

# Let the Employers Beware... *of claims for Wrongful & Unjustifiable (Unfair) Dismissals*

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1. In Jamaica employment relationships are governed by the contracts of employment, statutes and the common law. Employers terminating contracts of employment may be faced with claims for wrongful or unjustifiable (unfair) dismissal. By the same token, employers may be required to make redundancy payments to persons qualified if the termination is by reason of redundancy and that a redundancy situation in fact exists. This paper is however concerned with wrongful and unfair dismissal.
2. This paper aims to discuss both forms of dismissal and the possible remedies a successful employee may be granted on a claim.

## **Wrongful Dismissal**

3. Wrongful dismissal is a cause of action at common law with the entitlement to the common law remedy of damages (monetary relief). This is usually the case where the dismissal is in breach of the relevant provision in the contract of employment relating to the expiration of the terms for which the employee is engaged.<sup>1</sup> An employee's entitlement to sue for wrongful dismissal is premised on the fulfillment of two conditions:

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<sup>1</sup> Halsbury's Laws of England, Volume 16, 4<sup>th</sup> ed. at 451

- i. The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and
  - ii. His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily.<sup>2</sup>
4. Additionally, there may very well be cases where the contract of employment limits the grounds on which the employee may be dismissed or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, the dismissal for any extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.<sup>3</sup>
5. Upon a claim being well-founded in wrongful dismissal, the consideration will then be the measure of damages that the employee would be entitled to which the employer would have to pay.
6. The normal measure of damages for wrongful dismissal is prima facie the amount that the employee would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment

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<sup>2</sup> Ibid at para 451

<sup>3</sup> Ibid at para 451

which the employee, in minimizing damages, either had obtained or should reasonably have obtained.<sup>4</sup>

7. On the other hand, where the employee is not engaged under a fixed term contract, and is dismissed in breach of the required notice period, whether by contract or statute, the measure of damages would be for the notice period. This however, does not prevent the parties from contracting to make payment in lieu of notice.
8. A discussion on wrongful dismissal would be incomplete without a brief mention of summary dismissal, which may be met with a claim wrongful dismissal if it turns out that there was no basis for summary dismissal.
9. Summary dismissal is a right given to employers at common law to dismiss an employee without notice on the grounds of the employee's gross misconduct and such a dismissal is not wrongful.<sup>5</sup>
10. This is so because gross misconduct justifying summary dismissal is seen as a conduct so undermining the trust and confidence which is inherent, though implied, in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.<sup>6</sup>
11. If, however, the decision to dismiss is unreasonable, the dismissal may be wrongful if the conduct was not actually gross and no notice

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<sup>4</sup> Mayne and McGregor on Damages, 12<sup>th</sup> ed. at p. 522; also cited with approval in *Lindon Brown v Jamaica Flour Mills Ltd*, Claim No. CL 2000/B199, delivered on December 15, 2006 at p. 8 per Sinclair-Haynes, J

<sup>5</sup> *Callo v Brouncker* (1831) 4 C & P 518

<sup>6</sup> *Neary v Dean of Westminster* [1999] IRLR 288 at 291 per Lord Jauncey of Tullichettle

was given.<sup>7</sup> The question of whether a conduct was gross to warrant summary dismissal is one of degree.

12. Even though the grossness of the conduct is a question of the degree of the conduct, it is to be noted that a single act of the gross conduct, for example, disobedience, could justify summary dismissal if it was such as to show that the employee was repudiating the contract of service or one of its essential conditions.<sup>8</sup>
13. With respect to a right to a fair hearing prior to dismissal, it is to be pointed out that at common law, such right is of no moment. This is because the parties must be free to contract with one another as also, subject to any contractually obligated compensation and/or penalty which may arise, to terminate their contractual obligations with anyone. The law will never force parties to remain in contractual obligations to one another, if the parties do not freely choose to do so.<sup>9</sup>
14. From the foregoing, it can be concluded that employers can be subject to wrongful dismissal claims if they breach a provision of the contract regarding notice period or where the contract, if for a fixed period, is terminated without cause before the expiration of the contract. Also, where employers terminate contracts by reason of gross misconduct, they would, if it is later shown that the degree of

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<sup>7</sup> Treganowen v Robert Knee & Co. Ltd [1975] ICR 405, [1975] IRLR 247

<sup>8</sup> Laws v London Chronicle (Indicator Newspaper) Ltd [1959] 2 All ER 285

<sup>9</sup> Calvin Cameron v Security Administrators Ltd [2013] JMSC Civ 95, delivered on June 26, 2013 at para 7, per Anderson, J.

the conduct was not sufficient to warrant dismissal, be held liable for wrongful dismissal.

15. It is also the case that because the law will not force parties to be in contractual relations, employers may use this to their advantage and dismiss employees at their pleasure in breach of contractual provisions aforesaid and pay damages for wrongful dismissal which measure would not ordinarily prejudice the employer's financial position.

### **Unjustifiable Dismissal**

16. Claims for unjustifiable (unfair) dismissal are dealt with at a different forum. This action has its foundation in statute specifically, the Labour Relations and Industrial Disputes Act (LRIDA).
17. The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal.<sup>10</sup>
18. For convenience, the word "unfair" equates with "unjustifiable" and not with "wrongful" or "unlawful".<sup>11</sup>
19. The Act provides for the establishment of an Industrial Disputes Tribunal (IDT) to hear and settle disputes between employers and employees. These disputes include issues with wages, termination of

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<sup>10</sup> Per Sinclair-Haynes, J in *Lindon Brown*, supra

<sup>11</sup> *Jamaica Flour Mills Ltd v Industrial Disputes Tribunal and the National Workers Union*, SCCA No. 7 of 2002, delivered June, 11, 2003; *Village Resorts Ltd v Industrial Disputes Tribunal and Uton Reid*, SCCA 69/97, delivered on June 30, 1998. This view has also been affirmed by the Privy Council in the *Jamaica Flour Mills* case

employment and other disputes properly considered to be of an industrial nature.

20. Prior to March 2010, only unionized employees could bring a claim before the IDT to seek appropriate relief arising from a former employee's unfair dismissal. However, with the amendments to the Act, non-unionized employees can now approach the IDT.
21. The Act also makes provision for the Minister (of Labour) to draft labour relations code as practical guidance for the purpose of promoting good labour relations.
22. The Labour Relations Code (Code) was duly approved in 1976 and highlights the tension between the efficient use of resources, material and human, and the need to accord respect and dignity to the workers. The Code is also read in conjunction with the Act and is therefore binding.<sup>12</sup>
23. The parties to the dispute can agree to refer same to the IDT as well as the Minister can, on his own initiative, refer the dispute to the IDT.<sup>13</sup>
24. The IDT's role is very wide. It has a free hand in determining its procedure and its findings of fact are unimpeachable. It is not bound

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<sup>12</sup> Jamaica Flour Mills Ltd v Industrial Disputes Tribunal and National Workers Union [2005] UKPC 16

<sup>13</sup> Section 11A of LRIDA; Jamaica Flour Mills (Privy Council) supra

by the ordinary or strict rules of evidence, provided that there is no breach of the rules of natural justice.<sup>14</sup>

25. Also, the IDT has wide discretionary powers in dealing with its proceedings. For example, the IDT can admit hearsay evidence and it can also decide whether any document produced before it has any value as evidence and is entitled to use such of them as it considers to be of value in arriving at its decision.<sup>15</sup>

26. A critical importance of identifying the role of the IDT in respect of disputes referred to it is that, in determining whether a dismissal is unjustifiable, it is not bound by the strictures of the common law relating to wrongful dismissal.<sup>16</sup>

27. In determining what is unjustifiable, it is the responsibility of the IDT to take a broad view of all the circumstances that prevailed at the time of dismissal.<sup>17</sup>

28. By way of procedure, it has long been established that it is incumbent on the employer to justify its dismissal to the IDT and for this reason, the employer is usually required to present its case first.<sup>18</sup>

29. It is critical that all employers should now give the reason for dismissing the employee whether or not their employment contracts

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<sup>14</sup> The Industrial Disputes Tribunal v University of Technology Jamaica and University and Allied Workers Union, SCCA No 71 & 72 Of 2010, delivered on October 12, 2012, per Brooks, JA

<sup>15</sup> R v The Industrial Disputes Tribunal, Ex Parte Knox Educational Services Ltd (1982) 19 J.L.R. 223 per Smith, CJ

<sup>16</sup> In Re Grand Lido Hotel Negril Suit No. M-98/1995, delivered on May 15, 1997 per Ellis, J

<sup>17</sup> In Re Grand Lido Hotel supra per Cooke, J

<sup>18</sup> The Industrial Disputes Tribunal v University of Technology supra per Brooks, JA

allow for dismissal without cause since any employer may be called upon to prove to the IDT that the dismissal was justifiable.<sup>19</sup>

30. It is critical to note that a dismissal may be lawful at common law, in that the employer observes its obligations under the contract but it may nevertheless be unjustifiable under the (LRIDA).<sup>20</sup>
31. IDT is attractive to employees because of its remedies. Its mandate is, if it finds that dismissal was unjustifiable, the provision of remedies unknown to the common law.<sup>21</sup>
32. The possible remedies include reinstatement, which may also be in addition to the payment of back wages from the date of dismissal to the date of reinstatement. The IDT may also award compensation which it will in its discretion determine.
33. From the foregoing, it may be concluded that there is a distinction between the actions of wrongful and unjustifiable dismissal and that in claims for unjustifiable dismissal, the IDT has wide powers in its proceedings and offers remedies unknown to the common law.
34. It is important that employers give reasons for their dismissals since they may be required to provide same to the IDT.

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<sup>19</sup> “You don’t have the right to remain silent”, Observer Article dated April 28, 2010 by Gavin Goffe, Senior Attorney-at-Law and Partner at the firm Myers, Fletcher & Gordon

<sup>20</sup> 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 J.L.R 407 (SC) per Smith, CJ; In Re Grand Lido Hotel Negril supra per Ellis, J

<sup>21</sup> Village Resorts Ltd supra, per Rattray, P



35. As has been seen, employees may very well opt to proceed to the IDT as an alternative to court proceedings for wrongful dismissal since the IDT's remedies are more attractive to the employees.
36. Should an employee decide to pursue wrongful dismissal, he would be deprived of the statutory protection afforded by Parliament.
37. Private sector employers are now urged, since the amendments to the LRIDA, to be careful in their decision to terminate lest they be hurled before the IDT and face embarrassment of having to reinstate an employee who has been unjustifiably dismissed.