

# DEATH TO NOTICE CLAUSES IN EMPLOYMENT CONTRACTS?

**Recent Decisions In Review - The Effect Of  
Statutory Intervention**

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# **DEATH TO NOTICE CLAUSES IN EMPLOYMENT CONTRACTS? RECENT DECISIONS IN REVIEW-THE EFFECT OF STATUTORY INTERVENTION**

## **INTRODUCTION**

Statutory intervention in labour law is not unique to the Jamaican context. In Jamaica the incursion by Parliament into the manner in which employees can be dismissed has led to the implicit establishment of the right of the worker not to be **‘unjustifiably dismissed’** by his/ her employer. It will be shown that the statutory concept of ‘unjustifiable dismissal’ does not equate to a common law action for wrongful dismissal. In essence, it was the intention of Parliament to establish statutory protection against unjustifiable dismissal which is a separate and distinct concept from the common law protection from wrongful dismissal. The rationale behind statutory intervention is the view that the worker has an interest in his/her job which is akin to a property right. Consequently, a person’s job should no longer be treated purely as importing contractual obligations which the employer can then terminate at will by the giving of the appropriate contractual notice. This also represents an incursion by the Legislature into managerial prerogative.

This Paper will focus on the overall impact of the March 2010 amendments to the **Labour Relations and Industrial Disputes Act (LRIDA)** on provisions in the employment contract which allow for termination of the employment without cause by the giving of the prescribed notice.

## **WHAT IS ‘UNJUSTIFIABLE DISMISSAL’**

The term ‘unjustifiable dismissal’ was introduced into labour law in Jamaica by **Section 12 (5) (c)** of the **LRIDA**. This section stipulates as follows:

*“(c) if the [industrial] dispute relates to the dismissal of a worker the Tribunal in making its decision or award-*

*(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine..”*

The Jamaican Legislature introduced the term ‘unjustifiable’ dismissal into labour law terminology without proffering any definition of the term. It has been left to judicial pronouncements and Awards emanating from the IDT to fill the lacuna by expounding the meaning to be ascribed to this legal term. The seminal Court of Appeal decision in the case of **Village Resorts Ltd v the Industrial Disputes Tribunal and Uton Green representing the Grand Lido Negril Staff Association**<sup>1</sup> offers a comprehensive review of the statutory concept of unjustifiable dismissal. Counsel for the Appellant, Village Resorts Ltd had sought to challenge the Full Court’s decision upholding an IDT Award that 225 workers of the hotel had been unjustifiably dismissed. Learned Counsel contended that the Full Court had misdirected itself in law by determining that the term ‘unjustifiable’ as used in Section 12 (5) (c) of the **LRIDA** is synonymous with the term ‘unfair.’ It must be noted that the term ‘unfair dismissal’ is the statutory action existing in many jurisdictions, including the United Kingdom, which allow a Tribunal/Court to look into the reason and manner of dismissal and that such an action is distinct from a common law action for wrongful dismissal. It was further argued on behalf of the Appellant hotel that the Court had made an error when it held that evidence which justified dismissal at common law did not justify dismissal under the Act and that the Act gives a different meaning to the word ‘unjustifiable’ than it bore at common law. One has to question though why the Legislature would find it necessary to codify by

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<sup>1</sup>(1998) 35 JLR 292 CA; Supreme Court Civil Appeal No: 66/97 (unreported)

statute the common law concept of wrongful dismissal which already had a well established plethora of cases which expounded on this form of dismissal.

The Hon. Mr. Justice Rattray P then opined that the LRIDA did not consolidate existing common law principles in the field of employment. The Act creates a new regime with new rights, obligations and remedies. He stated unequivocally that *“‘unjustifiable’ does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.”*<sup>2</sup> In his view the term equates to the term ‘unfair.’ The Hon Rattray P relied on the judgment in the case of **R. v Minister of Labour and Employment, Industrial Disputes Tribunal, Devon Barrett et al ex parte West Indies Yeast Co. Ltd (West Indies Yeast case)**<sup>3</sup> in which Smith C.J. traced the meaning of the statutory term ‘unfair dismissal’ in UK law and relied on Harvey’s on Industrial Relations which dealt with the topic of ‘Dismissal at common law-lawful and wrongful.’ In para 11 (29.22) of Harvey’s it was stated that unfair dismissal differs from the common law in that it permits tribunals to examine the reason and manner of dismissal. It is therefore not sufficient for the employer to abide by the contract when terminating the contract.

In the **West Indies Yeast** case, Smith C.J. further proceeded to rely on the Oxford English Dictionary to formulate a definition of the term ‘unfair’ which meant ‘not fair or equitable, unjust.’ The term ‘unjust’ was defined as **‘not in accordance with justice or fairness.’** According to Smith C.J.,

*“In my opinion, in the cases in which they are used in s. 12 (5) (c) of the Act (LRIDA) (parenthesis mine) and in the UK legislation the words ‘unjustifiable and unfair are synonymous and the use of one rather than the other merely shows a preference of the respective draftsmen.”*<sup>4</sup>

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<sup>2</sup> ; Supreme Court Civil Appeal No: 66/97 (unreported) page 13

<sup>3</sup> [1985] 22 J.L.R. 407

<sup>4</sup>

It can therefore be extrapolated that a dismissal which is ‘unjustifiable’ is one which was not carried out in accordance with principles of fairness and justice.

### **THE DISTINCTION BETWEEN THE COMMON LAW CONCEPT OF WRONGFUL DISMISSAL AND THE STATUTORY TERM OF UNJUSTIFIABLE DISMISSAL**

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It is essential for every legal practitioner to recognize that there is indeed a mammoth distinction between a ‘wrongful dismissal’ and a dismissal which is deemed to be ‘unjustifiable.’ A wrongful dismissal claim is to be instituted in a Court of Law whereas a claim of unjustifiable dismissal can only be pursued before the Industrial Disputes Tribunal.

In the Jamaican case of **Lindon Brown v Jamaica Flour Mills Ltd**,<sup>5</sup> the Claimant worker instituted a claim for wrongful and unfair dismissal in the Supreme Court. Sinclair-Haynes J was of the view that as the Claimant instituted proceedings in the Supreme Court, he has invoked the Court’s common law jurisdiction. Sinclair-Haynes J relied on Halsbury’s Laws of England 164<sup>th</sup> edition at para 451 which states:

*“The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal.”*

The learned Judge proceeded to further state that the **LRIDA** and its Code are the relevant Jamaican statutes which provide the employee with an alternative to the common law action. This case exemplifies the danger faced by practitioners when they fail to appreciate the difference between wrongful and unjustifiable dismissals and thereby seek redress for their clients in an incorrect forum. According to the Judge:

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<sup>5</sup> Suit No. CL 2000/B199, SC (unreported) delivered on December 15, 2006 available at : <http://waterworks7.com/ziplaw/case/lindon-brown-vs-jamaica-flour>

***“It is axiomatic that this claim was instituted for wrongful dismissal at common law. The claimant is therefore deprived of the remedies which would have been available to him had he proceeded under the LRIDA. He is denied the right to any security of employment and the right to a humane manner of dismissal, which the LRIDA and its Code would have accorded him.”***

Sinclair-Haynes J further opined that had the matter been instituted pursuant to the LRIDA, the IDT would have been at liberty to consider the circumstances surrounding the Claimant’s dismissal and the employer would have to conform to the provisions of the Labour Code. Ultimately Sinclair-Haynes J concluded that she was unable to award damages for unjustifiable dismissal because of the *‘inveteracy of the common law principles regarding wrongful dismissal’*<sup>6</sup>

The continuing challenge faced by aggrieved workers in this regard was aptly illustrated in the recent case of **Calvin Cameron and Security Administrators Ltd.**<sup>7</sup> The Claimant who was a former employee of the Defendant company instituted proceedings in the Supreme Court claiming compensation for his alleged unfair dismissal. His employment contract was terminated by means of notice pay of 8 weeks, in lieu of notice. Anderson K.,J. stated:

***“In Jamaica, a claim for unfair dismissal, can only be pursued by means of the statutory provisions as contained in Jamaica’s Labour Relations and Industrial Disputes Act.”***

According to Anderson J in a claim for wrongful dismissal, an alleged breach of a right to a fair hearing will be of no moment whatsoever, because the parties are free to contract with one another, subject to contractually agreed obligations and/or penalties which may arise as a result of the termination of their

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<sup>6</sup> Although the Judge was correct in principle it should be noted that at the time the judgment was delivered the applicant would have been unable to approach the IDT since the statutory framework would not countenance non-unionized workers having access to that forum..

<sup>7</sup> Claim No. 2007 HCV 02271, [2013] JMSC Civ 95 (unreported) delivered June 26, 2013

contractual obligations. The law will therefore not compel parties to remain in contractual obligations with each other.

This case also highlighted the limitations of a common law action for wrongful dismissal. The Defendant company was of the view that the Claimant employee was guilty of serious misconduct. However, while investigations into the alleged misconduct were in progress, the company terminated the contract by means of the notice provisions, without any reference to the alleged misconduct. The Court determined that the termination of the contract by payment in lieu of notice was cogent evidence that the dismissal was not for cause. Nevertheless, it was pointed out that the employer in fact assumed that the employee was guilty before the investigations were completed. Anderson, K. J. opined that the case underscored the importance of listening to someone before rushing to judgments of guilt. This undermined any appearance of fairness. Nevertheless, as an action for unfair dismissal could not be heard in the Supreme Court, the Judge was constrained from taking this fact into consideration. The **Cameron case** also exemplifies the approach which may be taken by the Court, if an action for unfair/unjustifiable dismissal is instituted in the incorrect forum, but the evidence proves another cause of action, in this case wrongful dismissal. The Court relied on rules 8.7 (1) (b)<sup>8</sup> and 1.1 of the Civil Proceedings Rule to establish that the interests of justice demand:

***“that where a cause of action exists from the claimant’s statement of case, albeit that is not the one claimed for, that if said case has reached as far as the stage of trial, then provided the Claimant can prove his case, in respect of the cause of action which exists on the claimant’s statement of case, then provided that such cause of action has been duly proven at trial, by evidence, the court should grant whatever remedy the claimant may be entitled, arising***

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<sup>8</sup> Permits the Court to grant any other remedy to which the Claimant may be entitled.

***therefrom. To insist on otherwise, would be, at a trial, to place greater emphasis on form than substance.”***

By adopting this approach, in an appropriate case the Court could examine the issue which was not properly pleaded as it did in this case in examining whether the worker was wrongfully dismissed even though the ostensible case before it was ‘unfair dismissal’. However since the court had no jurisdiction whatsoever in cases of unjustifiable dismissals it was estopped from addressing the issue.

It must be re-iterated that the statutory action for unjustifiable dismissal does not displace a common law action for wrongful dismissal. This means that the worker is not precluded from instituting proceedings for wrongful dismissal in a Court of Law. However, if the worker brings a common law action for wrongful dismissal, the common law principles would apply in the determination of the case, such as whether or not the contract was terminated in accordance with the notice clause in the contract. On the converse a matter commenced before the IDT, will only be decided in accordance with the provisions of the LRIDA, its Regulation and the Labour Relations Code. Furthermore, if the matter comes to the Court as an application for judicial review of an IDT Award, the matter must be decided based on a consideration of the provisions of the LRIDA, its Regulation and the provisions of the Labour Relations Code. As Rattray P put it in the **Village Resorts Case**<sup>9</sup>, *“the provisions of these legislative instruments have nothing to do with the common law...”*

One of the pivotal distinctions between a claim for wrongful dismissal and an action for unjustifiable dismissal is the manner in which both actions can be commenced. A Claimant for wrongful dismissal can institute proceedings in the Supreme Court without reference to the Minister of Labour. On the other hand, a worker wishing to institute proceedings for unjustifiable dismissal must refer an actionable industrial dispute to the Minister of Labour and Social Security. The Minister then has the authority to decide whether or not to exercise his

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<sup>9</sup> Supra page 2



discretion to refer the dispute to the IDT, after all the mechanisms to settle the matter have been exhausted. The Minister's authority to refer industrial disputes to the IDT, are set out in Sections 9-11 of the LRIDA. Section 9 addresses the power to refer disputes in the essential service, Section 10 deals with disputes likely to be gravely injurious to the national interest and Section 11 addresses the authority of the Minister to refer disputes where the parties inform the Minister in writing to refer the dispute to the IDT. Section 11A sets out the Minister's authority to refer disputes to the IDT on his own initiative. The Minister's authority to decide whether or not to refer a dispute to the IDT cannot be exercised arbitrarily, as the exercise of his discretion is subject to the searching glare of judicial review.

**Remedies available to the IDT if it determines that a worker has been unjustifiably dismissed:**

As previously stated by virtue of **Section 12 (5) (c) LRIDA**, the IDT has the authority to make the following Orders if it determines that the dismissal was unjustifiable:<sup>10</sup>

- (i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated (subject to subparagraph iv) order the employer to reinstate the worker with the payment of such wages as the Tribunal shall determine;
- (ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay such compensation or grant such other relief as the Tribunal may determine;
- (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the IDT may specify, order at the end of the period that the employer pay the worker such compensation or grant him such relief as the Tribunal may determine.

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<sup>10</sup> Since 2002 amendment to the LRIDA (Act 13 of 2002)

- (iv) shall, if in the case of a worker employed under a contract of personal service, whether oral or in writing, if it finds that the dismissal was unjustifiable, order the employer to pay the worker such compensation or grant such other relief as the Tribunal may determine, other than reinstatement.

It is evident therefore that the powers of the IDT are wider than those which can be exercised by a Court of Law in an action for wrongful dismissal. There had been some debate before the 2002 amendment to the LRIDA, as to whether the legislation made it mandatory for the IDT to re-instate a worker who wishes to be re-instated.<sup>11</sup> In the Privy Council decision in the **Flour Mills case**<sup>12</sup>, their Lordships expressed the view that the unamended **Section 12 (5) (c) (i) LRIDA**, imposed a mandatory duty to order reinstatement if the conditions of the statutory provisions are met. However they further opined that re-instatement possesses some degree of flexibility. Re-instatement does not necessarily require that the employee be placed at the same desk or machine or given precisely the same work in all respects as he/she had performed prior to the unjustifiable dismissal. What is the position however, if there is no job in which the worker can be re-instated? In many cases several years may have elapsed before the Order to re-instate is made. The Privy Council sets out a road map for how these cases may be addressed, however it is arguable whether this road map should be restricted to cases of dismissals on the grounds of redundancy, which was the subject of the suit before the Board. According to the Privy Council if there is really no suitable job into which the employee may be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code.<sup>13</sup>

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<sup>11</sup> See *The Institute of Jamaica v the Industrial Disputes Tribunal and Beecher* (unreported) Supreme Court Suit No. M. 62 of 2002, Court of Appeal, Supreme Civil Appeal 9/2002

<sup>12</sup> *Jamaica Flour Mills Limited v the Industrial Disputes Tribunal and the National Workers' Union*, Privy Council Appeal No. 69 of 2003, [2005] UPKC 16

<sup>13</sup> *Ibid* page 9 para 24

In the recent case of **The Chairman, Penwood High School’s Board of Management v the Attorney-General of Jamaica and Loana Carty**,<sup>14</sup> the Claimant filed a claim in the Supreme Court initially to have her status as senior teacher restored, and subsequently to be re-instated in her job. The appellants filed a procedural appeal asking the Court of Appeal to reverse decisions in the Courts below that portions of the claim should not be struck out. One issue which the Court of Appeal was asked to consider was whether the claim for unfair dismissal was wholly misconceived as the Supreme Court has no jurisdiction in the matter, it being the exclusive province of the IDT. The Court of Appeal determined that the remedies available for unfair dismissal, including re-instatement of an employee to the employment, are only available from the IDT. Her claim in respect of unfair dismissal and re-instatement was therefore struck out as being misconceived.

**The importance of the Labour Code in proceedings before the IDT and the authority of the IDT to enquire into the reason and manner of dismissal**

**The Labour Relations Code**

The Labour Relations Code was established pursuant to **Section 3** of the **LRIDA**. **Section 3** stipulates that the Minister shall prepare and lay before the Senate and the House of Representatives the draft of a Labour Relations Code (The Code), containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations. This Code was formulated after consultation with employers’ and employees’ representatives and is therefore believed to be reflective of the interests of all parties concerned.

In the Code recognition is given to the fact that work is a social right and obligation, it is not a commodity. The effect of this recognition is the emphasis on ensuring that the dignity of the worker is respected.

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<sup>14</sup> Supreme Court Civil Appeal No. 18/2013, [2013] JMCA Civ 30 (unreported) delivered July 25, 2013

**Section 3 (4)** of the LRIDA specifies that:

***“A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to criminal proceedings; but in any proceedings before the Tribunal or Board, any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining the question.”***

The status to be accorded to the Code in proceedings before the IDT has been the subject of judicial challenges and pronouncements. In the **Village Resorts**<sup>15</sup> case, Rattray P emphasized that: ***“...the Code is road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships.”***<sup>16</sup>

The case of **Jamaica Flour Mills**<sup>17</sup>, which was appealed all the way to the United Kingdom Privy Council, is the foremost authority on the legal status of the Code. The case encompassed a determination of the effect if any, that the IDT should give to the provisions of the Code when addressing disputes which come before it for a determination. In its ruling the IDT stated as follows:

***“Quite often...non-compliance with the Code is explained on the grounds that is not enacted law but merely a set of guidelines and not binding. This approach is morally inappropriate and procedurally unwise. The Code is as near to law as you can get (emphasis mine). The Act mandates it. It consists of ‘practical***

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<sup>15</sup> Supra n. 1

<sup>16</sup> Ibid Page 10

<sup>17</sup> In the matter of an Application by Jamaica Flour Mills Limited and in the Matter of an Award by the Industrial Disputes Tribunal, Suit No. M105 of 2000, Supreme Court

***guidance' by the Minister after consultation with Employers and Employees..."***<sup>18</sup>

The Supreme Court, Court of Appeal and the Privy Council<sup>19</sup> concurred with the IDT's statement on the status to be accorded to the Code in proceedings before the IDT. This means that in any proceedings before the IDT, the provisions of the Code will be examined to determine if the employer and employee complied with the provisions of same.<sup>20</sup> In a case of unjustifiable dismissal for example, an employer who dismisses a worker will not only have to establish that he had good cause to dismiss the worker, but also that the dismissal was carried out in accordance with the procedure set out in the Code. It is therefore imperative and prudent that all labour law practitioners advise themselves as to the provisions of the Code, so as to ensure that their clients act in accordance with its provisions. A failure to do so could have a deleterious effect on the outcome of any proceedings before the IDT.

The following are some of the important provisions of the Code that every Labour Law practitioner should be aware of-

- **Para 5 sets out responsibilities of employers-**
  - To respect their workers' right to belong to a trade union and to take part in union activities.
  - Implement adequate and effective procedures for negotiation, consultation and the settlement of grievance disputes.
- **Para 6 sets out responsibilities of individual workers-**
  - Responsibility to his employer to perform his contract of service to the best of his ability and to his trade union to support it financially.
- **Para 7 sets out responsibilities of trade unions-**
  - Where appropriate, maintain jointly with management and other trade unions effective arrangements at industry or local levels for

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<sup>18</sup> Quote taken from the Court of Appeal Judgment in Jamaica Flour Mills and the IDT and the National Workers' Union, Supreme Court Civil Appeal No. 7/2002 page 6

<sup>19</sup> Supra n.8

<sup>20</sup> See also R v IDT ex parte Egbert Dawes (1984) 21 JLR 49, where 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'.

negotiation, consultation and communication and for settling grievances and disputes.

- Provide adequate advisory services for their members and in particular assist them to understand the terms and conditions of their employment.
- **Para 8 responsibilities of employers' associations-**
  - To co-operate with trade unions for the establishment of industry level where appropriate, of procedures for the negotiation of terms and conditions of employment and the settlement of disputes and grievances.
- **Para 11 security of workers-**
  - Recognition is given for the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency-
    - Provide continuity of employment, implementing where practicable, pension and medical schemes;
    - In consultation with workers or their representatives take all reasonable steps to avoid redundancies;
    - In consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure that in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies.
    - Actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit.
- **Para 19-communication and consultation-**
  - Communication and consultation are necessary ingredients in a good industrial relations policy as these promote a climate of mutual understanding and trust.
  - Communication is a two way flow of information between management and workers or their representatives.
  - Management should following consultation with workers or their representatives take appropriate measures to apply an effective policy of communication.
- **Para 20-disputes procedures-**
  - Management and workers representatives should adopt a procedure for the settlement of disputes which-

- Should be in writing;
- State the level at which an issue should first be raised;
- Sets time limits for each stage of the procedure and provides for extension by agreement;
- Precludes industrial action until all stages of the procedure have been exhausted without success;
- Have recourse to the Ministry of Labour and Employment conciliation services.

➤ **Para 21-grievance procedures-**

- All workers have a right to seek redress for grievance relating to their employment. The procedure should neither be too numerous nor too long to avoid frustration. Procedure should be in writing and should indicate:
  - That the grievance be normally discussed first by the worker and his immediate supervisor-commonly referred to as the 'first stage;'
  - That if unresolved at the first stage, the grievance be referred to the department head, and that the worker delegate may accompany the worker at this stage-the second stage, if the worker so wishes;
  - That if the grievance remains unresolved at the second stage, it be referred to higher management at which stage it is advantageous that the worker be represented by a union officer; this is the third stage;
  - That on failure to reach agreement at the third stage, the parties agree to the reference of the dispute to conciliation by the Minister of Labour.
  - A time limit between the reference at all stages;
  - An agreement to avoid industrial action before the procedure is exhausted.

➤ **Para 22-disciplinary procedure-**Should be in writing and should-

- Specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;
- Indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;

- Give the worker the opportunity to state his case and the right to be accompanied by his representatives;
- Provide for a right of appeal, wherever practicable to a level of management not previously involved;
- Be simple and rapid in operation.

The disciplinary measures taken will depend on the nature of the misconduct. But normally the procedure should operate as follows-

- The first step should be an oral warning or in the case of more serious misconduct, a written warning setting out the circumstances;
- No worker should be dismissed for a first breach of discipline except in a case of gross misconduct;
- Action on any further misconduct, for example, final warning suspension without pay or dismissal should be recorded in writing;
- Details of any disciplinary action should be given in writing to the worker and to his representative;
- No disciplinary action should normally be taken against a delegate until the circumstances of the case have been discussed with a full-time official of the union concerned.

### **Enquiry into the reason and manner of dismissal**

Procedural fairness is paramount in cases of unjustifiable dismissal. In proceedings before the IDT, the Code enjoys a position of preeminence and a failure to comply with the Code will result in a determination that the dismissal is unjustifiable, even if it can be established that there was sufficient cause for dismissal.

The IDT Award in **Victoria Mutual Building Society v National Workers Union**<sup>21</sup> illustrates the importance of procedural fairness. The Minister of Labour and Social Security referred to the IDT for settlement a dispute between VMBS and the NWU over the dismissal of an employee, Mrs. Blair-Gayle. Despite finding that the employee was guilty of conduct which amounted to gross negligence in the performance of her duties and was less than forthright in her

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<sup>21</sup> Dispute No.: IDT 13/2006, delivered October 2, 2007



evidence, the IDT held that the dismissal was unjustifiable and ordered the reinstatement of the worker. The basis of this Award was the failure of VMBS to comply with **Para 22 of the Labour Code**. The Company had failed to ensure that the matter giving rise to disciplinary action was clearly specified and communicated in writing to the worker. The worker was not advised of the charges against her and was not informed that the ‘meeting’ she was invited to was in fact a hearing which could lead to her dismissal. The IDT determined that the worker was not given a fair hearing, in the circumstances. In accordance with **Section 12 (5) (c) (iii) LRIDA**, the Tribunal ordered that VMBS reinstate the worker with six (6) months basic wage for a specified period. If the worker was not reinstated by the date stipulated, she was to be paid nine (9) months wages. It must be noted that the options were offered to VMBS because the worker was guilty of gross negligence.

In **GSB Co-operative Credit Union Ltd v Bustamante Industrial Trade Union**,<sup>22</sup> the Minister of Labour referred to the IDT for determination and settlement a dispute over the dismissal of an employee. The worker was dismissed for alleged gross disrespect and insolence in breach of the GSB’s ‘Employee Code of Conduct.’ There was no hearing before the dismissal occurred. The IDT had to address the following issues: was the worker disrespectful and insolent, was she denied the right to due process under the principle of natural justice and was the dismissal fair and reasonable?

In relation to the principles of due process the IDT referred to authors Adolph M. Koven and Susan L. Smith in “Just Cause, Seven Test”-Bureau of National Affairs Inc. Washington D.C. According to these authors due process requires that an employee is informed promptly and in reasonable detail of the charges or possible charges against him/her and is afforded the opportunity to tell his side of the story. It was further stated that:

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<sup>22</sup> Dispute No: IDT 11/2003, delivered May 7,2004

***“If the Company fails to let the employee defend himself, or bypasses other avenues of investigation, whatever penalty has been imposed is likely to be reduced by an arbitrator, even if the employee is clearly guilty.”<sup>23</sup>***

As relates to ‘natural justice,’ the IDT stated that Para 22 of the Code will be the measure in determining whether there was adherence to the principles of natural justice. The IDT determined that although the employee was guilty of inappropriate conduct when she expressed her disgruntlement, her dismissal was not carried out in conformity with Para 22 of the Code in that dismissal should only be considered in the first instance if the employee’s conduct constituted gross misconduct otherwise. In the first instance an oral and written warning should have been given as the worker’s infraction did not amount to gross misconduct. Furthermore, a fair and proper investigation was not conducted before the decision to dismiss was taken. The main employee who had made the complaint against the dismissed worker, was a witness to the alleged misconduct and yet she participated in the decision to dismiss. This breached the well established principle of natural justice, “*nemo iudex in re sua rule* (a judge is disqualified from determining any case in which he may fairly suspected to be biased).” This equates to the Judge also being the executioner. Additionally, the dismissed worker was not afforded a hearing and at no time was she given an opportunity to state her case.

The findings of the Tribunal were:

- 1) The worker displayed her disgruntlement in an inappropriate manner.
- 2) There was no evidence of previous infractions.
- 3) The dismissal for the infraction was not in keeping with para 22 sub-paragraph II (a) and (b) of the Labour Relations Code.
- 4) The worker was denied the opportunity to state her case and the right to be accompanied by her representative which was in contravention of the

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<sup>23</sup> Ibid page 159

company's Employees Code and para 22 sub-paragraph 1 (b), (c) and (d) of the Labour Relations Code.

The IDT ordered that the worker is re-instated with 75% of her wages up to the 14<sup>th</sup> day of May 2004 or the date on which she resumes duties, whichever is earlier, and thereafter she should be paid full wages.

### **THE RATIONALE POLICY OBJECTIVES BEHIND THE MARCH 2010 AMENDMENTS TO THE LRIDA**

In March 2010 amendments were made to the **LRIDA** to facilitate the referral of specified industrial disputes to the IDT in respect of the individual/non-unionized worker. These amendments came into effect on March 23, 2010. Before this amendment was made to the law, an individual non-unionized worker could only challenge his/her dismissal in a Court of Law by instituting a claim for wrongful dismissal. We have already discussed the limitations of an action for wrongful dismissal. Once the employee has been dismissed in conformity with the terms of the contract, such as the giving of notice or payment in lieu of notice, the dismissal would not be deemed to be wrongful.

The main rationale behind the March 2010 amendment was to reverse the decision in the **West Indies Yeast case**<sup>24</sup> through statutory intervention. Before the decision in the **West Indies Yeast Case**, the Minister of Labour had been referring 'industrial disputes' in relation to unionized and non-unionized workers to the IDT. In the **West Indies Yeast** the Minister referred to the IDT a case involving the termination of the services of three workers. The Minister referred the dispute to the IDT under the then **Section 11A (1) of the LRIDA** which stated as follows:

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<sup>24</sup> Supra n.3

***“...where the Minister is satisfied that an industrial action exists in an undertaking and should be settled expeditiously, he may on his own initiative-***

***(a) refer the dispute to the Tribunal for settlement-***

***(i) if the satisfied that attempts were made without success, to settle the dispute by such other means as were available to the parties; or***

***(ii) if in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do...”***

At the time of referral there was no threat of industrial action. The employer sought judicial review of the Minister’s decision to refer the dispute to the IDT on the basis that the Minister acted *ultra vires*, unlawfully or without authority in making the reference to the IDT as the condition precedent to the exercise of his power of reference under s 11A was not satisfied. Having heard the matter the Court laid down the following principles:

- a) the scheme of the **LRIDA** is aimed at settling disputes without the stoppage of work;
- b) The Minister’s intervention could only have been sought in the situation where an industrial dispute exists;
- c) The industrial dispute must exist in an ‘undertaking’ before it can be referred for settlement to the IDT. This means that the Minister’s reference must be exercised so as to endeavour to ensure industrial peace in the undertaking, in which the dispute exists and not merely to satisfy some narrow personal interest.
- d) the Minister has no authority to act in the interest of a dismissed ex-employee where his dismissal does not give rise to a dispute which threatens industrial peace;

- e) the scheme of the **LRIDA** only contemplates disputes between an employer and a non-unionized worker where this dispute threatens industrial peace.

The ultimate importance of the decision was that for all intents and purposes, the Minister's authority to refer disputes in relation to non-unionized workers to the IDT was fettered. It was highly unlikely that a dispute in relation to a non-unionized worker could result in a threat to industrial peace or the stoppage of work. This is evidenced by the fact that since the decision in this case, the Minister was unable to refer any dispute in relation to a non-unionized worker to the IDT.

The Legislature was of the view that this situation was untenable as non-unionized workers were being deprived of access to an adjudication body which specializes in employment and labour relations, and were not being afforded the opportunity to have their disputes heard in a less rigid and adversarial environment and in a more cost effective forum. This placed the non-unionized worker at a distinct disadvantage when compared to his/her unionized counterpart. This was compounded by the recognition of the fact that with the decline in union membership, the majority of the workforce is comprised of non-unionized workers. Yet it was non-unionized workers who are more susceptible to harsh, unfair and illegal practices from employers than the unionized worker (who has the union to advocate for him) in the current framework of the labour arena.

It was further appreciated by the Legislature that the common law principles which guide the Courts in a case of wrongful dismissal claim were not as wide as the powers given to the IDT to re-instate a worker who has been unjustifiably dismissed. It was the intent of Parliament that non-unionized workers be given another avenue to seek redress, in the form of the IDT.

## WHAT WERE THE AMENDMENTS

The definition of the term ‘**industrial dispute**’ contained in **Section 2 LRIDA** was amended. The definition in sub-clause (a) will be applicable to unionized workers. It must be noted that no change was made to the types of disputes which can be referred in respect of unionized workers. An ‘**industrial dispute**’ in relation to a unionized worker is defined as:

***“a dispute between one or more employers or organizations representing employers and one or more workers or organization representing workers... being a dispute relating wholly or partly to-***

- (i) terms and conditions of employment, or the physical conditions in which any workers are required to work;***
- (ii) engagement or non-engagement, or termination of suspension of employment of one or more workers;***
- (iii) allocation of work as between workers or groups of workers;***
- (iv) any matter affecting the privileges; rights and duties of any employer or organization representing employers or of any worker or organization representing workers; or***
- (v) any matter relating to bargaining rights on behalf of any worker.”***

The definition of ‘**industrial dispute**’ in **Section 2 (b)** will now be applicable to disputes involving non-unionized workers. This sub-section states as follows:

***“in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:***

- (i) the physical conditions in which any such worker is required to work;***
- (ii) the termination or suspension of employment of any such workers; or***

***(iii) any matter affecting the rights and duties of any employer or organization representing employers or of any worker or organization representing workers.”***

It must be noted that the words ‘*terms and conditions of employment*’ have been deleted from sub-clause (b). In this context terms and conditions of employment refers to terms and conditions which are being negotiated between the employer and employee such as wages and hours of work. Additionally, the Minister of Labour and the IDT are not given the authority to interfere in disputes in respect of non-unionized workers which relate to engagement or non-engagement of the worker, allocation of work as between workers or groups of workers, privileges of the worker and any matter relating to bargaining rights on behalf of any worker.

In essence, the Minister of Labour is constrained to interfering in and referring to the IDT *disputes of rights* in relation to non-unionized workers. It must be pointed out that disputes are classifiable into two categories; disputes of rights and disputes of interests. ‘*Disputes of rights*’ refer to disputes in relation to the application, interpretation or violation of existing labour agreements and statutory provisions. At this stage the rights have already been established through negotiations or otherwise. Therefore the Minister only has jurisdiction to assist the parties to settle disputes in respect of rights which have already been established or settled, such as statutory rights and rights which have already been established pursuant to the contract of employment. Of course it is evident that the Minister has the jurisdiction over disputes relating to termination and suspension of employment, and can refer cases of alleged ‘unjustifiable dismissal’ to the IDT in respect of non-unionized workers.

‘*Disputes of rights*’ must be contrasted with ‘*disputes of interests*’. The latter term refers to disputes not regulated by any law or agreement. These disputes mainly relate to the employment terms to be adopted for new agreements. Disputes of interests generally refer to rights which are being bargained for, rights which are

not yet the subject of any agreement. An interest is that which a party is not yet entitled to, but to which he would like to be entitled. In respect of unionized workers the Minister of Labour and the IDT have jurisdiction over '*disputes of interests*' as well as '*disputes of rights.*' What is the rationale for this differential treatment? The Legislature was hesitant to interfere with the freedom of the individuals to enter into contractual arrangements and the freedom to choose the precise terms that form a legally enforceable obligation which underpins contract law. Consequently, the Minister was not given the authority to intervene in the mechanisms of the process for the negotiation of the terms of the contract of employment between the individual worker and his/her employer.

The terms *disputes of rights* and *disputes of interests* are already recognized in the Labour Relations Code of Jamaica. Part V1 of Section 20 of the Code stipulates that disputes are broadly of two kinds, disputes of interests and disputes of rights. According to the Code, disputes of rights involve the application and interpretation of existing agreements or rights. Disputes of interests relate to claims by workers or proposed by management as to the terms and conditions of employment.

In **Section 2 LRIDA**, the definition of the term '**undertaking**' was amended so as to ensure that an undertaking employing only one worker is encompassed in the definition.

**Section 11A** was amended to remove the need for the Minister to establish that industrial action is likely to be taken or contemplated before referring a dispute involving a non-unionized worker to the Industrial Disputes Tribunal (IDT) and to remove the need for the Minister to establish that the matter has to be settled expeditiously before referring such a dispute to the IDT. This was accomplished by the addition of a new subsection 3 (a). This was in direct response to the decision in **West Indies Yeast**. Out of an abundance of caution subsection 3 (b) has been added to ensure that where there is an industrial dispute involving a non-unionized worker, the individual does not have to establish that he/she is



a member of a trade union having bargaining rights in order to have the dispute referred to the IDT.

In an effort to enhance the capacity of the IDT to address the anticipated increase in case load, **Paragraph 1(1) (a)** of the Schedule to the Act was amended to increase the number of Deputy Chairmen. This crucial amendment facilitates the establishment of even more panels to sit at the IDT to hear disputes.

**REVIEW OF IDT SELECT AWARDS IN DISPUTES INVOLVING NON-UNIONIZED WORKERS SINCE THE MARCH 2010 AMENDMENT TO THE LRIDA**

There can be no doubt that there has been a steady increase in the number of disputes involving non-unionized workers as the Table below indicates<sup>25</sup>.

**INDIVIDUAL (NON UNIONISED) DISPUTES REFERRED SINCE 2010 AMENDMENT TO LRIDA**

YEAR	NUMBER OF CASES
2011	12
2012	24
2013 (as at April)	9

In 2011 there were only 12 disputes, however as persons became more aware of the fact that the law was amended the number of cases doubled in 2012.

It would be interesting to note how the IDT has treated with disputes involving non-unionized workers and the role which the Labour Code plays in the proceedings. The following cases should assist in elucidating this point.

The case of **Carib Star Shipping Limited v Mr. Herbert Tracey**<sup>26</sup> involved a claim of unjustifiable dismissal of a non-unionized worker and was referred after the March 2010 amendment to the LRIDA. The company contended that it had to dismiss Mr. Tracey, as his ID Card was withdrawn at the request of the Port Authority (no reason was given for the request). The company further contended

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<sup>25</sup> Note that the Table does not reflect the number of disputes which were settled through conciliation at the Ministry of Labour, nor the disputes which the Minister decided not to refer to the IDT in respect of non-unionized workers.

<sup>26</sup> Dispute No. IDT 9/2012 delivered October 30, 2012

that the Carib Star ID System was controlled by the Port Authority. Once the card was withdrawn Mr. Tracey would not have been able to access the Company. Carib Star lost confidence in Mr. Tracey by virtue of the demand for the surrender of his ID Card. The IDT determined that the contract was frustrated by the withdrawal of the ID Card, as the worker could no longer access the areas required to perform his duties. However the IDT still held that the provisions of the Code should have been applied to the dismissal. The worker was denied natural justice, was not given the right to state his case or to be accompanied by his representative and was not provided with the right to appeal. As a consequence it was determined that the worker was unjustifiably dismissed and should be paid five (5) weeks full pay.

The Chairman of the IDT did not concur with the decision of the majority. He was of the view that this was not a case of unjustifiable dismissal but one of termination of the contract of employment as a result of the withdrawal of Mr. Tracey's ID. There was no report of any disciplinary proceedings brought against Mr. Tracey resulting in his dismissal; accordingly the Labour Relations Code and the right to appeal are not applicable. The worker was dismissed in accordance with the terms and conditions of employment which he signed. He was of the view that Mr. Tracey's employment was therefore properly terminated. This case aptly illustrates that the IDT will examine whether or not the provisions of the Code were complied with when determining whether or not the individual worker was unjustifiably dismissed. Although it is arguable as to whether the Chairman of the IDT was correct in his view that the Code should not have played a role in this particular case, having regard to the fact that the contract was frustrated.

The fact that the IDT will still pay keen attention to procedural fairness in disputes involving non-unionized workers, is further exemplified by the case of **Allied Protection Limited v Joseph Mc Lean**<sup>27</sup> where the IDT found that the worker was unjustifiably dismissed because of procedural defects including: the

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<sup>27</sup> Dispute No. IDT 26/2012 (unreported) delivered April 22, 2013

failure to give the dismissed workers copies of written statements by other workers which set out their version of the incident which gave rise to the dismissal, failure to request a written statement from the dismissed worker setting out his version of events, not advising the worker he could bring a representative to the hearing and the fact the Supervisor acted as a witness and yet he was a part of the disciplinary panel.

In **A.V.G. Import and Distributor and Ms. Kerrant Clarke**,<sup>28</sup> the Minister of Labour referred to the IDT, a dispute in relation to the termination of Ms. Kerrant's employment. The worker contended through her Consultant that her services were terminated on the grounds of her pregnancy. The Company contended that her performance was unsatisfactory and despite written warnings there was no improvement. The Company also cited the worker's inappropriate dress and attire.

The findings of the IDT were that there was evidence that Ms. Clarke's behavior over the period of employment was not satisfactory. However, the letter of dismissal made no reference to any specific breach of conduct or unsatisfactory performance. Additionally, the dismissal occurred after she had confirmed her pregnancy. The IDT noted several procedural breaches of the provisions of the Labour Code including:

- The dismissal of the worker without formally informing her of the charges against her.
- The failure of the company to afford the worker the opportunity to answer the charges against her.

As a result of the failure of the company to follow due process, the IDT determined that the worker had been unjustifiably dismissed and awarded that she be paid compensation in the sum of Two Hundred Thousand Dollars (\$200,000.00). Re-instatement was not ordered as the IDT formed the view that

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<sup>28</sup> Dispute No.IDT 2/2013 delivered July 11, 2013

the environment at the workplace would not be conducive to good working relations.

In **Byndloss Hardware and Hopeton Ranger**,<sup>29</sup> the fatality of failing to observe procedural fairness was further exemplified. The Company was experiencing shortages in its inventory and a staff meeting was called to address the problem. At this staff meeting the charges were announced and Mr. Ranger objected. He was thereafter suspended and then his services were terminated as a result of this non-co-operation at the meeting. The worker claimed unjustifiable dismissal. The IDT determined that the worker had been unjustifiably dismissed as the procedure adopted by the company was in variance with the Labour Relations Code. The main procedural defects highlighted were the dismissal of the worker without formally informing him of the charges against him and the violation of the worker's rights which included: the right to be informed of the charges, the right to confront his accusers, the right to answer charges, the right to call witnesses and the right to be represented. As there was no request for reinstatement, the worker was awarded the amount of Three Hundred Thousand Dollars (\$300,000.000) as compensation for unjustifiable dismissal.<sup>30</sup>

Practitioners should note from the cases explored, that similarly to cases involving unionized workers, the IDT will pay strict attention to whether the provisions of the Labour Code were complied with in dismissals involving non-unionized workers.

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<sup>29</sup> Dispute No. IDT 21/2012, delivered July 16, 2013,

<sup>30</sup> Also note the case of S.O.S. Foods Limited and Messrs. Gary Brown and Ripton Brown, Dispute No. IDT 27/2012 delivered on July 31, 2013. This is a case where the IDT Award was in favour of the company as the men had not been dismissed but had abandoned their jobs.

## **THE EFFECT OF THE AMENDMENTS ON TERMINATION BY NOTICE**

Has the 2010 amendment to the **LRIDA** sounded the death knell to notice clauses in the contract of employment? From a theoretical perspective the answer is 'No,' as it has been shown that an action for wrongful dismissal and a claim of unjustifiable dismissal will still co-exist. A claim for wrongful dismissal would be pursued in a Court of Law and an action for unjustifiable dismissal before the IDT. However, from a practical standpoint it can be argued that the 2010 amendment may have struck a death blow to claims for wrongful dismissal or at the very least claims for wrongful dismissal may decline significantly based on the presumption that the Claimant will choose the more favourable forum to ventilate his/her claim. It is evident that in the same way that the manner and reason for dismissal is irrelevant in common law proceedings, the fact that the employer complied with the notice clause when dismissing the worker will be of no moment in proceedings for unjustifiable dismissal, if the employer is guilty of procedural defects. An employer, who dismisses a worker solely in reliance on the notice clause in the employment contract, is likely to run afoul of the LRIDA and the Code in proceedings for unjustifiable dismissal which are pursued at the IDT.

## **Practical Guidance to Labour Law Practitioners**

- 1) Appreciate the distinction between wrongful and unjustifiable dismissal, as this will ensure that valuable time is not wasted instituting proceedings in the incorrect forum.
- 2) Ensure that you are intimately familiar with the provisions of the **LRIDA** and the **Labour Relations Code**.
- 3) Emphasize to Clients the importance of complying with the provisions of the Code.
- 4) Before a worker is dismissed employers must comply with **Para 22** of the Code. A failure to do so could result in a determination that the dismissal was unjustifiable.
- 5) It must be appreciated that the Minister of Labour and by extension the Ministry and the IDT only have jurisdiction to intervene in **'industrial disputes'** as defined under **Section 2** of the **LRIDA**. As regards the individual non-unionized worker, **'industrial disputes'** are restricted to the disputes set out in **Section 2 (b) LRIDA**.

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