BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

NO: ERT/2017/233

BETWEEN:

ALICIA CHELTENHAM **CLAIMANT**

AND

SANDY LANE HOTEL CO. LTD. **RESPONDENT**

DATE: February 7, 2023

TRIBUNAL:

Kathy-A. Hamblin, LLM, LL.B. (Hons.), FCIArb.	**Deputy Chairman**
Frederick Forde, GCM	**Member**
Deighton Marshall CMgr, FCMI, CMC, FIC, Chartered MCIPD, PGDip /Employment Law & Practice	**Member**

APPEARANCES:

The Claimant in person.

Mr. Michael Koeiman of Dentons Delany, Attorneys-at-Law for the Respondent.

The Claimant's Case

Alicia Cheltenham, unrepresented in these proceedings, was employed with the Respondent, Sandy Lane Hotel Co. Ltd., "*a five-diamond resort*", as Compensation and Benefits Business Partner from April 6, 2009, to September 20, 2016. She alleged that on June 9, 2016, she sent an email to heads of department and coordinators "*listing the criteria for the layoff process*" with respect to temporary staff. She did not copy that email to Human Resources Manager Donna Harper-Nicholls, in breach of

a directive that all emails sent from the Human Resources Department must be copied to Ms. Harper-Nicholls.

The Claimant was summoned to a meeting on July 20, 2016, and informed of a complaint made by Jo-Ann Roett, the Director of Finance, Risk and Compliance, in relation to that email. She was invited in writing to a disciplinary hearing on July 27, 2016, to answer the following charges, namely:

1. "*that the Claimant's actions contravened Rules of the Game Section 22 "Gross negligence" in that she failed in her role as HRBP Compensation and Benefits by giving erroneous information to a head of department, and by copying said information to a junior member of staff thereby exposing the Hotel to damages.*"
2. "*[d]eliberately refusing to carry out instructions from an immediate supervisor or a more senior member of Management without proper reason*", by not copying the email to Ms. Harper-Nicholls in contravention of Rules of the Game Section 17.

The meeting was attended by the Respondent's Chief of Security, the Claimant, the Claimant's witness/notetaker and Ms. Harper-Nicholls. The disciplinary hearing concluded on August 19, 2016, with dismissal following on September 20, 2016.

The Claimant submitted that the complaint that she disseminated erroneous information was inaccurate and that she had remitted the same email to heads of department for over four years. She also contended that no confidential information was contained in that email, that the junior staff member who was copied in the email had access to the same information in the normal course of her employment and that Ms. Harper-Nicholls was intimately involved in all "*interactions*" leading up to the dissemination of the email and was therefore fully aware of its content.

As such, the Claimant contended that her dismissal was unfair and she sought relief in accordance with the provisions of the Employment Rights Act, 2012-9 ("the Act").

The Respondent's Case

The Respondent submitted that the Claimant was summarily dismissed for gross misconduct after a disciplinary hearing which complied with the Fourth Schedule to the Act.

The Respondent contended that the Claimant willfully disregarded a clear directive from Ms. Harper-Nicholls, when she sent out the email. Further, the Respondent submitted that the advice contained in that email was erroneous, "*clearly false*" and "*incompetently given*" and that the junior employee to whom it was copied was not required to receive information of such a sensitive nature. This, according to the Respondent, was a breach of the company's confidentiality policy. The Claimant's actions, the Respondent submitted, resulted in the destruction of the Respondent's trust and confidence in the Claimant.

The Respondent argued that the Claimant issued no apology or attempted in any way to show that she could be relied upon not to repeat such misconduct. The Respondent also argued that progressive discipline does not apply in the circumstances of this case.

The Tribunal heard the evidence of the Claimant and Ms. Harper-Nicholls, each of whom filed a single witness statement.

APPLICATION TO ADDUCE FRESH EVIDENCE

The Respondent made an application to adduce fresh evidence, to call a new witness and to recall the Claimant at the close of the Claimant's case and after having completed its cross-examination of the Claimant.

The basis of the application

The Respondent contended that it was not clear from the Claimant's witness statement that her case was that she had, throughout the years, regularly sent an email in the same terms as the email which led to her dismissal.

The Respondent submitted that the Claimant's contention had implications for whether it was reasonable for the Respondent to dismiss the Claimant or not. Further, since Ms. Harper-Nicholls could only give evidence as to what obtained when she joined the company (approximately one year before the Claimant was terminated), the Respondent desired to adduce evidence from its IT Manager to rebut the inference raised by the Claimant.

Specifically, the Respondent sought to introduce emails sent by the Claimant during her tenure containing the key words "*severance*" and "*temporary employment*".

Counsel contended that the prejudice to the Respondent would be greater if the Respondent was unable to respond to the claim that the Claimant was accustomed to send an email in the same form as that which resulted in her dismissal than would be the inconvenience of having to delay the trial. Delay, Counsel submitted, would be the only prejudice.

The Claimant opposed the application on the ground that the evidence which the Respondent sought to adduce would be prejudicial. She contended that if allowed, the effect would be to further delay the matter, which had been adjourned on several previous occasions because of the Respondent's failure to appear. She argued also that the Respondent had enough time to present the evidence which it was now seeking to adduce. The Claimant proposed that if the application were allowed, certain conditions ought to be imposed, including that the search period be limited, that "*lay off*" be included in the key word search and, that the Chairman of the Tribunal be present during the extraction of those emails from the Respondent's email server.

The Law

The Tribunal is not constrained by the rules of evidence, and in fact, the Evidence Act, Chapter 121A of the Laws of Barbados does not apply to hearings before this body. That is not to say, however, that the Tribunal should completely disregard recognised rules of procedure and evidence.

Sir Ralph Kilner-Brown in ***Snowball v. Gardner Merchant Ltd.*** [1987] ICR 719 at 722 stated as follows:

> "*In spite of the wide discretion which Parliament has entrusted to an [employment] Tribunal, it must not, however, be exercised in a capricious fashion. In particular, a Tribunal must not ignore nor totally disregard the well-established principles of law with reference to the admissibility of evidence.*"

It is within the discretion of the Tribunal to allow a party to introduce relevant evidence, even at the stage at which the Respondent sought to do so, if, in the opinion of the Tribunal, that evidence would

assist it in fairly determining the issues between the parties. The discretion is exercisable even if that evidence was not led earlier by reason of inadvertence or carelessness on the part of counsel for the party seeking to adduce the new evidence, "*for the laxity of counsel should not, generally, redound to the detriment of the client.*" [1].

Counsel argued that the Claimant's case appeared at the start of the hearing to be straightforward-that the email which led to her dismissal was a routine email. He stated that it was not clear from the Claimant's witness statement whether it was her practice to submit twice yearly emails in the terms of that which led to her dismissal. Consequently, justice required that all relevant evidence be given just weight.

At paragraph 1 of her witness statement the Claimant states unequivocally that "*the charges of erroneous information was inaccurate as I would have performed this task for over 4 years or more remitting the said email to the Heads of Department.*"

Further, at paragraph 3 of that witness statement the Claimant states as follows:

> "*In April 2016 and* (sic) *I would have commenced communication to heads of departments and coordinators on the temporary staff within the company advising them on the employment period that is if they were there for 2 years or less, and the implications if they wanted to just end the contract of the employees over 2 years. This is a practice I did every year April and in*" (sic).

The last sentence appeared to have been truncated and, in response to a question from the Tribunal, the Claimant clarified that the process was done every April and "*every end of year.*"

Even though the last sentence of paragraph 3 was incomplete, it ought to have been sufficiently clear to the Respondent from the Claimant's witness statement that her argument always was that the email for which she was dismissed was not an anomaly.

In ***Ladd v. Marshall*** [1954] 3 All ER 745 at 748, Denning LJ stated as follows:

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[1] *J D Heydon, Cross on Evidence, 11th Australian Edition at page 726.*

> *"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."*

In the instant case, the evidence which the Respondent sought to adduce was at all times within its exclusive control, custody and possession. The Respondent, through Ms. Roett, informed the Tribunal that all the information which the Respondent was now seeking to adduce was stored in its email archiver. There is no reason why those emails could not have been obtained and presented in the response to the Claimant's claim, which was filed some five years prior to the hearing.

Further, though the Respondent listed several reasons which informed its decision to dismiss the Claimant, the case did not turn on the frequency of the Claimant's dispatch of the same or similar emails relating to temporary staff lay-offs or on "*the nature of what she did send*", but on the deliberate refusal of the Claimant to copy her manager in the email which led to her dismissal. Allowing the production of that evidence would therefore have had no appreciable impact, if any at all, on the outcome of the case.

On the question of the credibility of the evidence, Counsel informed the Tribunal at the time of making the application that the emails which he was seeking to introduce were enough to fit into a standard binder. That disclosure calls into question the usefulness of the Tribunal's supervision of the retrieval of the emails, since it appeared that the Respondent had already searched for and extracted the emails it considered pertinent prior to the application being made. The Tribunal expressed reservations as to the integrity of the search and retrieval process and was not persuaded that even with agreed or expanded search parameters or key words, the Respondent could not skew, or had not already skewed, the results of the proposed search.

The Tribunal's assessment of whether the decision to dismiss was reasonable or not was based, not on what evidence the Respondent could potentially have relied on to inform its decision to dismiss, but on that evidence which was in fact relied on by the employer to justify the dismissal.

Consequently, even if there was evidence in existence that was not considered at the time of the dismissal that would have justified that decision, it could not be fair for this Tribunal to take notice of that evidence retroactively to determine whether dismissal was a fair penalty for the Claimant's alleged misconduct.

Additionally, the Tribunal was not persuaded that the unrepresented Claimant would not be prejudiced by the introduction (in the middle of the hearing, after she had rested her case and had been thoroughly cross-examined) of a binder of emails which she had sent more than five years earlier.

Further, allowing the Respondent to adduce evidence of any emails sent relating to the matters in issue would have been equivalent to facilitating the investigation which ought to have been undertaken by the Respondent prior to the Claimant's disciplinary hearing and subsequent dismissal.

The Tribunal concluded that the fresh evidence sought to be adduced was more likely to be prejudicial than probative. Accordingly, the Respondent's application was refused.

THE ISSUES

Counsel for the Respondent identified three issues for determination by the Tribunal:

(a) whether the Respondent fully complied with the procedural requirements under the Act in order to dismiss fairly.

(b) whether the decision to dismiss was reasonable; and

(c) whether the fairness of the dismissal is *"affected by the fact that the Claimant was not suspended but allowed to continue her duties from the invitation to the disciplinary notice* (sic) *until her termination."*

It is the opinion of this Tribunal that the issues identified by Counsel can be condensed into one main issue: whether the Claimant's dismissal was fair or unfair.

THE LAW

In order to resolve that principal issue, the Tribunal must consider whether the reason for the dismissal falls within section 29(2) of the Act or was some other substantial reason of a kind such as to justify the dismissal in accordance with section 29(1)(b) and, if was, whether the employer followed a fair procedure before making the decision to dismiss the Claimant.

Section 29 of the Act deals specifically with fairness. The relevant parts of that section are reproduced below.

> *29. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show*
>
> *(a) the reason, or if more than one, the principal reason for the dismissal; and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) An employer shall have the right to dismiss an employee for a reason which falls within this subsection if it*
>
> *(a) relates to the capability of the employee to perform work of the kind which he was employed by the employer to do;*
>
> *(b) relates to the conduct of the employee."*
>
> *(c)is that the employee was redundant, but subject to section 31; or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention, either on his part or on that of his employer, of a duty or restriction imposed by law.*
>
> *(3) In subsection (2) (a) "capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.*

(4) Where the employer has fulfilled the requirements of subsection (1), the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether

(a) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) the employer complied with the rules set out in Part A of the Fourth Schedule.

(a) The principal reason for dismissal

It is for the Respondent to identify the principal reason for the Claimant's dismissal.

From the detailed termination letter dated September 20, 2016, it appears that there were at least three reasons given by the Respondent for dismissing the Claimant, namely,

(i) her failure or refusal to follow the clear and reasonable instructions of the Manager of the HR Department;

(ii) her inability to accept or understand where [she] provided erroneous advice; and

(iii) her inappropriate behaviour including [her] conduct in copying a junior member of staff.

Ms. Harper-Nicholls, in answer to a specific question from a member of the Tribunal, stated that the Respondent's principal reason for dismissing the Claimant was that the Claimant gave incorrect information to a manager.

Counsel for the Respondent asserted that it was the Claimant's willful refusal to follow a lawful order which resulted in the Respondent's loss of trust and confidence in the Claimant and that this "*is aggravated by the fact that the advice she gave was incompetently given, being clearly false*".

Notwithstanding Ms. Harper-Nicholls' oral testimony the Tribunal accepts Counsel's assertion that the Claimant's alleged failure to follow a lawful order was the principal reason for her dismissal.

The principal reason is one which relates to the Claimant's conduct and is a reason falling within section 29 (2) (b). Consequently, the Respondent had a statutory right to dismiss the Claimant for that reason,

provided the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant and followed a fair procedure before dismissing the Claimant.

(b) Was the decision to dismiss the Claimant fair or unfair?

The question whether the dismissal was fair or unfair requires an examination of first, whether the Respondent acted reasonably or unreasonably in treating the Claimant's failure to copy Ms. Harper-Nicholls in an email as a sufficient reason for dismissing the Claimant and secondly, whether the Respondent complied with the rules set out in Part A of the Fourth Schedule.

The Tribunal considered whether:

i) the Respondent reasonably believed that the Claimant willfully refused to observe the said policy.

ii) the Respondent had reasonable grounds for that belief.

iii) the Respondent had undertaken as much investigation into the alleged misconduct as was reasonable in all the circumstances, when it made the decision to dismiss the Claimant, and

iv) dismissal was within the range of reasonable responses which a reasonable employer would have taken having regard to the Respondent's findings, as well as to any mitigating factors.

The email policy, outlined in the letter of termination, was that no correspondence should leave the HR department unless the HR manager was informed and copied on same.

(i) **The Respondent has not shown that it reasonably believed that the Claimant willfully refused to observe the email policy or that it had reasonable grounds for that belief.**

The Respondent contended that the email which led to the Claimant's dismissal was sent to the Executive Housekeeper, Lucy Ocampo, and was copied to two other members of staff, but not to Ms. Harper-Nicholls.

The Claimant admitted that she was aware that she was required to copy Ms. Harper-Nicholls in that email and that her failure to do so was a breach of that directive.

The Claimant testified, and her evidence was not refuted, that she had complied in part with the company's policy relating to emails. She noted that notwithstanding her failure to copy Ms. Harper-Nicholls in the email, Ms. Harper-Nicholls "*was aware that this email was coming out...it was not the first time that she would have been aware. We had conversations and meetings on March 15, 2016".*

The Claimant further stated that *"I communicated the fact that it was happening before I sent off the email to the managers. I even created a document, so she was aware of the process. I believe she was aware. I did not deliberately not copy her."* She also stated that "*it was an oversight but not an intentional act to decide what to send her and what not to send her.*"

Although her termination letter stated that the Claimant ***deliberately refused*** to carry out instructions, the Respondent has not shown the basis of its contention that the Claimant's omission was an act of willful defiance. The Respondent referred to a single occasion in March 2016, when the Claimant sent an email to the Food and Beverage Department regarding the hiring of new employees, but failed to copy Ms. Harper-Nicholls, *"when there was a problem of which [Ms. Harper-Nicholls] ought to have been made aware.*"

It is instructive that other than that statement, there is nothing in the record to indicate:

(a) whether the failure to copy the Human Resources Manager was investigated further;

(b) whether the Claimant's omission was the subject of any disciplinary action; or

(c) that it was determined to be a deliberate act of defiance on the part of the Claimant.

While Ms. Harper-Nicholls mentions in her witness statement "*continued failure to follow the reasonable instructions given by me regarding correspondence being sent by the Human Resources Department*", the Respondent adduced no evidence of a history of defiance by the Claimant to any reasonable directive given by Ms. Harper-Nicholls. There is, equally, no history of insubordination towards any other superior from which, in the opinion of the Tribunal, a reasonable employer could have drawn an inference that the Claimant was inclined to engage in acts of willful disobedience.

The Tribunal is of the opinion that a single event (in the absence of any indication of the surrounding circumstances), could not reasonably be construed by a reasonable employer as evincing a pattern of behaviour suggestive of willful defiance.

In fact, while the Claimant was issued with a warning letter on July 4, 2016, following an April 21, 2016 meeting with Ms. Harper-Nicholls, that meeting was held "*to explain her poor standard of work and her failure to complete very important tasks*" in a timely manner. Nothing in that letter alluded to any open or even covert acts of defiance.

In her witness statement, Ms. Harper-Nicholls states that the Claimant "***refused to accept** that she had done anything wrong in copying the information contained in her said e-mail to a junior member of staff thereby breaching the confidentiality policy between the Respondent and the employees and she also **refused to accept** that her advice was erroneous*". Further, she states that at the disciplinary hearing, the Claimant "***refused to accept** that she had made any errors in the matter, including copying her said e-mail to a junior member of staff*" (emphasis supplied).

It is not stated in the witness statement in similar terms, or at all, that the Claimant *refused* to follow a reasonable instruction to copy the Human Resources Manager in all outgoing departmental emails.

Under cross-examination by the Claimant, Ms. Harper-Nicholls stated that the Claimant *"did not say [she] would not carry out tasks but there were some occasions when [the Claimant] did not carry out functions as they were to be carried out*" and that "*it could be an interpretation of refusal*". Ms. Harper-Nicholls did not clearly articulate any specific instances to support that contention or to assist the Tribunal in determining whether what Ms. Harper-Nicholls construed as an "*interpretation of refusal*" was a subjective or an objective assessment or was merely conjecture.

The Respondent alluded in the termination letter to two occasions on which instructions relating to the email policy were given:

> "*During the disciplinary meetings, you stated that you did not think that you had "deliberately refused" to carry out the instruction of informing and copying your Manager on the correspondence related to **this** matter, however, on explanation that the reference was not only*

to this matter but to instructions which were given on at least two (2) occasions, the first, in September 2015 during a HR department meeting when the HR Manager assumed the role; and again during a one-on-one meeting when you had sent an email to the Director of Finance, Risk and Compliance making reference to the HR Manager but failed to copy her."

The Respondent appears from that statement to have acknowledged that the Claimant denied that her omission amounted to a "*deliberate refusal*" to follow the directive.

It also appears that the Respondent took into consideration, in reaching its finding that the Claimant's non-compliance was "*deliberate*", the earlier email in respect of which there is no evidence of a disciplinary charge having been brought against the Claimant, no evidence of an investigation, no evidence of a hearing in accordance with the Act, no finding of willful defiance and no evidence of a sanction having been imposed on the Claimant.

The Respondent also relied on instructions given at an HR meeting in September 2015. Exhibited to Ms. Harper-Nicholls' witness statement is a letter dated September 22, 2015, which is addressed to the Claimant, and which bears provision for signature by Randal Wilkie, General Manager.

Under cross-examination, the Claimant stated that she does not recall having seen that document other than in Ms. Harper-Nicholls' witness statement. In answer to Counsel for the Respondent, the Claimant contended that while there was a meeting with Mr. Wilkie at which he introduced Ms. Harper-Nicholls to staff, no formal memorandum in writing was issued following that meeting. In any event, the letter is unsigned and is the only document in evidence which is presented on an unbranded, generic sheet of paper.

That missive merely confirms the introduction of Ms. Harper-Nicholls as the new manager of the Human Resources Department. It is otherwise of dubious evidentiary value. It does not establish the existence of any formal policy *vis-à-vis* the sending of emails, including copying the Human Resources Manager on all outgoing emails, the rationale for the same, or the consequences of non-compliance with that policy.

The Tribunal is not persuaded, based on all of the foregoing, that the Respondent has shown that the Respondent reasonably believed that the Claimant *willfully refused* to observe the email policy or that there were reasonable grounds on which to base that belief.

(ii) **The Respondent did not conduct any or any reasonable investigation into the allegations of misconduct when it made the decision to dismiss the Claimant.**

No evidence was presented to the Tribunal to show that the Respondent conducted any investigation into the allegations of misconduct on the part of the Claimant. In fact, Counsel submitted that "*there were no relevant witnesses to be considered and no further evidence was needed than the email that led to the charge.*"

The Respondent does not merely state that the Claimant refused to carry out an order. The Respondent submitted that she "*deliberately*" refused to do so "*without proper reason*". Implied in that contention is that the Claimant had a motive for defying her superiors. The Respondent neither showed what that motive was, nor that it had sought to ascertain or investigate the reason for her failure to copy Ms. Harper-Nicholls in the email.

Apart from the principal reason for the Claimant's dismissal, there were other reasons which contributed to the decision to dismiss, as appears from the termination letter and Counsel's submissions.

The assertion by the Claimant that she was accustomed to send the same email yearly to various heads of departments was a claim which merited investigation before the disciplinary hearing was convened.

Further, her claim that the junior employee who was copied in the said email was privy, in the normal course of business, to information of the very nature as that for which the Claimant was sanctioned ought to have been investigated.

It is the Tribunal's opinion that the Respondent did not undertake as much investigation into the Claimant's alleged misconduct as was reasonable in all the circumstances, when it made the decision to dismiss her.

(iii) **A reasonable employer was unlikely to have dismissed the Claimant in the circumstances of this case.**

The question at all times for the Tribunal must be "*whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a "reasonable" employer might have adopted... An Employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.*" Per Aikens, LJ in **Orr v. Milton Keynes [2011] ICR 704.**

While there is evidence before the Tribunal to support the Respondent's contention that the Claimant did not comply with the email directive, the Tribunal needs more than an admission of non-compliance with that directive to conclude that the decision to dismiss the Claimant was reasonable. This is especially so since the Claimant repeatedly stated that her failure to copy her manager was an oversight and that all that was contained in the email was communicated to her manager prior to the email being sent out.

Having pleaded "*deliberate and willful refusal*" on the part of the Claimant, the Respondent tendered no evidence to support its conclusion at dismissal and repeated at the hearing, that the Claimant refused to comply with the directive, or, that her "*refusal*" was deliberate and "*without proper reason*". The Respondent's submission that this was "*an admitted calculated refusal to follow the employer's clear instruction because in her view it was not necessary*" is not borne out in the Claimant's evidence in chief or under cross-examination, or in the evidence of the Respondent's sole witness.

The Claimant stated in answer to questions put to her that "*at the time it was more important to ensure staff and management were aware of the process. My thought process was the urgency of the matter. It was not a deliberate matter. It was a mistake. It was an effort to ensure I communicated with the persons.*"

Counsel for the Respondent contended that the "*wilfulness of the breach vitiates the need for a warning*" that "*failure to obey the rule that Ms. Harper-Nicholls must be copied would lead to dismissal.*"

The Tribunal is of the view that the Respondent's email policy, breach of which could and did result in summary dismissal, ought to have been reduced to writing in clear and unequivocal terms, whether in,

or as an addendum to, the Respondent's "*Rules of the Game*", or as an addendum to the contract of employment, or in some other formal document to which the Claimant was privy, specifying the gravity of a breach and the consequences of non-compliance.

Counsel submitted that "*the law remains clear that absent a good reason for refusing to obey a lawful instruction an employe(r) is entitled to dismiss*". The Tribunal agrees. It is for this reason that an employer must, before exercising its right to dismiss for disobedience (deliberate, inadvertent, or otherwise) of a lawful instruction, give due to consideration to the justification offered by the employee for that insubordination.

The Claimant attributed her non-compliance to an "*oversight*". The Respondent has not persuaded the Tribunal that the Respondent sought to ascertain from the Claimant the reason for her non-compliance with the directive. The Tribunal is also not persuaded that the Respondent had before it at the time of dismissal evidence which a reasonable employer could have relied on to establish that the Claimant's failure to comply with the directive was anything but an oversight.

Counsel relied on ***A Courtney v. Babcock & Wilcox (Operations) Ltd.*** [1977] IRLR 30 in support of his argument that a "*refusal to obey a lawful instruction without good reason is gross misconduct.*" We would distinguish *Courtney*. Courtney was instructed to work a guillotine machine, which he refused to do, stating that he would consult his shop stewards. When he was interviewed in the presence of his shop stewards, Courtney maintained his refusal to obey the instruction. Courtney's refusal was express, clear and unequivocal. There is no evidence that the Claimant in this case categorically refused to carry out the instructions of her superior as in *Courtney's Case.*

Counsel also contends that the "*Respondent or any employer must have the right to dismiss where an employee makes clear they have no intention of following the organisation's rules.*"

The Respondent has not demonstrated that the Claimant "*made clear she had no intention of following the [Respondent's] rules.*"

The Respondent established early in its cross-examination of the Claimant that it is a five-diamond resort with high standards of work. However, dismissal for failure to copy a supervisor on an internal

email, which was not shown to be anything other than an inadvertent slip, one which was circumvented early, which resulted in no financial or other identified or identifiable harm to the Respondent or its relationship with its temporary staff is, in the opinion of the Tribunal, extreme and disproportionate. The Tribunal notes that between the date of the commencement of the disciplinary hearings and her dismissal, the Claimant reported for work every day and was permitted to carry out all her duties, including sending emails, without restriction. Yet, the Respondent declared at dismissal that it had lost all trust and confidence in the Claimant.

The fact that the Respondent opted not to suspend the Claimant during that interval does not, in the opinion of the Tribunal, affect the fairness of the dismissal. However, it is the opinion of the Tribunal that a reasonable employer would not have permitted an employee, whose breach of the email policy it deemed so egregious as to merit dismissal and in whom it had lost confidence and trust, to carry out without restriction from July 20, 2016 to September 20, 2016, duties of the very nature which triggered the disciplinary action.

Accordingly, the Tribunal rejects the Respondent's contention that the decision to dismiss was reasonable in all the circumstances.

(iv) **Aggravating and Mitigating Factors**

The main aggravating factor which the Tribunal identified is that the Claimant made a similar omission prior to that which led to her dismissal. However, the Respondent has not demonstrated that the Claimant's failure to copy her manager on that prior occasion was "*calculated*".

Counsel stated that the length of the Claimant's service is the only mitigating factor. It is the opinion of the Tribunal that there are other mitigating factors.

Although in the termination letter the Respondent claimed that "*the Company would have been exposed to substantial financial liability*" if the advice provided to Ms. Ocampo had not been circumvented, Ms. Harper-Nicholls admitted in response to a question from the Tribunal that the Respondent suffered no damage as a consequence of the Claimant's failure to copy her in the email.

More specifically, she stated that even though there were some "*persons who would have heard through the grapevine and had come saying they heard they were going to be severed*", the Respondent "*would not have considered paying severance*" to those persons. This, and the early interception of the email are mitigatory factors.

Further, in her seven-year plus tenure, the Claimant had only twice been subject to disciplinary action, in both instances receiving warning letters. Neither was shown to be for an act of defiance of her employers and neither appears to have been issued following the conduct of a disciplinary hearing in accordance with the Act.

(c) Procedural fairness

It is the duty of the employer to carry out a proper investigation into the alleged misconduct, followed by a fair disciplinary hearing. The type and extent of the investigation may vary depending on the size and resources of the organisation.

The Act provides as follows at section 29 (5):

> *(5) Notwithstanding subsection (1), an employer is not entitled to dismiss an employee for any reason related to*
>
> *(a) the capability of the employee to perform any work; or*
>
> *(b) the conduct of the employee,*
>
> *without informing the employee of the accusation against him and giving him an opportunity to state his case, subject to the Standard Disciplinary Procedures and the Modified Disciplinary Procedures set out in Parts B and C, respectively of the Fourth Schedule.*

The three-step Standard Disciplinary Procedures detailed in Part B of the Fourth Schedule are as follows:

1. *The employer must first provide the employee with a statement of grounds, setting out in writing the alleged conduct which has lead the employer to consider taking disciplinary action and invite the employee to a meeting.*

2. *Next the employer must convene a meeting with the employee within 7 working days of presentation of the statement of grounds. The meeting must not take place unless:*

   (a) the employer has informed the employee of:

      (i) his right to have a friend or a shop steward present; and

      (ii) the basis for including in the statement the ground or grounds set out in that statement.

   (b) The employee has had a reasonable opportunity to consider his response to the information referred to in (a) (ii).

At the conclusion of the meeting the employer must inform the employee in writing of his decision and notify him of his right to appeal against that decision if he is not satisfied with it.

3. *The employee must inform the employer in writing if he wishes to appeal the decision and follow the established disciplinary procedure of the workplace.*

The Respondent maintained that the procedure set out in the Fourth Schedule was fully complied with and that this was not disputed by the Claimant. The Respondent argued that the Claimant was provided with a statement of the charges against her, that she was advised of her right to bring a friend to the disciplinary hearing and that she was given a full opportunity to be heard. The Respondent also submitted that it is the evidence of Ms. Harper-Nicholls that the Claimant never indicated in the disciplinary hearing that she wished to cross examine anyone in relation to the initial investigation.

For her part, the Claimant's only complaint with respect to the disciplinary process was that there "*were no witness statements taken from any of the parties and this included Human Resources Manager*".

It appears to the Tribunal that the Respondent was for the most part compliant with Part B. The Claimant's evidence is that she was given a letter clearly setting out the grounds on which the employer was contemplating disciplinary action and inviting her to a disciplinary meeting. Although the invitation erroneously gave notice of a meeting which was scheduled to occur before the date of the invitation, the initial meeting took place within a reasonable period after that invitation was given. The Claimant therefore had adequate notice and time to respond.

The Claimant was also advised that she had the right to bring a friend or representative to the meeting. On both hearing days, she was accompanied by a friend.

While the Respondent asserted that the principal ground for dismissal was failure to follow the policy requiring that the supervisor be copied in all outgoing emails, the Claimant faced two additional charges, namely, disseminating inaccurate information on temporary/permanent employees' eligibility for and right to severance and copying a subordinate in confidential emails.

Counsel submitted that "*there is no other person whose input could have assisted the Claimant in either disproving the allegation or mitigating the offences.*" It is the opinion of the Tribunal that the Claimant was entitled to see the statements made against her, to cross-examine the makers of those statements if she so desired and to and respond to the allegations contained in those statements.

Counsel also submitted that the Claimant agreed that the Respondent complied with Part B. If this were so, why would the Claimant have complained to this Tribunal that she was not provided with the statements of any of the parties?

Even though we hold the view that the Claimant was not entitled to confront her accusers in the investigatory stage[2], at the disciplinary hearing stage, she was entitled to be shown and respond to the statements which informed the charges brought against her.

Ms. Roett allegedly authored and sent to Ms. Harper-Nicholls the complaint which prompted disciplinary proceedings, but that correspondence was not shown to the Claimant. Ms. Ocampo also allegedly complained about the content of the email but her complaint, which was made by email, was also withheld from the Claimant. At the time of the disciplinary hearing, all relevant "witnesses" were still employed by the Respondent, but none was made available for cross-examination by the Claimant. That contradicts any suggestion that the Claimant knew the case she was being called on to meet.

The Claimant specifically identified Ms. Harper-Nicholls as one of the people from whom no witness statement was taken. The Claimant was entitled to cross-examine Ms. Harper-Nicholls, in view of her contention that Ms. Harper-Nicholls was involved in all "*interactions*" leading up to the dissemination of the email. Further, if that claim is true (and it was not disputed), the fact that Ms. Harper-Nicholls

[2] *See British Home Stores v. Burchell (1978) Industrial Tribunal Reports 560 at 564*

was intimately involved in the conduct of the disciplinary hearing also calls into question the fairness of that process.

The Respondent exhibited to Ms. Harper-Nicholls' witness statement what appears to be a partial thread of emails passing between Ms. Roett and Ms. Harper-Nicholls in which Ms. Roett declares only that "*this is not good enough*". Ms. Harper-Nicholls offered no credible explanation for the apparent gap in those emails or even what was "*not good enough*". The Claimant was not afforded the opportunity to explore or exploit those gaps, because she saw those emails for the first time when the Respondent filed its witness statement.

PROGRESSIVE DISCIPLINE

Part A of the Fourth Schedule to the Act stipulates that:

(a) disciplinary action must be applied progressively in relation to a breach of discipline: and

(b) except in the case of gross misconduct, an employee should not be dismissed for his first breach of discipline.

Counsel asserted that progressive discipline does not apply in the instant case. The Tribunal disagrees. An employer is not obliged to apply progressive discipline in the case of gross misconduct by an employee. In the instant case, the Respondent has not demonstrated that the conduct complained of amounted to "*gross misconduct*" justifying summary dismissal.

Conduct such as theft, threats of, or actual violence on the job and abuse of customers are among the acts which would automatically be construed as constituting gross misconduct, whether they are captured in an employee handbook or not.

The Tribunal hesitates to add to that category of conduct an employee's inadvertent omission to copy a manager on an email, especially where, as in the instant case, there was no clearly defined or documented policy restricting the employee from sending emails at all, or sending emails that were not first vetted or sanctioned by the Human Resources Manager. In the circumstances of this case, the Tribunal holds that the Claimant's failure to copy an email to her superior does not rise to the level of gross misconduct.

There was, as far as the Tribunal could discern, one warning letter on the Claimant's record which was issued within a year of her dismissal. It is not clear whether the warning letter which was issued for signing a document she should not have signed had been expunged from her employment record by effluxion of time.

In any event, a reasonable employer might have considered issuing a verbal warning, another warning letter, or suspending the Claimant, those sanctions being sufficient to register its displeasure and to reinforce the gravity of the breach. Dismissal would not have been, in the circumstances of this case, the first resort of a reasonable employer.

Counsel pointed to a lack of remorse on the part of the Claimant, and he referred to previous decisions of this Tribunal in which the claimants failed to show any contrition for their wrongdoing. In **Nicole Layne v. G4S Secure Solutions (Barbados) Limited ERT 092/2014** the claimant used obscene language directed at her employer's customer and in **Sonya Toppin v. Republic Bank (Barbados) Limited ERT2018/047** the claimant violated the Exchange Control Act, Chapter 71 of the Laws of Barbados. Both claimants knew or ought to have known that their conduct was wrong. The Claimant's alleged misconduct in the instant case was of a different calibre.

While the Claimant's failure to copy her superior on an email was the principal reason given for her dismissal, the Respondent appears to have placed considerable emphasis at the disciplinary stage on its contention that the Claimant provided "*grossly inaccurate and erroneous information*" which exposed the Respondent to substantial financial liability.

Counsel submitted that "*[e]ven where it was pointed out to the Claimant that her advice differed materially from what Mr. Morris advised she refused to accept that meant she was wrong to send it.*"

The Claimant's answer to that allegation was that she was accustomed to send similar emails to heads of department biannually without complaint. Under cross-examination she conceded that "*the one thing I would have apologized for was not copying Ms. Donna Harper-Nicholls.*"

Should this Tribunal treat her failure to apologise for not copying the manager in the email as a demonstration of a lack of remorse when in fact her focus, like that of the Respondent, was the allegation that she disseminated erroneous information with potentially serious financial repercussions?

A reasonable employer, having recognised that the Claimant, who had no training for the position she held, clearly misunderstood the principles relating to severance and layoffs, might have considered providing her with the requisite training or tools to ensure there was no repeat of that misinformation, rather than place as much emphasis as the Respondent did on an apology.

For the reasons stated above, it is the unanimous decision of the Tribunal that the Claimant was unfairly dismissed by the Respondent.

The Tribunal wishes to make a final observation. It is, that though the Act is silent on timelines for delivery of decisions in internal disciplinary matters, it is to be inferred from the requirement that a hearing be conducted as soon as practicable after the alleged misconduct occurred, that Parliament recognised the importance of not having disciplinary proceedings hang over the head of an employee for an inordinate period of time. A reasonable inference, therefore, is that the disciplinary panel should render its decision as soon as practicable after the conclusion of the disciplinary hearing. The interval between the conclusion of the hearing and the dismissal of the Claimant in the instant case was 31 days, which in the opinion of the Tribunal is wholly unsatisfactory.

DISPOSAL

In accordance with section 33(1) of the Act, the Tribunal informed the Claimant that it may make orders either for reinstatement or re-engagement. Since the Claimant declined both options, the Tribunal makes an order for compensation calculated as set out below.

In accordance with Rule 1 of the First Schedule to the Act, the Tribunal makes an award to the Claimant consisting of the aggregate of:

(a) a basic award being 2.5 weeks' pay for each completed year of service; and

(b) compensation for travel, entertainment and medical allowances for a period of three months.

The Claimant submitted that her gross monthly salary was the sum of **Eight thousand two hundred and forty dollars ($8,240.00)**. She was paid for the month of September 2016 and she received accrued vacation pay at dismissal.

A basic award in the sum of **Thirty-three thousand two hundred and seventy-six dollars and ninety-two cents ($33,276.92)** is accordingly made to the Claimant. An award in the sum of **Four thousand and forty-eight dollars and ninety-eight cents ($4,048.98)** representing car/travelling, entertainment and medical allowances in the respective sums of **Six hundred dollars ($600.00), Six hundred and fifty dollars ($650.00)** and **Ninety-nine dollars and sixty-six cents ($99.66)** per month for a period of three months is also made to the Claimant.

The total sum awarded in accordance with Rule 1 of the Fifth Schedule is therefore the sum of **Thirty-seven thousand three hundred and twenty-five dollars and ninety cents ($37,325.90).**

In addition to that sum, the Claimant is entitled, in accordance with Section 22(3) of the Act, to one month's notice pay, being the sum of **Eight thousand two hundred and forty dollars ($8,240.00).**

The Claimant submitted that she suffered loss of a portion of her unemployment benefits having been dismissed "*for cause*". The Tribunal makes no award in respect thereof.

The Respondent is ordered to pay the Claimant the sum of **Forty-five thousand five hundred and sixty-five dollars and ninety cents ($45,565.90)** within 28 days of the date of this decision.

Deputy Chairman

Member

Member