Industrial Relations in Trinidad and Tobago
The Known and the Unknown

Date: Thursday 23rd November 2006

Controversial Decisions made by The Industrial Court of Trinidad and Tobago" PRESENTED BY FREDERICK GILKES [1]

INTRODUCTION

There is no guarantee that everyone will agree that the Industrial Court decisions considered in this presentation are "controversial". After all, one party's controversial decision is another's welcome breath of fresh air. There is little doubt however that the principles coming out of those decisions should be firmly within the contemplation of anyone employing a workforce in Trinidad and Tobago. To that extent therefore, this presentation is faithful to the overriding objective of today's panel discussion, namely, touching on salient principles that are familiar and well known to those present and perhaps, on a few that are as yet unknown.

Some licence is claimed though in terms of the source of the decisions reviewed. This presentation therefore is not restricted to decisions of the Industrial Court but contains references to decisions given in the Court of Appeal and in the Judicial Committee on appeals from decisions of the Industrial Court.

1. WRONGFUL DISMISSAL/HARSH AND OPPRESSIVE CONDUCT

At common law an employee's dismissal is justified even if the grounds for the dismissal are not known to the employer at the time of the dismissal. A dismissal is lawful at common law so long as it can be justified when challenged. The Industrial Court may grant redress to a worker who is dismissed or otherwise disciplined if the action taken by the employer is, in the opinion of the Court, "harsh and oppressive or not in accordance with good industrial relations practice"[2] .

In exercising this jurisdiction, the Industrial Court considers not only the cause for the dismissal but the manner in which the matter of the dismissal was handled. A number of salient principles may be extracted from the body of case law that the court has developed.

A. A DISMISSAL MUST BE PROCEDURALLY CORRECT/ CAUSE ALONE WILL NOT SUFFICE

Even if an employer has cause for dismissal, he may still be ordered to pay compensation to the dismissed worker if he fails to give the worker an opportunity to be heard in relation to the charge that constitutes the ground for his dismissal.

In Fernandes (Distillers) Ltd. v. Transport and Industrial Worker's Union[3] the Industrial Court awarded compensation to a worker who had allegedly stolen a quantity of overproof alcohol. The employer appealed the award and the Court of Appeal confirmed that the Industrial Court had power to make the award even if the dismissal was lawful, that is, that it was made for cause. The court's duty was to ensure that workers were fairly dealt with. The discharge of that duty made it necessary for the court to consider not simply whether an employer had cause to dismiss, but also, the procedure that he employed in making the decision to dismiss.

The Industrial Court is concerned with process as well as result and accordingly an employer may be made to pay compensation notwithstanding that, as it happens, he managed to get the result right. The employer is making a decision that impacts on the livelihood of the worker and good industrial relations practice requires that he observe basic rules of natural justice[4].

B. THE TERMS OF THE CONTRACT DO NOT ALWAYS PREVAIL

The Industrial Court may treat as "harsh and oppressive" action that is well within the scope of the contractual terms agreed between an employer and a worker. Thus a contract of employment may provide for dismissal upon 1 month's notice but rare is the occasion that an employer is allowed to rely solely on that provision, if ever, in effecting a dismissal.

In the Fernandes (Distillers) case, the Wooding CJ made the following observation:

"Take the case of a worker who finds himself thrown out of his employment for a mere whim after very many years of dedicated service but who was given the appropriate notice or payment in lieu of notice. That would not be a wrongful dismissal at law. But who can doubt that it would be harsh or oppressive and unreasonable and unjust?" (Emphasis added)

C. PROCEDURAL CORRECTNESS IS REQUIRED EVEN DURING PROBATION

Even where a worker is on probation, an employer may not dismiss without cause or without giving the worker an opportunity to be heard. The Industrial Court once took the position that "probation is a period of testing both for the employer and the worker during which both parties are free to decide whether they wish the relationship to

continue on a permanent basis"[5]. In one case, the Court took the position that it was not necessary to consider whether a dismissal of a worker who was on probation was harsh or oppressive [6].
The current of the court's decisions has, since then, taken us in a rather different direction. In Bank and General Workers' Union v. Colonial Life Insurance (Company) Limited[7] the Court made the following pronouncement:
"It is a well established principle of industrial relations that the services of a worker on probation cannot be dispensed with for tenuous or improper reasons. An employer is not entitled at his will to terminate the appointment of a worker merely because he is on probation. As the Court of Appeal stated in Civil Appeal No. 31/75 between Oilfields Workers' Trade Union v. National Insurance Board (unreported) "In our view, if a person is on probation, he is on probation for a purpose: to ascertain his suitability for the office in which he is employed."[8]
It is apparent therefore from the majority of decisions on this point that an employer must treat with an employee who is on probation in much the same way as he would a permanent employee. The Court maintains that the position of a worker on probation "is not as secure as that of a permanent worker" [9]. It is not however always apparent what the difference is between the two positions.

2. SUCCESSORSHIP

AN EMPLOYER WHO ACQUIRES A GOING CONCERN INHERITS HIS PREDECESSOR'S LIABILITY FOR THE WORKERS' YEARS OF SERVICE

When a person acquires a business as a going concern, he may find that if he decides to retrench a worker who is surplus to his needs, he is liable to compensate that worker for the years of service that he gave to his previous employer. In law, the new employer is deemed to be a "successor" of the previous employer and since he enjoys the benefit of the worker's experience, garnered while in the employ of his predecessor, he must compensate that worker accordingly if he finds it necessary to terminate the worker's services on the ground of redundancy. This is the implication of the Court's interpretation of the "successorship" provisions of the Industrial Relations Act[10].

The Act provides for the enforcement of collective agreements made between employers and unions and stipulates who are deemed to be parties to such collective agreements. These include the "successors"[11] of the employers and the

unions[12]. An employer who purchases a going concern would therefore, as a successor to the previous employer, be a party to any collective agreement made between his predecessor and the recognised majority union. He would therefore be obliged to recognise and be bound by the terms and conditions of the workers' employment that are set out in the said collective agreement.

These principles of successorship have been extended beyond the question of who is a party to the collective agreement. The Industrial Court has extrapolated that if a successor is bound by the terms and conditions of employment set out in a collective agreement, he must therefore be liable for the service of the workers in the same way that his predecessor would be.

Accordingly, when one acquires a business as a going concern, one must consider the potential liability to compensate a worker for his past services to the former owner of the business, in the event that one decides to sever that worker on the ground of redundancy. This liability could be a substantial one that could have a significant bearing on the price that a purchaser is prepared to pay to acquire a business.

3. SEVERANCE OF WORKERS UPON CLOSURE OF A BUSINESS

IF AN EMPLOYER SEVERS A PORTION OF HIS WORKFORCE HE IS REQUIRED TO PAY SEVERANCE BUT IF HE SEVERS HIS ENTIRE WORKFORCE HE IS NOT

Ironically, an employer is not required to pay severance to his workers if he is severing all of them owing to the fact that his business is being closed down or wound up, but he is required to pay severance if he is severing only a portion of his workforce.

In Commercial Finance Co. Ltd. (In Liquidation) v. Indira Ramsingh-Mahabir[13] an order had been made for the compulsory winding up of the company and the worker sought severance benefits under the Act. The liquidator rejected the claim. The Industrial Court ordered the liquidator to make the payment; an order with which the Court of Appeal agreed.

On appeal to the Judicial Committee of the Privy Council, their lordships were of the opinion that under the Retrenchment and Severance Benefits Act[14] , an employer'

obligation to pay severance exists when a worker's employment is terminated on the ground of redundancy. The premise is that the undertaking that is severing the worker is continuing as a going concern.

Redundancy is defined in the Retrenchment and Severance Benefits Act as "the existence of a surplus of labour in an undertaking for whatever cause" and therefore by definition, "redundancy" cannot apply to situations where the undertaking is going out of business or has gone out of business.

4. THE UNION'S LIABILITY FOR THE ACTIONS OF ITS AGENTS

THE UNION CAN ONLY BE HELD ACCOUNTABLE FOR THE ACTS OF ITS DECISION MAKERS AND NOT THE ACTS OF ITS LESSER MEMBERS

A union may engage in strike action as a means of bringing resolution to a dispute with an employer. Strike action is only legal however if certain conditions stipulated in the Industrial Relations Act are met. If those conditions are not met the union would have committed an industrial relations offence (IRO) and may be prosecuted accordingly[15] .

In order to secure a conviction for the IRO one must establish the union's responsibility for the strike action. This burden is not discharged by merely establishing that a member of the union orchestrated the strike. The employer must connect the strike action to the union's decision makers. Evidence, for example, that a shop steward of the union was heard calling upon workers to withdraw their services will not suffice [16].

IN PARTING

The cases referred to above set out principles of good industrial relations practice developed in the 40 odd years that have elapsed since the introduction of the Industrial Stabilisation Act 1965. The objective then was to introduce a standard of fairness to the treatment of workers in the work place at a time when industrial unrest was a matter of growing concern. These principles are now of some vintage and may not seem to be terribly controversial or hold many terrors for those born and bred in the new culture. To the uninitiated however, or to those mostly familiar

with standard principles of contract law, these principles may take some getting used to.

---

1. Frederick Gilkes is a partner of the firm J. D. Sellier & Co. and has practised in the Industrial Court of Trinidad and Tobago since 1989.
2. See in that regard section 10 (5) of the Industrial Relations Act Chap. 88:01.
3. (1968) 13 WIR 336
4. This concept is far from novel. In American courts, evidence gathered after the arrest of an accused is often inadmissible in a criminal trial if the arresting officer failed to read the accused his Miranda rights at the time of his arrest. The Court's concern for the process by which evidence is gathered is the overriding concern and thus a murder weapon discovered as a result of a confession improperly obtained is excluded on the so-called "fruit of the poisoned tree" principle. The conceptual basis of this stance is that the State must at all costs be made to employ fair and just practices in the gathering of evidence.
5. Caribbean Industrial Research Institute v. Caribbean Industrial Research Institute Staff Association TD 156 of 1976.
6. Tru Fit Garment Factory Limited v. All Trinidad Sugar Estates and Factory Workers' Trade Union TD 313 of 1978.
7. TD 265 of 1986.
8. In National Union of Government and Federated Workers v. Caribbean Bottlers (Trinidad and Tobago) Limited TD 386 of 1997, the Court observed that the position taken in the Tru Fit case never represented the law in this country.
9. See Caribbean Bottlers case (supra) at page 4.
10. Chap. 88:01 of the Laws of Trinidad and Tobago 1980 Revision.
11. See section 48 of the Act.
12. In Shipping Association of Trinidad v. Seamen and Waterfront Workers' Trade Union TD No. 20 of 1969 the Industrial Court listed 3 criteria for identifying the "successor" of an employer. A new employer is a "successor" if he "carries on substantially the same operation as the previous employer, in substantially the same way, with substantially the same employees".
13. [1994] 1WLR 1297.
14. Act No. 32 of 1985.
15. See section 63 of the Industrial Relations Act.
16. See in that regard Transport and Industrial Workers' Union v. Fernandes (1968) 13 WIR 310.