

## Workplace

# The difference between wrongful and unfair dismissal



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By Sheena Mayers-Granville

Law is not always black and white. This is not surprising especially since we know that there are two sources of law – case law and legislation. When considering claims of former employees against their dismissal, it is useful to note that wrongful dismissal is a common law (case law) construct while unfair dismissal only became a possibility in 2012 with the proclamation of the Employment Rights Act (ERA).

Prior to 2012, an employee who believed they were dismissed in questionable circumstances could only seek redress through the Court via a claim for wrongful dismissal. Under common law, a wrongful dismissal claim could only be successfully made if the employer breached the terms of the contract of employment (for example, failure to give required notice). Notable historic cases include June Clarke versus. ALICO where the Court deemed that the notice period was inadequate.

Unfair dismissal is a dismissal which contravenes the provisions of the statute which created it; the Employment Rights Act. Section 30 of the ERA has listed reasons that would be considered as unfair, such as:

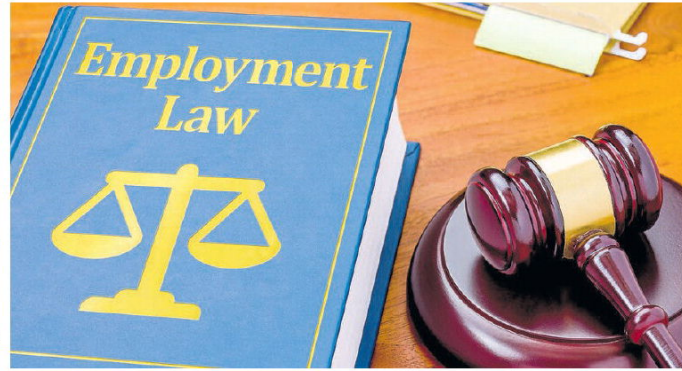
- The dismissal took place as a direct result of the employee being an officer, shop steward or a safety and health representative or a delegate or member of a trade union.
- That reason relates to the race, colour, gender, age, marital status, religion, political opinion or affiliation, national extraction, social origin, or indigenous origin of the employee.
- The dismissal occurred while the employee was on certified sick leave for less than 12 consecutive months or less than 12 months in any one period of 24 months.

Further, the onus is on the employer to prove that there was good and sufficient reason to dismiss an employee and the employer must act fairly in terminating the employee.

There are five fair reasons for dismissal as set out by the Employment Rights Act:

1. Capability – If a person lacks the skills, qualifications or ability to perform the job role. Section 29 (2)(a).
2. Conduct – If the employee has committed gross misconduct or received previous warnings for serious misconduct. Section 29 (2)(b).
3. Redundancy – If the role is no longer required by the organisation. Section 29 (2)(c) & Section 31
4. Legal reasons – If the continuation of employment would cause legal issues, such as a security guard who is denied a licence. Section 29 (2)(d).
5. Some other substantial reason (SOSR). Section 29 (1) (b).

Beyond the reason for the dismissal, fairness in the dismissal process will also be determined by examining if the employer acted reasonably and complied with the



Unfair dismissal only became a possibility in 2012 with the proclamation of the Employment Rights Act. (Internet image)

Disciplinary Rules stated in the Fourth Schedule of the Act.

The Employment Rights Tribunal (ERT) deals with claims of unfair dismissal. If a dismissal is unfair, there is no legal justification for it and therefore the legislation provides not only monetary compensation as a potential remedy, but it also gives the Tribunal the power to order reinstatement or re-engagement as remedies to an employee. The decision(s) of the tribunal are final and not privy to appeal, except on points of law.

#### Breach of contract

As mentioned earlier, wrongful dismissal, means dismissal in breach of contract – and can only be litigated in the Courts (the ERT has no jurisdiction). Applying to the Courts as a potential route for a dismissed employee in view of the time and very significant expense required to take this type of action. A claimant at the ERT does not need to have an attorney as their representative, it is their decision if they want a trade union or another person to represent them. Or they can choose to present their own case.

It must be noted that to claim for unfair dismissal under the act, the following must apply:

- The employee has in fact been dismissed.
- Complaints are directed through the Chief Labour Officer.
- The person was employed for at least 12 months.

Notably, an employee can, in theory, bring a wrongful dismissal claim even during the first year – but such claims are difficult.

The Fifth Schedule of the ERA allows the tribunal to award compensation for unfair

dismissal, which includes (a) a basic award; (b) an amount in respect of any benefit the employee may have reasonably expected to receive had he still been employed and (c) an amount not exceeding 52 weeks if the reason for dismissal fell within those specified in Section 30(1)(c).

In the Caribbean Court of Justice's (CCJ) judgement in the case of Orlando Harris vs. Chefette Restaurant Limited, the CCJ clarified that the power given to the ERT to make an award for lost benefits is limited to awarding for fringe benefits once the employee proves this loss. At paragraph 126 of its 59-page judgement the CCJ stated: "The meaning of the word benefit in this area of employment law is commonly accepted as including pension rights, salary increases, tips, allowances, and what are called fringe benefits."

Wrongful dismissal still exists, and always will, as established via case law. However, since the advent of the ERA, I believe such claims have greatly reduced. This is because there is clarity in the ERA surrounding the reasons and process for fair termination. Even though delayed, the ERT as a dedicated labour tribunal has settled many cases through case management conferences and is certainly faster than the Court of Law.

In lay terms, the words wrongful and unfair may be used interchangeably. However, when it comes to dismissal, they have two distinct meanings. The arbiters are different (Court or Tribunal), and the remedies that can be applied are also different. Employers, if you are unsure on any aspect of a dismissal, we at the Barbados Employers' Confederation encourage you to seek advice before proceeding.

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