



PRESENTATION

TOPIC:

**THE INDUSTRIAL COURT: More than a Court of Law: it is a Court of Industrial
Common Sense**

Delivered by

His Honour Mr. Melvin Daniel

Judge

Industrial Court of Trinidad and Tobago

AT THE

**LAW ASSOCIATION OF TRINIDAD AND TOBAGO
CONTINUING LEGAL EDUCATION: INDUSTRIAL COURT**

Strengthening the Legal Profession

Building Excellent Attorneys

Tuesday 16th October, 2018

2:00 pm

Law Association of Trinidad and Tobago Offices

JURISDICTION OF THE COURT:-

Delivering Social Justice in an Independent Society

At the outset, it is instructive to make a few observations about the unique nature of the Industrial Court and the jurisdiction which it exercises. The Industrial Court is a creature of statute, that is, the Industrial Relations Act, chapter 88:01, which exercised jurisdiction that has been created by statute. It is not the High Court of Justice. Notions of the Common law and High Court experience while at times useful, are oftentimes misplaced at the Industrial Court.

Mr. Addison Khan in his text “the Law of Labour and Employment Disputes in Trinidad and Tobago” put it this way:

“The role and function of the Industrial Court are often grossly misunderstood. Industrial Courts are specialised Courts that are established for the settlement of employment and labour disputes that are not appropriate for determination by ordinary civil Courts.”

This view of the role and function of Industrial Courts is not distinctly Trinidad and Tobago either. Neither is it an aberrant one. Indeed, when England had a National industrial Relations Court, Sir John Donaldson, who was its President, said in *Heaton's Transport Limited v. Transport and General Workers' Union* [1972] ICR 308, at 316 that,

“the National Industrial Relations Court is a Court, but a Court with a difference. All Courts exist to uphold the rule of law. So does this Court. All Courts are concerned with people. So is this Court. Without the rule of law and Courts to enforce it, each one of us would be free to push and bully our fellow citizens and (which may be thought more important) our fellow citizens would be free to push and bully us. In a free for all none of us could hope to be the winner. The justification for law, the Courts, and the rule of law is that they protect us from unfair and oppressive actions by others;

Why, then, is this Court different? It is a different in its composition, in its objects and in its procedures. It is a Court of law, but not a Court of lawyers. Only the chairman is a judge. All the other members are appointed for their knowledge or experience of industrial relations. These industrial members are not advisers; they

are full members of the Court. In reaching decisions each has a vote, as does the judge. There are at least two of them and only one judge.

The Intention of Parliament was that this Court should not only interpret and apply the law, but should do so with knowledge of industrial life from every angle. The judges benefit from the industrial knowledge of the appointed members. The appointed members benefit from the judges' knowledge and experience of the law. The resulting decision is reached by a combining their skills. ...The industrial Court is more than a Court of law: it is a Court of industrial common sense."

Section 4 (1) of the Act expressly affirms:-

"For the purpose of this Act, there is hereby established an Industrial Court which shall have in addition, to the jurisdiction and powers conferred on it by this Act all powers inherent in such a Court."

WHAT IS INHERENT JURISDICTION

According to Halsbury's Laws of England,

"...The jurisdiction of the Court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a Court of law...The inherent jurisdiction of the Court enables it to exercise (inter alia) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process... In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to endure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." [See Halsbury's Laws of England 4th ed. vol. 37, p.23, para.14]

FUNCTIONS OF THE INDUSTRIAL COURT OF TRINIDAD AND TOBAGO

The Industrial Court of Trinidad and Tobago was established on March 20th, 1965 by section 5(1) of the Industrial Stabilization Act. This Act was repealed and replaced by the Industrial Relations Act, Chapter 88:01 on July 31st 1972. The purpose of the act is to make better provision for the stabilization, improvement and promotion of industrial relations.

The Court sits in two Divisions:

- (a) **The General Services Division** which exercises the jurisdiction of the Court as set out in section 7 of the Industrial Relations Act, Chapter 88:01 with respect to services other than essential services ; and
- (b) **The Essential Services Division** which exercises the jurisdiction of the Court as set out in section 7 of the Industrial Relations Act, Chapter 88:01 with respect to essential services.

The Special Tribunal established by the Civil Service Act, Chapter 23:01 hears and determines disputes in the Civil Service, the Police Service, the Fire Service, the Prison Service, the Teaching Service, the Supplemental Police and the Central Bank.

MEMBERSHIP AND STRUCTURE OF THE COURT

The Court consists of –

A President of the Court who may be either:

- A Judge of the Supreme Court of Judicature designated, with his consent, by the President of Trinidad and Tobago after consultation with the Chief Justice; or
- A person who has the qualification (age excepted) to be appointed a Judge of the Supreme Court of Judicature and is appointed by the President of Trinidad and Tobago after consultation with the Chief Justice.

A Vice-President of the Court, who shall be a Barrister or Solicitor of not less than ten years standing, appointed by the President of Trinidad and Tobago;

Such number of other members as may be determined by the President of Trinidad and Tobago from time to time who shall be appointed by the President of Trinidad and Tobago from among persons experienced in industrial relations or qualified as Economists or Accountants, or who are Barristers or Solicitors of not less than five years standing.

There are currently 21 Judges sitting in the Industrial Court inclusive of the President.

Administrative Staff

The administrative staff comprise Public Officers and Contract Officers. Public Officers are all appointed by the Public Service Commission with the exception of the Registrar and Assistant Registrar who are Attorneys, and must be appointed by the Judicial and Legal Service Commission.

For administrative purposes, the Court is divided into various Departments. They are:

- Accounts
- Communications
- Court Registry
- Court Reporting
- Human Resource Management
- Information Technology
- Internal Audit
- Legal
- Library
- Office Management
- Office of Economic and Industrial Research
- Pension and Leave

- Secretarial

The Industrial Court is a superior Court of record. As a superior Court of record it has a status that is equivalent to that of the High Court of Justice. It is a specialized Court with its own peculiar jurisdiction; it is responsible for dispensing social justice.

In addition to its inherent powers as a superior court of record, the Court has jurisdiction in accordance with Section 7 of the Industrial Relations Act –

- a) To hear and determine trade disputes;
- b) To register collective agreements and to hear and determine matters relating to the registration of such agreements;
- c) To enjoin a trade union or other organization or workers or other persons or an employer from taking or continuing industrial action;
- d) To hear and determine proceedings for industrial relations offences under this Act;
- e) To hear and determine any other matter brought before it, pursuant to the Act.

The legislation under which the Court is empowered to hear cases are:

- The Industrial Relations Act, Chapter 88:01 (I.R.A.)
- The Retrenchment and Severance Benefits Act, No. 32 of 1985
- The Maternity Protection Act, No. 4 of 1998
- The Minimum Wages (Amendment) Act, No. 11 of 2000
- The Occupational Safety and Health Act 1 of 2004 as amended

WHAT IS A TRADE DISPUTE?

A trade dispute can be defined as any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, reemployment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the

expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to Certification of Recognition under Part 3 of the IRA.)

UNFAIR DISMISSAL

The Court has made a plethora of pronouncements regarding unfair dismissal. There are several important points that can be culled from the following cases: -

1. In the landmark judgment of **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 - underscores the importance that the employee must be given a fair opportunity to be heard before any dismissal action can be taken at pages 36 -37,

“The essence of a fair opportunity to be heard involves the provision of relevant information by the employer to enable the latter to appreciate and understand the substance of the allegations made against him and an opportunity given to the employee to reply to such allegations and to put forward any reasons in mitigation of any penalty or penalties which may be possible having regard to the nature of the allegations made against him. It is a requirement of basic fairness and justice as well as of the principles of good industrial relations practice. It is to enable the employee to bring to the notice of the employer relevant facts and circumstances and to enable the employer to hear and understand the employee’s side of the story before he makes up his mind finally. The opportunity must be given before the decision to dismiss is made.”

2. In **TD No. 2 of 2001 between Banking, Insurance and General Workers’ Union and Hindu Credit Union Cooperative Society Limited** delivered on 31st July 2001

by His Honour Mr. Addison M. Khan specifically makes mention of I.L.O. Convention No. 158 and its importance in industrial relations practice at pg. 58,

“One of the best statements of this good industrial relations principle is contained in ILO Convention No. 158 of 1982, the salient parts of which are as follows:

1. *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.*
2. *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 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.*
3. *Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.*
4. ***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.” (my emphasis)”***

His Honour Mr. A. M. Khan continues to state certain elements required of an employer before dismissing a worker at page 59 of the judgment,

“Before dismissing a worker from his employment, therefore, the employer should

- a) Properly investigate any allegation or allegations of misconduct made against him or her;***
- b) Save in exceptional cases where it is not possible to do so, inform the worker of the specific reason or reasons for the proposal to dismiss him; and***
- c) Give the worker an opportunity to explain any allegation or allegations made against him.***

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 worker’s dismissal was not in accordance with the principles of good industrial relations practice.”

3. In **TD No. 27 of 2011 between Oilfields Workers Trade Union and Caribbean Packaging Industries** delivered on 7th May, 2013, Her Honour Mrs. Thomas Felix highlights the **“audi alteram partem”** principle and its significance in industrial relations at pg, 6 of the judgment,

“The audi alteram partem principle is a well-known, integral and a very important principle in the practice of industrial relations. This principle and the principles of natural justice place a duty of impartiality and fairness on decision makers at the work place. The right to a fair hearing is a fundamental right for all workers; decision makers therefore have a duty and obligation to be independent and unbiased when they hold disciplinary hearings into the conduct of workers. The audi alteram partem principle and the principles of natural justice are

*universal principles which aver that a Worker who is accused of misconduct at the work place has the right to be heard and the right to a fair hearing. **Impartiality and fairness are bulwarks of the disciplinary process in Industrial Relations, the failure to adhere to these principles tantamount to conduct which is harsh and oppressive and conduct and in breach of the principles and practice of good industrial relations.***

RETRENCHMENT

Pursuant to section 2 of the Retrenchment and Severance Benefits Act (Chapter 88:13) retrenchment is defined as: ‘the termination of employment of a worker at the initiative of an employer for the reason of redundancy’ and that section also defines redundancy as: ‘the existence of surplus labour in an undertaking for whatever cause.’

The Retrenchment and Severance Benefits Act No 32 of 1985 Section 4 (1) stipulates the procedure with regard to carrying out retrenchment:

“Where an employer proposes to terminate the services of five or more workers for the reason of redundancy he shall give formal notice of termination in writing to each involved worker, to the recognized majority Union and to the Minister.

2. **The notice shall state –**
 - (a) ***the names and classifications of the involved workers;***
 - (b) ***the length of service and current wage rates of the involved workers;***
 - (c) ***the reasons for redundancy;***
 - (d) ***the proposed date of the termination of employment;***
 - (e) ***the criteria used in the selection of the workers to be retrenched ;***
 - (f) ***any other relevant information.”***

3. ***Where notice of retrenchment given by an employer to fewer than five involved workers is followed by notice of retrenchment to any other worker within the time period of the previous notice to the other workers, all workers receiving such notice shall be counted together***

in determining the number of workers to whom notice has been given for the purposes of this section.”

Section 6 of the RSBA states:

“Subject to section 7, the minimum period of formal notice required by section 4 shall be forty-five days before the proposed date of retrenchment.”

Clearly it is a requirement of the RSBA that formal notice of termination in writing, must be given to each worker where five or more workers are terminated and a minimum period of forty five days' notice is necessary.

Thus failure to give formal notice is a breach of the law and the principles of good industrial relations practice.

In **Civil Appeal No. 37 of 2000 between Claude Albert and Alstons Building Enterprise Limited**, M.A. de la Bastide C.J expressed the importance of notice at page 3 of the judgment,

“Notice is intended to provide the employee with the opportunity to adjust to the loss of his job, primarily by finding another one. Payment in lieu of notice compensates the employee for loss of that opportunity, it provides a sort of financial buffer to tide him over.”

It is essential to highlight certain principles pertaining to retrenchment. These principles are evident in the following cases from the Industrial Court:

(a) In TD No 244 & 245 of 2004 between **Banking Insurance and General Workers Union and Public Services Association** delivered on 28th June 2007 by her Honour Mrs. D. Thomas – Felix emphasises that consultation is an important part of the redundancy procedure.

Fair Consultation is Vital

Her Honour Mrs. Felix opines at page 11 of the judgment,

“It is an integral part of good industrial relations practice for employers to have consultation with recognized trade unions in cases where retrenchment is considered. That consultation, within the meaning of the Retrenchment and Severance Benefits Act, **must be fair and adequate.**”

Fair consultation requires (the employer) to hold talks with the Union when the proposals for retrenchment are at a **formative stage**. Fair consultation also requires that the Union receives adequate information from (the employer) for it to address and respond if necessary. **Sections 4 and 5 of the said Act are obvious safeguards to prevent employers from using the selection of retrenchment as a backdoor device for dismissing workers for unjust reasons.**”

(b) In TD No 43 of 2001 between **Oilfields Workers' Trade Union and Trinidad and Tobago National Petroleum Company Limited** delivered on 24th October 2011 by Her Honour Ms. B. Mahabir considered the **Essential Requirements when executing Redundancy** at page 15 of the judgment:

“Consequently (the employer) must ensure that they follow the procedures set out in the RSBA and engage in behaviours that are consistent with the principles of good industrial relations practice. **These include: consultation, the consideration of alternatives and a fair selection process. Furthermore, 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.** (See Mitchell, D. 1992 – “The burgeoning of fairness in the law in relation to redundancy.” Auckland University Law Review 897 - 930”

INTERPRETATION OF APPLICATIONS

Pursuant to Section 16(1) of the Industrial Relations Act, Where any question arises as to the interpretation of any order or award of the Court, the Minister or any party to the matter may apply to the Court for a decision on such question and the Court shall decide the matter either after hearing the parties or, without such hearing, where the consent of the parties has first been obtained. The decision of the Court shall be notified to the parties and shall be binding in the same manner as the decision on the original order or award.

Further Section 16(2) and (3) stipulates:

16(2) Where there is any question or difference as to the interpretation or application of the provisions of a registered collective agreement any employer or trade union having an interest in the matter or the Minister may make application to the Court for the determination of such question or difference.

16(3) The decision of the Court on any matter before it under subsection (2) shall be binding on the parties thereto and is final.

INDUSTRIAL RELATIONS OFFENCES

A recognised majority union or an employer that violates section 40(1) of the Industrial Relations Act is guilty of an industrial relations offence and liable to a fine of **four thousand dollars**.

The following will give rise to an industrial relations offence by virtue of section 40 (1):

- Failure by an employer to recognise a trade union as the recognised majority trade union where that trade union has obtained recognition for workers comprised in a bargaining unit in accordance with Part III of the IRA;

- Failure of a recognised majority union to treat and enter into negotiations with an employer in good faith for the purposes of collective bargaining;
- Failure of an employer to treat and enter into negotiations with the recognised majority union for the purposes of collective bargaining.

In addition, Section 63 (1) of the IRA states where an employer or a trade union takes industrial action that is not in conformity with the Industrial Relations Act commits an industrial relations offence.

Thus, section 63 (2) highlights,

A person guilty of an industrial relations offence under this section is liable –

(a) In the case of an employer, to a fine of **twenty thousand dollars**; or

(b) In the case of a trade union, to a fine of **ten thousand dollars**.

TIME LIMIT FOR INDUSTRIAL RELATIONS OFFENCES

Section 84 (2) of the IRA requires that an industrial relations offence should be instituted by an application to the Industrial Court within three months from the time when the industrial relations offence took place, and not after.

The following case illustrates the concept of Industrial Relations Offences:

In Complaint No. GSD – IRO 031 of 2015 between **Steel Workers’ Union of Trinidad and Tobago and Arcelormittal Point Lisas Limited** delivered on 10th March, 2016 by Her Honour Mrs. D. Thomas-Felix highlighted the industrial relations offences committed in this case,

“It is our finding that the Company failed to treat with the Union in good faith for the purpose of collective bargaining when it did not give the Union the opportunity to deliberate and to respond to its proposal which was raised for the very first time at the meeting on 7th December. Even when the Union requested a meeting after the layoff was put into effect, the

Company refused to meet with the Union, giving it no option but to resort to the procedures under the IRA and the instant proceedings.”

It was held that The Company failed to treat and enter into negotiations with the Union in good faith for the purpose of collective bargaining contrary to Section 40 of the IRA; and the Company failed to recognise the Union as the Recognised Majority Union by treating directly with workers.

The order of the Court identified that the aforementioned as an industrial relations offence and the the Company was ordered to pay a fine of \$4000.00 on or before 24th March, 2016 for failure to treat and enter into negotiations with the Union in good faith for the purpose of Collective Bargaining contrary to the provisions of Section 40 of the IRA.

Moreover, in the instant case it was held that the Company engaged in illegal industrial action in violation of Section 63 of the IRA and the Court ordered that for the offence of illegal industrial action the Company pays a fine \$20,000.00, the said sum to be paid on or before 24th March, 2016.

WHAT IS A COLLECTIVE AGREEMENT?

A Collective Agreement as defined by the Industrial Relations Act means:

“An agreement in writing between an employer and the recognised majority union on behalf of workers employed by the employer in a bargaining unit for which the union is certified, containing provisions respecting terms and conditions of employment of the workers and the rights, privileges or duties of the employer or of the recognised majority union or of the workers, and for the regulation of the mutual relationship between an employer and the recognised majority union”.

A collective agreement is achieved as the result of collective bargaining between a recognised majority union and an employer. Before a trade union can claim the right to bargain collectively with an employer, that trade union must first obtain recognition as the recognised majority union for an appropriate bargaining unit or units of workers in the employer's employment.

Moreover, a recognised majority union can be defined as that trade union certified by the Registration Recognition and Certification Board as having more than fifty percent (50%) of the workers comprised in the appropriate bargaining unit as members in good standing.

Furthermore, the principal objective of a collective agreement is to settle the terms and conditions of employment of workers in a bargaining unit for an agreed period with a view to avoiding disruptions of work for the duration of the agreement.

TERM OF COLLECTIVE AGREEMENT

A collective agreement must be for a term to be stated in the agreement, which must not be less than three years nor more than five years.

MEANING OF COLLECTIVE BARGAINING

One of the fundamental purposes of the Industrial Relations Act, is the promotion of good industrial relations which is based on free collective bargaining. According to the IRA collective bargaining means treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes.

In a paper entitled "The Duty to Bargain in Good Faith" (71 Harvard Law Review, 1401, 1408 -1409), Professor Archibald Cox recorded the views of a 1902 Industrial Commission, which had given their opinion on the value of periodic Collective Bargaining in the following way:

“The chief advantage which comes from the practice of periodically determining the conditions of labour by collective bargaining directly between employers and employees is that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.”

JURISPRUDENCE/LIBRARY SERVICES

The Library curates all the Courts’ Judgments and its related Court of Appeal Judgments in electronic format and provides access to these resources through the library’s subscription service. Content is curated in both born-digital and digitized formats.

Judgments:

- 1965 to present
- All High Court, Court of Appeal, Privy Council case which are related to the Industrial Court or are high profile are sourced and filed
- Judgments are available in print and electronic formats.

Monographs:

- Text on Employment Law, Industrial Relations, Occupational Health and Safety, Business, Leadership, Management, Economics, Psychology, Legal Writing and more.
- Speeches and Papers presented by Judges

Law Reports:

- All England Law Reports
- Commonwealth Law Reports

- Dominion Law Report
- Halsbury's Law of England
- Industrial Cases Report
- International Labour Report
- Knights Industrial Reports
- Labour Arbitration Cases
- New South Wales Law Reports
- New Zealand Law Reports
- Times Law Reports
- Trinidad and Tobago Law Reports
- West Indian Reports

Statutes:

- Full collection of the Laws of Trinidad and Tobago
- A compilation of Trinidad and Tobago Labour Laws (Available for purchase)

Special Collections:

- West Indian Collection
- Reference Collection: Encyclopaedias, Dictionaries, Laws and Bound Volumes of Industrial Court Judgments
- International Labour Organization publications
- Industrial Court bibliography – Newspaper articles, journal articles, book extracts as it relates to the discussion on the Industrial Court of Trinidad and Tobago.

Information Files:

The daily newspapers are indexed on topics relevant to the Court and its patrons.

Topics include:

- Collective Bargaining
- Industrial Action
- Occupational Safety and Health

- Restructuring
- Retrenchment
- Sexual Harassment in the workplace
- Wages

Online Services:

The Industrial Court has an online public access catalogue which provides access to Judgments of the Court. This Judgment Database (MINISIS) provides Industrial Court Judgments (1965-2018) and related Court of Appeal, High Court and Privy Council. (Website: <http://library.industrialcourt.org.tt>)

The Industrial Court uses the LEXISNEXIS database and ILO Conventions and Recommendations when conducting research.

Industrial Court Publications:

- Industrial Court of Trinidad and Tobago Annual Reports (2011-present)
- Trends in Labour and Industrial Relations (2016, 2017)
- The Industrial Court of Trinidad and Tobago Strategic Plan (2010-2015)
- 50th Anniversary of Industrial Court of Trinidad and Tobago “Journey to Gold” (1965-2015)
- The Trinidad and Tobago Industrial Court Reports Volume I (2011)
- 40th Anniversary Industrial Court of Trinidad and Tobago (2005)
- An Analysis of Wages and Salaries Extracted from Collective Agreements (2014 – present)

Library Services

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