BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

NO: ERT/2015/152

BETWEEN:

RICARDO DELISLE NURSE **CLAIMANT**

AND

MILLENNIUM INVESTMENTS LIMITED

(T/A THE CRANE RESORT) **RESPONDENT**

TRIBUNAL:

KATHY-A. HAMBLIN, Deputy Chairman

BEVERLEY BECKLES, Employees' Representative

DR. CATHY NORVILLE-ROCHESTER, Employers' Representative

Dates of hearing: June 15, 29 and 30, 2022 and July 4, 2022

Date of Decision: December 12, 2022

Miss Honor C. Chase Attorney-at-Law for the Claimant.

Mr. Mark H. Forde, Attorney-at-Law for the Respondent.

DECISION

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

THE FACTS

Ricardo Delisle Nurse, ("the Claimant") a security supervisor in the employ of Millennium Investments Ltd., trading as The Crane Resort ("the Respondent"), complains that he was unfairly dismissed from his position on May 12, 2015, based on an allegation that on April 19, 2015, he had received a quantity of stolen desert rose plants, the property of his employer. The Claimant contends that at the material time, he was not on the Respondent's premises but was attending a motor rally event at Sailor Gully, St. Peter.

In response, the Respondent states that on April 20, 2015, Edwin Franklyn, the resort's landscape manager, reported that 20 desert rose seedlings with a total value of $40.00 were missing from the Respondent's plant nursery.

Investigations led to another employee B[1], who allegedly confessed to having stolen and sold the plants to the Claimant. The Respondent further alleges that B claimed that at approximately 11:00 a.m. on April 19, 2015, the Claimant arrived at the resort in a blue car which needed bodywork on the side, which was being driven by "*a big, fat, black, man*".

The Respondent reported the matter to the police, who took the Claimant into custody and executed a search warrant at his residence. The Claimant was identified at the police station by Adrian Arthur, then a security officer but now the Respondent's security supervisor. Mr. Arthur stated that the Claimant came onto the resort premises on April 19, 2015, face obscured by a cap, crouched in the front seat of a white Hiace van driven by a "*light-skinned man*".

The Claimant was also identified at the police station by B as the person to whom B sold the plants. However, the plants were not found in the Claimant's possession, custody or control and he was neither charged nor prosecuted in relation to them.

The Claimant was instructed by Wallwin Strickland, the Director of Security, to attend a meeting on May 4, 2015. At that meeting, he was presented with a letter titled "*Notice of Disciplinary Action*" and was instructed to return to the resort the following day, May 5, 2015, for a hearing. Meetings were held with the Claimant on May 5, 7 and 12, 2015, at the conclusion of which the Claimant was terminated.

The Respondent justified the dismissal by asserting that they concluded "*on a balance of probabilities that it was more likely that he was at the resort at the time both [B] and Security Officer Adrian Arthur contended than was his assertion that he was at the Sailor Gully in St. Peter.*"

The Claimant brought his claim for unfair dismissal to the Employment Rights Tribunal by Claim Form filed on December 18, 2015.

THE ISSUE

The issue for determination by the tribunal is whether the Claimant's dismissal was fair or unfair.

Resolution of that issue necessitates that the tribunal consider whether the reason for the dismissal falls within section 29(2) of the Employment Rights Act, 2012-9 ("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.

Even if the employer's reason for the dismissal falls within section 29(2), the dismissal will be deemed to be unfair if the disciplinary procedure followed by the employer was not fair.

[1] The name of the employee is withheld in the absence of any documentary evidence that the employee was convicted of any offence related to the matter giving rise to this claim.

The principal reason for termination

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.*
>
> *(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.*

The Respondent appears to have cited two different reasons for dismissing the Claimant, namely, *"due to an allegation made by a former employee that [the employee] sold eighteen stolen plants, property of the Crane to [the Claimant]. His presence at the property at the material time was corroborated by a Security Officer/Gateman"* as stated on the NIS Termination/Lay-Off Certificate, and "*loss of confidence*", the ground stated in the letter of termination dated May 12, 2015.

Counsel for the Respondent sought to explain the discrepancy in the two documents in this way:

> *"All the statement written on the back of the NIS Termination of Services/Lay-Off Certificate sought to do was to expand on the reason for the Loss of Confidence in keeping Mr. Nurse on staff. My client could not write, for example, "receipt of stolen goods" as that would be entering into the realm of proven criminal offence, where the standard of proof is beyond reasonable doubt."*

Counsel's explanation is confusing, a fact made more apparent by the Respondent's contention that the Claimant's dismissal was justified, since "*it is quite clear that receiving of stolen goods, like theft or sale of illegal drugs would constitute gross misconduct and attract termination. But the actual offence does not have to be proven*".

While he does not specifically refer to the relevant section of the Act, it would appear that counsel for the Respondent is here invoking section 29 2(b) and is asserting the employer's right to dismiss for matters relating to the conduct of the employee.

Counsel for the Claimant argues that the dismissal "*could not be related to any conduct and/or misconduct on [the Claimant's] part if the reason for his dismissal was due to* ***an allegation*** *made by a former employee (emphasis added).*"

She cites a Webster's dictionary definition of the words "*conduct*" and "*allegation*" as, "*to act or behave in a particular manner*" and "*an assertion unsupported and by implication regarded as unsupportable*", respectively, to question how the employer could "*ascribe an unproven assertion to the behaviour of an employee*". She states further:

"*In the absence of proof of the allegation, the employer cannot say that the employee misconducted himself in any way.*"

Counsel pointed out that the Claimant was not charged by the police for any crime relating to the alleged theft of the plants and, further, that the Respondent never found the plants in the Claimant's possession.

What Counsel is suggesting is that absent proof of misconduct, an employer cannot take disciplinary action against an employee who has allegedly engaged in wrongdoing.

Counsel's argument, if accepted, would be effective to preclude any employer from taking disciplinary action against an employee who is, on reasonable grounds, suspected of misconduct but against whom the employer has no direct evidence of culpability. Her argument runs counter to the learning and case law on the subject.

While the evidence suggests that the Respondent employer applied both the criminal standard of proof (proof beyond a reasonable doubt) and the civil standard of proof (proof on a balance of probabilities) in a complete blurring of legal principles, it is the view of this tribunal that the legislation does not impose on an employer either of those standards. The threshold which an employer must reach in order to discharge his burden is appreciably lower than the civil standard of proof.

Halsbury's Laws of England 4th Edition, Reissue, Vol. 16 explains the rule relating to dismissal for reasons related to conduct as follows:

> *"It is well-established that in a case of suspected misconduct the test of fairness is not whether the employer has proved the employee guilty and still less whether he has done*

so beyond reasonable doubt, but rather whether the employer genuinely believed on reasonable grounds in the employee's guilt."

The Act does not require specific proof of an allegation of misconduct. It only requires that the reason for dismissal be *"related to"* the employee's conduct. Accordingly, an employee may be dismissed for an act or an omission to act. A dismissal in either case need only be based on a reasonable belief.

The tribunal must be careful not to impose on employers a higher standard of proof than the legislature intended. To do so would effectively tie the hands of employers rendering it difficult, if not impossible to dismiss except where the employer has in hand the so-called "smoking gun".

At the same time, the low bar which an employer must overcome must not be construed as a licence to dismiss based on spurious or malicious allegations of misconduct which no reasonable employer would genuinely believe.

The test in such circumstances, is:

> *"...whether the employer who discharged the employee on the ground of the misconduct in question (usually though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed the belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."* (per Phillips, J ***in British Home Stores Ltd. v. Burchell [1978] IRLR 79.***

Counsel further argued that the Respondent *"offered no other **substantial** reason, or any other reason at all, to justify the dismissal of the Claimant (emphasis added)"* and submitted that *"any such substantial reason had to be put to the Claimant to permit him to defend himself"*.

For these reasons, she contends that the Respondent has not fulfilled the requirements of section 29 (1) (b) and argues that *"the Respondent cannot rely on the fact that it may have acted reasonably in reaching the decision to dismiss the Claimant. The test of reasonableness of the employer's decision arises only when the employer has fulfilled the requirements of **subsection (1)**."*

It is the opinion of the tribunal that the allegation that the Claimant received stolen property is conduct which falls within section 29 (2) (b). The Respondent has accordingly fulfilled the requirements of subsection (1) and the issue of any other substantial reason being given for the dismissal is therefore moot.

The fairness of the decision to dismiss

We next considered whether the dismissal was fair or unfair and whether: -

(1) the Respondent acted reasonably or unreasonably in treating the Claimant's alleged misconduct as a sufficient reason for dismissing the Claimant; and

(2) the Respondent complied with the rules set out in Part A of the *Fourth Schedule.*

(1) Did the Respondent act reasonably or unreasonably in treating the allegation of receiving stolen goods as a sufficient reason to dismiss the Claimant?

The answer to this question requires an examination of whether:

i) the Respondent reasonably believed that the Claimant received the stolen desert roses;
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 Respondent's evidence is that the director of security received a complaint of missing desert rose plants from its landscape manager. An investigation was immediately commenced, and that investigation allegedly led to a confession by B, that B had sold the roses to the Claimant, who is B's cousin. The Respondent reported the matter to the police, who arrested and interrogated the Claimant and effected a search warrant at his residence.

The early involvement of the police suggests that there was a genuine belief by the Respondent that the Claimant was involved in the theft of the plants.

The Respondent's evidence also demonstrates that the Respondent had reasonable grounds upon which to base its belief that the Claimant was in receipt of the stolen property, even though the missing plants were never found in the Claimant's possession, custody or control.

The Respondent not only had a confession to the theft, but it also had a statement implicating the Claimant in the receipt of the stolen plants. Additionally, B and the gateman, both of whom were well-acquainted with the Claimant, reported that the Claimant was present at the resort on April 19, 2015, even though there were glaring inconsistencies as to their descriptions of the vehicle in which the Claimant allegedly arrived at the resort, the description of the driver of that vehicle and the time of the alleged visit to the resort. Following the Claimant's arrest, both B and the gateman identified the Claimant at the police station. B had the opportunity to recant the confession and retract the statement implicating

the Claimant when the Claimant was brought to the police station for questioning. Instead, B reiterated that it was the Claimant to whom the stolen plants had been sold.

When he was subsequently asked to account for his whereabouts on the date and at the time he is alleged to have received the plants, the Claimant asserted that he was attending a motor rally in Sailor Gully, St. Peter. He brought two witnesses to prove that he was not at the resort on the day in question. One of those witnesses allegedly volunteered to show the disciplinary panel photographs which were taken at the event. The Claimant's image was not captured in any of those photographs. Further, the Claimant was unable to show from his cellular phone records to which he voluntarily allowed the Respondent access, that he was at Sailor Gully at or about the time B and Mr. Arthur claimed he was at the resort receiving the stolen property.

While the burden of proof at all times rested with the Respondent, it is still noteworthy that the Claimant could not rebut the Respondent's witnesses' testimony with independent evidence that he was elsewhere.

The Respondent asserted that based on the Claimant's inability to account for his whereabouts, it was determined that it was more likely than not that the Claimant was at the resort at the material time than at Sailor Gully as he claimed.

It is settled law that it is for the employer's disciplinary panel and not this tribunal to balance the inconsistencies in the employer's own evidence against the discrepancies in the Claimant's evidence. Consequently, the tribunal offers no opinion on the weight the Respondent gave or ought to have given to any of the evidence relied upon by its disciplinary panel.

We next considered whether the Respondent had undertaken as much investigation into the Claimant's alleged misconduct as was reasonable in all the circumstances when the decision to dismiss the Claimant was made.

Having identified the alleged thief, secured a confession from that individual not only admitting to the theft but identifying a relative as the party to whom the items were sold and the price at which they were sold and, having placed the Claimant on property at the material time by two witnesses independent of each other, would a reasonable employer have thought it necessary to carry out further investigations into the matter?

We alluded earlier to the inconsistencies in the description of the driver of the vehicle which allegedly brought the Claimant to the resort, and in the description of the vehicle itself. Mr. Arthur and B also gave differing accounts of the time the Claimant is alleged to have entered the resort. Given that eyewitness testimony is notoriously unreliable, should those inconsistencies have resonated with the Respondent and compelled further investigation?

The employer's duty is to conduct a reasonable investigation and what is reasonable is a question of fact. The question then is, did the employer's failure to investigate further in light of those discrepancies render the investigation unreasonable?

A reasonable employer was unlikely to have considered it necessary to dig deeper and would more likely than not have determined that there was sufficient evidence upon which to base a decision to dismiss the Claimant. In the premises, the tribunal concluded that the investigation conducted by the Respondent was of the kind which a reasonable employer would have carried out if faced with a similar set of facts and circumstances.

(2) Compliance with the procedural rules set under Part A of the Fourth Schedule

Part A requires an employer to apply progressive disciplinary action. That is not to say that an employer may not dismiss an employee for a breach of discipline amounting to gross misconduct even if that is the employee's first transgression.

Counsel for the Claimant argues that "*the Respondent produced no evidence that this was a case of gross misconduct and therefore any disciplinary action should have been applied progressively, the Claimant should have been warned either orally or in writing before action was taken. This they did not do.*"

If the Respondent reasonably believed on reasonable grounds that the Claimant was in receipt of stolen property, the Respondent would have been entitled to treat the same as amounting to gross misconduct.

The alleged receipt of stolen property was not the Claimant's first disciplinary offence. Counsel appears to have overlooked the unchallenged documentary evidence adduced by the Respondent which shows that the Claimant had been the subject of disciplinary action just five months prior, when on January 2, 2015, he was suspended for seven days for using insulting language to a subordinate. Even though that infraction was deemed by the Respondent to be gross misconduct, dismissal was not automatic. Should dismissal be automatic in a case where an employer makes two consecutive findings of gross misconduct on the part of the same employee?

In every case, the employer must weigh the aggravating and mitigating features of the Claimant's conduct before making the decision to dismiss. In the instant case, the principal aggravating feature was that the Claimant was employed in a supervisory position, one of trust, when he allegedly colluded with another employee to receive property stolen from their employer.

But for the suspension for using insulting language to a subordinate, the Claimant's record was sufficiently impressive that in the seven years during which he was employed by the Respondent he had earned a promotion from security officer to security supervisor. This is a mitigating factor.

Would a reasonable employer retain in its employ a ***security officer*** who was reasonably suspected of participating in the very activity which he was mandated to protect his employer against? A reasonable employer weighing the aggravating and mitigating factors would more likely than not have treated an allegation against its security supervisor of receiving stolen company property as being of sufficient severity as to merit dismissal.

The tribunal holds that the decision to dismiss the Claimant was a fair sanction in all the circumstances.

Even though the decision to dismiss the Claimant constitutes a fair sanction, the Respondent's conduct of the disciplinary hearing was flawed and a breach of the procedural rules under Part B of the Act.

Consequently, the dismissal of the Claimant was unfair.

PROCEDURAL FAIRNESS

Underpinning a fair procedure is the duty of the employer to carry out a proper investigation into the alleged misconduct, followed by a fair disciplinary hearing. While it is to be expected that the type and extent of the investigation will vary from one employer to another depending on the size and resources of the organisation, there is no moratorium on fairness.

The Law

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.*

Suspension pending investigation

Steps 1 and 2 do not apply where the employee has been suspended with full pay pending an investigation, until the employer contemplates taking disciplinary action against the employee. Even though neither counsel for the Claimant nor counsel for the Respondent specifically addressed the tribunal on the issue of suspension, the evidence shows that on May 1, 2015, having been released from police custody, and being rostered to work the afternoon shift, that the Claimant contacted Mr. Strickland to ask if he still had a job. Mr. Strickland advised him to "*take the weekend off and come up there on the Monday and they would have a talk*" with him.

On May 4, 2015, the Claimant was presented with a "*Notice of Disciplinary Action*" bearing the same date. The evidence also reveals that the Claimant was only paid up to May 9, 2015, if the dismissal letter is relied on, or May 7, 2015, if the Termination/Lay off certificate is relied on, although he was dismissed on May 12, 2015.

Mr. Forde alluded to the Claimant having been put on paid suspension, to which Ms. Sade Piggott, Human Resources Manager in her evidence in chief responded, "*if you can call it that, he was on paid leave.*"

Whatever Ms. Piggott chose to call it, it appears to the tribunal that the Respondent's action amounted to suspension even though the Claimant was not formally notified that he was being placed on suspension and was not paid his full pay for the period he remained on suspension. Further it appears that by the time the Claimant was advised to come to the Crane Resort on May 4, 2015, the Respondent had already contemplated taking disciplinary action against him.

Consequently, the Respondent was obliged to comply with steps 1 and 2 of Part B of the Fourth Schedule.

Compliance with Part B

The tribunal heard the evidence of the Claimant and three witnesses for the Respondent, namely, Mr. Strickland, Ms. Piggott, and Mr. Arthur.

Based on the evidence of the first two, it is our opinion that the Respondent conflated its disciplinary and investigatory hearings, making it difficult if not impossible to ascertain when one stopped and the other started.

The hearing, irrespective of the title bestowed upon it by the parties, was striking in that the Respondent showed little regard for the procedural requirements of the Act or for basic principles of fairness.

1. Failure to provide a statement of grounds.

The Respondent's letter to the Claimant dated May 4, 2015, informed the Claimant that the Respondent proposed to discuss taking disciplinary action against him in relation to "*[i]nformation arising of a disciplinary meeting with [B] where your name was mentioned in relation to a number of stolen Desert Roses plants which occurred on April 19, 2015.*"

The insufficiency of this "*statement of grounds for action*" cannot be overstated. The tribunal is of the opinion that the statement sets out no "*conduct or characteristics of the employee, or other circumstances*" which would justify the Respondent in contemplating taking disciplinary against the Claimant.

Further, that statement contains no basis whatsoever for the disciplinary action which the Respondent was contemplating taking against the Claimant. It does not indicate by whom the Claimant's name was mentioned. In any event, the mere mention of the Claimant's name in a disciplinary meeting with another employee ought not, without more, to have been the basis for disciplinary action against the Claimant.

The statement did not reveal the context in which the Claimant's name was mentioned, whether as witness, thief or receiver. The number of plants allegedly stolen was not specified. We consider that omission to be relevant, since in the evidence presented by the Respondent, that number varied from unspecified to 18 to 20.

Questioned by the tribunal, Ms. Piggott agreed that the notice "*could have been more specific*" and that it was vague. However, she assured the panel that she "*went through the letter with [the Claimant] and had a side bar with him.*"

Indeed, whenever the tribunal questioned what appeared to be a deficiency in the Respondent's procedure, Ms. Piggott assured the tribunal that she compensated for whatever that deficiency was by explaining to the Claimant, or having a "side bar" with him, since she was "*trying to help prove his innocence*".

The Act makes no provision for the oral statement of grounds or the alleged conduct which lead the Respondent to contemplate taking disciplinary action against the Claimant. Accordingly, we conclude that the Notice of Disciplinary Action presented to the Claimant did not contain any statement of grounds and as such did not conform with the provisions of the Act.

2. Convening a disciplinary meeting with 24 hours' notice.

The Claimant was summoned to his workplace on May 4, 2015 and given a letter bearing that date inviting him to a meeting the following day.

Counsel for the Respondent contends that "*the ERA provides that where reasonably practicable, the meeting must take place within 7 working days of the transmission to the employee of the statement referred to in paragraph 1(b). There is nothing before us to show that the 24 hours between letter and proposed meeting time was not reasonable.*"

In making the above assertion, Counsel conveniently disregards the stipulation in the Act that the meeting must not take place unless "*the employee has had a reasonable opportunity to consider his response to the information referred to in (a) (ii)*".

While the objective is to ensure that disciplinary matters are dealt with expeditiously, there is a caveat to the requirement that the meeting must take place within seven working days of the presentation of the statement of grounds. It is that the employee must be given a reasonable opportunity to mount a defence to the charges levelled against him.

We should also point out that the Act does not state that a meeting must absolutely take place within seven working days of transmission of the statement to the employee. The Act only states that this ought to be done "*where reasonably practicable*". It follows that a meeting which occurred outside the seven-day period would not have contravened the Act if it was not reasonably practicable to convene it sooner.

The tribunal finds that in the instant case, the less than 24 hours' notice of the meeting was neither reasonable nor in keeping with the spirit of the Act as Counsel contends. When the disciplinary meeting was convened, the Respondent had yet to put a specific allegation of misconduct in writing to the Claimant, the quantum of alleged stolen goods was unknown to the Claimant (and, it appears, to the Respondent) and the Claimant had been given no basis by the Respondent on which the allegation of receiving stolen goods was made against him.

How could the Claimant have considered his response in the face of such critical omissions and/or vagueness?

Moreover, at no time before or after the meeting was scheduled did the Respondent provide the Claimant with a copy of the statements made against him by the Respondent's witnesses.

In answer to this observation, Counsel for the Respondent argues that the Claimant "*by his own admission, faced both ... [B] and Mr. Arthur at District "C" Police Station and heard their assertions. What the Crane management told him did not differ from what he had already heard from those two persons.*"

While that may be so, it is no answer to the specific statutory requirement that the employee must be given a reasonable opportunity to state his case, to say that the Claimant had already heard the case that was being made against him from a third party.

Counsel relies in support of his argument on the dicta of Phillips J in *Burchell* to reject the contention by Counsel for the Claimant that the Claimant ought to have been given an opportunity to confront B and Mr. Arthur.

It is our opinion that *Burchell* does not support Counsel's arguments. In that case, the EAT held that what the tribunal had dealt with "*in a way which is in a measure unsatisfactory*" was the suggestion that "*the proper course for management to have pursued in relation to its investigations was to confront Mrs. L and Miss Burchell and to observe what passed between them upon such confrontation where perhaps the truth was most likely to lie*" given that Mrs. L had given a statement implicating Miss Burchell.

The distinction between that and the instant case is that in the instant case, the issue of confrontation arises, not in relation to the *investigation* into the alleged theft of the roses, but in the context of a *disciplinary hearing*, where the Respondent had already determined that the Claimant had a "*disciplinary action*" to answer.

The Claimant was here faced with a serious allegation of misconduct which could and did eventually lead to his dismissal. He was entitled to know the specifics of that allegation, in order to defend himself against it. When the hearing was convened, Mr. Franklyn and Mr. Arthur were still in the employ of the Respondent, yet no written statement was obtained from either of them. B had already been terminated and while Ms. Piggott testified that she "*took a statement from [B]*" she did not provide a copy to the Claimant. She testified to having "*told [the Claimant] of the statement, exactly what [B] had said but I did not have the physical statement with me.*"

In relation to Mr. Arthur, she stated that although she took a statement from him prior to the start of the meeting, she did not give the Claimant a copy of that statement either; "*it was only verbally told to him*". She further testified that she believed that it was on May 5, 2015, that she asked the Claimant if he wanted to meet with Mr. Arthur, an offer, she contended, the Claimant declined.

The Respondent also argues that "*everything was done to provide the Claimant with ample opportunity to provide evidence to refute the allegations made against him. He simply could not.*"

The Respondent alleged that the Claimant was implicated in the theft of its property. As the party making that allegation, the onus was on the Respondent to prove its case. By the time the disciplinary hearing was convened, the Claimant ought to have been given a statement setting out the case against him, and then given a reasonable opportunity to respond.

The Respondent having failed to provide any statements to the Claimant before the meeting was convened, the Respondent cannot now state that the Claimant was given a reasonable opportunity to consider his response to the allegations made against him.

3. **Not advising the Claimant of his right to have a friend or shop steward present at the disciplinary meeting.**

The Act requires the employer to convene the meeting only when the employer has informed the employee of "*his right to have a friend or a shop steward*" present at that meeting. In the

Respondent's notice to the Claimant, the Claimant was informed that he "*was entitled to be accompanied by another work colleague or witness.*"

Ms. Piggott testified that she told the Claimant "*he could bring any representative he chooses. I would have explained that he could bring anyone he chose to.*" Mr. Strickland stated in his evidence in chief that "*the Claimant and two persons were invited into the conference room and questioned whether they were there as representatives or witnesses and at that stage, they were asked to go into a room outside the conference room. Sade Piggott then asked the Claimant if he intended to have a friend or representative present and he said no*".

The Claimant's right to have a friend or shop steward present ought to have been sufficiently clear in the "*Notice of Disciplinary Action*" so that there would have been no need to explain who could accompany the Claimant to that meeting.

Counsel for the Respondent contends that "*a work colleague or witness is equivalent to bringing a representative or a friend... The Claimant was informed and he brought two witnesses. The evidence shows that these two persons were his friends and he brought them there to represent him; to support him*". Consequently, he stated, "*the Claimant was indeed represented.*"

There is no merit in that assertion. Those two witnesses, Ryan Blades and Everton Sandiford, were removed from the hearing room by Ms. Piggott after it was discovered that they were there as witnesses of fact and not as friends or representatives as contemplated by the Act.

Counsel suggests that the Act presents "*something of a conundrum*" given that the wording in section 29 differs from that in Part B of the Fourth Schedule.

The "*conundrum*" in the opinion of the tribunal, was created by the Respondent in the *Notice of Disciplinary Action* by substituting the specific wording in the Act for the Respondent's own "*verbiage*" (in the words of Ms. Piggott).

Under cross-examination by counsel for the Respondent, the Claimant testified that at the May 5, 2015 meeting he was accompanied by Rasheed Belgrave, then a law student, and two alibi witnesses who were allegedly with him at Sailor Gully at the material time.

Neither counsel for the Claimant nor counsel for the Respondent sought to bring any clarity to Mr. Belgrave's role at the meeting. Indeed, the evidence of the witnesses for the Respondent proceeded as if Mr. Belgrave's presence was not recorded. Since we are not clear as to the role Mr. Belgrave played, we are unable to make a definitive ruling on what transpired at the May 5, 2015, meeting.

It appears from the evidence that while he was at the May 5 meeting, Mr. Belgrave was not present for either of the two subsequent hearings on May 7 and 12, 2015. To be clear, the right to have a friend or shop steward present continues for the duration of the disciplinary hearing, unless it is specifically and unequivocally waived.

Even if the Claimant misunderstood what the Respondent meant by "*witness*" and the Respondent's notice was defective, the Claimant's right to have a friend or shop steward present at the hearing was not contravened on May 5, 2015, if that was Mr. Belgrave's role. The Respondent would have been at liberty to proceed with the hearing on that date, if the notice had been sufficient, since Mr. Belgrave would have qualified as a "friend" for the purposes of the Act.

However, the meetings ought not to have continued on the two subsequent hearing dates, in the absence of a friend or shop steward unless the Claimant had specifically waived that right on each of those dates. There is no evidence before the tribunal, other than Mr. Strickland's word, that the Claimant specifically waived that right. Mr. Strickland was not cross-examined on the point even though it is one of the pillars of the case for the Claimant that this statutory right was contravened. Mr. Strickland did not present as an altogether credible witness, and we hesitate to accept his testimony in relation to the waiver of the Claimant's right to have a witness present at the hearing.

4. **The Respondent's conduct of the investigation and disciplinary hearing.**

Quite apart from the statutory requirements, the employer must, in conducting its investigation and disciplinary hearing, observe basic rules of fairness. These include affording the employee a fair hearing and appeal against any decision given at the conclusion of that hearing.

Wherever possible, the same panel which investigates the complaint against the employee ought not to be the panel hearing the disciplinary case against that employee or any appeal which follows.

A careful examination of the role played by Mr. Strickland in the investigation, hearing and dismissal of the Claimant strongly suggests that the Claimant was denied a fair hearing.

Mr. Strickland told the tribunal that having been informed by Mr. Franklyn that 20 desert roses were missing from the landscaping nursery on the resort compound, he "*commenced investigations and interviewed [B]*", who admitted selling the plants to a family member who was identified as the Claimant. Mr. Strickland immediately reported the matter to the police.

In his evidence in chief, Mr. Strickland stated that "*after that in pursuance of the report, I sought to continue investigations and I spoke to the security officer posted at the main gate. I was trying to ascertain what vehicles entered the premises on April 19.*" (That statement appears to contradict that which he gave to the tribunal when he later asserted that he "*brought [his] investigation to an end*" after B admitted selling the desert roses to the Claimant.

Mr. Strickland placed himself at the meeting on May 4, 2015 when the notice was handed to the Claimant. He was present when the Claimant was asked to give an account of his whereabouts on April 19, 2015. He was privy to the testimony of the Claimant's witnesses.

He also told the tribunal that "*we (he and Sade Piggott) sought to give the Claimant time and the benefit of the doubt to show that he was at Sailor Gully instead of the Crane where [B] and Mr. Arthur had placed him. No valuable information was retrieved from the Claimant's phone*". He also stated that he "*believed those phone calls bounced off sites in Speightstown earlier in the day.*"

This witness stated further that "*we took 13 days to come to a conclusion*". He admitted he was involved in the investigation and was in the disciplinary meeting but "*I would not say that I assisted Sade Piggott in coming to the dismissal decision.*"

However, Ms. Piggott in her evidence in chief stated that the case was brought on behalf of the company by she and Mr. Strickland and that she and Mr. Strickland made the dismissal decision. She stated also that the two of them "*deliberated for 15-20 minutes. We went over the information*" after which the Claimant was told of the decision. She asserted that "*myself and Mr. Strickland came to the decision then and there.*"

Based on the testimony of these two witnesses, it is clear that Mr. Strickland assumed the role of investigator, prosecutor, judge and jury, actively participating in every aspect of the investigation, disciplinary hearing and decision to dismiss the Claimant, rendering that process patently unfair.

It also appears to this tribunal that by May 7, 2015, a decision had already been taken by the Respondent to dismiss the Claimant. That was the last day for which he was paid. The Claimant received his letter of termination containing precise calculations of his entitlements and final pay cheque within minutes of the conclusion of the May 12, 2015, meeting, suggesting that his dismissal was indeed a *fait accompli* by May 7, 2015, even though the hearing did not officially conclude until May 12, 2015.

APPEAL AGAINST DISMISSAL

Pursuant to section 29(5) a dismissed employee must inform his employer in writing if he wishes to appeal the decision and follow the established disciplinary procedure of the workplace.

Ms. Piggott testified that she advised the Claimant of his right to appeal but "*he never responded*".

While an aggrieved employee has a statutory right to appeal a dismissal decision, the Claimant's decision not to do so in this case ought not to be to his detriment. His evidence is that it made no point appealing, because he did not believe that he would receive a fair hearing.

The Respondent's appeal process, which was alluded to in the termination letter, and which pointed to the Employee Handbook at page 39, allowed for any appeal against dismissal to be made to Sean Alleyne, the general manager of the resort.

Two things are striking in this regard. The first is that the Employee Handbook which was exhibited by the Respondent contained no page 39.

The tribunal cannot comment with any degree of certainty on the Respondent's procedure for appealing a dismissal decision. While Ms. Piggott suggests that the wrong manual was exhibited, she was unable to persuade the panel that the Claimant was in receipt of the manual which she said contained appeal instructions. The Respondent adduced no evidence that the Claimant had signed as having received that manual. Ms. Piggott conceded that she did not give the Claimant a copy of page 39 along with his termination letter but noted that "*every employee is given an employee handbook.*"

Secondly, the appeal was to the general manager who was involved to some extent in the matter, at least in the early stages of the proceedings. The Claimant's evidence is that when he sought to confirm whether he still had a job after being released from police custody, Mr. Strickland conferred with the general manager before advising the Claimant to attend the May 4, 2015 meeting with Mr. Alleyne and Ms. Piggott. It is doubtful whether Mr. Alleyne could have been seen as an impartial arbiter of the facts. The Claimant's reluctance to appeal to that individual was, in the circumstances, excusable.

The evidence of Adrian Arthur

The tribunal feels compelled to address specifically submissions made orally and in writing by counsel for the Respondent in response to what could only be construed as a request that he be allowed to testify during the course of the hearing.

Under cross-examination by counsel for the Claimant, Mr. Arthur admitted that matters relating to the Claimant's earnings contained in paragraphs 1 and 2 of his witness statement dated January 7, 2016, were not within his personal knowledge. He also testified that his statement was limited to the information which was contained in paragraph 3 of his witness statement. In fact, he admitted that "*paragraph 1 and 2 I did not say.*" Mr. Forde interjected, stating "*I can explain*!" to which counsel for the Claimant vociferously objected.

Counsel for the Respondent now submits that:

> "*At that point I sought to intervene but was denied the opportunity. I felt that in the interest of truth and clarity, an explanation was required here.*"

We consider wholly improper the suggestion that the tribunal suppressed an attempt by counsel for the Respondent to provide pertinent information. As an experienced attorney-at-law, counsel had at least two options open to him to bring "truth and clarity" to the matter. Being allowed to answer a question which had been put to his witness in cross-examination, was not one of them. He could have re-examined his witness or, he could have objected to counsel's line of questioning. He did neither.

While the rules of evidence are relaxed in proceedings before the tribunal, we consider inappropriate, the suggestion that the rules ought to have been so relaxed as to allow Counsel to answer a question put to his witness.

DISPOSAL

We note that the Claimant was paid up to May 7, 2015, even though his services were terminated on May 12, 2015. Accordingly, we hold that the Claimant is entitled to receive his unpaid wages for the period May 8, 2015, to May 11, 2015.

In addition, he is entitled to receive basic pay in accordance with the Fourth Schedule of the Act. Having been in the employ of the Respondent for seven clear years, he is entitled to receive as compensation for his unfair dismissal 2.5 weeks' pay for each of those seven years, together with whatever benefits he lost consequent upon his dismissal.

The Claimant avers that he was entitled to wellness and lunch bonuses as well as service charge. Neither the Claimant nor the Respondent provided any documentary evidence of the Claimant's average annual earnings to assist the tribunal in determining how much he received weekly, on average, for service charge. We are therefore constrained to calculate his average weekly service charge at the only figure provided to us, namely, $97.20 for the last week of the Claimant's employment.

Accordingly, we have arrived at an average weekly wage of $733.54 being gross weekly wages in the sum of $600.00, $97.20 for service charge, $20.34 for wellness bonus and $16.00 for lunch bonus. The weekly wage is pro-rated for the four-day period for which the Claimant was not paid and amounts to $586.83.

The Claimant is also entitled to four weeks' notice pay being the sum of $2,934.16.

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In the premises, the Respondent is ordered to pay the Claimant the total sum of $16,357.94 within 28 days of the date of this decision. That sum is made up as follows:

Notice pay	$ 2,934.16
Basic Pay in accordance with the Fourth Schedule of the Act	$12,836.95
Four days' pay for the period 8th to 11th May, 2015	$ 586.83
Total	$16,357.94

Deputy Chairman

Employees' Representative

Employers' Representative