INDUSTRIAL COURT
of Trinidad and Tobago

Keynote Address

by

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'Striking a Balance: Management Prerogatives vs Employee Rights in the Age of Workplace Flexibility'

at the

Employers Solution Centre
Landmark Court Judgments: A Retrospective: 2020 - 2023

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I thank you for your invitation to address you on Striking a Balance: Management Prerogatives vs Employee rights in the Age of Workplace Flexibility'

Introduction

When we look at the history of the world of work and workplace relationships, it is fair to say that its origins have been in opposing or adversarial needs, competing interests. This is true or factual whether we are considering systems from which we have emerged in the Caribbean, like the plantation system or the feudal system that existed in medieval Europe. In preparing this address, I recalled that the late Lloyd Best when lecturing to his first year students in Economics would constantly remind us when studying Economics, we were actually studying phenomenon but through the lens of economics.

Similarly, it is my view that when looking at Management Prerogatives and Employee rights it is not so much that they are really diametrically opposed but it is the lens through which we are looking at what is essentially, workplace interactions, that may lead us to that conclusion. I believe you may agree with me as I delve into the subject of Management's prerogative versus employee rights, that it is akin to looking at two sides of the same coin. Whether looking at the unfettered or unreasonable exercise of management's prerogative or the unrestrained exertion of employee rights, both can lead to labour unrest and social instability.

Chattel slavery and its deleterious socio-economic and psychological effects was an extreme example of unfettered management prerogative. On the other side, the exuberant use of the strike as a weapon, can have a major impact on the economy, as evidenced in our own society. We need look no further than the five year period 1960 to 1964, when there were 230 strikes, an average of 46 per year resulting in a total of 803,899 man-days lost, an annual average of 100,000 man days per year.[1]

[1] See Speech of Prime Minister, Dr. Eric Williams , on the second Reading of the Industrial Stabilisation Bill, 1965 in the House of Representatives-Trinidad and Tobago Hansard dated March 18, 1965, referred to in Khan, Addison M, *The Law of Labour and Employment Disputes in Trinidad and Tobago*, 2006, Derwent Press, p7 England

When viewed in this way, therefore, whether in the more traditional workplace model or in the newer paradigm shift to flexible working arrangements, it is really the way in which management's prerogatives or rights and employee or worker's rights are exercised that makes the difference.

To ensure that we are all singing from the same song sheet, I will define Management prerogative or management right, which I will use interchangeably and highlight some key principles from decided cases of the Industrial Court. The dicta in those cases would show the interconnection between Management's right and that of employees. I will devote some time to the rights of workers.

Finally, since the Court has not yet built up a substantial body of decisions in the area of flexible working arrangements, I will point to certain challenges experienced in other jurisdictions in which such working arrangements are prevalent and from which we appreciate the issues that can arise in those circumstances.

Management Prerogative/ Right

What is a management prerogative or right?

Management (or managerial) prerogative refers to the right of management to take and act upon decisions affecting the business or organisation. The scope of management prerogative is broad, from the level of product or service strategy to day-to-day operational issues. It is bounded by legal regulation, collective bargaining and other agreements with employees and their representatives. Such boundaries need not fundamentally challenge management prerogative, but rather subject the process of decision-making to a requirement to acknowledge the interests of other stakeholders, including employees. [Eurofound (2007), *Management prerogative*, European Industrial Relations Dictionary, Dublin]

Management prerogatives run the full range from hiring to firing. What is important however, from the judicial perspective is how Management exercises its prerogative.

Permit me to highlight dicta from some of the Industrial Court's judgments which in some cases have referred to other jurisdictions.

In **ICA 8 of 1995 between Bank Employees Union and Republic Bank Limited**, dated July 31,1995, His Honour Mr. Elcock said of management rights:-

> "*These rights are invariably mentioned in collective agreements between employers and unions, but they could just as easily be omitted, for they are not derived from or conferred by such agreements. Rather they are inherent in the very fabric of employer-employee relationships. They are the unwritten and unspoken part of every contract of employment, and indeed they came into being on the very first day that one human being engaged another in a contract of service."*[2]

Of the use of these rights he said:-

> *"…. the governing criterion should be one of reasonableness, but …what is reasonable in that respect depends entirely on the particular right or prerogative of management under scrutiny and equally so, on the nature of the employment that is under consideration."*
>
> He further noted that:-
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> *"…. there are still one or two remaining management rights which are largely unfettered and will no doubt always remain so in societies that have a proper regard for the rights and freedoms of the individual. These include the right to start up a business and as a corollary the right to close down that business. And reasonableness in relation to the latter right can only mean that an employer must pay to his displaced former employees the terminal benefits due to them by law.*

[2] Pp 8,9,10

…. And here we state quite clearly and categorically that the exercise of such management rights must strictly be subject to reasonableness and … the principles and practices of good industrial relations."

The Court has considered in a number of cases, various rights of management and their fair and just use. These include, Management's right to hire and fire, the right to discipline to restructure its organisation and to appoint and promote its employees.

Management's Prerogative to Discipline

Under Management's prerogative to discipline, it is accepted that generally a reasonable exercise of Management's right would be to engage in progressive discipline, starting with warnings, suspension and ultimately dismissal.

Suspension

A decision to suspend is management's prerogative however, the worker should be given the reason for his or her suspension as well as an opportunity to respond to those reasons. The terms of the suspension, that is, with or without pay and length of suspension should be clearly stated. Generally, an investigative suspension should be with pay, unless there is a collective agreement or terms of employment that provide otherwise. (See **Trade Dispute No. 274 of 2007 between *Public Services Association and Trinidad and Tobago Association for the Hearing Impaired,*** dated February 27, 2015*)*

The Court has held that certain basic principles of good industrial relations practice are as applicable in cases of suspension as in dismissal. [3]

Suspensions are temporary by definition. Accordingly, an indefinite suspension is unlawful and may also give rise to a personal grievance for an unjustified dismissal.

[3] See Trade Dispute 2 of 2001 between ***Banking Insurance and General Workers' Union v Hindu Credit Union Cooperative Society Limited delivered on July 31, 2001 for exposition of these principles***

Moreover, it is impossible as a matter of good industrial relations practice for an employer to indefinitely suspend an employee merely because the employer seeks to investigate the claim against the employee. (See **Trade Dispute No. 25 of 2008 Amalgamated Workers Union v Chief Personnel Officer** dated November 9, 2012.)

Where the suspension is pre-emptive or to facilitate an investigation, such investigation should proceed with despatch and the worker should be made aware within a reasonable time of the reason for the suspension, in what regard he is being subjected to investigation and be afforded an opportunity to make representation. At the conclusion of the investigation the worker should be informed of the results, whether he is cleared of any suspicion in wrongdoing or if not then reasonable particulars of alleged defaults are to be given him as well as the opportunity to address the allegations**.** (See ESD TD No 51 of 2001 *Communication, Transport and General Workers' Trade Union v BWIA West Indian Airways Limited dated June 22, 2004*)

Dismissal

Now I turn to the much-traversed area of dismissals. In **TD No. 143 of 2020 (S) between Steel Workers' Union of Trinidad and Tobago and National Gas Company of Trinidad and Tobago Limited**, dated July 26, 2022 which will be the subject of a presentation later today, the Court at page 24 of the judgment cited *Fernandes (Distillers) Ltd v. Transport and Industrial Workers' Union* **[1968] 13 W.I.R. 336, (1965-75) 1 T.T.I.C.R. 133,** in which Wooding CJ, considered a line of cases from the Commission set up by the New South Wales *Industrial Arbitration Act*. He noted:-

> "1. *An Employer's right to dismiss is as fundamental in the relationship of employer and employee as is the right of an employee to leave his employment.*
>
> …
>
> *3. It is not the province of the Commission [or the Court] to take over the functions of the employer or to say whether, if it had sole control of the*

business, it would have dismissed the employee in the circumstances or to substitute its own opinion for the employer's; that also is a cardinal or fundamental proposition; the mere fact that the Commission might disagree as to the propriety of any particular dismissal is not in itself sufficient to justify intervention.

In keeping with our own legislation, the *Industrial Relations Act*, Chapter 88:01, provides that all dismissals are subject to the principles and practices of good industrial relations. The Court has pronounced on these principles and practices of good industrial relations in a number of decisions, notable among them, Trade Dispute No. 140 of 1997, *Bank and General Workers' Union v. Home Mortgage Bank* dated March 3, 1998 and **Trade Dispute No. 2 of 2001, Banking Insurance and General Workers' Union v. Hindu Credit Union Co-operative Society Limited** dated July 31, 2001. 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
d. The opportunity is to be given before the decision to dismiss is made.

ILO Convention C158 *Termination of Employment Convention*, 1982 has long been accepted by the Court as one of the best statements of good industrial relations practice. Articles 4 to 7 of C158 provide for a valid reason for termination connected with the capacity or conduct of the worker or based on the operational requirements of the

undertaking, establishment or service. Union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; seeking office as, or acting or having acted in the capacity of a workers' representative; 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; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave; temporary absence from work because of illness or injury do not constitute a valid reason for termination. A worker should not be terminated for reasons related to his 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.

Summary Dismissal

Generally, summary dismissal, is not a reasonable exercise of Management's prerogative. The Court has made it clear in its rulings that where the dismissal was effected summarily the employer must establish firstly, that exceptional circumstances exist such that he could not have been expected to allow the worker an opportunity to be heard and secondly, if even if he had done so it would have made no difference to the outcome. *(*See **TD. 15 of 2000 Bank and General Workers' Union and Public Service Association of Trinidad and Tobago** dated April 27, 2001*)*

In **TD No. 101 of 1992 between Communication Workers' Union and Busy Business and Equipment Limited** delivered on 28th June 1994 by His Honour Mr. Addison Khan, former President stated at page 2:-

> "*It is well known in industrial relations practices that there are varying degrees of dissatisfaction with worker's services. For summary dismissal to result, there must be dissatisfaction of a very serious nature and the Company must have taken steps to bring the dissatisfaction to the worker's notice and allow a worker an opportunity to correct any deficiencies. There is also the matter of progressive disciplinary action. Summary dismissal is rarely justified where a worker has not been told beforehand of his*

shortcomings in performance and given an opportunity to improve his performance.

In accordance with the principles of good industrial relations practices a system of progressive discipline is considered more appropriate and should normally be utilized to discipline poor performers."

Restructuring and Retrenchment

How does the Court view the use of Management rights in cases of retrenchment and restructuring?

In **TD No. 4 of 1991 between Transport and Industrial Workers' Union and Trinidad Distributors Limited**,[4] His Honour Mr. Elcock examined the issues of restructuring and retrenchment as a management prerogative at page 20 of his judgment:

"… we are fully cognisant of the fact that employers are free and entitled to organize and/or reorganize and/or restructure their business operations as they see fit, this being one of the rights and prerogatives of management that are expressly recognised by law. We would also say that where an employer chooses to reorganize or restructure his business to any appreciable degree it is usually extremely difficult for an outsider, be it a Union or a Court, to successfully challenge the genuineness of the resultant reorganization. However, where the reorganization or restructuring appears to be quite superficial, in choosing as it does the mere reallocation of storage space for goods and the redeployment of managers it is in our opinion, incumbent upon an employer to furnish an aggrieved worker (and consequently to this Court) a much more convincing and satisfactory explanation."

[4]Dated July 10, 1992

In **TD No. 43 of 2001 between Oilfields Workers' Trade Union and Trinidad and Tobago National Petroleum Company Limited**, dated October 24, 2011, Her Honour Ms. Mahabir considered the principle of retrenchment as a management prerogative. She stated[5]:-

> *"It is not disputed that retrenchment is a valid management prerogative. It is however, subject to faithful compliance with the substantive and procedural requirements laid down by the RSBA, jurisprudence and the principles of good industrial relations practices. The right of an employer to dismiss an employee differs from and should not be confused with the manner in which such a right is exercised. It is incumbent that an employer exercises its* prerogative *to retrench employees in good faith for the advancement of its interest (for instance to restructure for efficiency) and not to defeat or circumvent the employees right to work and thereby earn a livelihood."*

She stressed that the Employer must ensure that they follow the procedures set in the RSBA and engage in behaviours that are consistent with the principles of good industrial relations practice, including consultation, the consideration of alternatives and a fair selection process. Furthermore, she opined that for the redundancy process to be considered procedurally fair, then all actions taken must meet the principles of natural justice, including a decision free from bias and predetermination. [6]

In the post COVID-19 pandemic era, there has been some challenge of Management's prerogative to restructure and reorganise its operations as well as to lay off and retrench its workers. One such case is **Trade Dispute GSD-TD 190 of 2021 between Communication Workers' Union and Mitchell's Service Station Limited** dated March 21, 2024, a trade dispute involving layoff and eventual termination of employment. At page 9 of the judgment the Court had regard to dicta in Complaint **GSD-IRO 031 of 2015**

[5] Pp 14-15

[6] Mitchell, D. 1992 –"The burgeoning of fairness in the law relating to redundancy." Auckland University Law Review, 7,897-930).

between Steel Workers Trade Union of Trinidad and Tobago and ArcelorMittal dated March 10, 2016, by then President Thomas-Felix, in which the Court opined:-

> *"We do not question the managerial prerogative which a company has to organize and reorganize its business but this must be balanced with the right of the worker to job security, equity and fairness and above all to the processes that are laid down by the various legal principles, especially the provisions of the I.R.A. which mandate the adherence to the principles and practices of good industrial relations as that term has come to be understood."*

The Court ruled against the Employer who had extended a period of layoff without consulting the worker, and drastically and unilaterally reduced the Worker's hours of work. The Court found in favour of the Union and awarded compensation to the Worker who had seventeen years' service.

In Trade Dispute **GSD-TD 106 of 2022 National Union of Government and Federated Workers and Universal Restaurant and Bar** dated May 3, 2024, another case of layoff of workers, the Court accepted the impact of COVID 19 on the employer's operations. However, in that case which involved three workers, they remained on layoff even after the business re-opened and despite repeated enquiries over a five-week period they were not called back to work but they saw others return to work. The Union argued that Management's failure to communicate, explain and recall the employees after the bar re-opened was tantamount to constructive dismissal.

You may be wondering if the Court never finds that Management has exercised its prerogative reasonably, as in the cases highlighted, they were found to have done otherwise. I can assure you that where they do, in some of those cases, they may have been dismissed and be the subject of extempore or oral judgments.

Appointments and Promotions as Management's Prerogative

The Court has repeatedly said that it will not usurp the functions of management in making appointments or promotions. However, it has also stated with the same regularity that the exception to the rule is that there is a manifest injustice or where there is some compelling reason for the Court to intervene in the interest of equity fairness and good industrial relations, then the Court will not hesitate to do so.[7] In Trade Dispute **No. 236 of 1986 between Seamen and Waterfront Workers' Trade Union and Port Authority of Trinidad and Tobago**, dated December 5, 1989, the Court asserted at page 5 of the judgment that it will not impede the decision of the employer to select his employees, however, it must be done in a fair manner:-

> *"...it is not the function of this Court to deprive an employer of his right to choose his own employees. It is not within the province of this Court to take over, the functions of the employer in relation to the selection of his employees. This Court will only interfere with an employer's decision concerning the promotion of his employees in exceptional circumstances and only if a strong case is made out justifying its intervention. It will intervene only where its intervention is necessary to protect an employee against an unjust or unfair exercise of the employer's right or where the employer's action is harsh or oppressive or not in accordance with the principles of good industrial relations practice**."***

In Trade Dispute No. 205 of 1977 Texaco Trinidad Inc. and the Oilfields Workers' Trade Union, dated May 17,1978, the Court posited at page 2 of the judgment that appointments as a management prerogative must be exercised in a reasonable manner:-

> ***"While appointments are within the prerogative of management, yet they cannot exercise those rights unreasonably to the prejudice and disadvantage of any of the workers. The worker has the right to complain if he has been wrongly by-passed. The purpose of this Court is to try to right injustice where injustice has been done. It is not a***

[7] Trade Dispute No. 52 of 1993 between ***Transport Industrial Workers Union and National Maintenance Training and Security Company Ltd***.

question of interference of management's prerogative but rather a matter of justice to the worker."

Management Prerogative in Determining Method of Work

In an interesting and somewhat unusual case, the Court pronounced on management's right regarding the method of work. In **TD No. 105A of 1969 between Halliburton Tucker Limited and Oilfields Workers' Trade Union** dated April 13, 1971, His Honour Mr. Braithwaite, then Vice-President, stated at page 6 of his judgment the following on the issue of management prerogatives:-

> *"We find it rather startling and disappointing that this proposition could be advanced to us that an employer's prerogative entitles him to alter unilaterally at his whim and fancy the methods under which work is carried out in his establishment. It seems to us to take no account whatsoever of the course and practice of industrial relations or the elementary principles of industrial psychology, social psychology or individual psychology for that matter. We reject this and support the contention of the Union that when an industrial agreement governing the terms and conditions of employees is entered into, an employer is certainly not acting properly if he proceeded to unilaterally make material changes in the methods used in the performance of work covered by such an agreement.*
>
> *We are satisfied from the evidence that the introduction of a sandblasting machine into the work of spray painting was a major and drastic change in the circumstances under which Lynch had been working for ten years. We consider that since the question whether it was right that he should be called upon to do sandblasting was under discussion between the Union and the Company, it was improper of the Bulk Plant Superintendent, while that state of affairs was admittedly within his knowledge, to order Lynch to use the sandblasting machine. We consider that the Company was wrong in any event to issue such an order and in the event unilaterally make such a drastic and material change in the content of his work."*

Of note is that in accordance with section 60 of the IRA, Management does have the right to lockout workers in accordance with the said section.

Employees/Workers Rights

I now turn to Employee or Workers rights. Employees or workers in Trinidad and Tobago are not afforded the Constitutional right to work, as is the case in Guyana[8]. Instead, the rights of workers in Trinidad and Tobago are derived from the IRA, and other legislation including the *Retrenchment and Severance Benefits Act*, (RSBA), Chapter 88:13, the *Maternity Protection Act*, Chapter 45:57, The *Minimum Wages Act* and the *Occupational Safety and Health Act*, Chapter 88:08, which govern workplace relations. The overarching principle as stated in the IRA is for workplace relations between Management and workers to be conducted in accordance with the principles and practices of good industrial relations. Therefore, broadly speaking, all of management prerogatives give rise to corresponding rights to workers if exercised contrary to reasonableness and good industrial relations principles and practices.

Some specific employee rights include, the right to strike in accordance with IRA, except for prohibited classes of employees, the right to join a Union of their choice, guaranteed by the Constitution as the right to association. Regrettably, this right seems to be lost on some employers. ILO, C087, a Convention that this country has ratified since 1963 also guarantees this right.

Foremost among the rights of workers, in dismissals and generally in all disciplinary matters, is the right to be heard before disciplinary action is taken. After a decision is taken, an employee has the right to be heard in mitigation, there should be a right of appeal against the decision, reasons for the dismissal, preferably in writing should be given.[9] The Court of Appeal in **Civil Appeal No. P013 of 2018, Public Services**

[8] Pursuant to Article 22 of the Constitution, every citizen has the right to work and its free selection in accordance with social requirements and personal qualifications.

[9] See ***TD No. 130 of 1994 between Association of Technical and Administrative and Supervisory Staff and Caroni 1975 Limited*** delivered on 17th June 1996 by His Honour Mr. Addison M. Khan, where he underscored the importance that the employee must be given a fair opportunity to be heard before any dismissal action can be taken at pp 36 -37

Association v Water and Sewerage Authority dated October 31, 2023, remitted a matter to the Industrial Court to consider submissions on the issue of mitigation and whether the omission of WASA to hear the worker in that case, before the imposition of the penalty rendered the dismissal harsh and oppressive or contrary to the principles of good industrial relations or not.[10]

In retrenchment matters, retrenchment should be done in accordance with the provisions of the RSBA, and/or a collective agreement where the benefits thereunder are greater than those in the RSBA. Last In First Out (LIFO) all things being equal, alternative employment where possible and generally consultation prior to decision to retrench are all in keeping with the principles of good industrial relations practice in such cases.

In cases of maternity, workers are entitled to the statutory provisions under the Maternity Protection Act. Included in these benefits are maternity leave of 14 weeks, and the right to return to work after that leave in the same position. However, workers do not always receive their just due. **In MPD 3/04 National Union of Domestic Employees** and **High Place Enterprises Limited** dated April 11, 2005, the Court addressed maternity benefits. The worker left her former job, (where she worked for eleven years) to become Foreman of a company which managed one of the CEPEP programmes. She was promised permanent employment, a higher salary and two weeks' vacation leave; she assumed duty in September, 2002. In 2003, she became pregnant. She submitted a report stating her pregnancy, and her fitness report to continue work. The Employer responded that she would have to cease working with effect from 13.06.03 during her pregnancy, owing to the nature of the work. During her maternity leave she sent Maternity Leave forms to her employer to be filled out but on two occasions they were returned to her riddled with errors. The National Insurance Board rejected them because of the said errors. She was therefore deprived of maternity benefits during her maternity leave. When she submitted a fitness report at the end of her maternity leave, she was told in writing that, the position was temporary, and there were no vacancies for Foreman available.

[10] See p 31 of the judgment

The Court declared that in the absence of a collective agreement, the duty of the employer was to practice good industrial relations to adhere to the existing laws, the Industrial Relations Act, the Maternity Protection Act, and the National Insurance Act. To those Acts, we now add, the OSH Act. The Court found that the employer's actions were harsh, oppressive, and contrary to good industrial relations practices. It therefore ordered compensation and damages in the sum of $70,000.00.

Workplace Flexibility

There is currently no universal definition of Flexitime. It is sometimes referred to as flex time, remote work or tele work or teleworking. In a 'Health and Safe Technical Brief' prepared by the World Health Organisation (WHO) and the International Labour Organisation (ILO) in 2021, **Telework is defined** as:-

- the use of information and communications technology (ICT) – such as desktop computers, laptops, tablets and smartphones – for work that is performed outside the employer's premises. This includes work performed from home, a satellite office or another location.
- "Hybrid" work is a combination of telework and work on the employer's premises.

Characteristics of telework:-

- work that is fully or partly carried out at a location other than the default place of work, and the use of electronic devices such as a computer, tablet or telephone to perform work.

Currently, there is no legislation expressly providing for flexitime and remote work in this jurisdiction. In its absence, issues of occupational safety and health in such cases will be subject to the *Occupational Safety and Health Act*, Chapter 88:08, where applicable or other general legislation protecting the rights of workers such as the *Industrial Relations Act* 88:01, the *Maternity Protection Act*, Ch. 45:57, *Workmen's Compensation Act*, Ch. 88:05.

However, Managers may wish to pay close attention to the following definitions at section 4 of the *Occupational Safety and Health Act,* which I suggest are broad enough to cater to remote work:-

> "employee" means any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing or partly oral and partly in writing, and includes public officers, the protective services and teachers;
>
> "employer" means a person who employs persons for the purpose of carrying out any trade, business, profession, office, vocation or apprenticeship;
>
> "industrial establishment" means a factory, shop, office, place of work or other premises but does not include—
>
> premises occupied for residential purposes only; or (b) other categories of establishment exempted by the Minister in accordance with this Act.
>
> "workroom" means a room in which an employee is required to work;
>
> "premises" includes any place, and, in particular— (a) any vehicle, vessel, aircraft or hovercraft; ….

In addition, employers have a common law duty to take reasonable care for the safety of their employees during the course of their employment, including a duty to provide competent staff, proper plant and equipment, a safe place of work and a safe system of work.

A useful document which I am sure you are aware of and which gives some guidance on the use of Management prerogative in flexible work arrangements is the Industrial Relations Advisory Committee's document ***'POLICY GUIDELINES ON REMOTE WORK IN TRINIDAD & TOBAGO' ABSTRACT***[11] Making Remote Working Work! Which was a response to the COVID-19 Pandemic.

[11] Industrial Relations Advisory Committee June 2020 Revised on 19 August, 2020.

Currently, there is Guidance on the exercise of Management prerogative in ILO Convention on *Occupational Safety and Health,* 1981. Those employing teleworkers should develop programmes to promote healthy and safe telework. and safety; workstation, computer and peripheral equipment, and remote ICT support.

International Labour Organisation. C177 - Home Work Convention, 1996, while not catering specifically for teleworkers can give some insight into the reasonable treatment of issues affecting teleworkers, specifically at Article 4, 2 which provides:-

> 2. Equality of treatment shall be promoted, in particular, in relation to:
>
> – (a) the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations;
>
> – (b) protection against discrimination in employment and occupation;
>
> – (c) protection in the field of occupational safety and health;
>
> – (d) remuneration;
>
> – (e) statutory social security protection;
>
> – (f) access to training;
>
> – (g) minimum age for admission to employment or work; and
>
> – (h) maternity protection.

R184 - Home Work Recommendation, 1996, Vii. Occupational Safety and Health provides:-

> 19. …
>
> 20. Employers should be required to:
>
> – (a) inform homeworkers of any hazards that are known or ought to be known to the employer associated with the work given to them and of the precautions to be taken, and provide them, where appropriate, with the necessary training;

- (b) ensure that machinery, tools or other equipment provided to homeworkers are equipped with appropriate safety devices and take reasonable steps to ensure that they are properly maintained; and
- (c) provide homeworkers free of charge with any necessary personal protective equipment.

vii. OCCUPATIONAL SAFETY AND HEALTH (cont'd)

Homeworkers should be required to:

- 21. (a) comply with prescribed safety and health measures;
- (b) take reasonable care for their own safety and health and that of other persons who may be affected by their acts or omissions at work, including the proper use of materials, machinery, tools and other equipment placed at their disposal.

22.(1) A homeworker who refuses to carry out work which he or she has reasonable justification to believe presents an imminent and serious danger to his or her safety or health …should report the situation to the employer without delay.

- (2) In the event of an imminent and serious danger to the safety or health of a homeworker, his or her family or the public, as determined by a labour inspector or other public safety official, the continuation of home work should be prohibited until appropriate measures have been taken to remedy the situation.

Case law -Trinidad and Tobago

The jurisprudence on Management's prerogative and employee rights is in its infancy in the Industrial Court, and virtually all of the cases which have engaged the Court's attention arose during the COVID 19 period, some of which I have referred to earlier.[12] One case

[12] See also *Trade Dispute No. GSD-RSBD 34 of 2021National Workers Union v International Shipping Limited* dated March 7, 2024;

which I have not addressed and which will engage your attention this afternoon is **ESD-TD Nos 81 & 82 of 2021 Public Services Association of Trinidad and Tobago v WASA** delivered on March 24, 2023, a dispute concerning job abandonment relating to work from home arrangements for two female Workers of WASA, arising out of the COVID 19 Pandemic. I say no more as the Chairman of the panel that heard that matter His Honour Mr Herbert Soverall, Vice-President, will be here to do that presentation.

Lessons from other Jurisdictions

- **CASE LAW CANADA**

Air Canada and Gentile-Patti
2021 QCTAT 5829 Administrative Labor Tribunal
(Occupational Health and Safety Division)

Ms. Alexandria Gentile-Patti, a customer agent for Air Canada works remotely from home. She fell down the stairs in her home on her way to her dinner time. She asserts that her fall constitutes an unforeseen and sudden event that occurs during work, since the fact of going to dinner constitutes, in particular, a comfort activity from which the employer benefits. The Commission for Standards, Equity, Health and Safety at Work recognizes that she suffered an employment injury.

Air Canada - the fall did not occur during work, since she was no longer in her professional sphere, but rather in her personal sphere. There is no connection between this activity and work and adds that when a worker is in the comfort of his home, there is a presumption of privacy such that there is no effective control on the part of the employer. Decision of the Tribunal-Ms. Gentile-Patti's fall, which occurred a few moments after she disconnected herself from her workstation to go to dinner, represented an unforeseen and sudden event that occurred during work. She therefore suffered an employment injury.

Trade Dispute No. GSD-RSBD Communication Workers Union v Kapok Hotel and Restaurant Company Limited dated March 27, 2024.

- **CASE LAW ENGLAND**

Chief Adjudication Officer V. Rhodes [1999] ICR 178

A claim for industrial injuries benefit for personal injury under the Social Security Contributions and Benefits Act 1992 (c. 4), s. 94(1)(3)

The applicant, an employee of the Benefits Agency, informed the agency that a neighbour was claiming benefit while working. Some months later, while she was on authorised sick leave and walking on her drive at home, the neighbour assaulted her, accusing her of being a Department of Social Security spy. The applicant sought a declaration that she had suffered an industrial accident, in order to establish her entitlement to industrial injuries benefit. An adjudication officer dismissed the application on the ground that the accident did not arise out of and in the course of her employment within the meaning of section 94(1).

On appeal, the Social Security Appeal Tribunal allowing the applicant's appeal held that she was still in the course of her employment when home on sick leave; that the assault having direct reference to her employment as a Benefits Agency employee, all the elements of section 94(1) were fulfilled; and, further, that, since she had to do preparation work at home, her home could become her place of work and she came within the broad sense of "in the course of" her "employment."

He accordingly declared that the accident arose out of, and in the course of, her employment. There was no evidence before the tribunal or the commissioner that on the day or at the time of the assault the applicant was performing work at her employer's request.

Held on appeal to the Court of Appeal, allowing the appeal (Swinton Thomas L.J. dissenting), that section 94(1) of the *Social Security Contributions and Benefits Act 1992* required an employee to establish not only that the injury arose "out of" his employment, but also that it arose "in the course of" the employment; that the mere fact that the injury was causally linked to something which had been done in the course of employment did not satisfy the dual test and accordingly it was not enough for the applicant to show that she was injured because she was a Benefits Agency employee; that, in order to be acting

in the course of her employment at the time of her injury, the applicant had to be either doing something which she was employed to do, or doing something reasonably incidental thereto; and that if, and in so far as, the commissioner had found that the applicant had been working at the relevant time, there was no evidence entitling him to reach that conclusion (post, pp. *182D–F* , *184G–H* , *185H–186B* , *191C–F* , *192G–193A*). *Faulkner v. Chief Adjudication Officer* [1994] P.I.Q.R. P244, C.A. applied.

Conclusion

I trust that you are now sold on the idea that the principles for the reasonable exercise of both management prerogative as well as employee rights do not depend upon whether or not we are operating in a traditional work setting or in the newer world of teleworking. There is room in traditional and flexible arrangements for the reasonable exercise of rights on both sides of the divide. That I submit would make for more harmonious workplace relationships wherever we find ourselves in the world of work. It is dependent on managers and employees alike. For as Henry Thoreau said, “things do not change, we change”.

Thank You.

Her Honour Mrs. Heather Seale
President, Industrial Court