Comprehensive Guide to Unfair Dismissal: Misbehaviour/Misconduct

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Introduction:

What is Unfair Dismissal?

As per section 10(5) of ***Industrial Relations Act Chap 88:01*** (IRA), this is a dismissal that is "harsh and oppressive or not consistent with good industrial relations practice."

This type of case is dealt with before the Industrial Court. If a worker wants to pursue a case for unfair dismissal, he must join a Union who will bring the case on his behalf (as per the IRA). An attorney or other industrial relations practitioner can seek the authorization to act on behalf of the union to represent the worker pursuing the claim.

The person claiming unfair dismissal must be a 'worker' in accordance with the definition in the IRA. If you believe your client falls within the definition of 'worker', then the next step is to determine if you think their dismissal may have been unfair.

There are a few ways that a worker's dismissal may be unfair. One such way is if he was dismissed for alleged misbehaviour/misconduct and the proper disciplinary process was not followed.

The key components of a proper disciplinary process are:
i) whether the employer complied with natural justice and gave the worker a fair opportunity to be heard,
ii) whether progressive discipline was applied, and
iii) whether the punishment was reasonable, having regard to the unique circumstances of the worker's case.

i) Natural Justice & The Opportunity To Be Heard

There are three key aspects of natural justice/the opportunity to be heard: a) the investigation, b) the disciplinary hearing, and c) the decision.

a) The Investigation

If there has been a complaint or accusation that a worker has breached a company policy or engaged in misconduct, before the worker can be dismissed, the company must conduct an investigation. The worker must be informed of the details of the complaint, and then the company must meet with him and any witnesses to gather as much information as possible.

Premier Beverages v Edmeade Joyce Claim No ANUHCV 2006/0266- The Antiguan High Court was moved to find that the claimant was unfairly dismissed in circumstances where, although he caused the company to lose a considerable sum based on his misconduct, the employer did not carry out a proper investigation, neither was the claimant told that his performance was under review nor given an opportunity to proffer any explanation. The matter was compounded by the fact that he was not given a hearing and was not told the reason for his dismissal. These are fundamental tenets of the principle which were not adhered to and will factor greatly into the decision of the adjudicator.

TD No. 187 of 2002 Transport and Industrial Workers' Union and Public Transport Service Corporation
The Worker was a driver/conductor with the Corporation. Whilst driving the bus, the Worker ran off the road and the occupants of the bus were injured. The Union contended that the bus experienced a mechanical problem, whilst the Corporation stated that the bus was in good working condition. The Court found that although there was a meeting with the Corporation, the Worker was not called to an inquiry to give his account of what transpired on the date of the accident. It was important for the Corporation to conduct a thorough and balanced inquiry into the events which led to the bus leaving the road and colliding with a tree. Such inquiry is critical to the investigation into allegations of recklessness and/or negligence on the part of the Worker on the day in question. There is no evidence forthcoming from the Corporation to indicate that the Worker was given the opportunity to properly explain the circumstances which led to the accident at an inquiry. There is no evidence that he was afforded the opportunity to respond to allegations of negligence and speeding. The Court found that the Corporation had not concluded a proper and fair inquiry and/or investigation of the accident and thus the dismissal was harsh and oppressive.

In ***TD NO. GSD-TD 277 of 2015 National Union of Government and Federated Workers Union v Telecom Security Services Limited***, the Court considered the following:
"Was the worker informed of the nature of the investigation and provided with particulars of same? Was the worker invited to participate in the said investigation? Was the worker given an opportunity to respond to any questions or statements given against him in the course of the investigation? Was the worker at the very least given a copy of the investigation? Assuming

though not admitting there was a finding of guilt was there worker given an opportunity to mitigate? Was this the first incident of its kind involving the worker? If so, was he given an opportunity to improve or rehabilitate? The Court found as a fact that the Company both in Evidence and Arguments and Witness Statements failed to address any of these concerns the Court had."

Elements of a fair investigation:
The employer must:

- give the worker notice of the complaint and the investigation
- meet the worker and gather evidence from him
- follow up on any information given by the worker
- meet with all witness and collect evidence
- seek to gather all available and relevant information and then provide it to the worker in advance of any disciplinary hearing
- have an unbiased investigator
- conduct a fair, reasonable & thorough investigation

If a proper investigation was not conducted and the worker was dismissed for misconduct, that dismissal may be deemed harsh & oppressive or not in accordance with the principles of good industrial relations practice (aka unfair dismissal).

Questions to ask your client concerning the investigation:

- Did the company conduct an investigation?
- Were you notified of the investigation in advance?
- Were you informed of the purpose of the investigation, ie did they tell you what they were investigating?
- After the investigation, did you receive a copy of the evidence they gathered?
- Did they meet with all the relevant witnesses? Did they provide you with the evidence of those witnesses?
- Who conducted the investigation?
- Was that investigator also a witness to the alleged incident? Was the investigator the same person who made the complaint?

b) Disciplinary Meeting/Hearing

If the investigation establishes that there is evidence to suggest that the worker may have committed misconduct, the next step is to have a disciplinary hearing. The company must inform the worker of all the disciplinary charges that he has been accused of, provide all the evidence gathered during the investigation and set a date for the hearing. At the disciplinary hearing, the worker must be given an opportunity to respond to the allegations, bring witnesses of his own and question the company's witnesses. The worker should be allowed to have a representative who can argue on his behalf. The chairperson of the hearing must be impartial.

TD No. 27 of 2011 Oilfields Workers' Trade Union v Caribbean Packaging Industries
"The audi alteram partem principle is a well-known, integral and a very important principle in the practice of industrial relations. This principle and the principles of natural justice place a duty of impartiality and fairness on decision makers at the workplace. The right to a fair hearing is a fundamental right for all workers; decision makers therefore have a duty and obligation to be independent and unbiased when they hold disciplinary hearings into the conduct of workers. The audi alteram partem principle and the principles of natural justice aver that a Worker who is accused of misconduct at the workplace has the right to be heard and the right to a fair hearing. Impartiality and fairness are bulwarks of the disciplinary process in Industrial Relations, the failure to adhere to these principles is tantamount to conduct which is harsh and oppressive and in the breach of the principles and practice of good industrial relations."

TD NO. GSD-TD 277 of 2015 National Union of Government and Federated Workers Union v Telecom Security Services Limited, concerned the dismissals of two workers. On 23rd July, 2014 both workers reported for work as usual and were separately instructed to see the Operations Director before assuming duties, where they were served with termination letters dated 23rd July, 2014.
In the Operations Director's evidence, he referenced that a tribunal took place, but provided no information on the date or procedure and provided no evidence of the notes taken. The Court stated that, "a Court properly constituted cannot be expected to accept someone merely stating there was a tribunal with no supporting evidence. Moreover, the Worker No.1 was a stranger to there being any tribunal at all…the worker herein ought to have been given the opportunity to defend himself. Consequently, the Court found as a fact that his dismissal was not consistent with good and proper industrial relations practices…
In respect of Worker No.2 the Company in its Evidence and Arguments contended that the worker from the outset had not performed his duties in a professional and/or suitable manner. Some of this included sleeping on the job; smoking on the compound and generally poor work ethic. The Company stated further that it gave the worker numerous warnings and the opportunity to improve which he did not.
Evidently though those various warnings to the worker weren't before the Court. Indeed the Court found it curious that it was never even stated whether those warnings were oral or in writing. Further there is no evidence, if those warnings were given, what period of time was the worker afforded to take corrective actions. In a similar manner the dismissal letter given to Worker No.2 was devoid of any reason or reasons for his dismissal.
There is no evidence as in the other instance that any attempt was made to constitute a tribunal herein. On a balance of probability the Court found as a fact that the worker herein was not given the opportunity to defend himself. The Court found further that the dismissal herein was inconsistent with good and proper industrial relations practices and procedures…"

In ***TD No. 15 of 2000 Bank and General Workers' Union v Public Service Association of Trinidad and Tobago***, the Court reviewed Recommendation of the ILO No. 119, and concluded that: "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…When this procedure has not been followed, in order to sustain a dismissal, management must prove that the result would have been the same if it had been followed."...

In our system of industrial relations, every worker has the right to a fair opportunity to defend himself against any charge or allegation made against him, as well as to be heard in mitigation of any possible penalty (especially dismissal) by the person/s in management responsible for taking such decisions, before they are effected. This is not a trifling matter to be taken lightly or viewed as a mere technicality. It is a fundamental principle of good industrial relations. Its omission by an employer from any disciplinary process, would amount to a fundamental breach of the principles of good industrial relations practice and render any disciplinary action by an employer (especially dismissal) harsh and oppressive and unsustainable, except in the most exceptional circumstances.

An employer seeking to sustain and justify the dismissal of a worker in such circumstances, places on his own shoulders, the very difficult task and perhaps unbearable burden of proving on the one hand, that he could not reasonably have been expected to provide the worker with the opportunity to be heard; and on the other hand, that even if he had done so, it would have made no difference to the outcome.

The worker did not know of the allegations against him; was never charged with anything; there was no investigation or disciplinary inquiry in which he was involved; he never had an opportunity to be heard in his defence; never had an opportunity to be interviewed, give explanations or make a plea in mitigation…

The worker certainly had an unenviable record of employment, with numerous letters recording his persistent breaches and infractions. It is clear that the Association became frustrated by this and had reached the point where it considered the worker to be more of a liability than an asset. This appears to be what the Association was most influenced by, when it dismissed the worker in the way that it did. But bad though it may be, a worker's past disciplinary record is relevant only after he has already been heard and found guilty of any alleged misconduct or breaches. His past record goes not to a finding of guilt or innocence, but to determining the nature of the consequence or penalty an employer may reasonably impose, after guilt has already been established; it should not be allowed to predetermine a worker's guilt or prejudice the employer's mind in relation to present allegations. Indeed, it is by no means an excuse for denying a worker a fair opportunity to seek to establish his innocence, or to be heard in mitigation of any possible penalty, by the person with whom the authority to take disciplinary action resides."

The dismissal was harsh and oppressive.

TD No. 27 of 2011 Oilfields Workers' Trade Union v Caribbean Packaging Industries

The key issue in this trade dispute is whether a Supervisor who has a complaint against a Worker ought to be a part of an investigation team into the said complaint and at the same time give "evidence" to the said team. Moreover, whether that person (the complainant) can be the ultimate decision maker and in so doing determine the fate of that Worker…

Good industrial relations requires employers to conduct enquiries and investigative hearings/meetings. This provides management with the opportunity to discover the relevant facts about incidents and allows management to make informed decisions. In the present case,

there was no evidence before the Court to suggest that the Company made any effort to get other witnesses to attend its disciplinary hearing/meeting and there was no evidence that an enquiry was conducted to assist the disciplinary panel in its deliberation. The disciplinary procedure which was adopted by the Company (which excluded potential witnesses) was flawed and contrary to the principles of good industrial relations.
The right to a fair hearing is a fundamental right for all workers; decision makers therefore have a duty and obligation to be independent and unbiased when they hold disciplinary hearings into the conduct of workers.
In this case, the Company caused a Supervisor who had a complaint against the Worker to be involved in the decision making process. Although the Company has a Human Resource Department, the Supervisor suspended the Worker and the Supervisor dismissed him. The Company by this very act deprived the Worker of his rights to a fair hearing.
The Company's investigative process did not include attempts to get other witnesses to appear before the disciplinary hearing/meeting to provide information which may have been useful to determine what transpired, this flawed process violated the principle of fairness and good industrial relations.
The Court held that the Company dismissed the Worker in circumstances which were harsh, oppressive, unreasonable and unjust…

Elements of a proper disciplinary hearing:

- Worker informed of charges beforehand and provided with evidence
- Worker given sufficient time to prepare
- Worker has right to representation
- Worker allowed to put forward his defence and challenge any evidence and witnesses
- All relevant witnesses brought to the hearing
- The matter should be heard by an unbiased panel

If a proper disciplinary hearing was not conducted and the worker was dismissed for misconduct, that dismissal may be deemed unfair.

Questions to ask your client about the disciplinary hearing:

- Were you informed of the charges beforehand?
- Were you informed of the date, time and place of the tribunal?
- When were you notified of the hearing? Did you have sufficient time to prepare?
- Were you allowed to bring a representative?
- Were you given all of the evidence in advance of the hearing?
- Did they bring all of the witnesses to the hearing?
- Were you allowed to cross examine the witnesses?
- Were you given the opportunity to respond to all the allegations at the hearing?
- Were you given the opportunity to explain any mitigating factors?
- Who was the chairman of the tribunal? Was he/she also involved in the investigation? Was he/she a witness? Was he/she the person who made the initial complaint against you?

c) The Decision

After the disciplinary hearing, the employer must make a decision about the worker's guilt or innocence.

TD No. 377 of 2010 National Workers Union v Servisair Trinidad and Tobago
The questions therefore which had to be determined by the Court are: (i) whether a reasonable management could find on the examination of the evidence before it, that the Worker is guilty of misconduct…

In ***Trade Dispute No 58 of 2007 Transport and Industrial Workers Union v. Ansa Polymer Limited***, the worker was dismissed by letter on the grounds that after an investigation by the Company, he was found guilty of unauthorized absence from work and falsification of the Company's records. The evidence relied on by the company was a report from a security guard that he had seen an employee climbing over the fence. Based on that evidence, the Company was convinced of the worker's guilt and he was dismissed.
"The question is, did the Company have sufficient evidence before it to conclude that the worker was the person seen by the security guard. The best evidence of that was the evidence of the security guard himself. He was not called as a witness before the court. However, there is nothing in his statement to the Company that suggests he was able to identify the person who jumped the fence…
Dismissal is so serious a punishment that an allegation of misconduct against a worker must be supported by such evidence of the worker's guilt as would justify its imposition. Serious doubt as to the worker's guilt ought to be resolved in the worker's favour. In this case there was room for serious doubt as to the worker's guilt, the identification evidence being tenuous at best…
In the circumstances we find that there was insufficient evidence to establish the guilt of the worker. Where dismissal is contemplated, the standard of proof of guilt approaches the criminal standard. In this case the evidence available to the Company was not sufficient to establish guilt on a balance of probability. The dismissal was harsh and oppressive."

There must be evidence to support a finding of guilt against the worker.

In the decision, the decision-maker/tribunal must:

- Show that they properly assessed & considered all the evidence before making a decision
- Indicate which evidence was believed or disbelieved
- Indicate which witnesses were believed or disbelieved, especially if there were inconsistencies and conflicting evidence
- Show that the charges were proved against the worker

If the panel fails to make such an assessment, it may seem like the disciplinary proceedings were conducted to 'check the box' as opposed to giving the worker a fair opportunity to be heard and trying to arrive at the truth.

If the company's decision does not take into account the evidence that was presented at the tribunal and it is not a decision that a reasonable employer would have made having regard to the evidence that was available, the dismissal may be deemed unfair.

Questions to consider when reviewing the company's decision:

- Did the company provide a written decision in respect of the disciplinary proceedings?
- Does the decision list the charges that were brought against the worker?
- Does it state whether the worker was found guilty of any or all of the charges?
- Does it state what evidence the panel believed and relied upon to determine that the worker was guilty?
- Does it state which witnesses were believed?
- Does it show that the panel considered all the evidence from all the witnesses and then arrived at the conclusion that the worker was guilty?

(ii) Progressive Discipline

If the worker is found guilty after the hearing, then the employer may impose a punishment.

A finding of guilt is not automatic grounds for dismissal. Good industrial relations generally requires employers to apply progressive discipline when workers are found guilty of misconduct, unless there are exceptional circumstances.

Progressive discipline means that workers receive the least severe punishment for their first act of misconduct, and the punishments become increasingly severe with each further act of misconduct. The available punishments from least severe to most severe are: Verbal Warnings, Written Warnings, Final Written Warning, Suspension & Dismissal.

Employers are expected to apply progressive discipline, unless the misconduct was serious enough to warrant the imposition of a more serious punishment.

TD No. 93 of 2008 Banking, Insurance and General Workers Union and Kemicals Worldwide (T&T) Limited

The Company requested that the worker provide her BIR number. She failed to do so and was subsequently dismissed. There was no evidence to suggest that over the course of the Worker's employment that any form of disciplinary action was taken against her for failure to provide the Company with her BIR number. There was no evidence that the Company conducted an investigation into the matter after receiving correspondence from the worker, nor did it hold any form of discussion with the worker. Instead the Company terminated the worker's services on the grounds of loss of confidence. The general principle of good industrial relations requires that employers use a system of progressive discipline in cases of misconduct by workers. Dismissal is at the very end of the range of disciplinary actions which are available to employers and ought to only be used when it is absolutely necessary or in instances where there is an exception to the general principle. In this case, there was no exceptional circumstances which warranted deviation from the general principle; the Company failed to consider the established standards of progressive discipline; the worker was not given the opportunity to be heard in accordance with natural justice; and accordingly the dismissal was harsh, oppressive and not in keeping with good Industrial Relations practices, and the Company was ordered to pay to the worker compensation and damages.

However, It is not automatically fatal to an employer's case if he fails to strictly adhere to the principles of progressive discipline. As always, it depends on the specific facts of the case.

TD No. 509 of 2017 Banking, Insurance and General Workers Union and Smith Robertson and Company Limited

The worker received a number of warning letters which spoke to her progressively excessive tardiness and high absenteeism rate. These letters highlighted the negative effect her absence had on the Company's operations and sought her improvement in respect of same. However,

the Worker was never suspended and thus the principle of progressive discipline had not been applied. The concept of progressive discipline is not to be found in any of the Laws of Trinidad and Tobago. The principle itself seems to have evolved out of a number of labour disputes and collective bargaining practices in the United States. It is found mainly as a concept of Human Resource Management and envisions penalties which increase in severity for each infraction committed by the employee. Its application to the disciplinary process therefore adds to transparency and provides the Worker a fair opportunity for improvement prior to the imposition of the ultimate sanction of dismissal. Thus, the expected progression for a recalcitrant employee will be: 1) Oral warnings 2) Written warnings 3) Suspension 4) Termination. The Industrial Court has therefore recognized the application of progressive discipline as best practice for employers when deficiencies exist in the services these employees provide. Failure to follow each and every step in the process is not necessarily fatal to the employer, but rather each case is determined on its own merits. The Company was extremely sympathetic and accommodating to the Worker; she was given many opportunities to improve over the years and she grasped at none. In the end, she was also given the opportunity to be heard alongside her Union Representative. The Company Handbook spoke of using the steps of Progressive Discipline according to the merits of the case. On the merits of this case, the Company's actions were reasonable and foreseeable in light of the numerous warnings and the Worker's chronic absenteeism. Accordingly, the matter was dismissed.

Generally, if the employer failed to apply progressive discipline and jumped to dismissal of the worker, the dismissal may be deemed unfair.

(iii) Reasonable Punishment

Employers must impose punishments that are reasonable and fair. Being found guilty of a disciplinary charge should not automatically result in being fired. There are several factors that an employer should consider when determining what punishment is reasonable/fair.

TD No. 315 of 2002 Contractors and General Workers Trade Union and National Quarries Company Limited
"The central issue in this trade dispute is whether the Company's decision to dismiss the worker for loss of confidence was reasonable in all the given circumstances…the Company's decision to dismiss the worker was reasonable."

TD No. 365 of 2014 National Union of Domestic Employees and Superstore Limited
"Based on the totality of the evidence, the Court is satisfied that there is evidence to justify the reasonableness in the dismissal of the Worker."

Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111- the Court of Appeal confirmed that the band of reasonableness approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss a person from his employment for conduct…

To determine whether or not the employer has acted reasonably in dismissing the employee, the current test is: 'What would a reasonable employer have done?'...If the circumstances of the case are such that a reasonable employer might dismiss, the dismissal will be fair even though not all the employers would take that view (***British Leyland (UK) Ltd v Swift***).

TD No. 227 of 2001 National Union of Government and Federated Workers v Caribbean Development Company Limited ("Chubby Bottle Case")
Balloon, the Worker, asked his subordinate to put a chubby bottle filled with paint in Balloon's car, in a clandestine manner. The paint belonged to the Company. The worker was dismissed. The Court noted that: there was never a need to discipline the worker; he worked his way up from a labourer to a Supervisor; he had twenty years of unblemished service with the Company; he was forty-seven years of age when he was dismissed; the Company did not find that he lied at any stage of the inquiry; he admitted that he took the paint for his personal use; he admitted that the paint belonged to the Company; he said he knew there was a "procedure" whereby one must check with security for approval before leaving the compound with the Company's property for one's personal use; he intended to obtain approval but inadvertently neglected to do so; and in his own words, he said he "was not thinking" at the time when he told his subordinate to put the item in his car, before seeking security's approval.
Nowhere in the letter of dismissal of the Worker was it said by the employer that it gave due consideration to the worker's length of service and unblemished record. His upward mobility in the company is testimony to his dedication to work and loyalty to his Employer.
The Worker, particularly in his position as Supervisor, should not have been so complacent when handling such a situation. He is not without blame and his culpability should be reflected in the award. While looking at the breach of the "procedure", the employer should also have

given serious consideration to the following factors: i) long service and unblemished record; ii) viewing each case on its own merits; and iii) he admitted he failed to follow the existing procedure…
There were other options which, in the Court's view, would have met the justice of this case such as a warning letter, suspension, etc.

Key Question: Would a reasonable employer have dismissed the worker, having regard to the unique circumstances of the case?

Factors to consider to determine what punishment is reasonable:

- Previous Misconduct- Was the worker previously found guilty of misconduct? If so, how long ago did it occur? (Generally, the more instances of misconduct, the more severe the punishment should be. However, if the misconduct occurred a long time ago, it may not be fair to consider it in the present case as it may have 'expired'.)
- Seriousness of the offence- How serious was the misconduct? The punishment should be proportionate to the offence- the more serious the misconduct, the more serious the punishment. (Serious misconduct includes theft, dishonesty, fighting, substance abuse, insubordination, etc.)
- Length of Service- How long has the worker been with the company? The longer the worker's service, the more leniency the employer is expected to exercise, particularly if he has been a good worker with a clean disciplinary record.
- Aggravating factors- Did the work show a lack of remorse? Was he dishonest during the disciplinary process? Did his misconduct cause loss to the business or harm to other workers?
- Mitigating factors- Did the worker acknowledge his wrongdoing at an early stage in the process? Has he apologized for his actions? Was it a genuine mistake? Has the worker sought help or counseling to ensure there isn't a repeat of his actions? Is this a first time offence that is out of character?

After considering all the relevant factors, the company should impose a reasonable & fair punishment.
Dismissal should be reserved for the most serious offences and usually, for repeat offenders.

If the employer failed to consider the relevant factors in determining a reasonable punishment for the worker, the dismissal may be deemed unfair.

Questions to ask your client to determine if the punishment was reasonable:

- When did you join the company?
- What position did you join in? Did you get any promotions?
- How long have you been at the company? Did you work continuously from the time you joined or were there breaks in service?
- When were you dismissed?
- Did you receive any disciplinary punishments before? Verbal Warnings, written warnings, final written warnings or suspensions?

- What offences did they find you guilty of?
- Did you express any remorse or apologize?
- Was it a genuine mistake or did you intentionally commit the misconduct?
- Did you offer to make amends for the losses caused/harm caused to your coworkers?
- Have you sought any rehabilitation or counselling?

Conclusion

If your client has been dismissed for alleged misconduct, you have to ensure that:
i) he was given a fair opportunity to be heard- this means that there was a proper investigation, proper disciplinary hearing, and his finding of guilt was fair having regard to the evidence that was available;
ii) progressive discipline was applied (unless the misconduct was so serious that it warranted a more severe punishment);
iii) the punishment was reasonable- all the relevant factors were considered and a reasonable employer would have made the decision to dismiss the worker.

If any of those elements are missing, your client may have a good claim that his dismissal was harsh and oppressive or not consistent with the principles of good industrial relations practice.

Sources:

1. Legislation:

- Industrial Relations Act Chapter 88:01

2. Case Law

3. Texts:

- Commonwealth Caribbean Employment and Labour Law, Natalie Corthésy and Carla-Anne Harris-Hoper
- Labour Law in the Commonwealth Caribbean, The Practice of Good Industrial Relations in the 21st Century, Deborah Thomas-Felix
- Labour Law, Simon Deakin & Gillian S Morris, Sixth Edition,
- Selwyn's Law of Employment, Twentieth Edition, Astra Emir