BARBADOS

EMPLOYMENT RIGHTS TRIBUNAL

NO. ERT/2016/185

BETWEEN:

CAROLYN HAYNES **CLAIMANT**

AND

BARRBADOS BEACH CLUB **RESPONDENT**

TRIBUNAL

Kathy-A. Hamblin, LLM, LL.B. (Hons.), FCIArb — Deputy Chairman
Beverley Beckles, MSc., BSc. (Hons.), CertCIB — Member
Deighton Marshall, CMgr, FCMI, CMC, FIC, Chartered MCIPD, PGDip /Employment Law & Practice — Member

APPEARANCES

Mr. Keith M.C. Robertson, LL.B. Attorney-at-Law for the Claimant
Mr. R. Alair Forde, LLM (Dist.), LL.B. (Hons.), Attorney-at-Law for the Respondent

Date: March 29, 2023

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[1] INTRODUCTION

[1.1] This matter has its genesis in an "*altercation*" so styled by the Claimant, Carolyn Haynes, which occurred between Ms. Haynes and Rico Harte in the kitchen of the Barbados Beach Club on April 6, 2016. That incident resulted in the termination of the Claimant's services on April 8, 2016.

[1.2] The Claimant had been employed by the Respondent as a porter/kitchen steward for 14 years. There was no documented history of misconduct on her part, nor of any disciplinary action having previously been taken against her. She alleged that the dismissal was unfair, in that the Respondent failed to comply with the procedural requirements of the Employment Rights Act, 2012-9 ("the Act"). The

Respondent countered that despite there being procedural irregularities, the Respondent was entitled to dismiss the Claimant for fighting on the premises in breach of company policy.

[1.3] The Claim Form was filed on August 15, 2016. The Respondent's Form 2 was not filed until six and a half years later on February 10, 2023. The Claimant supported her claim with her own witness statements filed on August 17, 2016, and January 27, 2023. The Respondent submitted witness statements of Michael Moore, Costella Cave and Antoinette Barnes all three dated April 6, 2016, Michael Coppin dated April 19, 2016, and Felix Broome dated April 25, 2016. It is worth noting that all of the Respondent's witness statements pre-dated the filing of the Claim Form. Counsel for both parties presented written submissions for the consideration of the Tribunal at the conclusion of the hearing.

[2] THE ISSUES

[2.1] The principal issues for determination by the Tribunal are first, whether the Claimant's dismissal was related to her conduct; secondly, if it was, whether the Respondent acted reasonably in treating that conduct as a sufficient reason for dismissing the Claimant; and lastly, whether the employer complied with the requirements of Parts A, B and C of the Fourth Schedule to the Act.

[3] THE LAW

[3.1] The Tribunal must consider whether the principal 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.

[3.2] Section 29 of the Act provides that:

> *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.

[3.3] There is no dispute that there was an altercation between Harte and the Claimant on April 6, 2016. In her first witness statement, the Claimant contended that Harte struck her several times in the top of her head with a pan.

[3.4] The Claimant alleged that Harte "*push his hand in my face saying you ain't know I would hit you in you face with this pan. I then push back my hand in his face and at that time is when he hit me in the top*

of my head about three times with the pan." The Claimant also contended that she did not retaliate because Harte "*was much taller than I am I just took the lashes from him*". She stated that Antoinette Barnes, the pastry chef, "*came and pull me away and took me in the storeroom.*"

[3.5] The Tribunal is persuaded that the principal reason for the Claimant's dismissal related to her conduct, namely fighting on the Respondent's premises. Although she sought to portray the incident as a one-sided attack on her, in her oral testimony, the Claimant referred to the incident as a "*fight*". That characterisation appears to be appropriate having regard to the fact that the Claimant had to be "*pulled away*" from Harte and taken to a storeroom.

[3.6] Whether the dismissal was fair or unfair depends on if the Respondent acted reasonably in treating the Claimant's role in the fight as a sufficient reason to dismiss her, and whether the Respondent complied with Part A of the Fourth Schedule to the Act.

[4] WAS THE DECISION TO DISMISS THE CLAIMANT REASONABLE?

[4.1] The Tribunal considered whether:

i. the Respondent reasonably believed that the Claimant was guilty of misconduct and, if so, whether there were reasonable grounds upon which to base that belief;

ii. the Respondent had conducted a reasonable investigation into the Claimant's alleged misconduct when the Respondent made the decision to dismiss the Claimant; and

iii. a reasonable employer would have dismissed the Claimant in the circumstances of this case.

[4.2] The Claimant's supervisor Chef Michael Moore, who was summoned to the kitchen while the dispute was still ongoing, stated that after the Claimant and Harte were parted by other employees, the Claimant "*started to carry on in the presence of the Duty Manager and myself*". He ordered her "*to stop with that now, that guests can hear her from the Dining Room*". The Claimant responded, not with an apology to her superiors for raising her voice or for her role in the brawl, but with a threat to Harte, allegedly telling him: "*I going get you even if it is in town.*"

Chef Moore testified that the Claimant was "*all up in [Harte's] face*" and "*still going up in his face to fight*", even when they were in his office. In his opinion, the Claimant did not appear to be afraid of Harte.

[4.3] The Tribunal is persuaded that a reasonable employer seised of that evidence would reasonably have believed that the Claimant was guilty of misconduct. The Tribunal is also persuaded that the Respondent had reasonable grounds upon which to base that belief.

[4.4] The Respondent's rules and regulations, a copy of which the Respondent submitted to the Tribunal, provide for termination for "*fighting or repeated quarrelling with other employees*". Those Rules were in effect at the date of the Claimant's dismissal, and she was aware of them. Even where the rules of the workplace provide for summary dismissal for fighting, the employer still has a duty to consider all relevant factors including the cause of the fight and the role each party played in either instigating or provoking that fight, before dismissing the employee or employees involved.

[4.5] The Respondent argued that it carried out an investigation into the incident and, based on that investigation, the decision was made to dismiss the Claimant. Chef Moore testified that on the day of the incident, when he arrived at the kitchen, he "*could just hear mouths going.*" He, along with Duty Manager Costella Cave, met with the Claimant and Harte into an office where the two employees gave their respective account of the incident. Harte stated, according to Chef Moore, that the Claimant "*pushed her hand in his face and touched him in his face and he retaliated and hit her.*" The Claimant, meanwhile, told Chef Moore that Harte had struck her on the head with a plastic tray.

[4.6] Chef Moore also stated that after he had suspended the two of them, he set up a meeting with other members of staff to hear their version of events. He was assisted by management in that investigation which lasted "*45 minutes to an hour*" and entailed interviewing *"six or seven"* witnesses.

[4.7] Given the nature of the alleged misconduct, a reasonable investigation would have required not much more than obtaining statements from Harte, the Claimant and the employees who witnessed the

incident. Accordingly, the Tribunal is of the view that the investigation conducted by Chef Moore was reasonable in all the circumstances.

[4.8] In considering whether a reasonable employer would have dismissed the Claimant, the Tribunal weighed the mitigating and aggravating factors. The Claimant was employed by the Respondent for 14 years. According to the Claimant, her employment record was exemplary. Chef Moore concurred. The Respondent's managing director testified that the Claimant did a good job keeping the restaurant floor clean and a good job in the wash-up area. She was even given a "*slight promotion*" to head of the pot washing department. These are mitigating factors.

[4.9] There are also several aggravating factors, among them the raising of her voice and "*carrying on*" alluded to by Chef Moore, and her threat to Harte. Even if she was not the instigator, as Counsel for the Respondent argued, it is apparent that the Claimant actively participated in the brawl.

[4.10] The Claimant stated that she did nothing to defend herself while she was being struck repeatedly by Harte. At the same time, she offered no evidence of the measures, if any, which she took to diffuse the situation. She did not testify to having attempted to shield her head or to duck, or to walk or run away from Harte. Based on the Claimant's account, Harte was not restraining her, or blocking her path, or otherwise preventing her from leaving the kitchen, which, based on Chef Moore's account appeared to have been spacious, with a distance between the two sinks in the pot washing area of approximately 12 feet. The fact that she was neither attempting to flee nor to shield herself from the blows, which someone who is being attacked or who fears for their safety would be inclined instinctively to do, suggests that it is more likely than not that the Claimant was fighting back, even if only to defend herself. This is buttressed by the fact that the Claimant admits that she was forcibly removed from the scene of the altercation and taken to a storeroom by another employee.

[4.11] The aggravating factors outweigh the mitigating factors. A hotel is a place of respite and relaxation. Guests pay handsome sums of money for tranquility. In view of the nature of the Respondent's business,

the potential negative impact of that commotion on the Respondent's brand, image and business, and the Claimant's active role in the fracas, it is the opinion of the Tribunal that a reasonable employer would likely have dismissed the Claimant even though it was her first offence.

[5] PROCEDURAL FAIRNESS

[5.1] The Claimant testified that following a meeting with Chef Moore, she was issued with a letter in the following terms:

> ***"To Carlean Haynes***
>
> ***This letter represents suspended of work due to misconduct in the kitchen on Wednesday April 6th, 2016. A meeting would be set and you would be inform of the date.***
>
> ***Chef".***

[5.2] The Claimant next met with Chef Moore on April 8, 2016, and was advised that she and colleague Harte had disturbed the guests in the hotel and that was the reason for her termination. She claimed that she was issued with a National Insurance Certificate but was not given "*a warning letter, dismissal letter, termination letter or the six weeks' notice period.*"

[5.3] Under cross-examination by Counsel for the Respondent, the Claimant stated that she received a telephone call from one Ms. Kelly, the restaurant supervisor, who "*tell me that Mr. Broome told me come in for a meeting. My understanding was that it was to give me my green paper, the leggo paper.*"

[5.4] The Claimant stated that she attended the meeting but was not accompanied by a friend or a representative. At that meeting, which the Claimant said was attended by Chef Moore and Gwendolyn Broome, wife of the hotel's managing director Felix Broome, she gave her side of the story and Mrs. Broome "*just listened to me and give me my paper. That is all. Mrs. Broome did not tell me I had a right to appeal the decision.*" She also stated that she was given nothing in writing, that she was not told by Mrs. Broome why she was being dismissed and that "*everything was done orally.*"

[5.5] Two of the five employees of Barbados Beach Club who tendered witness statements testified on behalf of the Respondent at the hearing of this matter. The first was Mr. Broome, who admitted that he neither witnessed the incident nor was present at the disciplinary hearing.

[5.6] Despite having no firsthand knowledge of the incident or the events which followed, Mr. Broome asserted that the Claimant "*was told to return the following day or two days for a disciplinary meeting and that she may bring a friend or representative to the meeting.*" He contended that "*we were following the Employment Rights Act which carries four lines for immediate dismissal*".

[5.7] Mr. Broome later admitted he was unaware whether a letter had been given to the Claimant inviting her to a disciplinary meeting. He stated also that "*it could have been done verbally but I am not sure. I know she got a notice asking her to come to a disciplinary meeting and bring a representative. I am not aware whether or not the notice was in writing.*"

[5.8] He also asserted that he "*understood*" that notice of the right of appeal was given verbally. Further, despite claiming that a letter of termination was attached to his witness statement filed on September 1, 2016, in his oral testimony Mr. Broome admitted that to the best of his knowledge no letter of termination was issued to the Claimant.

[5.9] Mr. Broome concluded:

"*I am aware of the procedures employers must follow and to the best of my knowledge the company followed those procedures.*"

[5.11] Although now Executive Chef Moore's recollection of the events of seven years ago is spotty, he presented as a credible witness. Chef Moore maintained that the suspension letter was the only letter sent to the Claimant. He stated also that he had discussions with management before the Claimant was dismissed. He could not recall who was present for those discussions, but he was certain that he held discussions with Gwendolyn Broome. Chef Moore conceded that he did not inform the Claimant that she could bring someone with her to the disciplinary meeting nor did he inform her of the charges against her.

He admitted that the suspension letter "*just had misconduct*" and that it did not detail the nature of that misconduct.

[5.12] Chef Moore, who started work at the hotel in 2014, testified that prior to April 6, 2016, the Claimant had never been suspended nor had any disciplinary charges been brought against her. This contrasted with the evidence of Mr. Broome, who stated that the Claimant was "*quarrelsome and aggressive*" and was "*verbally cautioned on several occasions*". Under cross-examination, he maintained that the Claimant "*would have been disciplined before but it was never recorded, not in writing. She was never suspended before April 2016.*"

[6] DISCUSSION

[6.1] It is the duty of the employer to ensure that the employee is afforded a fair disciplinary hearing. 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.*

[6.2] In accordance with Part A of the Fourth Schedule to the Act, employers are required to apply disciplinary action progressively.

Part A stipulates as follows:

> *(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.*

[6.3] The Claimant contended that the incident which led to her dismissal was her first breach of discipline and, for that reason, she ought not to have been dismissed. In his written submissions, Counsel for the Claimant referred to ***Chefette Restaurants Ltd. v. Orlando Harris [2020] CCJ 6 (AJ)*** and in particular to ***Hilton International (Barbados) Ltd. v. Boyce (1966) 52 WIR 59,*** cited in that case, where it was held by the Court of Appeal of Barbados that "*although dismissal for a single act of disobedience was unusual, it was justifiable where that act interfered with and prejudiced the proper conduct of the employer's business*". Counsel asserted that the Claimant's conduct did not in any way prejudice or interfere with the Respondent's business.

[6.4] The incident did not occur in the sand hole in St. Andrew or on a rural construction site. It occurred in the kitchen of a hotel, allegedly within earshot and sight of visitors to the hotel. The Respondent led no evidence to show the impact, if any, which the brawl might have had on its image or business. Equally, the Claimant did not demonstrate that her behaviour on April 6, 2016, neither interfered with nor prejudiced the Respondent's business. Counsel for the Respondent rightly submitted that *"the Respondent's business is in the hospitality industry and as such there are certain high standards which are required for customer service and as such engaging in altercations within the Respondent's industry was conduct so egregious that a warning would not have sufficed.*" The incident could have had serious implications for the hotel's image, and it had the potential to influence decision-making by those guests whose holiday memories included mayhem in the Respondent's kitchen.

[6.5] Counsel for the Claimant stressed that she was not the aggressor, and he pointed to her height and the fact that her opponent was a man. Even though she claims not to have landed a blow, that does not make the Claimant any less culpable than Harte. On the Claimant's own admission, Harte did not strike her until she "*push back*" her hand in the face of that taller man, escalating what was up until then a war of words to a physical altercation. She also admitted that she had to be pulled away from Harte. That, to the Tribunal suggests mutual combat, rather than the beat down of an innocent victim by a taller opponent. Further, even though she neither admitted nor denied having raised her voice as alleged by Chef Moore, it

is unlikely that she, having blow after blow rained on the top of her head, would have been standing, hands limply at her sides, pleading *sotto voce* with Harte not to hit her.

[6.6] It is the opinion of this Tribunal that a reasonable employer would have concluded that the Claimant *"disregard(ed) the standards of behaviour which an employer has a right to expect of its employee"*[1] by engaging in the altercation and causing a disturbance on the hotel's premises and, as such, her behaviour amounted to gross misconduct. Accordingly, the Respondent was entitled to avail itself of the exception in subsection (b) above.

[6.7] The 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.*

[1] Giles v. District of Columbia Department of Employment Services (August 31, 2000) cited in the *Chefette* case at paragraph 90.

[6.8] Mr. Broome contended that the Respondent complied with the Act. However, the letter of suspension issued to the Claimant by Chef Moore demonstrates otherwise. That letter was defective in every respect. It was not properly addressed to the Claimant, whose Christian name is "*Carolyn*" and not "*Carlean*". The letter was undated. While there was a reference to misconduct in the kitchen, no specifics of that alleged misconduct were given. Counsel for the Respondent "*conceded that the Respondent failed to provide the Applicant (sic) with a detailed written statement of the allegations against her. However, the Respondent did disclose the basis for the allegations against the Applicant* (sic)".

In the Tribunal's opinion "*misconduct in the kitchen*", without more, is insufficient to satisfy the statutory requirement.

[6.9] A disciplinary meeting must, in accordance with the Act, be held within seven days of the provision of the statement of grounds, provided that the employee has had a reasonable opportunity to consider her response to the allegations. The letter referenced a meeting on an unspecified date. Nothing in that letter indicated that the proposed meeting was a disciplinary hearing or even that the Claimant was invited or required to attend that meeting.

[6.10] Counsel for the Respondent asserted that *"she was made aware of the meeting as she attended it."* Not only is that assertion dismissive, but it also suggests a total rejection or misapprehension of the spirit and intent of the legislation. Adequate notice of a disciplinary meeting such as would afford the claimant a reasonable opportunity to attend and be heard at that meeting, are key components of a fair disciplinary process. The letter given to the Claimant was ambiguous. It did not, in the opinion of the Tribunal, give proper notice of a disciplinary hearing as contemplated by the Act.

[6.11] No evidence was led as to the date on which the Claimant received the verbal invitation to the meeting. However, in the absence of a statement of grounds, the Claimant could not, in the 48-hour period (or less, depending on when she was summoned by telephone to a meeting) between suspension and

termination, be said to have had a reasonable opportunity to consider her defence to the allegations of misconduct made against her.

[6.12] Counsel asserted that "*when she met with Ms. Broomes (sic) on the 8th day of April 2016 at the said disciplinary hearing, she stated her case. Accordingly, the Respondent has given the Applicant (sic) an opportunity to be heard and as such the Respondent is not in contravention of section 29(5).*" The fact that Counsel would construe a meeting at which the Claimant merely told her side of the story and was immediately handed a pre-prepared "*green paper*" without charges being read to her, or without being given an opportunity to call or cross examine witnesses, "*an opportunity to be heard*" and compliance with the statutory requirements, suggests a complete lack of appreciation for the object of the legislation and/or of the principles of natural justice which underpin that legislation.

[6.13] In response to a question from the Tribunal, Mr. Broome stated that *"depending on what action it is, if it is a dismissal or if it is a dismissal incident you will inform the employee that they should bring, on a specific day, a representative of their choice to a meeting".* He then clarified that statement by stating that the employee "*must be informed of the right to have a representative present if the offence is dismissible*". It is settled law that whether or not an offence is "*dismissible*", the employee is entitled to have a friend, representative or shop steward present at the disciplinary hearing.

[6.14] Chef Moore, who suspended and ultimately dismissed the Claimant, admitted that he did not inform the Claimant of her right to bring a friend or shop steward to the meeting, notwithstanding Mr. Broome's contention that the Claimant was informed of that right by an unnamed person. The Tribunal accepts the evidence of Chef Moore, rather than that of Mr. Broome, whose testimony was based solely on a third-party account of the events of April 6 and 8, 2016.

[6.15] Despite having heard Chef Moore's admission, Counsel for the Respondent still sought to persuade the Tribunal that given the length of time between the incident and the hearing "*it is uncertain if the*

Respondent definitively gave the Applicant (sic) notice to bring a friend or representative to the meeting." He has not succeeded in doing so.

[6.16] The Respondent was also required under Part B to inform the Claimant in writing of its decision and advise her of the right of appeal if she was dissatisfied with the Respondent's decision. She was required to give notice in writing to the Respondent of her intention to appeal and thereafter to follow the disciplinary procedures of her workplace. The Claimant was adamant that she was neither provided with a written notice of the decision, nor was she advised by Chef Moore or anyone else of her right of appeal. Consequently, there was no appeal against the Respondent's decision. For his part, Chef Moore admits that "*I was the person who informed her verbally that she was dismissed.*"

[6.17] Under Part C of the Fourth Schedule, the employer is entitled to substitute the Standard Disciplinary Procedure for the Modified Disciplinary Procedure where the employee's conduct justifies summary dismissal. The employer is not required in such cases to invite the Claimant to a disciplinary meeting but is still required to follow a fair procedure at dismissal. The employer must still set out in writing the alleged misconduct, set out in writing the basis for thinking the Claimant was guilty of the alleged misconduct, set out in writing the right of appeal and send a copy of that written statement to the Claimant. The Respondent opted for the Standard Disciplinary Procedures instead of the Modified Disciplinary Procedures. The evidence clearly indicates, however, that the Respondent's treatment of the Claimant's disciplinary process conformed with neither the Standard Disciplinary Procedures nor the Modified Disciplinary Procedures. Accordingly, the Tribunal is satisfied that the Respondent has not met the requirements of Parts A, B or C of the Fourth Schedule.

[6.18] Counsel for the Respondent conceded that the *"Respondent's dismissal of the Applicant (sic) did have some procedural irregularities in that the letter prior to the meeting was not sufficiently detailed. The Respondent also failed to provide the Applicant (sic) with a termination letter."* Despite having made those concessions, Counsel concluded that *"[n]otwithstanding the procedural irregularities the substance of the dismissal was fair"*. The law is pellucid. Absent a fair disciplinary process, even a justifiable dismissal is

unfair. That Counsel could admit to the existence of so many procedural irregularities and still seek to defend the fairness of the dismissal is absurd.

[6.19] The Tribunal holds that the Respondent failed to meet its burden and that the Claimant's dismissal was unfair in all the circumstances.

[7] DISPOSAL

[7.1] The Claimant suffered a permanently debilitating injury which forced her premature withdrawal from the workforce on April 8, 2017, some 25 years before her statutory retirement age. In the circumstances, no useful purpose would be served by the enquiry mandated by the Act into whether she is desirous of reinstatement or reengagement.

[7.2] The Tribunal is satisfied that the Claimant was not blameless. However, there are no rules allowing for either the award of a nominal sum, or the diminution of the award where a claimant, though unfairly dismissed because of a flawed disciplinary process, is part-author of her own demise. If such rules existed, this would have been a fit case for contribution. This is a lacuna in the law which cries out for legislative intervention.

[7.3] At the date of termination, the Claimant earned the sum of $313.16 for a 40-hour work week, in addition to a weekly productivity bonus. Mr. Broome testified that the productivity bonus, which was calculated with reference to a points system, was not a fixed amount. According to Mr. Broome, based on the position an employee holds, he is entitled to between 3 and 4 points, each of which has a variable dollar value. This points system, which is similar to the service charge paid elsewhere in the hospitality industry, is peculiar to the Respondent's property. Mr. Broome confirmed that the productivity bonus is paid in or out of the tourist season. The Claimant stated that she was paid $53.79 weekly for productivity bonus. While the Respondent disputed her claim that the figure was fixed, they adduced no evidence to support their position. Consequently, the Tribunal accepts the Claimant's argument that she was entitled to a weekly productivity bonus in that sum.

The Claimant's evidence is that at dismissal she was paid the sum of **One thousand one hundred and seven dollars and sixteen cents ($1,107.16)** gross, in respect of holiday pay. That evidence is unchallenged. Counsel for the Claimant erroneously submitted that she was paid **One thousand and twenty-three dollars and twenty-six cents ($1,023.26)** in respect of wages. The latter sum is the amount which the Claimant's final pay slip shows she received in hand after deduction of NIS.

[7.4] The suspension letter was silent on the issue of payment of wages for the suspension period. Mr. Broome told the Tribunal that the Respondent "*followed the labour laws*" but could not recall if the Claimant's suspension was with or without pay. He stated further that "*if suspension with pay was due it would have been followed; if suspension did not require with pay it would not have been done.*" Chef Moore testified that he did not discuss with the Claimant whether her suspension was with or without pay but claimed that as far as he could recall all suspensions were with pay.

[7.5] The incident occurred on Wednesday and the Claimant was dismissed on Friday. The Tribunal is not persuaded that the Claimant was paid for the first three working days of her final week of employment or that she was paid for the two days during which she was suspended from work. When she was finally paid on April 19, 2016, all she received was holiday pay.

[7.6] The Holidays with Pay Act, Chapter 348 of the Laws of Barbados was in force at the date of dismissal. That Act provided for the payment of 4 weeks' vacation pay to an employee who served for five or more years, that sum to be calculated based on the employee's average wages paid over a 12-month period. It was repealed and replaced with the Holidays with Pay Act, 2017-3, with effect from February 2, 2017. Save that the 2017 Act goes further than the repealed Act in detailing how holiday pay is to be calculated, the result is the same. The Claimant ought to have received **One thousand four hundred and sixty-seven dollars and eighty cents ($1,467.80)**, gross, inclusive of productivity bonus, which formed part of her weekly entitlement.

[7.7] The Tribunal orders the Respondent to pay the Claimant the sum of **Eighteen thousand three hundred and forty-one dollars and nineteen cents ($18,341.19)** within 28 days of this judgment. That sum is calculated as follows:

i. Three weeks' wages per year inclusive of productivity bonus for each of the Claimant's 14 completed years of service or the sum of **Fifteen thousand four hundred and eleven dollars and ninety cents ($15,411.90)**.

ii. Six weeks' notice pay or the sum of **Two thousand two hundred and one dollars and seventy cents ($2,201.70).**

iii. One week's wages inclusive of productivity bonus for the period April 4 to April 8, 2016, in the sum of **Three hundred and sixty-six dollars and ninety-five cents ($366.95)**.

iv. The sum of **Three hundred and sixty dollars and sixty-four cents ($360.64)** for holiday pay which is the difference between her statutory entitlement and the sum she received on termination.

8. COSTS

[8.1] The Respondent mulishly defended this action despite having conceded that its disciplinary process was fraught with irregularities. That notwithstanding, the Tribunal has no statutory power to award costs against the Respondent. Accordingly, Counsel's claim for costs at 15% of the sum awarded to the Claimant is denied. Each party will bear their own costs.

Deputy Chairman

Member

Member