Volume 1 / Issue 2

THE J.D.

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Editor: Barrie R. N. Attzs

J.D. NEWS

NEW PROFESSIONALS

J.D. is pleased to announce the following additions to the Litigation + Dispute Resolution practice group:

- Kimberleigh Peterson (Associate)
- Nicardo Lawson (Associate)

EVENTS

J.D.'s OSH Committee, as part of its efforts to encourage and foster a safe and healthy work life is hosting a walk/jog/run around the QPS every Wednesday.

Clients Welcome!!!!

WHEN CAN I TERMINATE THIS EMPLOYEE??

Imagine you are an employer and you have an employee who by all accounts has abandoned the job. The employee in question has not turned out to work for several days. He has not communicated any reason to you or his supervisor or the Human Resource Manager for his absence. Rumours suggest that the employee has taken up an offer of employment at one of your competitors. Are you allowed to treat this employee's employment with you as at an end?

The answer to the above question may surprise you. The answer is (as lawyers are prone to say): "It depends…" It depends on whether you as an employer have observed "*good industrial relations practice*". This is a broad, sometimes troubling phrase found in the Industrial Relations Act, Chapter 88:01 ("the Act") and given teeth by the Industrial Court of Trinidad and Tobago.

The Industrial Court is invested with the jurisdiction to consider whether an employer has observed *"good industrial relations practice"* in treating with the employee. As a consequence an employer may be ordered to pay damages for failing to observe *"good industrial relations practice"* even if he is justified in terms of the cause for terminating the employment. In other words, the Industrial Court is concerned not only with the question whether an employer had good cause to terminate, but also with the procedure employed in effecting termination.

As a matter of procedure, the Industrial Court will broadly consider:-

a. whether the employee was given notice of the complaints relied upon by way of justification of the termination;
b. whether the employee was apprised of the gravity of the complaints and the possible implications;
c. whether the employee was afforded the opportunity to be heard in relation to the complaints; and

d. whether the employee has been given a reasonable opportunity to address the complaints.

If these principles of *"natural justice"* are not observed, an employer may well find himself paying a heavy price even if he had good cause to terminate employment.

As regards the question of "cause", the matter(s) relied upon by way of justification of the termination must strike at the root of the contract of employment. The gravity of such matter(s) must not be such as to render it more appropriate, for example, to suspend the employee rather than to terminate the employment.

Generally an employee can take two days sick leave without having to provide a medical certificate, as well as he can have planned/approved leave. However, if an employee overstays an approved leave of absence, or when he absents himself from work without proper justification, he can be deemed to have abandoned the job. Abandonment is a matter of intention and this can only be inferred from the conduct of the person intending to abandon the job - ***IRO No. 16, 17 and 18 of (1991) Steel workers Union of Trinidad and Tobago v. Central Steel Limited.***

If the employee fails to turn up to work after three days and there is no communication or reason for his absence, it is within the right of the employer to cross the name of the employee off his payroll, as the employee by his actions has repudiated the contract of employment. However, this can only be done if the rules of natural justice are first complied with by the employer.

In ***Trade Dispute 225 of 2003*** between the ***All Trinidad Sugar and General Trade Union v. Sandra Chung*** it was held that mere absence of the employee from the workplace does not *ipso facto* prove abandonment of the job by that employee. There are other factors that the employer should bear in mind before arriving at a hasty and potentially harsh decision. These include: the length of the absence; whether or not the worker/employee remained in contact with the employer during the absence; whether or not the employee failed or refused to return to work on being directed by the employer to do so; and whether or not the employer warned the employee that failure to return by a fixed date would result in dismissal.

As a result of the position enunciated in ***Trade Dispute 225 of 2003;*** it is imperative that when an employer seeks to terminate employment of a

LITIGATION AND DISPUTE RESOLUTION

The firm's litigation and dispute resolution practice group manages a substantial civil litigation portfolio which includes public law, admiralty, banking, mortgagee and foreclosure actions, wrongful dismissal, workmen's compensation and medical negligence. Its non-commercial litigation portfolio comprises contentious probate matters, personal injuries claims, defamation and a family practice that includes divorce and custody proceedings, property settlement and maintenance applications.

The firm's litigation attorneys-at-law have also undergone extensive training in arbitration and mediation to further develop their skills to enable them to resolve their clients' differences and disputes without recourse to the Court.

The practice group is headed by Marcelle Ferdinand, an attorney-at-law with more than 30 years experience in litigation. She is ably supported by a team of highly qualified and dedicated associates and a complement of well-trained, committed support staff who work assiduously to ensure the efficient delivery of services to the firm's clients in a timely manner.

worker/employee on the grounds of job abandonment that the following guidelines are adhered to:

1. The employer should make reasonable attempts to contact the employee to ascertain the reason(s) for his/her absence, if such absence is not planned or goes beyond the two sick days allowed.

2. If the employer is unable to contact the employee after reasonable attempts, a letter (via registered mail) should be sent to the last known address of the worker/employee, directing him/her to return to work at a fixed/specified date.

3. The employee should be warned that failure to return by the fixed/specified date will be deemed to be job abandonment on the part of the employee.

Applying the above guidelines to the hypothetical scenario we framed in our introduction, it is clear that deciding whether to terminate an employee is not a simple "black and white" or "right and wrong" scenario. In exercising its discretion, an employer must be reasonable and anticipate that the employee *may* have a good reason which explains his absence. The employee in our factual matrix should be contacted by the employer (as far as reasonably practicable), given an opportunity to explain his absence and if it is found that an infraction has been committed, the severity of that infraction should be weighed and depending on its severity, the appropriate disciplinary action taken.

In Trinidad and Tobago there are two distinct approaches relating to the dismissal of an employee. The approach that will be applicable in any given situation will depend on whether or not, the employee in question, is or is not a "worker" as defined in the Act.

In relation to an employee who is not a "worker" as defined in the Act, notice of dismissal must be given in accordance with the employment contract (which does not have to be in writing), as these categories of employees will usually have their rights specified in their contracts. If there is no express term as to the length of notice required in the contract, then such notice given must be reasonable for the dismissal to have effect. All employees that fall into this category have the option of seeking redress at the High Court, if the period of notice is in dispute or if there are other issues that exist that are contentious.

The Industrial Court handles all matters related to "workers" as defined in the Act and it has been reiterated by the Industrial Court on numerous occasions that in relation to "workers" as defined in the Act, the only acceptable reason(s) for termination of the employment relationship are those relating to misconduct, incapacity or operational requirements (e.g. retrenchment).

The main issue before the Industrial Court in most trade disputes is whether the company/employer dismissed the worker/employee in circumstances which were harsh and oppressive and not in accordance with the principles of good industrial relations practice. If the Industrial Court finds that this is the case, the Industrial Court can exercise its power under Section 10(3) of the Act. It is therefore imperative that employers practice good industrial relations when dealing with employees in general, and it becomes even more relevant if disciplinary/dismissal proceedings are envisaged.

Some of the key practices that should be adhered to as an employer, when dealing with disciplinary/dismissal proceedings are as follows:

1. You must have grounds for dismissal, for example a fundamental breach of the terms governing the employee's contract.

2. If it is a first offence, it usually has to be a very serious breach to warrant dismissal of an employee. Dismissing an employee for a first time offence (the gravity of which is not morally repugnant could be viewed as harsh and oppressive by the Industrial Court.

3. When alleging decline in employee's performance/incompetence, these must be clearly explained to the employee in sufficient detail so that he understand the shortcomings. Further, adequate opportunity for improvements must be provided, as well as any (reasonable) required assistance from the employer to enable the employee to improve his/her performance must be forthcoming – ***TRADE DISPUTE No. 198 of 2007 BETWEEN COMMUNICATION WORKERS' UNION v. TOTAL IMAGE LIMITED.***

4. If the behavior complained of by the employer is a repetitive/continued/on-going issue(s) with the particular employee, this should be well documented so that the court can see that dismissal was not a hasty decision by the employer. Such documentation would include performance appraisals and letter(s) sent to the employee indicating the performance and/or behavior complained of and suggested solution(s) to correct the same.

5. The employee must be given an opportunity by the employer to be heard (*audi alterem partem*) if dismissal is involved - ***TRADE DISPUTE No. 130 of 1994 BETWEEN ASSOCIATION OF TECHNICAL, ADMINISTRATIVE AND SUPERVISORY STAFF AND CARONI (1975) LIMITED; JOHN -V- REES (1969) 2, ALLER 274.***

ABOUT J.D. Sellier + Co.

J.D.Sellier+Co. was founded by Jean-Baptiste Denis Sellier who was admitted to practice as a Solicitor and Conveyancer in Trinidad and Tobago in 1882. He practiced on his own until 1916 when he invited his colleague and friend George Cecil Pantin to join him in a partnership.

Today, J.D.Sellier+Co. has expanded to approximately 20 attorneys-at-law and 77 employees and offers its clients quality legal services. Our clients include industrial, commercial and financial enterprises, domestic and foreign, public and private, ranging in size and complexity from small single location business enterprises to large diverse, multinational corporations.

Our firm is a general practice law firm divided into four areas of civil practice, namely: Corporate + Commercial (including banking + finance; energy + regulated industries; probate; estate planning + administration; mergers + acquisitions; tax), Real Estate, Intellectual Property, and Litigation + Dispute Resolution (including admiralty + shipping).

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ABOUT THE AUTHOR

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André, a past National Scholar of Trinidad & Tobago, joined the firm's Litigation and Dispute Resolution practice group in February 2008.

André has appeared in and instructed Counsel in the High Court, the Court of Appeal, the Tax Appeal Board and in the Industrial Court. André focuses on all areas of dispute resolution and he advises the firm's clients on, among other areas, Employment, Insurance, Admiralty, Medical Negligence, and Personal Injury matters.

In particular, André has acquired a wealth of experience in the law of defamation and has primary responsibility for advising a leading media group in Trinidad and Tobago on all aspects relating to its publishing and broadcasting business.

In addition to the above considerations, it is to be noted that there is a statutory procedure to be followed where an employer proposes to terminate the services of workers for the reason of redundancy (i.e. the existence of surplus labour), what is usually referred to as a retrenchment. The employer must give a formal notice of termination to the worker/employee (at least 45 days) and to any recognised trade union that represents these workers/employees. There is a formula for minimum severance payments that is applicable on retrenchment (based on earnings and years of service).

Employees who are not workers for the purposes of industrial relations and retrenchment are not protected by this statutory provision, but must be given reasonable notice of termination depending on a number of variables, these include (inter alia); the responsibilities and duties of the employee, re-employment prospects, the age of the employee and the length of the employee's service.

In the event that the Court finds that an employee has been unfairly dismissed, it can order that the employee is to be reinstated and award damages, award damages alone, including exemplary damages in lieu of reinstatement. Moreover, it must also be borne in mind, that there is no right of appeal from a decision of the Industrial Court except on a point of law in which case an appeal lies to the Court of Appeal.

What can be derived from all of the above information is that dismissal of a worker/employee is a process, and this process must be done in keeping with good industrial relations practice if it is to have effect. Without a doubt, the phrase cross all your **T's** and dot your **I's** is extremely applicable when an employer is contemplating the dismissal of an employee.

[*N.B. This is not intended to be legal advice. You should contact your legal adviser if advice is required.*]

The author gratefully acknowledges the invaluable assistance of Jason Charles, In-Service Student.