

AN EMPLOYEE'S TIME OFF WORK:

All You Need To Know



**GENERAL LEGAL COUNCIL
CONTINUING LEGAL PROFESSIONAL DEVELOPMENT
SUNDAY DECEMBER 15, 2019
LLOYD BARNETT SEMINAR ROOMS- 78 HARBOUR STREET KINGSTON**

PRESENTER: CARLA-ANNE HARRIS-ROPER

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Introduction

- ➔ The Doyen of modern labour law, Otto Kahn Freund, in his pioneering work *Legal Framework* (1954) described the common law legal notion of contract as the **'cornerstone of the edifice'** of labour/employment law.
- ➔ Its importance derives from the fact that contracts supposedly includes all the terms and conditions agreed by the parties in the **'wage/work bargain'** also called the **"effort/reward relationship"**



Introduction

- ▶ The contract creates the legal obligations between the parties i.e.
 - ▶ The employer has a legal right to the employee's services and the employee obtains a legally enforceable right to his salary or wages and other related benefits (wage/work bargain)
 - ▶ It is also a binding agreement made voluntarily and agreed upon by the parties either personally or through the negotiations of a union acting on their behalf

Introduction

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- But what happens when the employee does not provide the **“work”** for which the **“wage”** should be payable?
- Should the employee in any circumstances be able to get **“rewarded”** if he has not put in any **“effort”**?

Introduction

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**NO BEES,
NO HONEY;
NO WORK,
NO MONEY.**

Proverb

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- This is a very vexed matter especially for employers because it is a bottom line \$\$\$ issue.
- After all.... There is also another well known concept in labour/employment law that could also be equally applicable the **“no work/ no pay principle”!!!**

Introduction

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- For the purposes of today's presentation, the focus will be on the **Rights, Duties** and **Obligations** of the employee and the employer when it comes on to the employee's absence from duty in various circumstances
- The intent is equip counsel with knowledge to assist their clients whichever area of the employment from which they emanate

Introduction

- Generally three types of terms form the content of an employment contract
 - *Statutory terms*
 - *Express terms*
 - *Implied terms*
- Each type of terms imposes duties on both employers and employees
- We will be examining these terms in the context of the employee absences from work/duties
- (** This presentation is in relation to **EMPLOYEES ONLY**)

OUTLINE OF PRESENTATION

- **Types of Time Off – Governed by Statute**
 - Holiday with Pay/Vacation Leave
 - Sick Leave
 - Maternity Leave/Paternity Leave
 - Public Holidays
 - Rest Days
 - Lay Off
 - Jury Duty
 - Election Voting
- **Concluding Thoughts**
- **Question and Answer Session**

*Time Off -
Governed by Statute*

Statutory Terms

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- ➔ These are terms required by statute to be included in the contract of employment by implication.
- ➔ The employer cannot avoid these terms and cannot ask the employee to sign away any of these statutory rights (unless there are prescribed exceptions).
- ➔ The laws are for the most part aimed at protecting the interests of the worker/employee
- ➔ Statutory Terms are referred to as the **“Floor of Rights”** – these are minimum standards that the employer cannot go below; employers can however provide greater benefits than those that are prescribed.



Holidays with Pay/Vacation Leave

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Holidays With Pay Act

- The Act was passed in 1947
- It makes provisions for the granting of sick and vacation leave as well as the payment of gratuities and sick benefits.
- The substantive Act lays the framework for the promulgation of subsidiary legislation (Ministerial Orders) to articulate the scope of these benefits –

Section 3

Holidays With Pay Act

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- The importance of this law should not be underemphasized. To enhance the welfare and well-being of workers it is imperative that they are provided with adequate time for rest and rejuvenation at appropriate times during their working life as this will allow them to be more productive.
- In fact the concept is guided by the **ILO Convention 132 (1970)**
 - *annual paid holiday of a specified minimum length.*
 - *holiday shall in no case be less than three working weeks for one year of service.*
- JAMAICA has not Ratified the convention



Holidays With Pay Act

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- ➔ The worker should also be remunerated at regular rates of pay during the period of vacation **(Section 4)** and guaranteed the right to return to work thereafter, thus not prejudicing their employment during this time.



Holidays with Pay Act

- The Act recognises that there needs to be special regimes for workers employed by way of contracts of indefinite duration and those who it defines as “casual” (-i.e. employed from day-to-day for performance of tasks which normally cannot be done in less than one working day)
- This is set out in **Section 5** of the Act.

Holiday with Pay Act

- Other major provisions of the Act include:
 - A “non opt out” clause which protects the worker from agreeing to receive any less benefit than he is entitled to under the law. (Section 7)
 - Requiring the keeping of records of payment made for holidays, sick leave and or gratuity to be kept by the employer (Section 8)



Holiday with Pay Act



- Offences under the Act
 - Failure to grant leave
 - Inserting into employment contracts any provision which purports to deprive the worker of benefits
 - Failing to keep records
 - Contravention of the provision of the Regulations made under the Act
- **Penalty on conviction is a maximum \$250,000.00 fine or three months imprisonment (Section 9)**

Holidays with Pay Act

18 The Act also makes provisions for any agent of the employer who fails to abide by the provisions of the Act and the Regulations to be charged jointly for the breach of the legislation except the employer proves that the offence was committed without his knowledge, consent or connivance **Section 10**



➔ An amendment to the Act in 2009 now provides an independent jurisdiction to a Parish Judge to hear and determine claims for breach of the Act's provisions affecting a worker's benefits under the contract of employment of up to a maximum of \$500,000.00 **(Section 10A)**

Holidays With Pay Order

- The Holiday with Pay Order was promulgated in 1973
- A holiday with pay is applicable to workers as defined in the Order who are employed in:
 - Any Trade , industry , undertaking or business
 - Any other activities whether of a commercial nature or not
 - Worker must undertake the work personally



Holiday with Pay Order

➤ Normal wages to be paid for holidays

This is defined as:

- Remuneration regularly paid to employees as wages or commission and includes any amounts regularly so paid by way of bonus as part of such.
- It does not include overtime rates
- It does not include any special or premium allowances

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Holiday with Pay Order (Vacation Leave)

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- **To qualify:**
- The worker (other than a casual worker) should have worked 110 days or more during the qualifying year
- 110 days = $\frac{1}{2}$ the yearly entitlement
- More than 220 days = Full year's entitlement
- 220 days or less but more than 110 days = 1 in every 22 days ($\frac{1}{22}$) – Pro rated formula
 - **NOTE: Qualifying year means a period of 12 months (52 weeks) commencing from the first day of employment**



Holiday with Pay Order (Vacation Leave)

- ▶ **Quantifying the Entitlement**
- ▶ Employed for :
 - ▶ 1-9 years = 2 weeks leave
 - ▶ 10 years and over = 3 weeks leave
 - ▶ **(Example- Person worked for 10 years and no leave taken - person would be entitled to 21 weeks pay in lieu – $9 \times 2 + 1 \times 3 = 21$)**

Holiday with Pay Order (Vacation Leave)

- The number of days granted for holidays shall be consecutive working days, on which that employee would normally work for his employer and may be granted in tranches.
- The holiday with pay is an “earned benefit”: it is not available until after the worker has worked the requisite qualifying period.
- However if there is an agreement between the worker and the employer the leave can be taken within the qualifying year

Holiday with Pay Order (Vacation Leave)

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- Upon termination of a worker's employment where the worker has earned any holiday that was not granted before termination, the employer shall pay to the worker a sum equal to the holiday remuneration which should have been payable to him if all such holidays were then being granted.

Holiday with Pay Order (Vacation Leave)

- ▶ Can vacation leave that is not taken at the date of entitlement be accumulated?
- ▶ The provisions of the Order indicate that
 - ▶ “the worker may carry forward and add to any holiday with pay which he may have in the two succeeding qualifying years if there is a provision in an agreement between himself and the employer for accumulation of not more than 3 consecutive years”

Holiday with Pay Order (Vacation Leave)

- For many years this provision was thought by some to preclude the worker from accumulating leave for more than 3 years and only if there was an agreement to that effect between the parties
- However a relatively recent Jamaican Court of Appeal decision appears to have debunked that view ...as it relates to claims made for payment of benefits on termination of employment. An IDT award also seems to accept the principle.

Cecil July v Kirk Hall

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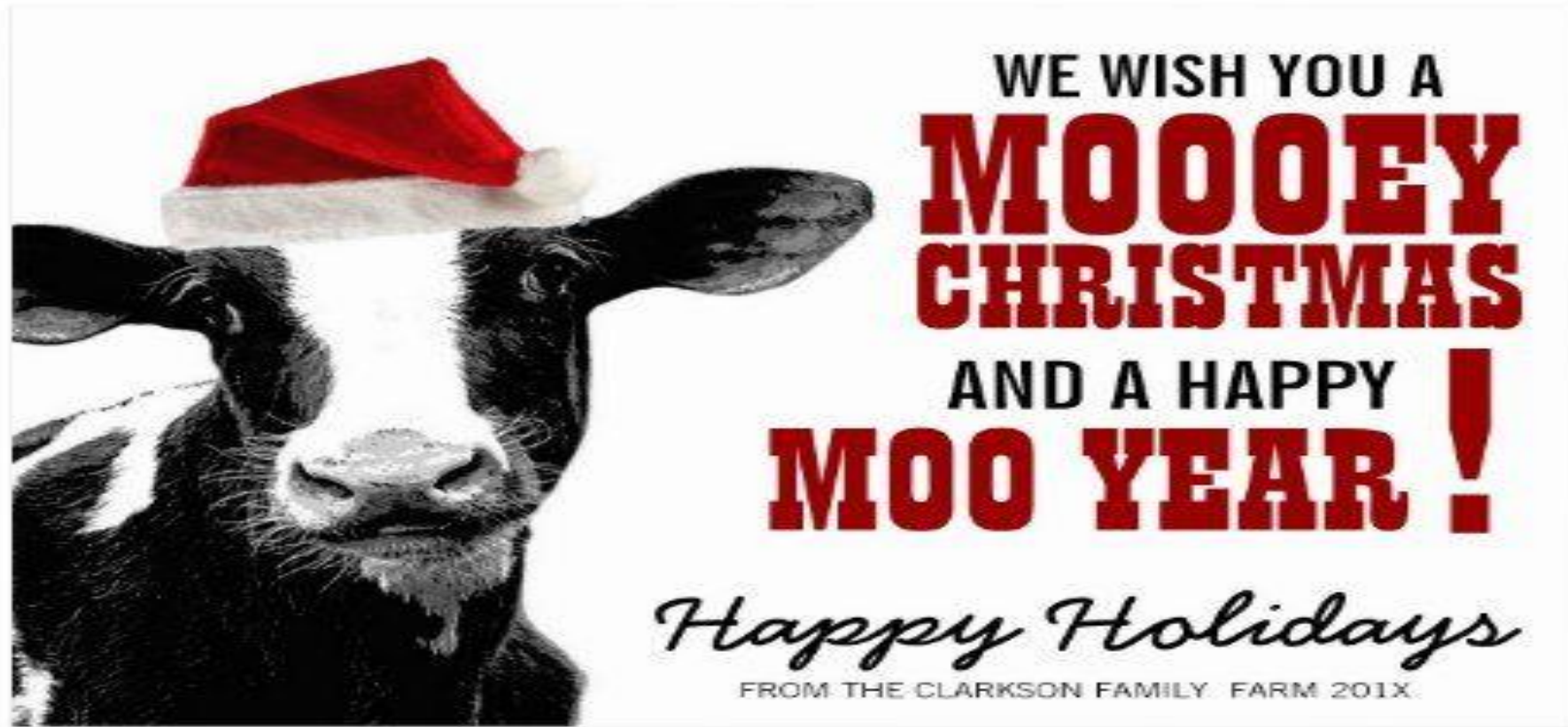
[2011] JMCA Civ 3 (unreported) delivered January 28, 2011

- ➔ The appellant (an attorney) employed the respondent as a cowhand in 1989 and he was dismissed in 2008. The respondent alleged that he was not allowed to take any vacation leave during the period neither was he paid in lieu thereof. When he enquired about vacation leave the employer stated that "*cows don't get holiday*" and in effect required the respondent to work continuously over the 19 year period. Hall sued July for non payment of accumulated vacation leave.

Cecil July v Kirk Hall (2011)

[2011] JMCA Civ 3 (unreported)

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Cecil July v Kirk Hall (2011) [2011]

JMCA Civ 3 (unreported) delivered January 28, 2011

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- At the Parish Court the judge found in favour of the respondent. The Court of Appeal also agreed awarding him the sum of \$142,450.00 as a leave arrears entitlement.
- Mr. Justice Panton stated:
 - “It is quite clear that there is no limitation placed ...on the period for which the worker may be paid **at the time of termination.** What is required,... is for the employer to pay the worker upon termination a sum of money equal to the holiday remuneration earned but not granted as if all the holidays were then being granted” (paragraph 14)

A.E. Parnell & Co. v Dean Williams

IDT 10/2014 (unreported) delivered March 19 2015

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- ▶ Mr. Williams was employed to the company as a Stevedoring Timekeeper from September 1982 and voluntarily resigned in March 2013. He claimed that for the period of his employment he was not afforded vacation leave and as such, he should now be paid retroactively for the 31 year period. The matter was unresolved at the Ministry of Labour and therefore referred to the IDT for settlement. The company contended that he was adequately compensated for the period as its policy is that there is no accumulation of leave. They also had no record of submission of leave application by Mr. Williams. The claimant, on the other hand insisted that the company was in breach of the law especially since they had not kept records as required by the Act to counteract his assertions.

A.E. Parnell & Co. v Dean Williams

IDT 10/2014 (unreported) delivered March 19 2015

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- ▶ The IDT concluded that while Mr. Williams did not appear to be aware of his right to raise a grievance about not receiving his vacation leave entitlement, the HWP Order was clear about his entitlements, as well as the duty of the employer to keep proper records in that regard. The company only produced records for some years post 2003, to show that Mr. Williams was paid in lieu of vacation for 6 of those years. As such the onus was on the company to prove that he was granted and/or paid for vacation leave during the entire period of employment and the Company failed to do so.
- ▶ **The Tribunal awarded Mr. Williams 60 weeks pay in lieu of vacation pay and attendant allowances for which he would have been eligible to receive while on vacation leave.**



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Vacation Leave is not to be used as a disciplinary measure

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- ▶ It is an established principle of law that vacation leave is for the benefit of the worker and that it should be applied for, NOT sent on; to do otherwise would be tantamount to indefinite suspension; suspension is disciplinary in nature.
- ▶ ***R v Permanent Secretary Ministry of Justice ex parte Lackston Robinson Claim 81 of 2002 (unreported) delivered July 31, 2007***
- ▶ “Suspension for disciplinary reasons and vacation leave are horses of a different colour” per Jones J



Holiday with Pay Order (Vacation Leave)

- Important point to note:
 - An employer **shall not** grant vacation leave to a worker during a period of **NOTICE** given by the employer to terminate employment

This is protecting the worker from abuse as an employer could try to use this practice to not provide vacation leave pay on termination of the employee



Gratuity payment to Casual Workers

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- Casual worker, by virtue of the nature of their employment may be paid a gratuity in lieu of leave

- **QUALIFICATION**

- Have to work not less than 110 days **OR**.
- If the number of days cannot be ascertained and he earned wages 110 times the established daily rate paid.

- **OR**

- When the number of days worked cannot be ascertained and there is no such established daily rate, his name has appeared on the pay bill for not less than twenty weeks.

- **ENTITLEMENT:**

- Minimum payment due is 3 % of the total wages earned during the year in which the gratuity is paid.



Sick Leave

Holidays With Pay Act (Sick Leave)

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- The worker should also be remunerated at regular rates of pay during the period of Sick Leave **(Section 4)** and guaranteed the right to return to work thereafter, thereby allowing the employee reasonable paid time off to recuperate from illnesses that may develop during their working life.



Holiday with Pay Order (Sick Leave)

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- **To qualify:**
- The worker (other than a casual worker) should have worked 110 days or more **DURING** first 12 months of employment (the qualifying year) to be entitled to leave in that year

Entitlement

- 110 or more days worked = 1 in every 22 days (1/22) leave gained



Holiday with Pay Order (Sick Leave)

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- If the worker falls ill **AFTER** the first 12 months he is entitled to 2 normal working weeks sick leave
- This means that after the first 12 months there is no need to "earn" sick leave

Holiday with Pay Order (Sick Leave)

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- Exclusions from sick leave with pay
 - If a benefit for employment injury benefit under the National Insurance Act or Workmen's Compensation Act is payable
 - If the worker fails to satisfy any condition which is contained in an agreement (e.g. Collective Labour Agreement) between the employer and himself which provides greater sick leave benefits than those provided by the Order
 - If the worker fails to notify the employer of his illness **during the first working day** when it occurred and:
 - **If the period exceeds three (3) days** the worker fails to provide the employer with a medical certificate from a registered medical practitioner stating that that he is ill and the period for which he will be unable to perform his duties.

Holiday with Pay Order (Sick Leave)

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- Therefore the employee is not required to produce a “sick certificate’ until the 4th day of illness
- A sick certificate cannot be stated in terms of “working days” as illness is not exclusive to work days
- The doctor should simply state the number of days required in his professional opinion for the worker/patient to be recovered and fit enough to resume duties

When sick leave is a fraud

JAWS dropped and eyebrows raised throughout the workforce in T&T on Friday, December 6, when readers awoke to see in their morning papers that someone had actually been sentenced to six months in jail for falsifying a sick leave certificate and submitting it to his employer.

Most people are not aware that six months in prison can be the outcome of pretending to be ill when you are not, although most people over the age of 12 are aware that fraud is a criminal offence.

Most people know that claiming money under false pretences is fraud. But for some reason there are people over the age of 12 who have not put together the fact that to claim for "sick leave with pay" from your employer and the fact that you are not really sick constitutes fraud.

In our Industrial Relations Act (IRA) which governs the conduct of industrial relations in Trinidad and Tobago, there is a provision that makes this very clear. Captioned "Fraudulent Medical Certificates," Section 77 states: "A worker who, by deception, absents himself from his employment is liable on summary conviction to a fine of one thousand dollars or to imprisonment for six months."

In this case the worker who at the time was employed in the Police Service managed to get a genuine medical certificate for six days and "doctored" it by putting an extra "0" after the figure "6" and added a "ty" after the word "six".

Please note that a doctor cannot grant "sick leave" to anyone unless that person works for the doctor. A medical practitioner can only recommend that it be given. The doctor is not the employer and does not pay the worker's wages. The employer does. A medical certificate is not a command form, it is a recommendation. People forget.

There is actually no such thing as literal sick leave. There is, in reality, an agreed payment during illness" to assist an employee to continue to support his family who could otherwise experience hardship. Back in the day, employees did not get paid for a day in which they did not turn up for work.

Many daily paid workers still do not get paid for the day if they miss work due to illness.

Because of this hardship, in 1976 a min-

DIANA MAHABIR WYATT

Sick leave is not an entitlement unless you are genuinely sick. Otherwise, claiming it is fraud.



imum wages law was passed entitling permanent workers up to 14 days' paid sick leave per year if they were genuinely ill, not to take an extra two weeks vacation with full pay. It just doesn't work that way.

The IRA even goes on to provide that a medical practitioner who issues a fraudulent certificate is liable under summary con-

viotion to a fine of \$2,000 or to a year in prison. This applies to those fraudster medical practitioners that charge \$20 a day for false medical certificates. Most workers know where to find them.

They usually don't bother to do an examination, they just ask how many days you want and tell you how much it will cost. They insist on being paid in cash to avoid taxes.

But in this case it was not the doctor who was party to the attempted deception, it was the worker, or his brother who brought in the "doctored" certificate for him.

Kind of obvious, wouldn't you think? How do people get away with it?

Is it because their human resources department doesn't look closely enough at the "certificate"? Do their supervisors, seeing them reasonably healthy one day, actually believe that the next day they are suddenly so ill as to need 60 days leave without even a NIS request to cover the days not covered by the 14 days allocated? And not check to find out what has really happened?

In this case, the supervisor did check.

That the worker was a member of the police service, a public service that a sadly substantial percentage of the population already perceive as corrupt. That does not help. We want to believe and trust in our police service.

We NEED to be able to believe and trust our police service. Our police service wants to be able to believe and trust in itself. Why destroy the foundations on which your own organisation is built?

So this worker will serve his time in jail. And, now that the possibility of having to do likewise has come to the attention of the public, so may other people.

Sick leave is not an entitlement unless you are genuinely sick. Otherwise, claiming it is fraud.

Now we know.

Illegal Use of Sick Leave - Sick out

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Sick out is a type of industrial action which is in breach of an implied term of the employment contract and the employer can terminate except in the case of 'genuine' illness. The proof of whether this is the case will clearly then be an issue.

R v Industrial Disputes Tribunal Ex Parte Alcan Jamaica Ltd suit M 35 of 1980 (unreported) delivered Dec. 1, 1980

The workers in the Instrumentation section of the plant objected to the appointment of another worker. They raised objection and wanted another worker appointed. When that recommendation was rejected, the workers began reporting sick and presented sick certificates in support.

Illegal Use of Sick Leave -Sick out

- **R v Industrial Disputes Tribunal Ex Parte Alcan Jamaica Ltd Suit M 35 of 1980 (unreported) delivered Dec. 1, 1980**
- The company in response indicated to the workers that they needed to present a fit to work certificate on their return to work. They refused to do so. When they finally returned the company refused to pay them for the period they were off sick. This in turn created another dispute which was referred to the MLSS. Conciliation proved futile and the case was referred to the IDT.
- The IDT held that the Med Certs. could not be contested although they were of the view that the workers were not genuinely sick and that the workers should be paid for the period they were off sick. Company applied to the Court for Order to quash award.

Illegal Use of Sick Leave -Sick out

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R v Industrial Disputes Tribunal Ex Parte Alcan Jamaica Ltd Suit M 35 of 1980 (unreported) delivered Dec. 1, 1980

- **COURT decided: the workers ought to be guided by the Labour Code, and the staging of a sick-out is not in the national interest. The court also thought that a sick out is a deliberate misrepresentation concerning the health of workers and to seek the assistance of medical practitioners to further this deception in order to receive remuneration should not be tolerated. One judge said “claiming pay during period of sick out is trying to obtain money by false pretences.”**

- **Sykes v. The Minister of National Security and Justice and Another and Legal Officers Staff Association (2000) 59 WIR 411**
- Legal Officers employed by the government upset about the slow pace of wage negotiations undertook a 'sick out' in May 1992. Following on that action, the Ministry of National Security and Justice made the decision to withhold salaries from the legal officers for the days on which they were absent. The legal officers took court action to restrain the government from taking that course. The Supreme Court ruled that the government was entitled to deduct the sums on the 'no work no pay' principle.

Sykes v. The Minister of National Security and Justice and Another and Legal Officers Staff Association (2000) 59 WIR 411

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- The Legal Officers appealed.
- The Court of Appeal agreed with the decision of the Supreme Court. Zacca J stated:
 - “A deduction to take account of salary that, by reason of unauthorised absences from work has not been earned, is not a penalty at all. It is a deduction necessary to be made in order to calculate the officer’s contractual entitlement to salary.”
- The matter was further appealed to the Privy Council which concurred with both the courts below.
 - (Interestingly the amounts were never deducted but the PC was of the view that the amounts could not be recovered from the officers some 8 years after the fact)

Holiday with Pay Order (Sick Leave Casual Workers)

➤ QUALIFICATION

➤ During the first qualifying year:

- Have to work not less than 110 days **OR**.
- If the number of days cannot be ascertained and he earned wages 110 times the established daily rate paid.

➤ **OR**

- When the number of days worked cannot be ascertained and there is no such established daily rate, his name has appeared on the pay bill for not less than twenty weeks.

Holiday with Pay Order (Sick Leave Casual Workers)

➤ Entitlement

- To be paid 10 days sick benefit for the period of illness

or

- the 1st 10 days if the total period of illness in that qualifying year exceeds 10 days

The same entitlement applies to the worker in the second or subsequent qualifying year

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Holiday with Pay Order (Sick Leave Casual Workers)

- ▶ The minimum sick leave payable to a casual worker in respect of each day of any illness shall be $\frac{1}{10}$ of 3 % of earnings in the employment of the employer for the period
 - ▶ From the start of employment to the first day of illness
 - ▶ From the date of resumption of work to the day prior to the first day of any subsequent illness



Maternity Leave



**“If you plan to stop working to have your baby,
please do it during a coffee break and try not
to disturb your coworkers.”**

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MATERNITY LEAVE ACT

The law recognizes that women have to be offered protection in the workplace when they are pregnant. Protection is offered to these women via the provisions of the Maternity Leave Act, passed by Parliament on December 31, 1979.

The main measures implemented by the law to protect women are:

- ❖ the granting of maternity leave and pay
- ❖ protection from dismissal wholly or partly on the grounds of pregnancy
- ❖ the right to return to work after giving birth.

MATERNITY LEAVE ACT

The ILO's Maternity Protection Conventions (C183, C191) advocates for:

- the minimum paid maternity leave from 14 weeks;
- 6 week compulsory period after childbirth during which women are not to be allowed to work

Jamaica has not Ratified these Conventions



MATERNITY LEAVE ACT

- Some important definitions under the Act include:
 - **"worker"** means an individual of the female sex who has entered into, or works under, a contract with an employer, whether the contract is express or implied, and (if it is express) whether it is oral or in writing and whether it is a contract of service or of apprenticeship, and includes any such individual employed in the service of the Government (including service in the Jamaica Defence Force and the Jamaica Constabulary Force), and "employer" shall be construed accordingly.

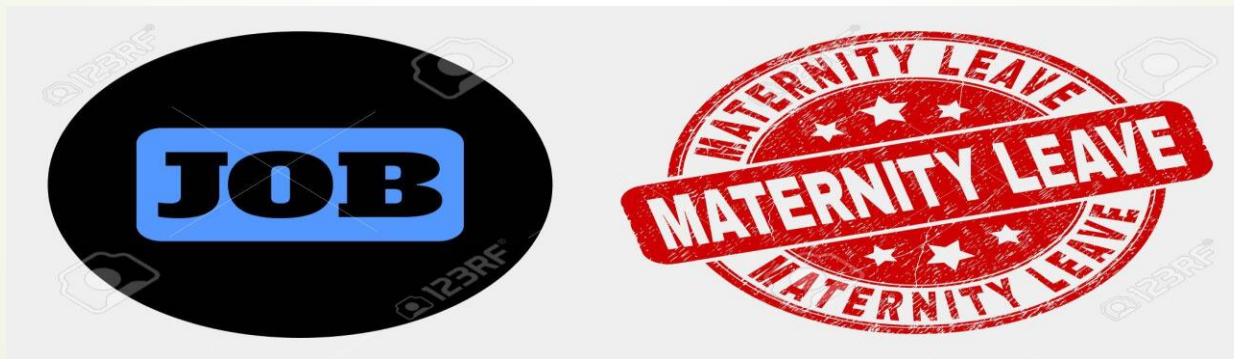
MATERNITY LEAVE ACT

- **"confinement"** means the birth of a living child or the birth of a child whether living or dead after twenty-eight weeks of pregnancy;
 - This makes maternity leave applicable if there is a premature birth or stillbirth after the 28th week of pregnancy (5th month)



Maternity Leave (Qualification)

The main purpose of maternity leave protection is to ensure the safety of the mother, the foetus or newborn by ensuring that sufficient rest is given to the mother and that she is allowed time to take care of the newborn after birth.



Pursuant to **Section 3** of the Act, a female Jamaican employee is therefore entitled to **maternity leave** if she satisfies prescribed conditions. These conditions are that:

Maternity Leave (Qualification)

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- ❖ She must have been continuously employed by her employer for a period of not less than 52 weeks at the date on which her absence begins- **Section 3(1) (b).**
- ❖ She must inform the employer that she wishes to be absent from work wholly or partly because of her pregnancy or confinement and that she intends to return to work with the employer- **Section 3 (1) (a).**
- ❖ She must provide a Medical Certificate from a registered medical practitioner if the employer requests one. This Certificate must state that it is necessary for the worker to be absent from work wholly or partly because of her pregnancy or confinement- **Section 3 (1) (c).**

Maternity Leave (Qualification)

- ▶ Interestingly at this stage there is no mention of maternity **PAY**.
- ▶ This is because it is entirely possible that a woman could qualify for leave but does not meet the pay criterion (**Section 5**).



Maternity Leave (Entitlement)

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It must be noted that in accordance with **Section 3 (2)** of the Act, the duration of maternity leave is generally **twelve (12) weeks.**

However a worker can be granted maternity leave for an additional period of fourteen (14) weeks if she provides her employer with a Medical Certificate from a registered Medical Doctor which certifies that it is necessary for her to be absent from work as a result of an illness arising from her pregnancy or confinement or as a result of the state of health of her newborn child- **Section 3 (3).**



Maternity Leave (Entitlement)

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If a woman requires maternity leave in excess of the additional 14 weeks for the reasons mentioned in **Section 3 (3)** the employer can require that she submit herself and the newborn to a medical examination by a Medical Doctor chosen by and paid for by her. **Section 3(4)(a)**

The employer can further request that this examination is carried out in the presence of a Doctor chosen and paid for by him/her- **Section 3(4) (b)**.

If there is disagreement between the medical practitioners, the matter can be submitted to the government's chief medical officer whose decision will be final. **Section 3(4)(c)**

There is no time frame placed on the leave to be provided under this mechanism. It is wholly dependent upon the results of the medical examinations and the recommendation made by the registered medical practitioners

Maternity Pay (Entitlement)

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By virtue of **Section 5** of the Act, a 'qualified worker' who has been granted maternity leave is entitled to receive maternity pay. This pay will only be received for the **first 8 weeks of maternity leave.**

This means that maternity pay will not be paid during the **additional 4 weeks** of maternity leave or during any additional maternity leave granted because of illness of the mother or the newborn.

Maternity Pay (Qualification)

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A 'qualified worker' is defined in the Act as a worker who:-

- ❖ Is not less than 18 years of age on the first day of the eleventh week before the expected week of confinement (the date the baby is due to be born).
 - ❖ This practically works out to approximately the 5th month of pregnancy
- ❖ Is not employed as a domestic worker (Domestic workers are covered under **the National Insurance Act** where they receive the 8 weeks pay if qualified based on the current rate of the minimum wage).

Maternity Pay (Qualification)

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A qualified worker will be disentitled from receiving maternity pay unless:

- ❖ she informs her employer of the expected week of confinement (EWC) by the **29th week of pregnancy** or as soon as is reasonably practicable,
- ❖ produces a Medical certificate for inspection by her employer if he so requests
- ❖ and if she has already been granted maternity leave by the employer in respect of three or more pregnancies- **Section 5 (2).**



**MATERNITY
LEAVE**

Maternity Pay/Leave (Penalty)

- ❖ An employer who fails to grant a qualified worker maternity leave or Pay can be fined \$500.00 or imprisoned for 4 months- **Section 7 (1)**.



- ❖ An employer who fails to keep proper records can be fined \$300.00 or imprisoned for 3 months- **Section 7 (4)**.

Protection from dismissal

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It must be recognized that some employers may want to penalize a woman on the basis of her pregnancy. The Maternity Leave Act seeks to protect women from such a course of action.



Section 7 (2) states that an employer who dismisses a woman without reasonable cause, wholly or partly because of her pregnancy, is guilty of an offence.

If the employer is convicted before a Parish Judge he/she can be fined One Thousand Dollars (\$1,000) or be imprisoned for 6 months.

Neveast Supplies Limited v Karma-Gaye Williams.

IDT 2/2015 (unreported) delivered November 3, 2016

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Ms. Williams was employed in August 7, 2012 and later appointed in the capacity of In-House Sales Representative and Drawing Technician. She proceeded on 3 months Maternity Leave on January 10, 2014 to end on April 9, 2014; she was invited to a meeting on March 25, 2014 and given a dismissal letter (and asked to exit through the back door), purportedly because the “the economic conditions in the industry resulted in slow sales”.

Neveast Supplies Limited v Karma-Gaye Williams.

IDT 2/2015 (unreported) delivered November 3, 2016

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In deciding that the employee was unjustifiably dismissed, the IDT considered that not less than 2 months after her termination, the same job was publicly advertised. They also examine MLA provision relating to the employee's right to return to work, and they accepted her testimony that she had advised the employer that she would return. They accepted there was a clear breach of the MLA.

► **The IDT awarded her compensation in the amount of \$1,750,000.00.**

Right to Return to Work

The right to maternity leave would be ineffective if the employee were not guaranteed a right to return to work after giving birth. Women would in many instances decide not to utilize the maternity leave provision if by doing so they would not be able to return to their place of employment.

Section 4 of the Act therefore specifies that every worker who has been granted maternity leave is entitled to return to work with the employer who granted her leave.

Right to Return to Work (Cont'd)

Additionally the law ensures that the woman cannot be demoted or penalized by her employer after exercising her right to maternity leave. Therefore the woman must return to work:

- ❖ in the same capacity and place that she was employed under her original contract of employment and to do work of the same nature for which she was employed- **Section 4 (1) (b)**.
- ❖ on the same terms and conditions of employment as regards seniority and pension rights for example- **Section 4 (1) (c)**.

Right to Return to Work (Cont'd)

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A woman will lose her right to return to work unless she serves on her employer a notice that states the day on which she proposes to return to work. This Notice has to be served on the employer **at least three weeks** before the day on which she proposes to return- **Section 4 (3) (b)**.

An employer who refuses to permit a woman to return to work will be treated as having terminated the contract of employment without cause on the grounds of pregnancy- **Section 7(3)**.

- If the employee is scheduled to return to work and is prevented by interruption of work (e.g.) Industrial action making it unreasonable for her to do so, she may return as soon as practicable thereafter **Section 4(4)**.

Redundancy- Implication for Maternity

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- **Section 4 (5)** If the employee is scheduled to return to work and is prevented by reason of redundancy she shall be entitled to be offered suitable alternative employment with the employer or his successor or an associated employer under a new contract conforming to the following guidelines:
 - The new job must be suitable and appropriate for her to do
 - The provisions as to capacity and place must not be less favourable than the previous job
 - Her seniority, pension rights must be preserved **(Section 4(6))**
 - If these provisions have been complied with and redundancy is still in issue she should be treated as being continuously employed up to the date of her slated return to work and entitled to redundancy pay as prescribed under the ETRPA **(Section 4(7))**



Possible Legislative Reform

There is advocacy relating to maternity protection and a safe and healthy work environment for both male and female workers by ensuring that workplaces are free from hazards which could potentially impair human reproductive health. –

Occupational Safety and Health Act – Currently being Debated (Joint Select Committee of Parliament)

“

**Paternity leave
is a privilege, not
an entitlement.**

”

Paternity Leave

JCSA Pushes for Paternity Leave

FINANCE & PUBLIC SERVICE

SEPTEMBER 11, 2019

WRITTEN BY: OKOYE H



PHOTO: DWAYNE YOUNG

President of the Jamaica Civil Service Association (JCSA), O'Neil Grant, addresses JIS 'Think Tank', at the agency's Montego Bay Regional Office in St. James, on Monday, September 09.

Chuck: No Paternity Leave If Men Don't Live With Mothers

Published: Wednesday | October 23, 2019 | 12:11 AM

[Albert Ferguson/Gleaner Writer](#)



Flow Introduces Paternity Leave, Extends Time Off For Moms

Published: Thursday | July 11, 2019 | 5:49 PM



GRANTED



PATERNITY LEAVE PLAN NOT INTENDED TO PROMOTE 'BABY FAT CULTURE' – PHILLIPS



BY [CHEVON CAMPBELL](#) SEP 24, 2019, 00:49 AM

Carla-Anne Harris Roper (c) 2019

Paternity Leave

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In recent times there has been a lot of debate around the introduction of paternity leave in the Jamaican landscape

- There is currently no legislation to address this issue
- There will need to be intensive debate around how the policy can be structured in order to ensure that the intent is able to be translated into strong statutory guidelines that can be effectively administered



Paternity Leave

The Work and Family Responsibilities Convention (C156,165) proposes a holistic approach to child rearing and development through paternity leave immediately after or within the first few weeks of childbirth.

Jamaica has not Ratified this Convention

Possible position could be 5-10 days off (paid) to be taken immediately at the birth of the child



Public Holidays

Holidays (Public General) Act)

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- The **Holidays (Public General) Act** makes provision for the closure of business' on designated days where the nation is called to National Observance, corporate rest and relaxation. These include:
 - All courts of justice,
 - public offices,
 - all wharves (unless where exemption is made)
 - Banks and their agencies
 - Offices and places of business of all solicitors, assurers, insurers, bill discounters, building societies,
 - all persons licensed to carry on the business of merchants, general factors, wholesale dealers, storekeepers, commission agents and retailers who pay a trade licence on any place of business
 - printing and newspaper offices

Holidays (Public General) Act)

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- The Public Holidays in Jamaica are:
- 1. New Year's Day, or in case New Year's Day falls on Sunday, then the day after New Year's Day.
- 2. Ash Wednesday.
- 3. Easter Monday.
- 4. The 23rd day of May (or in case the 23rd day of May falls on Saturday or Sunday, then the following Monday) which shall be known as "National Labour Day".
- 5. The following days in August, that is to say-
 - (a) the 1st day of August (or in case the 1st day of August falls on a Sunday, then the following Monday) which shall be known as "Emancipation Day";
 - (b) the 6th day of August (or in case the 6th day of August falls on a Sunday, then the following Monday) which shall be known as "Independence Day".
- 6. The third Monday in the month of October, which shall be known as "National Heroes" Day
- 7. The day after Christmas Day, or when Christmas Day falls on a Sunday, then the 26th and 27th of December.
- 8. A day appointed by the Minister of national observance.

Holidays (Public General) Act)

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- The Public Holidays in Jamaica are:
- Missing from the Listing in the Schedule to the Act is
 - Good Friday
 - Christmas Day
- These days are set according to the Ecclesiastical Calendar and are accepted as “common law” holidays



Holidays (Public General) Act

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- As such, regular employment with a few exceptions
 - *(two notable examples are pharmacies and gas stations)*
 - should be closed for business with the necessary corollary that employees are not obliged to undertake work on those days; however they are to be paid their normal salary and benefits that may be applicable.

Holidays (Public General) Act)

- Note **Section 10** which states that:
- “ Every contract for any service in any office, business or other place mentioned, included or brought under the operation of [the Act], whereby the person employed undertakes or agrees generally not to claim or to observe all or any Public General Holidayshall be absolutely void; but it shall nevertheless be lawful for any person employed as aforesaid, as well as for other persons not so employed to make a special agreement on the approach of any Public General Holiday, to forego his right to any such particular Public General Holiday, and to continue in service or to enter upon and perform any duties during the whole or any part of such particular Public General Holiday”

Holidays (Public General) Act

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- As such, should the employer and the employee reach agreement for an employee to undertake work on any of these days, the Contract, Collective Agreement (where applicable) and custom and practice will make provisions as to the rate of remuneration and benefits that attach to those days
- Exception in the case of Minimum Wage earners where the Minimum Wage Order legislates minimum rates of pay in such instances.
- The Orders provides for Time and a half to be paid for work done on Public Holidays



Rest Days

Rest Days

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- Different forms of rest are important for a workers physical and mental well-being.
- If structured properly, they can all have a positive impact on occupational health and safety as well as improve productivity in the workplace



Rest Days

The ILO Weekly Rest Convention of 1921 (No. 14) provides for“:

- employees to be entitled to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of seven days.
- The weekly rest period shall, wherever possible, be granted simultaneously to all the persons concerned in each establishment.
- The weekly rest period shall, wherever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district.
- The traditions and customs of religious minorities shall, as far as possible, be respected.
- Jamaica has not ratified this Convention

Minimum Wage Orders (National and Industrial Security Guards)

- ▶ The **Minimum Wage Orders** have instituted “rest days” in relation to any worker covered by its provisions
- ▶ **Paragraphs 3(1) and 3(2)** of both Orders mandate that every employer shall in each week during which the worker other than an hourly worker works for him, allow that worker one day as a rest day.
- ▶ The day on which the rest day is to fall in any particular week shall be determined by agreement between the worker and his employers

Minimum Wage Orders (National and Industrial Security Guards)

- ▶ The major importance of the designation of the rest day relates to the rate of pay to be ascribed if the employee does in fact undertake work on that designated rest day.
- ▶ The Orders provided for Time and a half to be paid for work done on rest days (overtime)
- ▶ Other higher rates of pay can also be negotiated by the parties





Lay Off

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*)

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 Appeal No. 27 of 1984 Jamaica CA
(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

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Everton Samuda v Harry Prendergast **Everton Samuda v Harry Prendergast RMCA Appeal No. 27 of 1984 Jamaica CA (unreported) delivered January 25, 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

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➤ **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

Lay Off

- **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 limes only.

Lay Off

- Lay off is redress available at the option 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” 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

Lay-off....

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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.



Jury Duty

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Jury Duty

- ➔ Prior to the enactment of the **Jury (Amendment) Act** in December 2015 there were no specific legislative provisions that spoke to how this critical civic duty was to be administered from an employment law standpoint.
- ➔ This was usually addressed through tacit agreement or in some cases via collective agreement or company policy

JURY DUTY

by Joe Lindsey & Debbie Ohi

Did you hear about
the case Marg was
selected for? They
had a HUNG JURY!

Gasp...I had no
idea that jury
duty was so
hazardous!!



d.ohi

Jury Duty

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- ➔ When the employee is summoned to Jury Service, the employee shall be entitled to time away from his place of employment to serve on a jury without loss of remuneration or other benefit or advantage to which they would be entitled. **Section 19 A**
- ➔ When employee is summoned he must advise the employer as soon as reasonably practicable **Section 19 B**



Jury Duty

- If the employer receives the summons on behalf of the employee he must advise the employee as soon as reasonably practicable

Section 19 C

- Where the employer refuses to release the employee
- Deprives the employee of benefits or remuneration
- Dismisses the employee or threatens to dismiss
- Takes any other punitive action against the employee
- The employee may apply DIRECTLY to the Court or the IDT for relief

Section 19 D

- **This relief may include reimbursement of lost wages, or reinstatement if the employee was dismissed**

Jury Duty

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The amendment while seeking to provide protections akin to the occupational detriment concept of the Protected Disclosures Act and Flexi Work Act, does not utilize the provision already included in the LRIDA, but rather creates a different genre of protection.

- 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 by the Minister.
- It is therefore arguable whether this new provision in the Jury 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.



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Election Voting

Time Off to Vote

- All Citizens of Jamaica upon gaining the age of majority have the constitutional right to participate in the democratic process to install elected officials via a nationally legislated process.
- This applies to both General and Local Government elections.
- **The Representation of the People Regulations Paragraphs 4(1) and (2))** regulates the process as it relates to the employers' duty to give employees time off to exercise their franchise.





NOTICE

You are
allowed

TIME OFF to **VOTE**
on Election Day

THE REPRESENTATION OF THE PEOPLE (LEAVE & SYMBOLS) REGULATIONS, 1944

1. These regulations may be cited as the Representation of the People (Leave and Symbols) Regulations, 1944.

Subject to the provision of paragraph (2) every employer shall permit each of his employees to be absent from his work on polling day for three hours in addition to the normal meal hour.

2. The provisions of paragraph (1) shall not apply to any employee whose work on polling day commences at or after 10:00am or concludes before or at 2:00pm.

Orrette Fisher
Director of Elections

Time Off to Vote

- ▶ While the provisions are clear that the employee must be provided with the time off to vote,, what is NOT pellucid is that the employer must not prejudice the employee when they exercise the right.
- ▶ It would have been best if this was spelt out specifically (i.e. that the employee should be paid for the time that they utilize to vote).
- ▶ Nevertheless the implicit message must be that this is the case.



Other Contractual Related Time off

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Suspension
No pay leave
Garden Leave
Study Leave/Day Release
Departmental/Casual Leave
Personal Obligation Days (PODS)



Concluding Thoughts

- The employee's right to "time off work" is prescribed in some instances and agreed by Contract/Collective Agreement in others
- Where the statute is the benchmark it is simply a minimum standard that the employer can improve upon if they have the capacity to do so.
- The implications for the employer from a monetary perspective can prove challenging and unfortunately encourages some to seek out methodologies to avoid these obligations.
- This could explain why Jamaica has not ratified most of the relevant ILO Convention even though they have instituted some standards
- Some of the legislation governing the issue needs to be reviewed in light of current economic, employment and labour law realities.



ANY
QUESTIONS
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