WILJ
WEST INDIAN LAW JOURNAL

2020-2022 • Vol. 41 No. 1 & 2

VOLUME 41 ISSUE NO. 1

VOLUME 41 ISSUE NO. 2

ISSN: 0253-7370
eISSN: 0799-0861

jurisdiction constitutes a quorum for plenary meetings and decisions are taken by consensus or, if consensus cannot be achieved, by majority vote of two-thirds. Exceptionally, the withdrawal of an eligible institution from the statute requires an affirmative vote of not less than three quarters of all eligible institutions. Amendments of the Statute may be proposed by any eligible institution and may, upon the recommendation of the Legal Affairs Committee, be approved by the Conference of Heads of Government.[95]

CONCLUSION

The CCAT has taken its rightful place among the family of international administrative tribunals. In so doing it has added value to the statutes which preceded it by introducing innovative features which balance the immunity of regional organizations from suit in domestic courts with the constitutional right of employees to a fair hearing before an independent and impartial tribunal. The Tribunal emerged from a genuinely democratic process of negotiation among CARICOM Institutions and through approval by the formal governance arrangements within the Caribbean Community. A complainant must exhaust all available internal remedies before approaching the Tribunal and in determining regional employment grievance, the Tribunal is required to apply the principles of fundamental human rights in accordance with international administrative law. There are opportunities to appeal decisions taken without jurisdiction or which appear erroneous on a question of fact or law, and there are elaborate institutional provisions to ensure the stability and sustainability of the Tribunal and to facilitate its integration into the regional governance arrangements. This represents strong foundations for a viable regional administrative tribunal and mark an important step in the maturing of the Caribbean civil service. Ultimately, the success of the Tribunal will be judged by the efficiency and perspicacity of its decision-making: matters that will be the primary determinants of the degree of confidence that it engenders among CARICOM Institutions and their employees.

95 Article XXI, CCAT Statute.

The Labour Relations and Industrial Dispute Act: Is It Time to Change the Wineskins?

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DOI: 10.37234/WILJ.2020-2022.4102.A002

Abstract

An apt analogy can be drawn between the challenges produced by pouring new wine into old wineskins and the various amendments to the Labour Relations and Industrial Disputes Act (LRIDA). This article traces the rationale for statute's enactment, the various revisions made thereto and their effects. It posits that the most recent changes are "new wine" when examined against the legislation's ethos which is threatening to "burst" the Act's proverbial wineskins with possible deleterious effects to Jamaica's labour and employment law landscape. Further, based on Jamaica's current economic, legal and social environment, the time has come for a comprehensive review of this seminal law. The review should examine whether the LRIDA's underlying framework remains relevant, and if not make suggestions that the current "new wine" is poured into appropriate wineskins to ensure that the country profits from a strong legislative framework which inures to the benefit of all the stakeholders.

Keywords: employment law, labour policy, industrial relations, unjustifiable dismissal, Industrial Disputes Tribunal, legislative reform.

"And no one pours new wine into old wineskins.
Otherwise, the new wine will burst the skins;

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the wine will run out and the wineskins will be ruined.
New wines must be put into new wineskins.[2]

INTRODUCTION

In ancient times, the treated hides of small animals were used for storing and transporting wine. However, these "wineskins" would eventually lose their elasticity and become brittle and were suitable for storing old wine which was no longer fermenting. When new wine was placed into a wineskin it continued to ferment and create carbon dioxide, so it was essential to put it into a new, flexible, skin that could expand. If new wine was placed into an old wineskin, the gas would burst that skin and the wine would be lost.

An apt analogy can be drawn between the challenges produced by pouring new wine into old wineskins and the amendments to the Labour Relations and Industrial Disputes Act (LRIDA) since its enactment. This article will trace the historic development leading to the LRIDA's enactment, explore its initial provisions, the various revisions made thereto and their effects and impact. It posits that the changes made over the years are "new wine" when examined against the legislation's original ethos, which threatens to "burst" the proverbial wineskins with possible deleterious effects to Jamaica's labour and employment law landscape. Further, the writer argues that based on the current economic, legal and social environment, the time has come for a comprehensive review of this seminal law.

THE LABOUR RELATIONS AND INDUSTRIAL DISPUTE ACT 2 (LRIDA) – FIRST VINTAGE: 1975

When the *Labour Relations and Industrial Disputes Act*[3] (LRIDA) along with its attendant Regulations and the Labour Relations Code,[4] were enacted 43 years ago, it was hailed as the long awaited "new wine" which it was hoped would bring much needed improvement within Jamaica's volatile Labour and Employment law sphere.[5] Indeed, the LRIDA was

2 Luke 3:37-39; similar verses are found at Mark 2:22 and Matthew 9:17.

3 Act 14 of 1975, coming into operation on April 8, 1975.

4 The former were made by the Minister on May 1, 1975 and the latter became operational on November 1, 1976.

5 See discussion in Chaudhary, R.L., and Reid, G.C. (1976), "An Appraisal of the Jamaica Labour Relations and Industrial Disputes Act", (1975) 8 *Lawyer*

described as the "new bible"[6] of industrial relations by legislators of opposing political persuasions, who in uncharacteristic fashion found consensus in accepting the necessity for enacting this ground-breaking statute.

This position ought not to be considered strange considering the prevailing labour relations landscape in Jamaica's post-independence environment. While union activity became legitimized and their activities were provided with a measure of protection with the earlier passage of the Trade Union Act,[7] the influence of unions was stymied by the prevailing industrial relations structure. The system inherited from the metropole eschewed the law's intervention, in deference to a voluntary approach to labour relations, which was at least theoretically thought of as a better vehicle, of allowing employers and worker representatives the flexibility to negotiate collective agreements. It was also expected to more effectively address grievances and disciplinary concerns without the strictures of legislative compulsion. More often than not the *de facto* position proved the exact opposite. Employers were at liberty to decide whether they would purposefully interact with unions, irrespective of clear indicators of majority worker endorsement. Employees were in many instances disenfranchised, since although the Constitution provided the right to associate and form and join trade unions,[8] there were no legislative provisions to compel employers to recognize them.[9] To the extent that there was any statutory intervention, it was limited and at best could be considered as only moderately useful.

Two statutes reigned supreme prior to the LRIDA's enactment; the Public Utility Undertakings and Public Services Arbitration Law

of the Americas, pp. 36-59; Stone, D.H.F. (1972), "The System of Industrial Relations in Jamaica" (unpublished mimeo); Gershenfeld, W.J. (1974), *Compulsory Arbitration in Jamaica*, Institute of Social and Economic Research (UWI, Mona); Taylor, O. (2002), "The Jamaican Labour Relations and Industrial Disputes Act: A Critical Assessment", in Cowell, N. and Branche, C. (Eds.), *Human Resource Development and Workplace Governance in the Caribbean*, Ian Randle Publishers, pp. 426-450; Kirkaldy, G. (1988), *Industrial Relations Law and Practice in Jamaica*, Caribbean Law Publishing Company, pp. 148-178.

6 Senator Carlyle Dunkley, Jamaican Parliamentary Hansard, dated March 19, 1975 at p. 203.

7 Cap. 389 [1919] as amended.

8 Section 23(1), Jamaica Constitution (pre 2011 Amendment).

9 ***Banton v. Alcoa Minerals of Jamaica*** [1971] 17 WIR 275.

(commonly referred to as the "Essential Services Law") and the Trade Dispute (Arbitration and Enquiry) Law[10] – (Trade Disputes Law). The former mandated the compulsory settlement of labour disputes occurring within designated essential services, while the latter facilitated voluntary mediation, conciliation, and arbitration of disputes in undertakings outside of these essential services. According to Gershenfeld,[11] there were substantial problems with the procedures under the Essential Services Law. In many cases the Minister of Labour lacked the power to effectively intervene in disputes because of loopholes in the Act, resulting in protracted industrial action and negative impacts for the society and economy at large. The Trade Disputes Law also presented concerns, since the *ad hoc* arbitration tribunals created thereunder could only be established with consent of the parties. The remedy of reinstatement was not available under the operation of either law and there were no penalties for disregarding tribunal awards. Additionally, Boards of Inquiry set up under the Acts could only make recommendations which need not be adopted by the parties to a dispute.

With this backdrop, as well as the evolving post-independence political landscape of the 1960s and early 1970s and the symbiotic relationship between the major trade unions and the major political parties, at least five attempts to repeal these laws were stillborn.[12] After having first made an appearance as the "Industrial Disputes Act" in 1970 under a Jamaica Labour Party (JLP) administration, the LRIDA was eventually enacted some five years later under a People's National Party (PNP) government amid consultations, closed door discussions among the tripartite players and widespread public debate. The LRIDA's policy was underpinned by the then transcendent labour law theories of collective *laissez faire* as enunciated by Otto Kahn-Freund.[13] This

10 Law 16 of 1939 and Law 6 of 1952 respectively; both statutes were repealed by the LRIDA.

11 Gershenfeld, W.J. (1974), *Compulsory Arbitration in Jamaica*, Institute of Social and Economic Research (UWI, Mona), p. 73.

12 See discussion in Chaudhary, R.L., and Reid, G.C. (1976), "An Appraisal of the Jamaica Labour Relations and Industrial Disputes Act", (1975) 8 *Lawyer of the Americas*, pp. 36-59; Stone, D.H.F. (1972), "The System of Industrial Relations in Jamaica" (unpublished mimeo), pp. 79-90; Gershenfeld, W.J. (1974), *Compulsory Arbitration in Jamaica*, Institute of Social and Economic Research (UWI, Mona), pp. 59-73.

13 Kahn Freund, O. (1954), "Legal Framework", in A. Flanders and H.A. Clegg (Eds.), *The System of Industrial Relations in Britain*, Blackwell Publishing, p. 49.

espoused that legislation's role in the labour sphere should be both auxiliary and restrictive in nature; the intent was to support the establishment and entrenchment of collective bargaining on the one hand while concurrently limiting the scope of trade union activity, particularly the disruptive impact of industrial action.

As such the provisions of the LRIDA focused on two major concerns. Firstly, it sought to entrench trade union membership rights, thereby creating the scaffold for the operation of collective bargaining. It not only reiterated the workers' constitutional right to be members of a trade union of their choice and to participate in its activities but went further.[14] It prescribed sanctions against errant employers by creating the criminal offence of "union busting" where either through discrimination or positive inducements workers were discouraged from exercising their rights.[15] The Act also moved to firmly cement workers' entitlement to have the union of choice recognized as having bargaining rights vis-a-vis an employer.[16] This became necessary when the fallacy that the Constitutional right of freedom of association encompassed an automatic right to be represented by a chosen union in collective bargaining was categorically debunked in ***Banton v. Alcoa Minerals***.[17] To facilitate this position, the new Act immortalized the Ministry of Labour's previously discretionary practice of certifying unions as bargaining agents after an agreed polling process.[18]

In furtherance of advancing collective principles, the Act provided for the Minister of Labour to institute a Labour Relations Code (LRC) to provide "...such practical guidance... as would be helpful for the purpose of promoting good labour relations".[19] The principles of collective bargaining freely conducted on behalf of workers and employers and the development and maintenance of orderly procedures for the peaceful and expeditious settlement of disputes by negotiations, conciliation or arbitration were given primacy in the LRC. Coming into effect one and half years after the parent Act, the LRC has to date never been amended.

14 Jamaica Constitution (1962) – Section 23(1).

15 Section 4; see also ***Regina v. Mark McConnell and United Estates*** (unreported) delivered July 31, 2001 and ***Regina. v. Norman Reittie, Royden Reittie & Century Corporation Limited*** [1990] 27 JLR 110.

16 Section 5(5) and Section 5(6).

17 [1971] 17 WIR 275.

18 Section 5.

19 Section 3.

However, its influence in the employment and labour relations sphere has transcended its humble beginnings. It has seemingly been elevated to mandatory guidelines for proper worker and employer interaction by virtue of the decisions in the ***Jamaica Flour Mills Limited v. Industrial Disputes Tribunal and National Workers Union*** cases.[20]

It was clear that the parliamentarians also sought to pay homage to the tenets of self-governance and industrial autonomy as part of the Act's voluntary ethos. The LRIDA therefore mandated that collective agreements which did not possess a dispute resolution mechanism should adopt procedures requiring all efforts to be made at the enterprise level to resolve disputes. If no solutions were found, the second step of government-provided conciliation seeking similar results, should be invoked before (as a last resort) an industrial dispute could be referred by the Minister of Labour[21] for compulsory arbitration.

What should rightfully constitute an "industrial dispute"[22] was also clearly defined by the Act as being issues between workers, their union representatives and employers relating to terms and conditions of employment, engagement, non-engagement, termination or suspension of employees, allocation of work between workers and matters affecting the rights and duties of the parties. An examination of the definition of "bargaining rights"[23] presents a virtual mirror image of the "industrial dispute" description which gives a clear indication of the legislature's intent in formulating the statute; bargaining rights concerns were envisioned as being the substantive purview for industrial disputes. Therefore, in the original domain of the LRIDA, the influence of collective representation of workers was considered most important and addressing concerns emanating therefrom was thought most critical to the maintenance of workplace stability.

Secondly, the new Act formulated the means whereby the principles of collectivism could be administered. It therefore prescribed the circumstances under which disputes could be advanced to government-provided compulsory arbitration for eventual settlement, with the intent being that industrial action should be prohibited or heavily proscribed. It should however be noted that the Minister of Labour was the sole conduit through which these matters could be referred to arbitration. The initial circumstances under which matters could be referred were threefold. Mirroring the previous provisions in the Essential Services Law, disputes in essential services remained in scope forbidding industrial action, except when the Minister has not acted within a specified timeline after a matter was reported and efforts to settle the matter has proved futile.[24]

Another instance where the Minister could refer disputes for settlement, was where industrial action had begun or appeared likely to begin in non-essential services establishments, if in the Minister's view its impact would be gravely injurious to the "national interest."[25] The Act however prescribed a rather cumbersome process to do so. The Minister had to make an Order subject to negative resolution of Parliament and that Order was to be served on the parties to the dispute giving written directives to desist from industrial action and to seek resolution of the matter within thirty days. Only if the matter was not settled, could the Minister proceed to seek the parties' input for the establishment of a customized Tribunal and if this was not forthcoming, on his own volition the issue could be transmitted to mandatory arbitration. Needless to say, this power was and still remains virtually a dead letter in practice as it has only been invoked once[26] and indeed was later considered as impractical in application by legislators.[27]

The remaining circumstance where matters could be sent to arbitration was where all parties jointly requested a referral.[28] Even so, before the Minister could proceed, he had to be satisfied that all

20 Dispute No. IDT 22/99 decided October 9, 2000; Full Court Suit No. M 105 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.

21 Section 6.

22 Section 2.

23 Section 2.

24 Section 9; Undertakings which constituted "Essential Services" as stated in the First Schedule are Water, Electricity, Health, Hospitals, Sanitary, Fire Fighting, Prison Services, Public Passenger Transport, loading and unloading ships, oil refining, and the loading distribution or retailing of petroleum fuels. This list was expanded in 1976 to include Banking Services, Air Transport, Services and Civil Aviation Services. In (1986) Overseas Telecommunications services were also added.

25 Section 10.

26 Kirkaldy, G. (1988), *Industrial Relations Law and Practice in Jamaica*, Caribbean Law Publishing Company, pp. 172.

27 See comment by then Minister of Labour Wills Isaacs in the Parliamentary Hansard, dated May 18, 1978, p. 60.

28 Section 11.

efforts at self-determination of the dispute yielded no success. Again, it was pellucid that government intervention would be driven only by ensuring that the country was not prejudiced by industrial action or on the obvious need to bring disputes to an end in the face of parties' inability to do so by their own consensus.

The mechanism established by the Act to provide the necessary intervention through arbitration or other appropriate methods was the Industrial Disputes Tribunal (IDT).[29] This is a permanent quasi-judicial body which was given the mandate to settle industrial disputes. The IDT typically sits in panels of three, headed by a chairman or deputy chairman appointed by the Minister and two "wing members" who are also appointed by the Minister from a panel supplied to him by organizations representing employers and organizations representing workers. The chairman or deputy chairman should be persons who "appear to the Minister to have sufficient knowledge of or experience in labour matters".[30] The Act makes provision for matters relating to interpretation, application, administration, or alleged violation of collective agreements (so called "rights disputes"[31]) to be adjudicated by the chairman or a deputy chairman sitting alone[32] as well as for panels to be assisted in their deliberations by assessors.[33] It should be noted however that in practice, the latter provisions are rarely utilized in favour of the tripartite arrangement which tends to impute a more balanced approach to dispute settlement.

In making its awards the IDT is required to run the gamut of interpreting the LRIDA considering specific facts, the accepted practices of Jamaican industrial relations as well as applicable general legal principles. As such IDT awards are unimpeachable except on points of law,[34] and only examinable via the judicial review process. In furtherance of the restrictive ambit of the legislative structure, the IDT is seized of the power to intervene and make cease and desist orders against

29 Section 7.

30 Paragraphs 7 & 8 Second Schedule.

31 "Dispute of rights", is where people or groups are entitled by law, by contract, by previous agreement or by established practice to certain rights. Disputes of right focus on conflict issues such as employment contracts, legally enforceable matters or unilateral changes in accepted or customary practices.

32 Section 8(2).

33 Section 8(5).

34 Section 12(4)(c).

the parties who undertake unlawful industrial action in furtherance of industrial disputes.[35]

Another extremely important jurisdiction accorded to the IDT lies in the remedies that it can provide when dismissal cases are in scope. Based on its awards, monetary compensation may be ordered as well as reinstatement of aggrieved employees if they were adjudged to be unjustifiably dismissed.[36] The power to order reinstatement is indeed very significant as it was reposed only in the IDT. Thus, it provided an extra-judicial avenue of redress for workers since the courts were estopped from ordering specific performance-like judgment in the case of employment contracts.[37]

Parliament instituted the term 'unjustifiable dismissal' into employment and labour law terminology via Section 12(5) of the LRIDA without proffering any other definition of the term. Indeed, during the legislative debates, the words 'wrongfully', 'unjustly' and 'unjustifiably' were used interchangeably by parliamentarians[38] to describe an employer's arbitrary manner of dismissal as the mischief being addressed. The use of these conflicting terms has not boded well for the proper interpretation and implementation of the provision in practice. The matter was further complicated by the *obiter dicta* pronouncement of Chief Justice Smith in ***R. v. Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast*** [39] that:

> *"... the words* 'unjustifiable' and 'unfair' *are synonymous and the use of one rather than the other merely shows a preference of the draftsman... 'unjustifiable' in the section refers to the reason for the dismissal and not the dismissal itself."*

It should be noted that while the LRIDA gives the IDT the power to provide redress to workers who are deemed "unjustifiably dismissed" it did not establish an explicit right not to be unfairly dismissed as is

35 Section 12(5)(a).

36 Section 12(5)(c).

37 See dicta of Fry, L.J. in ***DeFrancesco v. Barnum*** (1890) 43 CH D 165; ***Calvin Cameron v. Security Administrators Limited*** [2013] JMSC Civ. 93 unreported delivered June 26, 2013, para. 7.

38 For example see Senator Leacroft Robinson Q.C., *Jamaican Parliamentary Hansard*, dated March 27, 1975 at p. 199.

39 [1985] 22 JLR 407, p. 410.

the case in the UK and some other jurisdictions in the Caribbean.[40] However over time, the principle that employers should have a valid reason for dismissal as well as utilize a reasonable disciplinary process in order to escape the IDT finding liability for unjustifiable dismissal, has become somewhat entrenched in this jurisdiction. Acceptable reasons include employee misconduct, non-performance, and redundancy. The question of what constitutes a reasonable procedure has also come in for much legal discourse as unlike the somewhat analogous unfair dismissal regime in the United Kingdom,[41] the LRIDA deliberately does not prescribe a very structured guideline for employers to follow and the IDT to utilize in making awards. Thus, the common law principles of due process and natural justice have been prayed in aid to elucidate the local process. However as stated previously, the provisions of the LRC have seemingly now become the preeminent benchmark of what should be considered as an acceptable disciplinary process. While the LRC itself is not actionable per se, the IDT is mandated to consider whether its guidelines were followed in making its awards.[42]

Notwithstanding this guidance, there have in some cases been a heavy reliance on United Kingdom precedent related to unfair dismissals. Thus, for many years the true interpretation to be attached to the term "unjustifiable dismissal" remained opaque until the matter was frontally addressed by the Privy Council in ***IDT v. The University of Technology of Jamaica (UTECH) and University and Allied Workers Union (UAWU).***[43] Here it was categorically stated that when determining disputes about the dismissal of an employee the IDT's jurisdiction was

40 Barbados Section 27(1) Employment Rights Act; The Bahamas Section 34 Employment Act; Antigua and Barbuda Section C56 Labour Code; St. Vincent and the Grenadines Section 5(1) Protection of Employment Act; also see discussion in Corthésy, N.S.G. and Harris-Roper, C.A., (2014). *Commonwealth Caribbean Employment and Labour Law*, Routledge, pp. 217-219.

41 See Smith, I., Baker, A., and Warnock O. (2017), *Smith and Wood's Employment Law*, Oxford University Press, pp. 483-570 – the process under the UK Employment Rights Act 1996 (as amended) has specific provisions that create automatically fair dismissal, potentially fair dismissal, automatically unfair reasons for dismissal and how to address such factual situations when they occur.

42 Section 3(4) LRIDA.

43 ***IDT v. The University of Technology of Jamaica (UTECH) and University and Allied Workers Union (UAWU)***, IDT 6 of 2008 (unreported) delivered December 9, 2008; Claim No. 2009 HCV 1173 (unreported) delivered 23 April, 2010 (SC); [2012] JMCA Civ. 46 (unreported) delivered October 12, 2012 (CA); PC Appeal #106 of 2013; [2017] UKPC22 (unreported) delivered July 17, 2017.

distinctly Jamaican and "... there is absolutely no reason why the IDT or the courts in Jamaica should be obliged to follow the United Kingdom's approach."[44]

Initially therefore, the 1975 incarnation of the LRIDA's emphasis was on allowing the parties (either by themselves or with the help of conciliators) to settle disputes voluntarily without an imposed determination through the IDT's arbitration process. Only where there was little or no likelihood of success, or where the national interest was imperilled, was the IDT's compulsory process imposed and even then, only when the Minister made the decision to refer a matter for settlement. Orville Taylor's view is that the "... Act was never designed to dispense justice nor to enfranchise workers. Neither was its objective to establish equity in labour management relations as an end in itself. Therefore, the issues of justifiability, equity, fairness, or the balance of power are not goals in themselves but are important only in so far as they have an impact on industrial peace."[45]

PRIMARY FERMENTATION: 1978

The first major change to the Act came in 1978.[46] It represented a further incursion into the voluntary rubric of Jamaica's labour relations framework by inserting a major new Section 11A. Within three years of the statute's passage, it was becoming increasingly apparent that the available procedures for facilitating the Minister's intervention to quell industrial disputes were *de facto* very limited. Hence, the new provision accorded the Labour Minister power to unilaterally refer an industrial dispute to the IDT on his own initiative, where it was believed the matter should be settled expeditiously. It should however be noted that the Minister could not act unless he was satisfied that efforts made to resolve the impasse were unsuccessful. Hence the underlying premise of the Act was still maintained; parties should only access the

44 Ibid., para. 23.

45 Taylor, O. (2002), *The Jamaican Labour Relations and Industrial Disputes Act: A Critical Assessment in Human Resource Development and Workplace Governance in the Caribbean*, Cowell, N., and Branche, C. (Eds), Ian Randle Publishers, pp. 427-450 at p. 427.

46 Act 13 of 1978 – becoming operational on June 6, 1978.

compulsory arbitration mechanism to settle matters if they were unable to manage it themselves.

The 1978 amendment also estopped the IDT or any other voluntary arbitration process from making any award which was inconsistent with the "national interest".[47] This change to the LRIDA was the harbinger of continued governmental intervention into industrial relations to address issues of national economic importance. It was hastily pushed through Parliament as a virtually imposed International Monetary Fund (IMF) imperative as part of a structural adjustment regime. It was deemed necessary to address the expected flood of industrial disputes premised on the stringent national wage guidelines imposed by the government aimed at plugging the country's burgeoning budgetary deficit.

The amendment also required that all collective agreements should be provided to the Ministry of Labour within fourteen days of execution or the handing down of any other arbitration award.[48] The clear intent was to police agreements and awards to ensure that there were no breaches of the wage guidelines. Even though breach of this requirement is punishable by criminal sanction, it appears to be an ignored section of the Act, made even more obvious because of the Ministry's limited resources, apparent lack of willpower to enforce it, as well as the administrative challenges associated with actually getting such matters before the court.[49] It is also arguable whether the necessity for this provision even exists except for statistical purposes, considering current economic realities.

While quite a few cases heard by the IDT and the judicial review court have emanated from the operation of the new Section 11A, one early case is worthy of focused examination as its decision has had a serious impact on employees and the government and indeed has since spawned other amendments to the LRIDA. In ***R. v. Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast***[50] the issue of what constitutes an "industrial dispute" capable of being properly referred to the IDT was squarely addressed. The positions

47 Section 12(7); section 29(1).

48 Section 29(2).

49 Note that the Ministry of Labour would need either assistance from the Office of the Director of Public Prosecutions or the Police to initiate the prosecution.

50 [1985] 22 JLR 407.

of three employees of West Indies Yeast were made redundant and they were provided with the requisite redundancy and notice payments which they accepted without demur. Some two weeks later, the now dismissed workers (who were non-unionized) sought the intervention of the Minister of Labour in the "dispute" with their employer over their alleged unjustifiable dismissal. The Ministry having invited the parties to conciliation meetings did not eventually refer the so-called dispute to the IDT for arbitration for another nineteen months.

The company immediately sought orders of certiorari and prohibition from the court on the basis that *inter alia* the conditions precedent for the Minister to exercise his powers under Section 11A were not satisfied. The Judicial Review court agreed with this assertion as it could not discern that there was any need for the matter to be settled expeditiously; indeed, there was no industrial action nor was there any credible threat of the same within the undertaking. Smith CJ was emphatic that the statute's language was clear and as such the "Minister was not authorized to act with complete freedom; his powers are governed by the scheme and policy of the Act."[51]

The court further went on to find that the definition of "worker" (as it then was enunciated) did not envision a dismissed employee having any access to the Act's dispute resolution mechanisms since it only delineated "an individual who entered into or works or normally works under a contract of employment."[52] Therefore, unless the cause of the ex-employee could command the support of an appreciable number of other current employees acting in concert so as to have the capability of disrupting industrial peace, the Minister would have acted ultra vires in making a reference to the IDT.

This judgment served to confirm the Judicial Review Court's earlier decision in ***Kerr v. Kaiser Bauxite Company***[53] and the strong collective ethos of the LRIDA. In effect, the case ended the Minister's prior practice of referring to non-unionized disputes for settlement which had been pursued since the initial passage of the Act. In other words, without the benefit of representation by a recognized union, an employee's prospects of gaining protection against unjustifiable dismissal were virtually non-

51 Ibid., p. 412.

52 Section 2.

53 Suit M14 of 1980 (unreported) delivered February 17, 1981.

existent. This status quo remained unchanged for some twenty-five years until the LRIDA was further amended in 2010.

SECONDARY FERMENTATION: 1986

In 1986 more invasive amendments were made to the LRIDA;[54] however as with the previous change, its bedrock philosophy remained relatively intact. It should also be noted that in March 1982, the Minister of Labour appointed a tripartite committee to examine and report on the effectiveness of existing labour legislation and particularly the LRIDA in promoting good industrial relations and to make recommendations based on their findings. While there was no consensus on many of the issues discussed, a majority report was submitted to the Minister in August 1983 making several proposals for reforms. Interestingly, while this Committee was deliberating the Prime Minister concurrently appointed a Task Force on Work Attitudes whose terms of reference included *inter alia* "... to evaluate laws, guidelines, regulations ... governing collective bargaining and dispute settlement ... with a view to proposing changes which can better secure the rights of workers and management while ensuring a more stable industrial relations climate".[55] Some of their recommendations were similar to the Labour Minister's Committee's positions but not unexpectedly, they too were not implemented.

An analysis of the Committee's report shows that the 1986 amendment only effected two of the nineteen proposals it provided and unsurprisingly these were quite restrictive in nature.[56] This lack of legislative action evinces a disturbing trend in Jamaica's employment and labour law environment. While government policy makers ostensibly recognize the need for review of and possible changes to legislation, there appears to be an appalling lack of resolve to institute recommended amendments even where there is concurrence of necessity between the other social partners of employers and worker representatives. This only serves to perpetuate the stagnation of statutory provisions with the attendant, mostly negative impact on the populace in the rapidly evolving employment and labour law landscape.

The substantive amendments effected in 1986 related to Section 11A which was adjusted to sidestep the constraint exposed by the ***West***

54 Act 7 of 1986, becoming operational on March 3, 1986.

55 Task Force on Work Attitudes Report March, 1983 – Government of Jamaica.

56 These were court sanctioned injunctions and increased fines and penalties.

Indies Yeast judgment whereby the need for expediency in referring industrial disputes must be pellucid.[57] Such matters could now be referred to the IDT on the Minister's own initiative regardless of whether attempts were made by the parties to settle the dispute, if in his opinion the circumstances constituted an "urgent or exceptional situation".

The power of the IDT to order the cessation of industrial action once a dispute was referred[58] was expanded to include the power to prohibit similar action by employees, even if it had not yet commenced.[59] The import of this insertion was to extend the Minister's ability to maintain industrial peace especially in an era of extreme economic uncertainty and volatility.

Further, the possible ambit of governmental intervention to cauterize industrial action was deepened to allow applications to the Supreme Court for *ex parte* injunctions to curtail threatened or actual industrial action considered as "... gravely injurious to the national economy" or which would "... imperil national security, create serious risk of public disorder or endanger the life of a substantial number of persons or expose a substantial number of persons to serious risk of disease or personal injury."[60] In an apparent belt and braces approach, recourse to this medium was permissible whether the impugned industrial action was undertaken in conformity with the Act or not and disregard of any such order is punishable by contempt of court proceedings. This insertion was thought necessary to combat the at times blatant disregard for IDT back-to-work orders, made even more telling as the IDT possesses no legislative powers to enforce its own awards. This lacuna still remains a problematic flaw in the framework of the Tribunal's operation which needs to be urgently addressed.

A complementary provision was also inserted to obviate the need for personal service of Orders on disputants by providing an alternative modality to notify impacted parties of orders made by both the court and the IDT. This was a unique provision where "cease and desist" instructions could be deemed as being served on workers via publication in the Gazette as well as in the media via radio, television, and local

57 Section 11A(1)(a)(ii).

58 Section 12(5)(a).

59 Section 12(5)(a)(ii).

60 Section 32.

newspapers.[61] Notification via these media impacts all persons in the categories identified in the order thus there is no need for specific persons to be named.[62]

Presumably to circumnavigate the stymieing of the process by errant parties who refused to attend IDT proceedings, the Act was also amended to allow the Tribunal to hear applications for "back to work" orders on an *ex parte* basis.[63] A similar-type power was also accorded to the IDT permitting it to deal with substantive cases ex parte, once it is satisfied that notice was served on the party which absented themselves from the hearing.[64] All parties to an industrial dispute were also prohibited from embarking on or continuing industrial action while court proceedings in respect of their dispute are ongoing on pain of contempt of court proceeding being instituted against them.[65] Employers in essential services are now required to keep a register, so that their employees can be easily located in the event of industrial action being undertaken.[66] The Act also increased fines and penalties for involvement in unlawful industrial action as well as disobedience of IDT orders or awards.[67]

Viewing the tone of these amendments, Rattray's critique was particularly apt when he declared:

> "... it holds the sword of heavy penalties over the parties...particularly workers ... it deliberately reduced the opportunity to the workers of the legitimate use of strike action as a weapon in their negotiating armory ... and permitted the entry of the courts in a penal way in the industrial relations environment on the threat perceived by the Minister of intended industrial action."[68]

It should however be recognized that at the time of this enactment, the country was again being faced with economic imperatives with

61 Section 12(5B) and Section 32(4).

62 Section 15(5C).

63 Section 12(5A).

64 Section 16A; see IDT 46 of 2013 ***Caribbean Events Group v. Kelli-Ann Blissett Madden*** (unreported) delivered April 15, 2014.

65 Section 31.

66 Section 30.

67 Section 13(1)(a).

68 Rattray C. (1986), *The Recent Amendments to the LRIDA and Its Implications for the Trade Union Movement*, Joint Trade Union Research Development Centre, p. 9.

attendant mandates coming from external forces which brought pressure to bear on the one-party Parliament of the JLP administration to curb industrial strife. The legislation was therefore being used as an instrument to promote macroeconomic stability. Workers chafed under this tight restraint and along with their unions waged a determined campaign to rid themselves of the strictures accompanying this law. The government of the day however showed a predisposition to take a hardline approach to labour relations, as exemplified when in 1985 they terminated wholesale Fire Brigade employees who participated in a general strike.[69] Then as now, politics and labour relations continue to be uneasy bedfellows.

THE VINTAGE AGED: 2002

The next major incursion into the provision of the Act arrived some sixteen years later.[70] Whereas it appears that the two previous amendments were driven mostly by the government's need to keep a tight lid on a volatile industrial relations climate, the 2002 changes were more comprehensive in nature, with clear tripartite involvement. They encompassed more of the recommendations from the abovementioned reports as well as other recommendations made by yet another review body (the Labour Market Reform Committee, more popularly known as the "Eaton Report").[71] Commissioned by the Prime Minister in 1995, its remit was *inter alia* to "... review existing labour legislation and recommend strategies to make them comparable to those of our [Jamaica's] major trading partners".[72] These proposals were also subject to the deliberations of a Joint Select Committee of Parliament which had the benefit of hearing submissions from the general public as well as other interested stakeholders. Debate on the resultant Bill was therefore non-contentious and it virtually sailed through both Houses of Parliament and was passed without amendments, as clearly both sides of the political divide were ad idem about the need for the reforms.

69 Seaga, E.P.G. (2010), *My Life and Leadership Volume 2*, Macmillan Publishers Limited, pp. 155-156; Taylor, O. (2014), *Broken Promises, Hearts and Pockets*, Arawak Publications, pp. 159-166.

70 Act 13 of 2002 becoming operational on March 28, 2002.

71 Eaton, G. (1996), *Interim Report of Committee on Labour Market Regulation*, Government of Jamaica.

72 Ibid., p. 2.

It appears that these revisions were a valiant attempt to address some structural and systemic issues identified during the LRIDA's previous twenty-seven years of operations; the Act was seemingly coming of age. The various fines and penalties which were out of step with the prevailing economic conditions were again increased seeking to enhance their deterrent effect.[73] The definition of "industrial dispute" was amended to establish that initial claims for representational rights could be actionable disputes since there were cases where that very fact prejudiced workers' employment with no available avenue for seeking redress for such discriminatory practices.[74]

A major change which engendered strong debate among the social partners was the definition of "worker". As noted previously the original designation did not contemplate an ex-worker as being eligible to have a dispute raised on his behalf except where there was a credible threat to or actual breach of industrial peace. Additionally, the definition simply referred to working under a "contract of employment". To the seasoned employment law practitioner, it is well-known that the contract of service concept is a perennially difficult matter to establish and is usually determined by the courts or Tribunals using various "tests"[75] applied to the scenarios of each case. After much debate at the Joint Select Committee level and within the Labour Advisory Committee[76] an attempt was made to incorporate the major tenets of the common law tests of employee status into the "worker" definition while concurrently encompassing a dismissed worker as a person who could seek redress under the Act. It is now expressed as:

> "'worker' means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee."[77]

73 For example Section 13 increased the fine for undertaking unlawful industrial action from $50,000.00 for the employer's breach to $500,000.00 and $500.00 for the employee's breach to $5,000.00.

74 Section 2; see also ***Holiday Inn Sunspree Resort v. Industrial Disputes Tribunal, Minister of Labour and Social Security, National Workers Union*** [2010] JMCA Civ. 9 (unreported) delivered March 26, 2010; Claim No. HCV 2281 (Supreme Court unreported) delivered February 9, 2007.

75 See Corthésy, N.S.G., and Harris-Roper, C.A. (2014), *Commonwealth Caribbean Employment and Labour Law*, Routledge, pp. 96-102, discussing the various common law tests of employed status.

76 See Kirkaldy, G. (1988), *Industrial Relations Law and Practice in Jamaica*, Caribbean Law Publishing Company, p. 305.

Since the amendment to the definition, it is debatable whether the intended purpose of statutorily identifying and providing protection to workers in precarious employment has been achieved.[78] As noted previously the Act was clearly designed to facilitate collective labour relations, thus it is quite understandable that the new definition's impact has primarily been felt in that sphere as its utility is illusory outside of the Act's application. In other words, this definition is not of general application across the employment and labour law spectrum and as such it operates only with respect to the operations of the LRIDA, although it could certainly be used as a broad reference guide in the field. An excellent example of this is the case of ***Motor Sales and Service Company Limited v. National Workers Union***[79] where the new definition has been applied to determine whether persons meeting the description were eligible to access union representation.

In another change, the discretionary "may" was replaced by the mandatory "shall" with respect to the Minister's power to cause a ballot to be taken when there is a dispute regarding whether workers wished to be represented by a union or unions.[80] The IDT is also now empowered to determine the composition of bargaining units if the Minister is unable to do so.[81] Out of an abundance of caution and to promote clarity, workers are now accorded the right *not* to join a trade union in the same degree that they can exercise the right to choose union membership.[82]

77 Section 2.

78 See ***Valerie Juggan Brown and Marksman Limited v. RMCA*** No 11/06 (unreported) delivered December 18, 2006 (CA); Also view of Senator Navel Clarke in the Hansard debates 2002 that "the provisions of the new definition ... will be the basis on which we will now proceed in the engagement of employees or workers in order to let them enjoy the benefits that an employee is accustomed to" (p. 183).

79 IDT 1/2004 (unreported) delivered February 22, 2005.

80 Section 5(1).

81 Section 5(3A); see also ***Holiday Inn Sunspree Resort v. Industrial Tribunal, Minister of Labour and Social Security, National Workers Union*** [2010] JMCA. Civ. 9 unreported delivered March 26, 2010, HCV 2281 (Supreme Court unreported) delivered February 9, 2007.

82 Section 4(1)(c).

The amendment now permits employers to voluntarily recognize a trade union without the need for a ballot if they are satisfied that a majority of eligible workers so desire.[83] It also sought to address an issue exposed in the case of ***R. v. Industrial Disputes Tribunal and Half Moon Bay Hotel Limited***,[84] that of whether voluntary union recognitions for the purposes of collective bargaining survived the enactment of the LRIDA. Thus Section 5(10) was inserted to confirm that bargaining rights established prior to the Act's 1975 inception, determined with or without a poll should continue to subsist. Further, the amendment strengthened the position of unions after recognition became established, mandating that within a period of 15 days or any longer period agreed by the parties, the union should make its claims and thereafter within 30 days, the parties should proceed to negotiate in good faith to conclude a collective agreement.[85]

An inherent flaw in the Essential Services provision was finally addressed as Section 9 was amended to provide the Minister with the authority to intervene in an essential services dispute without the need to have a referral being made by a party to an industrial dispute. Notwithstanding this amendment, the section still remains unwieldy and impractical and thus is only of theoretical importance. Another revision of note emanated from the International Labour Organisation (ILO) Recommendations that the categories of essential services where strike action is proscribed should only be in undertakings where there would be a clear and imminent threat to life, personal safety, or health of the population.[86] As such Banking, Telephone, Public Passenger Transport and Air Transport Services, were removed from the First Schedule. However, the law concurrently created a category of other "major dispute" industries[87] where 72 hours written notice of potential industrial unrest was mandated and failure to adhere to the requirement was deemed unlawful industrial action.[88] The intent was that the Minister having been advised beforehand, could intervene, and seek to

83 Section 4A.

84 [1979] 16 JLR 333.

85 Section 5A (1) and (2).

86 See Digest of Decision of the Principles of Freedom of Association of the Governing body of the ILO 5th Revised Edition (2006) p. 109.

87 Fifth Schedule; Public Passenger Transport, Telephone, Banking, Air Transport, Bauxite and Alumina, Marine, Sugar, Telephone, Tourism Services.

88 Section 5B

avert industrial action in a proactive manner since this could likely have a detrimental effect on a significant part of the nation's economy.

Several modifications were also made to various provisions which directly impacted the operations of the IDT. Specifically, Section 8 was amended to insert the wide omnibus category of "ceases to be a member for any other reason" to allow a tribunal member to be replaced in appropriate circumstances. Additionally, the Minister of Labour is now required to consult with representatives of workers' and employers' organizations in making the decision to appoint the Chairman and the Deputy Chairmen of the Tribunal;[89] this move was designed to create buy-in from these critical stakeholders for the appointment of the head of each Tribunal panel as constituted from time to time, thereby at least conceptually, removing the spectre of bias on the part of the government in such appointments.

An eligibility time frame of twelve months within which a disciplinary matter must have been reported to the Minister for action was also created.[90] This provision was somewhat revolutionary because for the first time, a determinable period within which the employee must lodge a complaint or risk losing his right to access redress was established for unjustifiable dismissal and other disciplinary cases. This level of certainty was an obvious positive for employers who could know the extent of their exposure to the making of claims in such cases. It also placed limits on employees' attempts to seek compensation or reinstatement after extended periods subsequent to the initial incident which was the subject of a dispute. The Minister is also constrained by the new provision, as he would be acting ultra vires and subject to judicial review proceedings if he sought to refer the matter for arbitration and the aggrieved employee will be unable to access any remedy which would emanate from the Tribunal.

Previously, retrospectivity of Tribunal awards was not contemplated beyond the date when the dispute arose. With the 2002 amendment this position changed with three new circumstances now becoming applicable:[91] that is, from the expiry date of a previous collective agreement, from the actual date of termination of an unjustifiably dismissed worker and from any date determined by the Tribunal for

89 Second Schedule.

90 Section 11B.

91 Section 12(4A) and (4B).

the organization of a new bargaining unit. Notably, the amendment now allows the Tribunal to exercise discretion in ordering the reinstatement of a worker who has indicated such a desire, in favour of alternatively offering compensation where it was clear to the panel that the latter was better suited in the circumstances of the case.[92] Additionally, recognizing the challenges that attend disputes involving a contract for personal services, the amendment also provided that the remedy as reinstatement will not be an option of redress in these cases;[93] thus, monetary compensation would be the only relief available for such workers.

In as much as these amendments have been enacted, there were still other important recommendations made by the reports that have not found their way into the law. Specifically, decertification of previously recognized trade unions did not find favour, thus unions continue to have perpetual representational rights albeit this is an employee's desire: except where another union is able to snatch bargaining rights through the existing stringent polling process. Neither did employee's "right to strike" make the grade, even with the conditionality of a strike ballot. There was also no place for the concept of making Collective Labour Agreements legally enforceable or addressing the legal status of "contract workers" thereby providing them with access to critical employee-related benefits.[94] In today's fast-paced economic environment where the need for increased certainty in the labour market environment is critical, it is disappointing that these provisions were apparently not seriously contemplated for the value to be gained by more employee involvement in the union representation process.

A NEW VINTAGE BEGINS FERMENTATION: 2010

The most radical substantive legislative change to date was the 2010 amendment[95] which saw the previous ethos of the Act being modified significantly to address an issue laid bare by the ***West Indies Yeast***[96] decision that of the Act's non-applicability to workers who were not

92 Section 12(5)(c)(i).

93 Section 12(5)(c)(iii); see ***Grace Salmon v. Marlene Dobson*** IDT 52 of 2013 (unreported) delivered May 28, 2014.

94 Eaton, G. (1996), *Interim Report of Committee on Labour Market Regulation*, Government of Jamaica, pp. 41, 81.

95 Act 8 of 2010 coming into operation March 23, 2010.

96 Supra.

members of a union having bargaining rights. The definition of industrial dispute[97] was altered to create a dual schematic whereby the nature of an "industrial dispute" was re-categorized to facilitate both individual and collective disputes. In effect, while the previous definition remained in force for unionized employees, a derivative which relates to "disputes of rights" became relevant for non-unionized workers. This means that only a breach of existing contractual or statutory rights, as well as conditions of work are actionable disputes for individual workers. In actuality, the main types of cases that emanate from this change are purported claims of unjustifiable dismissal or allegations of unjust disciplinary measures meted out to a worker.

Complementary modifications were also made to Section 11A, coming full circle to re-establish the pre-1978 position by deleting the provision that made it a requirement for the Minister to show that the industrial dispute had to be settled expeditiously. To remove any further impediments to the utilization of the Act by non-unionized workers, Section 11A(3) was inserted to make it clear that there is no longer a need to prove a likely threat of, or that actual industrial action had taken place or that the aggrieved worker was a member of a union having bargaining rights for access to the IDT to be in scope. Additionally, to cope with the expected influx of cases, power was given to the Minister of Labour to appoint more Deputy Chairmen to augment the capacity of the IDT to hear cases on an as-needed basis.[98]

It is indeed quite understandable that the government made this fundamental change considering that unionization has decreased considerably since the heady heydays of the 1970s and 1980s.[99] Indeed, anecdotal accounts charitably suggest that the unionized working populace currently hovers between 15% and 20% leaving over 75% of Jamaican workers without access to critical remedies for unjustifiable dismissal prior to the amendment. This state of affairs is untenable and troubling in any right-thinking society, if notions of workplace justice, and procedural fairness are matters for fulsome consideration in the employment arena.

97 Section 2.

98 Second Schedule.

99 See Manley, M. (1991), *A Voice at the Workplace*, Howard University Press, p. 244, which estimated that 43% of workers were unionized in (1983) and 57% of the workforce remains stubbornly outside the scope of trade unions.

Notwithstanding the laudable rationale for the change, it is posited that the modality utilized was perhaps not the best fix. From a practical perspective, already the increased strain on resources of the understaffed and under-resourced IDT is being seen, as the numbers of individual disputes being referred have dwarfed the collective disputes by at least multiples of four.[100] Additionally, by virtue of these increased numbers, there are growing applications for judicial review of the Minister's decision to refer or not to refer matters to the IDT[101] which multiply the strain on the courts and Legal Services Division in the Ministry of Labour as well as the Attorney General's Department who are mandated with conduct of such matters. The staff of the Conciliation Department of the Ministry has also not been spared, as they not only have the daunting task of attempting to settle these disputes, but they have also become the principal witnesses in judicial review cases, with the attendant impinging on already limited resources.

Another area that has also become a hot topic is the activities of the conciliators as they seek to assist in settling disputes as mandated by Section 6 of the Act. The nature of the conciliation process requires that conciliators' *bona fides* as neutral third parties are protected, so that disputants may purposefully utilize the services, candidly sharing sensitive positions in furtherance of resolving the issues at hand. Indeed, Taylor intimates that it is usually in "unilateral off-the-record [conciliation] discussions that solutions if arrived at all will have its genesis."[102] The utility of conciliation is however now likely to be undermined as representatives of parties are with increasing regularity requesting copies of conciliators' notes via the provisions of the Access to Information Act. This is ostensibly in a bid to ascertain the opposing side's position to better prepare their case should the matters go to arbitration or judicial review.

Such requests while legally permissible, could cause irreparable damage to the current industrial relations framework as the latitude

100 Data from the Ministry of Labour for example shows that in (2021) there were 20 awards in individual dispute cases as opposed to 4 awards in unionized cases; notably the number of cases in each category has reduced dramatically since (2020) with the onset of the COVID-19 pandemic.

101 See for example, ***Spur Tree Spices Jamaica Limited v. The Minister of Labour and Social Security*** (unreported) [2018] JMSC Civ. 103 delivered July 17, 2018.

102 Taylor O. (1992), "Conciliation, Its Relevance in Labour Disputes". *Caribbean Labour Journal*, p. 33.

which would otherwise be afforded to the conciliator may well be reduced if parties form the view that information provided in this setting may be used to prejudice them at a later stage should the matter remain unresolved. Conciliators may also take the view that in order to protect the process, they should not make notes of discussions and thereby not run afoul of the Access to Information Act if there is in fact nothing to disclose.[103] Such an approach could create its own set of challenges for the process in terms of continuity of record keeping for the conciliation department. Perhaps the solution is to exempt the conciliation process from the provisions of the Access to Information Act to preserve its efficacy as an important means to secure non-contentious settlement of industrial disputes.

The twelve-year-old change to the LRIDA has spawned a number of cases, which have brought to the fore various issues. There is public outcry among the employers' groupings that the Tribunal's decisions are inimical to their operations, especially those which do not have a Human Resources Team; for those businesses with a Team, inexperience make them ill-equipped to handle the strict requirements of the LRC.[104] For example, in the case of redundancies, when workers are represented the issue of how to conduct consultations as required by the LRC is somewhat clear as the employer would engage with the representative union. However, in the case of non-unionized individuals whose positions are made redundant, what does the obligation to consult entail? Must the employer discuss this matter with each affected employee or is it sufficient to simply advise them?[105] This is but one of the many issues that has arisen as an unintended consequence of the 2010 amendment.

103 ***Manor Court Limited v. Minister of Labour and Social Security and Industrial Disputes Tribunal*** (unreported) [2018] JMSC Civ. 59 delivered April 25, 2018, para. 30.

104 Adrian Cotterell, "Employers Have Feelings Too", *Jamaica Observer*, March 8, 2016: https://www.jamaicaobserver.com/business/employers-have-feelings-too/ (accessed July 31, 2022); Emile Leiba and Grace Royal Bassaragh, "How to separate the right way: The Jamaican Perspective", *International In-house Counsel Journal, Vol.15*, No. 59 (Spring 2022), 1.

105 See ***Cemex Jamaica Limited v. Lorel Sappleton*** IDT 13/2014 (unreported) delivered January 29, 2015; ***Lorel Sappeleton v. Industrial Disputes Tribunal and Cemex Jamaica Limited*** (unreported) [2017]; JMSC Civ. 70 delivered May 12, 2017.

NEW VINTAGES BEING MIXED WITH AGED BREW

Save for the amendments effected by the Constables (Special) Act in 1983,[106] all consequential amendments to the LRIDA have occurred after 2010. These modifications were for the most part made to facilitate enforcement of various government policies being pursued in other legislative instruments, the breach of which could possibly have negative impact on persons' employment status. While some of these principles were driven by the Ministry of Labour, there are others that have no direct correlation to the existing labour environment. Hence while clearly commendable, they needed to have had greater review by the Ministry of Labour's technocrats to ensure their compatibility with the LRIDA's current operational structure.

Beginning in 2011, the Protected Disclosures Act[107] (PDA) was enacted to create a framework for legally guided whistleblowing as part of the government's thrust to battle corruption and encourage transparency within business and government. Clearly, an employee who contemplates making a protected disclosure could encounter challenges, since this may be in breach of both the implied and substantive terms of their employment contract. At worst, a worker's employment may be terminated and at best continuing their livelihood could be made extremely difficult if errant employers acted in a manner injurious to their interest. A consequential amendment to the LRIDA adjusted the definition of "Industrial Dispute" to categorize making a protected disclosure an actionable dispute. Further, it imports the terms

106 Act 14 of 1983; the amendment was to exclude members of the Island Special Constabulary Force and the Rural Police from the application of the Act's provisions in addition to members of the Constabulary Force and the Jamaica Defence Force.

107 Act 3 of 2011.

"occupational detriment"[108] and "protected disclosure"[109] as specified under the PDA, into the lexis of the LRIDA in a bid to synchronize the operations of both statutes.

There are obvious issues with this approach; for example, while the LRIDA uses the term "worker" to encapsulate persons who are able to access its provisions, in contrast, the PDA utilizes the term "employee" which carries a much more expansive meaning to include, contractors, sub-contractors or agents and volunteers. This creates a conundrum as to whether the operations of the LRIDA should rightly be stretched to cover persons who do not fall within the ambit of its original jurisdiction.

Similarly in 2014, the Employment (Flexible Work Arrangements) (Miscellaneous Provisions) Act[110] (Flexi Work Act) modified the definition of "industrial dispute", expanding the category to include subjecting any worker to occupational detriment if they seek to exercise their right to manifest and propagate their religion in worship and observance. This amendment was geared towards facilitating the implementation of flexible working arrangements in Jamaica by providing protection under the auspices of the LRIDA, if a worker's religious rights were negatively impacted by the employer's unilateral imposition of contractual changes in advancing flexi-work operations in their business.

The Jury (Amendment) Act[111] is yet another change which apparently seeks to impact the operations of the LRIDA, though it did

108 Section 2 PDA "occupational detriment" means any act or omission that results in an employee, in relation to his employment, being:

(a) subject to disciplinary action;

(b) dismissed, suspended, or demoted;

(c) harassed, intimidated or victimized;

(d) transferred against his will;

(e) refused transfer or promotion;

(f) subject to a term or condition of employment or retirement from employment, that is altered to his disadvantage;

(g) provided with an adverse reference;

(h) denied appointment to any employment, profession or office;

(i) threatened with any of the actions specified in paragraphs (a) to (h); or

(g) otherwise adversely affected in respect of his employment, profession or office, including employment opportunities and job security.

109 Section 2 PDA.

110 Act 15 of 2014.

111 Act 32 of 2015.

not specifically make a consequential amendment to the statute. While the amendment Act addresses the very important issue of protecting the employment of workers who have been selected to fulfil civic duties of jury service, which was hitherto not covered by any legislative provision, the manner in which it sought to do so shows a decided lack of understanding of the policy underpinning the LRIDA's operations. Essentially, the Jury (Amendment) Act now places a duty on the employer to release the employee for jury service and further prohibits them from depriving employees of regular remuneration and benefits, dismissing or threatening to dismiss employees or take any other type of punitive action against employees in this regard.[112] Contravention of these provisions enables aggrieved employees (excluding those providing personal service) to seek relief directly from the IDT or the Court.[113] The Court is also now empowered in appropriate cases to order reimbursement of lost wages and benefits to the employee as well as reinstatement if they have been dismissed.[114]

The amendment, while seeking to provide protections akin to the occupational detriment concept of the PDA and Flexi Work Act, does not utilize the provision already included in the LRIDA, but rather creates a different genre of protection. Additionally, while these two Acts at the very least seek to create a causal connection with the LRIDA by making the potential breaches a form of industrial dispute so as to invoke the jurisdiction of the Minister to refer the matter to the IDT, the Jury (Amendment) Act in contrast takes no cognizance of these structures, instead indicating that an aggrieved employee may "apply" to the Tribunal directly for relief. While it is true that statutes can always create new rights, it is submitted that this provision flies in the face of the established protocols under the LRIDA. There is no authority to refer a matter to the IDT unless the employee's issue can be framed as an industrial dispute and referred to by the Minister. It is therefore arguable whether this new provision in the Jury (Amendment) Act has legal efficacy let alone being workable in practice, as there are currently no structures in place at the IDT to facilitate direct applications from aggrieved employees.

112 Jury Act Section 19D (1).

113 Section 19D (2) Jury Act.

114 Section 19D (3) Jury Act.

Notably, the Jury (Amendment) Act[115] does not acknowledge the underlying provisions in the LRIDA which promote non-contentious dispute resolution via conciliation. In order to access similar mechanisms, the Tribunal itself would have to encourage the parties to settle their dispute by negotiations or conciliation when the matter is first brought before it and assist them should they so agree.[116] Another area of concern raised by the new provisions is that it seeks to provide the Court with the power to reinstate workers, which as indicated earlier was never its purview.

The possible impact of these three amendments on the LRIDA's operations has yet to be truly felt as at the time of writing the provisions have not been tested via litigation or referrals to the IDT. It appears that the legislations were seeking to obliquely infuse the UK concepts of "automatically unfair" dismissals into the LRIDA procedures and jurisprudence. However as was seen by the ***UTECH***[117] judgment this may well be unsustainable within the Jamaican labour and employment law construct without the commensurate changes to the structural framework of the Act to expressly provide for this.

NEW WINESKINS DESPERATELY NEEDED

Forty-seven years later, I believe we stand at a crossroads with the LRIDA. Admittedly the shine has now left what was considered as cutting-edge new law in 1975, as deficiencies have become more visible through the extensive usage by stakeholders and the evolution of its provisions via judicial interpretation and further legislative amendments over the decades. It is true that the current provisions do confer benefits for the working class, but with its existing profile the real question is whether it still provides the best vehicle to deliver the much-needed redress to all stakeholders in the current economic and social dispensation? Amendments to the Constitution effected in 2011[118] removed the specific right to form and join trade unions. While admittedly the LRIDA and the Trade Union Act still provide some legislative protection of this right, it must surely constitute a sign of the times when the supreme

115 Supra.

116 Section 12(5)(b).

117 Supra.

118 The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 Section 13(3)(e).

law fortification of collective labour institutions is no longer deemed necessary.

Against this backdrop it is noted that, yet another Commission was established[119] having mandates like those before it; to undertake comprehensive Labour Market Reform to promote economic growth and equity aligned with the Vision 2030 Jamaica National Development Plan. The Labour Market Reform Commission's Report was tabled in Parliament in 2018. Its recommendations include a review of the operating process and procedures of the IDT, as well as the timelines set out in the LRIDA for collective bargaining.[120] While these proposals represent a useful base to start a reevaluation of the LRIDA, it does not appear to be adequate when viewed in light of the gaps and deficiencies previously outlined.

It is therefore submitted that the time has come for this seminal law to be comprehensively reviewed and overhauled. A piecemeal approach to this process is insufficient. What is required is an in-depth operational review to ascertain the level of its effectiveness and strategize on the best way to provide the required support to both employees and employers in resolving disputes. This should be undertaken while concurrently ensuring that the administrative systems are adequate to address the ever-increasing influx of cases. New wineskins are indeed needed in the form of a revamped legislative structure that distinctively defines employee rights with respect to unfair or unjustifiable dismissal while aligning with improved facilities for the Ministry of Labour and the IDT to fulfill their mandates.

The only caveat would be the "how"; in seeking to attain this high ideal of individual employment protection, the law should not be "... wrenched at a stroke into a new pattern to change its organic historical relationship with industrial relations".[121] Such a move could prove disastrous and will need to be carefully managed. Thus, concurrently the reform should also pay homage to the tried and proven collective ethos which has buttressed and underpinned the Jamaican employment and labour law landscape for decades.

119 Labour Market Reform Commission (2017), Reform Agenda Report, p. v.

120 Ibid., p. 14.

121 Wedderburn, L. (1991), *Industrial Relations and the Courts: The Judge's Response in Employment Rights in Britain and Europe. Selected Papers in Labour Law* (Lawrence and Wishert), p. 51.

Lessons from *Cheryl Miller v. The NWRHA and Others*: Movement Towards a UNCRPD Endorsed Social Model Approach to Psychosocial Impairment in Trinidad and Tobago

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DOI: 10.37234/WILJ.2020-2022.4102.A003

Abstract

This article considers attitudinal, policy and legislative barriers to the social inclusion, equality and dignity of persons with psychosocial disabilities in Trinidad and Tobago. Its analyses the recent high court decision, ***Cheryl Miller v. The NWRHA and Others***, to gauge TT's state of progress towards a social model approach to disability, as endorsed in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). It considers the Cheryl Miller ruling against a similar case, ***Ingrid Warner v. The AG of TT***, which was decided decades earlier. It calls for the needs of persons with psychosocial disabilities to be conceptualized in broader terms, beyond medical intervention, to include equality, dignity and social inclusion. It encourages state actors to embrace their duty to design and implement disability strategy, policy and legislation to further the autonomy, equality and inclusion rights of persons with psychosocial disabilities.

Keywords: employment law, industrial relations, unjustifiable dismissal, Industrial Dispute Tribunal, legislative reform

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