Checking the Employment Rights Act's boxes

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By Shanika Best

The point is often made that our **Employment Rights Act**, more commonly known as the ERA, is the most frequently referenced legislation for employers. However, there is still a plethora of employers who are not familiar with the requirements of this act. This article will cover some of the nuances and applications of which employers should be cognizant. Given the broad scope of the act all the areas cannot be covered in a short article, but this will be a starting point and an invaluable opening conversation on the matter.

To ensure compliance, the minimum requirement for an employer, are the contents of the act. This means that at every section, an employer should ensure compliance with the requirements of every section. Some common non-compliance areas include the provision of a statement of employment particulars, that is the contract of employment. While a verbal contract can exist, a written contract is ideal. A second one is an itemised pay slip to be provided at the time of payment of salary/ wage.

While a verbal contract of employment can exist, a written contract is ideal. (Internet image)

As we take a microscopic view at the compliance check boxes, it is prudent to mention consultation as the final common non-compliance area. This is for both redundancy and lay-off. The legislation requires that employers consult with employees, six weeks prior to any redundancy where the work force will be affected by at least ten per cent.

While the act is the minimum requirement, there is always scope to better the law. This means that even in instances where less than ten per cent of your workforce will be affected it is recommended that the employer facilitate the consultation process where possible. This allows for the opportunity to answer questions that may be misunderstood and the provision of career counselling or any other relevant counselling as well. The lay-off process also requires the six week consultation process. The act makes provision for employers who are unable to meet the consultation period. However, the recommendation remains to consult with employees where possible.

The ERA requires that employers follow a process indicating a step-by-step framework when working through disciplinary matters. The fourth schedule provides an outline of how to proceed when treating to discipline from issuing the invitation to the meeting and extending the right to appeal the outcome. In checking off this box employers must ensure that the processes required by the ERA are followed when treating to discipline. A code of discipline is effective in developing a step-by-step framework. This outlines the first, second and final outcomes for infractions. The process also indicates a lead up to and chance to correct the infraction by way of training or tools, for example.

Reasonability is another checkbox

There is often a disconnect between the reasonable employer who hires an employee, is eager to see them develop and contribute to the organisation and the unreasonable employer who is anxious to terminate an employee when infractions arise. To further explain this point, the same reasonability an employer applies during the initial stages of the employment relationship, is the same reasonability that should be maintained throughout the disciplinary process. To ensure you check off the box of reasonability start by asking the following questions:

- Is this outcome progressive or final?
- Did the employee have a reasonable chance to change their behaviour or performance?
- Did the reference documents exist to clearly outline the employee expectations and were they made available to the employee?

Once you can answer these questions favourably, it would confirm that reasonability exists within your framework. Should you answer no to any of the above questions, then it would indicate that the framework requires adjustment. The employer must ensure that there is a clear framework of expectations prior to any disciplinary action.

The final checkbox is gross misconduct

The question "what gross misconduct?" is very common. The short answer according to the Collins English dictionary is a proven crime in connection with employment that is serious enough to require dismissal. It is common for employers to attempt to characterise any type of conduct as gross misconduct to speed along the disciplinary process. The best way to support a clear understanding of gross misconduct within your organisational context, is to ensure that an employee handbook exist, where the term and examples of the conduct are clearly defined.

Finally, it is recommended that in instances where the conduct is alleged to be gross in nature, the shortened disciplinary process should not always be utilised by default. However, the infraction should be analysed to determined if an investigation is necessary and if so, the employee can be placed on suspension with pay in the interim.

For further assistance with your checkboxes for the ERA, please contact us at the Barbados Employers' Confederation. Ask about our **Red Book: Guide To Employment Relations** and our **Step-By-Step Conducting Discipline Guide**. In our next conversation we will continue our focus on the ERA, picking back up with compliance, what is suspension with pay and how is it used. Keep an eye on this space.

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