IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCV2019/003
BB Civil Appeal No 11 of 2016

BETWEEN

CHEFETTE RESTAURANTS LIMITED **APPELLANT**

AND

ORLANDO HARRIS **RESPONDENT**

Before The Honourables **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Satcha Kissoon and Mr Benjamin Drakes for the Appellant

Mr Gregory Nicholls, Mr Kashka Mottley and Mr Demetrie Adams for the Respondent

JUDGMENT

of

The Honourable Mr Justice Saunders, President
and the Honourable Justices Wit, Anderson, Barrow and Jamadar

Delivered jointly by
The Honourable Mr Justice Anderson
and
The Honourable Mr Justice Barrow
on the 7th day of May 2020

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

Introduction

[1] This is the first appeal to this Court involving a decision of the Employment Rights Tribunal ('ERT') of Barbados. The ERT was established by Section 6 of the Employment Rights Act 2012 ('the ERA') which entered into force on 15 April 2013. The ERA established new law in Barbados with the introduction of the concept of unfair dismissal. Prior thereto, the law of the land was limited to the common law cause of action of wrongful dismissal.

[2] Some three years after the commencement of the ERA, on 13 April 2016 to be precise, the ERT handed down one of its first written decisions and the first to be appealed. The ERT decided that the Respondent, Mr Orlando Harris, had been unfairly dismissed from his employment by his employer, the Appellant, Chefette Restaurants Limited. The ERT also decided that Mr Harris was entitled to an award of compensation in the sum of $106, 630.01 to be paid by the Appellant. These decisions were upheld by the Court of Appeal of Barbados save that the compensation awarded was reduced to $95,089.13. It is against these decisions by the Court of Appeal that the Appellant now appeals to this Court.

[3] The unprecedented nature of these proceedings means that it falls to this Court to provide authoritative interpretation of provisions of the ERA involving the right of an employee not to be unfairly dismissed and the right of the employer to fairly dismiss an employee. In this regard we have benefited from, and are largely in agreement with, the interpretation of the ERA presented in the judgment of the Court of Appeal. It is also incumbent upon this Court to definitively establish rules for calculating the compensation payable in the event of an unfair dismissal, an area which was not dealt with by the ERT or Court of Appeal to any detailed extent.

Factual Background

[4] On 10 January 2000, Mr Harris entered the employ of the Appellant, a major fast food chain in Barbados. He was appointed assistant manager at the National Heroes Square Bridgetown Branch. He remained in the employ of the Appellant until he was

dismissed by letter dated 27 January of 2014. The reason given for his dismissal was that he had failed to follow cash handling procedures. The letter further informed him that his termination was effective 13 January 2014. At the time of his termination he had retained his position as acting manager and was earning a gross monthly salary of $4,200.00.

[5] The events leading to Mr Harris' dismissal require detailed recounting. As an allowance for conducting an 'audit'[1] at a Chefette restaurant branch, a cheque dated 9 September 2013 in the sum of $40.00 was made out to Ms Donnalyn Ward, a manager at Chefette. Ms Ward did not receive the envelope containing the cheque. An email was addressed to all Managers, Assistant Managers and to 'Chef Foods' management enquiring about the missing envelope. The addressees were asked to conduct a check and to reply to the email by the following day.

[6] The enquiry was unsuccessful but subsequently, on 1 November 2013, information was received from the Appellant's bankers, First Caribbean Bank, that the cheque had been deposited on 14 September 2013, which was a Saturday, and cleared on 16 September 2013, the next working day. When the cheque was obtained from the bank, it was verified as having been signed "O Harris" and it bore the stamp of the National Heroes Square Bridgetown Branch. The only manager on duty on that Saturday at the National Heroes Square Bridgetown Branch was Mr Harris.

[7] Mr Harris was invited to meetings with senior managers of the Appellant on three separate occasions between December 2013 and January 2014. The first meeting was held on 12 December 2013, at the Appellant's Corporation Office at Clapham Court, Wildey, St. Michael. In addition to Mr Harris, three senior managers were present: Mr Harvey, the Industrial Relations Manager at Chefette; Ms Niles, the Executive Operations Manager of Chefette; and Mrs Mayers, Operations Manager. Ms Niles informed Mr Harris that Mr Harvey was in attendance as a witness to the proceeding and that Ms Mayers was in attendance because she was the Operations Manager in charge of the Appellant's Heroes Square Branch when the incident in question

[1] Essentially, the audit consisted of visiting a restaurant branch to verify that The Appellant's operation standards and procedures at that branch were being adhered to.

occurred; and that he, Mr Harris, was the manager on duty at the restaurant at the time of the incident.

[8] In response to questions posed to him, Mr Harris stated that he recalled the email that had been sent to all managers and assistant managers regarding a missing envelope addressed to Ms Ward. He had not responded to the email because he had not seen any such envelope. Mr Harris volunteered that he was under the impression that the envelope might have contained a cheque for Ms Ward which was directed to the wrong restaurant as happens from time to time with other employees. In response to the question why he thought that it was a cheque that was missing when the email only stated that an envelope was missing, Mr Harris responded that it was his experience that envelopes addressed to managers usually contained money or cheques.

[9] Mr Harris was shown a cheque payable to Ms Donnalyn Ward in the sum of $40.00 with the signature "O. Harris" at the back. Mr Harris immediately stated that he had never seen the cheque before and that the "O. Harris" written at the back of the cheque was not written by him. In response to repeated suggestions from Mr Harvey that the signature on the cheque was his, Mr Harris', Mr Harris emphatically denied that he was the author of the signature and repeatedly suggested that the cheque be examined by a handwriting expert and that the matter even be turned over to the police given the seriousness of the incident. In the face of continued accusations by Mr Harvey, an argument developed between the two men in which Mr Harris stated that he, 'was feeling very much accused of stealing $40.00'. The meeting culminated with Ms Niles informing Mr Harris that he was suspended with pay pending further investigation and that he would be contacted upon completion of the investigation.

[10] Shortly after the meeting, Mr Harris wrote a letter, dated 12 December 2013, addressed to Mr Harvey. As far as material, the letter stated:

> I have worked at Chefette Restaurant Limited for 14 years approximately. At present I am an Assistant Manager. On the 12th December 2013 about 1:30 p.m. I attended a meeting with yourself, Ms Marva Niles and Ms Valerie Mayers. I was shown a cheque payable to Ms Donnalyn Ward with the name O Harris at the back. I was asked to explain it and I indicated that it was not my signature and I am unaware how it got there.

> The meeting lasted for approximately 1 hour and 14 minutes after which Ms Marva Niles told me that I was suspended. I categorically deny that the O Harris written on the back of the cheque was written by me, and I am therefore requesting that the matter be referred to the Chief Labour Officer so that a handwriting expert can be requested to determine if it is my handwriting or alternatively that the matter be reported to the Royal Barbados Police Force. I would expect a reply from you within seven days.

[11] There was no response to this letter. Rather, Mr Harris was informed, by letter from Mr Harvey dated 23 December 2013, of a meeting to be held on 30 December 2013. This letter was in the following terms:

> Dear Mr Harris
>
> You are invited to attend a meeting which will be held on Monday, 30th December, 2013 at Chefette Office in Clapham Court, St. Michael, scheduled for 11:00a.m.
>
> The purpose of the meeting is to discuss the investigation of the unauthorized cashing of a co-worker's cheque which occurred on the 14th September, 2013.
>
> You may have a friend attending the meeting. Kindly submit his/her name by the 27th December, 2013.
>
> Yours faithfully
>
> Chefette Restaurants Limited
> Kenneth Harvey
> Industrial Relations Manager

[12] Mr Harris attended the meeting with his then attorney-at-law, Mr Keith Simmons. The Appellant claimed to treat this second meeting as the "first disciplinary meeting" with Mr Harris, but Mr Simmons contended otherwise. The attorney argued that the Appellant had failed to follow the guidelines of Part B of the Fourth Schedule of the ERA relating to standard disciplinary procedures in that disciplinary action was taken against Mr Harris at the 12th December 2013 meeting, and that Mr Harris was not informed of his right to have a representative or a friend present at that meeting. As a result, Mr Simmons argued, Mr Harris had no case to answer. The Appellant disagreed with these contentions but nonetheless agreed to reschedule the meeting.

[13] By letter dated 30 December 2013, sent via registered mail, Mr Harris was invited to a meeting to be held on 13 January 2014. The letter was in virtually identical terms

to that dated 23 December 2013, except for the change in date of the scheduled meeting. Neither Mr Harris, or his representative, or attorney at law, attended the meeting scheduled for 13 January 2014. However, on 15 January 2014, the Appellant received a letter dated 10 January 2014, from Mr Simmons. The letter acknowledged Mr Harris' invitation to the meeting of 13 January 2014 but restated that any meeting at that juncture was in violation of the ERA. Mr Simmons indicated that he had nonetheless advised Mr Harris that he should take all reasonable steps to attend the meeting, as a matter of courtesy. The Appellant informed Mr Harris, by letter addressed to him dated 27 January 2014, that his employment was terminated effective 13 January 2014, the date on which Mr Harris failed to present himself for the rescheduled meeting. The reason for the dismissal was stated to be the commission by Mr Harris of 'a serious offence in failing to follow the Company's cash handling procedure in relation to' the incident involving the cheque made out to Ms. Ward.

The Employment Rights Tribunal

[14] On 30 June 2014, Mr Harris filed a claim for unfair dismissal before the ERT. The claim was heard in February and April 2016. Mr Harris appeared in person and the Appellant was represented by Ms Esther Arthur, attorney-at-law. The written record included a witness statement by Mr Harris dated 10 July 2014; a bundle of documents, including the termination letter; as well as several commendations which Mr. Harris had received during his employment with the Appellant. There was also a bundle of documents submitted by the Appellant, which included the witness statements of Mr. Harvey, Ms. Wallace, Ms Greenidge and Ms. Knight, as well as cheques numbers 00069196 and 00069201, both dated 9 September 2013, and drawn in favour of Donnalyn Ward, and Orlando Harris, respectively. The ERT was also provided with a complete copy of the Appellant's Cash Handling Manual 2012.

[15] Mr Harris gave evidence on his own behalf. He testified that his 'ability to balance and handle cash registering procedures' had been proven throughout his 14 years of employment with the Appellant. He denied that he had misappropriated the cheque

made out to Ms Ward and maintained that a more adequate investigation would have vindicated him.

[16] Four witnesses appeared for the Appellant: Mr. Harvey, Ms. Wallace, Ms Greenidge and Ms. Knight. Ms Arthur made submissions on three principal issues. She argued that the Appellant had complied with the procedural requirements for fairly dismissing Mr Harris. Counsel contended that the Appellant had 'shown in accordance with Section 29 of the Employment Rights Act that the Claimant was dismissed for a reason relating to his capability and his conduct'. Normally this would require that the Appellant follow Step 1 (setting out in writing the alleged conduct of Mr Harris) and Step 2 (sending the written statement to Mr Harris); the procedure set out in Part B of the Fourth Schedule to the ERA. However, Ms Arthur contended that the Appellant was exempted from following Steps 1 and 2 because Section Four, Part B of the *Fourth Schedule* provided that where an employee was suspended with full pay pending an investigation, as Mr Harris was in this case, Steps 1 and 2 in Part B of the Fourth Schedule did not apply until the employer contemplated taking disciplinary action against the employee. Ms Arthur contended that as Mr Harris had been suspended with full pay pending an investigation, and as the Appellant had only contemplated disciplinary action against Mr Harris after the completion of the investigation, compliance with Steps 1 and 2 was not required at the first meeting.

[17] The second submission was that the Appellant had not breached the ERA by dismissing Mr Harris for his first offence. Counsel cited *Halsbury Laws of England*[2] as authority for the proposition that an employer may rely on a Code of Discipline made part of an employee's contract. Counsel argued that Offence 11 in the Appellant's "Code of Discipline", which formed a part of Mr Harris' "Conditions and Terms of Employment 2010-2013", provided that an employee may be dismissed for the first offence for 'negligence or carelessness which cause or might have caused injury to a customer or employee or negligence or carelessness involving a product served by the restaurant or to the provision, equipment or property of the restaurant; or to the business of a Restaurant'.

[2] 5th Edition Volume 40 paragraph 628.

[18] The third submission, for which Counsel again relied on *Halsbury Laws of England*,[3] was that, in determining whether Mr Harris's dismissal was fair or unfair, 'the key consideration for the Tribunal is the reasonableness or otherwise of the employer's conduct, not the injustice to the employee'. Counsel also relied on the case of *Iceland Frozen Foods Ltd. v Jones*[4] in submitting that 'the function of a Tribunal as an industrial jury is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted'. She argued that the ERT could not substitute its own thinking for that of the employer, and that the question must be what the reasonable employer would deem reasonable under the circumstances. Counsel cited *British Home Stores Ltd. v Burchell*[5] as establishing a three-pronged test of reasonableness, namely, that the employer: (1) must have entertained a genuine belief that the employee was guilty of misconduct; (2) must have reasonable grounds for that belief; and (3) must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Counsel submitted that the Appellant had satisfied all three prongs and had therefore acted reasonably in dismissing Mr Harris.

[19] The ERT accepted that the key consideration in determining the fairness or unfairness of a dismissal under Section 29 (4) of the ERA was the reasonableness of the employer's conduct. However, in its application of the *Burchell* three-pronged test, the ERT found that the Appellant had only satisfied the first two prongs but not the third prong, that is, of doing as much investigation as was reasonable in the circumstances, even though the Appellant had the resources to do so. In relation to whether it was reasonable to dismiss Mr Harris for his first offence, the ERT found that the type of offence of which Mr Harris was accused was one that could result in dismissal under the Appellant's Code of Conduct, but not for the first offence. It referenced the same paragraph in *Halsbury Laws of England* that had been cited by Ms Arthur but highlighted that it was also stated in that paragraph that contractual authority to dismiss in accordance with a disciplinary procedure does not necessarily

[3] 4th Edition Re-issue Volume 2, Volume 16, paragraph 325.
[4] [1983] ICR 17.
[5] [1978] IRLR 379.

make the dismissal fair. Further, the ERT made clear in its DECISION that it was of the view that the real reason for Mr. Harris' dismissal was, not only his failure to follow the company's cash handling procedures in relation to Ms. Ward's cheque, but also, the ERT's belief that this failure caused the misappropriation of the cheque resulting in loss to the Appellant in having to reimburse Ms Ward.

[20] Considering all the circumstances of the case, the ERT held that the dismissal of Mr Harris was not fair. In relation to the question of compliance with the relevant disciplinary procedures in the ERA, the ERT found that the Appellant was not exempt from following Steps 1 and 2 of the procedure, and that the Appellant had therefore failed to follow the required procedure in dismissing Mr Harris. For these reasons, the ERT held that Mr Harris' claim for unfair dismissal was well-founded. It noted that if neither reinstatement nor reengagement was practicable, compensation was to be calculated in accordance with the Fifth Schedule of the Act. The ERT calculated that compensation in the sum of $106,630.01.

The Court of Appeal

[21] The decision of the Court of Appeal was delivered on 23 August 2017. Counsel for The Appellant, Ms Arthur, essentially repeated the arguments and submissions she had made before the ERT and, additionally, contended that the ERT erred in its calculation of the compensation awarded to Mr Harris, resulting in him being over-compensated. Counsel for Mr Harris, Mr Edmund Hinkson, conceded that there had been a minor error in the calculation of the compensation which should be corrected but argued that the ERT's interpretation and application of the ERA were correct and should be upheld.

[22] The carefully reasoned judgment of the Court of Appeal was delivered by Burgess JA (as he then was), now a member of this Court.[6] The judgment identified two central issues for determination, namely, (i) whether the ERT correctly interpreted and/or applied Section 29 of the ERA and, (ii) whether the ERT correctly calculated the compensation awarded to the Respondent.

[6] The other members of court were Her Ladyship Sandra Mason, JA and Her Ladyship Kaye Goodridge, JA.

[23] The Court of Appeal agreed with the ERT that the first meeting was a disciplinary meeting, meaning that the Appellant was required to follow Steps 1 and 2 of the disciplinary procedure in Part B of the Fifth Schedule. The court found that the ERT was legally justified in ascertaining, on the evidence before it, what was the real reason for Mr Harris' dismissal, and also found that it had no jurisdiction to interfere with that finding as it was a finding of fact. The court found that the Appellant did not act reasonably in treating the failure to follow the cash handling procedure as sufficient for dismissing Mr Harris. Further, the Appellant had not complied with the rules in Part A of the Fourth Schedule. In the circumstances, the Appellant's action in dismissing Mr Harris was unfair.

[24] The primary challenge to the award of compensation was that the ERT erred in awarding holiday pay for both 2014 and 2015, but the Court of Appeal disagreed with this argument. The court did, however, accept that the payment in lieu of notice should have been deducted from the award. It therefore adjusted the sum awarded by deducting the payment in lieu of notice resulting in an award of compensation of $95,089.13.

The Caribbean Court of Justice

[25] By Notice of Appeal dated 27 May 2019, the Appellant appealed to this Court against the judgment of the Court of Appeal. The Appellant alleged that the Court of Appeal erred in holding: (1) that Mr Harris was unfairly dismissed under the provisions of the ERA; (2) that the ERT was legally justified in substituting the reason given by the Appellant for the Respondent's dismissal with its own; and (3) that the Court of Appeal had no jurisdiction to interfere with the Tribunal's findings, which finding were based on a particular interpretation of the said Act. The relief sought by the Appellant was for the decision of the Court of Appeal to be set aside or alternatively for the compensation to be re-assessed, and for costs in this Court and the court below.

[26] In more detailed terms, the claim for relief was premised on ten specific grounds of appeal, namely, that:

i. The Court of Appeal erred in law in holding that it had no jurisdiction to interfere with the findings of the ERT in circumstances where the said

findings turned on the proper interpretation of section 29 of the ERA which is a mixed question of fact and law and therefore open for an appellate court to consider.

ii. The Court of Appeal erred in law in declining jurisdiction to interfere with ERT's decision to substitute its own reason as "the real reason for dismissal" in place of the reason for dismissal given by the employer by averting to the decision of the ERT as a "finding of fact" in circumstances where the ERT had no basis in law for substituting the appellant's decision.

iii. The Court of Appeal erred in law by its interpretation of section "*real reason*" as applied by the ERT and further that the ERT was legally justified in substituting its own reason as the "*real reason*" in the particular case.

iv. The Court of Appeal erred in law in its interpretation of section 29 (1) (b) of the ERA in assessing the case with singular reference and consideration to whether the dismissal was for a reason falling within the proceeding section 29 (2) and thereby, failed to take into account and/or adequate account of the alternative limb of the section 29 (1) (b) namely *"... some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*".

v. The Court of Appeal erred on a question in its interpretation of section 29 (4) of the ERA in holding that the "band of reasonable responses" test does not apply to the determination as to whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee.

vi. The Court of Appeal erred on a question of mixed fact and law in holding that the evidence on which the Appellant dismissed the Respondent was insufficient to discharge its burden under section 29 (4) (a) of the ERA and in so holding, imposed too high a standard of proof on the Appellant.

vii. The Court of Appeal erred in law in its interpretation of the Appellant's Code of Discipline and the effect of section 29 (4) of the ERA to the extent that the Court of Appeal considered the schedule of conduct with corresponding forms of discipline as contracting out of Part A Fourth Schedule of the ERA in circumstances where that Code seeks to define the nature of conduct which amounts to gross misconduct in the particular employment relationship where the definition is silent in the ERA.

viii. The Court of Appeal erred in a mixed question of fact and law and misdirected itself in its approach and assessment of the calculation for compensation by placing detrimental reliance on the classification that the Respondent was summarily dismissed, in so doing, failed to take account and/or adequate account that the

termination was effected with payment of two (2) months' salary in lieu of notice and not summarily.

ix. The Court of Appeal erred in a mixed question of fact and law and misdirected itself in failing to take cognizance of the direction of the ERT that the Respondent must give evidence before the Complainant adduced evidence in chief was a material procedural irregularity which made the decision unsound in the circumstances.

x. The Court of Appeal erred in a mixed question of fact and law and misdirected itself in its approach and assessment of the calculation for compensation by failing to take cognizance of the material procedural irregularities and breaches of natural justice by the ERT's restrictions placed on the Appellant's counsel to cross-examine the Respondent on his ability to secure employment after termination, which made the decision unsound in all the circumstances, and which was an issue directly impacting the question of quantum.

[27] At the end of the hearing, this Court invited further submissions from Counsel in relation to the approach that should be taken in interpreting Paragraph 1(b) of the Fifth Schedule of the ERA relating to the award of compensation. The Court also sought, and did in fact obtain, a copy of the Hansard report of the parliamentary debate in relation to the passage of the ERA. The additional submissions and materials received were considered together with the submissions received previously in writing and orally.

[28] From the available materials, it appears that this appeal may be considered under four broad headings, namely: (1) Permissibility of the Grounds of Appeal; (2) Jurisdiction to interfere with decisions of the ERT; (3) The finding of unfair dismissal; and (4) The award of compensation. The present judgment addresses the issues falling for consideration under the first three of these headings. The issues for discussion under the fourth heading, namely the award of compensation, are addressed in a separate judgment by the Hon. Mr Justice Barrow, with which this judgment is in full agreement.

Permissibility of the Grounds of the Appeal

[29] During the proceedings before us the Appellant acknowledged that Grounds viii and x were new grounds that had not been argued before the Court of Appeal. The

Appellant subsequently abandoned Ground viii and no further consideration of this Ground is therefore necessary. In addition to Ground x, the Respondent claimed that Grounds iv and ix were also new grounds and should not be permitted by this Court.

[30] It is only in exceptional circumstances that an appellate court will allow a ground of appeal or a point of law to be raised which was not argued in the court from which the appeal emanated. The prohibition on the raising of new grounds of appeal or arguing new points of law is based on substantive principles. There must be avoidance of injustice to the other party; an appellate court benefits from the views expressed by the lower courts on the issues in dispute; and there must be an end to litigation. In a civil case, such as the present, the emphasis has long been on the avoidance of injustice to the other side and the need to bring litigation to an end. In *Jones v MBNA*[7] the court rejected the attempt to transform a wrongful dismissal claim before the lower court into a claim for breach of confidence and trust. The court held that it could not properly make, for the first time, the necessary primary and inferential findings of fact which the lower court was not asked to make; and that this was particularly so when this court has not seen or heard the witnesses as they gave their evidence, and where the factual case advanced was not apparent on paper. Peter Gibson LJ said:

> 52. Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the

[7] [2000] EWCA Civ 514

> substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case.

[31] In the Belize constitutional case of *Dean Boyce v The Attorney General of Belize and the Minister of Public Utilities*[8] this Court stayed an appeal because the importance of the issues meant that it would be appropriate to first hear the views of the courts below.[9] Furthermore, there could have been the need to evaluate factual evidence and this Court was 'loathe to undertake such an exercise as if we are a court of first instance'.[10]

[32] However, where argumentation of the ground of appeal or point of law does not involve fact-finding or would not otherwise be unjust to the other party, there is discretion in the appellate court to allow the argument to go forward. This is reflected in Part 11.3 (4) of the CCJ Rules of Court which provides that in deciding an appeal the Court shall not be confined to the grounds set forth by the appellant. In similar vein, the Australia High Court has said that it 'reserved to itself the right, in exceptional circumstances, to admit new grounds of appeal if justice demands that course'.[11] And this Court, in *Dhanessar v GUYSUCO,*[12] did not find merit in the argument that it should not permit argument solely because it was being raised for the first time. In that case the issue was a simple point of statutory construction and the other side had not been taken by surprise. As such this Court allowed the point to be argued in the exercise of its discretion.

[33] In the present case, none of the new grounds involves findings of fact. Nor do they take the Respondent by surprise in as much as they were part of the substantive discussion in the court below and are substantively addressed in the written and oral submissions. In relation to Ground iv, although the Court of Appeal was not asked to

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[8] [2012] CCJ 1 (AJ).
[9] Ibid. at [24].
[10] Ibid., at [25].
[11] Eastman v R [2000] HCA 29.
[12] [2015] CCJ 4 (AJ) at [20]

and did not specifically address Section 29 (1) (b) of the ERA, that court did identify from the grounds of appeal and the submissions made that the first principal issue to be determined was whether the ERT correctly interpreted and applied Section 29 as a whole. The Court of Appeal also reminded itself of the importance of interpreting the relevant provisions of the ERA 'to give guidance on how the ERT should approach the statutory provisions; guidance on how an employer should act so as to be regarded as being reasonable and fair; and guidance on how the disciplinary procedures established by the Act should be operated'. These policy considerations apply with equal force in this Court.

[34] In these circumstances, therefore, it would not be appropriate for this Court to now restrict itself from examining Section 29 (1) (b) when the entire section and other relevant provisions were in issue before the Court of Appeal. Further, interpretation of that subsection is an important requirement in determining the fairness of a dismissal under the ERA. Grounds ix and x are challenges to the procedure employed by the ERT, procedures that were at the root of argument before the Court of Appeal. Given the importance of clarity in the interpretation of the ERA this Court considers that it should exercise its discretion to permit the nine extant grounds of appeal to be considered, as well as the several related issues arising for determination under those grounds.

Jurisdiction to Interfere with Decisions of the Tribunal

[35] In relation to Grounds i and ii, the Appellant argued that the Court of Appeal improperly declined jurisdiction to interfere with findings of the ERT in circumstances where those findings turned on the proper interpretation of Section 29 of the ERA. The Appellant complained that the Court of Appeal had declined to interfere with the ERT's decision to substitute its own reason as "the real reason for dismissal" in place of the reason for dismissal given by the employer by adverting to the decision of the ERT as a "finding of fact" in circumstances where the ERT had no basis in law for substituting the Appellant's reason. Further, referring to *Abernethy v Mott Hay and Anderson,*[13] Counsel argued that the Court of Appeal failed to

[13] [1974] IRLR 213

adequately analyse the evidence to consider whether it was reasonable for the ERT to form the view that the first meeting was a disciplinary and not an investigative meeting.

[36] Section 6 of the ERA establishes the ERT and provides for its constitution. Section 7 makes clear that the 'function of the Tribunal is to enforce the rights conferred upon persons by this Act'. It is for the enforcement of those rights that the ERT exercises its jurisdiction. Thus section 7 (2) provides that: 'The jurisdiction of the Tribunal is to determine complaints made to it under this Act and, subject to section 48, to make awards and other decisions in relation to those complaints in accordance with its powers under this Act.'

[37] Section 48 deals with appeals from the Tribunal on questions of law and provides that, 'An appeal lies to the Court of Appeal in accordance with rules of court on a question of law from any decision of, or arising in any proceedings before, the Tribunal under or by virtue of this Act.' Section 46 is also relevant. It reinforces that the ERT's decisions are final on matters other than law by providing that, subject to section 48, 'an award, order or other decision made by the Tribunal in exercise of its powers under this Act is final and not subject to appeal'. Evidently, then, the appellate court cannot interfere with findings of fact. The jurisdiction of the appellate court is limited to reviewing the decisions of the ERT on questions of law.

[38] The grant of such a wide competence to the ERT is manifestly sensible and logical since every member of the tribunal is required to have experience in either industrial relations or law. The membership must include persons with experience as representatives of employers and persons with experience as representatives of employee.[14] It is only right, therefore, that the opinion of the tribunal, duly formed on a question arising in such a specialised area of human relations, should be final and not subject to review or recall by members of an appellate court except on points of law.

[14] Section 6, Second Schedule, Section 1 (2).

[39] What, then, is a question of law? A question of law involves the interpretation of the constitution, statutes, or legal principles which will be potentially applicable to other cases. A question of fact requires an interpretation of circumstances surrounding the case at hand; usually a question as to what occurred between the parties. There may also be a mixed question of law and fact. A mixed question concerns the proper application of the law to the facts that have been found: see *Trimart v Glenda Knight*;[15] *E. Pihl and Sons A/S (Denmark) and Brondum A/S (Denmark).*[16] There is one circumstance in which a finding of fact may entail a question of law. Whether a purported finding of fact is so contrary to the evidence as to be perverse in the *Wednesbury* sense of the term, is an issue of law. In our view the graduation of the question of fact into one of law necessarily brings the matter within the purview of the appellate court. We therefore accept the view of Sir John Donaldson MR in *Dobie v Burns International Security Services (UK) Ltd.*[17] where he stated that:

> All that this court …can do is to consider whether there has been an error of law. They may reach the conclusion that there has been an error of law on one of two alternate bases. The first basis is that the Tribunal has given itself a direction on law and it was wrong…The alternate basis, which is almost a [Wednesbury] basis (see Associated Provincial [Picture] Houses Ltd. v Wednesbury Corp [1947] 2 All ER 680…is that no [reasonable] tribunal could have reached that conclusion on the evidence and since all industrial tribunals are *ex hypothesi* reasonable tribunals, it must follow that although we cannot detect what it is, there has been a misdirection in law.

[40] Accordingly, stated in comprehensive terms, there is a role for the appellate court in the interpretation of the law, the application of the law to the facts and in relation to findings of fact. However, as far as a finding of fact is concerned, the role is a very limited one. It is only where the tribunal comes to a finding of fact on evidence which could not reasonably support such a finding that the appellate court may intervene. Provided that the finding of fact passes the *Wednesbury* test of reasonableness it may not be overturned. Where that test has been passed, the appellate court must proceed to determine whether the law was properly applied to the facts as found by the tribunal. The mere fact that the provision of an Act requires findings of fact is not enough to transform the factfinding exercise into something else. Such findings of

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[15] Trimart v Glenda Knight Civil Appeal No. 9 of 2014
[16] October 23, 2013. (Court of Appeal Barbados Civil Appeal 24 of 2012).
[17] [1984] 3 All ER 333 at 337.

fact as are necessitated by the Act do not, contrary to the contentions of the Appellant, grant the appellate court an unfettered review jurisdiction. The findings remain, subject to the caveat just discussed, immune from judicial review.

[41] We shall consider, in their proper places below, the application of these principles to specific findings of fact by the ERT and challenged by the Appellant in the various grounds of appeal.

Was the Dismissal Fair?

[42] Grounds iii, iv, v, and vii of the Appellant's grounds of appeal are intended to undergird the fundamental submission that the dismissal of Mr Harris was fair. These several grounds turn on the correct interpretation to be given to Section 29, and, further, upon the application of provisions in section 29 to the facts. It is therefore necessary to set out fully the provisions of the section as far as they are relevant to this appeal:

"Section 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) …

(d) …

(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*.

(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*."

[43] The Court of Appeal made certain interpretative declarations in relation to section 29 with which we concur. We agree that individual provisions of the Act must be interpreted in the light of the overall purpose of the ERA which is 'to make provision for the rights of employed persons.' Part VI, covering sections 26-37, deals with the subject of Unfair Dismissal. Section 27 (1) provides that 'An employee has the right not to be unfairly dismissed by his employer.' However, that right has effect subject to the subsequent provisions of Part VI, which includes Section 29. Accordingly, section 29 is to be interpreted in the context of section 27. Specifically, Section 29 is intended to define the procedural and substantive circumstances by which it may be determined whether the dismissal of an employee was fair or unfair and hence whether the dismissal was consistent with the right of the employee in section 27 not to be unfairly dismissed.

[44] On the plain language of section 29 (1) and section 29 (2) the employer bears the burden of showing that the dismissal of an employee was fair. The employer may discharge this burden by showing that the reason for dismissal, or, if there is more than one, the principal reason for the dismissal, was either a reason falling within the list in section 29 (2) or was 'some other substantial reason' which justified the dismissal. Importantly for the present appeal, the list in section 29 (2) gives the employer the right to dismiss an employee if the reason for the dismissal (i) relates to the capability of the employee to perform work of the kind for which he was employed: section 29 (2) (a); or (ii) relates to the conduct of the employee: section 29 (2) (b). However, section 29 (5) imposes certain procedural obligations with which the employer must comply prior to dismissing an employee for a reason related to capacity or conduct.

[45] It bears emphasis that the procedural obligations in section 29 (5) are prescribed by statute and therefore cannot be watered down by interpretational gloss obtained from foreign cases. The House of Lords' decision in *Polkey v A. E Dayton Services Ltd*[18] illustrates this point in an acute form. The employer in that case dismissed a van driver without any warning or consultation. That was a breach of the code of practice then in force under UK legislation. The House of Lords held that such a procedural flaw would render a dismissal unfair, except in the rare case where a reasonable employer could properly take the view that whatever the employee might say would have made no difference to the decision to dismiss. In the recent case of *Blackburn v LIAT (1974) Ltd*[19], the Privy Council assumed that the *Polkey* principle remains good law in the UK, subject to statutory exceptions introduced by subsequent legislation in that country. The Privy Council also noted that counsel on both sides in *Blackburn* appeared to have proceeded on the basis that the *Polkey* principle applied in Antigua and Barbuda. Both counsel place reliance on *Whitbread plc v Hall,*[20] which was to the same effect as *Polkey*. Whatever may be the position in Antigua and Barbuda, neither the *Polkey* principle, nor the 'band of reasonable responses' test associated with *Whitbread,* has any place in relation to the procedural requirements for dismissal

[18] [1988] AC 344.
[19] [2020] UKPC 9, at paras [42] and [43].
[20] [2001] ICR 699.

under the ERA of Barbados. Those procedures are mandated by the Parliament of Barbados in the ERA which it adopted in 2012 to 'to make new provision for the rights of employed persons and for related matters.'

[46] We therefore agree entirely with the Court of Appeal on the interplay between section 29 (2) and section 29 (5) when that court stated that:

> [73] … it is critically important to note that section 29 (5) carves out of the list of statutory reasons which entitle an employer to fairly dismiss an employee, reasons related to the capability and the conduct of the employee, and imposes a strict statutory procedural regime which must be followed by a dismissing employer before any question of the fairness of a dismissal can arise. More particularly, that subsection stipulates against an employer exercising his section 29 (2) right of fair dismissal for any reason related to the capability or conduct of the employee without first informing the employee of the accusation against him and giving him an opportunity to state his case. To satisfy this requirement, the employer must show that he followed, as appropriate, either the Standard Disciplinary Procedures or the Modified Disciplinary Procedures set out in *Part B* and *C* respectively of the *Fourth Schedule* of the ERA.
>
> [74] To be sure, section 29 (5) imposes a burden upon an employer dismissing an employee for his capability or conduct to show that the employee was informed of the accusation against him and was given an opportunity to state his case in the manner stipulated in *Part B* of the *Fourth Schedule*. If the employer fails to discharge this burden, the employer is disentitled from invoking the right of dismissal conferred on him/her by section 29 (2**)** and that is the end of the matter. No question of fairness or unfairness of the dismissal can then arise. Where the reason for the dismissal relates to the capability or conduct of the employee a question of fairness or unfairness can only arise if the employer shows that the procedure in section 29 (5) has been followed by him/her.

[47] Where an employer satisfies the requirements of section 29 (5) regard must then be had to section 29 (4) to determine whether the dismissal was fair or unfair. That determination is to be made based on whether, having regard to the reason for the dismissal shown by the employer, the employer acted reasonably or unreasonably in treating it as a sufficient reason for the dismissal and the employer has complied with Part A of the Fourth Schedule. As the Court of Appeal emphasized, read in light of section 29 (5), the section 29 (4) test only applies where the reason for the dismissal relates to a reason other than the capability or conduct of the employee, or where the

reason does relate to the capability or conduct of the employee, the employer previously complied with the procedural requirements of section 29 (5). Where the focus shifts to the broad question of the reasonableness of the action of an employer in dismissing an employee, interpretational assistance may properly be obtained from pertinent general principles emerging from foreign authorities on unfair dismissal.

[48] It follows that we are entirely in agreement with the following summary of the steps in the operation of section 29 as outlined in the judgment of the Court of Appeal:

> [76] The upshot of the foregoing, then, is that, in determining whether the dismissal of an employee is fair or unfair under section 29, the ERT must have regard to four conditions. These are (i) whether the employee has met the criteria in section 27 (3) necessary to qualify for the right in section 27 (1) not to be unfairly dismissed; if so, (ii) whether, pursuant to section 29 (1) and (2), the reason, or principal reason, for the dismissal of the employee, related to the employee's capability or conduct or to some other statutory reason that justifies dismissal; if the reason relates to capability or conduct, (iii) whether the appropriate statutory disciplinary procedures were complied with pursuant to section 29 (5); and if the reason for dismissal relates to reasons other than to the capability or conduct of the employee, or if the reason relates to the capability or conduct of the employee and the employer has complied with the procedural requirements in section 29 (5), (iv) whether the dismissal was fair under section 29 (4).

[49] In order to impose organization on the grounds of appeal the examination of the arguments of the Appellant will proceed in relation to these four steps.

(i) Entitlement to Section 27 (1) Right: Procedure for Presentation of Claim

[50] We unhesitatingly accept the argument in Ground ix of the Appellant's grounds of appeal that the first requirement before the ERT was for the Claimant to establish that the criteria in section 27 were satisfied so as to qualify the Claimant for the right in section 27 (1) not be unfairly dismissed. This would normally mean that the Claimant must establish that he or she was an employee in keeping with the definition under the ERA; that being such an employee, qualified for the protection of the ERA by satisfaction of Section 27 (3) of the ERA; and that being so qualified, was dismissed. It is only after these foundational facts have been established that the burden shifts to the employer to prove that the dismissal was fair. In the examples given by the

Appellant, it would be open to a defendant, claimed to be an employer, to show that he was not the employer; that even if he was, he never dismissed the employee; or if, as the employer, he had dismissed the employee, that the employee did not work for the requisite period. Without proof by the employee of the foundational facts, a defendant may well be entitled to summary dismissal of the claim.

[51] It follows, as the Appellant argues, again correctly, in our view, that a claimant before the ERT must, as a rule, give evidence first. However, whilst technically correct, the factual circumstances of this case are decisive against the substantive argument of the Appellant. The record of the proceedings before the ERT reveals no objection taken by the Appellant to order of presentation of the case. No point was taken before the Tribunal that the presentation of the Appellant's case had been prejudiced. To the contrary, counsel for the Appellant thanked the ERT for its superintendence of the process and expressed confidence that the evidence and submissions presented had proven that the dismissal of the Claimant was not unfair.

[52] More critically, the three foundational matters which the Appellant argued should have been proved by the Claimant were, in fact, admitted by the Appellant. On the ERT Claim Form 1, the Respondent indicated that he was employed from 10 January 2000 to 27 January 2014, a period of over fourteen (14) years. This period was affirmed by the Appellant in the Respondent Form 2, with the minor exception that the date of termination was stated as being 13 January 2014. The Appellant proceeded to indicate on the Form that the Respondent was employed by the Appellant under an employment agreement and that his employment was terminated. Considering that the Appellant acknowledged on the Respondent Form 2 each of the three facts that it claimed were foundational and needed to be established before the burden shifted from the Respondent, the claim that the Appellant was prejudiced 'in the manner in which it was forced to conduct its defence' must be rejected as being without merit.

(ii) **The Reason for the Dismissal**

[53] Grounds ii and iii of the Appellant's grounds of appeal challenged the interpretation of section 29 (1) (a) by the Court of Appeal. In summary, the Appellant complained that the Court of Appeal erred in holding that it could not interfere with the decision

of the ERT to substitute what the ERT found to be the real reason for the dismissal, in place of the reason given by the employer. The Appellant contended that this decision of the ERT was not protected from interference on appeal because of being 'a finding of fact' and the Court of Appeal erred in upholding the substitution.

[54] We have already held that the ERT was entitled, within the limits of the *Wednesbury* standard of reasonableness, to make relevant findings of fact and that, provided those limits were observed, an appellate court has no jurisdiction to override such findings. The Appellant's argument may therefore be restated as raising the following two separate issues: (a) whether it was permissible for the ERT to embark on a fact finding exercise of determining the "real" reason for the dismissal; and (b) whether it was permissible for the ERT to substitute its choice of reasons as the real reason for the dismissal instead of the reason advanced by the Appellant. A further issue is raised by the Appellant concerning (c) whether the relevant circumstances constituted 'other substantial reason' for the dismissal.

(a) Competence to Conduct Fact Finding of the Real Reason for the Dismissal

[55] In its letter of dismissal addressed to the Respondent, and in its Form 2 submitted to the ERT, the Appellant indicated that the reason for the dismissal of the Respondent was his failure to follow the Company's cash handling procedures in relation to the incident surrounding the cheque made out to Ms Ward. However, as stated by the Court of Appeal,[21] the ERT found that the real reason for Mr Harris' dismissal was 'not only his failure to follow the company's cash handling procedures in relation to the incident …, but also, because that failure 'resulted in misappropriation of another employee's property as a consequence of which (the Appellant) suffered loss'. The ERT found that the 'whole tenor of the Appellant's communication with the Claimant and of its evidence before the Tribunal was that the Claimant pocketed the proceeds of the cheque…' As the Court of Appeal further observed,[22] the ERT concluded as follows on this aspect: 'Regardless of how the accusation was framed, it is apparent as much to this Tribunal as it was to the Claimant, that the reason for his dismissal

[21] Decision of the Court of Appeal in *Chefette Restaurants Limited v Orlando Harris* Civil Appeal No. 11 of 2016, at [80].
[22] Ibid at [81].

was theft.' Counsel for the Appellant took issue with these findings and argued that the ERT erred in law in substituting its own reason for the dismissal for that of the Appellant, and that the Court of Appeal correspondingly erred in accepting the finding of the Tribunal.

[56] We cannot accept these submissions. If it were that the ERT was unable to interrogate the reason put forward by the employer and to itself ascertain the real reason for the dismissal, the entire statutory framework for the protection of employees from unfair dismissal would be circumvented and the statutory power of the ERT to protect employees would be rendered impotent. In the words of the Court of Appeal, such an inability would 'underwrite frustration of the whole purpose of section 29 and, would be in effect, to issue a pass to unscrupulous employers for undermining employees' section 27 (1) right not be unfairly dismissed by giving a reason for dismissal other than the real reason'.[23]

[57] Several English cases, some cited by the Court of Appeal, seeded the jurisprudence of the 'real' reason in interpreting 'reason for dismissal' in legislation *in pari materia* with the ERA. The view taken by Cairn LJ in *Abernethy v Mott, Hay and Anderson*[24] that the reason for the dismissal given by the employer 'does not necessarily constitute the real reason' has been accepted and approved by subsequent House of Lords decisions in *W Devis & Sons Ltd v Atkins;*[25] and *West Midlands Co-operative Society Ltd v Tipton.*[26]

[58] More direct authority is to be found in the ERA itself. Section 30 (1) (c) expressly provides that the dismissal of an employee is unfair and contravenes the rights conferred on the employee by section 27 where the reason for the dismissal is among a list of some eleven proscribed reasons. These proscribed reasons include dismissal for becoming a member of a trade union; having, or believed to have, HIV/AIDS; pregnancy or a reason connected with pregnancy in contravention of rights under the *Employment of Women (Maternity Leave) Act*; or a reason related to race colour, gender, religion, or the social or indigenous origin of the employee. The ERT would

[23] Ibid. at [83].
[24] [1974] IRLR 213.
[25] [1977] 3 All ER 40.
[26] [1986] All ER 513.

not be fulfilling its statutory responsibility to enforce the rights conferred by the ERA were it to accept, without question, the reasons proffered by the employer for the dismissal when the evidence available to it suggests that one or other of these reasons was the real reason for the dismissal.

[59] Section 25 of the ERA provides even more direct support. Under section 25 (3) (b), the ERT can make a declaration as to what it finds to be the reasons of the employer for dismissing the employee where it finds that the employer has provided inadequate or untrue particulars of such reason or reasons. Although it appears attached to a side-note which reads 'Complaints to Tribunal in respects of certificate of employment record', we consider that section 25 (3) (b) provides a statutory basis for the ERT to ascertain the true reason for a dismissal.

(b) **Choice of Reason**

[60] A significant difficulty appears from seemingly contradictory views that were expressed in the Decision of the ERT under the heading 'Reason For Dismissal'. There, after briefly rehearsing the Appellant's assertion that the Respondent was careless or negligent in his performance relating to the company's cash handling procedure, resulting in loss to the company, the ERT made an express finding that the Appellant had successfully showed that its reason for dismissing Mr Harris was the latter's failure to follow cash handling procedures. The ERT declared:

> We are persuaded that the [Appellant] has met its burden. The [Appellant] has shown the reason for its decision to dismiss the Claimant and that the reason falls within section 29 (2).[27]

Further, at the end of its Decision,[28] the ERT stated as its Conclusion:

> We find that notwithstanding the sum involved, the Claimant's handling of the cheque was a serious matter justifying disciplinary action, but we do not consider dismissal a fair sanction for that breach of the company's cash handling procedures.

[61] As appears in the first of those passages, the ERT found as a fact that the reason for the Appellant dismissing the Respondent was the latter's conduct in failing to follow

[27] Decision p 3.
[28] At p 15.

cash handling procedures. The second extract confirms that the ERT found as a fact that the Respondent's conduct justified disciplinary action. This means that the Appellant stated a 'true' reason, and not an untrue or fictitious one, for the dismissal. The question therefore arises, was it legally competent for the ERT to select and substitute its own reason?

[62] The ERT selected and substituted its own reason because it failed to appreciate the progression in the response of the Appellant to the incident that ultimately resulted in the dismissal. There can be little doubt, as the ERT captured in its summary of the evidence of what occurred when the Appellant was investigating the matter, that the representatives of the Appellant believed that the Respondent stole the money. The questions directed by Mr Harvey to Mr Harris at the first meeting held on 12 December 2013, at the Appellant's Corporation Office and the remonstration by Mr Harris that he felt very much accused of stealing $40.00, spoke volumes. Hence the ERT's conclusion that 'the reason for his dismissal was theft.' However, there is not a scintilla of evidence that this belief, perhaps conviction, on the part of the representatives who interviewed Mr Harris on 12 December 2013, and reflected in the letters to the Respondent dated 23 and 30 December referring impersonally to the 'unauthorized cashing of a co-worker's cheque', continued to be held as at 27 January 2014, the date of the letter of termination.

[63] But it hardly matters whether the decision makers of the Appellant believed, at the time of the dismissal, that the Respondent had stolen the money. Whatever their belief, it was perfectly open to them to decide to not rely on dishonesty. They had a choice. They made the choice. It was simply not open to the ERT to decide that a perfectly available and substantial reason for dismissal, deliberately chosen by the Appellant's decision makers, was not a (or the) real reason. It was not open to the ERT to invalidate or neutralize the Appellant's choice of the reason upon which it would act to discipline its employee without clear evidence.

[64] In this situation there can be no reticence about upsetting the ERT's decision as to the 'real' reason. As a matter of law, there was no evidence upon which the Tribunal could have made the finding that it did. That proposition fully opens the finding to

reversal. Further, even if there had been evidence that at the time the Appellant made its decision it believed Mr Harris had been dishonest, the ERT having found that the Appellant had good reason to take disciplinary action against Mr Harris on the ground of his failure to adhere to their cash handling procedures, and that the Appellant had relied on that reason, the ERT had no jurisdiction or competence to cast that reason aside as not being the real reason. On that basis, we hold that the Appellant succeeds on grounds ii and iii of its Grounds of Appeal; that the ERT erred in law in substituting what it decided was the 'real' reason for the reason for dismissal upon which the Appellant relied.

(c**) Some Other Substantial Reason**

[65] Having upheld the Appellant's reason for dismissal there is no necessity, but it may yet be useful for guidance, to give our view on an argument developed around ground iv of the Grounds of Appeal. The contention was that the Court of Appeal erred in its interpretation of section 29 (1) (b) in assessing the case 'with singular reference and consideration' to whether the dismissal was for a reason falling within section 29 (2) and thereby 'failed to take into account' the alternative limb of the section 29 (1) (b). That 'alternative limb' permits an employer to dismiss an employee for '… some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'.

[66] It is of some moment whether the reason for the dismissal related to the 'capability or the conduct' of the employee, referenced in Section 29 (2), or was for 'some other substantial reason' referenced in 29 (1). On the unadorned wording of Section 29 (5), where the reason for dismissal is related to the 'capability or the conduct' of the employee, certain procedural safeguards become available to the employee including the right to be informed of the accusation against him and the subjecting of his case to the Standard Disciplinary Procedures and the Modified Disciplinary Procedures set out in Parts B and C, respectively of the *Fourth Schedule*. By contrast, where the reason for dismissal is 'some other substantial reason' referenced in section 29 (1) (b), the provisions of Section 29 (4) become directly operable requiring consideration of whether the employer acted reasonably or unreasonably in treating it as a sufficient

reason for dismissing the employee and whether the employer complied with the rules in Part A of the Fourth Schedule.

[67] In its interpretation of section 29 (1) (b) the Court of Appeal did, in fact, have exclusive recourse to whether the dismissal was for a reason related to capability or conduct within section 29 (2) and did not consider whether the dismissal was for some other reasons within section 29 (1) (b). However, we are not persuaded that this was an error. In neither its written nor oral submissions before the ERT or the Court of Appeal did the Appellant indicate that its dismissal of Mr Harris was for 'some other substantial reason' referenced in section 29 (1) (b). To the contrary, pursuant to Section 29 (1) (a), the reason given by the Appellant for the dismissal appeared related to the capacity and conduct of the Respondent in failing to comply with cash handling procedures.

[68] The Appellant's reliance on the ground of competency and conduct was reiterated numerous times before the Tribunal and maintained before the Court of Appeal. So much so that the Court of Appeal commended the Appellant in the following terms: 'To be fair, though, The Appellant has not raised any issue with the holding of the ERT that the reason shown for the dismissal of Mr Harris related to the capability as well as his conduct. Similarly, [the Appellant] has not disputed the ERT's finding that the reason shown therefore fell within section 29 (2).'[29] It is now much too far in the day for the Appellant to renege from the position that it has adopted and maintained throughout the litigation.

(iii) **Compliance with the Disciplinary Procedures in Section 29(5)**

[69] We agree entirely with the Court of Appeal that, having determined that Mr Harris' dismissal was for reasons relating to his capability as well as conduct within section 29 (2), the ERT should have then turned its consideration to whether the Appellant had complied with the disciplinary procedures mandated in Section 29 (5). This is a matter wholly separate and apart from any question of whether the dismissal was fair or unfair under section 29 (4). To repeat, where the reason for the dismissal of an

[29] Ibid., at [90].

employee is related to capability or conduct, the Section 29 (5) disciplinary procedures apply, on their plain reading, 'Notwithstanding' the provisions in Section 29 (1) for determining whether the dismissal was fair or unfair. Accordingly, in treating Section 29 (4) as 'identical' to section 98 (4) of the UK Employments Rights Act, 1996 (which it plainly is not) and, relatedly, in treating section 29 (5) as an aspect of the section 29 (4) fairness test, the ERT clearly fell into error.

[70] What, then, were the disciplinary procedures that the Appellant was obliged to follow in its dismissal of Mr Harris for reason, as found by the ERT and affirmed by the Court of Appeal, of capability and conduct? Section 29 (5) ordains that an employer is not entitled to dismiss an employee for any reason related to the capability or conduct of the employee without informing the employee of the accusation against him and giving him an opportunity to state his case. These obligations are 'subject to' the Standard Disciplinary Procedures and the Modified Disciplinary Procedures set out in Parts B and C, respectively, of the Fourth Schedule.

[71] Part B of the Fourth Schedule contains the Standard Disciplinary Procedures which must be complied with by an employer before dismissing an employee, in a case such as the present, for a reason relating to conduct or capability. The three steps to be followed by the employer are as follows:

> *"Step 1: Statement of grounds for action and invitation to meeting*
>
> 1. The employer must
>
> (a) set out in writing the alleged conduct or characteristics of the employee, or other circumstances, which lead him to contemplate taking disciplinary action against the employee; and
>
> (b) send the statement or a copy of it to the employee and invite the employee, along with his representative, if any, to attend a meeting to discuss the matter.
>
> *Step 2: Meeting*
>
> 2. (1) The meeting must take place
>
> (a) before disciplinary action is taken; and

(b) where reasonably practicable, within 7 working days of the transmission to the employee of the statement or copy of the statement referred to in paragraph 1 (b).

(2) 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, if he is a member of a trade union, present during the proceedings; and

(ii) the basis for including in the statement referred to in paragraph 1, the ground or grounds set out therein; and

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

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee in writing of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: Appeal

3. (1) Where the employee wishes to appeal, he must so inform the employer in writing, and follow the established disciplinary procedure of the workplace.

(2) Where the matter is not settled under sub-paragraph (1), the employee or his trade union, if he is a member, may refer the matter to the Chief Labour Officer for conciliation.

(3) A meeting in respect of an appeal need not take place before the dismissal or disciplinary action takes effect.

Note on Steps

4. Where an employee is suspended with full pay pending an investigation, steps 1 and 2 do not apply until the employer contemplates taking disciplinary action against the employee."

[72] The Appellant did not challenge the finding by the Tribunal and affirmed by the Court of Appeal that it did not comply with the steps listed in Part B of the Fourth Schedule. Instead, the Appellant submitted that it was exempted from following Steps 1 and 2

listed in Part B because the Respondent had been suspended with full pay at the meeting held on 12 December 2013, which, the Appellant maintained before this Court, was not a disciplinary meeting.

[73] It is abundantly clear that the trigger for engaging the procedural obligations of the employer in Part B is the contemplation by the employer of disciplinary action against the employee. Steps 1 and 2 do not apply until such action is contemplated. Specifically, Steps 1 and 2 do not apply where the employee is suspended with full pay pending an investigation, and these steps remain inapplicable 'until the employer contemplates taking disciplinary action against the employee'.

[74] In the absence of relevant definitions in the Act, whether a meeting is investigative or disciplinary in nature is a matter of fact to be determined from the evidence. The ERT found that the first meeting of 12 December 2013 was a disciplinary meeting and, further, concluded that even the letters of invitation to the second and third meetings did not comply with the requirements of Part B. These findings were upheld by the Court of Appeal. Step 1 required the Appellant to provide to the Respondent a written statement setting out the alleged conduct that led the Appellant to contemplate taking disciplinary action. The letter of invitation to the second and third meetings only stated, in relation to the reason for the meeting, that the purpose of the meeting was 'to discuss the investigation of the unauthorised cashing of a co-worker's cheque which occurred on the 14th September, 2013'.

[75] There was nothing expressly stated in these letters to indicate the accusation against Mr Harris of a failure to follow cash handling procedures, the reason given by the Appellant for dismissing Mr. Harris. In amplification of the determination made by the Court of Appeal, and because the point is dispositive, as we emphasize below, we observe that the witness statement of Mr. Kenneth Harvey, the Appellant's Industrial Relations Manager, was crystal clear that the meetings called for 30 December 2013 and 13 January 2014 were both intended to be disciplinary meetings.[30] There was a complete failure by the Appellant to comply with the requirements of Part B of the

[30] See p. 564 of the Record.

Fourth Schedule. Thus, by the clear wording of Section 29 (5), as found by the Court of Appeal, the Appellant was not entitled to dismiss the Respondent.

[76] It is momentous that the Appellant did not appeal against the determination of the Court of Appeal that the failure of the Appellant to follow the disciplinary procedure disentitled it from raising the defence that the dismissal was fair, pursuant to section 29 (4). None of the 10 grounds of appeal filed by the Appellant touched upon this determination. We feel bound to belabour the point, for the sake of guiding the future conduct of employers and employees, lawyers and tribunals, that section 29 (5) must be taken literally: an employer is not entitled to dismiss an employee for misconduct without the prescribed due process. A dismissal done in non-compliance with the disciplinary procedures designed to ensure due process is unfair. And that is, necessarily, the end of the case whether there was unfair dismissal.

[77] The fact that the Court of Appeal, in this case, went on to consider the fairness of the dismissal must not mislead. The Court of Appeal went on to consider that and other aspects of the case because such a course was intended and expected to be helpful for the future. That course was not intended to imply that the court's further consideration could result in any different conclusion from the conclusion that a dismissal in breach of the due process requirements of section 29(5) of the ERA was unfair. It merits repetition: however meritorious may have been any of the several grounds of the appeal, success on any of them could not override the fatal consequence of failure to follow due process in dismissing an employee.

(iv**) Fairness Under Section 29 (4)**

[78] It follows from the foregoing that it was, and is, not necessary to consider the question of fairness under section 29 (4). Notwithstanding, both the ERT and Court of Appeal addressed the arguments in relation to that section. Given the need to provide guidance on matters that have already been the subject of judicial comment by the tribunals below it may be useful for this Court to express its views on the interpretation of the subsection.

[79] It is well to remember that Section 29 (4) makes the question of fairness of the dismissal, having regard to the reason proffered by the employer, dependent on two things. First, whether the employer acted reasonably in treating the reason it proffers as sufficient justification for dismissing the employee; and second, whether the employer complied with the rules contained in Part A of the First Schedule. These two matters are examined in turn.

(a) **Was the Reason Shown a 'Sufficient' Reason for the Dismissal?**

[80] In determining what it referred to as the 'substantive fairness' of the dismissal which, it must be remembered, the ERT determined was for 'theft', the ERT relied upon the case of *Iceland Frozen Foods Ltd., v. Jones*[31] to essay the view that there was a 'band of reasonable responses' to the employee's conduct and that within this band one employer might reasonably take one view, another might quite reasonably take another as to whether the conduct constituted sufficient reason to dismiss the employee. Relying upon another English authority,[32] the ERT held that it had to consider whether in dismissing the employee the employer had acted within that band or range of reasonable responses to the misconduct of the employee; if the employer had done so the decision to dismiss would be reasonable.[33] Basing itself on the premise that section 98 (4) of the UK's Employment Rights Act 1996, was 'identical' to Section 29 (4) of the ERA, the Tribunal proceeded to adopt the three-pronged test of reasonableness set out by Arnold J. in *British Home Stores v Burchell*[34] in relation to the UK Act. The application of the three-pronged test led the ERT to consider whether the Appellant:

i. genuinely believed that the Respondent's failure to follow the cash handling procedure resulted in misappropriation of another employee's money as a consequence of which the Appellant suffered loss;

[31] [1983] ICR 17 at 24 Browne-Wilkinson J.
[32] *Orr v. Milton Keynes [2011] ICR 704.* Also citing, Halsbury*' s Laws of England, Fourth Edition Reissue, Vol. 16 at paragraph 325 and Gibson v. British Transport Docks Board [1982] IRLR 221 at 232.*
[33] *Orr v. Milton Keynes [2011] ICR 704* at Para 78(5)
[34] [1977] IRLR 379; [1980] ICR 303

ii. had reasonable grounds for believing that the Respondent failed to follow that cash handling procedure; and

iii. had completed as much investigation into the matter as was reasonable in the circumstances when it determined that it would dismiss the Respondent.

[81] The ERT found that the first two limbs of the test were satisfied, but that the Appellant had failed to satisfy the third limb, even though it had the resources to conduct further investigations. For its part, the Court of Appeal found that the relevant sections and provisions in the ERA and the UK Act were not identical and strongly disapproved the application of the 'band of reasonable responses' principle in Barbadian law. The Court of Appeal emphasized the need to focus the interpretative approach on the provisions of the ERA and went on to find that the Appellant had failed to comply with the rules to be taken into account under Section 29 (4) (b), as laid out in Part A of the Fourth Schedule. However, the court also considered the three-pronged analysis of the ERT and agreed that whilst the misconduct for which the Respondent was dismissed was of a type sufficiently serious to warrant dismissal, the evidence on which he had been dismissed was insufficient because the investigation was deficient. Again, it is to be observed that the Court of Appeal also concluded that the real reason for the Respondent's dismissal was theft. Implicitly, the court was supporting the view as to the extent of the investigation required before dismissing an employee for theft.

[82] The Court of Appeal was clearly correct to focus on the provisions of the ERA enacted by the Parliament of Barbados in contrast with the provisions in employment statutes enacted in other countries. It is axiomatic that legislation is to be interpreted in accordance with the accepted rules of statutory interpretation which require, first and foremost, that the court must seek to give effect to the sovereign intention of the legislature by reference to the words used in the legislation. Subsidiary assistance may be obtained from other sources, such as foreign judicial decisions on provisions *in pari materia* with those under consideration, but care must be taken to consider any differences in wording or context of those provisions. As Sir David Simmons CJ

said, in the case of *Wood v Caribbean Label Crafts Ltd. (Unreported),*[35] the task in approaching English decisions is to read them with 'a discerning eye and an analytical mind'.

[83] The recent decision of the Privy Council in *Blackburn v LIAT (1974) Ltd*[36] on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda) provides a useful indication of the correct approach. The Privy Council noted that there were similarities between relevant provisions in the Antigua and Barbuda legislation and legislation in the United Kingdom on unfair dismissal, observing that both sets of provisions required consideration of the employer's reason for dismissing. They also required an assessment of whether the employer acted reasonably in dismissing the employee for that reason. Both pieces of legislation obliged the relevant tribunal to reach a decision in accordance with equity and the substantial merits of the case.

[84] In those circumstances, the Board accepted that the parties could legitimately have placed 'some reliance on the general principles emerging from United Kingdom authorities on unfair dismissal' as being 'relevant to the application' of the Antigua and Barbuda legislation. However, the Board also noted that there were many differences in the specific wording between the Antigua and Barbuda legislation and the UK legislation, and that it was therefore obliged to have regard to Caribbean cases which interpreted the specific provisions of the Caribbean legislation (such as the Trinidad and Tobago Industrial Relations Act) which were 'closely aligned' and in some respects 'identical' to the legislation in Antigua and Barbuda.

[85] We are of the view that cases that provide judicial interpretations of general concepts and principles in employment legislation can be helpful, whatever their source, provided that the interpretations are mined from provisions which are similar, and similarly situated, to local provisions being considered. It appears self-evident that, in respect of reasonable conduct by an employer, a range of responses may be reasonable; provided that the employer responds within this range, the response will not be unreasonable. In this regard, the three-pronged test used by the ERT is, in our

[35] Magisterial Appeal No. 11 of 2001 (16 July 2003).
[36] [2020] UKPC 9, at paras [42] and [43].

view, useful in considering whether an employer acted reasonably in treating the reason advanced for dismissal as a sufficient reason for dismissing an employee in satisfaction of Section 29 (4) (a).

[86] Indeed, we note that both the ERT and the Court of Appeal utilised the three-pronged analysis in arriving at the essential conclusion that the dismissal was unfair. Admittedly their analysis was premised on the 'real reason' for the dismissal being theft whereas we have held that this was an error inasmuch as the reason advanced by the employer i.e., the failure of the Respondent to follow cash handling procedures, ought to have been accepted.

(b) **Compliance with Part A of the Fourth Schedule**

[87] Further, in order for the dismissal to be fair, the employer must establish not only that the reason shown for the dismissal was a sufficient reason in the terms of section 29 (4), (a) but also, in accordance with section 29 (4) (b), that there was compliance with Part A of the Fourth Schedule. Part A reads as follows:

"PART A

RULES TO BE TAKEN INTO ACCOUNT

UNDER SECTION 29 (4) (b)

The following are the rules which are to be taken into account under section 29 (4) (b):

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

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

(c) in relation to breaches of discipline not amounting to gross misconduct

(i) an employee should be warned and given a reasonable opportunity to make correction; and

(ii) oral or written warnings or both should be utilised before stronger forms of disciplinary action are implemented; and

(d) where the period of 12 months or more elapses after a written warning is given, any breach of discipline committed before the commencement of that period shall be treated as expunged from the record of the employee."

[88] Evidently, the rules draw a clear distinction between 'gross misconduct', where the employee may be dismissed for the first breach of discipline, and other breaches of discipline, where disciplinary action must be applied progressively. The Act does not contain a definition of 'gross misconduct' and the parties have made conflicting submissions in relation thereto.

[89] In Ground vii of its grounds of appeal, the Appellant submitted that the parties had agreed that an act by an employee falling within Part 11 of the Code of Discipline ('the Code') would allow for dismissal on the first occasion. The Appellant made reference to the maxim *quilibet protest renuntiare juripro se introducto*, meaning 'a party may renounce a right introduced for his benefit'.[37] The case of *Dietmann v Brent London Borough Council*[38] was cited as authority for holding that, in the sphere of employment, gross negligence may be 'a really serious failure to achieve the standard of skill and care objectively to be expected from an [employee] of the grade and experience of the [employee]'. The Appellant applied this to the Respondent in stating that his failure, though it involved only "a $40 cheque", equated to the type of negligence classified as gross negligence, which in turn amounts to gross misconduct.

[90] We do not agree. Section 29 (4) provides that the assessment of whether the dismissal was fair or unfair, 'having regard to the reason shown by the employer', depends, *inter alia*, on whether the employer complied with Part A of the Fourth Schedule. It was therefore entirely proper for the ERT to have assessed, as it did, whether the failure to follow cash handling procedures constituted 'gross misconduct'. A single failing on the part of an employee can amount to gross misconduct. However, in its natural meaning, the term imports more than mere negligence or inattention which can be cured by the progressive application of discipline. Rather, 'gross misconduct' refers to,

[37] Francis Bennion, *Bennion on Statutory Interpretation*, (5th edn, LexisNexis Butterworths 2008) 57.
[38] [1987] ICR 737 QBD.

> Conduct that is so outrageous that it shocks the conscience; intentional behaviour which deliberately or wilfully threatens the employer's rules, or shows a repeated disregard for the employee's obligations to the employer or disregards the standards of behaviour which an employer has a right to expect of its employee.[39]

[91] The case of *Hilton International (Barbados) Ltd. v Boyce*[40] is illustrative of intentional behaviour that so seriously breached the employer's rules that it could not reasonably be expected that the employment relationship would continue. In that case, an employee wilfully refused a lawful instruction to refuel a generator by climbing up a ladder to fill a tank using a bucket. Instead, the employee switched off the generator which later that evening broke down. The Court of Appeal agreed that although dismissal for a single act of disobedience was unusual, such dismissal was justified in this case because the act of the employee had interfered with and prejudiced the proper conduct of the employer's business.

[92] Recourse to a contractual Code of Discipline between the employer and employee provides only limited assistance to the Appellant. First, to be of any assistance the Code must clearly and specifically indicate both the conduct regulated and the consequence for engagement in that conduct. Without such specificity it is not possible to assert that there was agreement between the employer and employee as to conduct that is to be treated as gross misconduct and worthy of dismissal. We note in passing that the words 'gross misconduct' do not appear in the Appellant's Code of Discipline or the Cash Handling Manual. Moreover, in neither place is it clearly specified that the first failure to follow cash handling procedures could result in dismissal.

[93] Secondly, great care must be taken with the suggestion that an employee is able to contract out of the rights conferred by Parliament in the ERA. Statutory rights intended for the protection of the employee cannot be circumvented by the simple expedient of the contractual relationship. The statutory rights are overriding. We certainly agree with the Court of Appeal that section 29 (4) (b) does not contemplate

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[39] *Giles v. District of Columbia Department of Employment Services*, District of Columbia Court of Appeals Decision of August 31, 2000.
[40] (1996) 52 WIR 59.

any contracting out of compliance with the rules of Part A of the Fourth Schedule. The suggestion in *Halsbury Laws of England*[41] that an employer may be permitted to rely on a Code of Discipline made part of the employee's contract must immediately be qualified by the observation, made in the same place, that contractual authority to dismiss in accordance with a disciplinary procedure does not necessarily make dismissal fair. It stands only to be added that dismissal in accordance with a contractual Code of Discipline does not necessarily make the dismissal fair under the ERA.

[94] A final observation may be made on contracting out of the statutory provision. The evidence establishes that the "Conditions and Terms of Employment 2010-2013", which contained the Code of Discipline upon which the Appellant seeks to rely, were issued and presented to the Respondent on 27 February 2012.[42] The ERA, which introduced into Barbadian law the right not to be unfairly dismissed and the protection now being discussed, was assented to on 18 May 2012. It is difficult, in light of that chronology, to see how it could be held that the employee by agreeing to the terms of the Code contracted out of his statutory rights before they were enacted.

[95] In the premises we conclude that the dismissal of the Respondent was unfair because of the failure of the Appellant to comply with the statutory procedures mandated by section 29 (5) of the ERA. Furthermore, even had the statutory procedure been followed, the dismissal would still have been unfair because the misconduct of the Respondent did not rise to the level that warranted summary dismissal.

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

The Award of Compensation

[96] In their Decision, the ERT did not discuss the matter of compensation and gave no reasons for their award. The need to give reasons has been described as 'absolutely essential'; the process of reducing reasons to writing contributes to the avoidance of error.[43] At the end of their Decision the ERT simply added, as if it were an annex, a

[41] 5th Edition Volume 40 Paragraph 628
[42] Record of Appeal p 161
[43] Blackwell v GEC Elliott Process Automation Ltd [1976] IRLR 144

page stating the Claimant was entitled to $106,630.01 as compensation, calculated in accordance with the Fifth Schedule of the ERA. The calculation was set out as follows:

Basic Award	
3 weeks wages for 14 years being the sum of (i.e. $2,233.91 x 14)	$ 31,274.78
Lost wages for the period January 13, 2014 to April 13, 2016 – 27 months at the rate of $2,978.55 per month	$ 80,420.85
	$111,695.63
Vacation pay for the years 2014 and 2015	$ 5,957.10
Prorated vacation pay for period January 14, 2014 to April 13, 2016: 4/52x$2,978.55x3	$ 687.36
Total	$118,340.09
Less:	
Wages earned between July 2015 and April 13, 2016 ($6.42 per hour x 48 hours x 4 weeks x 9.5 months)	$ 11,710.08
Total	$106,630.01

[97] The Court of Appeal addressed the award of compensation in the two regards that it was challenged. The court rejected the argument that the award of holiday pay should have been limited to a year's pay, and it accepted the argument that there should have been deducted from the total award, the sum of $11,540.88, paid to the Claimant in lieu of notice. It therefore reduced the award to $95,089.13.

[98] Before this Court, the Appellant's sole ground of appeal in relation to quantum was that it had been prevented from cross-examining the Claimant before the ERT on the matter of mitigation. This Court was concerned to have submissions on the quantum of compensation and at the end of the oral hearing it directed counsel for both parties to file submissions on the matter of compensation. It is in that way that the Court received such submissions on compensation as it did.

[99] The Court was concerned to obtain submissions from counsel on the quantum of compensation because it was a strikingly large award that the Tribunal made. The ERT awarded lost wages for 27 months, amounting to $80,420.85. It reduced that amount by income earned by the employee for 9.5 months, resulting in an award for lost wages in the sum of $68,710.77. What makes this striking is the fact that the award of compensation to which the employee would have been entitled for wrongful dismissal (and which he received as salary in lieu of notice) was $11,540.88 for 2 months' wages and vacation pay. While a court must not assess compensation for unfair dismissal as if it were for wrongful dismissal[44] this Court is of the opinion that it may meaningfully compare the scale of compensation in considering whether the legislature could have intended compensation under the ERA to so vastly exceed the historical and common law award of compensation.

The Provisions for Compensation

[100] Section 37 of the ERA provides that where a Tribunal does not[45] make an order for re-instatement or re-engagement, or an order is made but not fully complied with, or an order for re-instatement is made but there is no re-instatement[46], the Tribunal shall make an award of compensation, determined in accordance with that section, to be paid by the employer. Sub-section (2) (a) states that the amount of compensation awarded (where no re-instatement or re-engagement order has been made) shall be calculated in accordance with the Fifth Schedule.

[101] That Schedule states:

> "FIFTH SCHEDULE Section 37
>
> COMPENSATION
>
> 1. In a case to which section 37 (1) (a) or (c) applies, the Tribunal shall make an award of compensation, to be paid by the employer to the employee, consisting of the aggregate of the following amounts:

[44] The caution was sounded in Norton Tool Co Ltd v Tewson [1972] IRLR 86 at 5/281
[45] S. 37(1)(a)
[46] S. 37(1)(c)

> (a) A basic award determined in accordance with the rules set forth in paragraph 2;
>
> (b) An amount such as the Tribunal thinks fit in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal;
>
> (c) An amount, not exceeding 52 weeks' wages, where the dismissal was for a reason specified in section 30 (1) (c) or, where there was more than one reason for the dismissal, one of those reasons was a reason so specified

[102] Rules are set out in sub-paragraphs (2) to (5) for determining the basic award referred to in paragraph 1(a). Essentially, the basic award is to be calculated in accordance with a table based on the period of continuous employment of the employee. A person employed for less than two years is awarded 5 weeks' wages; a person employed for two years or more but less than ten years is awarded 2½ weeks' wages for each year of that period; a person employed for more than 10 years but less than 20 years is awarded three weeks' wages for each year; and where the period is 20 years or more but less than 33 years the person is awarded 3½ weeks' wages for each year. The rules indicate that employment beyond 33 years is not to be counted.

[103] Thus, there are three amounts of compensation that may be awarded: (1) a basic award; (2) an amount in respect of any benefit that might have been had; and (3) an amount, capped at 52 weeks' wages, where the reason for dismissal was one of a number of discriminatory and proscribed reasons such as trade union activities, HIV/AIDS infection, racial discrimination and more. The third amount is commonly regarded as a punitive award and is not relevant to this case, so it need not be discussed. However, the amount does provide the perspective that the legislature considered 52 weeks' wages as an amount large enough to deter and punish.

Statutory Award of Compensation

[104] The submissions did not address the nature and purpose of the legislation that introduced the awarding of statutory compensation for termination of employment. This has produced a gap in the understanding and appreciation of the policy behind statutory compensation. Before legislative intervention, compensation for

termination of employment was basically by way of an award of damages to compensate for breach of the employment contract. The object of an award of damages in contract is to put the claimant in the position in which he would have been if the contract had not been breached. Loss of wages caused by failure to give due notice is the damage caused by the breach of contract, broadly speaking, which is usually to be compensated.

[105] It was a distinctly new policy and approach to compensation for loss of employment that was introduced by statute. In the United Kingdom, which produced the model for the Barbadian legislation, statutory compensation for loss of employment because of redundancy was first provided in 1965 in the *Redundancy Payments Act*, followed in 1971 by the *Industrial Rights Act*, which provided compensation for unfair dismissal. Early judicial analysis of the policy behind statutory compensation for termination for redundancy was given in *Lloyd v Brassey.*[47] Lord Denning MR stated[48]:

> As this is one of our first cases on the Redundancy Payments Act, 1965, it is as well to remind ourselves of the policy of this legislation. As I read the Act, a worker of long standing is now recognised as having an accrued right in his job; and his right gains in value with the years. So much so that if the job is shut down he is entitled to compensation for loss of the job - just as a director gets compensation for loss of office. The director gets a golden handshake. The worker gets a redundancy payment. It is not unemployment pay. I repeat "not." Even if he gets another job straightaway, he nevertheless is entitled to full redundancy payment. It is, in a real sense, compensation for long service. No man gets it unless he has been employed for at least two years by the employer; and then the amount of it depends solely upon his age and length of service.

[106] The policy behind the redundancy payments legislation in the United Kingdom, as that observation shows, was not to provide an enhanced award of damages for wrongful dismissal. The principle that compensation for dismissal because of redundancy is *not* to compensate for loss of wages – that the purpose is retrospective and not prospective - is reflected in the fact that the employee is entitled to the redundancy payment even if he immediately gets new employment and loses no wages. But, equally, if the employee does not get new employment for many months

[47] [1969] 2 QB 98
[48] At 102

or even for years, the amount of redundancy payment that is to be awarded is not increased to compensate for loss of wages.

[107] However, it is material to this appeal to observe that this was the policy behind the severance payment legislation in the United Kingdom, when statutory provision was first made to compensate for loss of employment. Further, although it was not stated to be the purpose, a redundancy payment necessarily serves to relieve a dismissed employee against the loss of salary, where there is such loss. More fundamentally, it is important to observe that where legal concepts are imported from one jurisdiction to another, they are often substantially modified in the new jurisdiction. Thus, new incarnations or adaptations of a scheme of statutory compensation may see the evolution of the original purpose. These observations are a prelude to the discussion that follows on the purpose of compensation in this appeal and an alert to departures in that regard.

[108] For the moment, it is enough to advert to the historical, primary purpose of redundancy payment in the United Kingdom as showing the clear divide between compensation at common law and statutory compensation. As mentioned above, the UK legislation[49] dealing with the statutory provision for compensation for unfair dismissal created an entirely new cause of action and the common law rules and authorities on wrongful dismissal are irrelevant to calculating compensation for unfair dismissal: *Norton Tool Co. Ltd v Tewson*.[50] With statutory compensation, the policy behind the particular legislation must be ascertained.

Compensation for Retrospective and Prospective Loss

[109] In the case of unfair dismissal, the purpose of compensation is both retrospective and prospective. This is seen in the United Kingdom *Employment Rights Act 1996*[51] (the ERA 1996), which provides that compensation shall consist of a basic award and a compensatory award.[52] It was observed in *Harvey On Industrial Relations and Employment Law*[53] in relation to the ERA 1996 that the basic award for unfair

[49] S 116 Industrial Relations Act 1971, now replaced by s 118 ERA 1996.
[50] [1972] IRLR 86 at 5/281.
[51] S 123.
[52] S 118.
[53] Issue 279, February 2020.

dismissal is equal to the statutory redundancy compensation to which the employee would have been entitled had he been dismissed for redundancy at the date of dismissal.[54] The same is true in Barbados, where the rate of the basic award is a virtual replica of the rate of severance payment that is stated in the First Schedule to the Severance Payments Act of 1971.[55] In the UK, similar to the purpose of a redundancy payment, the purpose of the basic award under the ERA 1996 is to compensate the employee for their past service and investment in the employer's business. More accurately, compensation in UK law for unfair dismissal began, in section 116 of the Industrial Relations Act 1971, without providing an amount for compensation for past service. The basic award, that so provided, was added in the UK by what later became sections 73 to 75 of the Employment Protection Act 1975. Therefore, in the UK legislation, the basic award replicated the retrospective purpose of severance payment and the compensatory award served to compensate the employee for prospective loss, including loss of remuneration.[56]

[110] In Barbados, the ERA provides for a basic award, but it does not refer to a compensatory award. This divergence lies at the core of the uncertainty on this appeal on how to interpret the relevant provisions of the ERA. The provision in the ERA that appears in the place where the compensatory award is found in the ERA 1996 does not purport to compensate for lost remuneration. That raises the question, what does? And the further question: does the basic award in the ERA also have the singular purpose, as in the UK, of compensating for retrospective but not prospective loss? If there is no separate compensatory award, then that may be good reason for thinking that the scheme of the Barbados ERA was to make the basic award compensate for both retrospective and prospective loss.

[111] That thought leads to a closer examination of the basic award and immediately clear differences are seen in the basic award in the Barbados legislation and the UK legislation, beyond the manner in which they were respectively made law. The basic award in Barbados provides significantly greater compensation than does the basic award under the ERA 1996. We interpret that greater compensation as not simply a

[54] Ibid. at [2503].
[55] Laws of Barbados CAP 355A.
[56] Astra Emir Selwyn's Law of Employment 20th ed. at 17.198 .

matter of greater generosity but as the historically rooted reflection of a broader purpose.

The Broader Purpose of the Barbadian Basic Award

[112] A comparison with the UK basic award begins with the fact that the rate of compensation varies according to the age bracket in which an employee fell when they were giving their years of service, so that a younger employee is awarded less. Further, the basic award is to be calculated at a rate ranging from half weeks' pay to one and a half weeks' pay for each year of employment. Also, a statutory limit is placed on the amount of the weeks' pay to be used in the calculation; the limit stood at £525 on or after April 2019.[57]

[113] In contrast, under the ERA the rate of compensation for an employee who served at a younger age is the same as for an older employee. Further, the amount of wages ranges from two and a half to three and a half weeks, therefore more than doubling the rate in the ERA 1996. In addition, there is no cap on the amount of the weekly wage that is recoverable.

[114] It is another major difference that the basic award under the ERA 1996 is limited to 20 years. In contrast, under the ERA the basic award extends to 33 years. It is also significant that under s 122 of the ERA 1996 the basic award is subject to reduction on four possible grounds. These include the employee's unreasonable refusal of an offer which would have the effect of reinstating the employee, which is very much in the nature of failure to mitigate; where there was conduct by the employee justifying a reduction of the award; in a redundancy case to a stated extent; and in certain cases where other awards have been made to the employee.

[115] In contrast, the ERA makes no provision for reducing the basic award except by any amount received as severance payment or any redundancy payment.[58] Thus, under the ERA, the basic award may not be reduced because of the conduct of the employee or his refusal of an offer for re-instatement. The intention of the ERA is to statutorily

[57] S. 227 ERA 1996. It began at L40 weekly in s 118 of the Industrial Relations Act 1971 This was also the cap on the amount of weekly pay in calculating redundancy payment; reg 5(3), First Schedule Redundancy Payments Act 1965
[58] Paragraph 2(5) Fifth Schedule

prescribe the compensation, at the certain, stipulated rate that must be awarded in the form of the basic award.

[116] In summary, the basic award under the ERA provides compensation at double the rate of the basic award under the ERA 1996, without limiting the amount of the recoverable weekly salary, and a greater degree of protection against reduction. The reason for that difference, we conclude, is that the basic award under the ERA was intended to serve a dual purpose: to compensate for past services as well as for loss of future wages.

Dual Purpose

[117] There is no reason in principle and nothing in the ERA that stands in the way of viewing the basic award as intended to serve this dual purpose. Earlier, we looked at the far greater rate of the basic award under the ERA as compared to the basic award under the ERA 1996. There is an equally fundamental factor to consider, in relation to the compensatory award, in the observation made in the English Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*[59] on the scale of the compensatory award for unfair dismissal. The headnote summarizes the observations of Lord Dyson JSC as follows:

> The statutory right to claim compensation for unfair dismissal contained in the 1996 Act was first introduced by the Industrial Relations Act 1971. Parliament placed significant limitations on the ability of an employee to complain of unfair dismissal and on the remedies available where unfair dismissal is proved: there is a statutory cap on the level of the compensatory award which can be made by an employment tribunal. Parliament decided to give a remedy that was strikingly less generous than that which the common law would give for a breach of contract in the ordinary way. (emphasis added)

[118] The relative generosity of the compensation provided by the basic award under the ERA may now be better appreciated. In this case, the basic award was equivalent to 42 weeks' wages. Under the ERA 1996, the basic award an employee would have

[59] [2012] IRLR 129

received for his 14 years' service, using the highest multiplier, would have been 21 weeks' wages. Therefore, by providing in the ERA double what an employee would receive under the model legislation, the legislature had no need to award him compensation for lost wages under paragraph 1(b) because the amount of the basic award already served, as it was intended to do, to compensate him for lost wages. The compensation provided in the basic award meant, on the facts of this case, that for the better part of a year the employee did not suffer from loss of wages. He could have sat down at home for that entire period without working and enjoy the equivalent of the wages of his former employment. He had no obligation to mitigate[60] his loss by seeking employment. The irreducibility of the compensation provided in the basic award is the very object of paragraphs 2 (5) (a) and (b) of the Fifth Schedule: reduction may be made only on account of any amount received as severance payment or any redundancy payment.

No Separate Compensatory Award for the Loss Sustained

[119] It follows from this structure that there was no need to provide in the ERA for making a separate compensatory award. In the UK legislation, the compensatory award clearly compensates for prospective loss, so there is no need for the basic award to do so. In manifest contrast, the ERA does not refer to anything called, by whatever name, a compensatory award. The ERA chose to follow the ERA 1996 in using the term and concept of the 'basic award' but completely departed from the ERA 1996 by not even mentioning 'compensatory award'. It made no provision for a separate, compensatory award.

[120] On the view which we have taken, it is precisely because the ERA provides compensation for lost wages in the basic award that there was no reason to provide, separately, for a compensatory award. This is the conclusion to which a close examination of the compensation provisions in the ERA has led us. The elaborate provisions in the ERA 1996[61] concerning assessment of the compensatory award were completely omitted from the ERA because they were completely unnecessary.

[60] Paras 2(5)(a) and (b) Fifth Schedule.
[61] Sections 123, 124, 124A and 126 ERA 1996..

[121] The objection could be taken that if the ERA is interpreted as providing no separate compensatory award then an unfairly dismissed employee in Barbados can get no greater benefit than does an employee who is terminated for redundancy and is paid severance payment in exactly the same amount as the basic award.[62] The unarticulated premise of such an objection is that the unfairly dismissed employee should be awarded more than is awarded to an employee dismissed simply for redundancy. The response to that assertion is that the ERA does provide greater benefits than are available to a redundant employee. It does so by providing an award of an amount the Tribunal thinks fit in respect of any benefits the employee may have expected, which may be a considerable amount, in some instances. It does so, as well, by providing a substantial (punitive) amount of compensation where the employee is dismissed for one of the proscribed reasons. But a response to that hypothetical objection goes deeper than that. The response calls for a look, again, at the historical background to the Barbados Severance Payments Act, to appreciate that severance payment in Barbados was intended to provide for more than retrospective compensation, when the Act was passed in 1971.[63]

[122] As discussed, in the United Kingdom the Redundancy Payments Act 1965 first provided for severance payment with its retrospective purpose of compensating for past service. The UK Industrial Relations Act 1971[64] created the right of an employee not to be unfairly dismissed and to be compensated for loss of future income caused by the unfair dismissal, even if in a derided amount.[65] As noted, it was in 1971 that Barbados enacted its Severance Payment Act, which provided for more than double the rate given in the UK redundancy legislation and did not impose any cap on the amount of the weekly pay that could be awarded. It is inconceivable that when Barbados was drafting its far more generous severance payment legislation it would have been unaware of current, impending developments in UK employment law; specifically, of the right to be given to employees not to be unfairly dismissed and to be awarded compensation for unfair dismissal.[66] It would have been an obvious

[62] As mentioned in [109] above.
[63] Act 24 of 1971, enacted 7 August 1971; commencement date 1 January 1973.
[64] Enacted 5 August 1971
[65] See [117] above, citing Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2012] IRLR 129
[66] It was a modest amount of compensation that the legislation intended to provide, given the cap of £ 40 on the weekly wage that could be awarded, as stated in s 118 of the Industrial Relations Act 1971; see L J Hopkins v Nicholas Products [1974] IRLC 336 at 2. The reality that the compensatory award was quite limited is confirmed by information provided in Dunnachie v Kingston-upon-Hull City

choice before the Barbados legislature, whether its severance payment law should compensate only for past services or it should compensate also for loss of future income for an appropriate period, as the much debated pending UK legislation was proposing to do. Therefore, in the case of the ERA, as observed above,[67] it was not simply that greater generosity flowed from the Parliamentary heart to impel the more-than doubled rate of compensation in the Barbados basic award, compared to the UK basic award. That greater generosity, as we now see, had already occurred in the Severance Payments Act of 1971. It was from that time that severance payment was fixed at a rate intended to serve the dual purpose of compensating both for past service and to provide an amount in respect of loss of income.

[123] When, therefore, the right not to be unfairly dismissed was introduced into law in 2012 in Barbados, the ERA that created the right did not need to provide compensation for loss of future earnings in a separate limb. Such compensation was already a part of the compensation provided in the severance payment legislation enacted forty years earlier; and that was now being incorporated into the ERA. Accordingly, there is no justification for the proposition that an unfairly dismissed employee should be awarded more than an employee dismissed for redundancy: they are both compensated at the same rate for loss of future income and for past services.

[124] Two repetitions are apposite here, as a postscript to this conclusion. First, the object of the award of compensation for unfair dismissal is not to punish the employer; although an award may be increased to do so, when the unfair dismissal is egregious because the dismissal was for a proscribed reason. Second, the second limb of an award of compensation, in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal, is not to be regarded as a trifle: it is something only an unfairly dismissed (and not a redundant) employee may get.

Does 'Benefit' Include Wages?

Council [2004] 2 All ER 501 at [38] (reversed on appeal to the House of Lords). According to that information, in 1977 more than 95% of awards were under £2000.

[67] At [116] and following.

[125] The question whether the meaning of benefit includes wages was fully argued by counsel, seeking respectively to include or exclude wages as an item of compensation under paragraph 1(b) of the Fifth Schedule, but on the view we have taken the question is moot. Nonetheless, we offer some observations on the matter to elucidate the reasoning behind our decision. There are two other, similar provisions in the ERA which contain a definition of benefit that is missing from sub-paragraph 1(b). Sections 34 (2) and 35 (2) of the ERA state that in making an order for reinstatement or re-engagement the Tribunal shall specify in such order an amount payable by the employer 'in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of wages) for the period from the date of termination of employment to the date of reinstatement". (emphasis added)

[126] The meaning of the word benefit in this area of employment law is commonly accepted as including pension rights, salary increases, tips, allowances, and what are called fringe benefits. Clearly, the meaning may include wages but, as is apparent, it may also not include wages. The ERA took the approach of stating in two of three instances when the word 'benefit' was used, that benefit referred to wages. In the third and latest instance, that is of immediate interest to this appeal, i.e., in paragraph 1 (b) of the Fifth Schedule, where the word was used in a similar sentence to the first two instances, the ERA omitted stating that benefit referred to wages. This deliberate omission signified, in this instance, that the meaning of benefit did not include wages. This is a conclusion that is consistent with our decision that because lost wages are already compensated in the amount of the basic award, there is no need to include wages in the meaning of benefits when considering awarding an amount in respect of unfulfilled, expected benefits.

Assessment of Compensation for Lost Wages

[127] The decision we have reached also renders moot a discussion of separate compensation for lost wages; there is to be no assessment of compensation for lost wages. However, even though now purely hypothetical some observations on the limits of compensation may broaden the understanding of the conclusion we have

reached as to quantum, in an area of employment law which the Court of Appeal observed was still uncharted.[68] In this case, the ERT awarded 27 months' loss of wages, less wages earned for 9.5 months. Even if the ERT had been right to award compensation for unfulfilled expectations of benefit as if awarding compensation for loss of future wages (and we have decided it was not), the award it made would still have been erroneous. As seen in English and Australian decisions on compensation for unfair dismissal, there are some basic guidelines to follow to avoid excessive awards. In *Sprigg v Paul's Licensed Festival Supermarket*[69] an Australian appeal commission exhaustively discussed previous decisions on determining compensation for lost remuneration and identified four steps to follow in arriving at an award. In our view, on the purely hypothetical scenario that a separate compensatory award needed to have been made by the Tribunal, these or similar steps would have needed to be followed by the ERT otherwise, as counsel for the employer submitted, the hypothetical result would be the making of compensatory awards that would be disproportionate, excessive, absurd and even perverse.

[128] The first step, in that hypothetical scenario, would be to estimate the length of time the employee would have continued in the employment if he had not been terminated. In the *Sprigg* case it was decided the further period would have been one year, because there had been evidence that the employee had been thinking of moving on. In this case, the ERT found that while not meriting dismissal the employee had been guilty of serious misconduct justifying disciplinary action.[70] In addition, over the two months or so leading up to the dismissal, relations undoubtedly soured, as revealed by the witness statement of the employee before the ERT. The Tribunal could well have decided this made the continuance of the employment relationship fraught.

[129] The second step is to deduct earnings since termination. That was done in this case.

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[68] Chefette Restaurants Ltd v Harris Civil Appeal No 11 of 2016 (judgment delivered 23 August 2017), referring at [2] to this being the first appeal under the Act to come before the Court of Appeal on the right of an employee not to be unfairly dismissed.
[69] C No. 35979 of 1998
[70] Decision (unreported, delivered 13 April 2016) at p 15

[130] As the third step, a figure for contingencies should be deducted. In the *Sprigg* case, 25% was deducted for the uncertainty referred to in Step 1 and for the fact that the moneys were to be received as a lump sum.

[131] As the fourth step, the impact of taxation must be considered. In that case. the amount of taxation was left for determination.

[132] The failure of the ERT to consider Steps 1 and 3 would mean, in the hypothetical scenario, that the award for lost wages cannot stand. Fundamentally, if the employee would likely not have continued in the employment for, say, longer than a year, the Tribunal could not have regarded wages for in excess of a year as a reasonably expected benefit. Additionally, the award could not stand, as was conceded by counsel for the employee, because of the ERT's preventing counsel for the employer from eliciting evidence from the employee as to the steps he took to mitigate his loss. It is well known that failure to mitigate can reduce an award of compensation to zero.

[133] There would be other factors to consider, such as the very conduct of the employee in the complaint before the Tribunal, that could operate to further limit the generosity to which the ERT showed themselves to be disposed, but it is unnecessary to discuss these as there is no need to assess compensation for lost wages. It was a major accomplishment of the legislature to make such a discussion unnecessary and it is meet that we do not diminish that accomplishment by proceeding to the contrary.

Amount in Respect of Benefit

[134] We are conscious that there is nothing in the ERA to indicate what are the factors to which the ERT should have regard in arriving at an amount that it thinks fit. One consequence of the pointed omission in the ERA to state the factors to consider in awarding an amount in respect of any unfulfilled expected benefit is the measure of freedom that it provides. The employee has already been compensated, pursuant to paragraph 1(a), by the basic award, in an amount intended to cover, for an appropriate period, loss of wages along with compensation for services rendered. The ERT, therefore, has it open to them to award an amount it thinks fit in respect of benefits other than future wages. It would be for unfairly dismissed employees to identify the

benefits they claim. It must be recognized as a limited power that is given to the ERT because normally loss of future wages is the major loss to be compensated and the basic award already provides that compensation. It is interesting, regarding the power of the ERT to award an amount it 'thinks fit', to see a similarly imprecise authorisation in the Australian mandate to make an award that represents 'a fair go all round' for both employer and employee.[71] These expressions probably reflect the inability, in certain instances, to legislate in any definite way what are the applicable remedies, factors and considerations in employment law; hence the need to use broad expressions to confer the remedial remit.

[135] So, how is a Tribunal to proceed to decide what amount is fit to award for unfulfilled expectations of benefit? A Tribunal will need to proceed on a case by case basis. In this case, the Court has no idea of the nature, number or value of relevant benefits. It has no idea of the reasonableness of expecting them or the degree of probability that they may have been had but for the dismissal. In this situation, this Court is in no position to offer an example on how to proceed and must leave this exercise to be done in actual circumstances rather than in the abstract.

Windfall and Shortfall

[136] A remaining concern to address is the adequacy of the compensation regime of the ERA, as we have analysed it. The Barbados legislature would have considered that in a case where there is no loss of wages, because the employee immediately gets a new job and loses no income, the basic award would amount to a windfall. The legislature would also have considered that where there is loss of wages, because the employee is unable to find a new job and loses income for a longer period than the basic award covers, the basic award may result in a shortfall. It must be accepted that the legislature would have considered both scenarios when deciding upon the rate of compensation in the basic award. The legislature would have had information as to the average time it took for a terminated employee to obtain new employment.

[71] S. 170CA Workplace Relations Act 1996; referred to in Sprigg at 22, 29 and 30 (fn 71).

[137] Informed as to the state of the job market in Barbados, the legislature would have known at what rate to provide for potential loss of income. In this case, salary in lieu of notice amounted to $11,540.88 for two months' notice and vacation pay. As stated, the basic award amounted to the equivalent of 42 weeks' wages, which translated to $31,274.78. The ERT's further award of 27 months' or 104 weeks' wages before reduction was excessive, for the reasons already discussed. That excessive award is a wholly inapt and misleading comparator for the basic award: it is not a figure against which to measure the basic award. We have adverted to the evidence (to which no challenge was permitted) that the employee did not obtain a (lesser paying) job until after some 17 months. However, the length of time it took this employee to become re-employed is not a factor that affects this discussion. The purpose of compensation for unfair dismissal is not to indemnify indefinitely against loss of remuneration.

[138] For perspective, under the ERA 1996 the compensatory award cannot exceed 52 weeks' wages[72] and under the ERA a punitive amount is similarly 52 weeks' wages. Further, at the time when the ERA was passed in Barbados, the median unfair dismissal award in England was £4,832.[73] That works out, using the April 2019 salary cap, at around nine weeks' wages.[74] Of course, there can be no extrapolating of English data, but the reference to their median award does serve as a reminder that there is a scale to awards of compensation. The observation made in *Edwards v Chesterfield Royal Hospital* as to the low level of compensation for unfair dismissal[75] is further reminder that a legislature considers scale when deciding upon the rate of awards. The rate that the legislature specified for calculating the amount of the basic award would have been decided by considering the relationship and proportionality of the amount of the basic award to what would have been a projected median award or range of awards. The legislature would also have been aware that common law compensation is assessed at the rate of a certain number of weeks' wages for each year of employment. Therefore, it was no leap into darkness for the legislature, as a

[72] S 124 ERA.
[73] Honeyball & Bowers' Employment Law 13th ed 182.
[74] See text to footnote 16, above.
[75] Referred to in [23] above.

matter of policy, guided by such references, to decide upon statutory compensation at the rate they chose to specify.

[139] Counsel for the Respondent gave no weight to the fact that the basic award is determined by reference to the rate of the employee's wages, now lost to him by the dismissal. This is evident in counsel's submission that if the meaning of benefit in sub-paragraph 2(b) does not encompass lost wages, an employer would be liable 'only' – as counsel described it – to a maximum punitive award of 52 weeks' wages. As noted above, under the ERA 1996 that is the cap on the compensatory award, and we have seen what common law compensation would yield, so as a matter of comparison the qualifier 'only' is misconceived. As seen in the preceding paragraph, it was open to the legislature to fix compensation for unfair dismissal at a level that was more, or that was less generous, than common law compensation for wrongful dismissal. In this regard, counsel's complaint ignores the fact that an unfairly dismissed employee who has been employed for 18 years gets over 52 weeks' wages and an employee who has been employed for 33 years gets over 115 weeks' wages. It was surely permissible, as a matter of policy, for the legislature to decide to provide for lost wages by making compensation for that loss a component of the basic award, using the rate that the legislature determined.

[140] The further empowering of the ERT to give an amount it thinks fit in respect of unfulfilled expectations of benefits enables the ERT to have regard to circumstances that would justify adding to the amount of the basic award, in an appropriate case, where the ERT thinks fit. We have already seen that this is no wide-open discretion; the scope is limited by the benefits to which the Tribunal can have regard.

[141] The composition and structure of the compensation provisions upon which the legislature settled in the Act will not produce a perfect result in all cases. But perfection is hardly ever legislatively attainable. It must be sufficient that what the Act provides is designed to produce as satisfactory a result as may reasonably be expected.

Quantification of the Award

[142] At the end of the consideration of the award of compensation, it is an uncomplicated position that emerges. The basic award of $31,274.78 made by the ERT provided the compensation to which the Respondent was entitled in this case, under paragraph 1(a) of the Fifth Schedule. The Respondent was not entitled to any further sum for lost wages or vacation pay. The amount paid to him as salary in lieu of notice and vacation pay is not to be deducted from that award. This is one of the features of the basic award under the Barbadian ERA, which specifically states in paragraph 2 (5) of the Fifth Schedule the deductions which may be made, as we have mentioned at [115] and [118], above and these deductions clearly do not include salary in lieu of notice.[76] As we have also mentioned, at [134] above, the claimant, on whom the onus laid, did not adduce evidence of any benefit which he might reasonably be expected to have had but for the dismissal, for which paragraph 1(b) of the Fifth Schedule provides. Consequently, no award can be made of any amount the Tribunal might have thought fit in respect thereof.

Conclusion

[143] The result of all we have decided is that we dismiss the appeal against the finding of unfair dismissal and allow the appeal in part, in relation to the award of compensation. Our award of costs must reflect this mixed result.

[144] The Appellant did not appeal the decision of the Court of Appeal that, having failed to comply with the statutorily prescribed due process requirements for dismissal, it was not open to an employer to resist the claim for unfair dismissal. Such an appeal would have been bound to fail and so the Appellant was well advised not to appeal that decision. However, the Appellant chose to appeal against the decision that the dismissal was unfair on the merits. It would have been better advised not to do so. As we have found, even if there had been great merit to the decision to dismiss it would

[76] Sections 22 and 24 of the ERA provide for the giving of notice and the payment of salary in lieu of notice, which makes such payment a completely separate entitlement from compensation for unfair dismissal, provided as a remedy for a complaint under section 32 of the ERA.

still have been an unfair dismissal because of the failure of the Appellant to comply with the statutory disciplinary procedures mandated by section 29 (5) of the ERA.

[145] The Appellant's appeal against the amount of the award of compensation resulted in greater success than the grounds of appeal might have suggested was attainable. The award in the Court of Appeal of $95,089.13 is now reduced to $31,274.78.

[146] We award costs on the basis that the Respondent is the overall successful party. He succeeds on his claim for unfair dismissal and for an award of compensation. We take account of the Appellant's success and the extent of it by awarding to the Respondent 75 percent of his costs in this Court and in the Court of Appeal.

Disposal

[147] The appeal against the finding of unfair dismissal is dismissed.

[148] The appeal against the award of compensation is allowed in part. The award ordered by the Court of Appeal in the sum of $95,089.13 is reduced to $31,274.78.

[149] The Respondent is awarded 75% of his costs in this Court and in the Court of Appeal.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice Anderson

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ P Jamadar

The Hon Mr Justice P Jamadar