



Labour and Employment Law Online Training 2023 Practitioners' Forum

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Advising the Employee/Employer Client

What are we doing today?

The presentation today is not going to be delving much into “case law” and “legislative provisions” even as they must of necessity be a part of any conversation in respect of employment and labour law.

Today it is my intention to take us on a journey to promote better understanding of this discrete areas of law and fit you to be in a better place as you carry on your duties as Counsel.



Points For



- + What is the “true” nature of the Employment Contract
- + The importance of taking “fulsome instructions” and what to look for when speaking to clients;
- + Difference in management of issues in unionized vs. non - unionized environments ;
- + Advising on the law regarding issues which arise;
- + Importance of providing written advice to clients
- + Costs to clients and implication of decisions based on advice.

Background:

- + The practice of law (as learned) inherently lends it self to being “adversarial” as opposed to “inquisitorial” in nature
- + As good Counsel we tend to be **“in it to win it”** and we usually bring our “A” game to the table no matter the nature of the matter or the type of issue we face.

Employment and Labour Law is Different!



“ ...the nature and extent of employment and labour law in the Caribbean is characterized by an eclectic mix of:

***common law principles,*

*** legislation,*

***customs and practices and*

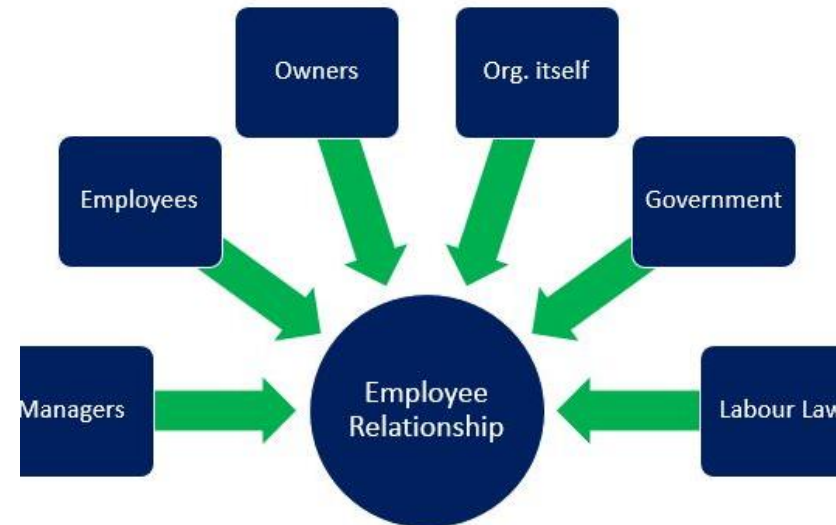
*** policies*

which creates a unique synergy for its operation”

- + Downes, A. S. et al . (2004) '**Labour Market Regulation and Employment in the Caribbean**' pp. 517-552 at 520 in Heckman, J. and Pages, C. (Eds) *Law and Employment Lessons from Latin America and the Caribbean* , Chicago, Il: University of Chicago Press.



What is the "true" nature of the Employment Contract?



Appreciate that:

- + • The law is a “reluctant entrant” into the employment relationship - it is simply there to assist in the regulation of the **RELATIONSHIP** between the parties
- + There is never a “problem” until there is a **“PROBLEM”**.
- + The fact is that when Attorneys are asked to get involved things **[by either the employee or the employer]** thing have ‘gone wrong’
- + Our goal should be to assist the parties as far as is possible to properly manage the issue for best outcomes on all sides at the end of the day ;

YOU MUST:

- + Do your homework: KYC - Research your client!
- + For EMPLOYER CLIENTS :
 - Is this a “mom and pop”/ small medium sized operation?
 - Is this a multinational/regional company?
 - Are they listed on the stock exchange?
 - Is this a government entity?
 - Is their staff unionised or under threat of unionisation?
 - Is there any/or a strong HR/IR Unit
- + Be sensitive to the needs of the organisation vis-à-vis the case that they present to you

YOU MUST:

- + Do your homework: KYC - Research your client!
- + For EMPLOYEE CLIENTS :
 - Is the person engaged as a “permanent staff” or under a Fixed Term Contract
 - Is the person engaged as an Independent Contractor?
 - Is the person a member of a union having bargaining rights?
 - If the matter is disciplinary in nature is this the first time that they have been involved in a disciplinary process?
 - Is the person a long standing employee - close to retirement age?
 - Has there been any challenges between themselves and management ?
- + Be sensitive to the needs of the employee vis-à-vis the case that they present to you

Taking Fulsome Instructions from the Client



I am a *“Creature of Instructions”*



Commentary on the Phrase “Creature of Instructions”

“What the public, however, lose sight of is that behind an attorney stands a client who instructs an attorney.

In the legal fraternity, a lawyer is defined as a ‘creature of instruction’, meaning they act out instructions received from their clients.

The creature of instruction will advise what a client can do, but the client will decide what he wants to do. Thereafter the legal representative has his instructions and he has to execute these instructions to the best of his abilities.

Failure to do so may land him in front of a disciplinary tribunal at the Law Society.

Many times the public misattribute the nastiness of a party to an attorney, while in reality it is that of the person who has employed the attorney.”

Commentary on the Phrase “Creature of Instructions”

- + *To put it otherwise, an attorney is the conduit of the intentions – good or bad – of a client.*
- + *Granted, an attorney advises his client on the law and the probabilities for success of a case, but at the end of the day it is the client who chooses down which path he or she wants to go.*

To put it in colloquial short and simple:

“Behind a mean attorney stands a mean client!”.

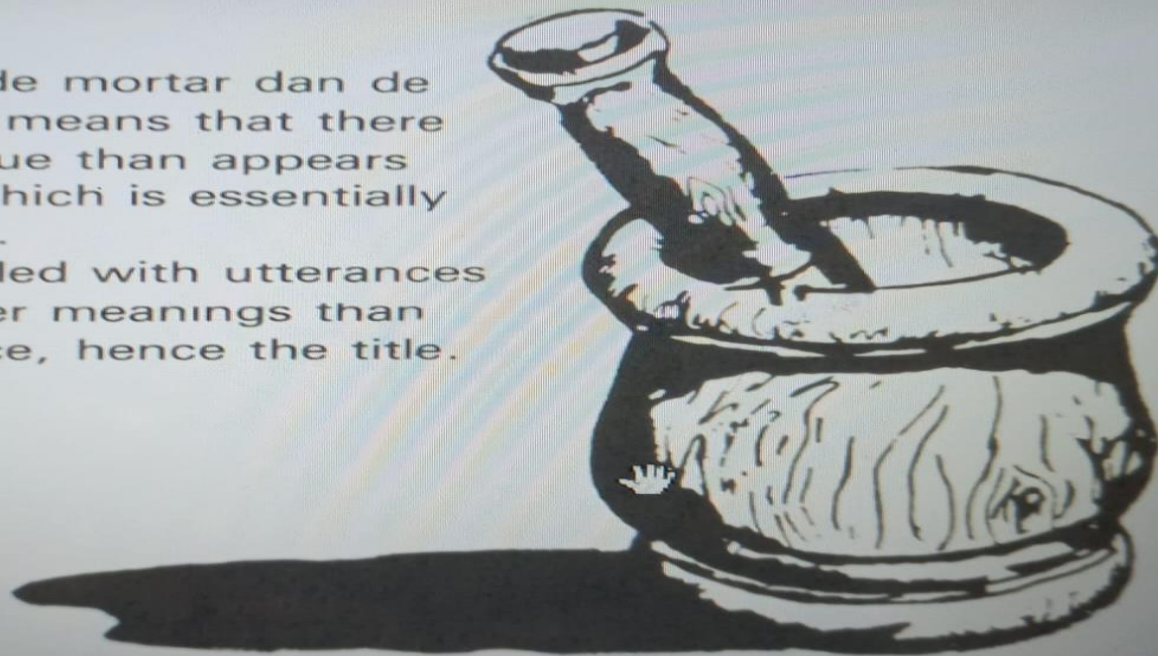
- + **See: <https://www.news24.com/news24/a-creature-of-instruction-20140829> (August 29, 2014)**

YOU MUST:

- + Do your homework: GYI - Get all the relevant information!
- + For EMPLOYER and Employee CLIENTS :
 - Request all the documentation related to the matter
 - Employment Contracts,
 - Company Handbooks,
 - Emails, Memoranda,
 - Staff HR Files,
 - Investigation Reports
 - Standard Operating Procedures for the business

Remember the Bajan Proverb:

"Duh is more in de mortar dan de pestle" (page 16) means that there is more to the issue than appears on the surface, which is essentially what a proverb is. This volume is filled with utterances which have deeper meanings than seen at first glance, hence the title.



(Don't focus on just what you "see"!!!)



Transport Board workers off the job

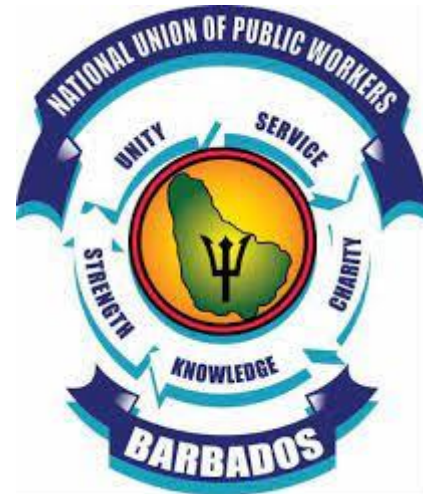


Article by
Barbados Today

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**Difference in
management of
issues in unionized
vs.
non - unionized
environments ;**

The Barbados Industrial Relations Landscape



YOU MUST:

- + Do your homework: GYI - Get all the relevant information!
- + Especially for the EMPLOYER CLIENTS :
 - Know the terms of your Collective Bargaining Agreement
 - Know your Shop Stewards and Union Officer
 - Create spaces for positive proactive Communications on a regular consistent basis
 - Ensure that as best as possible you have contingency procedure in place to manage operations dependent on the nature of your business should there be industrial action
 - Develop a system to "read the tea leaves"
 - Because of union dynamics it is not always best to "go hard and go home" if you wish ensure that your client's business does not suffer adversely

**Advising
on the [correct] law**

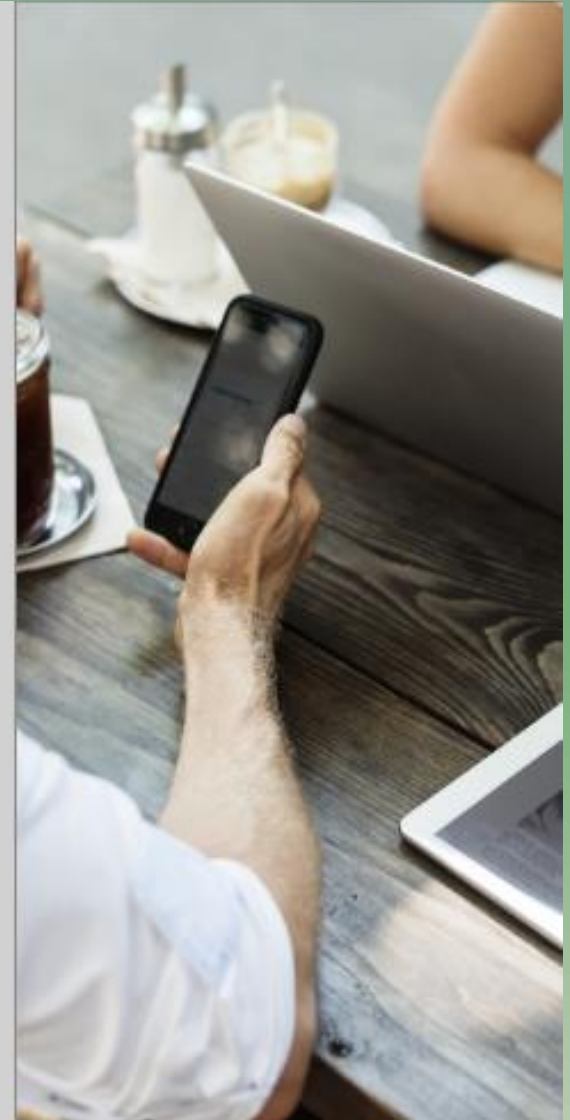


YOU MUST:

- + Do your homework: KYL - Know your Law
- + There is no substitute for ensuring that the state of the Law is correct when advising a client!
- + For EMPLOYER and EMPLOYEE CLIENTS :
 - Consult your legislation
 - Review case law (ERT Decisions for Unfair Dismissal cases]
 - Appreciate the various angles that can arise from the same set of circumstances
 - i.e. - you may have Redundancy,/Severance, Unfair Dismissal and Wrongful Dismissal Cases all coming out of the same facts
 - Reach out to other colleagues who practice regularly in the area for feedback and guidance

**The Importance
of
reducing your
advice
to writing**

**WHY WE
NEED
TO PUT IT IN
WRITING**



The CYA Principles Apply

- + Clients have short memories... (But the regulator won't!!!)
- + No matter how much you explain orally it is a different matter when the information is reduced to writing (save voice notes and watssapp messages)
- + Client must be made to appreciate the possible risks and benefits of taking particular courses of action;
- + Get their instructions **IN WRITING, BEFORE** proceeding



**Costs to clients
and implication
of decisions**



YOU MUST:

- + Tell your client: TYC - Keep the communication lines open!
- + Ensure that you advise the client of the possible costs associated with the pursuit or non pursuit of their matter so they can make an informed decision.
- + For EMPLOYER and EMPLOYEE CLIENTS :
 - Advise as best as possible the monetary and “non monetary” costs of the case (i.e. possible time it will take to conclude the matter, reputational damage)
 - Advise of Attorney’s fees

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