

The Right to Dismiss

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Over the last two (2) weeks, my colleagues highlighted both employees' and employers' rights. What was stated is that rights are derived from formal sources, such as, legislation and/or the employment contract. The proclamation of the Employment Rights Act (ERA), added a new dimension to the employment relationship that until then did not exist: the right not to be unfairly dismissed. This right is best discussed in the context of what existed prior to the ERA and how this new right now impacts the employment relationship.

Wrongful dismissal is a common law construct which always existed in the Barbadian landscape. In simple terms, wrongful dismissal is where you break the terms of an employee's contract in the dismissal process, e.g. dismissing someone without giving them proper notice.

Conversely, unfair dismissal, which is now introduced via the ERA, occurs where an employee is dismissed in one of the three circumstances stated below:

- the reason was unfair (as listed in the ERA), e.g. race, color, gender, marital status or participating in trade union activities
- the reason given for the dismissal wasn't the true reason
- the company acted unreasonably, e.g. by failing to give them adequate warning about their dismissal

Therefore the key difference is that wrongful dismissal involves a breach of contract, whereas unfair dismissal involves a statutory breach.

Because wrongful dismissal and unfair dismissal are different, the remedies for the infractions are also different. A claim for wrongful dismissal is laid before a court of law. If found guilty, the

court has the power to impose a financial settlement calculated on the basis of severance. However, unfair dismissal claims will be heard by the Employment Rights Tribunal, but remember that claims are sent to the tribunal by way of the Chief Labour Officer. The Tribunal has powers which exceed that of the Court of Law and if they have found that a dismissal was unfair they can order reinstatement, reengagement or compensation.

Reinstatement is an order that an employer treat an employee, in all respects, as if he had not been dismissed and Re-engagement occurs when the employee is engaged by the employer in employment comparable to that from which the employee was dismissed. These orders would be given after consideration to the will of both parties.

Can a dismissal be both wrong and unfair? That is a matter to be disputed within the court of law, however because wrongful dismissal and unfair dismissal are different, it stands to reason that an employee can claim both wrongful dismissal and unfair dismissal depending on the circumstances. Nevertheless, one would expect that should an employee pursue both avenues, that any money received for wrongful dismissal, will be cancelled out by the amount received for unfair dismissal (and vice versa) to prevent double compensation.

In the discussion around unfair and wrongful dismissal what employers must remember is that they do have the right to dismiss employees. Section 29(2) of the ERA gives employers the right to dismiss an employee for a reason which falls within this subsection if it:

- Relates to capability of the employee to perform work
- Relates to the conduct of the employee
- If the employee could not work without contravening law

To properly execute this right, the employer must have a fair reason **AND** act reasonably during the dismissal and disciplinary process. Considerations include having the appropriate investigations conducted, following procedures, informing the employee why they were being considered for dismissal, allowing the employee to be accompanied or represented at a disciplinary/dismissal hearing and allowing the chance to appeal.

The employee's right not be unfairly dismissed is balanced against the employer's right to dismiss once the specific criterion has been met. Therefore it is clearly illustrated that neither party holds all the rights in the employment relationship. Both parties need to ensure that they treat each other with mutual respect which will foster a good employment relationship and potentially avoid the need for intervention by the Court, Chief Labour Officer or Tribunal.