

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 9 of 2007

BETWEEN:

COLET ACHAM

Employee

and

CARIBBEAN STAR AIRLINES LTD

Employer

Before:

**The Hon. Philip A. Pilgrim
The Hon. Ms. Glendina McKay
The Hon. Dr. Hayden Thomas**

**President
Member
Member**

Appearances:

**Mr. George Lake of Lake & Kentish for the Employee
Mr. Hugh C. Marshall & Mrs. Cherissa Roberts -Thomas, of
Marshall & Co. for the Employer**

**2008: January 09
2008: November 27**

JUDGMENT

PILGRIM, P;

INTRODUCTION

1. The Employee Colet Acham (hereafter sometimes referred to as ("the Employee")) is an airline pilot by profession. On June 06, 2001 he obtained employment with Caribbean Star Airlines Limited (hereinafter)

sometimes referred to as (“the airline” or “the Employer”) in that capacity. He worked with the airline transporting its passengers and cargo to several Caribbean destinations.

2. The Employee’s employment with the Employer was terminated by letter dated October 18, 2004. It was exhibited as “GG1.1”. It states as follows:

“October 18, 2004

Mr Colet Acham

Antigua

Dear Mr. Acham,

Reference is made to the Company’s Operations Manual Vol. 6, Policy and Responsibilities, 1.23 Co-Pilot Off Probation – Permanent Employee, whereby in accordance with industry standards and guidelines, our pilots are required to undergo and pass certain periodic testing to ensure that aviation safety requirements are met and that they are suitably qualified and capable of exercising their duties to the requisite standards.

We are indeed very sorry that you were unable to meet these requirements, but as you know, our obligation in the airline industry is strict adherence to regulatory and safety standards. We cannot deviate from procedures and in this regard your services will be terminated effective October 15, 2004.”

3. A Reference and the Employee's Memorandum were both filed by the Employee's Attorneys-at-Law on August 9, 2007. In the Employee's Memorandum, the Employee claimed that he was unfairly dismissed and claimed compensation under the headings of (a) loss of protection, (b) immediate loss of earnings, (c) loss of future earnings, (d) loss by reason of the manner of dismissal and (e) loss of fringe benefits.
4. The basis for the submission that the Employee's dismissal was unfair is outlined at paragraph (4) of the Employee's Memorandum. It states as follows:

“4. The Employee challenges the fairness of this dismissal and asserts that based on his performance during his term of employment and the terms of the agreement reached between the Employer and the Caribbean Star Airline Pilots Association which represents the pilots employed by the employer, regarding the procedure to be adopted by the employer in regards to any pilot receiving an unsatisfactory grade for any simulator re-currency training, the employer had no basis for effecting a dismissal for just cause.”

Counsel also submits that upon other grounds which are contained in his Written Submissions the Employee's dismissal was unfair. These grounds are particularised at paragraphs [64 to 69] hereunder. Particulars of the Employee's Damages were filed on October 1, 2007.

5. On October 12, 2007 with both parties appearing, this Court granted leave to the Employer to amend its Memorandum in the manner which is

set forth in its Amended Employer's Memorandum which was filed on November 5, 2007.

6. The Employer contends in its Employer's Memorandum that the Employee was fairly dismissed due to his failure to pass a Base Check which rendered him incapable of flying pursuant to the Civil Aviation Act No.25 of 2003 and Regulation 2.1.4.11 and 8.10.1.20.
7. On October 8, 2007 a Witness Summary was filed by the Employee. On the same day, Witness Summaries were also filed on behalf of the Employee by Pilots Caesar Haynes, Ricardo Sealy, Paterson Thompson and Keith Thompson, all former employees of the airline.
8. On October 9, 2007 Counsel for the Employer filed its Witness Summary for Gerry Gill, Chief Pilot on behalf of the Employer. On November 5, 2007, another Witness Statement, on behalf of the Employer was filed for Brian Sanguinette of the Eastern Caribbean Civil Aviation Authority.

THE FACTS

9. Whilst employed as a Pilot with the airline the Employee worked for Ten thousand East Caribbean dollars (EC \$10,000.00) per month plus per diem and travel expenses. No figures of these travel expenses were ever produced. According to his Witness Summary, he asserts that after his dismissal he was unemployed for five (5) months. No evidence was given of any attempts which he made to mitigate his loss after being dismissed.

10. The Employee also asserts that he relocated his family to Canada in search of employment. In this regard, according to his Witness Summary, ***“his wife had to resign her employment at Stanford Financial Group of Companies where she earned a salary of \$4,500.00 per month.”*** According to him, she was unable to find employment for over twelve (12) months. He stated that he incurred costs to relocate to Canada in the sum of Three thousand, five hundred United States dollars (US \$3,500.00). He obtained employment in Canada from August 2005.
11. The Employee gave evidence in support of his claim on January 9, 2008. He stated *inter alia* that subsequent to his dismissal from the airline, he obtained employment as a Training Captain with Porter Airlines in Toronto Canada. He also became a Simulator Instructor employed by Flight Safety Canada and a Training Centre Examiner. In answer to Counsel for the Employer, he stated that he earns approximately Canadian Six thousand, six hundred dollars (\$6,600.00) per month as his combined net salaries from Porter Airlines and Flight Safety Canada.
12. His Witness Summary was admitted into evidence. He stated that he was aware of a meeting which was held on May 25, 2004 between representatives for the Pilots and the Employer. This meeting dealt with simulator training for Pilots and First Officers which was conducted on behalf of the Employer. He further states that he was aware of ***“the decisions made at the said meeting regarding persons in receipt of a form letter issued to persons who failed re-currency training check ride”***.
- See Paragraph 3 of his Witness Summary

13. The Employee was of the view that *“as early as January 2004, there had been serious concerns and complaints from both instructors and pilots regarding the simulator training [programme].”*

- See Paragraph 3 of his Witness Summary

14. In answer to Mr. Marshall Counsel for the Employer, the Employee stated that he undertook flight training in a simulator in Atlanta in the form of a Base Check. This took place on May 17, 2004. He failed this Base Check. The Base Check Record reveals that Captain G. Frederick was the examiner.

- See Exhibit GG1.4

15. He further stated that he obtained retraining on May 16, 17 and 18, 2004. This consisted of (a) one hour 30 minutes of flight training, (b) one hour 10 minutes of ground briefing to cover defective areas, (c) one hour 30 minutes of flight training and (d) **“Ground training covering failed items”**.

– see Exhibit GG1.4

16. The Employee undertook another Base Check on May 18, 2004. He failed this Base Check. Captain G. Gill was the examiner.

17. He was granted further training on June 20, 2004. This took the form of one hour 45 minutes of different aspects of flying procedures.

18. On June 21, 2004 he successfully completed the tasks mentioned in a Base Check and was declared as competent to act as Co-Pilot on the D H C -8 Aircraft. The examiner was Caesar Haynes. This test took place in a

simulator in Atlanta. The Employee stated that he was at that time a Permanent Employee. He was referred to paragraph 1.23 of the Airline's Training Manual entitled "**Policy and Responsibilities.**" This section deals with training for Co-Pilots of which the Employee at the material time was employed in that capacity with the airline.

19. On October 10, 2004 the Employee undertook a Base Check. The examiner was G. Gill. The Employee failed this Base Check. According to the airline, failure of this Base Check allowed it to dismiss the Employee fairly in accordance with Section 1.23 of its Training Manual.
20. Section 1.23 of the Employer's Operations Manual which governed its operation for the training of Co-Pilots of which the Employee was one so employed states as follows:

***"CO-PILOT OFF PROBATION – PERMANENT
EMPLOYEE***

A Co-Pilot who fails a Base Check shall be given ground instruction on all phases of the Base Check until the Training Captain is satisfied that the Co-Pilot is fully conversant with the check. Flight training encompassing areas that were failed and any other areas in which the Training Captain determined weakness in the ground instructions will be given. This flight training shall not exceed 1hr. 30 min. The Co-Pilot will be given a second Base Check (reassessment). If this check is failed, a third and final Base Check will be given, if this is failed, employment shall be terminated. The initial Base Check

and reassessment Base Check are to be carried out by three different Training Captains.

If either the second or third Base Check is passed, a Base Check reassessment shall be carried out in three months.

If this is failed, employment shall be terminated.

Where reassessment is necessary, the Training Captain must complete a "Recording of Company Checks" form and pass it to the SOCC who in turn will schedule the reassessment (Base Check) within the three-month period."

21. According to the Employee, he stated that an agreement between the Pilots including himself and the airline was in existence. This agreement dealt with the use of simulator training and the ability of the airline to discipline its pilots.

22. Firstly, according to him the terms of this agreement are set out in a Witness Summary of Mr. Keith Thomson at paragraphs (4) and (7) thereof. They state as follows:

"(4) That he was aware it was decided that persons in receipt of such a letter would not be disciplined as a result and would in fact be entitled to (2) two additional training sessions and a check ride. That a number of Pilots received these similar letters during the month of April, 2004, which necessitated the need for the meeting of May 25, 2004.

(7) *That he was never informed that the agreement of 25th May, 2004 was no longer in effect. That at all material time(s) he understood that he was subject to the terms of the agreement made on 25th May, [04] (and not 2007 as stated)."*

23. Secondly, he gave evidence which in his opinion supported his view that there was an agreement between himself and his Employer. According to him the agreement varied the terms of Section 1.23 of the Employer's Training Manual.
24. In answer to Mr. Lake he stated that his understanding of the company's policy and procedure was at variance with paragraph 12 of Gerry Gill's Witness Summary. At paragraph 12 of Mr. Gill's Witness Summary he stated *inter alia* that in his opinion the Employee was rightly dismissed in accordance with the relevant Civil Aviation Regulations, the terms of the Employee's agreement and the Company's Policy as contained in the Training Manual. According to the Employee, there was nothing in the Regulations which prohibited him from receiving an additional Check Ride.
25. In further response to Mr. Lake the Employee stated *inter alia* thus:

"I understand that there was an agreement between the pilots and Caribbean Star that no disciplinary action would be taken on the basis of failing a check ride or a flight test."

26. He then gave several responses to Mr. Marshall, Counsel for the Employer with respect to his regard and opinion of the Employer's use of simulator training and his understanding of the agreement which he opined was effective between himself and the Employer from May 25, 2004. He stated *inter alia* as follows:

"I was fired for failing a base check on a simulator machine. Failing a flight test prevented me from flying an aircraft which I was employed to do on 18 October, 2004. I got the dismissal letter. After I failed the flight test, I assumed that I would be given another chance to do the flight test. I also was aware of the meeting held between the two (2) parties that I would not be disciplined which resulted in my understanding that if I failed a flight test, I would be given two (2) additional training sessions and a chance to do the flight test. Even if I failed another flight test after being given two (2) additional training sessions, I would still not be disciplined in any way. I did not attend the meetings. I got no correspondence from the Employer which stated that if I failed a simulator test, I would have been given other chances to pass this test. The Chief Pilot of the Employer was responsible for employment of line pilots like myself. He never told me of this agreement."

27. He further told the Court that a Base Check is administered by an airline bi-yearly. It can be done in an airplane or in a simulator.

28. In answer to Mr. Marshall as to how many Base Checks he could fail before the company could terminate his contract for failure to pass such a test he stated *inter alia* as follows:

“My understanding was that I would have been given two additional 2 hour training sessions in the simulator. After the two (2) hour training sessions, then a flight test or a base check in a simulator would have been administered.

I got this from the meeting from Mr. Paterson Thompson. My understanding was that if I failed any flight test, I would not be terminated. My understanding was that the time given for the simulator training was inadequate. My understanding was that Caribbean Star would not terminate my employment for any failures of Base Checks. My understanding was based on a conversation probably with Paterson Thompson. I am not sure who told me. My understanding was that even if I failed a flight check, no disciplinary action would be taken against me.”

29. In further answer to Mr. Lake he stated *inter alia* as follows:

“My understanding was that if I failed a Base Check either in a simulator or an airplane, my employment would not be terminated. There were 3 different Training Captains who trained me.”

30. The third way how the Employee sought to state that an agreement existed between himself and the Employer from May 25, 2004 to vary Section 1.23 of the Employer's Training Manual that (a) no disciplinary action would be taken by the Employer against this Employee and (b) this Employee would be granted additional training sessions and thereafter be tested is contained in the Witness Summaries of certain former pilots who attended the meeting of May 25, 2004 and in their evidence.
31. The first pilot who gave evidence was Keith Thompson. A Witness Summary was sworn to by him on October 5, 2007. He stated in his Witness Summary that in May 2004 he was the Acting Chief Pilot for the airline. He referred to a meeting which took place on May 25, 2004 between certain representatives of the airlines and the pilots. The meeting was scheduled according to him to deal with the testing of pilots in simulators. He opined that problems existed which questioned the accuracy and reliability of the simulator tests. Until these challenges were dealt with, it was his opinion that the pilots "*should not be subject to such disciplinary sanctions as a result.*"
- See his Witness Summary at paragraph 3.
32. He stated that the pilots were represented at the meeting by Captains Caesar Haynes, Elliot Streete and First Officer Paterson Thompson. According to Mr. Thompson, the company was represented by the Chief Executive Officer, Mr. Paul Moreira, Director of Human Resources, Ms. Jan Surjusingh and himself as the acting Chief Pilot.

33. Mr. Thompson stated that a number of Pilots were in receipt of letters from the company which reminded them of the requirement to pass the requisite Base Checks, failing which in accordance with the Company's guidelines, they could be dismissed.
34. It was Mr. Thompson's opinion that *"the Company would not take any disciplinary actions against any Pilot in receipt of such a letter until such time as the Simulator Training Program was deemed as being adequate."* - See paragraph 5 of his Witness Summary. According to him, there was a further agreement. He referred to it at paragraph 6 of his Witness Summary. He states as follows:
- "6. It was further agreed that in addition any person in receipt of such a letter would also receive two (2) additional hours of adequate flight training followed by a check ride. I took notes of the said meetings at the time and retained them in my possession."*
35. In answer to Mr. Lake, Mr. Thompson referred to the evidence as contained in his Witness Summary.
36. Mr. Thompson's version of his understanding of an agreement between the pilots including the Employee and the airline was tested in cross examination by Mr. Marshall Counsel for the Employer. He stated *inter alia* as follows:
- "If a pilot is given a check ride and he fails it and he gets another check ride and he fails it and then he gets*

training, if he fails the next check ride, he could be terminated. If he takes two (2) successive check rides and he fails both and is retrained in excess of three (3) hours and gets another check ride and passes, he should be given another check ride within three months. This is my understanding. Then if he fails this check ride, I have no understanding of what the company should have done in this case. My understanding about this was not clear. If a pilot continues to fail successive check rides, he cannot be put on staff."

37. He further told Counsel for the Employer that his understanding of the terms of the agreement between the two (2) parties was as follows:

"(i) Any pilot who had failed the simulator ride would be given additional training of two (2) hours followed by another check ride;

(ii) If he fails this check ride, the company would have the discretion to act as it thinks fit. This means that the company would have had the option of giving additional training or dismissing the employee. Additional training always has to be followed by another check ride to satisfy the authorities."

38. In further answer to Mr. Marshall this witness further stated *inter alia* as follows:

“Captain Gill was the Chief Pilot at the time. The Chief Executive Officer, Mr. Paul Moreira represented the Company. There is no letter on behalf of the company which affirms the agreement. I did not confirm the terms of the agreement. The company never confirms the agreement in writing.”

39. In re-examination by Mr. Lake he stated *inter alia* as follows:

“I see the bottom of a letter of May 29, 2004. No person at the bottom of that letter replied to disavow the agreement stated therein.”

40. Mr. Keith Thompson also made reference to some handwritten notes which he made ***“of the meeting of the 25th May, 2004.”*** These notes were exhibited by him. The Court read them. A reading of the relevant note which he says that he made of the agreement reads as follows:

“Without precedent or prejudice at the discretion of the training captain none of the pilot (who have received the letter) will be given an additional two hours training session followed by a check ride.”

41. Mr. Caesar Haynes was the next Pilot who gave evidence on behalf of Mr. Acham. His Witness Summary was filed on October 8, 2007. He referred to the meeting of May 25, 2004. He attended this meeting. At paragraph 5 of his Witness Summary, he referred to a decision between the company and the pilots that no pilot would be disciplined for

simulation failures. If a failure took place, then the pilot would receive two additional training sessions and a further Check Ride.

42. In his Witness Summary he also referred to a letter date June 23, 2004 which he wrote to the Employer. This letter concerned the reduction in Check Rides from 10 to 5. In answer to Mr. Marshall, he stated that this letter did not refer to Mr. Acham. In further answer to Mr. Marshall he stated *inter alia* as follows:

***“If a pilot is given two (2) successive check rides which he fails, he is retrained for more than three hours, is given another check ride and he passes, he is to be given another check ride within three months. If he fails that check ride the company’s right to fire the pilot would depend on the company’s policy at that time.*”**

43. In answer to the Court, Mr. Haynes stated that at the meeting of May 25, 2004, no decision was taken if the pilot failed the additional Check Ride.
44. Mr. Ricardo Sealy also gave evidence on behalf of the Employee. His Witness Summary was filed on October 8, 2007. It was his understanding that an agreement in terms of that stated by the other witnesses and Mr. Acham was effected on May 25, 2004.
45. He attended the meeting of May 25, 2004 in his capacity as Chairman of Caribbean Star Airlines Pilots’ Association. In this regard he wrote a letter to Captain Keith Thompson the then acting Chief Pilot. The relevant part of that letter states as follows:

“After several hours of discussion it was the Association’s understanding that the Company had re-thought [its] position on the matter and that the following was decided; Any pilot in possession of such a letter, or any pilot who in the future found him or herself in a position that the company deemed it necessary to furnish them with a similar letter would receive TWO (2) additional hours of adequate flight training followed by a check ride. As you may recall, in depth discussions were held on what the Association considered as adequate flight training. Additionally, it was our understanding that the aforementioned letters would not be used to support disciplinary actions against the pilots until such time as the Simulator Training Program was deemed as being adequate.

At the conclusion of this meeting, both the CEO and yourself assured the Association that a letter or an e-mail containing the aforementioned agreement would be furnished to this body on the 26th of May 2004.

As of today, the 29th of May 2004, the Association still patiently awaits said correspondence.”

(The emphasis is that of Mr. Sealy’s).

46. In his opinion according to the agreement at paragraph [41] hereof, Mr. Acham was not afforded the two (2) additional hours of training followed by a check ride in these circumstances.
47. In answer to Mr. Marshall, Mr Acham stated that no confirmation exists in writing to evidence the terms of the agreement referred to at paragraph [41] hereof.
48. Mr. Paterson Thompson also gave evidence on the Employee's behalf. His evidence was in the form of a Witness Summary filed on October 8, 2007. He referred to his understanding of the terms of an agreement referred to by the above witnesses and Mr. Acham.
49. The first witness to give evidence on behalf of the Employer was Mr. Brian Sanguinette. He is employed as an Operations Inspector with the Eastern Caribbean Civil Aviation Authority (ECCA). A Witness Statement on his behalf was filed on November 5, 2007.
50. He states at paragraph [1] of his Witness Statement that he has worked with the ECCA as an Operations Supervisor from November 2004. The Civil Aviation Regulations of Antigua & Barbuda were in his opinion responsible for the introduction of the use of synthetic flight training devices one of which is a full flight simulator. In his opinion if a pilot is found to be operating an aircraft having failed a proficiency check, then certain enforcement action may be taken against the pilot and the airline by the ECCA.

51. In answer to Mr. Lake he stated that if a pilot fails a test he may operate another aircraft. The ECCA does not prohibit the pilot from being retested.
52. Mr. Gerry Gill also gave evidence on behalf of the Employer. A Witness Summary on his behalf was filed on October 9, 2007. At all material times he was the Chief Pilot of the Company.
53. Mr. Gill stated that Mr. Acham was trained to fly the Dash 8 aircraft. He described simulator testing as *“primarily mechanical in that the purpose of an examiner is merely to record the results of the test produced by the simulator in response to the pilot’s performance.”*
- See paragraph 5 of his Witness Summary
54. According to Mr. Gill, simulator training was introduced by the company in or about October 2002 in anticipation of the mandatory requirement for such testing and training by ECCA. He outlined Mr. Acham’s tests in the simulator programme. As a consequence of his failure of the Base Check on October 18, 2004, it is Mr. Gill’s opinion that Mr. Acham was correctly dismissed.
55. In response to Mr. Lake, he stated that he was not aware of any meeting between the company and the pilots. He also stated that there was nothing in the ECCA Regulations which permitted the company to dismiss the employee. According to him, the Employer fairly dismissed the Employee based upon the airline’s policy. This policy was located in

the airline's Operations Manual at paragraph 1.23. - See paragraph 10 of Mr. Lake's Witness Summary.

The Issues

56. It is this Court's opinion that six (6) main issues fall to be determined:-

Firstly, does any evidence exist of an estoppel in the form of a representation or conduct by the Employer to the Employee that Section 1.23 of its Operations Manual was inoperative and that there existed an agreement dated May 25, 2004 between the Employer and the Employee which the Employee relied upon?

Secondly, whether the Employee's performance manifested any incapacity and if it did was the Employer required to give the Employee a written warning before it dismissed him. Were the requirements of C59 (5) of the Labour Code satisfied in this case?

Thirdly, whether Caribbean Star honestly and reasonably believed that Mr. Acham was incapable and had not demonstrated at the time of his dismissal that he was able to perform his duties in a satisfactory manner?

Fourthly, whether any defect existed in the procedure to dismiss this Employee and if so did it render the procedure intrinsically unfair?

Fifthly, was the overall process by which this Employee was dismissed fair or unfair?

Sixthly, if the Employee's dismissal was unfair, what is the measure of damages which should be paid to him?

The First Issue

Does any evidence exist of an estoppel in the of a representation or conduct by the Employer to the Employee that Section 1.23 of its Operation Manual was inoperative and that there existed an agreement dated May 25, 2004 between the Employer and the Employee which the Employee relied upon?

Principles of Estoppel

57. **"Estoppel" cometh of the French word "estoupe", from whence the English word stopped [is derived]. [It] is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead...." (2 Coke on Litt 352a).**

58. ***"'Estoppel' has been described as a principle of justice and of equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. The person making the statement, promise or assurance is said to be estopped from denying or going back on it; 'estopped' means 'stopped' ".***

-See Halsbury's Laws of England Fourth Edition (Reissue) Vol 16 (2) at paragraph 951 (hereinafter called "*Halsbury's*")

59. The common law principle of estoppel by representation is stated at **paragraph 957 of Halsbury's (op cit)**. The text states *inter alia* as follows:

“Where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.”

60. Promissory estoppel is an extension by equity of the common law principle of estoppel by representation referred to at paragraph 59 hereof. It is to be found at **paragraph 958 of Halsbury's (op cit)**. The learned authors describe the doctrine as follows:

“Promissory estoppel is an extension by equity of common law estoppel by representation. The principle of promissory estoppel is that, when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at

his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced.

Promissory estoppel may prevent a party to a contract from going back on a concession he has made to the other party and so may modify contracts in the sense of suspending or even extinguishing contractual rights but cannot stand alone as giving a cause of action in itself and thus has not made any general inroads into the doctrine of consideration.”

61. The legal principle of promissory estoppel was first enunciated in **Hughes v Metropolitan Railway (1877) 2 Appeal Cases 439 at page 448 HL** by Lord Cains LC. It obtained judicial approval by **Denning J in Central London Property Trust Ltd v High Trees House Ltd [1956] 1 All E.R. 256 n at 258n.**
62. A promissory estoppel therefore arises in circumstances where the following three criteria are met:
 - (i) there must exist a clear and unequivocal promise by Caribbean Star to Mr. Acham that the company’s strict legal rights as contained in its Operations Manual with respect to the training of Co-Pilots like Mr. Acham would not be insisted upon;
 - (ii) Mr. Acham has acted in reliance of the promise;

- (iii) as a consequence of the promise made by Caribbean Star, it would be unequivocal or unjust for the airline to resile from its promise.

63. *“Whether the promise is sufficiently clear and unequivocal to give rise to a promissory estoppel is an objective question.”*

- See Snells Equity, Thompson Sweet & Maxwell, 21st edition, London 2005 at paragraph 10-09.

THE EMPLOYEE’S SUBMISSIONS

64. Counsel for the Employee submits that a meeting took place on May 25, 2004. At this meeting, Mr. Paul Moreria the airline’s Chief Executive Officer, Ms. Jan Surjusingh and the Acting Chief Pilot Mr. Keith Thompson represented the airline. Messrs Caesar Haynes, Elliot Street and Paterson Thompson all pilots, represented the Pilots Association. According to Mr. Lake, Counsel for the Employee, *“it was agreed that [there] were problems with the program [me] and that until the matter was rectified no pilots would be disciplined as a result of their failure on the simulator and if a pilot fails any such simulator training exercise and would normally be in a position to be disciplined for such failure, at that time he will be given two additional training sessions and then be retested. The agreement was reached on the direction of Chief Executive Officer Paul Moriera at the said meeting.”*

- See paragraph 4 of Mr. Lake’s Written Submissions

65. According to Mr. Lake this agreement was requested by the Airline Pilots Association to “*be reduced to writing as promised by management.*”
 - See paragraph 5 of Mr. Lake’s Written Submissions
66. Mr. Lake further submitted that Mr. Acham was not informed by the airline “*that the Employer would [resile] from its promise not to enforce the results of the simulator training until such time as it was deemed satisfactory.*”
 - See paragraph 7 of Mr. Lake’s Written Submission
67. In such circumstances, Mr. Lake submits that the agreement referred to at paragraph 64 hereof has “**legal effect**”. By “**legal effect**” Mr. Lake submits that a promissory estoppel exists to prevent the airline from reneging from the terms of the agreement referred to at paragraph 64 hereof. In such circumstances the company was wrong to insist upon its rights as contained in the Operations Manual.
68. Mr. Lake in support of his submissions referred to the cases of **Amalgamated Investments & Property Co. Ltd v Texas Commerce International Bank Ltd. [1981] 3 All E.R 577; Combe v Combe [1951] 1 All E.R 767; Greenwood v Martins Bank Ltd. [1932] All E.R. Rep.318; [1933] A.C. 51; Ajayi v RT Briscoe (Nigeria) Ltd. [1964] 3 All E.R.556 and D. & C. Builders Ltd v Rees [1966] 2 Q .B.617.**
69. The first case cited by Mr. Lake was **Amalgamated Investments** (op cit). The evidence in favour of an estoppel in that case was described by **Lord Denning MR** as in fact “*overwhelming from the very*

moment” when the guarantee took effect between the two parties. This relationship and understanding continued between Amalgamated and the Bank “*for years*”. An estoppel was very easily held in favour of the Bank. Certain cases mentioned by Mr. Lake in support of his submissions under this heading make reference to certain principles. However, the facts of those cases are quite different to the case under consideration. An example of this is **Combe v Combe** (op cit) which mentions the promissory estoppel principle. It states that it does not create any new cause of action. In **Ajayi’s** case (op cit) the Privy Council held that the facts to support the defence of promissory estoppel had not been investigated at the trial. In **D. & C. Builders Ltd.** (op cit) the doctrine of equitable estoppel was held to be inapplicable in circumstances which are different to the facts under consideration. **Greenwood’s** case is referred to hereunder at paragraphs [87] and [88].

THE EMPLOYER’S SUBMISSIONS

70. Mr. Marshall submits that Mr. Acham was “*neither privy to this purported agreement, nor had he been provided with any reference to it by his Employer.*” It was Mr. Marshall’s opinion that Mr. Acham was properly dismissed in accordance with the Company’s Operations Manual.

- See Mr. Marshall’s Written Submissions at Paragraph 7.

FINDINGS

71. In an examination of the evidence to ground an estoppel in favour of the Employee, it is imperative to ascertain whether or not there was a clear, unequivocal, unambiguous and unconditional promise by the airline to the Employee that it shall not enforce the provisions of Section 1.23 of its Operations Manual. If such a promise existed, Mr. Acham would not be liable to be disciplined until the problems with the training programme were rectified.

72. In a determination of whether or not a promise existed objectively the question is whether the meeting of May 25, 2004, the letter of Mr. Ricardo Sealy dated May 29, 2004 addressed to Captain Keith Thompson the then Chief Pilot of the airline, Captain Keith Thompson's own handwritten notes of the meeting of May 25, 2004, and the conduct of both Mr. Acham and the Employer "***can reasonably be understood to contain that particular promise. It does not matter what (Mr. Acham) thought it meant nor does it matter what a layman might have thought.....unless, of course, that layman is a passenger on the Clapham omnibus.***"

- See **Seechurn v ACE Insce [2002] 2 LLR (CA) page 390 at page 397 paragraph 26 per Ward, L.J.**

73. In addition, the matters contained at paragraph 62 hereof would also be taken into consideration.

74. A party to a contract can state that he will not enforce a specific legal right by words or conduct. In this regard a party may do so expressly by words. Alternatively, he may do so by the adoption of a course of conduct which is inconsistent with the exercise of that right. In the

present case this Court finds that no evidence has been presented of any express representation by the Employer or any of its employees that the Employer would not enforce its legal rights in accordance with Section 1.23 of its Operations Manual in circumstances where it sought to institute training for its Pilots and Co-Pilots inclusive of Mr. Acham.

75. However, Counsel for the Employee submits that an estoppel does exist in this case. This is based upon (a) a promise made by the Employer and (b) the Employer's conduct.
76. The evidence in support of an estoppel in this case is manifestly unreliable, poor and unsatisfactory for the following reasons. Firstly, there is considerable doubt whether or not any agreement ever existed between the Company and the Airline Pilots Association for Mr. Acham's benefit as alleged by him or at all. The law requires the agreement to be "*a clear and unequivocal promise or assurance*" (see **paragraph 958 of Halsbury's (op cit)**). However, the representation need not be clear in its entirety. It will suffice if so much of the representation as is necessary to ground the propounded estoppel satisfies the requirement. Captain Ricardo Sealy's letter of May 29, 2004 addressed to Captain Keith Thompson, Acting Chief Pilot, was written in his capacity as Chairman of the Caribbean Star Airline Pilots Association. In this regard, his interest was firstly to serve the interest of the pilots, as opposed to the airline.
77. Captain Sealy's letter with reference to the meeting of May 25, 2004 refers to "*the Association's understanding that the Company had re-thought (their) position on the matter.*" Of course it is the Employee's

responsibility to put forward such evidence to prove the estoppel. I am not satisfied that Captain Sealy's "*understanding*" represented an unequivocal or any promise by the airline in terms that are set out in his letter of May 29, 2004.

78. Secondly, acting Chief Pilot Keith Thompson attended the meeting of May 25, 2004. At paragraph 6 of his Witness Summary he stated inter alia as follows:

"I took notes of the said meeting at the time and retained them in my possession".

Although Captain Keith Thompson averred at paragraph 3 of his Witness Summary notions of a forbearance on the part of the Company to institute certain '**disciplinary sanctions**' against any of its employee's, this is in direct contradiction to his own handwritten notes which are made reference to at paragraph 40 of this judgment.

79. Thirdly, the evidence which was led by Counsel for the Employee at the trial of this matter did not establish a clear and unequivocal promise or assurance by the employer that it would not invoke Section 1.23 of its Operations Manual in favour of Mr. Acham. Mr. Acham's own evidence with respect to any promissory estoppel fell very short of any agreement which he states was realised between himself and the Employer.
80. Captain Keith Thompson's testimony in cross examination to Mr. Marshall, Counsel for the Employer did not withstand the test of scrutiny. In answer to Mr. Marshall at paragraph [37] of this judgment, he agreed with Mr. Marshall that the Company could lawfully terminate Mr. Acham's employment in the manner that it did. His testimony that he has

“no understanding of what the company should have done” in circumstances where Mr. Acham was dismissed varies considerably with his testimony at paragraph [34] of this judgment that *“the Company would not take any disciplinary actions against any Pilots in receipt of such a letter until such time as the Simulator Training Programme was deemed as being adequate”*. His testimony is therefore unreliable to support the submission that Caribbean Star promised not to invoke Section 1.23 of its Operations Manual.

81. Captain Caesar Haynes also attended the meeting. His testimony is referred to at paragraphs [41-43] of this judgment. At paragraph 43 he stated that *“no decision was taken if the pilot failed the additional check ride”*. According to him if this took place *“the Company’s right to fire the pilot would depend on the Company’s policy at that time.”* His testimony is not supportive of an estoppel.

82. The matter of witnesses who contradict themselves in circumstances where the Court was required to decide whether an estoppel existed arose to be decided in **Clarke & Chapman v Hart (1858) 6 HL Cases 633; 10 E. R. 1443**. In this case the question arose as to whether or not certain expressions which the Respondent used were to be considered as estopping him from his right to question certain matters. Lord Cranworth stated *inter alia* at page 1458 as follows:

“According to the evidence, the two witnesses on one side are contradicted by two witnesses on the other. So that the words cannot be considered as being proved to have been used.....”

83. The evidence as led in support of an estoppel was in disarray and contradicts the assertion that any promise was made by the Employer as stated by Mr. Acham.
84. Had the Employee established that a promise was made by the Employer in circumstances that it would have been estopped from making use of Section 1.23 of its Operations Manual, the Employee would next have been required to prove that he acted in reliance on the promise, and as a consequence of the promise made by the Employer it would have been unjust for it to renege on its promise.
85. Under cross-examination by Counsel for the Employer most of the employees (with the exception of Captain Sealy and Mr. Paterson Thompson) agreed that the Employer could fairly dismiss the Employee in the circumstances that he was dismissed.
86. The evidence does show that this Employee undertook Base Checks prior to the meeting of May 25, 2004 and was granted training on June 20, 2004. On June 21, 2004 he successfully completed a Base Check and failed one on October 10, 2004. These actions of the Employee were entirely consistent with the Employer's requests to get him to comply with Section 1.23 of its Operations Manual, as opposed to any promise as alleged by the Employee. Consequently there is no evidence that this Employee acted on any promise made by the Employer in circumstances where it would have been unjust for the Employer to resile from its promise.

87. What Mr. Lake Counsel for the Employee submits at paragraph 7 of his Written Submissions is that the Employer did not inform the Employee that it *“would be [resiling] from its promise not to enforce the results of the simulator training until such time as it was deemed satisfactory”*. In support of this submission he cites **Greenwood v Martins Bank Ltd (op cit)**.
88. The **Greenwood** case is often relied upon to support a submission of estoppel by silence. In that case a customer of a bank discovered that someone had forged his signature upon some of his cheques, but failed to notify the bank immediately of this occurrence. The Court held that his failure to speak estopped him from subsequently asserting that the cheques were forged. The estoppel only arose because the relationship of the bank and the customer gave rise to a legal duty upon the customer to inform the bank of the forgeries. The duty was a duty to disclose a fact of which the customer had actual knowledge. This case therefore does not assist the Court in an examination of the principle of estoppel as it relates to the facts of this case.
89. (i) The law may impose a duty upon someone to act or speak in certain circumstances. **Halsbury’s’ Laws of England (op cit) at paragraph 1059** states the law in the following manner:
- “In the absence of a duty to speak, mere silence or inaction is not such conduct as amounts to a representation. If a person’s consent to a particular act is required, he may be under a duty, when he knows that it has been done without his consent, not to stand by for so long that others are induced thereby to do that*

from which otherwise they might have abstained; and he cannot afterwards question the legality of the act to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct.

A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former.....”

- (ii) The learned authors also state at paragraph 1059 *inter alia* as follows:

“With regard to promissory estoppel, mere inactivity is usually insufficient to attract the High Trees doctrine,.....”

90. The test in the context of direct dealings between two parties such as the Employer and the Employee in this case is that stated by Black CJ of the Federal Court of Australia in **Demagogue Party Ltd v Ramensky** (1992) 39 FCR 31, at page 32. Black, CJ stated *inter alia* as follows:

“Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure, the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive.... To speak of ‘mere silence’ or of a duty of disclosure can divert attention from that primary question. Although ‘mere silence’ is a convenient way of describing some fact situations, there is in truth no such thing as ‘mere

silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."

91. Where there is a continuing repudiation of certain matters, the significance of silence in this regard has been considered by the English Court of Appeal in **The August Leonhardt [1985] 2 LL Rep. 28**.
92. The question which falls to be considered is whether or not the Employer said or did anything from which the Employee could reasonably conclude that it would no longer be bound by Section 1.23 of the Operations Manual.
93. At paragraph 86 hereof the dates on which the Employee was tested are stated. This clearly indicates that the Employer continued to utilise the provisions of Section 1.23 of its Operations Manual. There is no evidence that the Employer said or did anything that it, as opposed to the parties, had agreed to act inconsistent with Section 1.23 of the Employers Manual.
94. The Employer's behaviour with respect to its simulator training programme prior to May 25, 2004 and thereafter has been consistent. It was resolute prior to May 25, 2004 and afterwards that in accordance with Section 1.23 of its Operations Manual with which this Employee

was bound to comply that this would continue to form the basis for simulator training of Co-Pilots of whom Mr. Acham was one.

95. This matter of an individual's consistent response to matters complained of fell to be considered in **Clarke & Chapman v Hart** (op cit). At page 1458 of the judgment, Lord Wensleydale stated *inter alia* as follows:

“From the very first he disputed the right of the Appellants to declare the forfeiture of his share; he has been complaining of them from that day to this, and it is impossible to regard his conduct as amounting to an implied agreement, or an implied representation that they might go on with the concern for their own benefit, and that he would not claim any share of the profits. I think, therefore, that part of the case of the Appellants entirely fails.”

96. Similarly in the “**August Leonhardt**” (op cit) Kerr L.J at page 35 stated *inter alia* as follows:

“The applicability of the doctrine of estoppel in any given case can also be tested in another way. There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties- his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that

extent at least, therefore, the alleged representor must be open to criticism. In the present case, however, Mr. O'Donovan's silence and failure to react to the letter of January 12, 1982, were not open to any criticism. He neither said nor did anything from which could be implied that he – let alone both parties – were acting on the common assumption that the charterers had given their consent to the extension of time. The position would have been crucially different if, after the letter of Jan. 12, Mr. O'Donovan had in some way manifested to Mr. Short his acceptance that the extension to Apr. 26, 1982, was in force between the parties, and if Mr. Short had thereupon further relied upon this. But there was nothing of the kind here."

97. The Employer's silence and its failure to respond to the letter of May 29, 2004 cannot in any way be faulted.
98. In summary, in all of the circumstances of this case, I respectfully disagree with Mr. Lake, Counsel for the Employee that any estoppel, by whatever name or description, is capable of being raised against the Employer. As the Employer's conduct is not open to criticism, there can also be no question of unconscionability as an ingredient of any form of estoppel.

The Second Issue

Whether the Employee's performance manifested any incapacity and if it did was the Employer required to give the Employee a written warning before he dismissed him. Were the requirements of C59 (5) of the Labour Code satisfied in this case?

THE EMPLOYEE'S SUBMISSIONS

99. Counsel for the Employee submitted that the Employer "*never furnished the Employee with a warning letter in regards to his potential dismissal*". No authorities were cited in support of his submission.

THE EMPLOYER'S SUBMISSIONS

100. Mr Marshall submits that the Employee was incapable of performing his duties. According to him C 58 (1) (b) of the Antigua and Barbuda Labour Code is the governing provision which the Court should take into consideration in the examination of the issue under this heading. No authorities were forthcoming from Mr Marshall to support his submission under this heading.

FINDINGS

101. Mr Acham gave evidence with regard to the Simulator Flight Testing. In answer to Mr Marshall Counsel for the Employer Mr. Acham stated *inter alia* as follows:

"A base check is a flight test which is administered by an airline every six months. It can be done in an

airplane or in a simulator. I did base checks with Caribbean Star Airlines on previous occasions. On prior occasions the first two or three were conducted in an airplane in Antigua. The last four were done in a simulator in South Carolina and in Atlanta. The base check which I failed was conducted in a simulator”.

102. The Employee’s evidence that he was subject to a Base Check every six months was corroborated by Captain Gerry Gill, Chief Pilot of the Employer.
103. The procedure which the Employer and the Employee utilised for the training of Co-Pilots who were permanent employees of which class Mr. Acham was a member is set out at Section 1.23 of the Employer’s Operations Manual. This is referred to at paragraph 20 hereof.
104. The dates on which the Employee was tested and/or training administered are outlined at paragraphs [14 to 19] of this judgment. His evidence is that *“failing a flight test prevented (him) from flying an aircraft which (he) was employed to do on October 18, 2004.”* He previously failed base checks on May 17 and 18, 2004.” In the Base Check of June 21, 2004 Captain Caesar Haynes was the examiner. Mr. Haynes noted as follows:

“Satisfactory performance
Critique ILS. At 500-400 fee in excess of ½ scale fly up
approach not stabilized in vertical plane. Exercise
repeated satisfactory.”

Captain Caesar Haynes' notes at the back of the Base Check conducted on June 21, 2004 were provided pursuant to the provision overleaf of the Base Check which reads as follows:

“Any failed item is to be accompanied by a long hand explanation on the reverse side.”

The Base Check of June 21, 2004 reveals that Captain Caesar Haynes allowed Co-Pilot Acham to repeat a part of the test after he had originally failed it so that he would be able to pass the Base Check.

105. The necessity to pass Base Checks bi-annually was critical to the ability of this Employee to continue to perform his duties as a co-pilot.
106. The English Employment Appeal Tribunal (E.A.T) in the case of **Alidair Ltd v Taylor [1977] I.C.R. 446** upheld by the Court of Appeal at **[1978] I.C.R. 445**, was required to adjudicate upon an airline pilot's faulty landing of an aircraft. The E.A.T. in the process of delivering its judgment commented upon the degree of professional skill which is required of a pilot. Bristow J. in delivering the Tribunal's judgment at **pages 453 and 454** stated *inter alia* as follows:

“In our judgment there are activities in which the degree of professional skill which must be required is high and the potential consequences of the smallest departure of that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal. The passenger-carrying airline pilot [etc] are all in the situation in which one failure to maintain the proper standard of professional skill can bring about a major disaster.”

107. In the circumstances Mr. Acham as a highly skilled professional pilot must have been aware of the standards of training which his Employer expected him to undergo and pass in the circumstances which are outlined in Section 1.23 of the Employer's Operations Manual.
108. However it is Mr. Acham's testimony that there was an agreement in place between the Employer and Caribbean Star Airline Pilots Association which benefited him. It is therefore necessary to examine Mr. Acham's testimony and those Witnesses who gave evidence on his behalf to determine the nature and extent of this agreement, its relevance to Section 1.23 and whether or not in this context a written warning of impending dismissal was necessary to be given to him.
109. Mr. Acham's evidence of the nature and extent of the agreement are outlined at paragraphs [24 to 29]. In his answer to Mr. Lake he stated *inter alia* as follows:

"I understand that there was an agreement between the pilots and Caribbean Star that no disciplinary action would be taken on the basis of failing a check ride or a flight test."

In another answer to Mr. Lake he also stated *inter alia* as follows:

"I understand that if I failed a test I would be retested and if I passed I would be able to fly again."

110. In answer to Mr. Marshall, Counsel for the Employer he also gave the following evidence:

"Failing a flight test prevented me from flying an aircraft which I was employed to do on 18 October 2004. I got the

dismissal letter. After I failed the flight test I assumed that I would be given another chance to do the flight test. I also was aware of the meeting held between the two parties that I would not be disciplined which resulted in my understanding that if I failed a flight test, I would be given two additional training sessions and a chance to do the flight test. And even if I failed another flight test after being given the two additional training sessions, I would still not be disciplined in anyway. I did not attend the meeting. I got no correspondence from the Employer which stated that if I failed a simulator test, I would have been given other chances to pass this test. The Chief Pilot of the Employer was responsible for employment of line pilots like myself. He never told me of this agreement.”

111. Mr. Marshall asked Mr. Acham how many failed Base Checks should the company have expected to grant to him before it was entitled to dismiss him for failure to pass such a check? In his answer Mr. Acham repeated the answer he referred to at paragraph 110 and ended his response as follows:

“My understanding was that if I failed any flight test, I would not be terminated. My understanding is that the time given for the simulator training was inadequate. My understanding was that Caribbean Star could not terminate my employment for any failures of base checks. My understanding was based on a conversation probably with Paterson Thompson. I am not sure who told me. My understanding was that even if I failed a

flight check, no disciplinary action would be taken against me.”

112. Mr. Acham’s misunderstanding of the terms of an agreement from sources of whom he was “**not sure**” of was in my opinion the precipitating factor which ultimately led to his dismissal by the Employer.
113. None of the witnesses who testified in support of his case gave any evidence as wide as his that despite his failure of any Base Checks after being allowed opportunities to resit the checks, that in these circumstances he could not be terminated by the Employer.
114. This Court does not believe Mr. Acham that under no circumstances whatsoever in the context of his continued failure of Base Checks, that the Employer was prevented from an examination of whether or not to dismiss him for such failure having regard to the Labour Code.
115. If the airline could not exercise its option to dismiss in circumstances where a Co-Pilot continued to fail Base Checks, then no Pilot or Co-Pilot would have been allowed to fly any of its aircraft. Should this situation have occurred with respect to other similar personnel then the owners of the airline would have been faced with no other alternative but to lease its operations. This certainly would not have been fair to the Employer or the Employee. Certainly it would not have been correct for Mr. Acham to be kept on the Employer’s payroll until such time as he passed a Base Check.

116. This Court is of the view that had Mr. Acham applied himself to pass the Base Checks in circumstances where his chances to do so were finite as opposed to infinite, then in all probability he would have passed each and every Base Check. But to believe that the airline had agreed to provide him with unlimited opportunities to pass these Base Checks was absolutely wrong. This attitude clearly did not accord with the evidence led before this Court.
117. There was evidence that passing the Base Checks proved to be challenging to Mr. Acham. As a consequence of this he did demonstrate an incapacity which caused some concern to the Employer.
118. Whether or not it was mandatory for the Employer to issue a written letter or warning to the Employee is to be determined in light of the provisions of Section C58 (1) (b) of the Labour Code. This matter arose for consideration in the case of **Jewellers Warehouse v Cecil Norde Civil Appeal No. 29 of 2004**. Rawlins, J.A.:. (as he then was) wrote the Court of Appeal's judgment. Frankly, I am unable to state the law any better than that Judge and as a consequence thereof I reproduce below precisely what the learned Judge stated at pages 7 and 8 of the judgment. He stated *inter alia* as follows:
- “The ambit of Clause C58 (1) (b) [17] Section C58 (1) sets out various grounds on which the dismissal of an employee could be fair. Section C58 (1) (b) and the proviso to C58 (1), which is also relevant for the purposes of this case, state:***
- ‘C58 (1). A dismissal shall not be unfair if the reason assigned by the employer therefor***

- (a);
- (b) *relates to the capability or qualifications of the employee to perform work of the kind he was employed to do, within the limitations of section C59(5);*
- (c);
- (d) -----; or
- (e);

Provided, however, that there is a factual basis for the assigned reason.'

[18] Because of the cross-reference with section C59 (5), it is necessary to reproduce the latter, which states: 'C59 (5). Where an employee is no longer performing his duties in a satisfactory manner, the employer may give the employee a written warning which shall describe the unsatisfactory employment in

respect of which the warning is given and state the action the employer intends to take in the event of repetition; and, thereafter, if the employee does not, during the period of three months following the receipt of the written warning, demonstrate that he is able to perform and has performed his duties in a satisfactory manner, the employer may terminate the employment of the said employee."

[19] The question that arises is whether it is mandatory for an employer who wishes to terminate the employment of

an employee under section C58 (1) (b) of the Code to follow the procedure set out in section 59 (5). Standing on its own, section 59 (5) is directory and not mandatory. At first blush this sub-section appears to confer on an employer a discretion either to give or not to give the written warning to an employee who is not performing efficiently. However, because of the rules of natural justice there is no option but for an employer to give a written warning.

[20] When read with section C58 (1) (b) of the Code the requirements of section C59 (5) are mandatory in that where incapability is given as the basis for termination, the requirements of section C59 (5) of the Code must be satisfied if a dismissal for incapability is to be encompassed “within the limitation of section 59 (5).” The written warning must describe the nature of the incapability that is alleged. It must also state the action that the employer intends to take in the event of repetition. The action for which the employee is dismissed must be a repeat of the matter or matters complained of in the warning letter.

[21] As far as time requirement is concerned, section C59 (5) permits an employer to terminate the employment of an employee, if during the period of 3 months after receipt of the written warning, the employee does not demonstrate

that he or she is able to perform and has performed his or her duties in a satisfactory manner. This, however, does not require an employer to await the expiration of the 3 months after the warning letter before issuing a termination letter in a case, for example, in which alleged injurious or wrongful acts by an employee are repeated.”

119. In light of the above it was therefore mandatory for the Employer to furnish the Employee with a written warning.
120. The first consideration to be determined under C58 (i) (b) and 59 (5) of the Labour Code is whether the Employer furnished to the Employee a written letter of warning which contained the intended action which the Employer proposed to take in the event that that behaviour or other similar behaviour has been demonstrated by the Employee. At first blush it would appear that no written warning letter was forthcoming from the Employer to the Employee. However this was not so.
121. The facts of this case involve the airline industry. The industry is very different from so many other forms of business practices in which varying letters of warnings are usually issued by the Employers to Employee.^S The expectations of the Employer in this case to institute Base Checks in a regular fashion is contained in Section 1.23 of the Employer's Manual. It governs the training requirements of Co-Pilots who are to subject themselves to such periodic checks. This part of the Employee's contract of employment was required in order that the Employee would be able to comply with the training expectations of the Employer. Section 1.23 was

operational when the Employee was subject to Base Checks. It states in very clear terms *inter alia* as follows:

“If either the second or third Base Check is passed, a Base Check reassessment shall be carried out in three months. If this is failed, employment shall be terminated.”

122. Section 1.23 of the Employer’s Operational Manual forms the first part of the warning letter which was issued to the employee and which was relevant during the period when he was required to pass such Base Checks from time to time.
123. The Employee was also required to pass Base Checks upon his assumption as a Co-Pilot with the Employer. Base Checks contain very precise areas of airline operations which he was required to pass. They also describe the nature of the incapability which is alleged. These very precise areas of performance requirements did not change during the currency of his employment. Mr. Acham was therefore aware of the exact areas which he was required to pass. Base Checks therefore formed the second part of the warning letter. These Base Checks when combined with Section 1.23 of the Employer’s Operations Manual constituted the written warning which was mandatory to be issued by the Employer to the Employee.
124. It would therefore have been unnecessary and repetitive for the Employer to issue a formal written letter of warning which in these special circumstances embodied what was already contained in Section 1.23 of

its Operations Manual and the Base Checks which the Employee undertook. These Base Checks took place on May 17 and 18, 2004, June 21, 2004 and October 18, 2004. A Base Check always constitutes a warning. When it is read in conjunction with Section 1.23 of the Employers Operations Manual, if no improvement is seen, then in those special circumstances the Employer may terminate the employment of the said employee. To hold otherwise would have been tantamount to the employers being *“unreasonably impeded in the efficient management of their business”*.

(See Rawlins JA, (as he then was) in *Jewellers Warehouse (op cit)* at page 13.

125. The Employee was granted nearly four (4) months after the last warning letter or Base Check of June 21, 2004 (or in excess of five (5) months since the previous warning letter or Base Checks of May 17 and 18, 2004) to improve his performance. This is in excess of three (3) months that is required to be given by the Employer to the Employee in accordance with C 59 (5) of the Labour Code. However in accordance **with A8** of the Labour Code the period given to the Employee in excess of three (3) months is not in violation of C59 (5) since the time given to the Employee was *“more advantageous to (him) than those minimum standards which are set forth in this Code”*.
126. The second matter which shall be considered under C58 (i) (b) and C 59 (5) of the Labour Code is whether since May 2004 during the five (5) months following May 2004 or four (4) months since June 2004 when he

was in receipt of the warning letters or Base Checks did he show that he was able to perform and in fact performed his duties satisfactorily.

127. Mr. Acham was unable to perform his duties as a consequence of failing Base Checks on May 17 and 18, 2004. After June 21, 2004 he would have been able to resume his duties as a Co-Pilot. No evidence was led by either party as to how he performed his duties since June 21, 2004. Since his failure of the Base Checks on May 17 and 18, 2004 he was tested again on June 21, 2004. He passed this test after failing an item which he subsequently passed. Taking into consideration Section 1.23 of the Employer's Manual and C58 (i) (b) of the Labour Code when read in conjunction with C59 (5) of the Labour Code the Employer has satisfied the warning and repetition requirements.

The Third Issue

Whether Caribbean Star honestly and reasonably believed that Mr. Acham was incapable and had not demonstrated at the time of his dismissal that he was able to perform his duties in a satisfactory manner?

128. It is the Court's duty to decide whether there was material before the Employer which the Employer believed and upon which the Employer could reasonably have decided to dismiss the employee.
129. Whether or not this Employer could have determined that on the date of the Employer's dismissal the Employee did not demonstrate that he was able to perform and had performed his duties in a satisfactory manner is to be determined having regard to a particular test which the Courts have utilised from time to time.

130. Whether or not an Employee was capably performing his duties is to be determined by making use of a subjective test. That test was also applied in the case of **Jewellers Warehouse v Cecile Norde Civil Appeal No. 29 of 2004**. Mr. Justice Rawlins JA (as he then was) stated the test at page 13 of that judgment. He stated *inter alia* as follows:

“That test was succinctly stated in David Lashley & Partners Inc. v Bayley as follows:

‘If an employee is dismissed because of his incapability, the correct test to apply is whether the employer honestly and reasonable held the belief that the employee was not competent, and whether there are reasonable grounds for that belief. It is not necessary for the employer to prove that the employee was incompetent....In other words, the test....is a subjective one....it is sufficient if the employer honestly believes on reasonable grounds that the employee is incompetent.’

131. In **Alidair Ltd. v Taylor (op cit)** Lord Denning also articulated the test at page 451 in the following manner. He stated *inter alia* as follows:

“Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.”

132. In his evidence the Employee stated that he previously passed Base Checks which were required of him. He undertook certain other Base Checks and obtained further training so as to enable him to pass the Base Checks which he failed. The evidence in this regard is contained at paragraphs [14-19] of this judgment.
133. The Employee failed a base check on May 17, 2004. In accordance with Section 1.23 of the Operations Manual, he was entitled to a maximum of 1 hour and 30 minutes of flight training. He obtained (a) 1 hour and 30 minutes of flight training, (b) 1 hour and 10 minutes of ground training to cover defective areas, (c) 1 hour and thirty minutes of flight training. This initial base check was conducted by Captain G. Frederick.
– see **Exhibit GG1.4**
134. In accordance with Section 1.23 of the Employer's Manual, Mr. Acham undertook further Base Checks, two of which he failed and one which he passed. The Base Check on October 10, 2004 resulted in a failure.
135. This Court is satisfied upon the evidence that the Employer afforded to Mr. Acham more training and time than what was required in accordance with its Operations Manual and C59 (5) of the Labour Code. Furthermore this Court finds that on October 10, 2004, Mr. Acham did not display the degree of professional skill which was required of him to pass the Base Check in accordance with Section 1.23 of the airline's Operations Manual.

136. An airline pilot who is required to undergo constant training and retraining in efforts to pass Base Checks so that he may be able to command aircraft taking both passengers and their cargo safely to different destinations in the Caribbean is required to command a degree of professional skill unlike an ordinary employee. His opportunity for error is narrow. If he does not pass the Base Checks in accordance with the Company's policies and C59 (5) of the Labour Code then he would not be able to fly its aircraft.
137. The facts of this case are unlike the ordinary case where either (a) the employee is not a highly skilled professional or (b) the expectations of him may not be so great.
138. A Co-Pilot is not afforded many opportunities to make mistakes when he is required to undergo Base Checks. He either passes those base checks and maintains his ability to fly aircraft or if he continues to fail in the circumstances of this case he is liable to be dismissed by the Employer.
139. This particular field of employment is a special one. A departure from prescribed standards of conduct as a consequence of having obtained more than adequate training and opportunities to resit the Base Checks may justify dismissal. I am fortified in this view by reference to **Turner v Pleasurama Casinos Ltd [1976] I.R.L.R 151**. In this case the employee made a mistake which was central to his field of employment. His dismissal was held to be fair.
140. Having regard to all of the circumstances of this case, I hold that the airline as a reasonable Employer honestly believed on reasonable

grounds that the Employee had not demonstrated at the time when his services were terminated that he was able to perform his duties satisfactorily. As a consequence of this finding I further hold that the Employer acted reasonably. Mr. Acham's employment was fairly terminated due to his inability to perform his duties as a consequence of his failure of a Base Check on October 15, 2004.

The Fourth Issue

Whether any defect existed in the procedure to dismiss this employee and if so did it render the procedure intrinsically unfair?

141. Mr Lake Counsel for the Employee prayed in aid Section 1.23 of the Employers Operations Manual at paragraph 9 of his Written Submissions. He stated *inter alia* as follows:

“The last three tests that the Employee took were done by Captain Gill, Caesar Hynes and the last one by Captain Gill. By paragraph 1.23 of the Employee’s handbook ‘The initial base check and reassessment base checks are to be carried out by three different Training Captains.’”

At paragraph 20 of Counsel’s Written Submissions he submits that the company did not follow **“proper procedure”**.

142. Counsel’s submissions referred to at paragraph [141] of this judgment frankly collide with each other. On the one hand there is a mention of ***“The last three tests”*** whilst on the other hand there is a reference to ***“The initial base check.....”***

143. The word “*initial*” means “*existing or occurring at the beginning*” – see **The Concise Oxford Dictionary of Current English, eighth edition, 1990**. The evidence clearly indicates that the first Base Check was conducted by Captain G. Frederick, the second one by Captain G. Gill and the third one by C. Haynes. It was the reassessment Base Check that was conducted by Captain G. Gill.
144. However the words “*reassessment base checks*” in Section 1.23 of the Employer’s Operations Manual really occur in two different circumstances. The first takes place where (a) a base check is administered; (b) a second base check (reassessment) is conducted and (c) if the second base check or a reassessment is failed then a third base check (presumably a reassessment as well) is granted. In these circumstances, the initial base check and the two subsequent base checks were administered by three different Training Captains.
145. In the second scenario the provision that three different Training Captains be required to conduct the base checks is frankly inapplicable. In the second set of circumstances, only two Training captains are required to conduct the tests. This takes place in a circumstance where the second or third base check is passed. If this occurs, then a base check reassessment is carried out.
146. The second scenario took place in this case with the Employee having passed the third base check with Caesar Haynes as the examiner. In the final base check he was examined by Captain G. Gill.

147. In the circumstances of this case I find that there was no breach of procedure by the company.

The Fifth Issue

Was the overall process by which this employee was dismissed fair or unfair?

148. In the event that there was a breach of procedure the question which this Court would have been required to determine is whether or not the Employer's procedure constituted a fair process. This issue fell to be determined in **Fuller v Lloyds Bank PLC [1991] I. R.L.R. 336**. The headnote reads *inter alia* as follows:

“Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employers’ procedure constitute a fair process? A dismissal will be held unfair either where there was a defect of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair”.

149. Mr. Lake, Counsel for the Employee submits that since Captain Gill performed two of the tests then this constitutes some bias. No evidence was led by Mr. Acham or any of the witnesses to support this allegation of bias.

150. Captain Gill gave his evidence. He was not cross examined upon this issue by Mr. Lake. In his Witness Summary at paragraph 5 thereof Captain Gill stated *inter alia* as follows:

“This method of testing is primarily mechanical in that the purpose of an examiner is merely to record the results of the test produced by the simulator in response to the pilots performance.”

151. In **Perkin v St. George’s Healthcare NHS Trust [2006] I.C.R. 617** the facts of which were described as ***“highly unusual”*** (see **Wall LJ at paragraph 76**) the issue of whether or not the proper procedure was followed arose for consideration having regard to the claimant’s personality and behaviour. In that case the same person who previously stated that she wished the claimant to be dismissed also chaired the internal disciplinary procedure. In arriving at its decision as to whether or not the claimant obtained a fair hearing **Wall LH** in delivering the judgment of the Court stated *inter alia* at pages 640 and 641 as follows:

“I have to say that I find it quite extraordinary that a person in Ms. McLoughlin’s position could think it right to chair an internal disciplinary procedure when she herself, only days before, had made it clear beyond peradventure that she wanted Mr. Perkin dismissed. The overwhelming and irresistible inference is that she not only wanted him out, but was of the view that this was the speediest and most effective way of achieving her objective, since there was plainly no prospect, with her in the chair, that the disciplinary procedure would result in anything other than confirmation of Mr.

Perkin's dismissal. Against that background, it must at first blush, be reasonable to think that a fair procedure and a genuinely independent investigation would – or at the very lowest might – have produced a different result- and certainly not a result, which placed the entire responsibility for his dismissal on Mr. Perkin himself. That, I have to say, was my initial reaction on reading the papers.”

152. In Perkin's case which involved a large degree of subjectivity, the Court having taken into consideration the claimant's behaviour ***“and in particular his dogged insistence on maintaining his stance.....”*** concluded that the claimant's behaviour ***“opened the door to the tribunal being able to find that any other disciplinary process would have ended with the same result.”***

- See Wall LJ at page 641.

153. Mr. Acham had subjected himself to previous base checks. As a professional pilot he was aware of the general matters upon which he was tested and reassessed.
154. I therefore find firstly that no procedural defect took place. However, if there was such a defect in procedure, any defect in procedure was not such as to render the procedure intrinsically unfair so as to require the Employee's dismissal not to stand as fair. Secondly, I find that having regard to all of the circumstances of this case the overall process by which the Employee was dismissed was fair.

The Sixth Issue

If the Employee's dismissal was unfair, what is the measure of damages which should be paid to him?

155. In light of the above stated determination of the prior issues, the matter under this heading does not arise to be considered.

CONCLUSION

156. Having carefully examined all of the evidence led in this case, the submissions of both parties, the relevant provisions of the Labour Code and Section 10 (3) of the Industrial Court Act Cap 214, I find that this Employee was not unfairly dismissed. The Reference is hereby dismissed.

157. There shall be no order as to Costs.

Dated the 27 day of November 2008



PHILIP. A. PILGRIM
President

I concur



Ms. Glendina McKay
Member

I agree



Dr. Hayden Thomas
Member

