

THE INDUSTRIAL COURT OF TRINIDAD AND TOBAGO

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DUE PROCESS

**The Overarching Principle in
Industrial Relations Law:
Meaning and Effect**

DUE PROCESS

Due process is the legal requirement that the state must respect all [legal rights](#) that are owed to a person. Due process balances the power of [law of the land](#) and protects the individual person from it. When a government harms a person without following the exact course of the law, this constitutes a due process violation, which offends the [rule of law](#).

Due process has also been frequently interpreted as limiting [laws](#) and [legal proceedings](#) (see [substantive due process](#)) so that judges, instead of legislators, may define and guarantee fundamental fairness, justice, and liberty. That interpretation has proven controversial. Analogous to the concepts of [natural justice](#), and [procedural justice](#) used in various other jurisdictions,

DUE PROCESS

HISTORICAL BACKGROUND

• Judicial Power –

“The mere fact that the power affects rights or interests is what makes it ‘judicial’ and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised ‘judicially’, i.e. fairly, and the fact that the power is administrative does not make it any less ‘judicial’ for this purpose.”

- Wade & Forsyth

DUE PROCESS

- **Administrative Power –**

Cooper v Wandsworth Board of Works

(1863) 14 CB (NS) 180

DUE PROCESS

- **Employer's Power –**

- **Common law**
- **Work as Rights**

Employment Rights are the most critical rights and interests of the ordinary person in an inclusive participatory democratic society

Employment as a Right and an Interest

Employment is the major instrument for the creation and distribution of the economic resources of the state. It is perhaps the most significant space where the ordinary citizen finds the meaning of citizenship, self-expression, self-worth and dignity and ultimately self-existence within the State. This is where the citizen not only participates but is rewarded.

Employment as a Right and an Interest

Employment and labour law stands for a sense of co-ownership of the State shared with fellow citizens. When viewed in this manner labour law and industrial relations are pivotal to social change and the Industrial Court as the regulatory institution stands at the apex of transformation and change.

The Industrial Relations Act

The pivotal core of the jurisprudence of the IRA is described by s.10(3) of the Act:

“Notwithstanding anything in this Act or in any rule of law to the contrary, the Court in the exercise of its powers shall –

- (a) Make such order or award in relation to a dispute before it **as it considers fair and just**, having regard to the interests of the persons immediately concerned and the community as a whole;
- (b) Act in accordance with **equity, good conscience** and the substantial merits of the case before it, having regard to the **principles and practices of good industrial relations.”**

The Industrial Relations Act

Section 10(5) in giving the Court the power to exercise a wide discretion to make an award provides the platform for filling in the grid of moral values that must underlie any national law:

“An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice.”

THE COMMON LAW

At common law, employment is fundamentally governed by the philosophy of the law of contract.

Freedom of Contract which leads to the parties arriving at **Express Terms** and where they neglect to do so, the common law create **Implied Terms** which accord essentially with the employer's interest.

In *Fernandez (Distillers) Ltd v Transport and Industrial Workers' Union* Wooding CJ emphasised the historical common law prerogative of the employer as the owner of the worker singularly as a factor of production without any recognition of a rights and interests of the worker in and to his work.

THE COMMON LAW

In forceful language Wooding CJ said:

“And I cannot too strongly stress that the issue was not whether the company could justify the legality or propriety of the dismissal.”

THEREFORE AT COMMON LAW,

**EMPLOYMENT IS A PERSONAL BOND
OF THE EMPLOYEE TO THE EMPLOYER.**

THE NATURE OF RIGHTS

Rights are important because they recognize the respect the bearers are owed. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and integrity. Rights affirm the Kantian principle that **we are ends in ourselves and not means to others' ends.**

THE NATURE OF RIGHTS

It is, therefore, important that, as Ronald Dworkin so eloquently reminded us, **we see rights as ‘trumps’.**(?)**They cannot be knocked off their pedestal because it would be better for others, or even society as a whole, were these rights not to exist.**

THE NATURE OF RIGHTS

Workers do not merely have a claim or remedy, as Sir Hugh Wooding in *Fernandes* seemed to have said;

Workers have a property right in their job.

INDUSTRIAL COURT CASES

Union of Commercial and Industrial Workers v El Dorado Consumers Operative Society Ltd, TD 72 of 2000

“The idea still persists in some quarters that it is possible to terminate a worker's employment by merely giving him the required notice under the contract of employment. This was true under the common law but termination of workers by notice alone is insufficient under the Act. “

Union of Commercial and Industrial Workers v El Dorado Consumers Operative Society Ltd

“In addition, an employer must have an acceptable reason for terminating the worker's employment. Under the common law, the employer had the right to terminate without assigning a reason for the termination. This is not acceptable under the Act. An employer must have a valid reason for dismissal which must be connected with the worker's conduct or capacity to perform the work.”

***Union of Commercial and Industrial Workers
v El Dorado Consumers Operative Society Ltd***

“Additionally, an employer must inform a worker of the true reasons for his dismissal. There was no requirement under the common law for an employer to give a reason for a worker's termination. He just had to inform him of the termination. **By the principles of good industrial relations practice, however, an employer must give a worker the true reason for his dismissal.**

An employer must also give a worker an opportunity to be heard before a dismissal becomes effective.”

***Trinidad and Tobago Television Co v Communication,
Transport and General Workers' Union*** TD 68 of 1980

His Honour Mr. J.A.M. Braithwaite said:

"It is an understatement to say the common law rights of an employer have been circumscribed. For all practical purposes they have almost been completely eroded out of existence."

COMPONENTS OF DUE PROCESS IN THE INDUSTRIAL COURT JURISPRUDENCE

- INVESTIGATION
- NOTICE OF CHARGES
- REPRESENTATION
- HEARING
 - IMPARTIAL & UNBIASED
 - ALL EVIDENCE MUST BE CONSIDERED
 - REASONABLE DECISION
 - RIGHT TO BE HEARD AND DEFEND
 - RIGHT TO CONFRONTATION

DUE PROCESS IS THE OVERARCHING PRINCIPLE

Association of Technical and Administrative and Supervisory Staff and Caroni 1975 Limited

In the landmark judgment of TD No. 130 of 1994 delivered on 17th June 1996 by His Honour Mr. Addison M. Khan - made it clear that due process is the underlying philosophy of employment law in Trinidad and Tobago.

DUE PROCESS IS THE OVERARCHING PRINCIPLE

“The essence of a fair opportunity to be heard involves the provision of relevant information by the employer to enable the latter to appreciate and understand the substance of the allegations made against him and an opportunity given to the employee to reply to such allegations and to put forward any reasons in mitigation of any penalty or penalties which may be possible having regard to the nature of the allegations made against him. It is a requirement of basic fairness and justice as well as of the principles of good industrial relations practice. It is to enable the employee to bring to the notice of the employer relevant facts and circumstances and to enable the employer to hear and understand the employee’s side of the story before he makes up his mind finally. The opportunity must be given before the decision to dismiss is made.”

DOES EXPRESS CONTRACTUAL TERMS TRUMP DUE PROCESS?

- ***BANK AND GENERAL WORKERS’ UNION AND HOME MORTGAGE BANK*** TD 140 OF 1997

“In this trade dispute, the employer merely relied upon its contractual right to terminate the contract by giving of termination notice to the worker.” (p.11)

“In such an event, the Employer was nevertheless required to give a reason or reasons for the termination and the worker was entitled to have such reasons or reasons before the termination to enable him to make any representation which he wished to make to the Employer concerting the proposed termination. We find that the Employer’s failure to give such reason or reasons was in breach of the principle of good industrial relations practice.”

Examples: Double Punishment

- ***Bank and General Workers' Union and The Unit Trust Corporation of Trinidad and Tobago*** TD 370 of 1997

“There can be no doubt, therefore, that in accordance with equity, good conscience and the principles of good industrial relations practice, the Corporation was unable to punish the worker again for such alleged misconduct. (p.43)

Vague Allegations: “Loss of Confidence”

“The expression ‘loss of confidence’ used in the letter of dismissal is **a most vague and uncertain concept. It refers to nothing in particular** and is capable of embracing a variety of misconduct by workers. It is wholly inappropriate to use that expression in the context of modern good industrial relations practice. The principles of good industrial relations practice require an employer to inform a worker of **the exact reason** for taking disciplinary action against him **before such disciplinary action is taken.**” (p.44)

Investigation, Confrontation and Representation

- ***Transport & Industrial Workers Union and Penta Paints Caribbean Ltd*** TD 275 of 2009

“At no time in the hearing was the worker afforded the opportunity to face his accusers.” (para 6)

“The main purpose of a disciplinary hearing are twofold, first to give the worker the opportunity to have his input on the facts which are presented by the employer and secondly to allow the worker the opportunity to be heard.” (par. 17)

“Natural justice, ... requires not merely that the worker has a chance to state his case, he must be afforded proper representation and he must know sufficiently what are the allegations against him so that he can properly put forward his own case.” (para 20)

Adequate Investigation and Credible Evidence

- ***Transport and Industrial Workers’ Union and Public Transport Service Corp. TD 152 of 2010***

- “Notwithstanding the Worker’s contribution to the entire incident, the Corporation was mandated to carry out an investigation into the matter in keeping with good industrial relations practice.” (para 20, 23, 25)

- “However there were weaknesses in Rajaram’s account. He said there were no witnesses, then changed his mind and indicated that witnesses gave statements to the Security Officers. His evidence about the medical certificate was also inconsistent.” (para 21)

Impartiality, Fairness and Evidence

- ***Oilfield Workers' Trade Union and Caribbean Packaging Industries***, TD 27 of 2011
- “The *audi alteram partem* principle is a well-known, integral and a very important principle in the practice of industrial relations. This principle and the principles of natural justice place a duty of impartiality and fairness on decision makers at the workplace. The right to a fair hearing is a fundamental right for all workers; decision makers therefore have a duty and obligation to be independent and unbiased when they hold disciplinary hearings into the conduct of workers.” (para 16 & 17)

Hasty and Severe Discipline

- ***Barclays Bank of Trinidad and Tobago and Barclays Employees Union*** TD 98 of 1977
- “It will be convenient to summarise the matter, Corbie wrote an abusive and insulting letter to his Manager. This was such as to invite disciplinary action. Within a few days, the bank dismissed him. He had about 12 years’ service with a clean record. The Management Section dealing with discipline never interviewed him. The Managing Director, who alone could dismiss an employee, did not interview him and so he had no opportunity to put his case or to apologise before dismissal. The apology sent was late because of the haste with which the bank acted. The bank has not established that, had the proper procedure been followed, the result would have been the same.” (p9)

Are there Instances of Misconduct that Trump Due Process?

- Absenteeism and lateness
- Disobedience
- Dishonesty
- Violence and fighting
- Egregious Conduct outside of employment

Food for Thought: Is the position under UK ERA the same as under the IRA?

“No specific guidelines as to the type or seriousness of misconduct that can justify dismissal, some principles seem to have emerged from the cases. First, the conduct does not have to be gross, only substantial in relation to the circumstances of the case, so that relatively minor acts may, in certain circumstances justify dismissal. Second, the conduct does not have to be blameworthy.”

Deborah Lockton, *Employment Law (8th ed)* 9.5.2