

DEMYSTIFYING REDUNDANCY:

What it is vs. What it is not



**GENERAL LEGAL COUNCIL
CONTINUING LEGAL PROFESSIONAL DEVELOPMENT
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PRESENTER: CARLA-ANNE HARRIS-ROPER

Why Demystify?

- In the Daily Gleaner Published on April 19, 2018 there was an interesting story with the following headline:
- **“False Hope - Workers Resigning With Wrong Expectation Of Redundancy Payment”**
- Here a Ministry of Labour official revealed that scores of workers were resigning from their jobs with the mistaken expectation that they would receive “redundancy payments”. The issue becomes more dire when these employees have been long tenured.
- The story also quoted the head of the Jamaica Confederation of Trade Unions Helen Davis Whyte as being “aware of the issue” and citing as prescription the need for “more public engagement” on the subject.



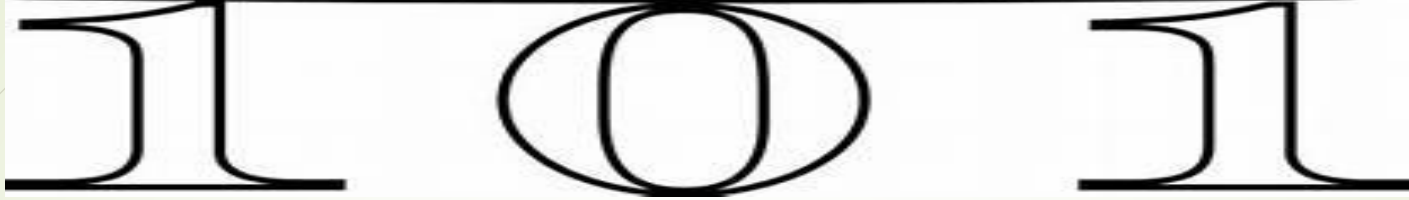
Why Demystify?



- A cursory review of newspaper archives and indeed case law is indicative that the rationale, operations and implications of the issue is the subject of intrigue and mystery to both the public generally and indeed to many attorneys who are not immersed in the every day practice of employment and labour law as well as industrial relations.
- **The Redundancy Red Herring: by Lambert Brown published: Sunday December 11, 2005 – Jamaica Observer**
- **Not All Firings Lead To Pay-Offs: By Roxanne Miller, GUEST COLUMNIST Published: Sunday | November 27, 2011**



REDUNDANCY



- The objective of this presentation therefore is to give guidance on major tenets of redundancy in the Jamaican legal context and to identify and debunk some common misconceptions thereby equipping counsel with the best tools to not only assist potential clients but where possible to enhance the public discourse on this very interesting area of the law as ministers of justice.



OUTLINE OF PRESENTATION

- What is “Redundancy”?
- Origin of the Concept
- What it is : How does it operate?
- Interplay between Redundancy and Unjustifiable Dismissal
- What it is not : Some Common Misconceptions
- Concluding Thoughts
- Question and Answer Session

What is Redundancy?

For a number of reasons employers may have to consider reducing, restructuring or the outright closure of their business.



- In such cases, before the advent of legislative interventions, unions and other representatives were able to negotiate the best options for their members to cushion the blow which could result from these decisions.

What is Redundancy?

- However, workers who did not have the benefit of representation were often left out in the cold to fend for themselves.
- The designation 'redundancy' is generally adopted to classify compensation for termination of employment due to economic downturn, financial difficulty within an enterprise, and when technological advances have necessitated revamping of operations.
- Statutory provisions now provide a minimum level of protection for all eligible workers, in the form of redundancy payments upon the occurrence of such events, thereby redressing the inevitable economic fallout which arise in these circumstances.



REDUNDANCY

A stressful experience



Jamaica's Statutory Provisions

- ▶ In our Jurisdiction, the **Employment (Termination and Redundancy Payments) Act (ETRPA)** is the relevant statute enacted in April 1974 and came into force on December 9, 1974.
- ▶ While the law was passed by the PNP government under Michael Manley, it was based on a Bill that was put forward in virtually identical form by the previous JLP government under the leadership of Hugh Shearer; note that both these Prime Ministers were also Union Leaders, well acquainted with this area
- ▶ The new law received unanimous support of both sides of the Parliament

Origin of the Redundancy Concept

- ▶ “The basic philosophical underpinning of ...redundancy provision in the **Employment Termination and Redundancy Payments Act (ETRPA)** was that the worker would over time develop property rights in his job which warranted compensation beyond the two weeks notice provided by the previously existing “**Master and Servant Act**” and in appropriate cases of redundancy”
- ▶ *Preliminary Report on Employment (Termination and Redundancy Payments) Act – Noel Cowell (2005) page 20 (unpublished)*

Origin of the Redundancy Concept

- Earnest Peart, then Minister of Labour stated during the parliamentary debates surrounding the passage of the ETRPA
 - *"It is now commonly held Mr. Speaker, that a man's job is as much his property as any other asset. The worker has made his contribution to his employers business and should be entitled to compensation when his job-**his property**-no longer exists"*

Similar views were echoed by many members of the legislature while endorsing the Act

Origin of the Concept

- ▶ Legal scholars are however at variance regarding the legitimacy of this view; Deborah Lockton in her book *Employment Law* (5th Edition) opines that;
- ▶ ***'The aim of a redundancy payment has never been to cushion a person over a period of unemployment, but rather to recognize an employee's stake in the job... his stake increases the longer he works.'***

On the other hand Simon Honeyball writing in *Textbook of Employment Law* (10th Edition) extols the view that;

'...redundancy is a lump sum payment designed to tide an employee over the period of uncertainty and hardship after dismissal'.

Origin of the Concept

- Whatever the conceptual thoughts on the matter, it should be clearly understood that the entitlement to the redundancy benefit is **based squarely on specific statutory criteria** which must be fulfilled before any payment becomes applicable.





REDUNDANCY



What it is. . . .

Redundancy – Eligibility Criteria

- ▶ **Prerequisites for redundancy payments:**
 - ▶ Where employees who have been employed continuously for 104 weeks (2 years) are **dismissed by reason of 'redundancy'** the employer and any other person who takes ownership of the business during 12 months after the dismissal shall be liable to pay compensation as stipulated by the **ETRPA Section 5 (1)**

NOTE: Typically it is the **JOB** or the **POSITION** that is made redundant and not the person occupying the role...

Employers fall into trouble with this sometimes as they try to utilise “redundancy” as method to terminate when there are clear performance, disciplinary or other miscellaneous issues.

► **Jamaica National Building Society v Mr. Clinton Reid**

(IDT Award 60 of 2016 (unreported) delivered April 8, 2019)

Mr. Reid was employed by JNBS since 2004 as an accountant moving up the ranks to be one of 5 Finance Managers and was purportedly dismissed by reason of redundancy in June 2014. His last assignment before the end of his employment was seconded to one of JNBS' subsidiary. At the end of the secondment, he was advised that the company did a restructuring exercise and no longer needed 5 Finance Managers as the functions of his role was subsumed among the remaining 4 Finance Managers and parts were also outsourced. The company also indicated that they reviewed the company structure and could not find him an alternative job.

Jamaica National Building Society v Mr. Clinton Reid (IDT Award 60 of 2016 (unreported) delivered April 8, 2019)

Mr. Reid contested the dismissal arguing that there was no genuine redundancy and this was a contrived activity to get rid of him. In fact he showed correspondence to the effect that saw JNBS acknowledging that it was because of “strained relationships” that he was actually seconded to JN Money Services for 8 months prior to the purported redundancy. He also showed his last performance review of high performance and also averred that he was taken off JN’s payroll even as he was on secondment.

**Jamaica National Building Society v Mr. Clinton Reid
(IDT Award 60 of 2016 (unreported) delivered April 8, 2019)**

The Tribunal while concluding that there was indeed a genuine redundancy that Mr. Reid himself acknowledged, they were also of the view that no formal restructuring had taken place and there was no proper consultation in the spirit of the Labour Relations Code.

They further noted that the evidence of JNBS was not transparent and contradictory and they could therefore not rule out that the “strained relationship” impacted the decision make Reid’s position redundant hence he was unjustifiably dismissed

Dismissal by “Reason of Redundancy” must be proved

- It is a condition precedent for a redundancy claim that the aggrieved worker must be dismissed by reason of redundancy.
- In Jamaica, these circumstances are clearly delineated by the statute, as follows:
 - (a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice; or
 - (b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or
 - (c) if he is compelled, by reason of the employer’s conduct, to terminate that contract without notice (resignation/ constructive dismissal).

Section 5(5) ETRPA

Dismissal by “Reason of Redundancy” must be proved

- A termination with or without notice meets the criteria, but this must be clear and unequivocal.
- Thus, in **Jamaica Broadcasting Corporation v Union of Clerical, Administrative and Supervisory Employees (UCASE)**

(IDT Award 10 of 1996 (unreported) delivered July 30, 1996)

The IDT declined to rule on a request made by the claimant union on behalf of the employee (Mr Lue—who was dissatisfied with the new position at which he was placed by virtue of a restructuring exercise) that he was made redundant. The Tribunal reiterated that a prerequisite for eligibility for a redundancy payment was a dismissal, and there was no such action in the instant case.

Holiday Inn Sunspree Resort v Pennicott RMCA Appeal No 14 of 2007 Jamaica CA (unreported) delivered December 18, 2009.

- Ms. Pennicott, a former security guard employed by the hotel was dismissed after being engaged on various six months contracts which were each broken by a period of over 3 weeks. She sued *inter alia* for redundancy payments. At the RM level the judge ruled that she was entitled to said payments as the time period between the renewal of the contracts included 2 weeks paid vacation and these weeks should be considered as a part of the contractual period following the provisions of **Section 4 (5) of the ETRP Regulations**. The company appealed:
- **HELD by the Court of Appeal that the judge was correct in counting the paid vacation as part of the two weeks within which the employee's contract was renewed and as such the 104 week provision was fulfilled**

Circumstances of non-dismissal

An Employee shall not be taken for the purposes of this Section to be dismissed by his employer if his contract of employment is renewed or he is re-engaged by the same employer under an new contract of employment and:

- In the case where the provisions of the contract as renewed, or of the new contract, as the case may be, as to capacity and place in which he is employed and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract; or
- In any other cases the renewal or reengagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of the contract or after an interval of not more that two weeks thereafter

Section 5(6) ETRPA

➤ **Paulette Richards v Trafalgar Travel Limited Claim No. 2010 HCV 00680 (unreported) delivered May 25, 2012.**

- Here the claimant had worked with the International Travel Services (ITS) since October 1, 1984. Under an agreement dated Sept. 8, 2004, was acquired by Trafalgar Travel Limited (TTL) who bought all ITS shares and took all the ITS business as well as the staff (except the GM) under the same terms and conditions as previously existed. All the employees were advised via memo on Sept 16, 2004. Ms. Richards took issue with a new contract that was provided claiming that there was a variance of terms and condition of her previous contract. She did not sign it and went on leave and sought to claim redundancy from the previous owners of ITS and was told she was not entitled to same. At the end of her leave she did not return to work in February 2005 when asked to do so. She claimed she was entitled to redundancy payment.
- **The court ruled that she was not dismissed by reason of redundancy and further that she received an immediate offer of re-employment in the new operations, which she had unreasonably refused; hence she was not due a redundancy payment as she had voluntarily terminated her employment.**

Redundancy – Eligibility Criteria


Section 5 (2) of the **Employment (Termination and Redundancy Payments) Act** sets out three (3) circumstances which amounts to a “redundancy situation” as follows:

- ➔ **1.** The fact that the employer has ceased, or intends to cease **to carry on business** for the purposes of which the employee was employed by him or has ceased or intends to cease, to carry on that business in the place where the employee was so employed. This is referred to as ***the cessation of business qualification.***



Redundancy



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- In the event that the business is completely closing down operations, all that is required is to ascertain whether it has actually ceased operations and nothing more.
 - Thus in **Moon v Homeworthy Furniture (Northern) Ltd** [1976] IRLR 298, [1977] ICR 117 the employer closed down its factory and made all the workers redundant. The redundancy was challenged on the basis that it closed because of bad industrial relations between the parties. The Employment Appeal Tribunal ruled that there was no need to examine a reason for the dismissal in this case, since there was in fact a cessation of business which grounded the redundancy situation.
 - This decision evinces the reluctance of courts to restrain the genuine use of management prerogative.

Redundancy – Eligibility Criteria



- ➔ **2.** The **requirements of that business** for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish. This is referred to as **the diminishing requirements qualification.**

To ground a successful redundancy claim, it must be shown that the employee's dismissal was either wholly or partially attributable to the state of affairs in the business and not the position in relation to the work of any particular employee.

➤ **Computers and Controls (Jamaica) Limited v Saddler.**

Claim HCV 206/2003 (unreported) delivered February 28, 2005;

SCCA No. 64 of 2005 (unreported) delivered March 14, 2008

- The respondent was successful at first instance in his claim for a redundancy payment consequent on the sale of the appellant company at which he was previously employed for over twenty years. The new owners of the company had offered Saddler new terms of engagement, which he had refused to accept, but thereafter worked for them as a 'self-employed' person (independent contractor) in a similar capacity.

Computers and Controls (Jamaica) Limited v Saddler

- ▶ The Supreme Court reasoned that there was in fact a redundancy situation within the meaning of section 5 of the ETRPA, since the respondent was actually doing the work he previously did as an independent contractor, and therefore the requirements of the business for a full-time employee had diminished. Moreover, since the new contract offered to Saddler would have substantially decreased his income, it also pointed to the fact that there was a diminution of the business requirements for his work, and hence a redundancy situation existed.
- ▶ However the Court of Appeal reversed the Supreme Court decision and ruled that the emphasis should be on whether the **requirement of the business itself** had diminished and **not whether there was a change in the contractual arrangements between the parties**. Indeed, the fact that the respondent was still carrying on his usual functions for the company was ample evidence that the business still required those services, notwithstanding that they were being done by a self-employed individual. Also there was no "dismissal" as required by the Act, but rather the employee left the employment and took up the independent contractor position voluntarily.



➤ This decision can be contrasted with the earlier case of

➤ **Haye v Fiscal Services (EDP) Limited ,
SCCA No. 48 of 2000 (unreported) delivered May 21, 2001**

where the Supreme Court refused to order a redundancy payment because, in its view, the plaintiff had not proven that his dismissal was because of redundancy. The Court of Appeal however arrived at the opposite conclusion in finding that the appellant was dismissed from the position of Director of Audit and Security on the basis that he was the only person employed in that department and, further, that no one filled the post for a year after his departure.

➤ ***It is however submitted that this decision was incorrect based on a proper interpretation of the statutory provisions***

Redundancy – Eligibility Criteria

- **3.** The fact that an employee has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease prescribed under the Act being a disease due to the nature of his employment.
- This is loosely referred to as '**medical redundancy**'.
- Regulation 7 and the Schedule to the ETRP Regulations outline the “prescribed diseases”

Medical Redundancy must relate to job injury or prescribed disease

**Foster v Alumina Partners of Jamaica Suit No. F100 of 1981
(unreported) delivered May 2 1986**

The question to be determined was whether the summary dismissal of the plaintiff by the defendant on the grounds of continued intermittent absences (albeit on most occasions justified by him on the ground of ill-health and were supported by medical certificates) was justified – the plaintiff's claim was that he was wrongfully dismissed and should receive *inter alia* redundancy payments

The court having reviewed the evidence concluded that the employee was not due a "medical redundancy" payment as he did not meet the criteria laid down in the Act for this and in fact that his actions constituted serious cause or other prejudicial action against the company and as such they were justified in dismissing him.

Redundancy Exclusions; Suitable Alternative Employment

Section 6 (3) ETRPA

- Where the worker has been made an offer in writing to renew his contract of employment or to be reengaged under a new contract so that the renewed or new contract does not differ as to the capacity and place in which the former worker was employed and the new arrangements take effect within 2 weeks of the date of the dismissal and the employee has unreasonably refused the offer.
- **Then NO REDUNDANCY is PAYABLE**

Redundancy Exclusions; Suitable Alternative Employment

➤ **Section 6 (4) ETRPA**

- Where the worker has been made an offer in writing to renew his contract of employment or to reengaged him under a new contract so that the renewed or new contract would differ (wholly or in part) as to the capacity and place in which the former worker was employed and the new arrangements:
 - Is suitable employment in relation to that employee
 - The place in which he would be employed would not be more than 10 miles place of former employment
 - The renewal or engagement takes effect within 2 weeks of the date of the dismissal
 - The employee has unreasonably refused the offer.
- **Then NO REDUNDANCY is PAYABLE**

Change of Ownership of Business

Section 7- If a business is sold and the previous employer terminates the employee's contract but the employee agrees to accept a renewed contract with the new employer then there will be no redundancy

- If the new employer offers a new contract to the employee and he refuses to accept it then the provisions of **Section 6(3) or Section 6(4)** will apply
- Provisio:
 - If the only real change is that the employer has been substituted that is not to be taken as being the "difference"
 - If the employee simply does not like the new employer this cannot be taken into account in coming to a decision of whether or not the refusal of the employee to take the new position is "unreasonable"
 - Where the contract is renewed the continuity of employment is not broken and if subsequently a redundancy exercise occurs the full years of service is to be taken into account.

Associated Companies

- **Section 15** – Where the employer is a company, re-engagement on termination will be taken to mean re-engagement or an offer to re-engage by that company or an associate company.
- If there is a change in ownership as contemplated by **Section 7** and the new owner is an associate company of the previous owner the provisions of **Section 7** will prevail
- Where the employee is dismissed by the employer (who is a company) which has 1 or more associated companies, then if no redundancy situation (cessation of business or diminishing requirement) occurs **but** would have applied if the employing company and the subsidiary were treated as being “one business” then the worker may be considered as being dismissed by reason redundancy.
- **This appears to be quite difficult to prove**

Calculation of Redundancy Entitlement

Regulations to the ETRPA prescribes the compensation which is available when this type of dismissal occurs: **(Regulation 8 (1))**

- **2 weeks pay per year up to the first 10 years employment**
- **3 weeks pay per year from the 11th year onward**
- It should be noted that before 1986 when there was an amendment to the ETRPA and its regulations, the amounts payable were capped at payment for 2 weeks pay (up to a set maximum figure \$500.00) for each year worked for a maximum of period of 26 years employment

Calculation of Redundancy Entitlement

- ▶ Employment for less than 13 weeks in any year is disregarded
- ▶ If worker is employed for more than 13 weeks but less than 39 weeks – this is treated as 'half year' for the purposes of payment.
- ▶ Similarly over 39 weeks work is treated as a 'full year' for the purpose of redundancy payment
- ▶ **(Regulation 8(2) ETRP Regulations)**



What constitutes a “Week’s Pay”? – Normal Wages

- ▶ “normal wages” means, in relation to any employee, the remuneration regularly paid to him by his employer as wages or commission, and includes any amounts regularly so paid by way of bonus as part of such remuneration but does not include—
 - ▶ (a) any overtime wages; or
 - (b) any premium or special allowance paid—
 - ▶ (i) in consideration of the times at which, or the conditions subject to which, or the circumstances in which, he works in the course of the performance of his duties; or
 - (ii) in consideration of any inconvenience suffered or likely to be suffered by him in the course of the performance of his duties; **(Regulation 2 ETRP Regulations)**

➤ **In Doreen Thomas et al v The Bank of Nova Scotia Jamaica Limited**

➤ **Suit No 2141-2 of 2003 (unreported) delivered May 8, 2009.**

- The claimants (who were senior management staff) sought to rely on an enhanced redundancy package formula negotiated by the union for the line staff after they were made redundant, to claim that the amounts they received when they accepted their entitlement should be increased. It should be noted that the new formula though increase the multiplicand (i.e. #of weeks per year) now used the "normal wages" guideline where previously the Bank had included allowances as part of wages
- The court, in rejecting the argument, found not only that the payments could not be influenced by the new formula negotiated by the union (which was now being done on a totally different basis) but also that there was no subsisting contract between the claimants and the Bank making it possible for this new provision to be utilized for their benefit.

Redundancy Entitlement; yes it may be taxable!

- From the Tax Administration Jamaica Website:
- How to Calculate the Tax Free portion of Redundancy Payment:
- For Employment of 3 years or more use the formula of $2 \frac{1}{4}$ times the Average Annual Pay for the last three years of service divided by $33 \frac{1}{3}$ years
- Any other sums thereafter will become taxable

Redundancy: *OTHER CONSIDERATIONS*

- ▶ Worker must be provided with a written statement of how payment is calculated by the employer. **Section 9 (1) ETRPA**
- ▶ If the employer does not provide this (without reasonable excuse) he is liable to criminal conviction to a fine not exceeding \$250,000.00 or 3 months imprisonment. **Section 9 (2) ETRPA**
- ▶ If the employee has not received the statement he may request it in writing from the employer and if the employer fails to produce it within 1 week (without reasonable excuse) he may upon summary conviction be subject to a fine not exceeding \$250,000.00 or 3 month imprisonment **Section 9 (3) ETRPA**
- ▶ Note also that the claim must be specifically pleaded and proved **See Fuller v Revere Jamaica Alumina Company (1980) 31 WIR 304**

Redundancy: *OTHER CONSIDERATIONS*

- ▶ Payment of redundancy must be at the current normal rate of pay
- ▶ To have a valid claim for redundancy the worker must within **6 months** of the date of the redundancy situation occurring :
 - ▶ Have had the employer agree to the payment; or
 - ▶ Have made a written claim for the payment; or
 - ▶ Have already begun a claim in court under the Act for the determination of the employee's right to the payment or a determination of the amount of the payment;
 - ▶ This period may be extended to 12 months if the dismissal comes because of the death of the employee **Section 10 ETRPA**

Redundancy: *OTHER CONSIDERATIONS*

- However there is a glaring flaw in the ETRPA, in that while the employee must make a claim before the end of 6 months of the redundancy situation occurring, there is **no time stipulation enacted** for the employer to make the payment which he may even agree is payable



Redundancy - Exclusion

- Persons who are employed under a fixed term contract for 2 years who have agreed in writing not to accept redundancy at the commencement of the contract they will not be eligible for redundancy **Section 8 (ETRPA)**
- Under the 2008 amendments to the ETRPA any aggrieved worker can now bring an action in the Parish Court for claims of up to \$1Million for non payment of notice **or** redundancy benefits. **Section 17 ETRPA**
 - **Note that these claims are without prejudice to any other claim which can be made for breach of employment contract**



THOMAS v. Caribbean Aviation Training Centre and Stewart

- Mr. Thomas resigned from the employment of Caribbean Aviation but was not paid for the last month on which he worked. He made a sued the employer for that sum (\$50,000.00) but the RM dismissed the claim on the ground that she did not have jurisdiction to hear the claim (note that this was before the increase and the maximum claim was then \$7,000.00).
- **HELD on appeal: The RM erred in coming to her decision as Section 17 only related to claims which were directly related to notice or dismissal claims. The application was simply for unpaid wages and not for notice or redundancy since he had in fact resigned.**

Requirement to advise Ministry of Labour about impending redundancies

In 2008 the Regulations under the ETRPA were amended to require that employers must advise the Ministry in writing within 21 days where they dismiss or proposes to dismiss employees by reason of redundancy. Failure to do so will attract a penalty of a fine not exceeding \$250,000.00 - **Regulation 11**

- ▶ They must state:
 - ▶ Effective date of dismissal
 - ▶ Name and address of employee
 - ▶ Amount payable to the employee
 - ▶ The name, description and type of post
 - ▶ Whether or not the displaced worker is a member of a union and if so which union.

A red stamp with the word "REDUNDANCY" in a bold, serif font, tilted slightly upwards to the right. The stamp has a double-line border.

REDUNDANCY

AND

A 3D-rendered signpost with a white arrow pointing left. A red banner with white text is overlaid on the signpost. The banner reads "UNJUSTIFIABLE DISMISSAL".

UNJUSTIFIABLE DISMISSAL

Redundancy and Unjustifiable Dismissal

- The spectre of redundancy can have an impact in unjustifiable dismissal cases, since a genuine redundancy carried out under a reasonable procedure may constitute an acceptable ground for dismissal.
- Another very important consideration is that the determination can have serious implications for the worker in that a finding of unjustifiable dismissal usually provides greater compensation for the employee. Employers may, however, escape liability if they adhere to the following guidelines:

Williams v Compair Maxam Limited [1982] ICR 156:

- Warn or inform employees /or representatives about the possibility of redundancy;
- consult with the affected employee (s) or their representatives;
- adopt a fair and objective basis for selection;
- ensure the criteria are used and fairly applied;
- take all reasonable steps to avoid or minimize redundancy or redeployment.



Redundancy and Unjustifiable Dismissal

All the prerequisites of the statutory provisions would have to be present in order to ground a genuine redundancy exercise in the first instance

- The major issues to be determined thereafter are:
 - whether the methodology utilized in the selection process for dismissal is in conformity with either accepted industrial relations practice or any agreement (for example, via contractual or collective agreement)
 - whether there was adequate consultation with the affected workers and/or their representatives.



"What do you mean 'being right handed is not an appropriate selection criteria for redundancy'?"

Labour Relations and Industrial Disputes Act (LRIDA).

➤ The term 'unjustifiable dismissal' was introduced into Jamaican law 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 IDT's role...

It is the IDT's purview to use its own judgement, guided by industrial relations practice and natural justice considerations to determine what would constitute an 'unjustifiable dismissal' as a matter of fact.

- Created by Section 7 of the LRIDA, the IDT's awards shall be final and conclusive and may not be impeached except on a point of law (Section 12 (4) (c))
- The Tribunal can also regulate their own proceedings as they see fit (Section 20) and indeed they are not bound to give their awards in writing Section 12 (3)
- Neither are they bound by their previous awards (no Stare Decisis)
- **Prior to the amendment of the LRIDA in March 2010, the unjustifiable dismissal remedy was only accessible through collective mechanisms (union membership) based on the scheme of the Act – to keep industrial peace.**

Role of the Labour Relations Code & “Fairness”

In determining what actions would constitute an ‘unjustifiable dismissal’, the IDT therefore uses its own judgment, guided by the Labour Relations Code (LRC), industrial relations practice and natural justice considerations, in considering the facts in any case. **See especially Paragraph 22, 19, 11 of the LRC**

- In this regard the various provisions of the LRC are extremely relevant in arriving at a conclusion in relation to procedural fairness.
- LRC Code is not actionable *per se* , but a breach of its provisions must be examined by the IDT in coming to a conclusion of whether the employer has dismissed an employee unjustifiably.
 - **Section 3 (4) LRIDA**

Jamaica Labour Relations Code : Paragraph 11


“Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency:-

- (i) provide continuity of employment, implementing where practicable, pension and medical schemes;
- (ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies
- (iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure 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
- (iv) Actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit ”

Jamaica Flour Mills Case

The landmark case of ***Jamaica Flour Mills Limited v Industrial Disputes Tribunal and National Workers Union Privy Council Appeal No. 69 of 2003 (unreported) delivered March 23, 2005.*** the importance of consulting with the employees and their unions (as stipulated in paragraphs 11 and 19 of the LRC) when redundancies were being contemplated was underscored.

- The company's contention was that the decision to dismiss 3 workers was taken in furtherance of a legitimate redundancy exercise. The Privy Council in its judgment indicated that even the IDT had tacitly assumed that the redundancy was well founded, but this was not the point.
- The real issue was that the dismissal of the workers who cumulatively possessed over 50 years of service. By simply providing them with pay in lieu of notice and the redundancy entitlement on the very day of the purported dismissals was held to be unjustifiable, since not only was the procedure set out in the LRC not followed, but there was also a clear breach of Natural Justice

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- See some cases that deal with the concept of Consultation under the LRC to address whether redundancies are not unjustifiable:
 - **City of Kingston Co-operative Credit Union Limited v National Workers Union IDT Dispute No. 17 of 2009 (unreported) delivered July 6, 2010**
 - **J. Wray and Nephew Ltd v Union of Clerical, Administrative and Supervisory Employees Industrial Disputes Tribunal, Dispute No. IDT 23/2008**
 - **North American Energy Services Limited v Union of Clerical, Administrative and Supervisory Employees IDT Dispute No. 3 of 2002 (unreported) delivered August 12, 2002**
 - **Global Directories (JA) Limited v Ladianne Wade IDT Dispute No. 13 of 2017 (unreported) delivered April 10, 2018**
 - **Cemex Jamaica Limited and Lorel Sappleton Jan. 2015 (IDT award) Sappleton v Industrial Disputes Tribunal & Cemex [2017] Jam Civ 70 (Judicial Review)**




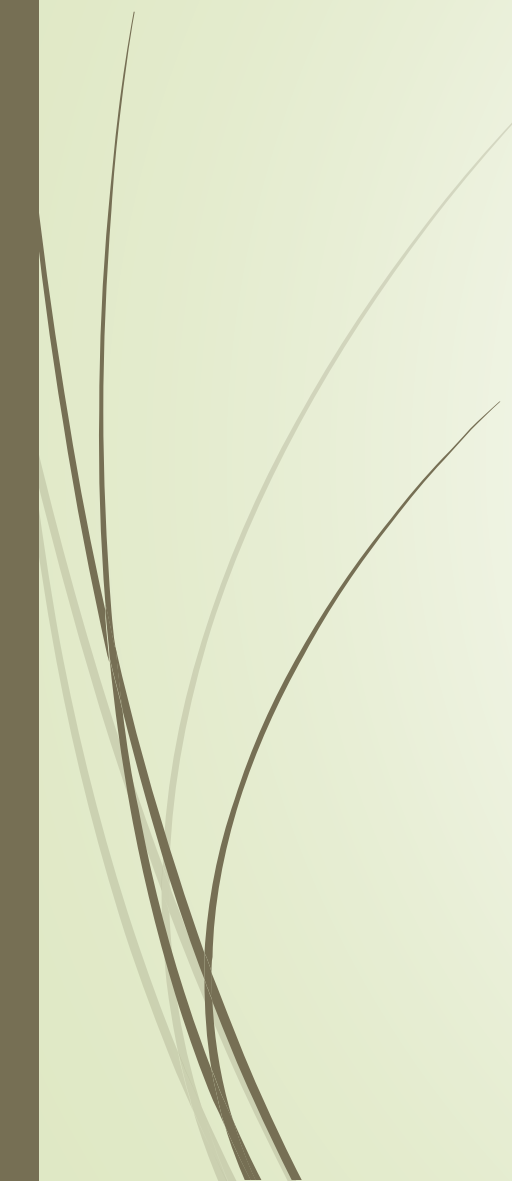
REDUNDANCY

What it is not. . . .



It is not termination for cause...

- ▶ Where employee is dismissed by the employer because of his conduct (e.g. summary dismissal) the ETRPA states that is a valid basis for dismissal and no redundancy will be applicable **Section 6 (2) ETRPA**
- ▶ Although a worker or the position may be prima facie redundant, the employee would not be eligible to obtain a redundancy payment if the employer is entitled to terminate the contract of employment because of the employee's gross misconduct which happens contemporaneously with the establishment of the "redundancy situation"
- ▶ **Foster v Alumina Partners of Jamaica Suit No. F100 of 1981 (unreported) delivered May 2 1986**

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- ▶ Trinidadian case of **Transport and Industrial Workers Union v Public Transport Corporation TD 133 of 1991 (unreported) delivered June 6, 1991** , where the worker was tried and convicted in the Magistrates' Court for stealing company property. Prior to the conviction, the worker was placed on suspension and thereafter the company decided to terminate him; however, in the same period there was a redundancy exercise, and the worker's name was inadvertently included in the list. The Industrial Court, in dismissing the employee's claim for redundancy payment, ruled that the worker (having been found guilty of misconduct) was effectively dismissed and was not to be accorded a severance benefit, as it was clear that his name was erroneously placed on the redundancy list.

It is not Retirement.....

- At the attainment of a specified age (usually prescribed by a pension trust deed, company policy or employment contract) an employee would no longer be required to work and is thereby terminated.
- This does not constitute a redundancy situation within the meaning of the law.
- If the employee is terminated by reason of retirement or in circumstances where he is entitled to (private) pension superannuation or other retiring benefits other than benefits under the National Insurance Scheme (NIS) then they will not be entitled to claim a redundancy payment even if there is a concurrent "redundancy situation" **Section 6 (1) (b) ETRPA**
- **See Cable and Wireless Jamaica Limited T/A LIME and Winston Sewell IDT Dispute No. 11 of 2005 (unreported) delivered November 30, 2016**

It is not Resignation.....



Resignation

- Employee can resign at any time but must give the employer notice – otherwise he will be in breach of contract and can be liable to pay damages.
- An Employee who resigns must do so willingly and without coercion or duress (otherwise it may be considered constructive dismissal)
- At common law once an employee resigns he is unable to make any claim for wrongful, redundancy or unjustifiable dismissal
- Under the ETRPA he may be able to argue for constructive dismissal, **Section 6 (1) (a) ETRPA** if he has been forced to resign based on the conduct of his employer and perhaps on that basis seek redundancy, but this is likely to be a very daunting task

Resignation: CASE

Essex County Council v. Walker (1972)

Ms Walker had a serious disagreement with her employer and was told that it would be in her best interest to resign. She did so and then claimed that she had been made redundant. The employer refused on the basis that she had “resigned voluntarily”

Held: where an employee is coerced or pressured into resigning, this is not a valid resignation, but a dismissal.

It is not "Severance"....

- ▶ Within the Commonwealth Caribbean, the terms 'severance pay' and 'redundancy pay' may be accorded differing meanings. Thus, according to Downes, Mamingi and Antoine:
 - ▶ ***... [I]n terms of payment for involuntary termination of employment labour law provides for severance pay (i.e. compensation for termination of employment for whatever the reason) and redundancy pay (i.e. compensation for termination due to existent economic or technological difficulty). The redundancy pay concept is more widely used in the region.***



It is not “Severance”....

- Note that entitlement to each benefit is based squarely on specific statutory criteria which must be fulfilled before any payment becomes applicable
- In the classic legal designation of severance (that is, payment of compensation simply because of termination for whatever reason, separate and apart from a redundancy-type situation which will be discussed below), five Commonwealth Caribbean countries have legislated such an entitlement



It is not Lay Off.....

➤ What is Lay Off?

- "This is a temporary measure undertaken to reduce the workforce owing to a cutback in production, machinery breakdown or temporary closure of operations. Workers are laid off without pay during the period of the lay off"
- *(A-Z of Industrial relations in the Caribbean Workplace – Phillip and Hussey page 93)*
- A provision to allow lay offs was inserted in the **ETRPA** in 1986 after a recommendation was made by the Task Force on Work Attitude Report (March 1983). The report was commissioned by the then JLP government in 1982 and was chaired by George Kirkaldy

Lay Off

- ▶ The issue of legislating Lay Off was brought to the fore after the decision in the case of
- ▶ **Everton Samuda v Harry Prendergast RMCA 27 of 84 (unreported) delivered January 25, 1985**
 - ▶ **Samuda was a forklift operator employed to Prendergast Haulage contractors for 8 years. In October 1980 the company laid him and 5 other employees off claiming that the forklifts needed urgent repairs. Samuda was asked to report to work in December but was told that there was no work available and he should return in January and thereafter in April as there was still no work.**

Lay Off

Everton Samuda v Harry Prendergast (1985)

- After a strike ensued at the workplace, the workers demanded to be made redundant. Samuda sought the assistance of the court in this regard. At the RM level the court found that he was entitled to redundancy pay. The employer appealed the ruling.
- **The Court of Appeal was of the view that the lay off was not in itself a dismissal. It was merely a suspension of the employment contract pending the end of the lay off. Such a person remained “employed” until recalled to work or dismissed. The court allowed the appeal and found it was for the employee to show that he was dismissed in order to claim redundancy.**

Lay Off

➤ **Section 5A (1) ETRPA**

- Where an employee has been laid off without pay for in excess of **120 days** the employee may by notice in writing to the employer elect to be regarded as being dismissed by reason of redundancy
- The effective date of dismissal must be not less than 14 days and not more than 60 days after the date of the notice itself.
- If the employee is then offered alternative employment in accordance with **Sections 6(3) & 6(4) of the ETRPA** no redundancy is payable

➤ **Section 5A(2)(b) ETRPA**

- A person may still be considered to be laid off without pay notwithstanding the fact that during the period of lay off he received some pay or is engaged to work for limited times only.

Lay Off

- Lay off is redress available at the instance of the employee. If he/she wishes to remain on lay off pending being recalled to employment he/she cannot be forced to elect to be made redundant; he would therefore remain “employed” and with continuity intact.
- If the employer wishes to sever the employment relationship they would have to dismiss the employee in accordance with the law and the terms of the employment contract

It is not lay-off....

In **Western Cement Company Limited v Bustamante Industrial Trade Union IDT Award No. 4 of 2003 (unreported) delivered May 30, 2003.** the Industrial Disputes Tribunal, in finding that the employees were eligible to be paid a redundancy benefit because their employment had been implicitly terminated by virtue of lay-off exceeding one hundred and twenty days, also accepted that the recognized union were empowered to make the written request to the employers on behalf of the workers.

- ➔ **Economy Hotels Limited T/A Hotel Montego v Doreen Harding (1997) 34 JLR 213.** has also accepted that a long-term indefinite lay-off, with an unsubstantiated allegation of misconduct, can allow the provisions of the Employment (Termination and Redundancy Payments) Act to be invoked, allowing the claimant to elect to be regarded as being made redundant.

It is not unemployment insurance.....

A concept which has some relation to redundancy is that of unemployment insurance.

- This is a cash benefit payable to workers who have some work history and have become recently unemployed. It is usually intended to be a short-term support to workers who are made redundant or retrenched through no fault of their own. It is intended to replace lost income and provide a cushion until workers can find new employment.
- The issue was addressed by Lord Denning in **Brindle v HW Smith (Cabinets) Ltd [1973] ICR 12 at p. 21.** when he stated:
 - *The Act gives the employee a right in his job which is akin to a right in property ... It is not unemployment pay. I repeat 'not'. The employee is therefore entitled to unemployment pay even if he obtains a redundancy pay, just as much as he is entitled not to lose his redundancy pay if he obtains a new job straight away.*

It is not unemployment insurance.....

- It should, however, be noted that, although entitlement to the benefit is triggered by virtue of an employee's termination or 'short time' working, it is also predicated on their payment of social security contributions.
- Thus, workers are usually unable to claim it unless they contributed under the requisite national insurance scheme. In the Commonwealth Caribbean, only two countries (Barbados and the Bahamas) have so far legislated an unemployment benefit, which provides for limited periodical payments to an employed person who has lost his job or is working on reduced time during a designated period.

It is not notice

- As the name suggest, the concept of notice, is to give the parties a “heads up” about a coming action, in this case dismissal.
- In Jamaica there is no specific provision regarding notice for the purpose of redundancy; we simply use the minimum statutory provisions which relate to notice generally as the yardstick for notice in the event of redundancy or where applicable any contractual prescription or industry standards or any similar provisions which may be agreed in a collective agreement.




Prerequisites for notice

- Employer required to give minimum period of notice once worker employed continuously for 4 clear weeks **ETRPA Section 3 (1)**
- Employee also required by law to give notice once employed for the same period **ETRPA Section 3 (2)**

Notice provisions – (EMPLOYERS)

ETRPA Section 3 (1)

- The following represents the Notice period required or payment to be made in lieu of such notice that employers should give to employees based on continuous service by the employee
- 4 weeks < 5 years = **2 weeks**
- >5 years but <10 years = **4 weeks**
- >10 years but < 15 years = **6 weeks**
- > 15 years but < 20 years = **8 weeks**
- Over 20 years = **12 weeks**



Statutory Notice Requirement (Employees) Section 3 (2)

- ▶ Unless there is an agreement, between the parties, the Employee is only required to give **2 weeks** notice to the employer on termination of employment regardless of the length of service

Statutory Notice Provision ETRPA

- ▶ The notice provisions does not prevent the parties to the employment contract from waiving the right to notice at the time of termination, or accepting a payment in lieu of notice or from giving or accepting notice of a longer duration than the relevant notice provided by law **ETRPA Section 3 (3) (a)**
- ▶ It also does not prevent parties to the contract from agreeing to give notice that is of longer duration than the relevant statutory provision to terminate the employment contract **ETRPA Section 3 (3) (b)**



Statutory Notice Requirements

ETRPA – During Probation

- ▶ During a period designated as PROBATION in the employment contract either party can terminate the contract without notice, or where this probationary period is greater than 90 days in duration, during the first 90 days: **ETRPA Section 3(4)**
- ▶ This could be considered as an accommodation to both parties in case the employment does not work out;

It is not an Ex Gratia Payment

- ▶ While some employees may receive a payment at the end of their employment life it need not be a “redundancy payment”
- ▶ In some cases the employer may as an act of “goodwill” provide the employee with a payment in consideration of their years of service
- ▶ It may also be used for employees who may be the subject of a de jure redundancy exercise but have not met the qualifying criteria for year of continuous employment
- ▶ The difference here is that there is no legal obligation to provide the “ex gratia payment” as it is more akin to a “tip”
- ▶ This as there is no “redundancy situation” in question
- ▶ Therefore the previously outlined payment regime is not applicable although it may be used as a guide by employers

It is not a Gratuity Payment

- ▶ Some employees may by virtue of the terms of their contract receive a payment at the end of a fixed term employment contract but this need not be a “redundancy payment”
- ▶ This “gratuity” is more akin to a replacement for pension where these employees may not have had access to the employers’ pension scheme as would an employee with a contract of indefinite duration.
- ▶ It should also be noted that to access this payment there are usually contractual criteria e.g. satisfactory completion of the terms of the contract and/or production of particular deliverables.
- ▶ Since there is no “redundancy situation” in question the redundancy formula is not usually used as a benchmark for calculations but it may be used as a guide by employers
- ▶ More usually a percentage of the contract is used as the payment calculation.

It is not a Voluntary Separation

- Similarly employers may pursue a “voluntary separation exercise” where because it is seeking to cut costs and it issues a call for interested employees to indicate if they are willing to leave their jobs;
- Again this is more a kin to airlines asking passengers to give up their seats for a premium price and await a later flight
- As in the case of the ex gratia payment, there is no legal obligation to make the payment and although the legal minimum standard may be used as a yardstick it is not a necessity.
- This as there is no “redundancy situation” in question





Concluding Thoughts

- Redundancy can be a very technical issue especially for the inexperienced
- The important points to note are that the concept cannot be used “willy-nilly”
- It is strictly a matter of statutory interpretation and without the pre-requisites it is likely that the the situation being faced by an employee is not really a redundancy
- As such we should seek to become more familiar with the concept so that we can be clear about how to advise clients
- Also there are some gaps in the legislation which requires that it be re-examined at this time



**KEEP
CALM
AND
TAKE THE
REDUNDANCY**



ANY
QUESTIONS
?