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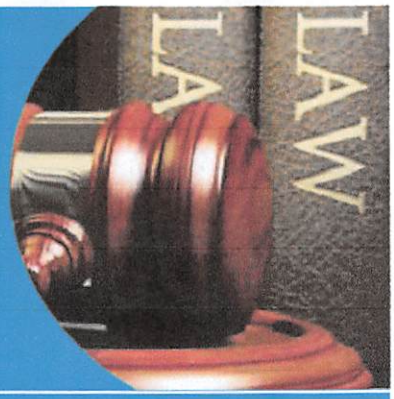

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THE LABOUR RELATIONS CODE:

Keep the baby, change the bathwater

CARLA-ANNE HARRIS-ROPER

While the employer/employee relationship is enabled by the legal construct of contract, it is an accepted fact that the bare bones of mutual agreement between parties many times require some assistance in making the rubric workable in actuality. Implied contractual terms provide one modus to achieve this purpose. Another instrument used is the intervention of government to set minimum standards for the operations of employment contracts via a statutory framework. These parliamentary insertions, by their very nature, sometimes produce a level of complexity that impacted individuals are often not able to easily navigate without the benefit of legal advice. In matters of such critical importance involving persons' livelihood and the ability of employers to effectively operate their businesses, it is indeed necessary that there be appropriate mechanisms to make the requirements of the law accessible and understandable to the average citizen. Codes of Practice constitute another avenue to achieve this objective in the employment and labour law sphere.

What are Codes of Practice?

Codes of Practice provide guidance for the conduct and promotion of good industrial/labour relations. In the context of employment and labour law, a code of practice interprets the duties and responsibilities of employers, as well as the rights and obligations of employees under statutes, regulations or orders. These instruments can either be established via legislation, as in the case of Jamaica – *the Labour Relations Code (LRC),*[1] or through government-mandated administrative policy[2]. The intent of the legislated Codes transcends being mere guidelines; they provide pointed directives on the practical application of legislation and accepted local industrial relations principles. However, they are not *de jure* legally binding since a breach of their provisions will not *per se* create liability for the offending party leading to legal proceedings[3]. It should also be noted that the Industrial Disputes Tribunal (IDT) must mandatorily consider any relevant provision of the *LRC* to the circumstances before it in determining the issue[4].

Another unique feature of these Codes is that they are usually worded in non-legal language since they are intended to be easily comprehensible by the lay person. This policy has much to commend it since the Code serves as the yardstick for best practices in workplaces that have not implemented inhouse work-rules, employee handbooks, or operate under accepted guidelines created through collective labour agreements.

A Bit of History

The concept of a labour code is not new. For example, the UK has implemented a plethora of Codes on several aspects of labour including health and safety, trade union balloting, disclosure of information for collective bargaining purposes, flexible working and time off for union duties[5]. Perhaps the most well-known code relates to Disciplinary and Grievance Procedures (Code of Practice No.1) which were first implemented in 1972 with the most recent revision being approved in 2015.

From the Jamaican standpoint the matter was first addressed in 1944, when the Secretary of State for the Colonies advised the UK Parliament that a "Fair Labour Code" was drafted by the local Industrial Relations Committee; however, it appears that it was never implemented. Fast forward to 1962, the year of independence, when attempts were again made to promulgate a Fair Labour Code after consultations with Jamaica Employers Federation (JEF), Unions and the Government but, once again, there was no consensus between the parties and hence the proposed Fair Labour Code was stillborn.[6] This draft had a wide scope in mind; it addressed areas such as the right to strike, unfair labour practices, representational rights, collective bargaining, union dues, minimum wage, hours of work, vacation leave, sick leave,

public holidays, maternity leave, workers' housing, severance pay, safety, health and welfare, pensions, among other matters[7]. This Code was envisioned to cover more than just "principles" and address certain basic terms of employment contract/ relationships. It should be noted that since then many of these areas have been addressed through legislation.[8]

With the promulgation of the *Labour Relations and Industrial Disputes Act*[9] *(LRIDA)*, the Parliament instructed the Minister of Labour to ". . . prepare and lay before the Senate and the House of Representatives, before the end of the period of one year beginning with the 8th April, 1975, the draft of a labour relations code, containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations".[10] In fulfilment of this directive, both houses of Parliament debated and approved the Code and it became operational on November 1, 1976. The debates were amicable with both political parties being *ad idem* on the need for its existence and exhorting employers, employers' organisations, individual employees and their unions to accept the letter and spirit of the document.

What areas does the LRC cover?

Part 1 of the LRC covers preliminary issues related to the establishment, purpose, applicability, and provisions made for its revision.

Part 2 sets out the responsibilities of employers, individual workers, trade unions and employer organisations. Salient points include the fact that employers should champion good management practices and institute industrial relations policies that have the confidence of all, and that employees have a responsibility to perform their employment contracts to the best of their abilities. Trade Unions are mandated to promote the interest of their members, while having a duty to maintain the viability of the undertaking by ensuring co-operation with management in measures to promote efficiency and good industrial relations. On the other hand, employers' organisations are asked to encourage their members to co-operate with trade unions and to follow procedures.

Part 3 sets out good personnel management practices, including guidelines for proper recruitment selection, making clear to workers the terms and conditions of their employment contract, establishing disciplinary rules and procedures for grievance handling, as well as occupational safety and health and welfare rules.

Part 4 sets out issues related to worker representation and the collective bargaining process, including providing guidance to unions with respect to eligibility of delegates, defining how delegates may be removed, and prescribing reasonable time off with pay for delegates to carry out their duties. It also indicates that management should consult with delegates on proposed changes in work programmes and methods.

Part 5 deals with communication and consultation. It gives a definition of the two terms and outlines how they should properly operate in a workplace setting.

Part 6 addresses the establishment of grievance and disciplinary procedures within workplaces.

This part of the Code is very topical as it sets out the broad procedures to be used in dealing with disciplining employees. This, of course, has major implications for the continuation of employment and is a major focus of the majority of matters (regarding alleged unjustifiable dismissals) brought before the IDT.

What has been the impact of the LRC?

Since its enactment, the legal status of the *Labour Relations Code* has been the subject of judicial examination. In *R v IDT ex parte Egbert Dawes*[11] Gordon J opined that the Labour Code was "...not an Act of Parliament but guidelines for promoting good labour relations. It is of persuasive force and should be applied unless good cause is shown to the contrary'. In *Village Resorts Ltd. v Industrial Disputes Tribunal and Uton Green representing the Grand Lido Resorts Staff Association*[12] *(the Grand Lido Case)* the Court of Appeal judges relied heavily on the provisions of the Code in justifying its decision. In fact, the IDT appended a large section of the LRC verbatim as part of its award. In the landmark Privy Council decision of *Jamaica Flour Mills Limited v Industrial Disputes Tribunal and National Workers Union*[13] the matter was again revisited. Here, neither the workers nor their unions were consulted prior to the immediate dismissal of three workers presumably on the grounds of redundancy, in clear breach of the Paragraphs 11 and 19 of the Code. At the IDT, the company argued that the *LRC* was not law but was merely a set of non-binding guidelines. However, in concluding that the workers were unjustifiably dismissed, the Tribunal opined:

> The Code is as near to Law as you can get. The Act mandates it. It consists of "practical guidance" by the Minister after consultation with employers and employees. It was (as legally required) approved by both the Senate and House of Representatives and can only be amended in the same manner as originally established. It is a statement of national policy.[14]

Upon appeal, the Judicial Review Court, the Court of Appeal and the Privy Council judges all concurred with the decision of the IDT regarding the proper use of the Code in its deliberations. The upshot of these decisions virtually elevates the status of the legislated non-binding Code to effectual obligatory law, since

ignoring its tenets empowers the IDT to rule a dismissal as being unjustifiable. As such, employers can no longer be content in having a passing knowledge of the Code's existence, especially in light of recent amendments to the *LRIDA*[15] which now allows non-unionised workers to have access to the Tribunal. This change widens the reach of its provisions to include all employees[16], where previously the Minister's power of referral to the IDT was restricted to disputes involving unionised workers.[17]

It is arguable that the effect of the *Flour Mills* decision was never what Parliament intended; that is, to impute the 'good industrial relations practice' provisions of the Code into individual contracts of employment. While the LRIDA was generally geared towards the collective, in that it encouraged collective bargaining and enshrined the rights of a worker to join or not to join a trade union, the attendant *LRC* cannot to be construed as being only applicable to a unionised environment. This, as Paragraph 3 of the Code states that except where the Constitution provides otherwise, it applies to all employers and all workers and workers' organisations in determining their conduct with each other.

Recent awards of the IDT, however, show its stoic interpretation of the Code as being transcendent especially with respect to the procedures to be employed in disciplinary matters[18]. While the general underlying principles of the Code clearly remain relevant, the fact that some areas are overshadowed by the collective ethos and, in others, the guidelines are somewhat underdefined and excessively wide in application, are testament to the era in which it was formulated. In today's environment, where technological changes are increasingly impacting the workplace and the extent of union representation has been significantly reduced, the *LRC*'s efficacy needs enhancement to meet the challenges of a new world of work.

Time for change?

Section 3 (3) of the *LRIDA* gives the Minister of Labour the authority to either wholly or in part revise the *LRC*; however, the draft of the revised code must be laid before the Senate and the House of Representatives for approval. Any amendments must also be done in consultation with the representative organisations of employers and workers[19]. It is ironic that from the outset one parliamentarian harboured deep-seated concerns regarding its prospective operation. Leon HoSang, a Senator in the debates surrounding the enactment of the Code stated:

> I would suggest that there be a specific provision that the Code should be revised at regular intervals, not just that it will be revised as occasions require and social values change or as practice develops... I urge that in a society such as ours where industry and commerce is dynamic, that some stated period of review be inserted in the Code in order to avoid the Code being out of date.[20]

Almost 42 years later this is arguably exactly what has happened! The Code has never been reviewed since it was brought into effect on November 1, 1976. We are now reaping the harvest of lack of re-examination and critical re-assessment of the legislative framework in the Jamaica's employment and labour law. The time has indeed come, in the view of the Industrial Relations and Labour Law Sub Committee of JamBar, for an overhaul of the current Code based on new directions in the world of work, the various amendments to the *LRIDA* and the impact of judicial decisions on the operations of the *LRC*. Hence, the committee has put forward recommendations for some revisions as a catalyst for tripartite discussions aimed at assisting the Code to be in step with current realities. Let's keep the baby but change the now stagnant bathwater!

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Endnotes

1. Under the *Labour Relations and Industrial Disputes Act (LRIDA)* (Section 3) as well as in the Bahamas –under the *Industrial Relations Act* (Section 40).
2. As in the case of Guyana – *Labour Laws; Primer*, launched in 2010 which outlines the basic laws of employment and is intended to guide employers and employees generally; this was preceded by the Handbook for Employers.
3. *LRIDA* Section 3(4).
4. Ibid; see also Balford Henry, "Leave the IDT alone, tackle the Labour Code", *Daily Gleaner* February 12, 2002
5. See Smith I. et al *Employment Law* 13th Ed. (2017) page 25.
6. Stone D.H.F. *The System of Industrial Relations in Jamaica* (1972) page 96.
7. Ibid.
8. For example, the *Maternity Leave Act* 1979 and the Employment *(Termination and Redundancy Payments) Act* 1974.
9. *Act 14* of 1975, coming into operation on April 8, 1975.
10. Section 3(1) of the *LRIDA*.
11. (1984) 21 JLR 49.
12. (1998) 35 JLR 292.
13. Dispute No. I.D.T. 22/99 decided October 9, 2000; Full Court Suit No. M105 of 2000 (unreported) delivered December 17, 2001; Court of Appeal SCCA 7 of 2002 (unreported) delivered June 11, 2003; Privy Council Appeal No. 69 of 2003 (unreported) delivered on March 23, 2003.
14. Page 9 IDT award.
15. Section 2 Act 8 of 2010.
16. See Brooks J dicta in *Rosmond Johnson v Restaurants of Jamaica* RMCA No. 17/2011 (unreported) delivered March 30, 2012 implicitly acknowledging the possibility of the Code's application to non-unionised workers after the 2010 amendment.
17. See *R. v. Minster of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry And Lloyd Dawkins Ex Parte West Indies Yeast Co. Ltd (1985)*, 22 J.L.R. 407
18. *Heart Trust/NTA v Rudolph Carroll*, IDT 23/2013, delivered on June 25, 2014; *Bellindo Iron Works Limited v Mawugbo Rayon*, IDT 19/2012, delivered on August 15, 2013.
19. Paragraph 4 LRC.
20. Parliamentary Hansard August 6, 1976.

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