INDUSTRIAL COURT
of Trinidad and Tobago

Keynote Address

by

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'Adopting Strong HR Policies that are consistent with Recent Judgments: A Roadmap for Employers'

at the

Employers Solution Centre's Seminar

on

LANDMARK COURT JUDGMENTS:
"Translating Precedent into Better Workplace Practice"

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Introduction

Permit me to start my address by quoting from two judgments which speak to the mandate of the Industrial Court. In the first decision, Rees JA in Civil Appeal No. 30 of 1972, *Caribbean Printers Ltd. v. the Union of Commercial and Industrial Workers*[1], in discussing the Industrial Court's mandate 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…"*

Simply put, as he himself said, the Court must look to what is right, fair and just as between man and man.

In the second judgment, first President of the Industrial Court, Sir Isaac Hyatali in Civil Appeal No. 53 of 1976, *Texaco Trinidad Inc. v. Oilfields Workers' Trade Union 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 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."*[2]

From those two quotations, it may be clear that what the Court is required to adjudicate upon really are practices that are borne out of our everyday dealings. These include principles of fairness, abiding by the rule of natural justice and being given an opportunity to mitigate.

Sir John Donaldson, who was President of the National Industrial Court of England, said in *Heatons' Transport Limited v. Transport and General Workers' Union* [1972] ICR 308,

[1] Delivered on February 27, 1975
[2] 34 WIR 215, dated March 11, 1981

at 316, in describing that Court which had a similar composition to our Industrial Court, that it was a Court of “Industrial common sense”.

It is my view then that you cannot go wrong in your quest to adopt strong human resource policies that are consistent with decisions of the Court, if those policies comport with the principles and practices of good industrial relations, which really have not changed much. What has changed is the landscape of the world of work which now requires an application of these policies to contemporary phenomenon, such artificial intelligence (AI). Balancing management prerogative with the rights of workers will assist employers in creating effective and robust human resource policies.

ILO publication ‘Human resource management: A manual for employer and business membership organizations [EMBOs] Tool 1: Human resource management in an organization – Fundamentals’[3], gives some useful guidance on human resource policies. It states under the rubric ‘Human resource policies’: -

Human resource policies are important tools for EBMOs to clarify and operationalize what would otherwise be complex and technical legal and compliance obligations. Each human resource policy is an important format for an EBMO to say: “This is how we do things around here.” Each policy provides written guidance for employees and managers on how to handle a specific employment issue. Each policy has an important role in practically and effectively implementing the organization’s human resource management strategy. The human resource policies also provide consistency and transparency for employees and managers, thus helping to enhance the psychological contract and create a positive organizational culture. Each human resource policy should provide general and practical advice and guidance for managers and staff on each specific employment issue, outlining the responsibilities of both the EBMO and employee in the employment relationship.

In giving guidance on policy writing the said ILO document states: -

[3] Human resource management: A manual for employer and business membership organizations/International Labour Office, 2023

An effective human resource policy should be written in a way that:

- *uses clear language – ensuring that key issues cannot be missed or misinterpreted;*
- *keeps the document brief – an overly long document will likely result in staff missing important information;*
- *avoids information that may become outdated quickly – such as staff names or other variables that are likely to change;*
- *clarifies eligibility for employees – such as entitlements for full-time versus casual employees; and*
- *allows for necessary exceptions – most policies will not be relevant to every possible circumstance.*

There are times when issues which the Court must consider in the course of a trade dispute, such as job abandonment, are either not contained in a written policy; included in a policy that is not clearly written; or included in a policy which has not been disseminated to all employees. Perhaps I may be preaching to the converted but you may be aware of employers, perhaps, in small organizations who may fall into this category.

In the remainder of my allotted time, I will focus on some issues which the Court addresses frequently and which could benefit from clear human resource policies.

Contract of Service/ Contract for Service

The tests that are used to determine whether the employment relationship is one of a contract of service (employer/employee) or a contract for service (employer/independent contractor) have been addressed in a number of cases both within and outside of our jurisdiction.

In Trade dispute no. GSD-TD 680/2017 between *Banking, Insurance and General Workers Union Cipriani College of Labour and Co-operative Studies*[4], the Court cited *IRO Nos 10-13, 14 A&B, 15 A&B, 21 & 22/1989 Transport and Industrial Workers' Union v Neal and Massy Industries Limited* dated June 8, 1994, which stated the position when determining whether there is a contract for service or a contract of service. No one test is conclusive and the courts must look to all the elements of the relationship to determine the issue. Some of the more important elements include: -

i. The employer's right of control;

ii. The employee as an integral part of the business;

iii. The chance of profit and the risk of loss by the person who undertakes the work;

iv. Ownership of the instrumentalia and the onus to provide;

v. The entitlement to exclusive service;

vi. The payment of wages, sickness pay and holiday pay and by whom payment is made;

vii. The power of selection and appointment;

viii. The power to suspend and dismiss;

ix. The power to fix the place, time of work and the times at which holidays are taken;

x. The deduction of PAYE, etc.;

xi. The intention of the parties;

xii. The view of the ordinary person.

[4] Dated March 5, 2021.

In *C.A. Correia (Trinidad) Limited v Amalgamated Workers' Union*[5], the Court held, among other things, that the fundamental test to be applied in resolving whether a particular contract was one of services or for services was to ask the question "***Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If 'yes' the contract is a contract for services and if 'no' the contract is a contract of service***."

Any HR policy which governs the employment of independent contractors should have regard to those factors. Regrettably, that is not always the case and frequently the Court is confronted with what appears to be a mixture of some factors which connote 'employee' while others imply 'independent contractor', all pertaining to one and the same position. The Court then has to consider all the surrounding circumstances in addition to the usual factors set out earlier.

Job Abandonment

The Court's experience in many instances is that job abandonment is pleaded as a defence by an employer in response to a claim by a Union that a worker has been summarily dismissed. It appears that this is an area which may be neglected in HR policies. Very often the facts do not support the claim of job abandonment but seem to be an afterthought. Clear guidelines in this area would greatly assist HR Managers and Management on the whole. It is not sufficient to claim that the worker left and never returned. The onus is on the employer to show that all necessary steps were taken to confirm the worker's willing departure and intention not to return to work.

Generally, the Court considers the following factors when addressing the issue of job abandonment:-

a. the worker's intention;

b. the length of absence from the job;

[5] (1965-75) 1T.T.I.C.R. 285

c. whether the worker kept in contact with the employer during his absence;

d. whether the worker failed to return on being directed to do so; and

e. whether the employer warned the worker that failure to return by a fixed date would result in dismissal.[6]

Progressive Discipline

9. In **TD 144 of 1996 between** *the Oilfields Workers' Trade Union and Phoenix Park Gas Processors Limited* delivered by His Honour Mr. G Baker on 2nd February, 2000 noted when progressive disciplinary action should be used. He said:

"*Save in the exceptional cases of dishonesty, violence and extreme negligence with a present danger to life and limb, the principle of progressive disciplinary action should be observed."*

I endorse his view. Certainly, progressive discipline should be used in cases of unsatisfactory performance. This view was expressed in the matter of ESD TD 20 of 1996 *Oilfield Workers' Trade Union and Trinidad and Tobago Electricity Commission* delivered on the 11th December, 1997, which states

"*More typically, however, good industrial relations practice requires that the response to unsatisfactory performance should be by way of progressive disciplinary action*."

Progressive discipline encompasses a number of the elements of good industrial relations practice. These are well known and well documented in the many decisions of the Court.

[6] Trade Dispute GSD No. 42 of 2008**,** *Communications Workers' Union v. Junior Sammy Contractors Limited*, delivered on December 11, 2011; ESD-TD No. 1 of 2021 (s), Trinidad and Tobago Registered Nurses Association v South West Regional Health Authority delivered on 23rd November, 2022 and ESD 97 of 2019 *Communications Workers' Union v Telecommunications Services of Trinidad and Tobago Limited* (s) dated November 28, 2024.

In TD 509 of 2017 *Banking Insurance and General Workers Union AND Smith Robertson and Company Limited* delivered 25th September, 2019 HH Stroude stated the following fundamental aspects with respect to progressive discipline: -

> "*The concept of progressive discipline … envisions penalties which increase in severity for each infraction committed by the employee. Its application to the disciplinary process therefore adds to transparency and provides the Worker a fair opportunity for improvement prior to the imposition of the ultimate sanction of dismissal. Thus, the expected progression for a recalcitrant employee will be:*
>
> *1. Oral warnings*
>
> *2. Written warnings*
>
> *3. Suspension*
>
> *4. Termination.*
>
> *The Industrial Court has therefore recognized the application of progressive discipline as best practice for employers when deficiencies exist in the services these employees provide. The judgments on the principle disclose one common thread, namely that failure to follow each and every step in the process is not necessarily fatal to the employer, but rather each case is to be determined on its own merit."*

In addition to the four steps above, the opportunity to offer a plea in mitigation should be added. However, even where no such opportunity was given, the Court may dismiss a dispute, having regard to all of the circumstances of the case. (See GSD- TD 127/2019 *Government Industrial and General Workers Union and Bryden PI Limited* dated 17th June, 2025).

Natural Justice

There are two basic rules of Natural Justice:

1) **Audi alteram partem** - Each party has a right to be heard - to be duly notified of the date, time and place of the hearing and be allowed full opportunity to present his case; and

2) **Nemo judex in causa sua** - A person must disqualify himself from deciding a matter if he has a direct pecuniary, proprietary interest or might otherwise be biased.

In Civil Appeal No. P013 of 2018 between *Public Services Association And Water And Sewerage Authority* dated 31st October, 2023, Mendonca JA, said in relation to the exercise of natural justice by courts: -

> *Natural justice refers to basic fundamental principles of fair treatment. They include the duty to give a litigant a fair hearing. I accept that a Court is not required to address every small consideration but is expected to give consideration to the main issues.*

In TD No. 385 of 2014 *Trinidad and Tobago Postal Workers Union and Trinidad and Tobago Postal Corporation* delivered by HH Ms. K. George-Marcelle on 9th June, 2020, asserted the following with respect to the topic of natural justice as it relates to the workplace: -

> *The underlying tenets of natural justice and principles of good industrial relations practices and procedures have been adequately addressed in numerous decisions from the Industrial Court. These include progressive discipline, fairness and impartiality.*

The judgment handed down in the English case of Bentley Engineering Company Limited and Mistry (1979) I.C.R. 47 which was referred to in *Trade Dispute 162 of 1996 between the All-Trinidad General Worker Trade Union and Caroni (1975) Limited* (1998) I.C.L stated:

> *that natural justice requires not merely that a man should have a chance to state his case, but that he must know sufficiently what is being said against him so that he could put forward his own case properly and that he should be given an opportunity to cross-examine the witnesses who gave evidence against him.*

In one of the Court's landmark judgments on natural justice, Trade Dispute No. 2 of 2001 between *Bank and General Workers' Trade Union and Hindu Credit Union Cooperative Society Limited* dated July 31, 2001 Khan P. as he then was, stated that: -

> ***It is essential that an employer should ensure that he makes a proper investigation of all the relevant circumstances, have a valid reason for terminating the worker's service, inform the Worker of the exact reason for dismissal and give the worker an opportunity to answer the allegations made against him. Depending on the circumstances, an employer's failure or refusal to afford a Worker an opportunity to be heard before dismissal may result in the Industrial Court finding that the dismissal was not in accordance with the principles of good industrial relations practices.***

The importance of natural justice and an opportunity to be heard are also appropriately addressed in ILO Convention No. 158 of 1982, Termination of Employment Convention. While I will not go into this Convention here, you may note that Khan P, found that Convention to be one of the best statements of good industrial relations practice.

Megarry J. in *John v Rees*[7] , an English case said: -

> *It may be that there are some who would decry the importance that the Court's attach to the observation of the rules of natural justice. 'When something is obvious,' they say, 'why force everybody to go through the tiresome waste of time in framing charges and giving the opportunity to be heard? The result is obvious from the start.' Those who take this view do not I think, do himself or herself justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.*

[7] (1969) 2 ALL ER at 274

In *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337, the Privy Council (*per* Lord Denning) described the right to be heard as one of the essential characteristics of natural justice. He stated: -

> "*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them … It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."*

The dicta cited from the foreign cases demonstrate that the principles which our Industrial Court upholds are not peculiar to this jurisdiction but are accepted internationally.

Due Process

In a paper titled '*Due Process The Overarching Principle in Industrial Relations Law: Meaning and Effect*' presented by Dr. Leighton Jackson at the Industrial Court's 6th Annual Meet With The Court Symposium, held on May 19, 2018, he listed the following as 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.

Therefore, disputes concerning inadequate investigations; vague allegations such as loss of confidence; unfair or bias in the investigative and/or disciplinary process; indefinite suspension, no opportunity to face one's accusers, would raise questions of due process.[8]

I trust that I have given you enough to whet your appetite on the subject for today and that you will find it helpful in developing or strengthening your HR policies.

Mrs. Heather Seale
President, Industrial Court

September 26, 2025

[8] See TD 349 of 2014 *Oilfields Workers' Trade Union AND Cole and Associates Engineering Safety Systems Limited*, delivered 9th July, 2019; TD NO. GSD-TD 630 OF 2018 *National Union Of Government And Federated Workers And Carib Glassworks Limited* delivered 18th July, 2023