EMPLOYMENT RIGHTS TRIBUNAL

CLAIM NO. ERT 65/2014

CLAIMANT: **ORLANDO HARRIS**

RESPONDENT: **CHEFETTE RESTAURANTS LIMITED**

APPEARANCES: **The Claimant in person**

Mrs. Esther Obiora Arthur, Attorney-at-Law for the Respondent

TRIBUNAL:

Deputy Chairman: **Miss Kathy-A. Hamblin, Attorney-at-Law**

Members: **Dr. Hartley Richards, Employers' Representative**

Mr. Ulric Sealy, Employees' Representative

Dates of hearing: **February 17, and 22, 2016, and April 13, 2016**

DECISION

For the reasons set out below, the unanimous decision of the Tribunal is that the Claimant was unfairly dismissed by the Respondent.

THE CLAIM

Orlando Ricardo Harris claimed that on January 27, 2014, he was unfairly dismissed by the Respondent, Chefette Restaurants Limited, with whom he had been employed as an assistant manager since January 4, 2000.

The Respondent alleged that the Claimant was terminated in accordance with clause 11 of the Respondent's Conditions and Terms of Employment, 2010-2013, for his failure to follow the cash handling procedures for the day-to-day running of the restaurant, among which were the following:

i. "Cashiers are allowed to cash a cheque for employees on (sic) the same or similar category but are not allowed to cash the Respondent's cheque made out to a manager, without permission from the Manager on Duty ("the Manager").
ii. If the Manager wants to cash a cheque issued by the Respondent, he would pass the cheque to the cashier during the balancing of the intake;
iii. The Manager must verify that the information on the front and back of the cheques is correct." ***(See Witness Statement of Kenneth Harvey dated August 29, 2014).***

The Respondent also alleged that on September 14, 2013, a cheque made payable to Donnalyn Ward, another employee, ("the cheque") was received, endorsed with the signature "*O. Harris*", cashed and deposited during the shift managed by the Claimant, who could lend no clarity to the matter when asked to do so by the Respondent.

THE EVIDENCE

The complaint was supported by the Claimant's witness statement dated July 10, 2014, and by a bundle of documents including the termination letter and several commendations which the Claimant received during the course of his employment with the Respondent.

The Respondent also presented a bundle of documents which included witness statements of Mr. Harvey, its Administrative and Industrial Relations Manager, Maria Wallace, a cashier on duty on the Claimant's September 14, 2013, shift, Sherry-Ann Greenidge, Human Resources Officer, and Junette Knight, Operations Assistant, as well as cheques numbers 00069196 and 00069201, both dated September 9, 2013, and drawn in favour of Donnalyn Ward and Orlando Harris, respectively. At its request, the Tribunal was provided with a complete copy of the Respondent's Cash Handling Procedures Manual, 2012, ("the Manual") in substitution for the extract from the Manual which was included in the Respondent's bundle of documents.

Counsel for the Respondent referred the Tribunal to the following authorities:

1. ***British Home Stores Ltd. v. Burchell [1978] IRLR 377;***
2. ***Clouston & Co., Limited v. Corry [1906] A.C. 122;***
3. ***Gibson and others v. British Transport Docks Board [1982] IRLR 221.***
4. ***Iceland Frozen Foods Ltd. v. Jones [1983] ICR 17.***
5. ***Halsbury's Laws of England, 4th Edition Reissue, Vol. 16 at paragraphs 325 and 335; and***
6. ***Halsbury's Laws of England, 5th Edition, Vol. 40 at paragraph 628.***

The Tribunal also considered the following cases:

1. ***X v. Ministry of Defence [2015] NICA 44;***
2. ***Rogan v. South Eastern Health and Social Care Trust [2009] NICA 47;***
3. ***Orr v. Milton Keynes [2011] ICR 704;***
4. ***Turner v. East Midlands Trains Limited [2012] EWCA Civ. 1470;***
5. ***J Sainsbury PLC v. Hitt [2003] ICR 111; and***
6. ***Brito-Babapulle v. Ealing Hospital NHS Trust [2013] IRLR 854.***

ISSUE

The principal issue for determination by the Tribunal is whether the Respondent's dismissal of the Claimant was fair in all the circumstances.

THE LAW

Under section 29 (1) of the Employment Rights Act, 2012 ("the Act") the employer bears the evidential burden. It is for the employer to show:

1. *The reason, or, if more than one the principal reason, for the dismissal; and*

2. *That the reason either falls within subsection (2) or must be some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*

Section 29 (2) provides, *inter alia*, that

"*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."*

Where the employer satisfies the requirements of sections 29 (1) and 29 (2), it is for the Tribunal to determine, in accordance with section 29 (4):

i) *whether the employer acted reasonably in treating the reason given for dismissal as a sufficient reason for dismissing the employee; and*
ii) *whether the employer complied with the procedures set out in the Fourth Schedule, Part A.*

Section 29 (5) further provides that the Respondent is not entitled to dismiss the employee for any reason related to the capability of the employee to perform any work or the conduct of the employee without informing the employee of the accusations 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 of the Fourth Schedule.

REASON FOR DISMISSAL

The Respondent asserted that on September 14, 2013, whilst in charge of its Heroes Square branch, the Claimant received the cheque and cashed and deposited that cheque to the Respondent's account at CIBC FirstCaribbean International Bank (Barbados) Limited. The Respondent contended that the Claimant failed to explain how the cheque was received, cashed and deposited and, as a consequence, the Respondent suffered loss, in that the Respondent had to reimburse Ms. Ward the sum of $40.00, the amount of the cheque.

The Respondent argued that at the commencement of his employment with the Respondent, the Claimant received mandatory training over the course of a six-month period, included in which was training in cash handling procedures. In addition, on February 27, 2012, the Claimant underwent training in the updated cash handling policies and procedures. Further, that the Claimant's failure to explain or lend clarity to the circumstances relative to the misappropriation of his co-worker's money amounted to negligence and carelessness involving the property of the restaurant or the business of the restaurant. Therefore, the Respondent's reason for dismissing the Claimant was related to his capability to perform work of the kind for which he was employed by the Respondent, as well as to his conduct.

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

The Respondent having fulfilled the requirements of sections 29 (1) and 29 (2), it is for the Tribunal to determine first, whether the Respondent acted reasonably in treating the Claimant's handling of the cheque as a sufficient reason to dismiss and, secondly, whether the Respondent complied with the procedural rules set out in Parts A and B of the Fourth Schedule.

SUBSTANTIVE FAIRNESS

Where the conduct of the employee is in issue, it is not for the Tribunal to consider the weight that was given or that ought to have been given by the disciplinary panel to the evidence on which it based its decision to dismiss the employee; that is the exclusive preserve of the disciplinary panel. ***(See X v. Ministry of Defence [2015] NICA 44***; and ***Rogan v. South Eastern Health and Social Care Trust [2009] NICA 47.***

Further, "*it is not relevant … for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through is reasonableness; and certainly…a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.*" *Per* Arnold J, in ***British Home Stores v. Burchell [1977] IRLR 379; [1980] ICR 303.***

In ***Iceland Frozen Foods Ltd., v. Jones [1983] ICR 17*** at ***24*** Browne-Wilkinson J noted that "*in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another*."

The Tribunal must consider "*whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable…The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a 'reasonable' employer might have adopted...An Employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice*." *Per* Aikens, LJ in ***Orr v. Milton Keynes [2011] ICR 704***. [1]

The general rule relating to dismissal for reasons relating to conduct are succinctly stated at paragraph 335 of Halsbury's Laws of England, 4th Edition, Reissue, Vol. 16:

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

[1] *See also 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.*

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

In ***Burchell***, Arnold J set out the correct approach to section 98 (4) of the United Kingdom's Employment Rights Act, 1996, which is identical to Section 29 (4) of the Act and is equivalent to Article 130 of the Employment Rights (Northern Ireland) Order 1996. His Lordship outlined a three-pronged test of reasonableness which the Tribunal should follow. This Tribunal, in applying that three-pronged test, must determine:

1. Whether the Respondent genuinely believed that the Claimant's failure to follow the cash handling procedure resulted in misappropriation of another employee's money as a consequence of which the Respondent suffered loss; and
2. Whether the Respondent had reasonable grounds for believing that the Claimant had failed to follow the cash handling procedures resulting in misappropriation of that money and loss to the Respondent; and
3. Whether the Respondent had completed as much investigation into the matter as was reasonable in the circumstances, when the Respondent determined that it would dismiss the Claimant.

The Respondent satisfies the first prong of the test. Mr. Harvey demonstrated in his witness statement as well as in his oral evidence that the Claimant was trained in the company's cash handling procedures and that he was familiar with those procedures, having served as an assistant manager for 14 years. The Respondent therefore believed that the cheque written to Ms. Ward and deposited by the Claimant bearing the signature "*O. Harris*", could only have been so deposited if the Claimant had failed to follow the cash handling procedures, and as a consequence thereof the proceeds of the cheque were misappropriated.

The Respondent also satisfies the second prong of the test of reasonableness. The Respondent based its belief that the Claimant had not followed the cash handling procedures on three main grounds. First, the Respondent had the cheque in its possession bearing the endorsement "*O. Harris*". Secondly, the irregularly endorsed cheque was processed by the Claimant, who prepared and verified the deposit and, thirdly, the Claimant offered no explanation for the irregularity, although no one else had reasonable access to the contents of the deposit bag until the seal was broken by bank personnel.

The Claimant had a duty to ensure the accuracy of the deposit and to account to the Respondent for the contents of the bag. Viewed objectively, the evidence would tend to support the Respondent's contention that the Claimant had failed to follow the cash handling procedures. The Claimant could not have "*verif[ied] that the information on the front and back of the cheque [was] correct*" as he was trained to do. If he had, he would have noticed the signature "*O. Harris*" on the back of the cheque.

A hypothetical reasonable employer seised of those facts could also have believed them to be reasonable grounds on which to conclude, on the balance of probabilities, that the Claimant was negligent or careless in his observance of the cash handling procedures. Consequently, the Tribunal finds that the Respondent has established that it had reasonable grounds for believing that the Claimant failed to follow the company's cash handling procedures.

In determining whether the Respondent has satisfied the third prong of the test, the focus of the Tribunal must be, not on whether the evidence was sufficient to establish to the satisfaction of the Tribunal that the Claimant misappropriated the cheque, but on whether the investigation into the circumstances surrounding the encashment and deposit of that cheque was reasonable. The Respondent must demonstrate that when it made the decision to dismiss, it had by then carried out a reasonable investigation into the alleged misconduct of the Claimant. An investigation will have been sufficient if it was the type of investigation which a hypothetical reasonable employer would have carried out. Whether or not an investigation was reasonable will depend on the circumstances of each case and on factors such as the size of the organisation and the employer's resources. The standard is objective rather than subjective.

Would a reasonable employer, having reviewed all of the evidence, have determined that there were reasonable grounds on which to conclude that the Claimant's failure to follow the cash handling procedures resulted in the misappropriation of the proceeds of the cheque, or would that hypothetical reasonable employer have investigated the matter further?

The Respondent contended that the cheque was endorsed "*in the Claimant's name"* and cashed, and that "*if the Claimant had inadvertently included the cheque made out to Donnalyn Ward*", there would have been a surplus of $40.00. While it was clear from the evidence that there was no $40.00 excess, there was also no evidence of a $40.00 shortfall. A deficit of $1.00 was recorded on the Claimant's shift while the earlier shift recorded a surplus of $0.80, resulting in an overall shortage of just $0.20. It is also possible that if the cheque had been inadvertently included in the night's tally and no cash was paid out in exchange, there would have been no deficit of $40.00.

Even though the Claimant revealed, and the Respondent ought to have been aware, that the Respondent's internal cheque delivery and safe-keeping arrangements were relaxed and susceptible to compromise, there is no evidence that the Respondent questioned any of the several other employees who were on duty on the Claimant's shift.

In her witness statement, Ms. Wallace swore that she could not "*recall being asked to cash a cheque made out to a person named Donnalyn Ward*", and was *"convinced"* that she "*did not cash any cheque for anyone named Donnalyn Ward on September 14, 2013*". Ms. Wallace told this Tribunal that "*no one came to the counter that night to have that cheque changed*." However, Ms. Wallace admitted that she wrote up and signed a description sheet at the end of her shift acknowledging receipt of two cheques totaling $191.96. Of that sum, $151.96 represented a cheque she cashed for another employee. The only other cheque in the sum of $40.00 deposited at the end of the shift was that which was payable to Ms. Ward.

Ms. Wallace also testified that cashiers "*are not allowed to cash cheques at the front counter. The Manager would watch me cash the cheque from my till in the office*." At no time did she state that the Claimant passed any cheque to her to be cashed during the balancing of the intake or at all, or that she paid the proceeds of any cheque over to the Claimant prior to signing her description sheet. Further, Ms. Wallace never claimed to have seen the Claimant remove any money from her cash till. The Claimant testified that the cashier alone had

access to the cash till. In addition, there is no evidence that the cashier's description sheet was altered after it was written up and signed by Ms. Wallace.

The whole tenor of the Respondent's communication with the Claimant and of its evidence before the Tribunal was that the Claimant pocketed the proceeds of the cheque. It is instructive that the Respondent's investigations were centered on a single employee: the Claimant. The Respondent argued that the Claimant was the only manager who failed to respond to an email circulated in connection with the missing envelope containing the cheque. Mr. Harvey labeled the endorsement of the cheque a "*deliberate*" act. While the invitation to the disciplinary hearing alluded to the "*unauthorized cashing of a co-worker's cheque*", Counsel argued that dismissal for failure to follow the cash handling procedures was a "*much milder… reason than cashing a fellow employee's cheque*". 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 was theft.

Not only does an accusation of theft have implications for the Claimant's future employment prospects, it also imputes criminal conduct to him. Therefore, a reasonable employer "*should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation*." (***See Turner v. East Midlands Trains Limited [2012] EWCA Civ. 1470 at paragraph 20.)***

Counsel argued that the issue before the Tribunal was "*the fact that the Respondent went too far in the investigation*"; that the Claimant said that it was "*just too much*". We do not agree with her interpretation of the Claimant's arguments. The Claimant testified that he was "*bull-rushed*" by the Respondent at the first meeting. He claimed that he felt disadvantaged, having been interrogated by three senior managers for 1 ¼ hours without prior notice of the specific allegations against him. He characterised the Respondent's first meeting with him as "*over-kill*". The Claimant contended that the Respondent stopped its investigation at him and sought no further answers "*to arrive at the truth*". In his estimation, the investigation did not go "too far"-it simply did not go far enough.

In ***J Sainsbury PLC v. Hitt [2003] ICR 111***, which also involved allegations of theft, even though there was uncontested evidence that the employee had an opportunity to steal items which were later found concealed in his locker, the employer did not limit its investigation to that evidence. The employer took statements from persons whom the employee identified as having access to, and being potentially culpable in planting the stolen items in, his locker. In spite of the fact that *Sainsbury* eliminated those other employees, the employer still adjourned the disciplinary hearing for two weeks to facilitate further investigation.

It was held that the employer was "*reasonably entitled to conclude on the basis of such an investigation, that Mr. Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out*."

The Court of Appeal determined in that case that "*[t]he investigation carried out by Sainsbury was not for the purposes of determining as one would in a court of law, whether*

Mr. Hitt was guilty or not guilty of the theft of the razor blades. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part."

In comparison, the Respondent in the instant case limited its interviews to the Claimant and the cashier, and does not appear to have looked beyond the documents which formed part of the deposit history of September 14, 2013. Although the Claimant consistently denied that the signature on the cheque was his, or that he misappropriated the proceeds of the cheque, the Respondent neither acted upon, nor responded to the Claimant's formal demand that the Respondent refer the matter to a handwriting expert or, alternatively, file a report with the Royal Barbados Police Force.

A reasonable employer might have inferred from the available evidence that it was more probable than not that the Claimant was careless in that he neglected to verify the accuracy of either the information on the front and back of the cheque, or the amount for deposit. However, a reasonable employer, having considered the Claimant's vigorous denial of misconduct, the inconsistencies in the cashier's statement and her description sheet, and the fact that the Claimant's integrity (as far as the evidence revealed) had not been previously questioned, would not have limited its investigation to confirming that the Claimant had not followed the cash handling procedures. A reasonable employer would have enquired further into the matter to determine whether, on the balance of probabilities, there were reasonable grounds on which to conclude:

(i) that money had been misappropriated; and
(ii) that it was more probable than not that the employee had either misappropriated that money or was complicit in the misappropriation of that money or, alternatively;
(iii) that the employee's carelessness or negligence facilitated the misappropriation of that money;
(iv) that the money which the employer paid out was money that it was forced to reimburse the payee of the cheque, rather than money it would in any event have had to pay on encashment of the cheque; and
(v) that the employer had in fact suffered loss.

A reasonable employer would also have sought to ascertain why an experienced employee intent on stealing his co-worker's money would have endorsed that cheque with his own signature, rather than with that of the payee.

In the circumstances, the Tribunal concludes that when the Respondent made the decision to dismiss, it had not carried out as much investigation into the matter as was reasonable, even though, in our opinion, the Respondent had the resources necessary to do so.

PROCEDURAL FAIRNESS

The Tribunal must also consider whether the Respondent acted within the band of reasonable responses in determining that dismissal was a fair sanction in all the circumstances. This entails consideration of the disciplinary procedures adopted by the Respondent to ascertain whether those procedures were in conformity with the statutory requirements.

1. Dismissal and Disciplinary Procedures under Part A

Part A of the Fourth Schedule specifies that the employer should apply progressive disciplinary action. The rules which an employer must take into consideration under section 29 (4) (b) include the following:

> *(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 warning or both should be utilized before stronger forms of disciplinary action are implemented; and*
>
> *(d) Where a 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."*

The Respondent relies on clause 11 of the Code of Discipline in support of its decision to dismiss the Claimant. That section states in part, that the sanction for "*[n]egligence or carelessness… to the provision, equipment or property of the restaurant or to the business of the restaurant*", is dismissal for the first offence.

Mr. Harvey testified that the Claimant's conduct was so egregious that a warning would not have sufficed. He asserted that the Claimant's conduct went beyond clause 10 of the Code of Discipline, which sets out a three-tiered disciplinary process for "*negligence, incompetence or carelessness in performance of duty*." According to Mr. Harvey, specific examples are given of the types of offence which would fall under that clause, namely, "*loafing on the job or wandering off without permission*", offences which in his opinion are far less serious than failing to follow the cash handling procedures. We interpret clause 10 disjunctively, and treat the offences captured by that clause as separate and distinct. Neither loafing nor wandering implies incompetence, negligence or carelessness.

Mr. Harvey found it difficult to identify the types of offence which the relevant part of clause 11 contemplates. The Claimant believed that the offences falling under this part could include "*something that would have a negative impact on the business or money, something related to money?*". The language of the code of discipline must be unambiguous, particularly where the only sanction for an offence is dismissal. It must be clear to each and every employee, management included, what conduct, in the view of a particular employer, will merit automatic dismissal. Counsel asked the Tribunal to determine whether the Claimant was guilty of gross misconduct. We are not prepared to speculate as to what offences are captured by the relevant part of clause 11, the language of which is vague.

On the other hand, the following stipulation specific to breaches of the Respondent's cash handling policies is set out at page 15 of the Manual under the rubric "Float Procedures-Managers":

> "*Failure to follow the [cash handling] procedures will be deemed a serious breach of Chefette Restaurants Limited's policies and will result in disciplinary action* ***up to and including*** *dismissal for EACH person responsible for the breach of the money handling policy.*" *(Emphasis supplied)*

It appears from the foregoing that the type of offence of which the Claimant was accused could result in dismissal, but that dismissal is not an automatic sanction for the first offence. In our view, that section of the Manual contemplates lesser forms of punishment, which might include an oral or written warning, suspension, reimbursement of lost money, or a combination of these, penalties which, according to the evidence of the Claimant, the Respondent has previously imposed on its employees.

Counsel submitted that the employer may rely on a code of discipline made a part of the employee's contract, and that the Conditions and Terms of Employment, 2010-13 were a part of the Claimant's contract. She relied on ***Halsbury's Laws of England, Fifth Edition, Vol. 40 at para. 628***. We concur with her submission. However, it is also stated in that paragraph, that "*[c]ontractual authority to dismiss, in the sense that a contractual disciplinary procedure lays down grounds for dismissal that cover the particular misconduct by the employee, does not necessarily make dismissal fair*."

Even where the evidence against an employee would justify a finding of gross misconduct, dismissal should not be an automatic response. The employer must consider any mitigating factors and balance these against the aggravating features of the employee's conduct: ***(See Brito-Babapulle v. Ealing Hospital NHS Trust [2013] IRLR 854.)***

The Claimant demonstrated by documentary evidence that he was an exemplary employee who received tokens of appreciation from the Respondent over the course of his 14 years of service. He also admitted that he received two written warnings during that 14-year period. He was exonerated in the first case, and even if the second warning could not have been treated as expunged from his record, his failure to follow the cash handling procedures should have been treated as only the second offence.

There is no suggestion that the Claimant was suspected of involvement in any prior acts of dishonesty. The Claimant's length of service and his otherwise clean record are also mitigating factors. It is our view that when the mitigating factors are balanced against the misconduct of which he was accused it was outside the band of reasonable responses to dismiss the Claimant for a first offence of that nature. In the premises, we find that the Respondent failed to apply progressive disciplinary action and, as such, did not comply with Part A of the Fourth Schedule.

2. Standard disciplinary procedures under Part B

Part B of the Fourth Schedule details two steps which an employer contemplating disciplinary action against an employee must take. The employer must:

1. *(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.

The meeting must take place before disciplinary action is taken and where reasonably practicable, within seven working days of the transmission to the employee of the statement or copy of the statement referred to in section 1(b).

2. (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).

a) Dispensing with Steps 1 and 2

The uncontested evidence of the Claimant was that on December 9, 2013, he was invited by telephone to a meeting on December 12, 2013 ("the first meeting"), that he was informed that the meeting related to his "*cash handling procedures regarding an incident which occurred while [he] was working at Chefette Heroes Square*", that he was not advised that he could bring a friend to the meeting with him and that he was neither provided with a statement of the accusations against him, nor with any witness statements on which the Respondent intended to rely.

The Respondent argued that it was not compelled to comply with steps 1 and 2 of Part B, because the initial meeting was not a disciplinary hearing, and the Respondent had not by that date contemplated taking disciplinary action against the Claimant. Accordingly, the Respondent contended that it was entitled to avail itself of Part B, section 4 which provides as follows:

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

Section 29 (5) of the Act stipulates that the Claimant must be given an opportunity to state his case prior to dismissal for a reason related to his capability to perform the work for which he was employed, or for a reason related to his conduct. If the Tribunal accepts the Respondent's argument and concludes that the first meeting was not in the nature of a disciplinary hearing, we need not go any further. If that first meeting was not a disciplinary hearing, and the second, scheduled for December 30, 2013, was abandoned without a hearing having been conducted, and the third meeting did not take place, it follows that the Claimant

was dismissed on January 27, 2014, without the benefit of any hearing, in contravention of section 29 (5). We do not accept the Respondent's argument.

Part B, section 4 of the Fourth Schedule tolls the applicability of sections 1 and 2 of that Part "*until the employer contemplates taking disciplinary action against the employee*." To avail itself of that exception, the Respondent must:

i) have suspended the Claimant with full pay; and
ii) not yet have completed an investigation into the Claimant's alleged misconduct; and
iii) not yet have contemplated taking disciplinary action against the Claimant.

It is not disputed that the Claimant was suspended with full pay following the first meeting. Accordingly, the Respondent satisfies the first of these three conditions. However, in our view the Respondent has not fulfilled the second and third conditions.

The Respondent argued that an investigation was still pending at the date of the Claimant's suspension. The Respondent alluded in support of that contention to the Claimant's demand for an independent investigation. That argument carries no weight. By the date of the first meeting, the Respondent had undertaken approximately one month of investigations, interviewed Ms. Wallace and reviewed the documents related to the September 14, 2013, intake and deposit.

Mr. Harvey informed the Tribunal that the investigation was completed approximately two weeks after the first meeting. Despite that assertion, the Respondent did not disclose either the focus, or the result, of any further investigations it might have conducted after December 12, 2013. It also did not take either of the steps suggested by the Claimant. It is therefore reasonable for the Tribunal to conclude that the Respondent had completed its investigation as early as December 9, 2013, when the Claimant was invited to the first meeting.

We are also of the view that the Respondent had already contemplated taking disciplinary action against the Claimant when he was invited to the first meeting. The Claimant testified that he was asked to produce three samples of his signature for comparison with the signature on the cheque. Mr. Harvey stated that up to the date of the meeting, the Respondent had not contemplated disciplinary action because the Respondent "*was still to be convinced that the signature on the ... cheque may not have been*" that of the Claimant. That statement is implausible. It is inconceivable that after 14 years in the employ of the Respondent, three of the Respondent's senior managers, including the Claimant's immediate supervisor, would still have been unfamiliar with the Claimant's signature. Even if we accepted Mr. Harvey's testimony, we would still have to reconcile that assertion with the Claimant's evidence that Mr. Harvey declared that the signature "*was his or looked just like his*", a statement from which one may reasonably infer familiarity with the Claimant's signature. Six weeks after that meeting, having disclosed no new or additional evidence to the Claimant, the Respondent dismissed the Claimant.

That reliance on the very evidence which was disclosed to the Claimant at the first meeting as the basis for his dismissal is sufficient to persuade us that the first meeting was not merely part of the investigative process, but that it was in fact a disciplinary hearing. By the date of

that meeting, an investigation had not only been initiated, but had already been concluded and the Respondent was contemplating taking disciplinary action against the Claimant. In the circumstances, section 4 of Part B is not applicable in the instant case.

While the first meeting took place before disciplinary action was taken against the Claimant as stipulated in Part B, Section 2 (1) (a), prior to that meeting, the Respondent failed to provide the Claimant with a written statement or to advise him of his right to have a friend present at that meeting. Having failed to disclose the basis for the allegations against him until the meeting was in progress, the Respondent did not afford the Claimant a reasonable opportunity to consider a response to the accusations against him.

b) Right to attendance of a friend or representative at disciplinary hearing

We are not persuaded that the invitations sent by the Respondent to the Claimant to attend meetings on December 30, 2013, and January 13, 2014, respectively, complied with the requirements of sections 1 and 2 of Part B of the Fourth Schedule.

Following the first meeting, the Respondent, by letter dated December 23, 2013, invited the Claimant to attend a meeting on December 30, 2013 ("the second meeting"). The Claimant was accompanied by Mr. N. Keith Simmons Q.C., Attorney-at-Law. Mr. Harvey testified that Mr. Simmons argued that the Claimant had no case to answer because the Respondent had not followed step 2 (2) (a) (i). The Respondent agreed to reschedule the meeting notwithstanding the fact that it did not agree with the Claimant's position.

The Respondent argued that as a manager, the Claimant was not a member of a trade union and as such the Respondent was not obligated to inform the Claimant that he had a right to have a shop steward present at the meeting. Under cross-examination by counsel for the Respondent, the Claimant contended that the Respondent had no way of knowing whether or not he was a union member. Absent proof of union membership, the burden of which was on the Claimant, the Respondent was under no obligation to inform him that he had a right to have a shop steward present at the meeting. The Claimant's ground for objecting to the second meeting was therefore without merit. We find that while the Respondent was not in breach of section 2 (2) (a) (i), the Respondent did contravene sections 1 (a) and (b) of Part B of the Fourth Schedule.

c) Duty to provide written statement of allegations against the employee

Counsel for the Respondent contended that the letters inviting the Claimant to disciplinary hearings on December 30, 2013, and January 13, 2014, "*were in conformity with the requirements of the Fourth Schedule of the Employment Rights Act because it (sic) informed the Claimant of a reason for the meeting and stated that he may bring a friend*."

In its letter dated December 23, 2013, the Respondent failed to properly inform the Claimant of the allegations against him. The letter merely stated that the purpose of the meeting was "*to discuss the investigation of the unauthorized cashing of a co-worker's cheque*." The letter did not identify the subject of the accusation, nor the grounds on which the accusation was based. It did not specify the particular cash handling procedure or procedures which the Claimant was alleged to have breached. The letter was vague and, contrary to Counsel's

assertion, did not comply with the step 1 requirements. The Respondent had a duty to present to the Claimant a comprehensive statement setting out all the evidence, including witness statements, on which it intended to rely at the disciplinary hearing, whether or not that evidence was potentially incriminating or exculpatory.

The letter of invitation to the third meeting was dated December 30, 2013, and was virtually identical to the first letter, except that the Respondent extended the invitation to attend the meeting "*to a representative or shop steward*." The addition of those six words was not curative. The letter was still defective. It did not meet the requirements of section 1(a) and (b) of Part B of the Fourth Schedule.

d). Non-attendance by the claimant at a disciplinary hearing

Section 2 (3) of Part B provides that the employee "*must take all reasonable steps to attend the meeting*."

The Claimant did not attend the third meeting. He informed the Tribunal that he received the letter "*about three or four days*" before the scheduled date of the meeting, which did not afford him sufficient time to properly prepare for the meeting. However, the Claimant admitted under cross-examination that he and his attorney-at-law chose not to attend that meeting even though, by letter dated January 10, 2014, addressed to the Respondent, Mr. Simmons wrote, that "*I have advised my client that he should take all reasonable steps to attend as a matter of courtesy*."

The Respondent argued that the letter should have reached the Claimant well in advance of the date of the disciplinary hearing. No evidence was led to establish when the letter was in fact dispatched. The onus was on the Respondent to prove that the Claimant would have received the letter within a reasonable time and that he had a reasonable opportunity to prepare for the meeting. The Respondent could have met its burden by exhibiting the registration receipt issued by the Barbados Postal Service. The registration receipt was not produced. Accordingly, we are not persuaded that the Respondent has discharged its burden.

Counsel placed considerable emphasis on the Claimant's failure to attend the third meeting on January 13, 2014. However, there is no statutory sanction for an employee's failure to attend a disciplinary hearing. In the instant case, the Claimant's failure to attend the meeting is outweighed by the Respondent's duty to ensure that the Claimant was advised of the accusations against him and that he was given a reasonable opportunity to respond to those charges. Even if he did timely receive the letter summoning him to the third meeting, the effect of the Respondent's failure to advise the Claimant of the accusations against him or the grounds on which those charges were based is that the Claimant was not afforded an opportunity to properly respond to the allegations against him.

e) Appeal against the decision to dismiss

While it is mandatory that the employer notify the claimant of his right to appeal, there is no corresponding mandatory requirement that the claimant appeal the decision of the employer to dismiss. Section 3 (1) of Part B of the Fourth Schedule provides that:

> *"Where the employee wishes to appeal, he must so inform the employer in writing, and follow the established disciplinary procedure of the workplace."*

Counsel for the Respondent emphasised that the Claimant failed to appeal the decision of the Respondent "*as required by the Employment Rights Act 2012*." Under Section 14(1) (b) (i) the Respondent ought to have provided the Claimant with a statement of employment particulars. In that statement, the Respondent should have specified the person to whom the Claimant could apply if he was dissatisfied with a disciplinary decision. The Act only requires an appellant to follow the established procedure of the workplace. No disciplinary appeals procedure is set out in the Respondent's Conditions and Terms of Employment 2010-2013 and the Respondent adduced no evidence of an established disciplinary appeals process. The Claimant could not therefore follow a procedure which did not then exist. The Claimant exercised his right of appeal by formally complaining to the Chief Labour Officer on March 7, 2014. The Claimant's failure to lodge an appeal with the Respondent is not, in these circumstances, an answer to his claim of unfair dismissal.

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. We also find that the procedural defects were so many and so fundamental that the Respondent can under no circumstances be found to have acted reasonably when on January 27, 2014, the Respondent dismissed the Claimant retroactive to January 13, 2014. We therefore hold that the Claimant's contention that he was unfairly dismissed on January 27, 2014, is well-founded. Accordingly, the claim succeeds.

COMPENSATORY AWARD

If neither reinstatement nor reengagement is practicable, the Claimant is entitled to compensation in the sum of **$106,630.01** calculated in accordance with the Fifth Schedule as follows:

- Basic Award

3 weeks' wages for 14 years being the sum of (i.e. $2,233.91x14)	$ 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, 2016 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 x4 weeks x 9.5 months)	$ 11,710.08
Total	$ 106,630.01