

HC

HALSBURY CHAMBERS BULLETIN



UNFAIR DISMISSAL



Without question, it is more common to hear of **Wrongful Dismissal**, than Unfair Dismissal. Perhaps this is more due to ignorance of the law, than anything else.

Notably, Sections 34 and 35 of the Employment Act makes provision thus:

34. *Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer.*

35. *Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case.*

Herein, at first glance, lies the challenge. For whatever reason, many attorneys construe the provision of Part IX to be limited to the four specific axiomatic scenarios presented therein, i.e.:

1. Termination by reason of Trade Union membership (Section 36);
2. Redundancy (Section 37)
3. Pregnancy (Section 38); or
4. Participation in lawful industrial action (Section 39)

To the contrary however, the Courts and the Bahamas Industrial Tribunal, pursuant to the Sections above, are constrained to have regard to whether the dismissal of the employee was fair or unfair in accordance with the substantial merits of each case. This has everything to do with the process undertaken with regard to every employee's termination, i.e., whether a proper and fair hearing or 'due process' was had. To this point, we hasten to state that every employer has the right to dismiss his employee, but where he purports to do so summarily, the law places on him the burden of ensuring that the dismissal has been executed fairly.

There is voluminous case and statute law to this effect which has its ready application in Bahamian law. Suffice it to say, every employee should have the opportunity to state their case at the conclusion of any investigation undertaken against them – especially where they have suffered suspension with or without pay in regards to such investigation. It is true that ***Justice must not only be done, it must be seen to be done.*** Accordingly, every employee is entitled to know the specific nature of the case made against him and, it is respectfully submitted that the rule ***'Audi Alteram Partem'*** - no one should be condemned unheard – applies.

We consider such rubric to be the corner stone of Labour law. To wit:

- i. Any party to an action is entitled to be heard;
- ii. He is entitled to dispute his opponent's case, to question his opponents' witnesses, to call his own witnesses and to give his own evidence;
- iii. He is entitled to know the reasons for the decision rendered by the body so making such decision.
- iv. He should have the opportunity for appeal to higher authority within the organization.

HOW OTHERWISE, CAN ONE HAVE A "FAIR" HEARING?

In this regard, there is clear authority that failure to follow proper procedures can turn a potentially "fair" dismissal into "unfair dismissal". To aid in this determination, the following questions may be asked:

Upon completion of the investigation, was the employee given a fair hearing by the employer? What evidence was used and was it presented to the employee at the hearing for response?

Did the employee have the opportunity for representation by a fellow employee or Union representative? Were other employees involved in such investigation and if so, were they all treated in the same way? Had the employer complained of such conduct on the employee's part before? Did the employee have previous warnings or citations, similar or otherwise? What was the overall performance of the employee, e.g., did he have a track record of good work and behaviour? Was dismissal the only viable option available to the Employer? Did the employee have the right and the opportunity to appeal the decision? Was the whole procedure carried out in accordance with established guidelines, policies and/or practices?

Simply stated, where one purports to terminate for cause, one can not, without proper review, make the bare statement to the employee that his employment is at an end. An employer may dismiss an employee summarily for fundamental breach of his contact of employment or for having acted in a manner repugnant to the fundamental interest of the employer ***provided that he fairly dismisses the employee.***

In a locally decided case, it was held:

...the Applicant was summarily dismissed by the Respondent in the most peremptory fashion. He was not given any opportunity to state his case, and even though he might not have been able to offer a reasonable explanation for his conduct, under the statutory regime of unfair dismissal, he ought to have lawfully been given an opportunity by the Respondent to give an explanation for his conduct...So in our view, except where the maxim res ipsa loquitur applies or where the reason for dismissal is axiomatic, an employer is required not only to state its reasons to an employee for summarily dismissing him, but also, to allow the employee a reasonable opportunity to state his case...

REMEDY FOR UNFAIR DISMISSAL

A number of remedies exist under this head. For example, an Order for Reinstatement under Section 43(2) or Reengagement under Section 43(4) or an award of Compensatory Damages, comprised of a Basic Award and Consequential Damages Award may be made where appropriate. In a nutshell therefore, the ***basic award*** is calculated on the basis of ***three weeks pay for each year of service up to the date of dismissal*** and ***where appropriate***, supplemented by an order for ***consequential damages*** in respect of ***any expenses reasonably incurred by the complainant in consequence of his dismissal, in addition to all benefits lost in that time***, to be assessed. There is a statutory limit on the compensatory award to 24 months (two years' pay) for supervisory or managerial employees.

Such an award may be reduced by such proportion as may be considered just and equitable where the dismissal was to any extent caused or contributed to by any action of the complainant. Indeed, there have been cases whereby, even though unfair dismissal was established upon the facts, because there was no actual loss sustained to the Complainant, no award was granted. Yet in other cases, where the Applicant contributed to the action levied against him, awards up to 75% have been deducted from Compensatory damages provided under this head.

Damages for Unfair Dismissal within our jurisdiction have well exceeded \$200,000.00, being awarded to the improperly dismissed employee. For this reason, employers would be well advised to ensure that each and every termination is properly executed to mitigate against such lofty assessments.

Written by: Rionda Godet, Partner