

Dismissal



-The ultimate sanction

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Dismissal

- Defined as **“termination of employment at the initiative of the employer”** – ILO Convention 158 (1982)
- Requires usually (i) Unequivocal intention to terminate *and*
- (ii) Date certain for termination

Consequences of Dismissal

- **Economic** -Loss of worker's major source of wealth
- **Physical** – dyspepsia, hypertension
- **Social** -Loss of friendships and social engagement at work
- **Reputational** -Loss of reputation, status
- **Psychological** --depression, shock

The need for justice

- Demanded by (i)consequences of job loss (ii)recognition of the worker's inalienable right to dignity as a person of independent moral worth and (ii)concern for the right of autonomy of the person to bring meaning to his or her life through work-
- Collins -*Justice in Dismissal*(1992)

Existing forms of Dismissal

- Lawful –neither wrongful nor unfair*
(contrary to statute)
- Constructive Dismissal
- Summary Dismissal
- Retrenchment/Severance/Redundancy

Wrongful Dismissal

- Termination of employment in breach of contract- Common Law phenomenon
- (i) Insufficient notice
- (ii) Inadequate payment in lieu of notice
- (iii) Failure to follow contractual procedure

Wrongful Dismissal(ii)

- (iv) Unjustified summary dismissal
- (v) Constructive dismissal
- *No entitlement of worker to reasons for termination*
- *No entitlement of worker to be heard in his or her defence*

Wrongful Dismissal (iii)

- **Absence of need to state reasons or to give worker an opportunity to be heard means that worker is treated as a commodity and not as a person –**
- **Contrary to worker's right of autonomy to permit employer to rely on an uncommunicated disciplinary code to justify dismissal**

Unfair Dismissal

- Termination of employment contrary to statute
- Traditional unfair dismissal legislation exists in all regional jurisdictions except SKN, Jamaica & T&T although term is used sometimes-see *BIGWU v WITCUCS Ltd.* [TD 50/10 -31/1/2014]
- Other forms of “unfair” dismissal -
- **Trinidad & Tobago** – *“harsh and oppressive or not in keeping with good industrial relations practice...”* –
- **s. 10 (5) Industrial Relations Act, Cap. 88: 01**

Unfair Dismissal (ii)

- **Jamaica** – *“unjustifiable...”*
- **s. 12(5)(c), Labour Relations & Industrial Disputes Act 1975**
- **Antigua & Barbuda*** – *“harsh and oppressive or not in keeping with good industrial relations practice...”*
- **s. 10(5), Industrial Court Act 1976**

Unfair dismissal (iii)

- **Features of the traditional legislations**
- Dismissal must be for a valid and not an invalid reason
- A fair procedure must be undertaken before termination of the worker
- Dismissal must be a not unreasonable sanction in the circumstances

Unfair dismissal (iv)

- Possible remedies of re-employment
- (Reinstatement or re-engagement)
- Compensation in lieu of reinstatement; for loss incurred; basic award; and possible punitive award.

The international labour standards

- **Termination of Employment Convention 158 (1982)**
- **Termination of Employment Recommendation 166 (1982)**
- Ratified by Antigua & Barbuda (2002) and St Lucia (2000) only in the region

Aspects of International labour law

- **(i) There must be a valid reason for termination** –“...connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking...” –Article 4
- **(ii) Worker is entitled to a reasonable period of notice of termination or compensation in lieu unless guilty of serious misconduct** –Article 11

Aspects of international labour law (ii)

- **(iii) Termination must not be for an invalid reason** –*trade union membership and activity; attempt by employee to enforce rights; absence from work during maternity leave; usually proscribed grounds for discrimination* –Article 5
- *Temporary absence from work because of injury or illness* –Article 6

Aspects of international labour law (iii)

- **(iv) Worker must not be terminated for reasons of conduct or performance before he or she is provided an opportunity to defend himself or herself against the allegations made** –Article 7

Aspects of international labour law (iv)

- **(v) Entitlement of worker to appeal decision to terminate to impartial body-** *“...court, labour tribunal, arbitration committee or arbitrator”* – Article 8(1)

- **(vi) Impartial body shall be empowered to examine the reasons given and other circumstances and to render a decision on whether termination was justified** –Article 9(1)

Aspects of international labour law (v)

- **“Burden of proving the existence of a valid reason should not be borne solely by the worker”** – *“...since Employer generally possesses better knowledge of the true reason for termination”* – Article 9(2)

Aspects on international labour law (vi)

- **Worker whose employment has been terminated entitled to (a) a severance allowance or other separation benefits; (b) benefits from unemployment insurance or other forms of social security or (c) a combination of both – Article 12(1)**
- **NB:** A worker justifiably dismissed for serious misconduct may be excluded –Article 12(3)
- Note that re-employment is not mandated as a remedy by the Convention

Aspects of international labour law (vii)

- **Employer contemplating terminations for reason of an economic, technological, structural or similar nature must provide the workers' representatives concerned in good time with relevant information – “reasons..., number and categories of workers concerned and the period over which the terminations are to be carried out” – Article 13**

Aspects of international labour law (viii)

➤ *“Consultations to be held with the workers’ representatives concerned, as early as possible, on measures to be taken to avert or to minimize the terminations, and measures to mitigate the adverse effects of the terminations ...such as finding alternative employment...” –Article 13(2)*

Aspects of international labour law (ix)


➤ **Recommendation 166** –Minimizing measures –*restriction of hiring; natural attrition of the workforce over a period of time; internal transfers; training and retraining; voluntary early retirement; restriction of overtime and reduction of normal hours of work...*
Para. 21

Aspects of international labour law (x)

- **The employer that contemplates terminations for reasons of an economic, technological, structural or similar nature must also notify the competent authority as early as possible [of the matters referred to in Article 13] –Article 14**

Aspects of international labour law (xi)

- Convention 158 permits states to exclude workers on fixed term or fixed task contracts, those serving a period of probation or a qualifying period, casual workers and other limited categories –Article 2(2); (5)
- Convention 158 accepted by ICTT in *BGWU v Home Mortgage Bank* (TD140/1997) and *BGWU v PSATT* (TD15/2000) as evidence of “good industrial relations practice”

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- In Trinidad & Tobago, the “fairness” of a dismissal is exclusively a matter for the Industrial Court and the Court of Appeal:
 - *“...the legislature has provided overarching principles and has emphatically positioned the Industrial Court as guardian of the national standards of what constitutes good industrial relations principles and practices...”*
 - *Per HH Thomas–Felix P in T&TNPC Ltd. v OWTU*



The End

➤ Thank you!