Employment Rights Tribunal

CASES • IN • REVIEW

IS IT REALLY REDUNDANCY?

DISCIPLINE

Is my performance management system effective?

TIPS TO AVOID AN APPEARANCE BEFORE THE TRIBUNAL

2019

COMPLIANCE

A compilation of cases heard before the Employment Rights Tribunal of Barbados.

BEC Barbados Employers' Confederation

Barbados Employers' Confederation

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A quick note about the BEC

Founded in 1956, the Barbados Employers' Confederation is a membership-based business support organization which specializes in Industrial Relations, Human Resources Management and Occupational Health and Safety.

As the premier employer representative on island, BEC is dedicated to providing guidance on legislation such as the Employment Rights Act; especially in the context of the cases heard before the Employment Rights Tribunal to date.

While we continue to hold a number of training sessions and forums on legislation, we thought it imperative to present employers with a quick breakdown of the first 4 cases heard before the Tribunal as well as tips and tricks toward avoiding some of the pitfalls outlined.

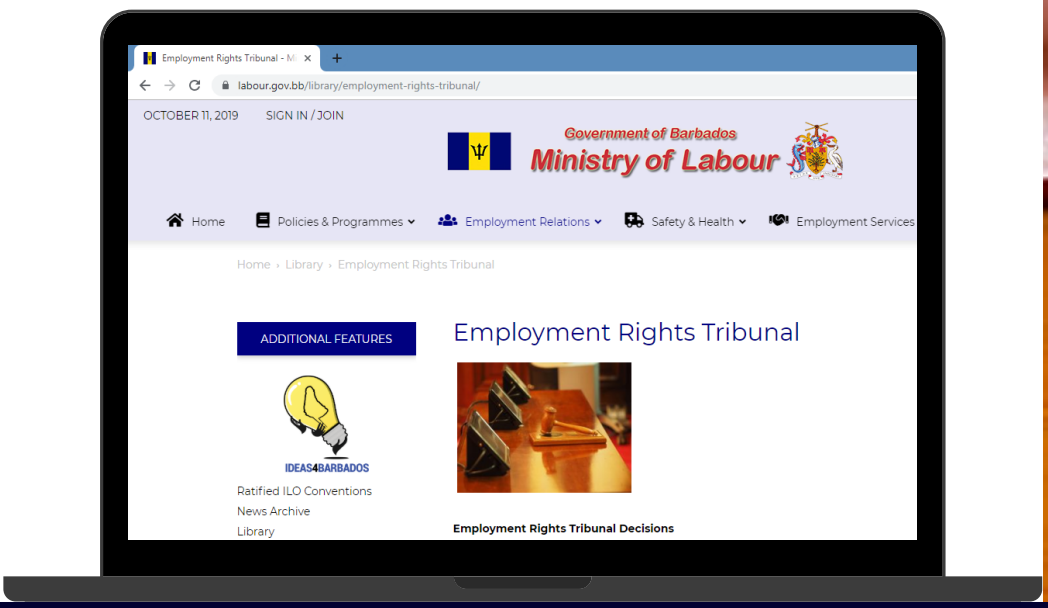
Advocacy • Training • Support

"making good employers better"

Employment Rights Tribunal

The introduction of the Employment Rights Act (ERA) in 2012 saw the creation of the Employment Rights Tribunal (herein after referred to as the ERT). The ERT has been empowered under legislation to determine cases of unfair dismissal. The tribunal's decisions may only be challenged on a point of law.

To date, this tribunal has made decisions regarding unfair dismissals in thirteen cases. In this series we will take an extensive look into the first four (4) unfair dismissal cases and the decisions, with a view to helping employers to avoid pitfalls and ensure compliance with the legislation.



Have you read the ERT cases?

https://labour.gov.bb/library/employment-rights-tribunal/

Our 2020 Training Schedule offers a wide range of training options such as

Navigating the Employment Rights Act

Do you understand the ERA - its importance and application within your organization?

This workshop is designed to expose management teams to the contents of the Act. By ultimately empowering them to conduct discipline and make decisions in alignment with the Act, the session seeks to reduce or prevent submissions to the Tribunal for adjudication.

Employee and Employer Rights

The very nature of the employment relationship embodies rights and responsibilities of both the employer and employee. These rights at work are derived from our labour legislation.

This workshop is designed to outline these rights and responsibilities, and provide the requisite knowledge of best practices.

Look out for our mid-week tips!

We offer guidance on a number of topical issues including

- **Severance**
- **Discipline**
- **Termination**
- **Mental Health**
- **Safety & Health**
- **NIS Contributions**

Missed our weekly article in the Business Authority?

THE BEC WEEKLY

Articles on various topics within Labour, Human Resources and Industrial Relations provided by the BEC Secretariat and some previous members of the Secretariat

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when redundancy

Cutie Lynch et. al. v. National Conservation Commission

From time to time and for one reason or another, organizations may find themselves in a position where making a post redundant is their only option. The economic climate, organizational restructuring or the closure of a business are all valid and plausible reasons for making employees redundant. However, the ERT ruled in favour of the claimants finding the NCC to have unfairly dismissed the workers.

While the need for making individuals redundant is not in question, following the process of making them redundant is! Let delve into the facts of the National Conservation Commission's (hereinafter referred to as "the NCC") case to give further insight and highlight the lessons learnt.

Factual Background

The Government of Barbados in December 2013 announced and approved a measure to reduce government expenditure by decreasing the public sector by 3000 employees between January to March 2014. As a result, a circular to all Permanent Secretaries and Heads of Department outlined the framework/ criteria in which the redundancies where to be conducted.

The four (4) main items from the criteria utilized are listed below:

1. The principle of Last In First Out (LIFO) was to be applied to the redundancy process
2. Payments to be made to the workers would mirror that of severance payments
3. No compensation would have been made to those having worked less than 2 years or those over 66 years old unless they did not qualify for NIS pension
4. Counselling was to be made available to the affected employees

Letters dated the 25th April 2014 were issued to Ms. Lynch and several colleagues at a meeting on the 30th April, 2014 notifying them of their termination with immediate effect. The employees' representatives, the National Union of Public Workers (the NUPW) and the Barbados Workers' Union (the BWU) found issue with the way in which the employees were selected for termination. Having found no resolution at the Chief Labour Officer, the case was referred to the ERT.

The decision of the ERT hinged on the below points:

1. Redundancy and Consultation
2. Selection Criteria (LIFO)
3. Recognition

goes wrong

Redundancy & Consultation

While the reason for the redundancies was not in contention as it was found that the NCC had no other alternative, given they were mandated by Government to make these cuts, the NCC erred in its delivery of the retrenchment process. The Tribunal found that they breached section 31 subsection 4, 5 and 6 of the ERA which speaks to the need for consultation between the employees, their representatives and the Chief Labour Officer (CLO) at least six weeks prior to the dismissal. Since this was not done the employees had partially made their case for unfair dismissal.

LIFO

Similarly, the selection process used by the NCC to terminate the employees was questioned heavily by the ERT who ruled that the LIFO system was the best or most appropriate criterion to make the posts redundant. The principle of LIFO is based on tenure within an organization. Employees who joined last or whose years of service are less than another employee would be first considered when a redundancy exercise is undertaken.

Recognition of a Trade Union

The NCC contended that the NUPW only represented 23% of the workers and therefore felt there was no need for consultation. However, evidence presented established that the union was in fact considered a "recognized" trade union. This was based on the previous interactions between the said union and the NCC notwithstanding a formal agreement.

HELPFUL TIPS
on unfair dismissal

1 THERE MUST NO LONGER BE A NEED FOR THE POST

Pursuant to ERA Sections 31 (2) (a), where the employer is considering the redundancy of employees, the employer must ensure that business of the company has ceased or has been diminished which establishes that there is no longer a need for the post.

2 YOU MUST NOTIFY THE CLO ON 10% STAFF REDUCTIONS

Once the employer is reducing the workforce of the company by 10% or more then he/she must by way in writing notify the CLO as well as the employee and / or trade union with:

a) The reason (s) for dismissal
b) The number & categories of workers
c) Date of expected dismissal

Open lines of communications with the employees and their representatives could result in alternative resolutions where possible and minimize any fall out resulting from the exercise.

3 YOU MUST PROVIDE CONSULTATION IF MORE THAN 10% WILL BE AFFECTED

Once more than 10% of the workforce is impacted, the employer must commence consultations.

The NCC was clearly in breach of this procedure as they neglected to discuss with the unions and the employees the decision of the Government to cut employment levels. One rationale for no consultation, may have stemmed from the fact they were given a directive. However the directive did not negate the fact that the NCC had an obligation under legislation. If consultation had occurred all parties would have a clear understanding regarding the process and the need for the terminations.

HELPFUL TIPS
on unfair dismissal

TRADE UNION RECOGNITION 4

While there is no legislation which speaks to mandatory recognition of trade unions and it is termed a gentleman's agreement, the union in trying to gain recognition usually needs to acquire 50% + 1 of the workers to be considered the representative by the employer. However, once the employer consults and includes a trade union over a period of time without official recognition it can be determined that the union was in fact the representative for the employees.

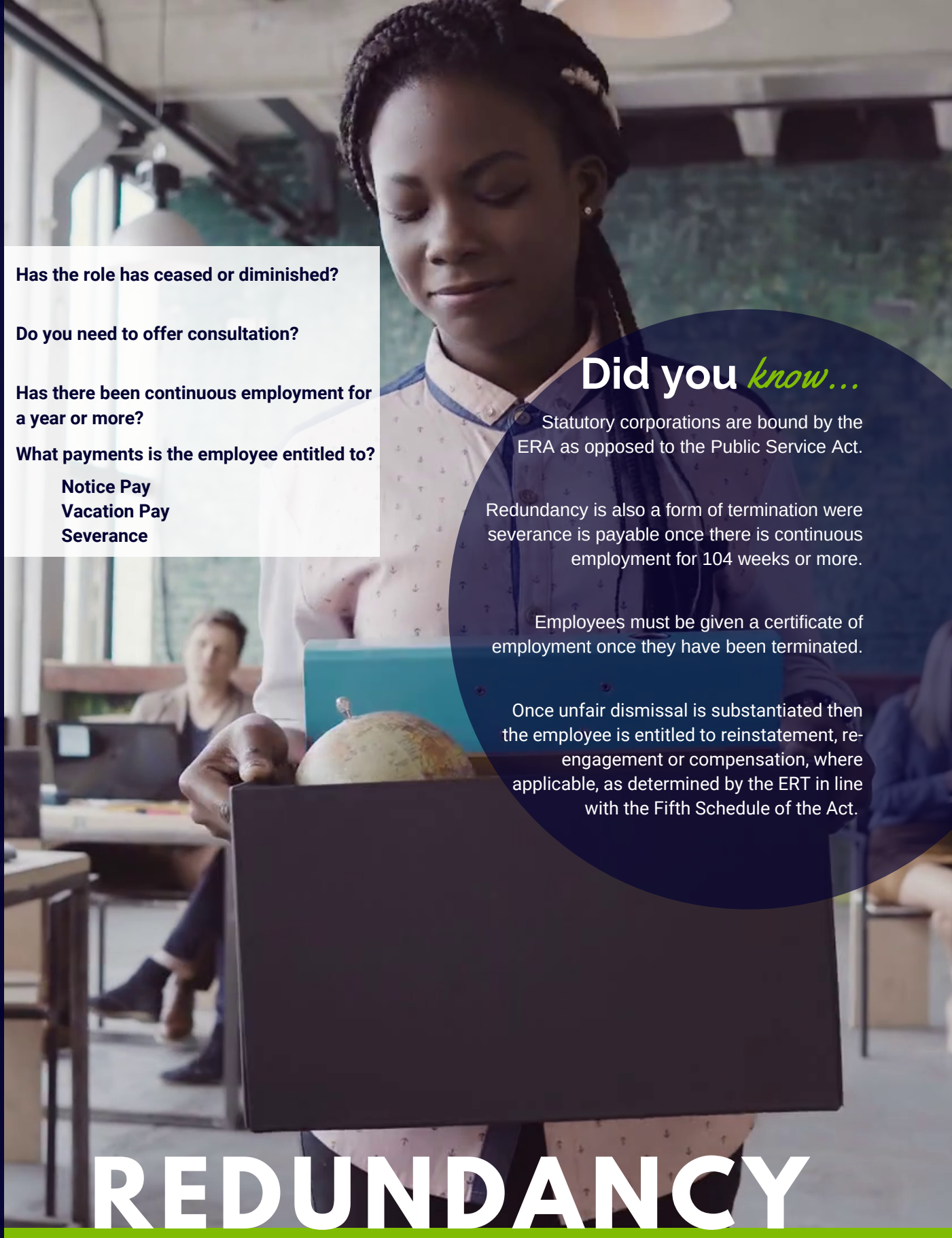
This was explicit in the NCC case where it was stated that the union was not the employees' representative. However, extensive review of case law proved otherwise and therefore recognition was determined.

THE METHOD OF SELECTION FOR REDUNDANCY MUST ENSURE FAIRNESS 5

The selection process is a critical component of any redundancy exercise which brings a level of fairness and equity for all parties involved. A clear documented process which highlights the employee's performance, skills and capabilities should be used when considering retrenchment of this magnitude.

NCC fell down in this regard because they merely used the LIFO principle, which the ERT found ineffective and resulted in an unfair advantage and displacement of high performers in the organization, based solely on tenure. While the NCC made mention of a document outlining performance of employees, they did not utilize this document to assist with the selection process.

While circumstances will change, and the selection criteria may vary, it is important for employers to note that the method of selection must ensure fairness. An efficient and effective performance management system is necessary in organizations today. Such a system would have clear documentation of performance of employees which would make for more objectivity when terminating employees. The NCC's poor performance record keeping also factored into the decision and the ERT criticized the institution for such.



- [ ] **Has the role has ceased or diminished?**
- [ ] **Do you need to offer consultation?**
- [ ] **Has there been continuous employment for a year or more?**
- [ ] **What payments is the employee entitled to?**
  - **Notice Pay**
  - **Vacation Pay**
  - **Severance**

Did you *know...*

Statutory corporations are bound by the ERA as opposed to the Public Service Act.

Redundancy is also a form of termination were severance is payable once there is continuous employment for 104 weeks or more.

Employees must be given a certificate of employment once they have been terminated.

Once unfair dismissal is substantiated then the employee is entitled to reinstatement, re-engagement or compensation, where applicable, as determined by the ERT in line with the Fifth Schedule of the Act.

REDUNDANCY CHECKLIST

PERFORMANCE MANAGEMENT SYSTEMS EVALUATE EMPLOYEES

THE AIM IS TO HIGHLIGHT STRONG PERFORMERS BUT ALSO GIVE POOR PERFORMERS THE OPPORTUNITY TO IMPROVE

IS YOUR PERFORMANCE MANAGEMENT SYSTEM EFFECTIVE?

Effective performance management systems allow organizations to evaluate the work of their employees, enabling them to assist those experiencing performances issues and reward and recognize top performers. Together management and employees work together to achieve organizational goals and objectives.

Quite often, performance management systems and performance appraisals are used interchangeably. While the performance appraisal is an essential part of a management system, it is merely the tool used to measure performance at prescribed intervals e.g. annually, semi-annually. Even though, this tool is crucial, there is a need for a comprehensive management system to monitor, evaluate and provide continuous feedback about employees' performance. The need for this system is exemplified by the next case.

Joel Leacock
v
PMM Services Limited

(also known as KPMG)

Unlike the first case, the unfair dismissal had nothing to do with redundancy, but rather procedural breaches of the disciplinary process as outlined in the Fourth Schedule of the Employment Rights Act (hereinafter referred to as "the Act") as a result of performance related issues with the employee. After careful evaluation of the facts of the case the Tribunal concluded that the claimant was unfairly dismissed. He was awarded the sum of $77, 176.92, which comprised of loss earnings for a period of 22 months at his previous salary, less what was paid to him on the day of termination.

FACTUAL BACKGROUND

... ruling hinged on 2 points:

Business Advisor II hired Nov 2011

The claimant Mr. Leacock began his employment with PMM Services Limited (also known as 'KPMG'), the defendant, in the capacity of Business Advisor II on the 22nd November 2011. After successfully completing a six-month probationary period, he was officially appointed to the position. Subsequently, he was **promoted to Business Advisor I** on October 01st, 2012 and was further informed that based on his performance he was scored a strong performer, also known as SP. This promotion also resulted in a salary increase.

Termination of Contract: Sept 2013

On September 23rd 2013, the claimant's employment contract was terminated effective immediately by a Director of the defendant Company. The claimant was subsequently issued with 'Termination of Services/Lay-off Certificate' commonly known as 'the Green Paper', which stated that the reason for dismissal was termination of contract, not as a result of the misconduct of the employee. For these reasons, the claimant brought an action against the Company for unfair dismissal.

Justified Termination based on performance

During the hearing the Company indicated that they terminated the claimant's employment contract because of poor performance, misconduct, refusal to sign an appraisal which cited poor performance and a poor attitude towards members of the company's Management team which led to a loss in confidence in his ability to effectively execute his duties. However, the reasons as provided above were not highlighted in the said termination certificate or the termination letter. In addition, the claimant indicated that he never previously received any written or oral warnings about his performance.

When dealing with performance related issues, employers should ensure that the process is applied fairly and objectively, providing ample opportunities for the employee to improve his or her performance. Given the fact that the claimant at no time received any prior warnings or discussions regarding his performance, termination of his employment based on poor performance could not be adequately substantiated.

Additionally, the clause utilized from the employee's contract to terminate him read,

"This correspondence indicates that your employment with KPMG PMM Services Limited is terminated effective immediately in accordance with item 21 of your employment contract dated November 4, 2011, which states the following: This employment Contract may be terminated by the service of one (1) month's written notice in advance on either side or payment of an amount in lieu of notice equivalent to one (1) month's salary"

This was also in breach of the Act. Not only had the employee been with the company since 2011 and acquired rights under the ERA which prevents dismissal without just cause, but the process of progressive discipline was not followed by the company.

See the next page to learn how to avoid these pitfalls.

"Your employment with KPMG PMM Services Limited is terminated effective immediately"

AVOIDING THESE PITFALLS

An efficient and effective performance management system is a vital asset for any organization. As such, employers must ensure that once the performance assessment tool is used to measure performance, there must be adequate **FEEDBACK** given to the employee regarding their performance. If the employee has been deemed to be performing unsatisfactorily, measures should be implemented to assist the employee to improve their standard of work.

COACH AND MENTOR BEFORE DISCIPLINING

Supervisors and managers should take this opportunity to coach and mentor the employee and agree to objectives and goals which would enable them to improve. This process is continuous and both parties must communicate often on their standard of performance.

After implementing these measures and there is no improvement on the part of the employee then management may have to apply varying levels of discipline. At each level of the review, documentation which reflects how the employee is performing is required. If disciplinary measures must be enacted, then documentation is key.

As can be seen in this case, this was a costly error for the company. Employers must be cautious when terminating on the grounds of poor performance. Never warning the employee about their performance places them at a disadvantage as they are not given the opportunity to improve their performance, and it also places the company at a disadvantage for breaching employee rights under the legislation.

Employers must be guided by the Act when administering discipline for breaches of any kind. The tribunal in making their decision relies on the rules covered under section 29 (4) (b) as outlined below in the case:

- disciplinary action must be applied progressively in relation to a breach of discipline;
- except in the case of gross misconduct an employee should not be dismissed for his first breach of discipline;
- in relation to breaches of discipline not amounting to gross misconduct
  - an employee should be warned and given reasonable opportunity to make correction; and
  - oral or written warnings or both should be utilized before stronger forms of disciplinary action are implemented.

TIPS FOR EMPLOYERS

1. **Document! Document! Document!**

   It is important for all employers to have accurate records and documentation especially when disciplining employees.

2. Continuously monitor and evaluate employee performance when implementing a performance management system

- Suggest and implement ways to help poor performers improve their performance.

3. The severity of the infraction should determine the level of disciplinary action to be imposed.

When disciplining employees take into account the severity of the infraction in an effort to determine the level of disciplinary action to be imposed.

4. When implementing discipline employers MUST ensure that they follow the process as outlined in the Fourth Schedule. This includes

- an invitation letter to a disciplinary hearing,
- the meeting should take place within seven business days,
- the outcome should be given after the meeting
- the employee must be aware of their right to appeal the decision

5. Ensure that any termination made is for just cause.

TIME FRAME FOR FILING OF UNFAIR DISMISSAL

Timing is key when filing unfair dismissal claims to the Tribunal. The law mandates a time period of three (3) months beginning from the effective date of termination for filing such claims. However it is important to note that the Tribunal within their discretion can still hear a claim when the time has elapsed once they believe that it wasn't practicably possible for the claimant to bring it before the time they did. This was a major point of contention for the company.

ERA SECTION 38: 3 MONTH TIMEFRAME

In their response to the allegations brought by the claimant, they argued that the three (3) month time frame as stipulated by section 33 of the Act had elapsed and therefore, the claimant's claim should be dismissed. However, the Tribunal was not persuaded by this notion based on the ground that the claimant made a former complaint to the Chief Labour Officer on the day of his termination.

TRIBUNAL'S DISCRETION

While section 33 of the ERA Act mandates that the claim must be brought within three (3) months, the Tribunal has the right to exercise its discretion to allow employees to have their cases heard provided that it is was reasonably practicable to do so. Similarly, Section 8 (3) of the Act states that a complaint shall be taken to have been made to the Tribunal on the date that it has been presented to the Chief Labour Officer pursuant to section 42 of the Act.

THEREFORE TIME IS A PRELIMINARY ISSUE

To this end, the defendant Company's defense was not substantiated given the timeframe in which the claimant's complaint was made to the Chief Labour Officer. Consequently, employers should be mindful when raising such a preliminary issue of time.

EMPLOYEE RIGHTS

under the ERA

1. **Successive short-term contracts**, without a minimum break of forty-two (42) days, **are treated as continuous employment**.
    - Therefore the employee's employment date will be determined as the date of first contract.
    - Depending on the length of employment, they can accrue rights under the ERA.

2. An employee acquires rights under the ERA after twelve (12) continuous months of employment.

3. For short term contracts constantly renewed for 1 year or more without a **forty-two (42) day break**, those persons acquire rights under the ERA such as the right not to be unfairly dismissed as outlined by the Act.

4. Schedule One in the ERA outlines the regulations under which a contract of employment exists.

Did you know?

"During those years, he had an almost unblemished record"

HARRIS V CHEFETTE RESTAURANTS LIMITED

This case examines unfair dismissal, not only by procedural breaches in the disciplinary process but by taking into consideration if the employer acted reasonably in their decision to dismiss the employee. While the company presented a strong case in their defense, the Tribunal took other facts also referred to as mitigating factors into account.

Let's take a closer look at this case to identify the missteps the company may have made which resulted in the claimant being awarded compensation of $106, 630.01.

The claimant was employed in the position of **Assistant Manager** and was with Chefette Restaurants Ltd. for **fourteen (14) years**.

During those years he had an almost unblemished record with only 2 warnings, one of which was expunged.

On 14th September 2013 while in charge of one of the branches, the claimant received, cashed and deposited a co-worker's cheque. However, the co-worker did not receive the 40.00 which was the amount changed. The company contended that when the claimant was questioned regarding the transaction, he failed to give an adequate explanation. This caused loss to the co-worker and by extension the company, as they had to repay the employee and this was deemed misappropriation of the cheque.

The company invited the claimant to a meeting on 12th December, 2013 to discuss cash handling procedures which related to the cheque of September, 2013. Invitations for a second and third meeting were scheduled for 30th December, 2013 and 14th January, 2014 respectively. These meetings did not take place and the claimant was dismissed January 27th, 2014.

The company argued that their decision to terminate stemmed from the fact that the claimant breached company policy as it relates to cash handling procedures for which he received extensive training. In their investigation, the claimant's signature on the back of the cheque as well as the witness statement gave them grounds to terminate.

BASIS FOR THE TRIBUNAL'S DECISION

Notwithstanding the fact that the company had very strong and compelling evidence against the employee, the tribunal examined how reasonable the Company acted when it terminated the employee. In determining the **REASONABLENESS** behind the decision, the tribunal looked to the fact that the Company's investigation only surrounded the claimant and the cashier on the night of the incident and did not go any further. In their test of reasonableness, the following factors were considered:

COMPANY SIZE AND RESOURCES

- In determining how far or how in-depth an investigation is required, is not only by case by case basis but also by the size and resources which the employer has or can afford.

INVESTIGATIVE THOROUGHNESS

- The investigation was limited to simply the cashier and the claimant, and did not fully consider all documentation presented from the night of the incident.

EVIDENCE

- Evidence presented did not show an excess or shortage of the $40.00 which the claimant had been accused of misappropriating.

PROCEDURAL FLAW

- A noted flaw in the Company's cheque delivery process which was known to the company and could have resulted in a breach.

ADDITIONAL INVESTIGATIONS

- The company, in the opinion of the Tribunal, could have extended the investigation and sought the assistance of a hand writing expert as suggested by the claimant to determine whether the signature on the back of the cheque was indeed in the claimant's handwriting.

RATIONALE

- In determining reasonableness, it was also questioned why an experienced employee whose intention was to steal his co-worker's money would endorse and sign the cheque as opposed to putting the payee's signature.

Having taken into account the above factors, along with the evidence presented the Tribunal declared that when the company made the decision to terminate the employee, they (the Company) did not carry out as much of an investigation into the incident as was reasonable even though they had the resources to do such.

DOES THE PUNISHMENT FIT THE CRIME?

To further determine reasonableness, the Tribunal also considered procedural fairness in that they examined the offence to ascertain whether dismissal was an appropriate measure.

To do this they examined the Fourth Schedule of the Act which speaks to progressive discipline. Section 29 (4) (b) outlines how discipline should be applied except in cases of gross misconduct. The clause used, justified the dismissal; however when questioned by the Tribunal the specific offences which would be considered in breach of the clause, the company failed to identify other offences. Additionally, the tribunal also made mention of the Cash Handling Manual's clause which generally indicated that any breach would result in disciplinary action up to and including dismissal.

As such, the Tribunal concluded that dismissal should not have been an automatic response to the breach, especially since other mitigating factors were at play such as the employee's tenure and his almost perfect record.

The disciplinary process taken by the Company was also found to be in breach of the ERA. The company argued that the first meeting which the claimant attended was not intended to be a disciplinary meeting. However, the tribunal found that it was in fact a disciplinary meeting and the employee's rights were infringed as he was not notified of this right to representation, nor was he able to adequately defend himself against the allegations.

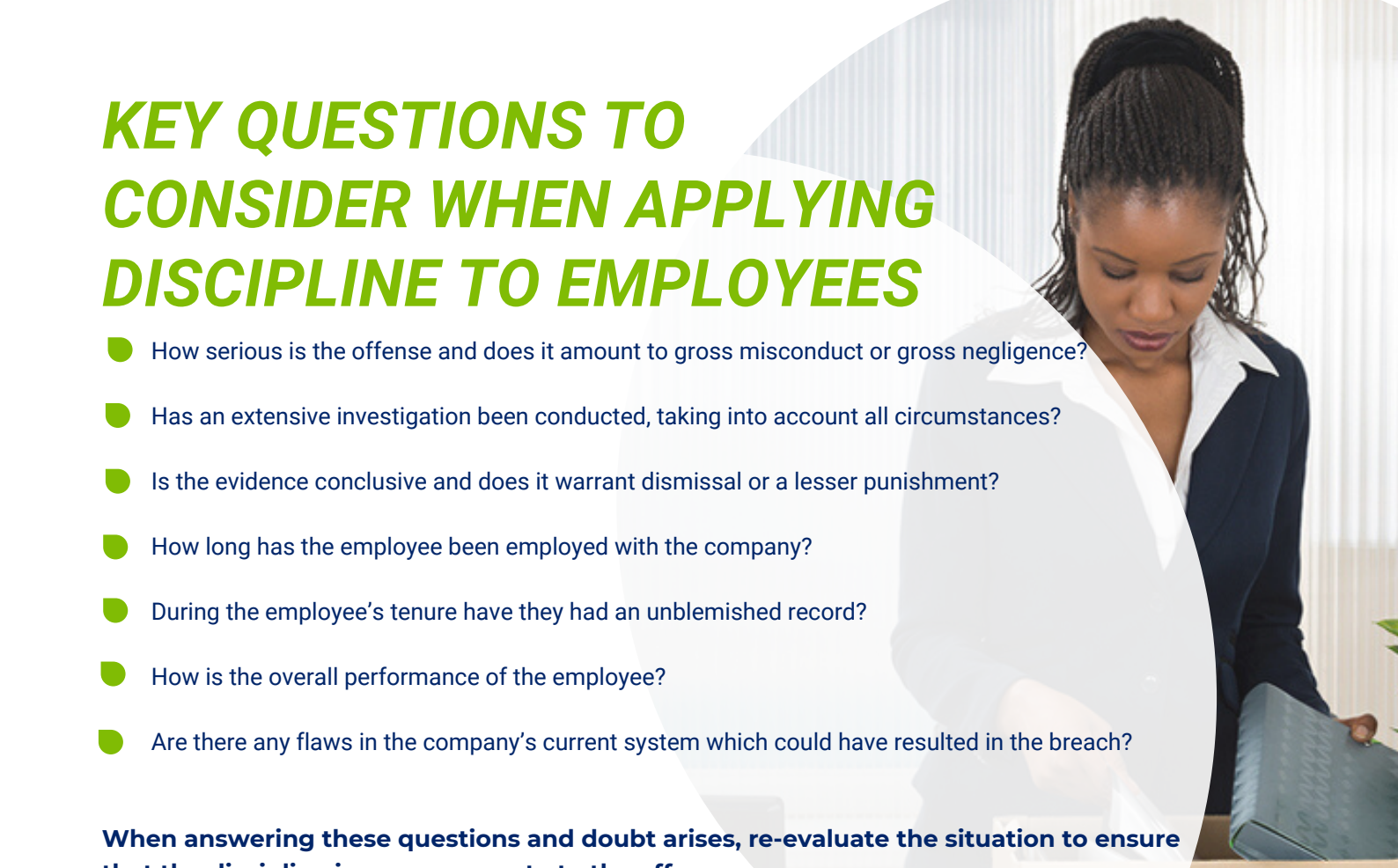
The company cited the fact that they utilized Part B of the disciplinary process which would enable them to have the meeting until they contemplated taking disciplinary action. However, after hearing all the circumstances surrounding the initial meeting and the following meetings some of which did not occur place, the Tribunal determined that the claimant had made his case for unfair dismissal and that the company did in fact breach the disciplinary process outlined in the Act.

REASONABLENESS

Often times situations occur where the evidence points to one particular person within the organization. While this may be so, employers are urged to evaluate all the evidence and conduct a comprehensive investigation into the incident before making their decision. While circumstances and cases are all different and will have to be treated accordingly, it is imperative that all factors are considered, both mitigating and convincing, before applying varying disciplinary measures or sanctions to employees.

Employers should also ask and answer key questions themselves when going through the disciplinary process?

KEY QUESTIONS TO CONSIDER WHEN APPLYING DISCIPLINE TO EMPLOYEES

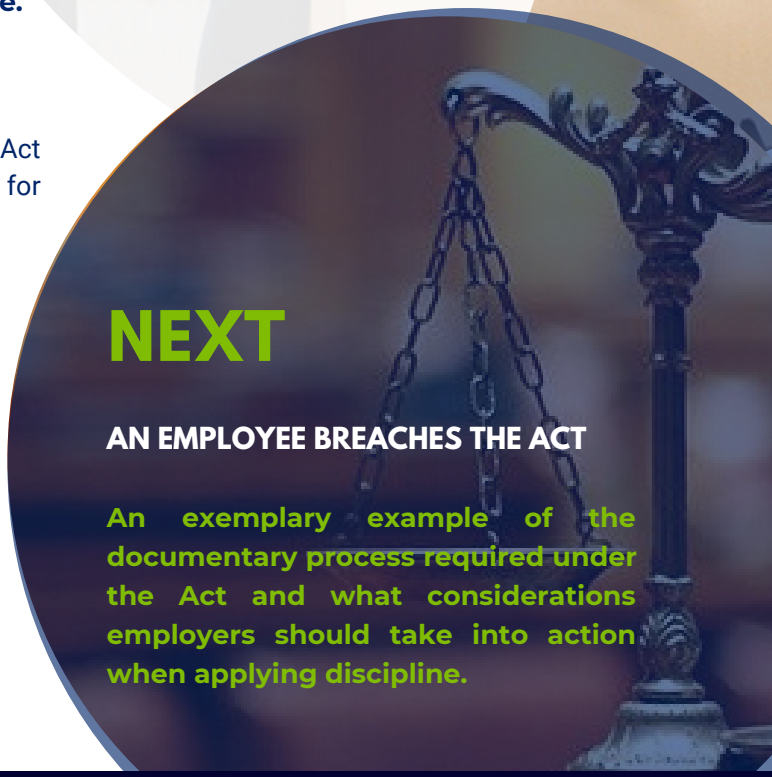


- How serious is the offense and does it amount to gross misconduct or gross negligence?
- Has an extensive investigation been conducted, taking into account all circumstances?
- Is the evidence conclusive and does it warrant dismissal or a lesser punishment?
- How long has the employee been employed with the company?
- During the employee's tenure have they had an unblemished record?
- How is the overall performance of the employee?
- Are there any flaws in the company's current system which could have resulted in the breach?

When answering these questions and doubt arises, re-evaluate the situation to ensure that the discipline is commensurate to the offence.

Since its enactment in 2012 the Employment Rights Act (ERA) provides the framework and sets the guidelines for which both employers and employees must adhere to.

While many of the cases heard before the Tribunal went in the favour of the employee due to missteps and procedural breaches on the part of the employer, this next case highlights the employee's breaches of the Act.



NEXT

AN EMPLOYEE BREACHES THE ACT

An exemplary example of the documentary process required under the Act and what considerations employers should take into action when applying discipline.

Let's examine the steps the employer used to justify the dismissal of the employee which withstood the test of reasonableness, procedural fairness as well as the necessary documentation and process required by the Act.

NICOLE LAYNE VS G4S SECURE SOLUTIONS (BARBADOS) LIMITED

Factual Background

Ms. Layne, while on duty on the 13th June 2013, was assigned to verify the baggage for Jet Blue airlines which was bound for New York. When she indicated the bag count, the Jet Blue agent notified her that her count was inaccurate and that she needed to redo it. While she complied with this request, she was heard on the walkie talkie using abusive language regarding the fact that Jet blue did not know the correct bag count.

The employee was issued an invitation to a disciplinary hearing for July 1st, 2013 after the manger received a formal complaint from the management of Jet Blue outlining the incident which occurred. After thorough investigation Ms. Layne was subsequently terminated September 12th, 2018.

Ms. Layne claimed unfair dismissal on the basis of denial of due process and a breach of the ERA. The Tribunal dismissed the claimant's case as they concluded that she did not followed established procedure outlined by the ERA and the company had substantiated its case for termination.

The claimant contended that she was denied due process and argued that she utilized Clause 6 of the Collective Agreement which allowed for her to appeal directly to the CLO. The Tribunal dismissed her claims on the following basis:

- Part B of the Fourth Schedule outlines the appeal process which must be taken by the employee.
- The employee must inform the employer in writing of his appeal and follow the established disciplinary process of the company.
- If there is no settlement reached here, then the matter can be referred to the CLO for conciliation by the employee or his/her representative.
- The first steps must be exhausted first before moving to the CLO.
- The claimant admitted that she did not appeal within the 5 days outlined in the termination letter.
- Nor did she appeal when the company offered another chance to do so in February of the following year.

Clause 6 of the Agreement read as follows:

"Failing settlement at a Joint Conference under (5) above, of any question brought before it, it shall be agreeable for either party to refer the question to the CLO for conciliation."

The above clause was also dismissed as this clause worked in conjunction with five others which outlined the agreed dispute / grievance procedure between the company and the union. Again, the claimant did not utilize the correct process.

It must be noted that in the Tribunal's findings, legislation supersedes collective agreements.

Justified Termination

As highlighted in the previous cases, it is the duty of the employer to document and follow the legislation to the letter to avoid successful claims of unfair dismissal. G4S, in managing the disciplinary process, provides a perfect of example of what to do and how to do it:

Steps Taken by G4S

- On receiving the complaint, the company issued a letter to a disciplinary hearing to the employee outlining the charges being brought against her.
- The company collected witness statements from the Jet Blue agent, the official complainant and other witnesses who were present.
- The company further acquired a statement from Digicel to ensure that the claimant did in fact transmit a message on that date in question.
- The claimant was issued another letter to attend another meeting on July 26th 2013 and another letter to attend a meeting on 6th September, 2013.
- Termination Letter issued the 12th September 2013
- Each meeting, the claimant was allowed the right to representation of her choosing.
- Each letter issued to attend a disciplinary meeting was issued 3 to 4 days prior to the scheduled meeting.
- The company engaged in a thorough investigation involving not only the claimant, who admitted to using abusive language, but also the service provider and several witnesses.
- The company offered the claimant a chance to appeal even though the first option given to her had expired.
- The aforementioned clearly highlights the necessary steps that an employer must undertake when implementing discipline.

KEY POINTS TO NOTE

Employers must ensure that they comply with all the relevant steps outlined in the disciplinary process and all items relevant to the legislation. While all the cases heard thus far at the level of the Tribunal have highlighted unfair dismissal claims, employers must ensure that they comply with all aspects of the ERA. This therefore means contracts of employment should be updated to ensure compliance, employees must be given a job description, itemized pay slips and be entitled to all rights conferred upon them by the Act.

Did you *know...*

Legislation trumps contractual agreements once they are in breach of the law.

Full time employees must be issued a contract of employment at the start of their employment.

An employee must be notified of the right to representation and their right to appeal when implementing disciplinary measures.

13 ERT Decisions to Date

2015	
Anne-Marie Holder v AVG Investments Inc	$22,411.12
Joel Leacock v PMM Services Ltd.	$77,176.92
2016	
Cutie Lynchv NCC	
Orlando Harris v Chefette Restaurants Ltd.	$106,630.01
2017	
Nicole Lane v G4S	DISMISSED
Mario Leacock v Bjerkhamn Associates	$5,900 Argument for severance dismissed
2018	
Bowen v Zaccios Restaurants	$9,156.00
Emerson Bascombe v BWU Cooperative Credit Union	
Rosalind Patrick v Rendezvous Retreat Homes Inc.	
Wendell Storey v Payne Bay Hotel T/A Waves	$40,149.79
2019	
Debra Brathwaite v First Citizens	$303,570.29
Shikeila Johnson v Ian Griffith's Mortuary	$15,686.82
Keith Lewis v Board of Management of the Lodge School	$15,686.82

Braemar Court
Deighton Road
Brittons Hill
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