

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

TERRITORY OF MONTSERRAT

MNIMCVAP2024/0001

BETWEEN:

GOLDEN YEARS HOME FOR THE ELDERLY

Appellant

and

INGRID BRANFORD HUGHES

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Jean Kelsick for the Appellant
Dr. David Dorsett for the Respondent

2025: May 7;

2026: January 14.

Re-Issue: January 22.

Civil appeal – Employment Law – Unfair dismissal – Sections 3 and 61(1) of the Labour Code – Section 26 of the Labour Code (Amendment) Act - Whether the Tribunal’s decision that the respondent was unfairly dismissed should be upheld - Correct test for unfair dismissal - Compensation for unfair dismissal – Section 68(2)(e) of the Labour Code - Whether the Tribunal erred in awarding the respondent compensation of \$104,931.15

By an appeal filed on 16th January 2024 the appellant challenged the decision of the Labour Tribunal of Montserrat (“the Tribunal”) delivered on 6th December 2023 that the respondent, Ingrid Branford Hughes, was unfairly dismissed from her employment with the appellant and awarded her compensation in the aggregate sum of \$104,931.15. The award comprised loss of earnings from the date of dismissal, August 2017 to the date of judgment, December 2023 in the sum of \$116,866.40 less loss of earnings from September 2021 to October 2023 of \$37,767.00 as well as \$16,567.95 for loss of protection; and \$9,263.80 for the manner of

dismissal, which the Tribunal found was hard and oppressive and in consideration of the disparity of treatment.

The appellant is a statutory body established by virtue of the **Golden Years Foundation (Care of the Elderly) Act** which operates a retirement home in Montserrat for the elderly and disabled. The respondent was a caregiver in the appellant's employ from February 2008 until August 2017 when she was summarily dismissed for gross misconduct by letter dated 25th August 2017 issued under the signature of Mr. Kenneth Scotland, the Chairman of the Board of the appellant.

The dispute between the parties is premised on two incidents which occurred on 13th June 2017 and 14th June 2017 at the appellant's retirement home ("the Home"). The first incident on 13th June 2017 involved a resident who fell and was left on the floor in the presence of another caregiver, Ms. Ferguson, while the respondent sought assistance outside of the Home. The second incident on 14th June 2017 involved a soiled diaper which was allegedly thrown on Ms. Ferguson's foot. By letter dated 15th June 2017 the respondent was placed on paid suspension effective 16th June 2017 pending the outcome of an investigation.

A meeting was held on 29th June 2017 with the respondent and the Chairman, Mr. Scotland, the manager of the Home, a member of the Board, a Senior Social Worker for Vulnerable Elderly. Following this meeting, the respondent was summarily dismissed by letter dated 25th August 2017, wherein she was informed that her 'behaviour was improper and demonstrated (i) wrongdoing and (ii) a deliberate violation of the Homes (sic) policy and procedures. Given the Home's functions and business; coupled with your responsibilities within the organization, your actions qualify as gross misconduct.' Accordingly, the Board's decision, made at a meeting on 2nd August 2017, was to summarily terminate the respondent's employment, and she was informed that she was 'not entitled to any period of notice or payment in lieu of notice.'

Following the issuance of this dismissal letter, the respondent sought compensation from the Tribunal for unfair dismissal. This application was dismissed by the Tribunal. The respondent successfully appealed this dismissal decision to the Court of Appeal. By a judgment delivered on 26th May 2020, the Court allowed the appeal, set aside the decision of the Tribunal dated 20th February 2019, and remitted the matter to the Tribunal to be heard by a new panel of members. It was also ordered that the rehearing take place on the affidavits already filed in the dispute, and each party bear their own costs of the appeal.

A second hearing was convened before the Tribunal as ordered by the Court of Appeal. The Tribunal determined on 1st February 2021 that the respondent's dismissal did not amount to "fair dismissal" as submitted by the appellant. The Tribunal awarded the respondent compensation of \$24,193.49 for unfair dismissal, to be paid in six months from the date of the judgment.

The respondent filed another appeal challenging the Tribunal's quantum of compensation. The Court of Appeal ordered on 7th February 2022 that 'the judgment and order appealed against is set aside and the matter is remitted to a properly constituted Labour Tribunal for determination.'

This resulted in a third hearing before the Tribunal, which decision is the subject of this appeal. In its decision delivered on 6th December 2023, the Tribunal stated that the main issue for determination was whether the respondent's actions amounted to gross misconduct. The Tribunal considered three actions in making its determination. The first action was throwing a soiled adult pampers on the foot of a colleague Ms. Ferguson. The second action was the incident on 13th June 2017 involving Mr. Morson in which the respondent went into the community to seek help instead of calling the fire and rescue unit or lifting Mr. Morson with Ms. Ferguson as was expected in the circumstances. The third action related to the respondent's "behaviour" at the 29th June 2017 meeting.

The Tribunal considered what may amount to "gross misconduct" under section 3 of the **Labour Code** and an employer's entitlement under section 61(1) to dismiss summarily and without notice an employee who is guilty of gross misconduct. The Tribunal determined that 'none of the acts attributed to [the respondent] amount to gross misconduct either in and of themselves or cumulatively'; and awarded her compensation of \$104,931.15.

By amended notice of appeal filed on 2nd July 2024 the appellant challenged the Tribunal's decision dated 6th December 2023, on five grounds. Some of these ground raise issues of law and others pure issues of fact. By section 26 of the Labour Code (as amended by Act No. 4 of 2022) ("the Act"), a party to a matter before the Labour Tribunal is entitled to appeal as of right to the Court of Appeal on certain specified grounds including the lack or excess of jurisdiction, that the award was obtained by fraud, the finding or decision of the Tribunal is erroneous in point of law, or some other specific illegality not mentioned in paragraphs (a) to (d) of section 26(1) substantially affecting the merit of the matter has been committed in the course of the proceedings. It was considered that grounds (a), (d), (e), (g), (h) and (i) of the amended notice of appeal fell within the ground 'erroneous in point of law' permitted by paragraph (d) of section 26(1) of the Act to be considered by the Court. The main issues for determination were (i) whether the Tribunal's decision that the respondent was unfairly dismissed should be upheld and (ii) whether the Tribunal erred in awarding the respondent compensation of \$104,931.15.

Held: dismissing the appeal against the Tribunal's decision against the finding of unfair dismissal, but reducing the compensation award to \$84,977.55 and making no order as to costs, that:

1. Gross misconduct is misconduct serious enough to overturn the contract between the employer and the employee thus justifying summary dismissal. Acts which constitute gross misconduct must be very serious and are best determined by organisations in light of their particular circumstances. A single act of disobedience or misconduct, especially an act of wilful disobedience, could justify dismissal, but only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions, or that the master/servant relationship cannot reasonably be expected to continue. Accordingly, it is settled law that an employer is only entitled to dismiss an employee for serious misconduct, wilful disobedience or a fundamental breach of contract. However, it is not every act of wilful disobedience which would justify summary dismissal. The underlying principle of "fairness" applicable to an evaluation of a dismissal is that it is not fair to dismiss an employee for conduct which he did not appreciate, and could not

reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence.

Butterworths Employment Handbook considered; **Laws v London Chronicle (Indicator Newspapers) Ltd.** [1959] 1 WLR 698 considered; **Cossington v C2C Rail Ltd** [2013] All ER (D) 304 (Nov) considered; **Hewston v OFSTED** [2023] IRLR 878 considered.

2. Having considered the definition of gross misconduct in the Labour Code leading to an employer's right to summarily dismiss a guilty employee and the applicable principles, the Tribunal identified the correct test at paragraphs 5 and 6 of its decision. Further, while at paragraph 11, the Tribunal correctly stated that an employee's conduct must be of a "serious nature", it did add incorrectly that the employer 'must have taken steps to bring the dissatisfaction to the employee's notice and allow the employee an opportunity to correct the deficiencies'. This added requirement at paragraph 11 is not applicable to a situation of serious misconduct leading to summary dismissal but would apply to circumstances where the employee's conduct complained of was not of such a serious nature as to warrant summary dismissal. It is in relation to the latter category of misconduct, that the employer would be required to first give the employee notice of the alleged misconduct, require them to respond to it or to explain why they had acted or behaved in the manner complained of and give the employee a warning or an opportunity to ensure it was not repeated, failing which it may lead to termination of his/her employment upon the giving of the appropriate or prescribed notice or payment in lieu of notice. However, this was not the test of 'gross misconduct' applied by the Tribunal in coming to its conclusion that the respondent was in the circumstances and having regard to the evidence, especially of Mr. Scotland, unfairly dismissed.

Section 3 of the **Labour Code Cap. 15:03 of the Laws of Montserrat** applied; **Butterworths Employment Handbook** considered; **Laws v London Chronicle (Indicator Newspapers) Ltd.** [1959] 1 WLR 698 applied; **Cossington v C2C Rail Ltd** [2013] All ER (D) 304 (Nov) applied; **Hewston v OFSTED** [2023] IRLR 878 applied.

3. It is the respondent's evidence, which was not disputed, that she went out to get assistance to lift up Mr. Morson and returned quickly. Viewed objectively, this does not demonstrate an employee who acted wilfully, or in a manner which would constitute gross misconduct leading to her summary dismissal. It was clearly not an abandonment of her post as submitted by the appellant. In the absence of any evidence, we are unable to conclude that the respondent knew or ought reasonably to have appreciated that not assisting to lift the resident off the ground but going out to seek assistance from the public, would have attracted the sanction of dismissal. Moreover, even if the allegations of misconduct on the part of the respondent in relation to the 13th June 2017 incident are accepted as correct, it is clear that none of them were capable of amounting in law to "serious misconduct" warranting her summary dismissal, as Mr. Scotland himself seems to have accepted during his testimony at the trial.
4. In considering what the respondent was accused of having done or failing to do during or in relation to the incident on 13th June 2017, it must be borne in mind that Mr. Scotland

himself in answer to questions in cross-examination and from the Tribunal agreed or accepted that this incident of itself was not sufficient to amount to “serious misconduct” and did not warrant the summary dismissal of the respondent. His evidence was that, in the end, the decision to summarily dismiss her was because she had not been contrite during the 29th June 2017 meeting in admitting to her faults or inappropriate actions and this was the real reason why she was not still “on the job”. Mr. Scotland’s evidence that she was not “contrite” did not and could not elevate what was not serious misconduct, as he accepted under cross examination, into serious misconduct warranting summary dismissal. If indeed the respondent was not contrite or sufficiently contrite in Mr. Scotland’s opinion, this cannot be used as a reason to justify her summary dismissal. Further, while mention was made in the dismissal letter of the 29th June 2017 meeting and that the respondent ‘took no responsibility or show any remorse’ for her actions on 13th June 2017, this was not a stated reason for the dismissal. For these reasons grounds (a) and (d) fail.

5. This Court has held that an unfairly dismissed employee is ‘obviously entitled to compensation for immediate loss of earnings (i.e. loss of earnings between the date of the dismissal and the date of the trial or judgment)’. A claimant also has a duty to take reasonable steps to mitigate the loss to him/her ‘consequent upon the defendant’s wrong and cannot recover damages for any such loss which he could have avoid but has failed, through unreasonable action or inaction, to avoid’, which the Labour Code also contemplates at section 68(2)(e).

Section 68(2)(e) of the **Labour Code Cap. 15:03 of the Laws of Montserrat** applied; **Montserrat Utilities Ltd v Kirwan** (2015) 86 WIR 308 followed.

6. The Tribunal awarded the respondent compensation for loss of earnings for the period August 2021 to December 2023. The respondent’s evidence before the Tribunal was that she obtained employment ‘on and off’ from May 2021 to October 2023’. The respondent also testified that prior to that period, her efforts to obtain employment remained unsuccessful for 4 years. The appellant is correct that the respondent should not have been awarded compensation for the period during which she obtained employment, being May 2021 to October 2023. The respondent should have been compensated for loss of earnings for the period August 2017 to April 2021 and not from August 2017 to the date of judgment in December 2023. The award for loss of earnings should therefore be ‘loss of earnings from the date of dismissal to the date of employment, August 2017 to April 2021 which is 3 years and 8 months at \$712.60 per fortnight = \$68,409.60’. The award for loss of protection and manner of dismissal was within the Tribunal’s discretion having considered the evidence and should not be disturbed.

JUDGMENT

- [1] **FARARA JA [AG.]:** This appeal was filed on 16th January 2024 challenging the decision of the Labour Tribunal of Montserrat (“the Tribunal”) delivered on 6th December 2023 that the respondent, Ingrid Branford Hughes, was unfairly dismissed from her employment with the appellant and awarded compensation in the aggregate sum of \$104,931.15 representing loss of earnings from the date of dismissal August 2017 to the date of judgment December 2023 being \$116,866.40 less loss of earnings from September 2021 to October 2023 of \$37,767.00; \$16,567.95 for loss of protection; and \$9,263.80 for the manner of dismissal, which it found was hard and oppressive and in consideration of the disparity of treatment.¹
- [2] The appellant is a statutory body established by virtue of the **Golden Years Foundation (Care of the Elderly) Act**² which operates a retirement home in Montserrat for the elderly and disabled. The respondent was a caregiver in the appellant’s employ from February 2008 until August 2017 when she was summarily dismissed for gross misconduct by letter dated 25th August 2017 issued under the signature of Mr. Kenneth Scotland, the Chairman of the Board of the appellant.
- [3] The dispute between the parties is premised on two incidents which occurred on 13th June 2017 and 14th June 2017 at the appellant’s retirement home (“the home”). The incident on 13th June 2017 involved a resident who fell and was left on the floor in the presence of another caregiver, Ms. Ferguson, while the respondent sought assistance outside of the home. The incident on 14th June 2017 involved a soiled diaper which was allegedly thrown on Ms. Ferguson’s foot. By letter dated 15th June 2017 the respondent was placed on paid suspension effective 16th June 2017 pending the outcome of an investigation.³

¹ Paragraphs 15-16 of the decision of the Tribunal dated 6th December 2023 located at pages 26-33 of Core Bundle.

² Cap. 6.04 of the Revised Laws of Montserrat.

³ Paragraph 2 of the Tribunal’s Decision dated 6th December 2023 located at page 27 of the Core Bundle filed on 7th January 2025.

- [4] A meeting was held on 29th June 2017 with the respondent and the Chairman, Mr. Scotland, the manager of the home Ms. Cheryl White, a member of the Board Ms. Valerie Lewis-Lynch, and Ms. Sharon Spencer, a Senior Social Worker for Vulnerable Elderly.⁴ Following this meeting, the respondent's dismissal was communicated to her by letter dated 25th August 2017, wherein she was informed that her 'behaviour was improper and demonstrated (i) wrongdoing and (ii) a deliberate violation of the Homes (sic) policy and procedures. Given the Home's functions and business; coupled with your responsibilities within the organization, your actions qualify as gross misconduct.' Accordingly, the Board's decision, made at a meeting on 2nd August 2017, was to summarily terminate the respondent's employment, and she was informed that she was 'not entitled to any period of notice or payment in lieu of notice'.⁵
- [5] Following the issuance of this dismissal letter, the respondent sought compensation from the Tribunal for unfair dismissal. This application was dismissed by the Tribunal. The respondent successfully appealed this dismissal decision to this Court. By a judgment delivered on 26th May 2020, this Court allowed the appeal. This appeal set aside the decision of the Tribunal dated 20th February 2019 and remitted the matter to the Tribunal to be heard by a new panel of members, and it was ordered that the rehearing take place on the affidavits already filed in the dispute and each party bear their own costs of the appeal.⁶
- [6] A second hearing was convened before the Tribunal as ordered by this Court. The Tribunal determined on 1st February 2021 that the respondent's dismissal did not amount to "fair dismissal" as submitted by the appellant. The Tribunal awarded the respondent compensation of \$24,193.49 for unfair dismissal which comprised of \$5,687.29 for the period 25th August 2017 to 31st December 2017; \$16, 274.40 for the period 31st January 2018 to 31st December 2018; and \$2,231.80 for the period

⁴ Paragraph 8 of the affidavit of Mr. Kenneth Scotland located on pages 18 -19 of the Core Bundle.

⁵ Pages 27 and 28 of the Core Bundle filed on 7th January 2025.

⁶ Ingrid Branford-Hughes v Golden Years Home for the Elderly MNILTAP2019/0002 (delivered 26th May 2020, unreported).

1st January 2019 to 20th February 2019. That award was to be paid in six months from the date of the judgment.⁷

[7] The respondent then filed another appeal challenging the Tribunal's quantum of compensation. By Order dated 7th February 2022 this Court ordered that 'the judgment and order appealed against is set aside and the matter is remitted to a properly constituted Labour Tribunal for determination'.⁸

[8] This resulted in a third hearing before the Tribunal, which decision is the subject of this appeal. In its decision delivered on 6th December 2023, the Tribunal stated that the main issue for determination was whether the respondent's actions amounted to gross misconduct. Having considered what may amount to "gross misconduct" under section 3 of the Labour Code ("the Code")⁹ and an employer's entitlement under section 61(1) to dismiss summarily and without notice an employee who is guilty of gross misconduct, the Tribunal determined that 'none of the acts attributed to Ms. Branford Hughes (the respondent) amount to gross misconduct either in and of themselves or cumulatively¹⁰'; and awarded her compensation of \$104,931.15. In reaching its decision, the Tribunal considered three "actions". The three actions and the Tribunal's summary of the evidence in relation to each of them at paragraph 7 of its decision are as follows:

- (1) "The first action was throwing a soiled adult pamper on the foot of a colleague Ms. Ferguson. There is no indication that either party was found to have committed any wrongdoing. This incident was not mentioned or relied upon in any major way.
- (2) The second action is the incident on 13th June 2017 involving Mr. Morson for which an investigation was done, and it was concluded that both parties acted improperly and breached policy. The breach of policy according to Mr. Scotland's evidence is that Ms. Branford-Hughes went into the community to seek help instead of calling the fire and rescue unit or lifting Mr. Morson with Ms. Ferguson as was expected in the

⁷ Pages 21 – 25 of the Core Bundle filed on 7th January 2025.

⁸ Certificate of Result of Application located at page 2 of the Core Bundle filed on 7th January 2025.

⁹ Chapter 15:03, of the Laws of Montserrat.

¹⁰ Paragraph 9 of the Decision of the Labour Tribunal dated 6th December 2023 located at pages 26 – 33 of the Core Bundle filed on 7th January 2025.

circumstances. In his evidence Mr. Scotland stated that he considered this an incident in which both parties were wrong but that the incident itself did not amount to gross misconduct.

- (3) The third action is not necessarily action at all but “behaviour”. Mr. Scotland in his evidence indicated that after the incident of June 13, reports were requested of both parties, and a further meeting was held on June 29th which sought to “give the two women an opportunity to give the committee a clearer picture of what transpired in addition to the report”. However, the behaviour of the two women was significantly different. Ms. Ferguson was contrite and acknowledged that she could have done things differently. She further indicated a willingness to undergo additional training. She also expressed concern that she just could not leave the naked Mr. Morson on the ground.”

- [9] The Tribunal went on at paragraph 8 to summarise Mr. Scotland’s evidence in relation to the respondent’s “behaviour” at the 29th June 2017 meeting referred to in (3) above: -

- “8. Ms. Branford-Hughes on the other hand was not at all contrite. She took no responsibility and insisted that Ms. Ferguson ought to have waited for her. Mr. Scotland in his evidence stated that had Ms. Branford-Hughes also behaved similarly to Ms. Ferguson she would likely have remained on the job. His evidence is that in the view of the committee Ms. Branford-Hughes’ behaviour during that meeting was a continuation of her misconduct. He further stated that the behaviour referenced in the letter of 25th August 2017 at paragraph 3 referenced Ms. Branford-Hughes’ behaviour during the meeting of 29th June 2017”.

- [10] The appellant filed an amended notice of appeal on 2nd July 2024¹¹ wherein it challenged the Tribunal’s decision on the following grounds:

- (a) The Labour Tribunal erred in law when it found that the respondent was unfairly dismissed and was entitled to compensation.
- (b) The decision of the Labour Tribunal was unreasonable and/or cannot be supported having regard to the evidence.

¹¹ Pages 37-20 of the Core Bundle.

- (c) The Labour Tribunal erred in its failure to consider that the respondent's dismissal was fair in that:
- (i) she failed to assist in lifting James Morson off the cold floor;
 - (ii) she abandoned her post when she went into the community;
 - (iii) her actions breached the Appellant's established staff policies;
 - (iv) she had received previous written warnings about her conduct.
- (d) The Labour Tribunal erred by failing to properly consider whether the acts of misconduct on the respondent's part complained of by the appellant amounted to gross misconduct in accordance with the Labour Code, thus rendering its decision unfair and/or unsafe.
- (e) In holding that the respondent was unfairly dismissed because of a lack of parity of treatment the Labour Tribunal misdirected itself.
- (f) The Labour Tribunal erred at paragraph 8 of its decision in holding that the respondent's behaviour at the meeting of 29th June 2017 formed part of the gross misconduct relied on by the appellant to dismiss the respondent when it was not one of the grounds relied on by the appellant in its letter of dismissal dated 25th August 2017.
- (g) The Labour Tribunal applied the wrong test for summary dismissal at paragraph 11 of its decision and further erred by implying that the appellant had not warned the respondent about her past work performance.
- (h) In holding at paragraphs 12 and 13 of its decision that the appellant was required to implement a system of "progressive discipline" before exercising its right of summary dismissal under s. 61(1) of the Labour Code the Labour Tribunal misdirected itself.

- (i) The Labour Tribunal erred in law by failing altogether to consider the requirements of s. 61(1) and (2) of the Labour Code when assessing if the respondent was guilty of gross misconduct and was therefore properly dismissed summarily.
- (j) The Labour Tribunal erred in awarding the respondent compensation of \$104,931.15 for the following reasons:
 - (i) Each of the calculations under the three heads of paragraph 15 of the decision is mathematically incorrect. If the Tribunal's calculations are corrected the respondent should have been awarded \$97,091.75 and not \$104,931.15;
 - (ii) The Tribunal provided no basis or reasons in law for making its substantial award;
 - (iii) The Tribunal failed to consider and apply the case law by which it was bound in arriving at compensation of \$104,931.15. The amount awarded is excessive.

[11] The appellant has challenged the Tribunal's findings of both fact and law. Some of the findings of the Tribunal are of mixed law and fact. None of the grounds of appeal relied on by the appellant concern or go to the jurisdiction of the Tribunal or to any allegation of excess of jurisdiction under paragraphs (a) and (b) of section 26(1) of the Code. Also, none of the grounds of appeal allege that the award of the Tribunal of compensation has been obtained by fraud (s.26(1)(c)). The grounds of appeal must therefore be considered as to which of them fall within or without the ambit of paragraphs (d) and or (e) of section 26(1) of the Code. In my view, grounds (a),(d), (e), (g) (h) and (i) of the Amended Notice of Appeal fall squarely within the permitted "ground" at paragraph (d) of section 26(1) of the Code that any finding or decision of the Tribunal is erroneous in point of law. Grounds (b), (c) and (f) do not fall within the permitted grounds at either paragraph (d) or (e) of section 26(1).

[12] The appellant's challenge of the Tribunal's findings of law are:

- “(i) That the respondent’s dismissal was unfair – ground (a).
- (ii) That the respondent’s conduct in the circumstances did not amount to gross misconduct under the Labour Code – ground (d).
- (iii) That per paragraph 11 of the decision “For an employee to be summarily dismissed, dissatisfaction with that employee’s performance must be of a very serious nature and the company must have taken steps to bring the dissatisfaction to the employees (sic) notice and allow the employee an opportunity to correct the deficiencies.” - ground (g)
- (iv) That per paragraphs 12 and 13 of the decision summary dismissal should generally be preceded by a warning and the appellant was required to implement a system of progressive discipline instead of opting for summary dismissal – ground (h).
- (v) That per paragraph 13 of the decision denying the respondent “parity of treatment” rendered her dismissal unfair”. – ground (e).¹²
- (vi) That the Tribunal erred in law by failing to consider the requirements of sections 61(1) and (2) of the Labour Code when assessing whether the respondent was guilty of gross misconduct and was therefore properly dismissed – ground (i).“

[13] It is worth noting that the respondent pursued enforcement proceedings of the Tribunal’s award at the High Court filed on 23rd February 2024. The High Court refused to hear that application because the respondent, who acted pro se, utilized the incorrect form. As part of the appeal instant, the appellant sought a stay of the payment of the compensation award of \$104,931.15, which was granted on 24th September 2024 pending the hearing and determination of the appeal.¹³

Appellant’s Submissions

[14] In respect of the first ground of appeal, being (a) of the amended notice of appeal, that ‘the Labour Tribunal erred in law when it found that the respondent was unfairly dismissed and was entitled to compensation’, the appellant’s submissions does not address this ground. While ground (a) was not specifically identified and addressed by the appellant in their skeleton argument, it is a general ground challenging the finding of unfair dismissal and the award of compensation to the respondent on legal grounds, which is addressed in relation to ground (d) as a ground which itself falls

¹² Amended Notice of Appeal filed on 2nd July 2024.

¹³ Chamber Order dated 24th September 2024 located at pages 41 - 43 of the Core Bundle filed on 7th January 2025.

squarely within the permitted right of appeal under section 26(1) of the Labour Code (as amended).

- [15] Regarding the second ground of appeal, (b) that ‘the decision of the Labour Tribunal is unreasonable in law and/or cannot be supported having regard to the evidence’, the appellant submitted that its reasons for the respondent’s dismissal are contained in its letter dated 25th August 2017 (the “dismissal letter”). In that letter, the appellant submitted, the reasons are that on 13th June 2017 the respondent had failed to assist her co-worker Ms. Ferguson in attending to Mr. Morson, a patient at the Golden Years Home who had fallen to the floor and instead left the home to seek help. Thus, both acts amounted to improper behaviour and a deliberate violation of the home’s policies and procedures. It was submitted that while the dismissal letter refers to a meeting held on 29th June 2017 between the respondent and the appellant’s investigative committee, and states that at the meeting the respondent took no responsibility and showed no remorse for her actions on 13th June 2017 and she indicated a total disregard and disrespect for management, it is important to note that the dismissal letter does not rely on the ‘respondent’s unremorsefulness and disregard and disrespect for management as grounds for dismissing her.’¹⁴
- [16] It was submitted that while the Tribunal held that ‘Mr. Scotland stated that he considered this an incident in which both parties were wrong but that the incident itself did not amount to gross misconduct¹⁵,’ the incident which the Tribunal referred to was the respondent’s failure to assist Ms. Ferguson with lifting Mr. Morson off the floor and then leaving the home to seek assistance instead of calling the fire and rescue unit for help.
- [17] Further, it was submitted that the Tribunal’s conclusion that the committee and Board erred by considering the respondent’s lack of contrition to be a demonstration of wrongdoing and had the committee not taken this into account a different outcome

¹⁴ Paragraph 4 of the appellant’s skeleton arguments in the Appeal filed on 28th February 2025.

¹⁵ At paragraph 7(II) of its decision, located at page 30 of the Core Bundle.

would have been determined¹⁶ cannot be supported by the evidence, as Mr. Scotland did not make either of the above statements in his evidence in chief or during his oral evidence at the hearing. In referring to Mr. Scotland's cross examination, the appellant submitted that Mr. Scotland made it quite clear that the Board's letter dismissing the respondent was complete and the respondent was dismissed for only the reasons set out in that letter. The respondent submitted that the Tribunal erred in finding that 'had Ms. Branford-Hughes also behaved similarly to Ms. Ferguson she would likely have remained on the job' as Mr. Scotland's evidence on the relevance of the respondent's behaviour during her interview by the investigative committee on 29th June 2017 was equivocal, that he gave different answers on different occasions on this issue during his oral testimony and it was unfair for the Tribunal to single out his one answer when he gave conflicting answers.¹⁷

- [18] In respect of grounds (c) and (d) of the amended notice of appeal, that the tribunal erred by failing to properly consider whether the acts of misconduct on the respondent's part amounted to gross misconduct, the appellant submitted that the Tribunal misdirected itself on Mr. Scotland's evidence or drew the wrong inferences therefrom, and failed to consider, as it should have, whether the acts of misconduct relied on by the appellant in its dismissal letter actually constituted gross misconduct as defined by sections 3 and 61 of the Labour Code. The appellant submitted that the Tribunal fell into this error because it improperly used Mr. Scotland's evidence to neutralize the grounds of dismissal relied on by the appellant in its dismissal letter and read into the latter things it did not say. Had the Tribunal considered whether the respondent's actions constituted gross misconduct it would or should have concluded that they did and in the absence of the Tribunal conducting this exercise, the Court of Appeal is invited to conduct it itself.

¹⁶ At paragraph 10 of its decision, located at page 31 of the Core Bundle.

¹⁷ Paragraph 15 of the Appellant's Skeleton Arguments in the Appeal filed on 28th February 2025.

- [19] Regarding grounds (f) to (i), that the Tribunal applied the wrong test for summary dismissal, the appellant referred to paragraphs 11 and 12 of the Tribunal's decision that for an employee to be summarily dismissed, the employer's dissatisfaction with that employee's performance must be of a very serious nature and the employer must have taken steps to bring the said dissatisfaction to the employee's attention. However, the appellant submitted that this decision is not in line with section 61 of the Code and, as a creature of statute, the Tribunal was required to consider and apply section 61 of the Code and also failed to identify which provisions of the Code, if any, support its decision stated at paragraphs 11 and 12. The appellant added that the concept of principles of good industrial relations referred to by the Tribunal at paragraph 12 of its decision is found in section 27(1)(b) of the Code which deals with the awards a Tribunal can make and not whether an employee has been unfairly dismissed.
- [20] The appellant maintained that the respondent was dismissed for '(i) wrongdoing and (ii) a deliberate violation of the homes (sic) policy and measures' which is permissible under section 3 of the Code, as it provides that gross misconduct means a serious offence which includes but is not limited to a serious breach of confidentiality or company policy. The appellant relied on the authorities **Steven Kent Jervis et al v Victor John Skinner**,¹⁸ **Montserrat Electricity Services v Latour**¹⁹, **Strathclyde Joint Police Board v Cusick**,²⁰ **Iceland Frozen Foods v Jones**²¹ and **Blackburn v LIAT (1974) Limited**²² to submit that the Tribunal adopted a substitution mindset, that it failed to make an objective assessment of the dismissal and ask what a reasonable employer caring for the elderly and disabled would have done in the circumstances. In this regard, the appellant submitted that it acted reasonably in dismissing the respondent, as reasonableness is the test prescribed by section 61(1) of the Code. This test is explained in **British Home**

¹⁸ [2011] UKPC 2 at para 22.

¹⁹ (1984) 33 WIR 108.

²⁰ (2011) UKEATS/0060/10 at para 16.

²¹ [1982] IRLR 439.

²² [2020] UKPC 9.

Stores v Burchell²³ that the employer must genuinely believe the employee is guilty of gross misconduct and hold that belief on reasonable grounds following a reasonable investigation. Further, the appellant submitted that a high level of care is expected of the appellant and its employees in caring for the elderly and disabled who are entitled to be treated with dignity and respect. Thus, the appellant was entitled to take the view that the respondent's conduct in leaving Mr. Morson on the ground instead of assisting in returning him to his bed, and then showing poor judgment by apparently panicking and leaving the home to seek help, amounted to gross misconduct because it fell 'far short of the level headedness expected of an experienced caregiver', since the appellant's trust and confidence in the respondent were seriously undermined as she failed to adhere to the appellant's policies.²⁴

- [21] The appellant argued that the Tribunal also erred by apparently creating new law and importing it into section 61 of the Code and failed to apply the relevant authorities on summary dismissal, in holding that the appellant was required to implement a system of progressive discipline and take steps to bring its dissatisfaction to the respondent's notice and allow her an opportunity to correct her deficiencies, the appellant submitted. The appellant relied on the case of **Leonart Matthias v Antigua Commercial Bank**²⁵ to fortify its submission that an employee can be dismissed in circumstances where 'the offence is so heinous and the facts so manifestly clear that a reasonable employer could, on the facts known to him at the time of dismissal, take the view that whatever explanation the employee advanced it could make no difference.' It was further submitted, based on the authorities cited above, that if the respondent's actions on 13th June 2017 constituted gross misconduct, the appellant had every right to dismiss her summarily instead of warning her, and notwithstanding its right of instant dismissal, an investigation was conducted, and the respondent given an audience, before its decision to dismiss her.

²³ [1980] ICR 303.

²⁴ Paragraphs 28, 29 & 30 of the Appellant's Skeleton Arguments in the Appeal filed on 25th February 2025.

²⁵ ANULTPAP2017/0002 (delivered on 28th May 2020, unreported).

- [22] Regarding ground (e), the appellant contended that the Tribunal misdirected itself by holding that the respondent was unfairly dismissed because of a lack of parity of treatment. It was submitted that parity of treatment is not required of an employer in exercising its powers of summary dismissal pursuant to section 61 of the Code, and the Tribunal's decision is silent on which provision of the Code it relied on for that determination. Alternatively, the appellant submitted, if the appellant was under a duty of parity of treatment, this was discharged as Mr. Scotland explained in his evidence that while the respondent, contrary to the rules and policies, abandoned Mr. Morson and left the home altogether, Ms. Ferguson stayed with Mr. Morson and tried to assist him off the cold ground,²⁶ thus the appellant correctly concluded that Ms. Ferguson's conduct did not cross the threshold of gross misconduct while the respondent's conduct did.
- [23] In respect of ground (j) above, the appellant contended that the award of \$104,931.15 is excessive and erroneous. The appellant submitted that awards of compensation for unfair dismissal are governed by sections 27 and 68(2) of the Code as held by this Court in **Montserrat Utilities Ltd. v Mildred Kirwan**.²⁷ The appellant submitted that the Tribunal fell into error as it did not consider these sections of the Code, or the authorities cited, evidentially preferring instead to simply adopt Mr. Dorsett's reasoning, calculations in his written submissions to the Tribunal, and authorities, in particular **Cable & Wireless (West Indies) v Hill**,²⁸ which decision long preceded the Code and was not on point. However, Mr. Kelsick, learned counsel for the appellant, in his oral submissions expressly abandoned the first limb of ground (j) that 'each of the calculations under the three heads of paragraph 15 of the decision is mathematically incorrect.' The appellant also noted that the respondent testified that she found alternative employment from May 2021 to October 2023,²⁹ and submitted that the Tribunal should not have awarded the

²⁶ Lines 10 & 11 of the transcript located at page 143-144 of the Core Bundle.

²⁷ (2015) 86 WIR 308 at paras 40 & 41.

²⁸ (1982) 30 WIR 120.

²⁹ Located at page 59 of the Core Bundle.

respondent loss of income for the period May to August 2021 with the result that \$5,700.80 should be deducted from the award.

[24] In furtherance of this ground, the appellant submitted that the Tribunal failed to document the net amount which it awarded to the respondent for loss of earnings, and it awarded the respondent loss of earnings for the months of November and December 2023 when she had found employment in May 2021 and could not claim for loss of earnings after this date. Further, it was submitted, that award of loss of earnings for the period August 2017 to September 2021, a period of over 4 years, was excessive according to the decision of this Court in **Montserrat Utilities Ltd. v Mildred Kirwan**,³⁰ as the delays in the tribunal hearings were multifactorial and not caused by the appellant. Thus, the appellant submitted, it is not in the interests of the employer to hold the appellant responsible for a delay of 6 years and 4 months and to make the appellant pay loss of earnings for 4 years and 3 months of that period. Instead, the Tribunal should have awarded the respondent 2 years and 1½ months of that period in keeping with fairness and justice required by section 27(1) of the Code.

[25] Additionally, the appellant submitted, the Tribunal's award of \$16,567.95 for loss of protection as adopted from the respondent's submissions, was erroneous as it was premised on section 75 of the Code which deals with severance pay when an employee is made redundant. The Tribunal's award of \$9,263.80 for the manner of dismissal was also challenged as being erroneous, on the authority of this Court in **Montserrat Utilities Ltd. v Mildred Kirwan**.³¹ Finally, in relation to the Tribunal's decision to award costs of \$2000.00, this was categorized as a nullity by the appellant, because the Tribunal has no legal authority to do so, and the appellant only became aware of this award upon receipt of the transcript, and costs was not recorded in the Tribunal's written decision issued on 19th December 2023. The

³⁰ The Court's reasoning at paragraph 59.

³¹ As held at paragraphs 62 and 63 of this judgment.

appellant therefore invited this Court to overturn the Tribunal's decision in its entirety.

Respondent's Submissions

- [26] The respondent identified two issues for determination based on the grounds of appeal contained in the amended notice of appeal filed on 7th April 2024. These are: '(1) is there a proper basis for interfering with the Labour Tribunal's finding that the respondent was unfairly dismissed; and (2) is there an error in the compensation awarded to the respondent?'
- [27] The respondent submitted that whether there has been gross misconduct is a question of fact and, based on the definition of this term in section 3 of the Labour Code as being a 'serious offence', it was argued that it is one that without argument justifies summary dismissal, and the burden of proof thereof is on the employer to show that the dismissal was fair.³² The respondent relied on the cases **McCardy v John Bull Ltd**³³ and **Bahamasair Holdings Ltd v Messier Dowty Inc**³⁴ and submitted that there is no proper or acceptable basis for overturning the Tribunal's finding of fact that 'none of the acts attributed to Ms. Branford-Hughes amount to gross misconduct either in or of themselves or cumulatively'.³⁵ The respondent also referenced Mr. Scotland's responses to the Tribunal's Chairperson's questions seeking clarification to a question posed during cross examination. In his response to the Chairperson, Mr. Scotland admitted that the respondent's behaviour referenced in the termination letter was relative to her conduct after the 13th June 2017 incident. His exact response was 'Yes, after the incident'.³⁶ Thus, the respondent submitted that there was a sufficient evidential basis for the Tribunal's finding that there was no gross misconduct on the respondent's part and its determination of unfair dismissal cannot be faulted.

³² Paragraphs 7 & 8 of the respondent's submissions filed on 3rd April 2025.

³³ (2019) 95 WIR 9 at paragraphs 122 – 125.

³⁴ [2019] 1 All ER 285 at paragraphs 32 – 36.

³⁵ Paragraph 9 of the Labour Tribunal's decision dated 19th December 2023.

³⁶ Located at lines 7 – 20 on page 149 of the Core Bundle.

[28] Regarding the second issue identified by the respondent, whether there is an error in the compensation award (ground j above), the respondent identified four main issues raised by the appellant in challenging the correctness of the award. These are: (i) mathematical errors in calculation; (ii) lack of legal basis; (iii) failure to consider relevant case law; and (iv) that the award was excessive. As the appellant's counsel indicated that they were no longer contending that there was a mathematical error in the calculation, this first point or issue falls away. As regards loss of wages, the respondent submitted that the Tribunal's award was based on sections 68 and 75 of the Labour Code and on the evidence, including the respondent's employment with the appellant commencing in February 2008 and not 2009 (see evidence of social security history from exhibit 1). Accordingly, the award correctly reflects the respondent's tenure and losses incurred. The respondent also submitted that the appellant's counsel was in error in submitting to the Court that the respondent earned \$1425.20 per month, as the correct position on the evidence is that the respondent earned \$712.60 per fortnight. The respondent also submitted that immediate loss of wages is 'loss of earnings between the date of the dismissal and the date of trial or judgment'³⁷ as held by this Court in **Montserrat Utilities Ltd v Mildred Kirwan**. It was also the submission of the respondent that the amounts awarded by the Tribunal were not excessive and the Tribunal did not include employer's contributions to social security under section 68(2)(b) of the Labour Code or any bonuses that the respondent would have been entitled to receive. Accordingly, the respondent submitted, the award was actually less than what the respondent was legally entitled to and concluded that there is no merit whatsoever in the appellant's complaint regarding the compensation award. Thus, the respondent submitted that this appeal should be dismissed with costs.

[29] Having considered the submissions of the appellant and respondent, as well as the grounds of appeal, the issues for determination are: (i) whether the Tribunal's decision that the respondent was unfairly dismissed should be upheld and (ii)

³⁷ *Montserrat Utilities Ltd v Kirwan* (2015) 86 WIR 308 at [50].

whether the Tribunal erred in awarding the respondent compensation of \$104,931.15.

Discussion

- [30] The Labour Code, as amended by the Labour Code (Amendment) Act) 2022, now permits appeals as of right to the Court of Appeal on five grounds namely; '(a) that the Tribunal had no jurisdiction in the matter; (b) that the Tribunal has exceeded its jurisdiction in the matter; (c) that the order or award has been obtained by fraud; (d) that any finding or decision of the Tribunal in any matter is erroneous in point of law; or (e) that some other specific illegality, not mentioned in paragraph (a) to (d), and substantially affecting the merits of the matter, has been committed in the course of the proceedings.'³⁸ Therefore, this Court's review is limited to ground (d) that any finding or decision of the Tribunal in any matter is erroneous in point of law.
- [31] The Tribunal highlighted one main issue for its determination, that is, 'whether Ms. Branford-Hughes' action amount to gross misconduct³⁹. It considered the definition of gross misconduct as contained in the Labour Code⁴⁰, and that an employer is entitled to summarily dismiss, without notice, an employee 'who is guilty of gross misconduct of a nature that would be unreasonable to require the employer to continue the employment contract'.⁴¹ The Tribunal noted that there were three actions in question, being that the respondent threw a soiled adult diaper on her colleague's foot; the incident on 13th June 2017 involving Mr. Morson; and the respondent's behaviour after the 13th June 2017 incident.
- [32] The Tribunal noted that based on the evidence, including the oral evidence of Mr. Scotland, the respondent's behaviour following the 13th June 2017 incident was 'not at all contrite', in that she 'took no responsibility and insisted that Ms. Ferguson

³⁸ Section 4 of the Labour Code (Amendment) Act, 2022, Act No. 4 of 2022.

³⁹ Paragraph 4 of the decision delivered on 6th December 2023, located at page 29 of the Core Bundle.

⁴⁰ Section 3 of the Labour Code, Chapter 15:03.

⁴¹ Section 61(1) of the Labour Code, Chapter 15:03.

ought to have waited for her'.⁴² On the other hand, Ms. Ferguson was 'contrite and acknowledged that she could have done things differently', 'indicated a willingness to undergo additional training' and expressed concern that 'she just could not leave the naked Mr. Morson on the ground'⁴³. The Tribunal considered Mr. Scotland's evidence that in the view of the committee 'Ms. Branford-Hughes' behaviour during that meeting was a continuation of her misconduct' and he further stated that the behaviour referred in the termination letter dated 25th August 2017 at paragraph 3 was of her behaviour during the meeting of 29th June 2017.

[33] Having considered the evidence filed and the oral evidence during the hearing, the Tribunal concluded that none of the acts attributed to the respondent amounted to gross misconduct either in and of themselves or cumulatively.

[34] What then is gross misconduct? According to the Labour Code, gross misconduct is a 'serious offence which includes but is not limited to theft, dishonesty, wilful damage to property, violent behaviour, possession or use of illicit drugs at the workplace, and a serious breach of confidentiality or company policy'.⁴⁴ Gross misconduct is 'generally seen as misconduct serious enough to overturn the contract between the employer and the employee thus justifying summary dismissal. Acts which constitute gross misconduct must be very serious and are best determined by organisations in light of their particular circumstances'.⁴⁵ In **Laws v London Chronicle (Indicator Newspapers) Ltd.**, the English Court of Appeal held that a 'single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract of service or one of its essential conditions, as would an act of wilful disobedience'⁴⁶. It is settled law that an employer is only entitled to dismiss an employee for a fundamental breach of contract. If the conduct complained of showed wilful disobedience, that would

⁴² Paragraph 8 of the Tribunal's decision located on page 31 of the Core Bundle.

⁴³ Paragraph 7. III of the Tribunal's decision located at page 30 of the Core Bundle.

⁴⁴ Section 3 of the Labour Code, Chapter 15:03 of the Laws of Montserrat.

⁴⁵ Butterworths Employment Law Handbook, Part 4 (LexisNexis reference).

⁴⁶ [1959] 1 WLR 698.

generally justify summary dismissal. One act of disobedience or misconduct could justify dismissal 'only if it was of a nature which showed that the servant was repudiating the contract or one of its essential conditions. This disobedience should have a quality that was 'wilful'.⁴⁷

[35] The United Kingdom Employment Appeal Tribunal ("the UKEAT") in **Hewston v Ofsted**⁴⁸ recently held that the underlying principle of fairness is that 'it is not fair to dismiss an employee for conduct which he did not appreciate, and could not reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence⁴⁹'. The UKEAT also notes that there are some types of conduct, the nature of which 'is inherently such that any employee ought reasonably to appreciate that it would attract the sanction of dismissal without needing to have it specifically spelled out in advance'. The UKEAT added that if an organization makes it clear to employees in advance by way of a disciplinary code for example, that, 'in *this* organisation a certain type of conduct will be regarded as gross misconduct, then it will be able to say that its employees have been fairly forewarned of what to expect'.⁵⁰ This decision by the UKEAT is merely persuasive authority. It is not binding on this Court.

[36] Having considered the definition of gross misconduct in the Labour Code leading to an employer's right to summarily dismiss a guilty employee and the applicable principles as set out above, in my judgment the Tribunal identified the correct test at paragraph 5 and 6 of its decision. Further, while at paragraph 11, the Tribunal correctly stated that an employee's conduct must be of a "serious nature", it did add that the employer 'must have taken steps to bring the dissatisfaction to the employee's notice and allow the employee an opportunity to correct the deficiencies'. While the employer ought to bring the 'serious' conduct to the attention of the employee and give them an opportunity to respond to the allegations, this

⁴⁷ Cossington v C2C Rail Ltd [2013] All ER (D) 304 (Nov).

⁴⁸ [2023] IRLR 878.

⁴⁹ Ibid.

⁵⁰ Ibid.

added requirement at paragraph 11 of an employer giving notice to the employee and demanding that the employee give an explanation and take corrective action, is usually applicable either on the basis that the statute so requires or on the basis that the employee ought to be afforded the opportunity to respond to the allegations before the employer decides it is serious enough to justify his/her immediate dismissal without notice. These issues go to the reasonableness of the dismissal⁵¹. The requirement to give a written warning to the employee prior to an employer making a decision to dismiss that employee is usually applicable in circumstances where the employee's conduct complained of is not so serious as to justify their immediate dismissal. It is usually not applicable to a situation of serious misconduct leading to summary dismissal. It would more properly apply to circumstances where the employee's conduct complained of was not of such a serious nature as to warrant summary dismissal. It is in relation to the latter category of misconduct, that the employer would be required to first give the employee notice of the alleged misconduct, require them to respond to it or to explain why they had acted or behaved in the manner complained of, and give the employee a warning or an opportunity to ensure it was not repeated, failing which it may lead to termination of his/her employment upon the giving of the appropriate or prescribed notice or payment in lieu of notice. However, this was not the test of "gross misconduct" applied by the Tribunal in coming to its conclusion that the respondent was, in the circumstances and having regard to the evidence, especially of Mr. Scotland, unfairly dismissed.

- [37] Did the respondent's action or behaviour as contained in the termination letter dated 25th August 2017 amount to gross misconduct? This requires an examination of the termination letter in which the appellant provided the reasons for its dismissal. The said letter is reproduced from the Tribunal's decision hereunder:

"August 25, 2017

⁵¹ See: *Polkey v A.E. Dayton Services Ltd* [1988] AC 344 per Lord MacKay of Clashfern at page 355, approved by the Privy Council in *Blackburn v LIAT (1974) Ltd* [2020] UKPC 9 per Sir Rupert Jackson cited in *Leonart Matthias v Antigua Commercial*.

Dear Ms. Branford-Hughes

I refer to my letter to you dated June 15, 2017 in which I indicated that effective June 16th, 2017 you will be placed on paid suspension leave pending the outcome of an investigation into two (2) incidents that occurred at the home.

You were invited to a meeting on June 29, 2017 and present were (i) the Manager Cheryl White (ii) Board member Valerie Lewis-Lynch (iii) Snr Social Worker for Vulnerable (Elderly) Sharon Spencer and myself. During the meeting, you reinforced the point that the Policy of the Home is that at least two (2) workers should assist bedridden or disabled residents. You admitted that you saw Ms. Ferguson (your co-worker) by herself attending to Mr. Morson, a disabled resident at the Home but you did not assist or stop her because she did not wait on you. Unfortunately, you took no responsibility or show any remorse for your actions on the evening of June 13, 2017 as you felt that Ms. Ferguson should have waited on you. You admitted that you left Mr. Morson on the floor while you went to the road to seek assistance, you have also indicated in the meeting your total disregard and disrespect for Management.

Please be advised that the reports relating to the incident that occurred on the evening of June 13, 2017 and minutes of the meeting held on June 29, 2017 were tabled at an Executive Committee Meeting held on August 2, 2017 and due consideration of what is in the best interest of the Home to include its Residents, Management and Staff were addressed. The Committee was of the view that your actions were inconsistent with the faithful discharge of your duties as a Caregiver working at the Home in excess of eight (8) years. The Committee concluded that your behaviour was improper and demonstrated (i) wrongdoing and (ii) a deliberate violation of the Homes (sic) policy and procedures. Given the Home's functions and business; coupled with your responsibilities within the organization, your actions qualify as gross misconduct.

As a result, the decision was taken to summarily terminate your employment with the Golden Years Foundation effective immediately. You are informed that you are not entitled to any period of notice or payment in lieu of notice. Since you have no holiday remaining you have no holiday entitlement.

Please be guided accordingly.

*Yours truly,
Kenneth Scotland
Chairman⁵².*

[38] From this letter, the following can be gleaned:

- (1) the respondent was placed on paid suspension pending an investigation into two incidents which occurred at the home;
- (2) only one incident was referred to, that being the one on the evening of 13th June 2017 and the respondent's behaviour at an executive meeting on 29th June 2017;
- (3) at that meeting the respondent acknowledged the home's policy that at least two workers should assist bedridden or disabled residents and admitted that she saw her co-worker, Ms. Ferguson attending to the resident by herself, but she did not assist her because Ms. Ferguson did not wait on her;
- (4) at that meeting the respondent took no responsibility or showed any remorse for her actions on the evening of 13th June 2017 as she felt that Ms. Ferguson should have waited on her. She admitted that she left the resident on the floor while she went to the roadside to seek assistance, and she indicated total disregard and disrespect for management;
- (5) the reports relating to the incident on 13th June 2017 and minutes of the meeting held on 29th June 2017 were tabled at an executive committee meeting on 2nd August 2017 and the committee's view was that the respondent's actions were inconsistent with the faithful discharge of her duties as a caregiver, that her behaviour was improper, demonstrated

⁵² Located on pages 27-29 of the Core Bundle.

wrongdoing and a deliberate violation of the home's policy and procedures; and

- (6) the Committee took the decision to summarily dismiss the respondent's employment given the Home's functions and business coupled with her responsibilities within the organization.

[39] In making the determination to summarily dismiss the respondent, although two incidents were investigated, only one, that is the 13th June 2017 incident where an elderly disabled resident was left on the floor and the respondent's behaviour at the executive meeting on 29th June 2017 were considered. The termination letter referenced the Home's Policy and procedures; however, copies of these were not provided in evidence. Could the respondent's actions on 13th June 2017 be deemed as acts of wilful disobedience?

[40] It must be noted that Ms. Ferguson attempted to attend to a bedridden resident alone despite management's directive that one employee should not do so. It is the respondent's evidence, which was not disputed, that she went out to get assistance to lift him up and returned quickly⁵³. Viewed objectively, this does not demonstrate an employee who acted wilfully, or in a manner which would constitute gross misconduct leading to her summary dismissal. It was clearly not, an abandonment of her post as submitted by the appellant. In the absence of any documentary evidence, I am unable to conclude that the respondent knew or ought reasonably to have appreciated that not assisting to lift the resident off the ground but going out to seek assistance from the public, would have attracted the sanction of dismissal. Moreover, even if the allegations of misconduct on the part of the respondent in relation to the 13th June 2017 incident are accepted as correct, it is clear that none of them were capable of amounting in law to "serious misconduct" warranting her summary dismissal, as Mr. Scotland himself seems to have accepted during his testimony at the trial. However, could the respondent's "behaviour" during the 29th

⁵³ Lines 15, 22 and 23 of the transcript located at page 64 of the Core Bundle.

June 2017 meeting, in relation to which Mr. Scotland's evidence was that she was not 'contrite', somehow transform what was not serious misconduct in relation to the 13th June 2017 incident into 'serious misconduct' warranting her summary dismissal.

[41] In considering what the respondent was accused of having done or failed to do during or in relation to the incident on 13th June 2017, it must be borne in mind that Mr. Scotland himself in answer to questions in cross-examination and from the Tribunal seems to have agreed or accepted that this incident of itself was not sufficient to amount to 'serious misconduct' and did not warrant the summary dismissal of the respondent. His evidence was that, in the end, the decision to summarily dismiss her was because she had not been contrite during the 29th June 2017 meeting in admitting to her faults or inappropriate actions and this was the real reason why she was not still "on the job". It is important to note the following aspects of Mr. Scotland's evidence and the questions posed during cross-examination to put this into context:

Excerpt 1:

"Dorsette: In view of the board, absolutely, alright let's put both of them together, in the view of the board what Ms. Ferguson and Ms. Branford did was improper?"

Scotland: Yeah

Dorsette: Yes, in the view of the board it demonstrated wrong doing would you say?

Scotland: Yeah it would⁵⁴".

Excerpt 2:

"Dorsette: What they did there was culpability on both on both of them violating policy and procedure?"

Scotland: Yeah⁵⁵".

⁵⁴ Line 22 – 28 of the transcript located at page 138 of the Core Bundle.

⁵⁵ Line 22 – 28 of the transcript located at page 138 of the Core Bundle.

Excerpt 3:

- “Dorsette: In the view of the board was the behaviour of Ms. Ferguson as it relates to the incident on June 13th was it improper?”*
- Scotland: Her behaviour as it relates to the incident was not improper, was the incident*
- Dorsette: Very Well it was not improper*
- Scotland: No, you can come out of that the incident itself was improper for both parties, but their behaviour after the incident occurred was totally different⁵⁶.”*

Excerpt 4: The Chairperson then interjected as counsel for the respondent had asked the same questions a few times and said this:

- “Chairperson: From what I understand, ok, I’m not sure that he has, what I understand the gentleman to be saying is that he viewed this language, this language that your referencing in this particular sentence, let me make it quite clear that your behaviour was improper demonstrated wrong doing and a deliberate violation on (sic) the homes procedure what he has proceeded to say is that he looked at the incident and he viewed the incident to be that both parties had committed wrong doing and then coming out of the incident and looking at the reports having the two parties invited to respond he then looked at the behavior and the response of those parties and largely this reference here is to that, saying that Ms. Ferguson’s behavior was contrite that she was willing to do whatever which included retraining where as your clients behavior was different, he hasn’t elaborated on what your clients behavior was, that (sic) your answer?”*
- Scotland: Correct⁵⁷.”*

Excerpt 5:

- “Scotland: Put it this way if Ms. Branford behavior similar to Ms. Ferguson behavior she would be on the job to⁵⁸.”*
- “Dorsette: You said her behavior qualifies as gross misconduct*
- Scotland: Yeah correct*

⁵⁶ Lines 25-27 of the transcript located at page 145 of the Core Bundle.

⁵⁷ Lines 1-20 of the transcript located at page 146 of the Core Bundle.

⁵⁸ Lines 5-6 of the transcript located at page 147 of the Core Bundle.

*Chairperson: I'm just seeking clarity to that, the question you asked was that her misconduct was how she responded after the 13th*⁵⁹.

Excerpt 6:

"Scotland: No, it's her behavior that make part of reference in the letter was as a result after the 13th after the incident occurred

Chairperson: Are you saying that the behavior referenced in the letter, is relative to her conduct after the 13th?

*Scotland: Yes, after the incident*⁶⁰

Dorsette: Yes

Chairperson: And the answer is yes

Scotland: Yes, her conduct continued from the 13th.

[42] Mr. Scotland's evidence that the respondent was not 'contrite' did not and could not elevate what was not serious misconduct, as he accepted under cross examination, into serious misconduct warranting summary dismissal. If indeed the respondent was not contrite or sufficiently contrite in Mr. Scotland's opinion, this cannot be used as a reason to justify her summary dismissal. Further, while mention was made in the dismissal letter of the 29th June 2017 meeting and that the respondent 'took no responsibility or show any remorse' for her actions on 13th June 2017, this was not a stated reason for the dismissal. For the reasons given above, grounds (a) and (d) fail.

Award of Compensation

[43] The appellant complained that the Tribunal did not consider sections 27 and 68(2) of the Labour Code and this Court's decision in **Montserrat Utilities Ltd v Mildred Kirwan**⁶¹ and therefore fell into error as it relied on the respondent's submissions. Sections 27 and 68(2) of the Labour Code, in so far as are relevant, provide that:

⁵⁹ Lines 5-6 of the transcript located at page 147 of the Core Bundle.

⁶⁰ Lines 5-6 of the transcript located at page 147 of the Core Bundle.

⁶¹ (2015) 86 WIR 308 at paras 40 & 41.

- “27. (1) The Tribunal in the exercise of its powers shall –*
- (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the parties and the community as a whole;*
 - (b) act in accordance with equity, good conscience and the substantial merits of the case before it, with due regard to the principles and practices of good industrial relations.*
- 68. (2) Where the Tribunal orders compensation, it shall take into account, among other things –*
- (a) any vacation pay earned, but not taken;*
 - (b) any wages and other remuneration lost by the employee on account of the dispute up to the date of determination of the issue by the Tribunal;*
 - (c) the termination notice to which the employee would have been entitled;*
 - (d) the employment category of the employee, his or her seniority and the ease or difficulty with which he or she can secure alternative employment; and*
 - (e) the duty of the employee to mitigate his or her losses.”*

[44] This Court has held that an unfairly dismissed employee is ‘obviously entitled to compensation for immediate loss of earnings (i.e. loss of earnings between the date of the dismissal and the date of the trial or judgment)’.⁶² A claimant also has a duty to take reasonable steps to mitigate the loss to him/her ‘consequent upon the defendant’s wrong and cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable action or inaction, to avoid’⁶³ which the Labour Code also contemplates at section 68(2)(e).

[45] The Tribunal considered that the respondent worked at the appellant’s Home from 2008 to 2017, a period of 9 years and made the following award:

- (1) “Loss of earnings from the date of dismissal August 2017 to the date of judgment December 2023.

⁶² Ibid at paragraph 50.

⁶³ Ibid at paragraph 56.

6 years 4 months 712.60 per fortnight \$116,866.40
Less Earnings from September 2021 to October 2023 at \$712.6 per
fortnight for 53 fortnights \$37,767

(2) Loss of protection
\$890.75 for 3 weeks for each year 15.5 years worked totaling \$16,567.95

(3) Manner of dismissal
The Tribunal considers the manner of dismissal to be hard and
oppressive summary dismissal being the immediate reaction rather
than progressive discipline. Consideration is also given to the disparity
of treatment.
Half a year's pay being totaling \$9,263.80

16. Final total being \$104,931.15.⁶⁴

[46] The Tribunal awarded the respondent compensation for loss of earnings for the period August 2021 to December 2023. The respondent's evidence before the Tribunal was that she obtained employment 'on and off' from May 2021 to October 2023⁶⁵. The respondent also testified that prior to that period, her efforts to obtain employment remained unsuccessful for 4 years⁶⁶. The appellant is correct that the respondent should not have been awarded compensation for the period during which she obtained employment, being May 2021 to October 2023. The respondent should have been compensated for loss of earnings for the period August 2017 to April 2021 and not from August 2017 to the date of judgment in December 2023. The award for loss of earnings should therefore be 'loss of earnings from the date of dismissal to the date of employment, August 2017 to April 2021 which is 3 years and 8 months at \$712.60 per fortnight = \$68,409.60'.

Loss of Protection Award

[47] As to the award of \$16,567.95 for loss of protection, the appellant argues that this was wrongly premised on section 75 of the Labour Code which deals with severance pay to an employee in cases of redundancy. It was submitted that section 75 is

⁶⁴ Located at pages 32-33 of the Core Bundle.

⁶⁵ Located at page 59 of the Core Bundle.

⁶⁶ Located at page 57 of the Core Bundle.

wholly irrelevant and the Tribunal had no authority to make this award as loss of protection is not an award contemplated or permitted by section 27 and/or section 68(2) of the Labour Code. It is also contended that while this Court in **Montserrat Utilities Ltd v Mildren Kirwan** did at paragraph 43 of its judgment opine that section 27 of the Labour Codes provides the Tribunal with a wide discretion, the section does not encompass or permit an award ‘for what is correctly termed loss of statutory protection or rights.’ This, contended the appellant, is a feature of specific English labour legislation, the purpose or object of which is to address situations where because of the employee’s tenure, they have acquired the benefit of various statutory rights, including the right to claim for unfair dismissal; and in such circumstances an award for loss of protection of that right is subject to a prescribed cap between 300 to 500 pounds sterling.⁶⁷

[48] In both their written and oral submissions, the respondent has not addressed in detail the appellant’s challenge to the award for loss of protection, except to assert that the award of compensation for ‘loss of protection’ is a recognised head of compensation, the Tribunal’s entire award is sound and there is no merit in the appellant’s criticisms of it.

[49] A convenient starting point on this issue is sections 27 and 68(2) of the Labour Code set out in full above. As this Court observed in **Montserrat Utilities Ltd v Mildred Kirwan**, section 27 of the Montserrat Labour Code gives to the Tribunal a wide discretion in making an award which it considers “fair and just”, while having regard or taking into proper account the interest of the parties (employer and employee) and the Montserrat community as a whole. In my opinion, the clear meaning and effect of this provision is that the Tribunal has the jurisdiction and power to consider any legitimate element of loss or damage claimed and properly proved by the employee as arising from the unfair dismissal and from the breach of the employee’s right under the statute not to be unfairly dismissed, the onus being on the employee to do so. Also, any award made shall be recoverable as a civil debt.

⁶⁷ See: Selwyn’s Law of Employment page 453 at para. 17.209.

[50] Section 68(2) list a number of matters which the Tribunal can take into account when making an award of compensation to an employee who has been unfairly dismissed. None of the categories listed include compensation for 'loss or protection'. However, the provision does not exclude consideration of other types or categories of loss to be taken into account by the Tribunal when making an award of compensation.

[51] In my judgment, the provisions of section 27 and 68(2) of the Montserrat Labour Code are sufficiently wide as to permit or to empower the Tribunal when making an award of compensation to an employee, to properly consider and to include an award for loss of protection. I have reached this conclusion not on the basis of any established practice *per se* before the Labour Tribunal in Montserrat, as there may very well be, but on an interpretation of the statutory provisions which confer jurisdiction on the Tribunal to hear and to decide on disputes between an employer and a dismissed employee and, where a finding or conclusion of unfair dismissal has been made, to award compensation to the affected employee as it considers "fair and just". I lend some support for or comfort in arriving at this pronouncement, on this passage at paragraph 17.209 of **Selwyn's Law of Employment**:

"Since it will take some time for a claimant employed in a new job long enough to obtain the benefit of a number of statutory rights (in particular, he will have to wait for a further period before he is protected against future unfair dismissal), the employment tribunals will usually award a modest sum of between about 300 to 500 by way of compensation for this loss (*SH Muffett Ltd v Head* [1987] ICR 1). Also, in the case of a claimant who had a long period of service with his former employer, it is possible to make an award in respect of the loss of the right to have a long period statutory notice (*Aurthur Guinness Son & Co (Great Britian) Ltd v Green* [1989] ICR 241)."

[52] Section 24 of the Labour Code of Montserrat establishes a Labour Tribunal "to settle any dispute transmitted to it by the Labour Commissioner." Section 24 provides for the appointment of members of the Tribunal. By section 27 the Tribunal is empowered to make awards which it considers to be "fair and just" and, in arriving at an award, to have regard to the interests of both the parties and the community as a whole. By section 27(2) and (3), an award of the Tribunal is a civil debt

recoverable as such; and a certificate signed by the Chairperson of the Tribunal is conclusive evidence in any court of the debt.

[53] The predicate for an award for 'loss of protection' is the right of an employee not to be unfairly dismissed, which right is protected by section of 68 the Labour Code, and especially in the case of an employee with a long tenure, they would have accrued certain benefits under the statute such as an entitlement to be paid severance, as is provided for in the Montserrat Labour Code. Where an employee of such long tenure is unfairly dismissed, it would take them a considerable number of years to build up an entitlement to be paid such benefits. It is on this rationale of a loss of potential benefits arising from the unfair dismissal in breach of their statutory right not to be unfairly dismissed, that any claim to compensation of 'loss of protection' is based. Furthermore, the Tribunal is empowered under section 27 to make awards of compensation which are "fair and just", and "to act in accordance with equity and good conscience".

[54] The concept or head of compensation for 'loss of protection' therefore arises where an employee, who has a certain minimum length of tenure with the employer, has a statutory right not to be unfairly dismissed. Thus, where an employee has been unfairly dismissed, there has been a breach of that right by the employer for which the employee is to be compensated, just as such an employee would be entitled to compensation for loss of wages and benefits arising under the contract of employment. However, this represents the "concept" underpinning a claim for an award of compensation for 'loss of protection'. In Montserrat there is no statutory right or entitlement to compensation for 'loss of protection' as there is in England. The question therefore arises as to whether the power for the Tribunal to consider 'loss of protection' as a separate head of compensation or whether no such power exists, as argued by the appellant, arises.

[55] The issue of a claim for ‘loss of protection’ and compensation for it, was considered by this Court in **LIAT (1974) Ltd v Novella Sheppard**.⁶⁸ In the judgment of the Court delivered by Byron CJ (as he then was), the Court considered this issue on the basis of there being an “accepted” practice in that State of the Industrial Tribunal making awards for loss of protection. (**Antigua Commercial Bank v Mary White**;⁶⁹ **and Dailey v West Indies Oil Company**).⁷⁰ It is on that basis that the Court approved of and maintained the award for loss of protection to the respondent employee. This reasoning was not based on any specific statutory provision permitted or underpinning an award for loss of protection.

[56] In my opinion, such a power can arise from a proper interpretation of the wide provisions of sections 27 and 68(2) of the Montserrat Labour Code. In this regard, the decision of this Court in **LIAT (1974) Ltd v Novella Sheppard**, was not grounded on any statutory provision conferring jurisdiction and power to the Industrial Court to make such an award, but on an “accepted” practice in Antigua and Barbuda before the Industrial Court. In the instant matter we do not have before us any assertion of such an “agreed” practice before the Labour Tribunal in Montserrat. Further, a resort to other decisions of this Court on the issue of compensation for ‘loss of protection’, do not assist as they all concern appeals from the Industrial Court of Antigua and Barbuda. None concern an interpretation of the statutory provisions of the Montserrat Labour Code which this appeal is concerned with. For example, in **Antigua and Barbuda Transport Board v Anderson Carty and Anique Francis**,⁷¹ it was held that the “practice has become accepted that the loss of protection (basic award) is the full equivalent of the employee’s entitlement to a statutory redundancy payment as set out in Section C44”.⁷²

⁶⁸ Antigua and Barbuda Civil Appeal No. 6 of 1991 (delivered 9th June 1993, unreported).

⁶⁹ Antigua and Barbuda Civil Appeal No. 1 of 1988 (unreported).

⁷⁰ Antigua and Barbuda Industrial Court Reference No. 32 of 1991 (delivered 7th April 1993, unreported).

⁷¹ ANUHLTAP2020/0005 (delivered 27th July 2023, unreported).

⁷² *Ibid* at para 7.

[57] In the instant matter, no case law was cited or referred to by the Tribunal in support of their decision to award the respondent the sum of \$16,567.95 compensation for loss of protection. The Tribunal's calculation of this sum is as follows: "\$890.75 for 3 weeks for each year 15.5 years worked totalling \$16,567.95." This is clearly based on redundancy payments to which the respondent would be entitled as a long serving employee of the appellant. Likewise, neither counsel in the appeal cited any authority on the issue. Dr. Dorsett simply contended that 'loss of protection' is a recognised head of compensation, which does not take the matter any further, in my respectful view.

[58] As stated above, I am of the view that the Tribunal had the jurisdiction and power under sections 27 and 68(2) of the Labour Code to make an award which is fair and just. This would extend to making an award for any type of loss caused by or flowing from the breach of the respondent's statutory right not to be unfairly dismissed. Such an award is intended to compensate the successful employee for any and all proven loss arising from the unfair dismissal. This would, in my opinion, include loss of any benefits under the employment contract or provided for by the Labour Code. It would therefore include the benefit available to a long serving employee to receive redundancy payments. In the instant matter, the respondent was employed with the appellant for a period of 9 years and would have accrued on to herself some entitlement to redundancy payments, which she would have lost as a result of being unfairly dismissed. Accordingly, I hold that the Tribunal was within its power to make the award of 'loss of protection' in this matter. Having made that finding, I can discern no error in the calculations and resulting award of \$16,567.95 to the respondent. Accordingly, the appellant's challenge to this award fails.

Manner of Dismissal and Cost Awards

[59] The Tribunal's award under this head is in the amount of \$9,263.80. The appellant argues that in making this award, the Tribunal made no specific finding of an aggravating factor, nor did they explain why the dismissal was harsh and oppressive. as they would need to do if this is to qualify as an aggravating factor. In

his oral submissions in response to this point, Dr. Dorsett referred to paragraph 15 of the decision, where the tribunal made the award under the various heads.

[60] In the decision, there is no finding of aggravating factors at all or such that could lead to such a finding. Accordingly, the tribunal ought not to have made any award for the 'manner of dismissal'. The award of the sum of \$9,263.80 must be set aside. Likewise, the award of costs to the respondent. This does not appear in the Decision of the Tribunal. I accept the appellant's submission that the award of costs by the Tribunal in the sum of \$2,000 is a nullity as the Tribunal, which is a creature of statute, has no authority to make an award of costs.

[61] Accordingly, the award for compensation is amended to 'Loss of earnings for the period August 2017 to April 2021 totalling \$68,409.60, plus loss of protection totalling \$16,567.95 are upheld. The award for the manner of dismissal totalling \$9,263.80 and of \$2,000 costs are set aside. The final award to be paid by the appellant to the respondent is \$84,977.55. The compensation award is therefore reduced from \$104,931.15 to \$84,977.55.

Disposition

[62] In the circumstances, I would dismiss the appeal against the Tribunal's decision of unfair dismissal as there was no error of law but reduce the compensation award to \$84,977.55. It is so ordered. There is no order as to costs.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Trevor M. Ward
Justice of Appeal

By The Court

Chief Registrar