INDUSTRIAL COURT
of Trinidad and Tobago

Keynote Address

by

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"Navigating the Industrial Court: Key Considerations and Best Practices for Employers"

at the

Trinidad and Tobago Chamber of Industry and Commerce
Employee and Labour Relations Breakfast Meeting

UNDERSTANDING THE INDUSTRIAL COURT
FROM THE EMPLOYER'S PERSPECTIVE

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It is my view, that the best approach for employers to take, in successfully steering their matters through the Industrial Court is to become well acquainted with the Court's jurisdiction and its powers as set out primarily in the *Industrial Relations Act*, Chapter 88:01 ("the IRA/the Act") and other relevant statutes. The Court's jurisdiction and its powers have also been addressed over time in papers, articles and judgments of the Court, as well as of the Court of Appeal and the Privy Council.

Therefore, with this as my thesis and in keeping with my assignment this morning, I will approach the topic by referring briefly to the Court's jurisdiction and powers as set out in the IRA; highlight certain comments on its jurisdiction and powers as found in judgments and papers which give insight into the application of those powers.

I will spend some time on the powers as set out in section 10 in particular, 10 (3) and the principles of good industrial relations practice. Underpinning those principles are natural justice and due process. Should time permit, I will devote some time to the disciplinary process and factors such as long service, unblemished records and the Court's approach to discipline in those cases.

THE COURT'S JURISDICTION

Section 4 of the IRA establishes the Industrial Court as a superior court of record and ascribes to it all the powers inherent in such a court. In addition, the Court has the jurisdiction and powers conferred on it by the Act.

His Honour Mr. Addison Khan, former President of the Court (now deceased) gave some insight into both the powers of the Court as a superior Court of record and its inherent jurisdiction in two of his judgments.

In addressing the inherent jurisdiction of the Court, in *Trade Dispute No.15 of 1990 Managers and Supervisors Association of Trinidad And Tobago v Fox International,* he explained by reference to Halsbury's Laws of England that:-

"The jurisdiction of the Court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The inherent jurisdiction of the Court enables it to exercise … control of its process by regulating its proceedings, by preventing the abuse of its process and by compelling the observance of its process. In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them". [See Halsbury's Laws of England, Fourth Edition, Vol.37, page 23, para.14.]

In *Trade Dispute No. 62 of 1975 Transport and Industrial Workers' Union and Tractors and Machinery (Trinidad) Limited*, Khan P. referred to a Paper, "*The Inherent Jurisdiction of the Court*" by I. H. Jacob. He noted that: -

"… the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused… it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. "

A superior court of record, therefore, has a responsibility to guard against abuse of its process by any party.

In addition to its inherent jurisdiction as a superior court of record, the IRA at section 7 (1) conveys jurisdiction on the Court: -

a) *to hear and determine trade disputes;*
b) *to register collective agreement and to hear and determine matters relating to the registration of such agreements;*
c) *to enjoin a trade union or other organization or workers or other persons or an employer from taking or continuing industrial action;*
d) *to hear and determine proceedings for industrial relations offences under this Act;*
e) *to hear and determine any other matter brought before it, pursuant to the provisions of this Act".*

By section 7(2) the Court can punish contempts of the Court; under Section 8 (1) the Court has all the powers, rights and privileges as are vested in the High Court on the occasion of an action, with to respect the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction.

Under section 8(5) of the IRA, the Court is empowered to require evidence or argument to be presented in writing and may decide the matters upon which it will hear oral evidence or argument.

This is important. A party who fails to put their case adequately before the Court and who may opt not to put in a written witness statement, but adopts the tactic of seeking to rattle the opposing parties' witnesses in cross-examination, as a means of bolstering their case, may be sorely disappointed, especially where the material facts are not in dispute and the Court decides there is no need to call oral evidence or hear further oral evidence.

In CA No S218 of 2022 between the *National Gas Company of Trinidad and Tobago and Steel Workers Union of Trinidad and Tobago*,[1]the Court of Appeal considered: -

(i) Whether the Industrial Court acted without jurisdiction

(ii) Whether the decision made by the Industrial Court or its findings on the primary facts were made in the absence of evidence; and

(iii) Whether its procedure followed by the Industrial Court was manifestly unfair or in breach of natural justice.

In that case after hearing the oral evidence and cross-examination of the Worker and allowing submissions from both sides, the Court acting pursuant to its powers under section 8(5) decided that it would hear no further oral evidence. All the grounds of appeal were dismissed.

The Court is empowered to take hearsay evidence. (Section 9(1)).

THE COURT'S POWERS UNDER SECTION 10

The Court has many powers under section 10, including at 10 (1) (d) the power to dismiss any matter or part of a matter or refrain from further hearing or from determining the matter, if it appears that the matter or part thereof is trivial, or that further proceedings are unnecessary or undesirable in the public interest.

Section 10 (2) prohibits the award of costs in any dispute before it, unless for exceptional reasons. This holds true as well for disputes of the Court which are the subject of appeal before the Court of Appeal.

Section 10 (3) states: -

[1] Delivered by V. Kokaram J.A. on 27th October, 2023.

Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall—

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

Under subsections 10 (4) and 10 (5) notwithstanding any rule of law to the contrary, in addition to its jurisdiction and powers under Part 1 of the IRA, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or reinstatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or reinstatement, or the payment of exemplary damages in lieu of such re-employment or reinstatement. Any such order may be made only where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles and practices of good industrial relations.

In making an order for compensation or damages, the Court in its assessment shall not be bound to follow any rule of law and the Court may make an assessment that is in its opinion fair and appropriate.

Subsection 10 (6) provides that the opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be

challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever.

In Court of Appeal No. 83 of 2002, Sharma CJ, pointed to the fact that: -

"*the legislature vested the Industrial Court with the responsibility of ensuring that good industrial relations practices are maintained in employment relationships….*"

He quoted De La Bastide C.J. in *Caroni (1975) Limited v Association of Technical and Administrative Supervisory Staff*:

"…the intention of Parliament, clearly expressed in S 10 (6) is that the question whether the dismissal of a worker is in any case harsh and oppressive and contrary to the principles of good industrial relations practice should be reserved to the industrial court. What distinguishes a dismissal that is harsh and oppressive from one that is not is a matter which the act clearly regards as not grounded in law but in industrial relations practice. This practice which is not codified in our jurisdiction is to be determined and applied to facts of each case by the Industrial Court."

Subsection 18 (2) sets out the grounds of appeal and also limits appeals to be brought on those grounds only. They are lack of jurisdiction where that objection was formally taken at some time during the progress of the matter before the making of the order or award; excess of jurisdiction; where an order or award has been obtained by fraud; any finding or decision of the Court is erroneous in point of law; or that some other specific illegality not mentioned above, and substantially affecting the merits of the matter, has been committed in the course of the proceedings.

THE PRINCIPLES AND PRACTICES OF GOOD INDUSTRIAL RELATIONS

A close attention to the provisions of section 10 and in particular the court's mandate at 10 (3) (b) to act in accordance with equity and good conscience and to have regard to the principles and practices of good industrial relations, I would expect, to be a key consideration of employers in their workplaces.

This is important because, what the Court does in the majority of trade disputes, especially those which concern dismissals, is to review the conduct of the parties which led to the particular issue. To seek after the fact to convince the Court that one adhered to the principles and practices of good industrial relations, may be futile, if in fact one's conduct in the lead up to the event, says otherwise. I would suggest that adherence to the principles and practices of good industrial relations should be standard operating practice and procedure for employers and not a strategy adopted at the doors of court.

The major tenets of good industrial relations practice have been well documented in decisions of the Industrial Court over the last 60 years of its existence, as well as in those of other labour tribunals and Courts and ILO Conventions and Recommendations.

In discussing the Court's mandate Rees JA, in Civil Appeal No. 30 of 1972, *Caribbean Printers Ltd. v. the Union of Commercial and Industrial Workers*[2] said: -

"The Court is under an obligation to pay due regard to the principles and practices of good industrial relations which have been aptly described as those informal, uncodified understandings which are ancient habits of dealing adopted by trade unions and acquiesced in or agreed to by employers…"

In Civil Appeal No. 53 of 1976, *Texaco Trinidad Inc. v. Oilfields Workers' Trade Union,* Hyatali CJ, said: -

[2] Delivered on February 27, 1975

"…It follows that both employers and trade unions are not only obliged to observe and apply these principles in all their dealings with each other but must be prepared to accept that any position taken up by any of them in breach thereof may well be condemned by the Court as unreasonable."[3]

Among the leading cases on the principles and practices of good industrial relations are Trade Dispute No. 140 of 1997, *Bank and General Workers' Union v. Home Mortgage Bank* delivered on March 3, 1998 and *Trade Dispute No. 2 of 2001, Banking Insurance and General Workers' Union v. Hindu Credit Union Co-operative Society Limited* 4 [4].

The key principles and practices of good industrial relations are that: -

a. The employer should properly investigate any allegation or allegations of misconduct made against a worker;
b. Except in exceptional circumstances, a worker should be given an opportunity to be heard before being dismissed from an employer's service;
c. c. The essence of a fair opportunity to be heard involves the provision of relevant information by the employer to the employee to enable the latter to understand the substance of the allegations made against him and an opportunity to reply to such allegations, including putting forward any reasons in mitigation of a penalty;
d. The opportunity is to be given <u>before</u> the decision to dismiss is made.

From disputes coming before the Court, there are a number of common failings on the part of some employers in adhering to the principles and practices of good industrial relations. Breaches occur quite frequently in the conduct of disciplinary meetings and inquiries. An employee is called without notice of the fact that the meeting is in relation to a disciplinary matter; in some cases especially where dismissal is contemplated, while

[3] 34 WIR 215, dated March 11, 1981
[4] Delivered on July 31, 2001

the employee is made aware of the disciplinary nature of a meeting, there are some other common flaws, including providing short notice, giving no particulars of the allegation(s) or insufficient information, tendering written statements from witnesses who are not present at the inquiry; calling an employee to a disciplinary inquiry at the close of which a prepared letter of dismissal is delivered to the employee, a clear indication that the decision was taken beforehand. The reasons stated for dismissal may differ from the reasons stated in the disciplinary charge(s). Quite frequently, additional reasons are added for the first time in the dismissal letter. Also, there is no chance for a plea in mitigation.

In recent times, the CA is stressing more often that employers should afford a worker the opportunity to make a plea in mitigation before imposing the penalty.

In Civil Appeal No. P013 of 2018, between the *Public Services Association and Water And Sewerage Authority*[5] a matter in which the Industrial Court dismissed a trade dispute. On appeal the Court remitted the matter to a differently constituted panel of the Court to consider the submissions of the Union in relation to the issue of mitigation, specifically, whether the omission of WASA to hear the worker in mitigation before the imposition of the penalty rendered the dismissal harsh and oppressive or contrary to the principles of good industrial relations practice or not.

Articles 4 to 7 of ILO C158 1982 are noteworthy. Article 4 addresses the question of 'Justification for Termination' of a worker's services. It states, that: -

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

[5] Delivered October 31, 2023

Articles 5 and 6 set out reasons which shall not constitute valid reasons for termination: They include at Article 5 the following: -

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
(b) seeking office as, or acting or having acted in the capacity of a workers' representative;
(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
(e) absence from work during maternity leave.

At Article 6, temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

Under Article 7, the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance **before** he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

ILO Recommendation 166, also includes some salient provisions in respect of the termination of employment, including entitlement of a worker to the assistance of another person when defending himself against allegations likely to end in termination of his employment and notification in writing upon request of the reasons for termination.

The Court treats with cases where some employees are not given the opportunity to be represented in disciplinary hearings and letters terminating their employment do not state the reason(s) for termination.

NATURAL JUSTICE AND DUE PROCESS

In the cases discussed much emphasis is placed on the right to be heard and what constitutes a proper opportunity to be heard. Natural justice then is the cornerstone of good industrial relations practice. The two basic rules of natural justice are the right to be heard -*audi alteram partem* and no man may be a judge in his own cause-*nemo judex in propia causa.*

In *TD No. 98 of 1977 between Barclays Bank and Barclays Employees Union* delivered on 12th January 1978, the Court underscored the importance of natural justice as follows:-

"…

(1) Whatever the circumstances, whatever an employee is alleged to have done and however serious it might be, it is always necessary that an employee be afforded some opportunity of explaining himself to the person in management who will in the first instance take the decision whether or not he is to be dismissed…"

Megarry J. in *John v Rees*[6] , an English case said: -

It may be that there are some who would decry the importance that the Court's attach to the observation of the rules of natural justice. 'When something is obvious,' they say, 'why force everybody to go through the tiresome waste of time in framing charges and giving the opportunity to be heard? The result is obvious from the start.' Those who take this view do not I think, do himself or herself justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut

[6] (1969) 2 ALL ER at 274

cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.

In *Kanda v Government of the Federation of Malaya* [1962] AC 322, 337, the Privy Council (*per* Lord Denning) described the right to be heard as one of the essential characteristics of natural justice. He stated: -

"*If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them … It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other."*

The dicta cited from the foreign cases demonstrate that the principles which our Industrial Court upholds are not peculiar to this jurisdiction but are accepted internationally.

Due Process

In a paper titled '*Due Process The Overarching Principle in Industrial Relations Law: Meaning and Effect*' presented by Dr. Leighton Jackson at the Industrial Court's 6th Annual Meet With The Court Symposium, held on May 19, 2018, he listed the following as components of due process in the Industrial Court jurisprudence: -

•INVESTIGATION

•NOTICE OF CHARGES

• REPRESENTATION

•HEARING

•IMPARTIAL & UNBIASED

• ALL EVIDENCE MUST BE CONSIDERED

• REASONABLE DECISION

• RIGHT TO BE HEARD AND DEFEND

• RIGHT TO CONFRONTATION.

Therefore, disputes concerning inadequate investigations; vague allegations such as loss of confidence; unfair or bias in the investigative and/or disciplinary process; indefinite suspension, no opportunity to face one's accusers, would raise questions of due process.[7]

PROGRESSIVE DISCIPLINE

The Court has repeatedly stressed the importance of progressive discipline as vital for the maintenance of good industrial relations practice in the workplace.

In *TD. Nos 131 of 1987 and 10 of 1988 between Transport and Industrial Workers' Union and Bata Trinidad and Tobago Limited* delivered on 4th February 1991 by His Honour Mr. A. Khan underscored the importance of progressive discipline,

"Good industrial relations practice requires the taking of progressive discipline for workers' misconduct. On the facts of this case, summary dismissal, the gravest penalty which can be meted out to a worker by an employer, was not in our view justified. In these difficult times, employers should not abuse their rights of dismissal. This was the worker's only act of misconduct in his four years' with the Company."

[7] See TD 349 of 2014 *Oilfields Workers' Trade Union AND Cole and Associates Engineering Safety Systems Limited*, delivered 9th July, 2019; TD NO. GSD-TD 630 OF 2018 *National Union Of Government And Federated Workers And Carib Glassworks Limited* delivered 18th July, 2023

In *TD 144 of 1996 between the Oilfields Workers' Trade Union and Phoenix Park Gas Processors Limited* delivered on 2nd February, 2000, His Honour Mr. G Baker said:-

"Save in the exceptional cases of dishonesty, violence and extreme negligence with a present danger to life and limb, the principle of progressive disciplinary action should be observed."

In *TD No. 101 of 1992 between Communication Worker's Union v Busy Business Systems and Equipment Limited* delivered on 28th June 1994 by H.H. Mr. A. Khan points to the use of progressive disciplinary action on the employer's part, he said, among other things that: -

"*For summary dismissal to result there must be a dissatisfaction of a very serious nature and the company must have taken steps to bring the dissatisfaction to the worker's notice and allow a worker an opportunity to correct any deficiencies. There is also the matter of progressive disciplinary action. Summary discipline is rarely justified where a worker has not been told beforehand of his shortcomings in performance and given an opportunity to improve his performance."*

In *TD 509 of 2017 Banking Insurance and General Workers Union and Smith Robertson and Company Limited,*[8] HH Mr. A. Stroude indicated, among other things, that the expected progression for a recalcitrant employee would be:-

a) Oral warnings

b) Written warnings

c) Suspension

d) Termination

[8] Delivered 25th September, 2019

However, he stressed that the judgments on the principle disclose one common thread, that failure to follow each and every step in the process is not necessarily fatal to the employer, but rather each case is to be determined on its own merit.

TERMINATION OF EMPLOYMENT

In a Presentation to the Caribbean Corporate Counsel Summit, December 2013 entitled '*How To Avoid Legal Pitfalls When Terminating Your Employees & Maintaining A Good Working Relationship Between Management And Unions'*, I outlined some factors considered by the Court in cases of termination of employment, and they may be worth repeating here in summary. Among the factors which act as mitigating factors are: -

- **Long service- Trade Dispute No. 164 of 1996, Caroni Limited v. All Trinidad Sugar Estates and Factories Workers' Trade Union** delivered on December 17, 1976,
- **Unblemished Record- Trade Dispute No. 21 of 1995, National Union of Government and Federated Workers and the Chief Personnel Officer** delivered on May 28, 1996,
- **Section 10 (3) Order- TD No. 258 of 2004 Oilfields Workers' Trade Union v. Jakob Straessle Old Grange Inn, Papillon Restaurant** [9]delivered on September 29, 2006, the Court can make an order in equity in an appropriate case even though the dismissal was effected in circumstances that were neither harsh and oppressive or not in accordance with the principles of good industrial relations practice.
- **Dismissal for conduct outside of work- In Trade Dispute No. 86 of 1969, Texaco Trinidad Inc. (Textrin) v. Oilfields Workers' Trade Union** delivered on September 26, 1969, - as a long as a connection could be made between an off the job action and an incident at work, the employer may be justified in dismissing

[9] See also Civil Appeal P213 of 2015 *Carib Brewery Limited v National Union of Government and Federated Workers Delivered February 19, 2020*

the worker. See also **Trade Dispute 65 of 1996 between National Union of Government and Federated Workers v. Berger Paints Trinidad Limited** delivered on May 14, 1999, involving an intimate relationship between co-workers which ended in physical assault outside of the workplace when the female worker decided to end the relationship.

- **Discipline of Shop Stewards**- In the matter of **Texaco Trinidad Inc. v Oilfields Workers' Trade Union, (1981)** 34 WIR 215, an appeal from a decision of the Industrial Court in **Trade Dispute No. 46 of 1976**,[10] Kelsick J.A. expressed the view that: -

"*a shop steward can be disciplined as a worker if he oversteps the limits of his authority as agent of the Union. While he may be permitted the use of strong language to his superior officer when they meet as representatives of Management and of the union, there is a limit to that concession."*

Nonetheless, the following view of the Industrial Court was upheld in that appeal. The Court said that: -

"A shop steward has a dual function as employee ... and an officer of the Union ... When he is discussing union business with a supervisor or anyone from management they are equals."

In the recent case of Trade Disputes Nos ESD 106-108 and 056 of 2019 *Communications Workers Union v Telecommunication Services of Trinidad and Tobago,* in which the Court considered the question of the retrenchment of the General Secretary of the Union while on approved leave for trade union business, the Court restored the status quo (that is to say, they did not uphold the dismissal while on approved leave of absence for Union business. The Court also awarded exemplary damages.

[10] Dated October 13, 1976

- **Dismissal of a pregnant employee**-Section 10 of the *Maternity Protection Act*, Chapter 45:57, gives a right to a female employee to return to work after a period of maternity leave and makes provision for the employee to postpone her intended date of return for nonmedical reasons on the fulfilment of certain conditions. At Article 8 of the ILO *Maternity Protection Convention* C-183, the burden of proving the reasons for dismissal of a pregnant or nursing mother are unrelated to pregnancy or nursing, rests with the employer.

The IRA has now to be read in conjunction with the *Occupational Safety and Health Act*, Chapter 88:08, specifically section 6 (9) to fully appreciate the responsibilities of employers to pregnant workers.

While I have not touched on the Court's power to conciliate disputes before a Judge under section 12 of the IRA, that is one avenue available to employers to avoid the full brunt of the Court where both parties agree. Terms of Settlement can be prepared and executed, and be made an Order of the Court where parties have come to an agreement.

In conclusion, I trust that you see that a sound appreciation of the jurisdiction and powers of the Court and of its mandate to act in accordance with the principles and practices of good industrial relations are as necessary to navigating the Court as is the adequate preparation of a ship's captain or any prudent seafarer who is setting out on a long voyage.

Mrs. Heather Seale
President, Industrial Court
February 21, 2025