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HOW TO AVOID LEGAL PITFALLS WHEN TERMINATING YOUR EMPLOYEES & MAINTAINING A GOOD WORKING RELATIONSHIP BETWEEN MANAGEMENT AND UNIONS

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Introduction

1. In this presentation on how to avoid the legal pitfalls when terminating your employees and maintaining a good working relationship between Management and Union, I will set the stage by outlining the legislation under which the Court operates. An appreciation of the Court's powers, particularly those provided under its primary legislation, the ***Industrial Relations Act***, Ch. 88:01, ("the Act", "the IRA") in disputes regarding termination of employment can shed some light on the ways in which employers can avoid the legal pitfalls when terminating employees.

2. As you know the Court in acting must have regard to the substantial merits of the case before it and more importantly for this discussion, with regard to the principles of good industrial relations practice. This term is not defined in the statute and it will be explored through some of the decisions of the Court

which it is hoped will throw light on ways of avoiding the legal pitfalls when dismissing employees.

3. Provisions of the IRA governing collective agreements and the conduct of parties with responsibility for negotiating collective agreements, that is, employer and recognized majority union, as well as the Court's powers with respect to the registration of collective agreements and related provisions under the Act can also give some insights into maintaining a good working relationship between Management and Unions and I will highlight relevant provisions.

Avoiding Legal Pitfalls when Terminating Employees

The Court's jurisdiction under the IRA

4. The legislation governing workplace relationships in Trinidad and Tobago and under which the Industrial Court is empowered to hear matters are, for the purposes of this discussion:-
    - *The Industrial Court Act,* Ch. 88:01
    - *The Retrenchment and Severance Benefits Act*, Ch. 88:13
    - *The Maternity Protection Act*, Ch. 47:50
    - *The Minimum Wages Act*, Ch. 88:04
    - *The Occupational Safety and Health Act*, Ch. 88:08. ("The OSH Act")

5. Of significance also are ILO Conventions and Recommendations.[1]

6. The primary legislation, the IRA governs industrial relations in Trinidad and Tobago. The powers of the Court are set out at section 10 of the Act, and I will highlight subsections (3) – (6) which state:-

> (3) Notwithstanding anything in this Act or in any other 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**.(Emphasis Added)
>
> (4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or reinstatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or reinstatement, or the payment of exemplary damages in lieu of such re-

[1] See Appendix for a list of conventions ratified by Trinidad and Tobago to date.

employment or reinstatement.

(5) 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**; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.

(6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever.

7. As you would observe from the express wording at section 10 (3), specifically "***Notwithstanding anything in this Act or in any other rule of law to the contrary...***" in the exercise of its powers the Court is not fettered by rules of the common law or statute law.

Principles of Good Industrial Relations Practice

8. The principles of good industrial relations practice are not codified in statute and so logical questions flowing from section 10 are 'What are the principles and practices of good industrial relations? Where can they be found?' It is to the Court's decisions, ILO conventions, recommendations and standards, decisions of the Court of Appeal, etc., as well as to what "the court considers right, fair and just as between man and man", as Rees JA put it in ***Civil Appeal No. 30 of 1972, Caribbean Printers Ltd. v. the Union of Commercial and Industrial Workers***[2] that we must look. In discussing the Industrial Court's mandate he said:-

> ***"The Court is under an obligation to pay due regard to the principles and practices of good industrial relations which have been aptly described as those informal, uncodified understandings which are ancient habits of dealing adopted by trade unions and acquiesced in or agreed to by employers…"***

9. In ***Civil Appeal No. 53 of 1976, Texaco Trinidad Inc. v. Oilfields Workers' Trade Union*** Hyatali CJ said this of these principles which the Court is enjoined to apply in the resolution of all trade disputes before it:-

> ***"…It follows that both employers and trade unions are not only obliged to observe and apply***

[2] Delivered on February 27, 1975

these principles in all their dealings with each other but must be prepared to accept that any position taken up by any of them in breach thereof may well be condemned by the Court as unreasonable."[3]

10. Among the Court's many decisions in which it has pronounced on the principles and practices of good industrial relations are ***Trade Dispute No. 140 of 1997, Bank and General Workers' Union v. Home Mortgage Bank*** delivered on March 3, 1998 and ***Trade Dispute No. 2 of 2001, Banking Insurance and General Workers' Union v. Hindu Credit Union Co-operative Society Limited***[4]***.*** Among the principles of good industrial relations practice that can be culled from those two and numerous other cases are that:-

    a. The employer should properly investigate any allegation or allegations of misconduct made against a worker;

    b. Except in exceptional circumstances, a worker should be given an opportunity to be heard before being dismissed from an employer's service (the natural justice requirement, one of the more important principles of good industrial relations practice);

    c. The essence of a fair opportunity to be heard involves the provision of relevant information by the employer to the employee to enable the latter to understand the substance of the allegations made against him and an opportunity to reply to such allegations, including putting forward any reasons in mitigation of a penalty; and

[3] 34 WIR 215, dated March 11, 1981
[4] Delivered on July 31, 2001

d. The opportunity is to be given before the decision to dismiss is made.

11. In both the ***Home Mortgage Bank*** and ***the Hindu Credit Union*** decisions, the Court pointed to ***ILO Convention C158 Termination of Employment Convention, 1982*** as one of the best statements of good industrial relations practice. It may be of interest to note that in a publication of the International Training Centre of the ILO, 'International Labour Law and Domestic Law- a training manual for judges, lawyers and legal educators', reference is made at p. 51 to the Industrial Court's consideration of ILO conventions and recommendations as the expression of general principles in the ***Home Mortgage Bank*** case.

12. Articles 4 to 7 of the Convention 158 are worth restating here. Article 4 addresses the question of 'Justification for Termination' of a worker's services. It states, as you may well know that:-

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.

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.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

13. Recommendation 166 concerning this convention also includes some salient provisions in respect of the termination of employment, including provisions on termination for

unsatisfactory performance, entitlement of a worker to the assistance of another person when defending himself against allegations likely to end in termination of his employment and notification in writing upon request of the reasons for termination.

Some Factors considered by the Court in cases of termination of employment

14. Among the many factors which the Court has considered in its deliberations on the termination of employment and some of which have been considered as mitigating factors are:-

- **Long service**- ***In Trade Dispute No. 164 of 1996, Caroni Limited v. All Trinidad Sugar Estates and Factories Workers' Trade Union*** delivered on December 17, 1976, the Court rescinded the decision of the Company to dismiss a cane cutter who allegedly assaulted an assistant foreman, cursed him and threatened him with a cutlass. The Union denied the assault but admitted that the worker cursed but argued that the language used was that "of the fields and plains". The Court held that the assault did occur but considered the worker's thirty-two (32) years of service should not be shrugged aside or lost because of one rash and intemperate act.
- **Unblemished Record-**In ***Trade Dispute No. 21 of 1995, National Union of Government and Federated Workers and the Chief Personnel Officer*** delivered on May 28, 1996, the

Court found that the dismissal of two Lifeguards with over sixteen and fourteen years of unblemished service, for dereliction of duty, was neither harsh nor oppressive or not in accordance with proper industrial relations. However, the Court considered that justice would not be served if the workers lost the benefit of their service. The Court ordered that they be treated as if they had retired on the date of dismissal and be given all of their service benefits.

- **Section 10 (3) Order-** The Court has made such an order in appropriate cases where dismissal is not contrary to the principles of good industrial relations practice. In the case of ***TD No. 258 of 2004 Oilfields Workers' Trade Union v. Jakob Straessle Old Grange Inn, Papillon Restaurant*** delivered on September 29, 2006, the Court considered the question of making an order in equity pursuant to section 10 (3) of the IRA where the dismissal was effected in circumstances which are found to be neither harsh and oppressive or not in accordance with the principles of good industrial relations practice. It concluded that such an order could be made in an appropriate case. The Court took into consideration that the worker, a Cook, who was dismissed for being absent over the Carnival period and who became abusive on being questioned on his return to work, was with the restaurant from its inception, he was required to work seven days per week, his service of over ten years was largely unblemished and his meals were well

prepared. The Court assessed the equity of the worker's service to the restaurant at thirty thousand dollars ($30,000.00) and ordered payment to him.

- **Dismissal for conduct outside of work-** In ***Trade Dispute No. 86 of 1969, Texaco Trinidad Inc. (Textrin) v. Oilfields Workers' Trade Union*** delivered on September 26, 1969, a case where a Barge Attendant was dismissed for assaulting his Supervisor in a bar away from the plant and in which the Union claimed it was a private matter to which the employer could not take notice in effecting dismissal, the Court established the principle that as a long as a connection could be made between an off the job action and an incident at work, the employer may be justified in dismissing the worker.

  In ***Trade Dispute 65 of 1996 between National Union of Government and Federated Workers v. Berger Paints Trinidad Limited*** delivered on May 14, 1999, an intimate relationship between co-workers ended in physical assault outside of the workplace when the female worker decided to end the relationship. The male worker was charged for attempted murder. After reviewing both foreign authorities[5] as well as decisions of the Court, the Court concluded that the law was clear that an employee's behavior away from his workplace and outside of his working hours may provide justifiable

[5] Pearce v. Foster [1886] 17 QBD 536
IRO 15 of 1988 between ***Oilfields Workers' Trade Union v. Trinidad and Tobago National Petroleum Marketing Company Limited*** delivered on November 18, 1993.

grounds for termination. Among the factors to be considered is whether the employee's conduct has been such as to make it unsafe for his employer to continue to employ him or whether his conduct has been prejudicial or is likely to be prejudicial to the interests or reputation of his employer. In a matter of this nature now, considerations of an employer's general duties to his employees under the OSH Act, may also be pertinent.

The principles in this case may well be applicable where an employee's conduct is in relation to the social media, blogs, postings on facebook etc.

- **Dismissal may be unjustified though lawful**- In ***Canadian Imperial Bank of Commerce v. Transport and Industrial Workers' Union***[6] a decision which considered section 13 A of the Industrial Stabilisation Act, the Court found that the fact that a dismissal is not wrongful at law was no bar to the Court's jurisdiction to find it harsh or oppressive or unreasonable and unjust. This principle is also applicable under the IRA as shown in ***Trade Dispute 306 of 1985 v. Seamen and Waterfront Workers' Trade Union and Port Authority of Trinidad and Tobago*** delivered on January 23, 1987. In that case the employer dismissed a worker pursuant to a clause in his contract which provided for termination of employment after the expiration of three months from the date of commencement and on one month's notice in writing. The

[6] (1965-75) 1 T.T.I.C.R. p. 300

Authority provided no grounds for dismissal but relied on the termination clause in the contract. The Court held the dismissal to be both contrary to good industrial relations practice and also harsh and oppressive. It found the employer's interpretation of the clause to be wrong.

In the same case the Court held that acceptance of payment in lieu of notice was no bar to a claim for adjudication of a trade dispute.

- **Discipline of Shop Stewards**- In the matter of ***Texaco Trinidad Inc. v Oilfields Workers' Trade Union***, (**1981**) 34 WIR 215, an appeal from a decision of the Industrial Court in ***Trade Dispute No. 46 of 1976,***[7] Kelsick J.A. expressed the view that:-

> ***"a shop steward can be disciplined as a worker if he oversteps the limits of his authority as agent of the Union. While he may be permitted the use of strong language to his superior officer when they meet as representatives of Management and of the union, there is a limit to that concession."***

Nonetheless, the following view of the Industrial Court was upheld in that appeal. The Court said that:-

> ***"A shop steward has a dual function as employee ... and an officer of the Union ... When he is discussing union business with a supervisor or anyone from management <u>they are equals</u>."[emphasis added]***

[7] Dated October 13, 1976

- **Job abandonment-**Job abandonment is frequently a defence by an employer in dismissal matters, especially where dismissal is not in writing. In ***Trade Dispute No. 130 of 1991, National Union of Government and Federated Workers v. Romeo's Gas Station*** delivered on May 12, 1993, the Court held that the *animus revertendi,* i.e. an intention to return is the antithesis of abandonment. In ***IROs 16, 17 and 18 of 1991, Steel Workers Union of Trinidad and Tobago v. Central Trinidad Steel Ltd.*** delivered on July 28, 1993, the Court acknowledged that abandonment as an industrial relations concept had not been specifically defined but the Court in treating with the subject over time treated it as a matter of inference to be drawn from a given set of circumstances. It is now fair to say that in this area the Court's considerations are the employee's intention; the length of absence from the job; whether the employee kept in contact with the employer during the absence; whether he/she failed to return on being directed to do so and whether the employer warned the worker that failure to return by a fixed date would result in dismissal- ***Trade Dispute GSD No. 42 of 2008, Communications Workers' Union v. Junior Sammy Contractors Limited***, delivered on December 11, 2011.

- **Retrenchment-**The question of collective dismissals falls under the Retrenchment and Severance Benefits Act. Where five or

more workers are dismissed the Act prescribes the procedure to be followed which includes, minimum notice period, minimum level of severance payments etc. The Act does not prescribe the order in which workers are to be retrenched. However, the principle of LIFO (last in first out) all other things being equal is accepted as one of the principles of good industrial relations practice-see ***Trade Dispute No. 119 of 1993, Seamen and Waterfront Workers' Trade Union v. Port Authority of Trinidad and Tobago*** delivered February 27, 1998.

- **Dismissal of a pregnant employee-**Section 10 of the Maternity Protection Act gives a right to a female employee to return to work after a period of maternity leave and makes provision for the employee to postpone her intended date of return for non medical reasons on the fulfillment of certain conditions. The Act should be read in light of Article 8 of the Maternity Protection Convention C-183, the burden of proving the reason for dismissal of a pregnant or nursing mother are unrelated to pregnancy or nursing rests with the employer. The Act has now to be read in conjunction with the Occupational Safety and Health Act, specifically section 6 (9) to fully appreciate the responsibilities of employers to pregnant workers.

15. I would suggest that in order to avoid the legal pitfalls in terminating workers one should be conversant with the provisions of the relevant statutes and decisions of the Court so

that in treating with employees you do not run afoul of the statute or principles laid down in judgments.

Maintaining a good working relationship between management and unions

16. In so far as the Court can give guidance on this topic, I would suggest advice similar to what has been proffered in respect of the first part of this presentation, that is, to be conversant with the laws that govern industrial relations. The long title of the IRA is 'An Act to repeal and replace the Industrial Stabilisation Act 1965, and to make better provision for the stabilisation, improvement and promotion of industrial relations'. From the long title can be gleaned its purpose which is in line with this discussion as its provisions seek to regulate interactions in the workplace and set the parameters for those interactions.

17. A good starting point is section 40 of the IRA which provides for the compulsory recognition of the recognized majority union by an employer. It places upon both parties the responsibility to, in good faith treat and enter into negotiations with each other for the purpose of collective bargaining.

18. Section 42 prohibits the victimization, including the dismissal of a Worker for trade union activities. Also prohibited is the condition that the employment of a worker is subject to the

condition that he shall not join a union or that he shall relinquish trade union membership. Such a condition you know would also run afoul of the freedom of association guaranteed under the ***Constitution, Ch. 1:01.***

19. The provisions at section 43 in respect of collective agreements, what they should and should not contain, are also instructive especially the requirements that they contain provisions for appropriate proceedings for avoiding and settling disputes and for the settlement of differences regarding interpretation, application administration and alleged violation of the collective agreement.

20. The Court's role is in the registration of collective agreements as outlined at section 46 and its power to refuse to register agreements and also in the enforcement of registered collective agreements.

21. Respecting the rights of workers in respect of trade union membership and activities as set out at section 71 of the IRA is also important in maintaining a healthy relationship.

22. Where opportunities for consultation exist for actions that benefit both workers and management, for example, at section 25E of the OSH Act which provides for the establishment of a Safety and Health Committee at an industrial establishment in

consultation with representatives of employees, advantage should be taken to foster good relations.

23. A pro-active approach by management in terms of policies that protect their employees ought also to engender a positive environment with the Union. Some policies that appear to be neglected in the workplace are in the areas of sexual harassment, HIV Aids, use of computers, cellular phones etc.

Conclusion

24. I trust that the areas on which I have focused have gone some way in raising your awareness of the principles and practices of good industrial relations and its important role in the termination of the employment of employees. Such awareness would no doubt better equip you to avoid the pitfalls that could be encountered. I do hope also that I have provided some food for thought in the area of maintaining good working relations between management and union. I end with a quotation from Martin Luther King Jr. which I consider to be appropriate to the theme of this presentation:-

> "Injustice anywhere is a threat to justice everywhere. We are caught in a network of inescapable mutuality. We are tied in a single garment of destiny. What affects one directly, affects us all indirectly."[8]

December 5, 2013

[8] Martin Luther King, Jr., Letter to Clergymen dated April 16, 1963 from a Birmingham jail.