

A closer look at compliance with the ERA



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By Shanika Best

Last week, we focused on checking the boxes of the Employment Rights Act (ERA), where we ended with the issue of suspension with pay. In that moment, you were probably thinking: 'what is suspension with Pay? I have heard it before, but I am not certain how or why it is used in the employment context'. In this article, we will breakdown what it is, how it should be used and highlight how it is different from suspension without pay. We will also continue to take a closer look at employment contracts under the ERA as we unpack some common misconceptions.

Suspension with pay is where an employee is suspended from their work for a specified time and receives their salary/wage during that time. Notably, suspension with pay is not punitive, that means that it is not a form of discipline but rather a measure utilised where an investigation is necessary. This is to ensure a level of objectivity and that there is no obstruction to the investigative process. Suspension with pay is commonly utilised during the preliminary stages of an investigation, where an employer is undertaking fact-finding exercises to determine if discipline should be contemplated.

Not punitive

How does suspension with pay contrast with suspension without pay? Remember, as mentioned in the earlier paragraph, suspension with pay is not punitive. On the contrary, suspension without pay is punitive and is a form of disciplinary action. It may be utilised as an appropriate (dependent on the infraction) outcome of a disciplinary process.

In continuing the conversation on compliance, another vital component is the employment contract. Where an employment relationship exists, there must be an employment contract. In the first instance it must be determined if an employment relationship exist. The ERA provides a measure to test if a



Employees can be suspended with or without pay. (Internet image)

relationship exists in the First Schedule.

Often employers are misguided in the notion that if they can be excluded from one or more of the factors in the litmus test, they can substantiate that a relationship does not exist. This is not the case. The list of factors assessed in the litmus test, have a long history in common law and each is assessed and weighted based on the merits of each case.

For clarification, this means that the aim is not to be exempted from one of the factors outlined in the First Schedule. Should any of the factors be in practice through the contract, this could possibly mean an employment relationship exists. It is important that employers know that in performing the litmus test, the actual treatment of the person is assessed and not simply what is in writing between the parties.

On the point of contracts, another common misconception is how to utilise fixed-term contracts. Let us unpack this for a moment. Many employers are of the misinformed

viewpoint that fixed-term contracts do not guarantee employees' rights under the ERA. Contrarily, this only creates an administrative burden on an employer. A crucial point outlined in the Act is on the matter of contract breaks. It notes that unless the contract break is more than 42 days then the employment is considered continuous. Amidst the renewals, the ERA confers rights to every employee, for example, the right not to be unfairly dismissed, the right to representation and the right to appeal a decision to name a few. The Act notes that 'the right not to be unfairly dismissed' is applicable to employees who have been continuously employed for one year or more.

To further expound, this means that once the litmus test determines that an employment relationship exists, it can only be ended for one of the reasons outlined in the Act as follows;

1. Termination for conduct.
2. Termination for capability.
3. Termination through redundancy.

4. Termination for some other substantial reason.

5. Termination through contravention because of a duty or restriction.

In concluding the point of administration burden, the recommendation would be for employers to aim to issue the correct contract. Temporary employment, part-time employment, fixed-term and casual employment are all legitimate forms of employment and contracts can be drafted to meet the organisational needs while being legally compliant.

Our team at the Barbados Employers' Confederation stands ready to assist employers with labour compliance. Ask about our Red Book: Guide to Employment Relations and our Step-by-Step Conducting Discipline Guide.

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