MANAGING SEVERANCE AND RETRENCHMENT:

THE INDUSTRIAL COURT OFTRINIDAD AND TOBAGO STANDARDS

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THE CONTEXT OF REDUNDANCY

Managerial proprietary prerogative

Redundancy is an indispensible aspect of managerial prerogative in a business organisation to promote efficiency, profitability or even survival in response to economic, market or technological changes, involving:

- Reorganisation
- Downsizing
- Out-sourcing
- Business transfers
- Modernisation and Technological changes
- Act of God
- Shortage of materials
- Mechanical breakdowns
- retrenchment

THE CONTEXT OF REDUNDANCY

- Compensation for redundancy was the first employment protection right introduced in British Employment Law in the *Redundancy Payments Act 1965*.

- All countries of the Commonwealth Caribbean have legislation some substantively similar to the British statute which has remained more or less the same. N.B. variations in definitions and levels of compensation. For example, in Barbados it is referred to a severance payment and covers dismissal through natural disaster. In Bahamas and Antigua & Barbuda the existence of unfair dismissal regime colours the operation of the statutory scheme.

SOME COMMONWEALTH CARIBBEAN STATUTES

- Retrenchment and Severance Benefits Act 1985 (T&T)
- The Employment (Termination and Redundancy Payments) Act 1974 (Jamaica)
- Severance Payments Act 1973 (Barbados)
- Employment Act 2001 (The Bahamas)
- Labour Act 1960 (Belize)
- Antigua and Barbuda Labour Code 1975
- Employment Act 2000 (Bermuda)

Managerial Proprietary Prerogative

"The commercial decision that the business needs fewer employees of a particular type rests with the employer, and the tribunal will generally not inquire into whether the employer was reasonable in taking that commercial decision."

Managerial prerogative

Thus:

The employer's motive or good faith is irrelevant

- the court may only look to see if a redundancy situation exists. It may not consider whether it **should** exist.

***Moon v Homeworthy Furniture* [1977] ICR 117**

The employer closed a factory on the grounds that it was not economically viable. The employees wished to contend that the factory should not have been closed. Held, dismissing their appeal from the refusal of the tribunal to consider that question, that there was no jurisdiction to determine whether or not a redundancy situation ought to exist, but only whether it did exist.

Managerial prerogative

Dismissal on the grounds of redundancy does not provide a basis for an action for wrongful dismissal (where reasonable notice is given or payment in lieu of notice), or unfair dismissal (where the correct procedure was followed – such as consultation and notice or a flawed process).

EMPLOYEES' PROPRIETARY INTEREST

- "The aim of redundancy payment has never been to cushion a person over a period of unemployment but rather to recognise an employee's stake in his job." (Lockton 283)

- "[P]rovides a lump sum payment to tide an employee over the period of uncertainty and hardship after dismissal or redundancy."(Bowers 414)

- "A redundancy payment is not, and never has been, intended to be a kind of unemployment benefit, tiding the worker over until a new job is found. It is more of a recognition of past service, or the worker's stake in and contribution to the enterprise." (Pitt 273-4)

EMPLOYEES' PROPRIETARY INTEREST

NUGFWO v The Central Market Agency HC 32/85

RSBA does not take away the right of an employer to retrench; but "simply seeks to cushion the effect and by, introducing certain procedures to encourage negotiation and bargaining, it minimises or reduces, where possible the numbers to be retrenched."

- Per Hamel-Smith J

Limitation to Managerial prerogative

The managerial prerogative should be differentiated from a consideration of whether a redundancy situation actually exists or does not exist.

This arises in two situations:

Limitation to Managerial Prerogative

1. In **pure** unfair dismissal jurisdictions, like The Bahamas and Antigua & Barbuda, dismissal for redundancy when there is none, is statutory *per se* unfair dismissal, which entitles the worker to unfair dismissal compensation which is generally higher than redundancy payment, in addition to his termination emoluments.

In ***Neely v Credit Suisse Trust Ltd*** **BS 2009 SC 12** the employee argued that his dismissal was not a redundancy situation and therefore his dismissal was unfair entitling him to the greater unfair dismissal compensation payment.

Limitation to Managerial Prerogative

In ***Tonge v St. James Club (Antigua) Ltd*** AG 1991 IC 6

The employee filed for compensation for unfair dismissal after he was dismissed on the grounds that he was 'retrenched' following a drop in business. The Industrial Court inquired stating that:

> ***"Now the first question to be answered is whether or not there was a genuine redundancy situation. The evidence does indicate that such was indeed the position."***

Limitation to Managerial Prerogative

"[T]he levels of compensation for unfair dismissal are higher than for redundancy, The redundancy payment is the equivalent of the basic award alone. Thus whereas before 1972 [in the UK], cases involved employees arguing that they were redundant while employer argued they had been dismissed for some other reason, afterwards the position was reversed. Employers were more willing to make the lower redundancy payment … while employees sought to argue that they had been unfairly dismissed."

- G. Pitt *Employment Law* (6th ed Thompson Sweet & Maxwell) 273

Limitation to Managerial Prerogative

Statute however sometimes does not invalidate the dismissal on the grounds of redundancy proclaimed by the employer but grants the employee compensation for unfair dismissal.

- The Antigua & Barbuda Labour Code -proviso to s.C60(1) provides that a dismissal should be deemed to be **unfair** if there is no factual basis for the claimed redundancy.
- Bahamas Employment Act s 37 which provides that dismissal for redundancy is unfair if the circumstances constituting the redundancy applied equally to one or more employees who held similar positions similar and who have not been dismissed.

Limitation to Managerial Prerogative

In ***Antigua Village Condo Corporation v Watt*** AG 1994 CA 2

The EC Court of Appeal upheld the finding of the Industrial Court that since redundancy was the reason assigned by the employer for the employee's dismissal for which there was no factual basis, in that the tasks which the respondent was employed to perform continued to exist, the Industrial Court was justified in concluding that the dismissal of the respondent was unfair.

- In ***Neely v Credit Suisse Trust Ltd*** BS 2009 SC 12

  The Supreme Court of Bahamas held that there was no redundancy were the requirement for employees, not necessarily the work, has ceased or diminished or was expected to cease or diminish

RETRENCHMENT AND SEVERANCE BENEFITS ACT (RSBA)

Trade disputes arising out of retrenchment

23(1) A dispute arising out of a retrenchment issue including-

(a) a dispute which alleges **unfair dismissal**;

(b) a difference of opinion as to the **reasonableness or otherwise of any action taken or not taken** by an employer or a worker; or

(c) a dispute as to what is reasonably comparable in respect of a terminal benefit scheme, may be reported to the Minister as a trade dispute and shall be dealt which as such under the Industrial Relations Act

Limitation to Managerial Prerogative

2. In non-unfair dismissal jurisdictions, and 'semi-unfair' dismissal states like Jamaica, the employee would want to show that he was dismissed for redundancy which would entitle him to redundancy payments in addition to other termination emoluments.

Computer and Controls (Ja) Ltd v Sadder JM 2008 CA 18. -- The employee resigned when he was offered a package by the new company which he did not like and contended that he was entitled to redundancy even though he continued to work as a consultant for the firm doing much the same job.

Limitation to Managerial Prerogative

In these situations also, the court will also inquire if there is in fact a redundancy where the management contends that it is merely a re-organisation within the managerial prerogative.

Haye v Fiscal Services (EDP) Ltd *JM 2001 CA 22*

Employee's 3-year contract terminated by 3 months' notice pursuant to the contract after re-organisational changes and the resulting effect on responsibilities and reporting. The CA reversing the lower court held that this was a redundancy as the employee "demonstrated that no one else was employed in the department for approximately one year. Before the appellant's dismissal the number of employees was reduced from 9 to 1. He is therefore entitled to [payment] for redundancy as claimed."

Statutory Procedures for Managing Redundancy

- However note that provision of labour codes such as the Jamaica Labour Relations Code may makes provision for certain procedures in relation to a decision to dismiss workers on the grounds of redundancy. These codes are "a road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships." - ***Village Resorts Ltd v The IDT*** **per Rattray P**
- "The Code through its sections dealing with its purpose and responsibilities of employers, workers, and the Unions establishes the environment in which it envisages that the relationships and communications between these parties should operate for the peaceful solutions of conflicts, which are bound to develop." ***Jamaica Flour Mills Ltd v IDT*** **JM 2003 CV 24 per Forte P**

Statutory Procedures for Managing Redundancy

Jamaica Labour Relations Code provides, in pertinent part,:

s 11 "Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency:-

(i) provide continuity of employment, implementing where practicable, pension and medical schemes;

(ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies

(iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies

(iv) Actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit."

Statutory Procedures for Managing Redundancy

- While not legally binding failure to follow the procedures can be taken into account by the Tribunal determining the dispute.
- In ***Jamaica Flour Mills case*** three workers were dismissed on the grounds of redundancy, without any previous communication or any notice that they were to be made redundant. The IDT while not questioning the redundancy held that the dismissal was 'unjustifiable' and ordered reinstatement. "it was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feeling of the workers. This is indeed aggravated when one considers their years of service involved."This decision was upheld by the CA and the PC.

STRATEGIC RESPONSES TO ECONOMIC PRESSURES

These managerial maneuvers negatively affect the workforce as a factor of production and may involve

- Redundancy
- Adjustment in terms and conditions of employment
- Re-deployment
- Early retirement
- Voluntary redundancy

STRATEGIC RESPONSES TO ECONOMIC PRESSURES

CHANGING HOURS	REPLACING EMPLOYEES	REORGANISATION FOR EFFICIENCY
CHANGING JOB DESCRIPTION	CHANGING PERKS	OUTSOURCING

DEFINITION OF REDUNDANCY

s 5(2) An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-

(a) the fact that his employer has ceased or intends to cease to-

(i) to carry on the business for the purposes of which the employee was employed by him; or

(ii) to carry on that business in the place where the employee was so employed

(b) the fact that the requirements of that business

(i) for employees to carry out work of a particular kind; or

(ii) For employees to carry out work of a particular kind in the place where he was so employed

has ceased or diminished or are expected to cease or diminish

DEFINITION OF REDUNDANCY

- **Note** Antigua & Barbuda

'**Redundancy**' means a situation in which, by virtue of

a lack of customers' orders,

retrenchment,

the installation of labour-saving machinery,

an employer's going out of business,

a force majeure, or

any other reason,

tasks which a person was last employed to perform, no longer exist.'

- s. C3 **Antigua Labour Code 1975**

DEFINITION OF REDUNDANCY

- **Trinidad & Tobago**
  - **Retrenchment and Severance Benefits Act 1985**

- s.2

"**Redundancy**" means the existence of surplus labour in an undertaking for whatever cause

"**Retrenchment**" means the termination of employment of a worker at the initiative of an employer for the reason of redundancy

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DEFINITION OF REDUNDANCY

- **Trinidad & Tobago**

Commercial Finance Co Ltd (in liquidation) v Ramsinh-Mahabir (1994) 45 WIR 447 (PC)– *" 'retrenchment' means termination for the reason of redundancy, and 'redundancy' means the existence of surplus labour in an undertaking for whatever cause. It does not apply to the termination of employment simply because the business has ceased to exist. Retrenchment contemplates that the business will continue in existence but that there are too many workers for the purposes of the business so that some have to be made redundant. Moreover, termination of a worker's employment has to be at the initiative of the employer. Termination by operation of law, following a compulsory winding up…, is not a termination at the initiative of the employer."(452)*

DEFINITION OF REDUNDANCY

- All writers agree that the concept of excess or surplus labour is the most difficult in the statutory definition.
  - The fact that the
    1. **requirements of that business**
    2. **for employees**
    3. **to carry out work of a particular kind…**
    4. **have ceased or diminished**

This is because it skates the boundary of the employer's prerogative to reorganise its business to increase efficiency.

RSBA PROCEDURE

SECTIONS 4 ET SEQ OF THE RSBA provides for the procedures to be followed in the event of a redundancy. Includes:

- Formal notice (where retrenchment fewer than five)
- Consultation with regard to a solution
- Minister's intervention
- Time off to seek alternative employment

IRA + RSBA PROCEDURE

- THE IRA, HOWEVER, PROVIDES A STRONGER BASIS FOR EFFECTIVE MANAGING SEVERANCE AND RETRENCHMENT

- GOVERNED BY THE CONCEPT OF GOOD INDUSTRIAL RELATIONS PRACTICE FOUND IN THE INDUSTRIAL RELATIONS ACT (IRA) AND THE PROCESS OF FINDING THAT THE DISMISSAL WAS HARSH AND OPPRESSIVE

- DETERMINING MATTERS IN RELATION TO EQUITY AND GOOD CONSCIENCE

IRA + RSBA PROCEDURE

The RSBA therefore places no limitation on the employer's right to choose and apply the criteria used in the selection of the workers to be retrenched, Additionally, the RSBA places no limitation on the employer's right to decide when the redundancy should occur or who should be retrenched. Absent any such limitation, PCS was free to implement its redundancy as long as it did not do so in breach of the principles of good industrial relations practices or in furtherance of some improper or ulterior motive, like eliminating a particular employee unfairly. In fact, it is this Court's responsibility pursuant to s10(3)(b) of the Act in hearing and determining the dispute to "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"

IRA + RSBA PROCEDURE

"This means that although managerial judgments must be respected, their bases are subject to examination. Professer Weiler in *UAW v Kysor of Ridgetown Ltd* (1967) 18 LAC 382, 389, sets out the requisite standard. Professor Weiler stated:

> "…the employer's initial decision is certainly not completely untrammelled and unreviewable. The judgment of the company must, first, be honest and unbiased and not actuated by any malice or ill-will directed at the particular employee…second, the managerial decision must be one which a reasonable employer could hae reached in the light of the facts available."

In order to meet this standard, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can best be objectively checked against such things as the attendance record, efficiency at the job, sill-set, qualification, seniority and experience.

"Fairly dismissed on the ground of redundancy"

OWTU v PCS Nitrogen TD 93/02

"If the Company's evidence discloses that circumstances made it inevitable that some employees must be dismissed, it is still necessary to consider the means whereby each of the 22 workers was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose that employee rather than some other employee, for dismissal. The HRM, and by extension, the employer must satisfy the Court that the dismissal of the 22 workers lay within the range of conduct which a reasonable employer would have adopted."

"Fairly dismissed on the ground of redundancy"

OWTU v PCS Nitrogen TD 93/02

- Bona fides of retrenchment – no surplus labour to the requirements of the company
- Breach of good industrial relations practice – by failing to ascertain whether instead of dismissing for redundancy, offer alternative employment rather than hire contract employees
- Failure to retrain to fill other positions based on ability of other workers
- FILO principle – selection for dismissal – redundancy procedure of the company/collective agreement (?)
- Failure to give warning of redundancy so employees can take early steps to inform themselves of relevant facts and consider alternative solutions or employment
- Failure to consult – so as to provide solution short of dismissal

FIRST IN LAST OUT

NUGFWO v The Central Market Agency HC 32/85

"We prefer the view advanced by those who hold that workers invest a part of themselves in their jobs and as a matter of fairness this investment should not be arbitrarily or unjustly expunged. The Court in TD 23,24/90 TIWU v PTSC (delivered on April 29, 1999) agrees and said:

> The application of the LIFO principle is a right which every worker enjoys in respect of retrenchment and which prevents him from being unfairly retrenched."

There can be no doubt that LIFO is the single most objective criterion used in redundancy. It goes without saying, therefore, that as a matter of comity and the interests of orderly and good industrial relations, it is undesirable for us to depart from that principle, without justification. Accordingly, the employer bears the burden of proving on the balance of probabilities, two issues: firstly why the skill, ability and merit factors were given greater weight (or all weight) than the seniority factor n retaining the less senior employee n the same position. Secondly, the employer must demonstrate that the less senior employee retained, has a clear advantage over each of the retrenched workers on the basis of skill, ability and merit."

The Company's Evaluation of the Skill, ability and Merit of the workers

The company must prove on the balance of probabilities whether there is a significant difference between the skill, ability and merit of the 11 retrenched workers and those retained.

- Testimony of managers/supervisors
- Performance evaluation
- Tests to be used in measuring skill, ability and merit

Based on the failure of the Company to produce evidence, the Court held that the dismissal of the 11 workers by reason of redundancy was arbitrary, capricious and inconsistent with the principles and practices of good industrial relations.

Training

- There was no requirement that the HR Department keep copies of training certificates
- Certificates found were considered and points conferred to the employee's advantage

"Clearly this action was arbitrary, discriminatory and accordingly inconsistent with the principles of good industrial relations practice."

"But there was more. Boochoon said points were awarded to employees regarding those training courses which were 'relevant and necessary' to the job. We reject this explanation on the ground of unfairness since the employee relies on the good faith of his supervisor in recommending him for training which is consistent with the Company's strategic plans. The fact that some training was not consistent with the Company's strategic plans is a reflection of the performance of the management team – not the employee. These employees were therefore disadvantaged in the selection process in so far as training was a consideration.

Natural Justice- Consultation/Representation/Warning

"The evidence disclosed that PCS failed either to warn workers of the pending redundancy or to consult them. No information was given to the workers. Accordingly, we find that the retrenchment of the workers who previously occupied positions listed in pools #1 and 3 was carried out in contravention of the principles of good industrial relations practice and tantamount to their being unfairly dismissed."

Natural Justice- Consultation/Representation/Warning

"Consultation (as opposed to unilateral action by the Employer) is one of the pillars of modern industrial relations practice and requires an employer to be candid and forthright with his employees. Good industrial relations practice in the ordinary sense requires consultation with the selected workers so that the employer may find out whether the needs of the business can be met in some way other than by dismissal and, if not, what other steps the employer can take to mitigate the blow to the worker."

"In this case, had there been consultation with the selected workers, they would have had the opportunity to make proper representation as to why they should not be selected for retrenchment by providing information and documentary evidence, on the skills and training acquired at TTUC, Fertrin and Arcadian."