

“UNJUSTIFIABLE” OR “UNFAIR” DISMISSAL:

WHAT'S IN A NAME?



**CONTINUING LEGAL PROFESSIONAL DEVELOPMENT
SUNDAY MAY 21, 2017
JAMAICA CONFERENCE CENTRE - KINGSTON**

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ROMEO AND JULIET

ACT II SCENE II –WILLIAM SHAKESPEARE

- Point of Departure for this presentation:



***“What’s in a Name?
That which we call a rose
by any other name
would smell as sweet;***

- Should it really matter whether this legal concept is described as **“unfair dismissal”** or **“unjustifiable dismissal”**?
- On a literal construction, are not these two things virtually the same?



THE POLEMIC:

THE TWO CONCEPTS ARE DIFFERENT!!

- The legal concepts as envisioned by the legislators in various jurisdictions, although similar in their foundations are expressed in different formats and the concept's application differs in each country.
- Thus it would be unwise in the Jamaican jurisprudence at this time to assume or believe that the two concepts are the same and as such act in accordance with legal precedence from other jurisdictions in dealing with matters of dismissal (except perhaps in matters of general principle)



OUTLINE OF PRESENTATION

- Difference between “Wrongful and Unfair/Unjustifiable”
- Origin of the Concept
- Define “Unfair Dismissal”
- Explain how it operates – UK Case study
- Define Unjustifiable Dismissal” – Jamaica Scope
- Signal Differences
- Recent Developments
- Concluding Thoughts - Recommendations



WRONGFUL DISMISSAL DISTINGUISHED

- At the outset we should note that the concept of “**wrongful dismissal**” or “**unlawful dismissal**” is not to be confused with the concept of “**unfair**” or “**unjustifiable dismissal**”
- The former is a common law concept while the latter is strictly statutory
- Essentially, the common law views a dismissal which is undertaken with proper notice as being lawful.
- Thus compensation is an adequate remedy

Addis v Gramophone Co Ltd[1909] AC 488.



"Power suits are great for up-and-comers. For you, I recommend the wrongful dismissal suit."

MAJOR DIFFERENCES BETWEEN WRONGFUL AND UNFAIR DISMISSAL

Legal Concern	Wrongful Dismissal	Unfair Dismissal
Forum actionable	Ordinary courts	Industrial tribunal/court
Remedy available	Damages, declaration, injunction, specific performance	Monetary compensation, reinstatement, re-engagement
Employment qualification period	None	Period of continuous employment after the expiration of statutory probation
Limitation period	Usual statute of limitations for civil claims	Varying timeframes for making claims
Amount of claim	Limited to amount payable for notice, contracted figure or remainder of unexpired fixed-term contract	In discretion of tribunal/court, except where there are statutory guidelines for calculation
Rationale for claim	No or inadequate notice or payment in lieu thereof; reasons for dismissal unimportant, except in summary dismissals	Reason, manner and procedure used in dismissal examined
Who can claim	All workers	Workers/employees defined by statute

ORIGIN OF THE CONCEPT – THE ILO

- The earliest contemplation of the subject of termination at the ILO level occurred in 1963, when **Recommendation 119 (Termination of Employment)** was adopted.
- It outlines the ‘... fundamental notion that managerial power should be exercised so as to be compatible with notions of formal rationality’.
- This bedrock principle has remained true in the successor **Convention 158 (Termination of Employment)** and its accompanying **Recommendation 166**



International
Labour
Organization


ILO FRAMEWORK

- The premise that ‘termination of employment should not take place unless there is a valid reason for such a termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service’.



- This *grundnorm* now forms the basis of most legislation which seeks to protect workers from the effect of unjust dismissal and arguably provides a rational basis for the exercise of managerial prerogative.

ILO FRAMEWORK

- The instrument also declares that, if employers are contemplating terminating a worker because of his conduct or performance, the affected worker(s) must be afforded an opportunity to defend themselves against the allegations, unless the employer cannot be reasonably expected to do so in the circumstances.
 - Convention 158 indicates that workers who believe they are unjustifiably terminated are entitled to make an appeal to an impartial body such as a court, tribunal or arbitrator.
 - The adjudicatory body should be able to reach their conclusions by reference to the surrounding circumstances of the case put forward by the parties, as well as any nationally established procedures and practices
- 



UK CASE STUDY

“UNFAIR DISMISSAL”

THE DONOVAN COMMISSION



731

ROYAL COMMISSION
ON TRADE UNIONS AND
EMPLOYERS' ASSOCIATIONS

1965-1968

CHAIRMAN: THE RT. HON. LORD DONOVAN

REPORT

*Presented to Parliament by Command of Her Majesty
June 1968*

LONDON

HER MAJESTY'S STATIONERY OFFICE

£1 0s. 0d. net

Cmd. 3623

House of Commons Parliamentary Papers Online.
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- The Report of the Royal Commission on Trade Unions and Employers Association (1968) - More popularly known as the

“Donovan Commission”

represented the UK's first comprehensive attempt to review the need for intervention in this area of the law



DONOVAN COMMISSION

- It recommended:
 - It is desirable that satisfactory voluntary procedures governing dismissals should be developed and extended
 - Early legislation should be enacted to establish statutory machinery to safeguard employees against unfair dismissal. This will encourage employers to improve their arrangements for handling dismissals
 - The legislation should state that dismissal is justified only if there is a valid reason for it connected with the capacity or conduct of the worker and that in the absence of such a valid reason it is unfair.
- 

UK STATUTORY ANTECEDENCE



- 1971 – Industrial Relations Act: 1st legislatively established unfair dismissal
- 1974 – Trade Union and Labour Relations Act
- 1975 – Employee Protection Act
- 1978 – Employee Protection Consolidation Act 1978
- 1996 – Employment Rights Act 1996 (ERA)– (various amendments)



MAJOR PROVISIONS FOR UNFAIR DISMISSAL

- Section 94 ERA – Creates a “right”
 - “An employee has the right not to be unfairly dismissed by his employer”

Unfair Dismissal – The Start Point

The Employment
Rights Act 1996 -
S94

“An employee has the right not to be unfairly
dismissed by his employer”

erollits



DEFINING “UNFAIR DISMISSAL”

- Phillips J in *W. Devis & Sons Ltd v Atkins* [1976] IRLR 16 aptly describes the phenomenon of unfair dismissal from a UK perspective thus:
- *“It is important to note, I think, that the expression 'unfair dismissal' is in no sense a common sense expression capable of being understood by the man in the street, which at first sight one would think that it is. In fact, under the Act, it is narrowly and to some extent arbitrarily defined. And so the concept of unfair dismissal is not really a common sense concept; it is a form of words which could be translated as being equivalent to dismissal 'contrary to the statute' and to which the label 'unfair dismissal' has been given”*



KEY ELEMENTS OF UK UNFAIR DISMISSAL

- Claimant must be an “employee” as defined
- There must have been a “dismissal” as defined
- The claimant must meet the qualifying time being employed
- Determine if the dismissal is “automatically unfair”
- Was the dismissal “potentially fair”?
- If the dismissal was potentially fair was it in accordance with the “range of reasonable responses” test?
- Was the dismissal carried out in accordance with the prescribed procedure (ACAS Code)
- Was the appropriate remedy accorded based on the circumstances



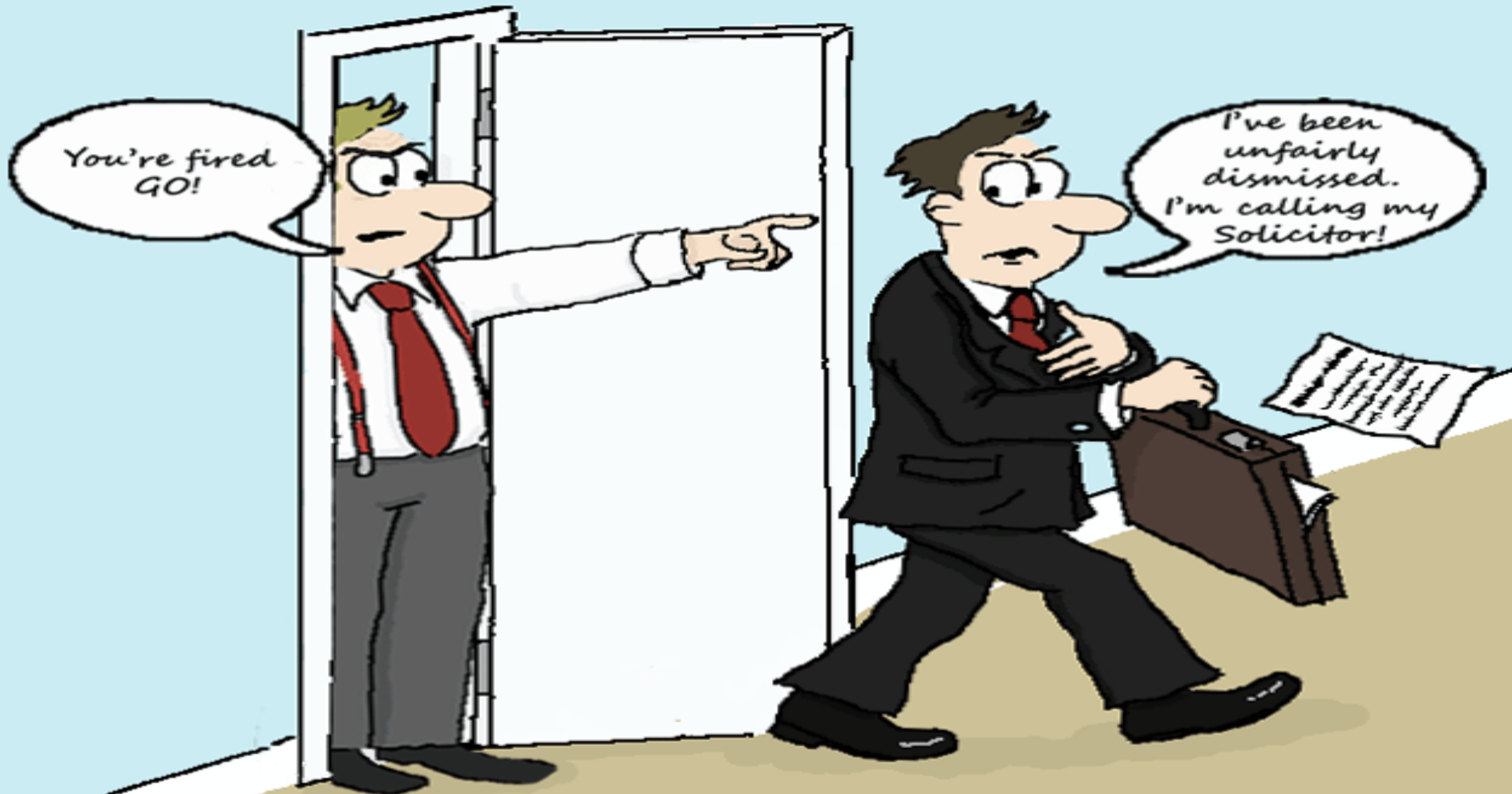
WHO IS EXCLUDED FROM CLAIMING

- Share Fishermen
- Members of the Police Force
- Agreed exemptions by the Secretary of State – by collective agreements
- Where there are alternate arrangements in place for arbitration
- Employees involved in industrial action and all are not reengaged within 3 months
- Employees knowingly working under illegal contracts



WHAT CONSTITUTES DISMISSAL?

- Section 95 ERA



WHAT IS CONTINUITY OF SERVICE & EXEMPTIONS

- Employees must meet the qualification bar of 2 years' continuous service
 - This was last increased from 1 year in 2012
 - The effective date will therefore be important to determine eligibility
- EXCLUSIONS: - cases of “automatically unfair dismissal”
 - Legitimate trade union activities
 - Asserting Health and Safety provisions
 - Pregnancy and childbirth and other family responsibilities
 - Discrimination
 - Protected shop worker/refusing to work on Sunday
 - Performing duties as a trustee of Pension scheme
 - Whistleblowing/protected disclosures
 - Statutory rights (minimum wage, flexible working request, medical grounds)
 -

AUTOMATICALLY UNFAIR DISMISSALS



○ **Examples:**

- Right to written statement of particulars of employment
- Right to itemized pay statement
- Right not to be subject to unauthorized deductions from wages
- Right to minimum notice period (if not prescribed by contract)
- Right to maternity, sick, vacation, adoption leave etc.
- Right not to be discriminated against on grounds of gender, race, disability, religion, sexual orientation or age
- Right to time off for public duties – e.g. jury duty, military reserves
- Whistleblowing
- Right to remuneration while off on medical suspension



MOST ACTIVE AREA OF UNFAIR DISMISSAL

- If the employee does not have the protection of the automatically unfair jurisdiction, they may enter the most active area in the UD jurisdiction – potentially fair dismissals

There are two stages –

- **STAGE 1 -REASONS:**

- must have a valid reason for dismissal

- **STAGE 2 – PROCESS – FAIRNESS**

- must act reasonably in relying on the reason (included here is the use of a fair/required process)



POTENTIALLY FAIR DISMISSALS



○ STAGE 1 – Reasons:

○ Section 98 (1) ERA

- In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or **some other substantial reason** of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(Burden of proof is on the employer)



POTENTIALLY FAIR DISMISSALS

~~UNFAIR~~



- Section 98 (2)
- A reason falls within this subsection if it—
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment



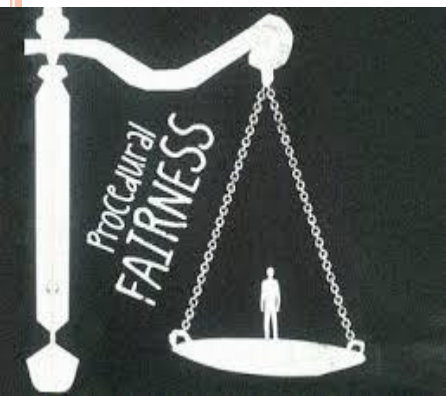
POTENTIALLY FAIR DISMISSAL

- In subsection (2)(a)—
- (a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.



POTENTIALLY FAIR DISMISSAL

- **Stage 2 – Reasonableness/Fairness**
- Section 98 (4) ERA
- Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.



REASONABLENESS AND FAIRNESS

- The two stages must be met before a dismissal will be considered to be fair.
- The facts of each case will become critically important as that will impact whether the employee is thought to have met the tests of reasonability.
- Procedural fairness in the UK is guided by the ACAS Code of Practice; the Code itself is not legally enforceable, however Employment Tribunals (ET) will take its provisions into account when considering if a dismissal is fair.
 - NB. The UK Code does not out rightly cover redundancies but the ET will take it into account when looking at all types of unfair dismissal claims

“RANGE OF REASONABLE RESPONSES” TEST

- Factors examined in the Test:
 - Duty to consult the employees at all stages
 - Existence and effect of any express or implied contractual terms
 - Breach of the implied term of “mutual trust and confidence”
 - Procedural faults
 - Instances of gross misconduct
 - Blanket dismissals
 - Selection criteria in redundancies
 - Breaches of the implied term of fidelity
 - Internal hearings and appeal procedure
 - The nature of illnesses
 - Natural justice requirements
 -



"I HATE TO FIRE YOU, OSGOOD, BUT I DON'T WANT TO GET A REPUTATION FOR FAIRNESS."

POLKEY V AE DAYTON SERVICES LTD[1987] IRLR 503.

- In probably one of the most important cases to the UD jurisdiction Polkey determined that the ET must look to find whether the Employer acted reasonably in reaching their decision of fair or unfairness and not just that they would have gotten to the same decision even they did not follow the procedures not the injustice or lack of it to the employee
- This means that the ET has wide discretion to reach a “just and equitable decision” even as it looks at the requirement to utilize a fair procedure in dismissal



BRITISH HOME STORES V BURCHELL

[1978] IRLR 379.

- This is another important case in dealing with dismissal in respect of the “reasons”
- The principles outlines are that
 - The employer must hold a genuine belief in the ground for dismissal
 - The belief itself must be held on reasonable grounds
 - The employer must have carried out a reasonable investigation
 - The investigation must have resulted in there being found reasonable grounds to dismiss



AVAILABLE REMEDIES:

- Re-engagement
- Re-instatement
- Monetary Compensation
 - Detailed statutory provisions made as to the quantum
 - Basic Award – (formula)
 - Compensatory award – (what is just and equitable now subject to a maximum)
 - Factors examined – immediate loss of earnings
 - Future loss of earnings
 - Loss of statutory rights
 - Loss of pension rights
 - Expenses incurred in seeking new employment



RECENT DEVELOPMENTS : TRIBUNAL APPLICATIONS:

- Radical changes made in 2013: - **Enterprise and Regulatory Reform Act & ET/ EAT Fees Order**
 - Mandatory requirement for ACAS conciliation before case can be brought to the ET
 - More cases can now be heard by single member Panels
 - No evidence relating to offers made during attempts made to settle matters before the case is heard in the ET is allowed
 - Reduced the cap on compensatory awards to 1 years' salary up to a maximum of £ 76,574.00
 - Introduction of fees to make an application to the ET-£ 250.00
 - Introduction of fees to hold an ET hearing £950.00
 - Effectively now costs £1200.00 for a dismissed employee to see “justice”



JAMAICA SCOPE

“UNJUSTIFIABLE DISMISSAL”

JAMAICAN CONTEXT

- Similar to the recommendations made by the Donovan Commission in the UK, Jamaica's Parliament contemplated enacting legislation to redress the issue of the lack of a legislative framework to address issue of unjust treatment of employees at least five times between 1964 and 1975 when the LRIDA was eventually passed
- It is evident from the parliamentary debates surrounding its promulgation that government and opposition legislators in both the House of Representatives and the Senate and were *ad idem* that this perceived injustice should be remedied

JAMAICAN CONTEXT – SENATE DEBATE

- Carlyle Dunkley -Hansard 19/3/75 p.203

- *‘... employers... cannot simply separate a man from his job whimsically or for no reason... there is a necessity to prove the worker’s guilt before you can separate him from the job. The right to one’s job is universal irrespective of what economic framework one is operating under. The arrogance of the employer class should be frontally dealt with by making it clear that if a worker is adjudged to be wrongfully dismissed... if the worker so desires he [should] be able to get his job back.’ (Emphasis mine)*



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.




LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT


- The Jamaican Parliament instituted the term *'unjustifiable'* dismissal into employment and labour law terminology without proffering any definition of the term. Indeed, during the legislative debates, the words **'wrongfully', 'unjustly' and 'unjustifiably'** were used interchangeably to describe an employer's arbitrary manner of dismissal as the mischief being addressed.
- The use of these conflicting terms did not bode well for the proper interpretation and implementation of the provision.



LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT

- The law also does not provide an explicit right against an individual's 'unfair dismissal'.
- Instead, it provided the Industrial Disputes Tribunal (IDT) with the power to award reinstatement to workers that they adjudge to be 'unjustifiably' dismissed.
- Effectively, then what the LRIDA did was to provide a remedy capable of judicial expansion to incorporate the *concept of unfair dismissal* without making it a free-standing right.
- Prior to the amendment of the LRIDA in March 2010, was only accessible through collective mechanisms (union membership) based on the scheme of the Act – to keep industrial peace. 

THE IDT'S ROLE...

- It became 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
- 

THE IDT'S ROLE.....

- What is therefore clear is that the IDT has a very wide discretion in terms of its operations BUT it is bound by the well known concepts of administrative law in that it cannot act outside of the scope of its authority (procedural impropriety) and it cannot act unreasonably, irrationally, or illegally -
- *Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935*
- *Hotel Four Seasons Limited v NWU (1985) 22 JLR 201 at 204 F-H*



JUDICIAL INTERVENTION

- Reliance on judicial pronouncements via Judicial Review of awards emanating from the IDT has also become pivotally important as we seek to fill the lacuna left by Parliament in the expounding the meaning to be ascribed to this legal expression.
- The definition of the ‘unjustifiable dismissal’ concept was first addressed by the courts in the case of *R v Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co Ltd* (1985) 22 JLR 407.



WEST INDIES YEAST CASE


Smith CJ, quoting

- *Harvey on Industrial Relations and Employment Law*, stated that:

“... the provision of unfair dismissal protection was designed to achieve a number of objectives. Together with [UK] Contracts of Employment Act 1963 and Redundancy Payments Act ... it marked a trend towards recognizing that the employee has an interest in the job which is akin to a property right. A person’s job can no longer be treated as a purely contractual right which the employer can terminate by giving an appropriate contractual notice.

... in essence (unfair dismissal differs) from the common law in that it permits tribunals to review the reasons for dismissal. It is not enough that the employer abides by the contract. If he terminates it he is in breach of the Act; even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law will do.”

WEST INDIES YEAST CASE

- The Chief Justice went further to state that:
 - *“In my opinion, in the cases in which they are used in Section 12(5)(c) of the [LRIDA] ... the words ‘unjustifiable’ and ‘unfair’ are synonymous and the use of one rather than the other merely shows a preference of the draftsman. In my judgment ‘unjustifiable’ in the section refers to the reason for the dismissal and not the dismissal itself.”* p. 410
 - It should be noted, that this dictum was considered *obiter dicta*
 - **It is my view that the challenges faced by the Jamaican jurisprudence with respect to these terms begun coming into sharp focus with judgement.**
- 

VILLAGE RESORTS/ GRAND LIDO CASE

- The seminal Court of Appeal decision of *Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green representing the Grand Lido Negril Staff Association (1998) 35 JLR 292 CA.* offers up a comprehensive review of the statutory concept of unjustifiable dismissal.
- At all the levels of the judicial system, the adjudicators came to the conclusion that the mass dismissal of over 220 employees were unjustified in the circumstances despite the strong objection of counsel for the Hotel



VILLAGE RESORTS/GRAND LIDO CASE

- Of note is the Court of Appeal's view of the IDT's powers in hearing disputes referred to it :
- **“Parliament has given the Tribunal a very wide discretion as to the application of ‘unfair’. This discretion appears to be wider in the Jamaica Act where unlike ‘unfair’ in the English Act the word ‘unjustifiable’ is undefined and not subject to the restrictions of descriptive examples”.**
- ***B.W. Bellis Limited (Trading 16 as the Coachman Inn) v. Canterbury Hotel, Hospital, Restaurant, Club and Related Trades Employees Industrial Union of Workers [1983] ACJ 956 at 959:***

“It is quite likely that a dismissal which may be entirely lawful yet deserve at the same time the label ‘unjustifiable’ will seem to be an elastic and novel concept for the lawyer. However, we do not think it can sensibly be defined in any precise way as a straight-out matter of law. Instead the conduct under examination in any particular case will have to be assessed in its own context and whether it does or does not involve elements of a sufficiently unsatisfactory nature as to attract the criticism that the dismissal was affected by features or was handled in such a way as to be unjustifiable, will then be decided virtually as an issue of fact.”

UNJUSTIFIABLE IN THE JAMAICA SENSE

- We can see that the LRIDA does not specify or designate what the “reasons” for dismissal should be – there is no designation of substantive reason such as Capability, Conduct, Redundancy, SOSR
- These are broad parameters and open to various interpretations that the IDT makes in “the round”
- **The Question is therefore is this wide jurisdiction good for the Employment/Labour law in the Jamaican context?**



ROLE OF THE LABOUR RELATIONS CODE & “FAIRNESS”

- In determining what actions would constitute an ‘unjustifiable dismissal’, the IDT therefore uses its own judgement, guided by industrial relations practice and natural justice considerations, in considering the facts in any case. **See especially Paragraph 22, 19, 11**
- In this regard the various provisions of the Labour Relations Code LRC (which is akin to the UK ACAS Code of Practice on Disciplinary and Grievance Procedures) are extremely relevant in arriving at a conclusion in relation to procedural fairness.
- LRC Code like the UK ACAS 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 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 Code) when redundancies were being contemplated was underscored.
- The company's contention was that the decision 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 3 workers who cumulatively possessed over 50 years of service. By simply providing them with pay in lieu of notice and 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 Code not followed, but there was also a clear breach of Natural Justice

UTECH CASE

- In the case of *IDT v The University of Technology of Jamaica (UTECH) and University and Allied Workers Union (UAWU)* , IDT 6 of 2008 (unreported) delivered December 9, 2008; Claim No. 2009 HCV 1173 (unreported) delivered 23 April 2010 (SC); [2012] JMCA Civ 46 (unreported) delivered October 12, 2012 (CA);
- the approach of the IDT in misconduct matters was reviewed by both the Judicial Review Court and the Court of Appeal, with both coming to differing conclusions. The employee was dismissed by the university on the basis that she proceeded on unauthorised leave and failed to return to duties on the date specified on the leave application form. The employer held a disciplinary hearing, which the employee did not attend, where the decision to dismiss was made. The matter was referred to the IDT as a dispute of alleged unjustifiable dismissal of the employee. The IDT ruled that the worker was in fact unjustifiably dismissed, since the employer did not show that the leave had not been authorised and that the fact that the employee did not attend a disciplinary hearing could not form a valid ground to dismiss her, especially when the conciliatory jurisdiction of the Ministry had been invoked by the union on her behalf before the scheduled hearing

UTECH CASE

- At the judicial review hearing, the decision of the IDT, was quashed on the basis that the Tribunal acted *ultra vires* in embarking on a ‘new hearing’ of the issue and allowing the worker to give evidence when she did not avail herself of the opportunity at the disciplinary hearing.
- Further, the learned judge herself embarked on a version of ‘rehearing’, allowing the request of the university to have the employee’s passport admitted into evidence to show that she was not in the country when she purportedly produced a medical certificate to cover an extended leave period. In so doing, the court despite recognising the fact that the wording of the ‘relevant statutes of England are different from the Jamaican legislation’, in effect imported the UK statutory standards and precepts regarding the role and function of the Employment Tribunal into how the IDT approached its work.
- This all falls under the umbrella of “unfairness”. Therefore, she further ruled that the IDT should have confined itself to a review of the behaviour of the employer in making a decision to dismiss based on the *British Home Stores Ltd v Burchell* principle that the honest belief of the employer, reasonably held, was enough to ground the decision.

UTECH CASE

- The Court of Appeal however stated categorically that the IDT's enquiry is not to be limited in the manner decided in the **Burchell** case,

Per the Honourable Mr Justice Brooks, JA.

- “On my reading of the statute, the Labour Relations and the Industrial Disputes Act does not place on the IDT, the strictures imposed by the English statutes. The IDT is not like a court of review.... In my view, the IDT is entitled to take a fully objective view of the entire circumstances of the cases before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of the dismissal even if those matters were not considered by, or even known to the employer at that time.”



UTECH CASE

- His Lordship also recognised that the English cases upon which the judicial review court relied in making its decisions were ‘based on a statutory regime that is different from that established by the LRIDA. The English legislation gives a more structured approach to their tribunal’s assessment of unfair dismissal’.
- The case is now being considered by the Privy Council...we await its guidance in this important area of the law....



(RELATIVELY) RECENT DEVELOPMENTS – LRIDA AMENDED TO ADDRESS – INDIVIDUAL DISPUTES

- **The West Indies Yeast Judgement** brought to the fore that fact that the Scheme of the LRIDA when it was enacted did not envision non-unionized employees having access to the IDT as an individual dismissal without the backing of a union/collective body was highly unlikely to threaten industrial peace
- This disenfranchised a large swath of employees from seeking relief from unjustifiable dismissal, with the demise of aspect of the union movement and the increase in differing types of employment contractual arrangements
- The Act was amended in 2010 to allow these workers access to this IDT through the MLSS for disputes of rights only

(RELATIVELY) RECENT DEVELOPMENTS – LRIDA AMENDED TO ADDRESS – INDIVIDUAL DISPUTES

- Since then, the number of cases heading to the IDT under this head has steadily increased with now close to 70 % of the IDT cases being individual disputes
- This has now created strain on the IDT and the MLSS Conciliation systems and has also brought the LRC's role in the unjustifiable dismissal up for more usage and scrutiny with the multiplicity of cases now being adjudicated

You're
Fired!





- While this development has given these workers some more redress with the greater compensation available, it has caused consternation in some quarters
- The IDT's remit with its wide discretion and seemingly boundless discretion as to facts makes some of their decisions almost appear "Bipolar"

RECENT DEVELOPMENTS LABOUR RELATIONS CODE

- The IDT's apparent almost slavish reliance on the LRC's provisions in determining procedural fairness tends to suggest that the employer has little protection even in what appear to be clear cut cases..... and no guidance as to possible quantum of awards
- **Cost Club Limited (t/a MegaMart Wholesale Club and Lloyd Bryan (March 2017)**
- **Mint Management and Nicholas Elliott May 2016**

BUT CONTRAST

- **Fleetwood Jamaica Limited and Frederick Hanson Sept 2014**
 - **Cemex Jamaica Limited and Lorel Sappleton Jan. 2015**
- 

RECENT DEVELOPMENTS LABOUR RELATIONS CODE

- Matters relating to the LRC's have also now come up for scrutiny as it relates to practical application:
 - What really constitutes an “opportunity to be heard?”
 - Who can be the representative to accompany the aggrieved employee and what stage of the proceedings can they be involved?

See case of **Peter Jennings v National Commercial Bank**



ADVICE TO EMPLOYER AND COUNSEL....


- When advising employers tell them to

Begin with the
End in Mind.

- Consider the fact that they want to dismiss and then work the LRC process as best as possible



RECENT DEVELOPMENTS - LRIDA

- We have started to see the Legislature intervening in the workings of the ‘unjustifiable dismissal space, by in effect inserting “de facto” automatically unfair dismissal concepts through an arguably awkward modality by amending the LRIDA to create new categories of “industrial disputes” and “complaints” requiring employee protection
 - *Jury Act Amendment 2015 – (Public duty/jury service)*
 - *Protected Disclosure Act 2014 – (Whistleblowing)*
 - *Employment (Flexible Work Arrangements) Misc. Provisions Act 2014 – (religious discrimination)*
 - *Disabilities Act 2014 – possible disability discrimination implications*
 - *Sexual Harassment Bill – Tabled Dec. 2015*
 - *Occupational Safety and Health Bill – tabled in March 2017 (discrimination)*
- 

LEGAL POUPOURI!!!!

COMPENSATION
BREACH
CONTRACTUAL
PERVERSELY
COVENANTS
RETTALIATION
TRUST
EMPLOYMENT
DUE WAGE
WRONGFUL
STATUTORY
PERIOD
ENTITLING
BOUND
SERVANT

UNJUSTIFIABLE....UNFAIR

MISCONDUCT
UNJUSTIFIABLY
WRONGFULNESS
DISMISSAL
ACT
UNJUSTIFIABLY
WRONGFULNESS

MINIMA
SUMMARILY
INJUNCTION
UNFAIR
CAUSED

DISMISSAL DUTY

SPITEFULLY
MITIGATE
ENTITLED
WRONGFULLY
UNLAWFUL
MISCALCULATE


REINSTATEMENT
LIEU
LAW
DISMISS
FICTIONS
FAITH
JURISDICTION

LAWFUL
TRIBUNAL
TERMINATION
NOTICE
DISCIPLINARY
RESTRICTIVE
UNILATERALLY
SERVICE

CONSTRUCTIVE



CONCLUDING THOUGHTS/RECOMMENDATIONS

- Jamaica has in various forms appears now to be trying to operate an “unfair dismissal system” in the “unjustifiable dismissal” space without the commensurate structured legislative framework.
 - Unfortunately the “unfair dismissal rose” is really not one and the same as the “unjustifiable dismissal rose” in this case although they have many similar characteristics.
 - Time to make the transformation in form and substance.
 - The Executive arm of Government should take a comprehensive look at the existing policy and statutory framework with a view of revamping the position in line with current realities.
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ANY
QUESTIONS
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