Comprehensive Guide to Unfair Dismissal: Retrenchment

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If a worker was allegedly retrenched but the proper process was not followed, the court may find that the worker was actually unfairly dismissed.

Employers sometimes use the excuse of 'retrenchment' to justify a worker's dismissal. This is why the court will examine the specific facts and the procedure implemented to determine if what took place was a legitimate retrenchment.

Oilfield Workers' Trade Union v Schlumberger Trinidad Incorporated TD 131 of 1993- Retrenchment is never due to the fault or misconduct of a worker. If a worker is dismissed in circumstances where there was deemed to be no actual redundancy, such dismissal would be an unfair dismissal. But once there was a genuine retrenchment within the bounds of management prerogative which occasioned a surplus of workers, the retrenchment would not be harsh and oppressive.

In Trinidad & Tobago, redundancy and retrenchment are governed by the ***Retrenchment and Severance Benefits Act Chapter 88:13 ("RSBA")*** which provides:

> (2) "redundancy" means the existence of surplus labour in an undertaking for whatever cause;
>
> "retrenchment" means the termination of employment of a worker at the initiative of an employer for the reason of redundancy.

Retrenchment must be carried out consistent with the RSBA, good industrial relations practice, employment contracts, and collective agreements where applicable.

There are 6 factors that must be present for a retrenchment to be fair:

1. **Genuine Redundancy.** There must be a genuine existence of surplus labour; the 'retrenchment' must not be a dismissal in disguise.

2. **Consultations.** Employers must have consultations with employees in effort to avert or mitigate retrenchment.

3. **Alternatives.** Employers must consider alternatives before moving to retrenchment. Example: 'redeploying' workers in other roles, temporarily reducing pay & work hours, or implementing temporary layoffs, etc.

4. **Fair Selection.** Employers must apply a fair employee selection method when choosing which employees will be retrenched. Typically, the most junior employees should be selected first ('Last In, First Out (LIFO), All Things Being Equal').

5. **Notice.** Employees who have been selected for retrenchment must be given at least 45 days' notice that they are being retrenched, unless the employer has a legitimate reason for providing shorter notice.

6. **Severance.** Employers must pay the correct amount of severance benefits to retrenched employees who qualify for such benefits and have not become disentitled.

(1) Genuine redundancy

The Court will examine the facts and circumstances at the time of the alleged redundancy and also what transpired thereafter to determine if a genuine redundancy existed.

Commercial Finance Co Ltd (in liquidation) v Ramsingh-Mahabir (1994) 45 WIR 447, the Privy Council defined the term "retrenchment": "Retrenchment" means termination for the reason of redundancy, and 'redundancy' means the existence of surplus labour in an undertaking for whatever cause. It does not apply to the termination of employment simply because the business has ceased to exist. Retrenchment contemplates that the business will continue in existence but that there are too many workers for the purposes of the business so that some have to be made redundant.

The UK case of ***Safeway Stores plc v Burrell [1997] IRLR 205***, established a test consistent with their statutory provisions governing redundancy. Although their statute differs from Trinidad's, the test is still instructive for practitioners. The questions to be asked are:
i) was the employee in fact dismissed?
ii) if so, was there a diminution or cessation in the requirements of the employer's business for the employees (not the particular employee) to carry out work of a particular kind currently or in the future?
iii) was the dismissal caused wholly or partly because of this state of affairs?

TD 3 of 1997 Bank and General Workers' Union v Trinidad Express Newspapers Limited, it was held that there was no genuine redundancy where three workers were retrenched on the basis that computerisation of the company's processes created surplus labour. It found that, within two weeks of dismissal, two of the workers were re-employed as part-time contract workers, thus evincing a continuing need for their services which belied the company's contention that there was a 'surplus'.

In restructuring a company, some changes to the employee's work will be so complete as to amount to a redundancy, as in the case of ***Murphy v Epsom College [1985] ICR 80***, where the introduction of new heating equipment meant that the employer needed a heating engineer rather than a plumber with the result that the applicant was made redundant.

Additionally, the existence of financial difficulties does not automatically lead to a conclusion that the business now has a surplus of labour. In the case ***Sundry Workers [Veronica Joseph & Others] v Kings Casino Limited Antigua and Barbuda Civil Appeal No 28 of 2001***, it was held that despite some financial difficulties, the casino was able to continue in business, and the work that the employees had been employed to perform had not ceased or substantially diminished. There was no actual redundancy.

TD 314 of 2004 CWU v Maibrol Insurance Brokers Limited

The Company contends that increased competitiveness in the Insurance industry required that it to reduce its costs. That involved reorganisation. It was in that process that the worker became surplus to its needs. The Company submitted organisational charts to show how responsibilities within the Accounts Department were realigned and amalgamated.

The Company's evidence on reorganisation is inconsistent…The evidence indicates the worker was not aware of any pending reorganisation or possible retrenchment…It is remarkable that the reorganisation exercise resulted in only one worker in one Department being found as surplus to the Company's needs.

It is also significant that the Company took steps to retrench the worker while she was on vacation leave…The evidence indicates that the Company embarked surreptitiously on a course of action designed to get rid of the worker.

Another argument which the Company advances to show that the worker was surplus to its needs is that for some years prior to 2002 the worker's duties only occupied her for some 63 hours per month. Even if that were so, the fact is that the Company accepted it for a substantial period of time and did nothing about it. Suddenly in December 2002 it acted. Good management practice should have dictated otherwise.

The Company has patently failed to establish that the worker was surplus to its requirements. The alleged reorganization appears to have been nothing more than a transparent ruse to terminate the services of the worker for reasons known only to the top management of the Company.

In this regard the Court endorses the position articulated in Trade Dispute No. 4 of 1991 between Transport and Industrial Workers' Union and Trinidad Distillers Limited that while an employer is free to reorganise or restructure his business, a spurious restructuring or reorganisation of an employer's business operations provides adequate grounds for questioning the genuineness of the employer's retrenchment of a worker. The dictum in that trade dispute goes on to state:

"It is altogether too easy for an employer to use words such as "restructuring", "reorganising" and "redundancy" as a smoke screen or cover for terminating the services of a worker at the lowest cost to himself and this Court has a duty to be vigilant and detect such oppressive industrial relations practices."

TD 303 of 2008 OWTU v Sherwood Park Apartments Limited

The Union claimed that the Worker was unfairly dismissed, while the employer claimed that she was retrenched.

The employer’s position was that it had reorganized its operations and would not be operating in the same way as before. Therefore it would not be able to continue with the services of the worker. Contrary to the principles of good industrial relations practice, there were no details regarding the effect of the reorganizing on the worker’s position and more importantly, of any prior discussions between the Employer and the worker. Even in its Evidence and Arguments, the Employer only stated that it was not “affordably possible” to have her continuously kept employed.

The termination letter alluded to the adverse financial situation of the Employer as the reason for her termination. In contending financial deficiency, it is necessary to provide direct evidence to support that position. The Employer did not do so satisfactorily and to the appropriate standard. A major failing in its tendered evidence.
The manager did not speak to the worker about her retrenchment before the termination and he did not give her the option to be employed as the representative instead of Ms Nikita Crevelle, who was employed after the termination of the worker.
Accordingly, the court observed that:

- The owner and the Manager held discussions between themselves on the restructuring over many months prior to the worker's termination.
- The employer did not bring the situation to the worker's attention at any time prior to the said termination.
- The manager testified that work days of the other workers' were reduced and that his salary was also reduced without providing adequate and proper written evidence of these arrangements.
- The manager was the officer who instituted the said reorganizing with a small labour force of 6 workers, and yet still, he was unable to present evidence on the dates of the individual changes in the terms and conditions of the workers.
- The employer failed to lead evidence from the owner to corroborate the testimony of the manager on its financial predicament…
- Six months after the worker's termination, the Employer employed Nikita Crevelle as its representative and in the process, failed to consider the worker.

Such termination can be categorized as a dismissal…it can be described as harsh, oppressive and contrary to the principles of good industrial relations practice.

Is Change of Ownership or Transfer of The Business a Genuine Redundancy?

Sundry Workers v Chevron West Indies Limited Reference No 2 of 2011 Antigua and Barbuda Industrial Court (unreported)- when the shares of the employer company change hands to a successor, the business continues to operate in virtually the same manner, and no employees are dismissed by reason of redundancy, there is a continuity of employment and no redundancy payments are applicable.

(2) Consultation

Section 5 of the RSBA provides:
Notwithstanding section 4, an employer may, prior to the giving of formal notice in writing of retrenchment, enter into consultation with the recognised majority union with a view to exploring the possibility of averting, reducing or mitigating the effects of the proposed retrenchment.

Consultation allows some time and opportunity for the parties to investigate any other alternative to the drastic measure of termination. In instances where consultation is absent, the

Court may hold that the retrenchment process is not consistent with the principles of good industrial relations practice.

TD Nos. 244 & 245 of 2004 Banking, Insurance and General Workers Union v Public Services Association, the Industrial Court held: Fair consultation requires the employer to hold talks with the Union when the proposals for retrenchment are at a formative stage. Fair consultation also requires that the Union receives adequate information from the employer for it to address and respond if necessary. The framers of the Act could not possibly have contemplated consultation to be a mere letter from an employer informing a union of a retrenchment after the entire exercise has been completed. This cannot by any measure be fair and adequate consultation or proper notice.

The Industrial Court also stated in ***Steel Workers' Union of Trinidad and Tobago v Arcelor Mittal Point Lisas Limited TD Nos. 15-19 of 2009 (S) Oilfields Workers' Trade Union and Offshore Atlantic Limited*** that: "In our view, consultation with a recognized majority union is an integral part of the procedural duty of employers where redundancy or layoff is contemplated.

TD 101 of 1991 Oilfields Workers' Trade Union v Trinidad and Tobago National Petroleum Marketing Company Limited: "the failure of the Company to consult with the worker violates one of the most fundamental canons of good industrial relations practice.....Moreso because he was not represented by a Union.

RSBD 34 of 2017 BIGWU v EIG Business Services Limited

In TD 348 of 2014 between BIGWU and Royal Bank Trinidad and Tobago Limited, it was said that: ILO Convention 158- Termination of Employment- Article 13 of the Convention requires that when an employer is contemplating terminations for reasons of an economic, technological, structural or similar nature, the Worker's representatives be consulted as early as possible, on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any termination of the Workers concerned such as finding alternative employment.

In August 2005, the International Finance Corporation's Good Practice Note on Managing Retrenchment stressed the importance of consultations to both the development and the implementation of a retrenchment plan. The Good Practice Note states that "without consultation, companies run the risk of not only getting key decisions wrong, but also of breaching legal rules; and collective agreements and alienating Workers and the community. Workers can often provide important insights and propose alternative ways for carrying out the process to minimize impact on the workforce and the broader community."

Therefore even though the RSBA is silent on the issue of consultation with the individual worker, good industrial relations practice dictates that the Worker to be retrenched should be consulted. Was there genuine consultation?...The consultation the Employer provided evidence of, were interactions relating to the overall restructuring of the Company before the Worker was notified that she was redundant. No evidence was provided by the Employer to indicate that there was consultation after the Worker was notified that she was redundant. The only evidence before the Court was the Worker's evidence indicating that there was no consultation on 16 December

2016 [when the Worker received the letters stating that she was redundant and that she was retrenched]. We accept the Worker's evidence that she was not consulted when given the letters on December 16, 2016. The retrenchment was not consistent with the principles and practices of good industrial relations and contrary to the RSBA.
In Mugford v Midland Bank plc [1997] ICR 399, the EAT suggested 3 propositions for the guidance of employment tribunals. (1) If there is no consultation with Trade Unions or individuals when redundancies are contemplated a dismissal will normally be unfair, unless a reasonable employer would have concluded that consultation would be an utterly futile exercise. (2) Consultation with a trade union does not of itself release the employer from an obligation to consult with the individuals concerned. (3) It will be a question of fact and degree for the employment tribunal to consider whether such consultations as had taken place were so inadequate as to render a dismissal unfair.
The question to be determined by the Court is whether the procedures adopted by the Employer were adequate or otherwise met the standards required by the law and good industrial relations."

(3) Alternatives

Retrenchment is a matter of last resort. All reasonable alternatives should be genuinely explored before a retrenchment is implemented.

An inexhaustive list of alternatives to retrenchment includes:

- Informing and consulting with the management, workers and recognized unions/worker representatives for ideas, suggestions, etc.
- Placing a freeze on new hires;
- Reducing any supplementary labour, such as contractors;
- Redeploying workers into new roles internally within the business or externally (if possible), and providing training for such redeployment if necessary
- Exploring options for financial assistance offered by the government;
- Introducing voluntary early retirement schemes;
- Exploring work sharing- reducing the working time of all workers by an equal amount;
- Reducing employees' pay across the board for a temporary period;
- Exploring voluntary retrenchments;
- Exploring temporary layoffs (i.e. workers not be given any work or pay for a period);
- Inviting workers to take leave without pay (this must not be forced; the workers must choose to make such a decision).

Where the employer fails to reasonably explore alternatives, any subsequent retrenchment may be considered contrary to good industrial relations practice.

TD No 244 & 245 of 2004 Banking, Insurance and General Workers Union and Public Services Association, the court held that: "We also find that the (employer) failed to make reasonable efforts to look for alternative employment within the structure of the organization for

the workers before they were retrenched even though they were employed for a significant number of years. This is contrary to good industrial relations practice."

TD 314 of 2004 CWU v Maibrol Insurance Brokers Limited

In its written Evidence and Arguments the Company states that it looked for alternative employment for the worker but was unable to find any. There is no evidence to support this assertion. Moreover, the Company admits that it did not consult the worker on the issue of alternative employment.

There was adequate time to indicate to the worker that her job was potentially imperilled and to engage her in discussion to see if her situation could be mitigated. Indeed a long standing worker with a record of high performance deserved no less.

The Company contends that an alternative position required insurance underwriting experience and skills which the worker did not possess. The Company did not explore the possibility that with appropriate training that hurdle could have been surmounted. The Company also gave no thought to exploring with the worker whether she would be willing to fill one of the "reorganised" positions even if it were at a junior level.

The Company eschewed its responsibility to search genuinely for an alternative position. Its failure to initiate discussion with the worker exacerbated the situation and undermined the credibility of its claim to be reorganising.

TD 303 of 2008 OWTU v Sherwood Park Apartments Limited

"...The employer did not offer to reduce the worker's work days instead of terminating her services…The Employer did not offer the worker the option of employment in the office of representative…The Employer did not offer to train the worker to perform the new duties as representative…"

Before committing to carrying out retrenchments, the business should consider implementing short-time working or layoffs.

Short-time working is the reduction of employees' working hours and pay.
Layoffs refer to when workers are temporarily sent home, i.e no work or pay.

Short-time working was discussed in ***IROs Nos. 23 & 24 of 1987 between Transport and Industrial Workers' Union and Bata Trinidad and Tobago Limited***:

It is a well established practice in these cases that the employer is entitled to lay-off temporarily the necessary number of workers where in the course of business, circumstances arise which make this necessary…The traditional method of lay-off has been to lay-off the requisite number of workers for a continuous period. In recent times, there have been instances of temporary reductions in the labour force being effected by lay-off of the entire workforce for one day at a time. For instance, if a reduction of the workforce by twenty (20) percent becomes necessary, the whole labour force is laid off over a period of time for one day each week, that is, twenty (20) percent of the normal work time of five (5) days per week, instead of twenty (20) percent of them being laid off continuously during the period. Thus, the burden of loss of work is shared

equitably by all instead of eighty (80) percent working fulltime and twenty (20) percent having no work at all…'

The RSBA does not contain any provisions on layoffs, therefore the common law and good industrial relations practice must be relied on. When executing layoffs (or short-term working), employers should apply the same procedures that are required for retrenchment, i.e. employers should provide consultation and notice, explore alternatives and fairly select workers.

The key difference between the retrenchment and layoffs is that retrenchment is conclusive, while layoffs must be temporary and should not exceed three months.

It is important when layoff, or any alternative, is contemplated to ensure that the process which is adopted is not in violation of the provisions of the collective agreement or the terms of the existing contract of employment.

The issue of layoff was dealt with in the case of ***I.C.A. No 9 of 1986 Transport and Industrial Workers' Union and Consolidated Appliances Limited***. It was held that the practice of a temporary layoff is well recognized in industrial relations practice. A temporary layoff is a remedy which may be utilized by an employer to obtain relief where circumstances beyond his control warrant its implementation. It is a right which an employer may use only when the circumstances demand it. It must not be abused or be as a result of a whimsical decision. It must be required by the circumstances which must be beyond the control of the employer and not of his own making. An employer cannot continue a temporary lay-off indefinitely. Temporary lay-off usually lasts for approximately three (3) months unless the parties agree on a longer period for a temporary lay-off in a registered collective agreement, or unless there are exceptional circumstances, no temporary lay-off should exceed three (3) months in accordance with the principles of good industrial relations practice.

Given that layoffs are intended to be temporary in nature, an employer has a duty to inform the workers of the date they should resume employment (***TD 209 of 2004 National Union of Government and Federated Workers v Grill King***).

If there is still a surplus of labour after exploring/implementing all reasonable alternatives, then it may be fair for the employer to proceed to the retrenchment.

(4) Fair Selection

Employers must use a fair method of selecting the workers who are going to be retrenched.

Some of the methods of selection include:
(i) Last In, First Out (LIFO) All Things Being Equal
(ii) Points-based system
(ii) Selection-based system

(i) LIFO

In Trinidad and Tobago, the courts have a preference for the "Last In, First Out [all other things being equal]" method of selection, as it protects long-serving workers and eliminates the risk of bias.

TD Nos. 23 and 24 of 1990 Transport and Industrial Workers' Union and Public Transport Service Corporation
"The application of the LIFO principle is a right which every worker enjoys in respect of retrenchment and which prevents him from being unfairly retrenched…There can be no doubt that LIFO is the single most objective criterion used in redundancy. It goes without saying, therefore, that as a matter of comity and in the interests of orderly and good industrial relations, it is undesirable for us to depart from that principle, without justification. Accordingly, the employer bears the burden of proving, on the balance of probabilities, two issues: firstly, why the skill, ability and merit factors were given greater weight (or all weight) than the seniority factor in retaining less senior employees in the same position. Secondly, the employer must demonstrate that the less senior employee retained, has a clear advantage over each of the retrenched workers on the basis of skill, ability and merit."

Therefore, whilst LIFO is the preferred method because of its objectivity, employers are not bound to use the LIFO approach. But the onus will be on the employer to justify the use of another method of selection.

(ii) Points-based system

This entails the taking account of a wide range of factors, placing a value on each, and scoring individual workers on these criteria, with those receiving the lowest aggregate score being dismissed. Some of the factors include attendance records, disciplinary records, performance or quality of work, skills and competencies, versatility or adaptability, qualifications, experience and length of service. In this way, the LIFO principle is not the sole determinative factor.

However, employers must be very careful in using these criteria so as not to fall foul of any unfair dismissal or discrimination principles. This is especially so when giving consideration to disciplinary records, as an argument can be made that an employee's misconduct ought not to have any bearing in a redundancy situation, particularly where the issue has previously been dealt with, and thus, giving (negative) consideration to such incident(s) may constitute a form of double-jeopardy.
(***Natalie Corthésy and Carla-Anne Harris-Roper, Commonwealth Caribbean Employment and Labour Law, Chapter 6, Page 194)***

(3) Selection-based system

This is where employers look forward to the structure they are intending to implement at the end of the exercise, determine the function of the new positions, and use this as the basis for the selection criteria. Employees are then invited to apply for the jobs in the new dispensation, with those who lack the appropriate skill-sets or qualifications and those who are unsuccessful at interview being made redundant. This methodology will also be subject to the relevant principles relating to whether the employer acted fairly in all the circumstances of the exercise.
(***Natalie Corthésy and Carla-Anne Harris-Roper, Commonwealth Caribbean Employment and Labour Law, Chapter 6, Page 194)***

Fair Application of the Selected System

Employers must not only justify the fairness of the method of selection itself, but they must also show that the system was fairly applied to the employees. (This mainly applies where a method other than LIFO is used.)

Employers should be as transparent as possible in regard to the method of selection being used and the manner in which it has been applied.
For example: employers can disclose the markings from the selection process so the employee can see for themselves how they fared in comparison to their counterparts.

In ***BL Cars Ltd v Lewis [1983] IRLR 58***, the Employment Appeal Tribunal of England, in construing a provision on the selection process under English law, held:
In determining whether an employee was unfairly selected for redundancy, it must be identified whether the selection criteria was adopted and whether the employers have demonstrated that they fairly applied these criteria to this redundancy. In the normal case of a large employer, the employer would usually consider the employee in relation to his length of service, his job and his skills compared to those others who might be made redundant. In the ordinary case, though not invariable, that would involve evidence from the person who made the selection indicating that the rating of each person who might be made redundant had been made and that as a result it emerged fairly and genuinely that the employee was one of those who rated worst under those heads.

Compliance with Collective Agreement

Where there is a collective agreement, employers must adhere to the method of selection outlined therein.

In ***TD 43 of 2001 Oilfields Workers' Trade Union v National Petroleum Marketing Company Ltd***, the company was penalised because it failed to utilise the principle which was agreed in the collective labour agreement.

(5) Notice

After the employer selects the workers to be retrenched (using fair and objective criteria), the employer must give those workers notice of retrenchment in accordance with the provisions of the RSBA or the terms of a collective agreement.

Section 4, 6, 7 and 14 of the RSBA provide:

> 4(1) Where an employer proposes to terminate the services of five or more workers for the reason of redundancy he shall give formal notice of termination in writing to each involved worker, to the recognised majority union and to the Minister of Labour.
>
> (2) The notice shall state—
> (a) the names and classifications of the involved workers;
> (b) the length of service and current wage rates of the involved workers;
> (c) the reasons for the redundancy;
> (d) the proposed date of the termination of employment;
> (e) the criteria used in the selection of the workers to be retrenched;
> (f) any other relevant information.
>
> 6. Subject to section 7, the minimum period of formal notice required by section 4 shall be forty-five days before the proposed date of retrenchment.
>
> 7. Where, due to unforeseen circumstances it is not practicable for an employer to comply with the requirements of section 6 with respect to formal notice, he shall give the maximum notice that he can reasonably be expected to give in the circumstances and the onus shall be on him to prove that the circumstances which prevented him from complying with section 6 were indeed unforeseen.
>
> 14. (1) During the period of notice of retrenchment stipulated in section 6, or such shorter period as the employer may have given under section 7, it shall be an offence for the employer to put into effect the whole or any part of his retrenchment proposals.
> (2) Notwithstanding subsection (1) the employer is not precluded during the period of notice from terminating the services of a worker for valid cause relating to the worker's conduct or job performance.

In ***Privy Council Appeal No. 69 of 2003 Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union [2005] UKPC 16***, three workers were dismissed on the grounds of redundancy, without any previous communication or any notice that they were to be made redundant. The Industrial Dispute Tribunal of Jamaica, while not questioning the redundancy, held that the dismissal was "unjustifiable" and ordered reinstatement and stated that: "it was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feeling of the workers. This is indeed aggravated when one considers their years of service involved."
This decision was upheld by the Court of Appeal of Jamaica and the Privy Council.

Note: An employer has to provide the minimum 45 days' notice to a worker, which includes all the information outlined in section 4(b), even if the employer is not retrenching 5 or more workers (as per section 4(a)).

RSBD 34 of 2017 BIGWU v EIG Business Services Limited

The process used by the Employer which eventually resulted in the retrenchment of the Worker breached the provisions of the RSBA: i) The formal notice did not meet the requirements of the RSBA; ii) The minimum period of formal notice was not consistent with the RSBA; iii) The worker was retrenched during the period of formal notice…

This information outlined in Section 4 of the Act was not required in the notice for academic purposes. This info provides the worker who has been placed on notice of retrenchment with key facts relative to the retrenchment which allows the worker to activate his/her natural justice right and to say to the employer "the information in the notice upon which you are acting is incorrect. I have more service than Mrs. X" or "the stated reason for the redundancy is not true." Failure to include the requirements of the notice outlined in Section 4 of the RSBA is not fair and just and must be contrary to the principles and practices of good industrial relations.

Section 4 mandates a minimum period of 45 days' notice; the Employer gave one month's notice. The Employer provided no good and proper reason why the requisite notice was not given…

The RSBD at section 14 prohibits retrenchment during the period of notice. The statutory period of notice is 45 days. The Employer only gave the Worker 30 days' notice before retrenching the Worker. Therefore, by retrenching the Worker after 30 days, the Employer effectively retrenched the Worker within the period of statutory notice of 45 days, contrary to the RSBD.

The retrenchment was not consistent with the principles and practices of good industrial relations and contrary to the RSBA.

The issues of shortened notice periods and pay in lieu of notice were addressed in the case of ***Oilfields Workers Trade Union and Trinidad Cement Limited Complaint No. IRO 36 of 2018***:

Where there is an unforeseen event or circumstance which has arisen, which makes it impossible or impracticable for an employer to give the requisite forty-five (45) days' notice, in those circumstances, the employer can give notice for a period less than forty-five (45) days and of course explain the nature of the unforeseen event. The onus will be on the employer to prove that there were unforeseen circumstances and that those unforeseen circumstances were of such a nature that it was impractical or impossible to comply with the requirements for a minimum period of notice. The case further provided that the RSBA does not contemplate an automatic waiver of notice. Therefore, employers cannot inform workers that they have elected not to provide a period of notice and that they have chosen instead to "pay in lieu" of notice. The question of providing no notice whatsoever is not a provision of the legislation. To terminate workers with immediate effect is in total violation of what a retrenchment exercise is about and also contrary to the practice of good industrial relations.

The terms of a collective agreement may provide that the notice period is to be greater than that provided for by the RSBA, but it cannot reduce or waive the notice period

Note: Workers cannot be forced to take their vacation leave during the notice period.

TD 328 of 2004 Bank and General Workers Trade Union v Development Finance Limited
The authorities have long held that accrued vacation leave is a right earned separate and apart from remuneration and cannot be denied without compensation.
So that in Civil Appeal 28/1992 between NUGFW and the CPO where the employer sought to have workers on whom retrenchment notices were being served to take their outstanding leave during the period of notice the Court had this to say:
"In my opinion, the clear purpose of the Act, meaning the Retrenchment and Severance Benefits Act in this instance, is to give notice to employees of their pending retrenchment and it is not intended to interfere with rights already accrued. Since vacation leave is an accrued right, the Employer is not entitled to interfere with that right in a manner that would deprive the employee of the benefits of such a right.
To order an employee to proceed on vacation leave during that 45-day period, without separately compensating him for that vacation leave, is not a right that is afforded an employer by the Act and, indeed, it would be contrary to the principles of good industrial relations practices to so order.

RBSD No. 22 of 2009 National Workers Union and Kee-Chanona Limited
"...The Court finds that to allow the period of notice under the RSBA and the vacation leave earned pursuant to the Worker's contract of employment to run concurrently, especially where the Employer proposes to do so retroactively, would be contrary to the principles of good industrial relations practice. I hold that the period of notice and the vacation leave are to be treated separately."

(6) Severance

Sections 3 and 18 of the RSBA deal with the entitlement and payment of severance benefits.

Section 3:

(1) This Act applies to persons falling within the definition of "workers" under the Industrial Relations Act with the exception of—
(a) subject to paragraph (d), workers who have not had more than one completed year of service;
(b) workers serving a known pre-determined probationary or qualifying period of employment;
(c) casual workers;
(d) seasonal workers, unless such workers are employed as part of the regular work force for at least three consecutive seasons with the same employer and for at least one hundred days each season;

(e) workers employed on a specified fixed term basis or workers engaged to perform a specific task over an estimated period of time where these conditions are made known to the worker at the time of engagement,
and does not apply to independent contractors.

Section 18:

(1) Where any part of the employer's retrenchment proposals is eventually put into effect, severance benefits shall be payable by the employer to the retrenched worker in accordance with this section.

(2) Where the retrenched worker is covered by a registered Collective Agreement, the terms of which with respect to severance benefits are no less favourable than those set out in this Act with respect to severance benefits, the provisions of the said Collective Agreement shall apply.

(3) Where the retrenched worker is not covered in the manner set out in subsection (2), the minimum severance benefits payable by the employer are as follows:

(a) where he has served the employer without a break in service for between more than one but less than five years, he is entitled for each such completed year of service to two weeks' pay at his basic rate if he is an hourly, daily or weekly-rated worker, or one half month's pay at his basic rate if he is a monthly-rated worker;

(b) where he has served the employer without a break in service for five years or more, he is in addition to his entitlement under paragraph (a), entitled for the fifth year and for each succeeding completed year of service to three weeks pay at his basic rate if he is an hourly, daily or weekly rated worker, or three quarters month's pay at his basic rate if he is a monthly-rated worker.

(4) For each period of service amounting to less than a completed year of service and in respect of workers who qualify under section 3(1)(d), payment shall be calculated on a pro rata basis.

(6) This section shall not apply to a retrenched worker who is eligible to receive from his employer terminal benefits that are no less favourable than those set out in this section

RSBD No 4 of 1996 OWTU v Schlumberger Trinidad Inc.

The worker was employed as a 'casual worker', where he worked continuously for 2 years until the Company switched him to a 'temporary worker agreement' for which he had to sign six-month contracts. He worked continuously under these 6 month contracts, with a gap of not more than a week or two between the expiry of one and the signing of another, and during those gaps he worked as a 'casual worker' for the company. There were no breaks in his services over a period of more than 10 years. When the last contract expired, he continued as a 'casual

worker' until the company informed him that due to a downturn in its activities it was not possible for the Company to renew his contract.
The Court stated in response to the Company's argument that they didn't have to pay severance benefits because they did not retrench 5 or more workers: A company is not exempt from paying severance benefits because they have retrenched less than 5 workers. This is a misinterpretation of section 4 of the RSBA. A failure in the procedural requirements of section 4(1) would not affect the section 18 entitlement of a worker to whom the Act applies.
"Is to be employed on a series of successive fixed term contracts the same as to be employed "on a specified fixed term basis" for the purposes of s3(1)(e)?"... "Can s3(1)(e) apply to a worker who is employed on a specified fixed term basis for a period of 20 years?" We do not think so. One of the stated purposes of the Act is to provide for severance payments to retrenched workers. In interpreting the Act we must seek to give effect, so far as possible, to that purpose. Therefore, faced with an interpretation which would include a person within the benefits of the Act and another which would exclude him from those benefits, the Court is under a duty to so interpret the Act that its stated purpose is not defeated. In keeping with that duty we hold that a worker who is employed by the same employer (or a successor) on a series of successive fixed term contracts does not fall within the exception in 3(1)(e) of the Act. Any other interpretation would be subversive of the intent and purpose of the legislation. It would render the legislation absurd if its purpose could be subverted by a device as transparent as that employed by the Company in relation to the Aggrieved.
[The worker's contract contained a clause saying that he was not entitled to severance benefits] A worker, for whose benefit the legislation was enacted, cannot contract out of its provision and that any attempt to do so by agreement with his employer would be null and void and of no effect. Any such provision in a contract of employment of a worker would be severable from that contract on the ground of repugnancy to the Act and the Court would treat the term as severed from the contract and would give no effect to it. We venture to say that contracts containing terms such as those found in the successive short term contracts which the Aggrieved was required to sign constitute a fraud on the RSBA and are contrary to the policy of the Act and the common good. It is for the protection of workers such as the Aggrieved that the Court must refuse to enforce such a provision in a contract of employment, where to enforce it would result in depriving the worker of benefits which Parliament has conferred on him by statute. In the circumstances we deem the offending provision, in so far as it would have disentitled the Aggrieved to be paid severance benefits to be severed from each of the successive six monthly contracts which the worker was required to sign. We therefore find that the Aggrieved had been a worker in continuous employment with the Company…and order that severance benefits be calculated…and paid.

Note: It may be open to the employer to assert that a retrenched worker has become disentitled to the severance benefits.

<u>Disentitlement to Severance</u>
Even though a worker may meet the statutory qualifications for redundancy benefits, he may become disentitled to such benefits for any of the following reasons: unreasonable refusal of a comparative and suitable offer of employment; dismissal for cause; retirement; and insolvency.

(i) Unreasonable refusal of a comparable and suitable offer of employment

Section 21 of the RSBA provides:
21. Where a worker unreasonably refuses an offer by his employer or his employer's successor of comparable and suitable employment without any break in service as an alternative to being retrenched, his severance benefits may be withheld.

The questions to be determined in order for the severance benefits to be withheld are:
(a) what amounts to 'comparable and suitable employment'; and
(b) what actions will constitute the employee's 'unreasonable refusal'.

(a) Comparable and suitable employment

In ***Taylor v Kent County Council [1969] 2 QB 560***, Lord Parker CJ stated that suitability should be assessed by reference to the individual concerned and, in essence, it means something substantially equivalent to the employment which has ceased.

It is therefore difficult to predict with any degree of certainty what can be adjudged suitable job alternatives but '…in general terms a drop in status or salary, different hours of work, a different place of employment, an offer to perform a different job than the one which the employee is qualified to do, an offer that constitutes a health risk could amount to an offer of unsuitable employment'.

It must be noted that where a worker accepts the offer of comparative employment but subsequently resigns, within a short or reasonable time, on account of being unable to perform the duties now required of him, the employer will still be obligated to pay severance benefits to the worker up to the date that his previous job was made redundant (***TD No. 196 of 1967 Southern Drilling Contractors Limited and Oilfield Workers' Trade Union***).

Further, where there is a change of ownership which contemplates the absorption of the workers, the redundancy benefits may be withheld.

In ***Steel Workers Union of Trinidad and Tobago v Iron and Steel Company of Trinidad and Tobago and Caribbean Ispat Limited TD 100 of 1990***, the employees were not eligible for a severance payment, since they had been absorbed into the successor company without a break in service as an alternative to being retrenched.

However, a short-term probationary engagement offered by the new employer would not satisfy the test for suitable alternative employment even if the worker eventually gains permanent employment with the new entity in the same or higher capacity (***Downie v Hill's Supermarket (Oistins) Limited (1978) 30 WIR 69***).
The alternative position must be unequivocally offered before, at or shortly after the takeover.

It should be noted that once the successor company is determined, should a retrenchment occur subsequently, they would be liable to make the severance payments thereafter, taking into consideration the employee's years of service with the previous employer (***RSBD 8 of 1991 Communication Workers' Union v Omni Foods Limited***).

This is the case only where the new entity is transferred as a 'going concern', basically carrying on the same business which the former employer was operating.
It is also the usual provision that, should the worker subsequently become redundant in the extended employment, their years of service are to be conflated and used in the calculation of the subsequent redundancy entitlement.
Where only the assets of the undertaking are transferred, and the new proprietors are engaged in a different concern using the same assets, this position would not subsist.

(b) Unreasonable refusal

As it relates to the unreasonableness of the refusal, factors which have been taken into account in this determination are personal issues such as health and family obligations, whether the offer was made late in the day and the requirement for employee's acceptance by a particular date, issues connected with travel to and from new worksites, reduction in wages, and whether the offer is made to continue working in a declining industry.

Civil Appeal No 14 of 1993 OECS CA Abbot v Liat (1974) Limited- The Court of Appeal of the OECS concluded that a worker who was transferred from one post to another by virtue of internal restructuring of the airline had unreasonably refused the change. Since there was no diminution in salary or grade, and only minimal changes in the terms and conditions of employment, the alternative position was suitable.

Alleyne, Arthur and Hunte Ltd v Griffith and Another (1992) 42 WIR 53- the workers were being offered new positions with the employer's parent company without loss of pay and status; however, they would now be required to work occasionally on Saturdays. One of the workers had two small children who would normally be left at a nursery while she was at work, but that facility did not open on Saturdays, so she had no childcare assistance on the days she would now be required to work. The other operated a catering business on weekends, and this new requirement would adversely affect this enterprise. The Barbados Court of Appeal in finding that the offers were unsuitable and the refusal of the employees to accept them, was not unreasonable, also found that the employer, in attempting to unilaterally change the workers' contractual terms, had in effect repudiated the contract, and the employees could regard themselves as being dismissed and they were eligible to receive redundancy entitlements.

(ii) Dismissal for Cause

Although a worker may, on the face of it, be redundant, the employee would not be eligible to obtain a redundancy payment if the employer is entitled to terminate the contract of employment because of the employee's gross misconduct.

In the case of ***TD 133 of 1991 Transport and Industrial Workers Union v Public Transport Corporation***, the worker was tried and convicted in the magistrates court for stealing company property. Prior to the conviction, the worker was placed on suspension and thereafter the company decided to terminate him; however, in the same period there was a retrenchment exercise, and the worker's name was inadvertently included in the retrenchment notice. The Industrial Court, in dismissing the employee's claim for redundancy payment, ruled that the worker (having been found guilty of misconduct) was effectively dismissed and was not to be accorded a severance benefit, as it was clear that his name was erroneously placed on the retrenchment list.

(iii) Retirement

S 18(6) of the RSBA disentitles workers from receiving redundancy payments if they are eligible to receive more favourable benefits than those provided by the Act.

(iv) Insolvency

'…an employer is not required to pay severance to his workers if he is severing all of them owing to the fact that his business is being closed down or wound up'.

In ***Commercial Finance Co Ltd (In Liquidation) v Indira Ramsingh-Mahabir Privy Council Appeal 27 of 1993***, the worker sought to claim severance benefits after being dismissed when her employer was placed into compulsory liquidation by the banking regulatory authority in the twin island republic. The Privy Council ruled that on a proper construction of the statutory provisions, the obligation to make severance payment only arose where the business was continuing as a going concern. The Act defined retrenchment as 'existence of surplus of labour for whatever cause', and thus redundancy was not applicable when the business ceased to exist.

If an employer fails to comply with the requirements under the RSBA or if a Worker believes that he has been unfairly dismissed under the guise of a retrenchment, this will give rise to a trade dispute.

RSBA Section 23:

(1) A dispute arising out of a retrenchment issue including—
(a) a dispute which alleges unfair dismissal;
(b) a difference of opinion as to the reasonableness or otherwise of any action taken or not taken by an employer or a worker; or
(c) a dispute as to what is reasonably comparable in respect of a terminal benefit scheme, may be reported to the Minister as a trade dispute and shall be dealt with as such under the Industrial Relations Act.
(2) A claim against an employer for unpaid severance benefits under this Act is deemed to be a trade dispute.

Principles/Summary of Retrenchment under the RSBA and Good Industrial Relations:

1. There must be a genuine redundancy, i.e. surplus labour. A business closing down or selling its shares is not a genuine redundancy. Financial difficulties does not automatically mean there is surplus labour. An employer must provide evidence of a financial hardship or reorganization that has led to a cessation or diminution in part of the business that has made the retrenched employees surplus to requirements.

2. There must be consultation. Employers must consult with employees as early as possible about the possibility of retrenchment, and they must provide employees (and their union representatives) with the relevant information so that they can make suggestions that could avert or mitigate the retrenchment. Consultation must be genuine; simply giving notice of impending retrenchment is not consultation.

3. Employers must consider alternatives before deciding to retrench workers. Employers should consider offering alternative employment to workers (even if they have to provide additional training); reducing working hours; implementing temporary layoffs; inviting workers to take voluntary retirement, retrenchment or unpaid leave, etc. Retrenchment is a matter of last resort, and employers must show that they exhausted all reasonable options before deciding to retrench workers.

4. Employers must fairly select workers to be retrenched. Employers have to show that they used a fair selection method and that they fairly applied that selection method. Employers should use the LIFO method, unless they have a valid reason for using another method. But if they use another method, they must provide evidence to justify why it was fair and reasonable to use that method instead of LIFO.

5. Workers must be provided with at least 45 days, unless the employer has a good and proper reason for providing a shorter notice period. The notice must include: (a) the names and classifications of the involved workers; (b)the length of service and current wage rates of the involved workers; (c) the reasons for the redundancy; (d) the proposed date of the termination of employment; and (e) the criteria used in the selection of the workers to be retrenched. There is no payment in lieu of notice and the workers can't be asked to take vacation leave during the notice period. The workers also cannot be retrenched during the notice period.

6. Workers who qualify for severance (and who have not become disentitled) must be paid severance benefits according to RSBA, or according to a collective agreement if its terms are more favourable than that of the RSBA. Workers may become disentitled if they unreasonably refuse suitable alternative employment, if they have been dismissed for cause, if they have received more favourable terminal/retirement benefits, or if the company has been wound up or closed down.

If the employer fails to comply with these requirements, the court may find that the retrenchment was not carried out in accordance with good industrial relations practice, or that there was no retrenchment at all and the worker was actually unfairly dismissed.

Questions to ask your client if he has been retrenched:

1. Were you terminated from your job? Did your employer say that you were being retrenched? Did you receive a termination letter explaining the reasons for your retrenchment?
2. Did the business close down or are they still operating? Was the business wound up? Were all of the employees let go?
3. Did the company no longer need employees who carried out the work/role that you did? Did they no longer need as many employees for that role? Did the work that you used to perform cease or substantially diminish? What changed in the business that made your employer require less workers all of a sudden? Did your employer show you any evidence of that change?
4. After you were dismissed, did the company hire anyone to perform the role that you used to perform?
5. Did the company have a reorganization? How many employees did they retrench? Did they show you any evidence of a legitimate reorganization? Did they show you how roles and responsibilities were being changed? How long were they planning this reorganization? Did they consult with you about it? Did they show how the work you (and other employees) did would no longer be needed, or how it would be substantially diminished, due to the reorganization?
6. What was your position/role? How many people performed a similar role to you? How many people from your department were retrenched?
7. Did your employer say that you were retrenched because of financial difficulty? Did they show you any direct evidence of the financial difficulty that caused them to have to retrench you?
8. Did the company get new owners? Did the company continue to operate in the same way?
9. Did your employer consult you before retrenching? How long before the retrenchment did the consultations begin? Did he tell you that it was a serious possibility that you might be retrenched? Did he invite you to make any suggestions or ideas for how you think you could avoid being retrenched? How many times did he consult with you before the retrenchment?
10. Did your employer try any alternatives before retrenching you? Did he stop making new hires? Did he terminate the contractors? Did he try redeploying you in other positions? Did he offer to train you to perform new roles? Did he offer you alternative employment in the company? Did he offer any voluntary retirement or retrenchment to you or any other workers?? Did he try implementing pay cuts across the board, reducing work hours or temporary layoffs? If so, how long did he implement those measures for? Did he invite you or any other workers to take unpaid leave?

11. What selection method did your employer use to determine which workers would be selected? Did he use LIFO? Did any of the employees who were not retrenched have shorter tenure than you?
12. Did he use a points-based system? What factors did he consider to evaluate the employees? Did he show you the rankings? Was your score accurate based on the things he considered? Did any of the employees who were not retrenched get a lower score than you? Were the factors relevant to the business or were they arbitrary? Did you feel like you had a fair chance compared to the other employees with him using these factors for the points system? Or do you feel like those factors were chosen so that you would end up being the one chosen to be retrenched? If so, why?
13. Did the employer choose who would stay on and who would be retrenched based on the intended future organization of the company? What were the new roles created? What were the requirements for these roles? Could you have performed any of these roles adequately? Why did he say that you were not best-suited for the new role/functions/structure of the company?
14. How many days notice did you get before the date of your retrenchment? Was it less than 45? Did your employer explain why it had to be less than 45? Did the notice include the names and classifications of the retrenched workers, the length of service and current wage rate, the reason for redundancy, the proposed date of termination and the criteria used in the selection of workers? Did your employer pay you in lieu of notice? Were you retrenched during the notice period? Did your employer make you take your vacation leave during the notice period? Did you receive payment for your accrued vacation leave, separate and apart from your severance payment?
15. Did you work at the company for more than one year? Were you in a probationary or qualifying period? Were you a casual worker? Were you a seasonal worker? If so, were you employed with the company for 3 consecutive seasons and at least 100 days each season? Were you employed on a specified fixed term basis or engaged to perform a task over an estimated period of time? Were you employed under successive fixed-term contracts? How much were you paid as severance benefits? Did your employer pay you the correct amount of severance, according to the RSBA or collective agreement? Did the company have a collective agreement that stated how much severance should be paid? How long did you work at the company? Did you have any breaks in service? What was your salary? Did you receive terminal benefits from your employer that were more than the amount you would've received in severance?
16. Did your employer make an offer to you to accept another position instead of being retrenched? Was that position similar to the one you held before? Similar wages, responsibilities, working hours, location, status? Did you have a good reason for refusing it?
17. Did your employer fire you for misconduct (or any other reason) before he retrenched you?
18. Do you believe that there was a genuine redundancy or do you believe that they used that as an excuse to fire you?