whether the Magistrate erred in her assessment of Ms. Stevens' income

[37] Mr. Wilkins submitted that the Magistrate erred in her finding of fact that Ms. Stevens earned, on a fortnightly basis, $900.00 and $1,000.00, in the slow season, and $2,000.00 in the high season. He argues further that, the pay slip adduced by Ms. Stevens in the court below was insufficient to support her claim that she made, on average, $2,964.80 per month. He relied on the established principle of law that the measure of damages for wrongful dismissal is the amount the employee would have earned if he or she had been given adequate notice. Ms. Grey, on the other hand, argued that the Magistrate properly considered Ms. Stevens' unchallenged evidence of her monthly earnings. She therefore submitted that this Court should not disturb the Magistrate's finding of fact that Ms. Stevens earned $2,000.00 during the peak season and $1,000.00 during the slow season.

[38] This is a short point. It was open to the Hotel, which would have had the complete records of Ms. Stevens' employment, to adduce evidence to refute Ms. Stevens' evidence. This was not done. Taking this into account I find that the Magistrate did not err in accepting Ms. Stevens' evidence about her earnings and she should not be criticised for accepting the evidence that she made $2,964.80 per month.

[39] I would dismiss the appeal against the Magistrate's assessment of the damages.

Issue 4 (ground 6): Whether the Magistrate erred in ordering the appellant to pay costs

[40] Mr. Wilkins in his written submissions submitted the Magistrate erred in ordering the appellant to pay Ms. Stevens' costs in the sum of $5,000.00. Ms. Grey, on the other hand contended that section 152 of the **Magistrate's Code of Procedure Act**[20] confers upon the Magistrate a discretion to award reasonable costs up to $10,000.00. The Magistrate exercised her discretion

[20] Cap. 3.17, Revised Laws of Saint Christopher and Nevis, 2009.

properly by awarding costs, in the amount that she did, to the successful party. This appears to be a reasonable amount for a heavily contested trial in the lower court and there is no basis for this Court to interfere with the exercise of the Magistrate's discretion.

Conclusion

[41] In all circumstances I would dismiss the appeal, affirm the orders made by the learned Magistrate and award costs of the appeal of $3,333.00 to the respondent.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gerard St. C Farara, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar