



# TERMINATION CONVERSATIONS - Right, Wrong, Reason and Liability

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**2014 Business Convention | May 8-11 | Sunset Jamaica Grande Resort**



# KNOW THIS

“The Court is not to second guess the employer as to what punishment is appropriate in cases where the conduct of the employee is sufficiently serious to merit **dismissal**. We must not usurp the province of management unless we can say that the punishment is disproportionate to the offence.”

Tobago Hospitality Trade Union and Mount Irvine Bay Hotel Limited [TD No. 251 of 1998]



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# Dismissal

The expression simply refers to the termination of the employment agreement, by the employer. Dismissal does not always constitute disciplinary action since it may be justified on the bases of redundancy or for medical reasons.



# Dismissal

It is generally accepted, as a principle of good industrial relations practice, that there must be a **valid reason** for a dismissal. In addition, the dismissal must be carried out fairly. If this is not done, a worker may lodge a grievance (claim/complaint) against the employer.



# Reason

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# Grounds

## Legitimate/ Justifiable

- Retrenchment
- Disability (Illness & Injury)
- Poor Performance
- Misconduct
- Early Retirement
- Expiration of Contract

## Interesting

- Change of Board of Directors
- Personality clash
- Lack of suitable qualifications
- Age, Sex, Religion, Ethnicity
- Job Abandonment



# The law

## THE EMPLOYMENT (TERMINATION AND REDUNDANCY PAYMENTS) ACT

- 5. (2)** For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to-
- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
  - (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or
  - (c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment.





# Key ILO Convention

C 158 – Termination of Employment Convention, 1982  
(No. 158)

## ***Article 4***

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C158](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C158)



# Key ILO Convention

## C 158 – Termination of Employment Convention, 1982 (No. 158)

### *Article 5*

The following, inter alia, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

<http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100> ILO CODE:C158



# Key ILO Convention

C 158 – Termination of Employment Convention, 1982 (No. 158)

## *Article 6*

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

<http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100> ILO CODE:C158



**Right**

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# Principles of law

“Unless there are statutory requirements or there is an express or implied agreement to the contrary, an employer may dismiss an employee with or without notice and with or without cause” (per Rowe JA (AG), as he then was, in **R v Alexander Dixon (1977) 16 JLR 39** at page 41B).



# Principles of law

This principle was emphasized by Lord Reid in the important case of **Ridge v Baldwin** [1963] 2 All ER 66 a page 71 F-G:

“The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.”



# Principles of law

The term of the contract with respect to its termination, must be followed.

[Gunton v London Borough of Richmond upon Thames \[1980\] 3 All ER 577](#)

Where the contract of employment does not specify a period of notice of termination of the contract, the minimum period of notice is that established by section 3 of the ETRPA. Common law rules require a reasonable period of notice. That required period may well be longer than the minimum (see **Godfrey v Allied Stores Ltd.** (1990) 27 JLR 421 at page 425 H – I).

[Resident Magistrate's Civil Appeal No 17/2011 between Rosmond Johnson Johnson and Restaurants of Jamaica Limited T/A Kentucky Fried Chicken](#)



# Notice

Section 3 of the **Employment (Termination and Redundancy Payments) Act** makes provision for notice to be given by employers to employees when terminating their period of employment.





# Summary Dismissal

“...the court recognized that the immediate dismissal of an employee is a strong measure and it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence.”

[Gulstine vs Anchor Life Insurance Co. Ltd \(1976\) 27 WIR page 68](#)



# Summary Dismissal

*“The factors to be considered to establish a right to dismiss summarily were set out in Hepple and O’Higgins’ Encyclopedia of Labour Relations Law at pg. 1129 and cited with approval by Madame Justice Permanand in Kenneth Daniel v Diversy Corporation (Eastern Caribbean) Limited HCA No. 3053 of 1984 as follows:*

- 1. The modern test is basically whether the conduct by the employee about which the employer complains is a breach of an important term of the contract of employment;*
- 2. Breach of an important term nowadays will not necessarily give rise to a right of summary dismissal if it occurs in such circumstances that the employee has a reasonable excuse or justification of his conduct;*
- 3. Single acts of misconduct are somewhat less likely to give rise to a right of summary dismissal than is a persistent pattern of misconduct; in the case of a single act of misconduct a record of unsatisfactory behaviour may tip the balance and lead the judge to view that there are grounds for summary dismissal;*
- 4. What is to be regarded as an important term will also depend upon the nature of the business or industry and the position of the employee; and*
- 5. Whether misconduct is sufficient to justify summary dismissal is not dependent upon proof that such misconduct has had in fact serious consequences; the test is the nature of the misconduct itself.” **Sharma Lalla v. Caroni (1975) Limited [H.C.A No. 2104 of 2001]***



# *The 7 C's*

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# The C's we should observe

- **C**onsider laws, policies, contracts and collective agreements and employment history
- **C**reate an informed opinion about the likelihood of the dismissable offence
- **C**ommunicate allegations to worker
- **C**onduct an incident investigation
- **C**harge Worker with related offence and state the particulars of the charge
- **C**onvene a Disciplinary hearing
- **C**apture reasons for decision to terminate (preferably in writing- 'dismissal letter')



# The Burchell Rules

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# Creating opinion about the offence

In the case of *British Homes Stores Ltd v Burchell* [1978] IRLR 379, EAT, the tribunal said as follows:

“In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair, an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time.



# Creating opinion about the offence

“...This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in mind reasonable grounds on which to sustain that belief and third, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable at all the circumstances to the case.”



# Communicating the allegations

“Before taking disciplinary action against any employee, an employer is required to observe certain basic principles. The employee must be informed as any alleged default on his part with reasonable particulars and be afforded a reasonable opportunity to respond to the allegations. There is no set formula for this, and no requirement that all the formalities of a Court of Law are followed. The employer must act fairly and this includes assessing all the facts and coming to a conclusion which is not perverse or imposing a sanction which bears no proportion to the default.”

**Oilfield Workers Trade Union v. Trinidad and Tobago Electricity Commission [E.S.D. No. 24 of 2005]**





# Workplace Investigations

“Before dismissing a worker from his employment, therefore, the employer should

- (a) Properly investigate any allegation or allegations of misconducts made against him or her,
- (b) Save in exceptional cases where it is not possible to do so, inform the worker of the specific reason or reasons for the proposal to dismiss him; and
- (c) Give the worker an opportunity to explain any allegation or allegations made against him.”

Banking, Insurance and General Workers' Union and Hindu Credit Union Co-operative Society Limited [T.D No 2 of 2001]

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# Aims of the Investigation

The objectives of an investigation must be identified prior to its start; determining the goals help the employer to take proper investigative measures.



# Investigation: Do's

- Assess the possible problems of the investigation
- Prepare a strategy for the Investigation (Action Plan)
- Select a suitable Investigator
- Recognize potential witnesses



# Investigation: Do's

- Prepare an outline for questions
- Identify documents to be reviewed for a valid resolution
- Secure files and records
- Review the Action Plan periodically



# Duty of Employer

The employer has an implied duty to act towards his employees in good faith. In so doing, 'the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship or confidence and trust between employer and employee.'

Mahmud v. Bank of Credit and Commerce International SA (1997 IRLR 462)



# **The Disciplinary Hearing**

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# Natural Justice

The rules of natural justice consist of the following elements:

- a. The right to a fair hearing; and
- b. The rule against bias.



# The right to a fair hearing

The right to a fair hearing involves the following:

- a. Prior notice of the hearing
- b. The opportunity to be heard
- c. The conduct of the hearing
- d. The right to legal representation
- e. The decision and the reasons for it





# The rule against bias

- The Adjudicator must be able to show that he has conducted a full enquiry into the circumstances involved before making his decision as to whether a wrongdoing has occurred and, if so, what sanction should be imposed.
- There should be no suggestion in his conduct of the hearing that prior to its commencement he has irrevocably decided the outcome.



# Grievance and Disciplinary Processes

Whilst the Grievance procedure is a tool used by the employee, to lodge complaints and to seek the resolution of workplace problems, the Disciplinary procedure (including the progressive form of disciplinary action) is the mechanism used by the employer, to address disciplinary infractions.



**Wrong**

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# Definition

“ the word “unfair” equates with the word “unjustifiable” and not with the words “unlawful” or “wrongful.”

Jamaica Flour Mills Ltd v Industrial Disputes Tribunal and the National Workers Union SCCA No. 7 of 2002 and Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Reid SCCA 66/97



# Wrongful dismissal

“A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:



# Wrongful dismissal

1. 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
2. His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily.

*Halsbury's Laws of England* volume 16 4<sup>th</sup> edition at para. 451



# Wrongful dismissal

“There may be cases where the contract of employment limits the grounds on which the employee maybe 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, a dismissal for any extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.”

Lindon Brown v. Jamaica Flour Mills Ltd. Claim No. CL 2000/B199



# Liability

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# Remedies

The remedies available for breach of contract of employment are damages. There are a number of decisions from the court that deals with this issue.

Coco Industry Board and Coco Farmers Development Company Limited and F.D. Shaw v Burchell Melbourne (1993) 30 JLR 242 (CA)



# Damages

“A fixed-term contract serves a number of purposes. It sets forth the duration of the employment and thereby defines the extent of the damages to which a party is exposed for the wrongful termination of the contract.”

Carr v Fama Holdings Ltd. (1989) 63 D.L.R. (4<sup>th</sup>) 25.



# Damages

“...in a case of wrongful dismissal, the damages recoverable is the estimated pecuniary resulting as a reasonable and probable consequence from the premature determination of employee’s service. Since under the Employment (Termination and Redundancy Payments) Act is respondent would have been entitled to be given six (6) weeks notice of termination if no cause had been shown, that would have been appropriate measure of damages for his dismissal if wrongful”.

**Claim No. 2010/HCV between Silvina Dixon and Executive Motors Ltd.**



# Avoid Damages

## Suggested Procedure

### (Cause)

1. Investigation
2. Charge
3. Disciplinary Hearing
4. Notice & Execution of termination





# The End.

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