The use of independent bodies in internal disciplinary hearings

Many employment law practitioners would agree that, in relation to claims for unjustifiable dismissal under the *Labour Relations and Industrial Disputes Act*, 1975 ("the *LRIDA*"), the Industrial Disputes Tribunal ("the IDT") places a strong emphasis on the question of procedural fairness.

What this means for an employer, is that they will be unlikely to successfully defend claims of unjustifiable dismissal before the IDT where an employee is dismissed for misconduct, in the absence of a disciplinary hearing, or where the internal disciplinary proceedings are found to breach the provisions of the Labour Relations Code ("the Code") or fundamental rules of natural justice.

On this point, the learned authors of *Commonwealth Caribbean Employment and Labour Law*[1] state that:

> In the Jamaican context it is apparent that, although the rationale for dismissals may have to be determined in many cases, the issue of whether procedural fairness was complied with is now the paramount issue examined in cases of unjustifiable dismissal. In proceedings before the IDT the Labour Relations Code enjoys a position of pre-eminence, and failure to comply with the Code (and other natural justice requirements) will most likely result in a determination that the dismissal was unjustifiable, even if it can be established that there was sufficient cause for dismissal."

A recent award of the IDT which emphasises the importance placed on the question of procedural fairness in the dismissal process is *The National Commercial Bank and Peter Jennings*.[2] This award has received a fair amount of media attention and has, in fact, been the source of two recent judgments of our courts: First, the Supreme Court[3] judgment refusing the National Commercial Bank's (NCB's) application for leave to apply for judicial review of the IDT's award; and the more recent decision of the Court of Appeal[4] upholding the Supreme Court judgment and dismissing NCB's appeal.

A review of the award reveals that the IDT determined that Mr Jennings's dismissal was unjustifiable, both on the basis that (in the Tribunal's view) the substantive reason for the dismissal was not proved, coupled with the fact that the disciplinary process was procedurally flawed.

The right to appeal to an independent body outside of the employer?

One of the most interesting procedural flaws outlined in the award (which gave many practitioners in this area, cause for pause) was the suggestion that the procedure was unfair because NCB did not provide Mr Jennings with the right to appeal the initial decision of the disciplinary hearing to an independent body outside of the organisation.

In the award, the Tribunal summarised the submissions made on Mr Jennings's behalf. These included the criticism that the initial disciplinary panel, comprised the chairperson (who was

the person who had drafted and laid the charges against Mr Jennings) and an employee who reported to the chairperson, and who had personal involvement in one of the matters. It was further stated that the appeal was to a sole adjudicator to whom the chairperson of the disciplinary panel directly reported within NCB's management hierarchy. It was submitted that this was in breach of the Labour Relations Code, as "the entire process was micromanaged to keep it within a small connected line of senior managers and *to ensure that no independent body was ever involved."*[5]

The IDT found that one of the recognised rules of natural justice was that "a man should not be a judge in his own cause," and, in relation to this rule, the IDT stated that: "…the procedure should show impartiality and be presided over and/or managed by persons who will be fair and objective, and *certainly not a part of the institution which is making the accusation or bringing the charges against the accused."*[6]

The award, therefore, seemed to accept as correct the submission made on behalf of Mr Jennings, that the appeal hearing should have been heard by an independent body, rather than persons who were employed by NCB.

Admittedly, even before the IDT's award in the NCB/Peter Jennings dispute, it was not uncommon for employees and/or their representatives to request that management permit the involvement of an independent or external consultant at some stage of the disciplinary process, on various grounds. The position taken by the Tribunal in the above award (although not binding in law), created concern on the part of employers as to whether they would now be placed in the onerous position of acceding to requests to engage independent bodies in disciplinary proceedings, for fear of a finding against them at the IDT.

Thankfully, the issue was clarified somewhat, in the recent judgment of the Court of Appeal in *National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings.*[7] There, Sinclair- Haynes JA stated that:

> While it is true that an employer is not automatically disqualified from presiding over disciplinary hearings, the requirement is that internal hearings are dealt with fairly.

Not only is an employer not automatically disqualified from presiding over disciplinary hearings, but in the writer's view, there is also no corresponding legal obligation to have an independent body do so, for the reasons explored below.

Unjustifiable dismissal is a statutory claim which arises under the provisions of the *LRIDA.* The term "unjustifiable dismissal" is not defined under the legislation, but its meaning has been judicially interpreted in a number of decisions of our courts. One of the most often quoted is the decision of the Court of Appeal in *Village Resorts Limited v. The Industrial Dispute Tribunal and Others,*[8] where Bingham JA stated, at page 324, that:

> The critical question was as to whether the dismissals were justifiable. In an industrial relations setting, and applying the provisions of the *Labour Relations and Industrial*

Disputes Act, the Regulations, and within the spirit and the guidelines set out in the Code as well as the new thinking introduced by the legislation, the onus then shifted to the hotel management to establish that their actions were justified within the meaning given to that term by the *Act*. This meant as the tribunal and the full Court found, whether in all the circumstances of the case, their actions were just, fair and reasonable.

Therefore, the question of whether a dismissal is justifiable, must be answered by applying the provisions of the *LRIDA,* the Regulations and the Labour Relations Code. The appropriate question is whether, in all the circumstances of the case, the actions of management were just, fair and reasonable.

Since the Privy Council decision in *Jamaica Flour Mills Limited v. Industrial Disputes Tribunal and the National Workers Union*[9]*,* it has also been made abundantly clear that the Code is "as near to law as you can get" and as such, an employer ignores its provisions at their peril.

With respect to disciplinary procedures, section 22 of the Code states, *inter alia*, as follows:

22. Disciplinary Procedure

(i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should: –

(a) Specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;
(b) Indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant -parties;
(c) Give the worker the opportunity to state his case and the right to be accompanied by his representatives;
(d) *Provide for a right of appeal, wherever practicable to a level of management not previously involved*; (Emphasis added)
(e) Be simple and rapid in operation…

When one examines this section, the inescapable inference must be that the Code envisages that disciplinary procedures are to be handled internally by "management", that is, the employer. Therefore, the Code places no automatic obligation on the employer to "contract out" an internal disciplinary procedure to an independent body. The Code simply states that, in the case of an appeal, it should be to a level of management not previously involved.

That being said, it is recognised that each case will be decided on its own facts and merits and, accordingly, all cases must be considered in the round, and a balancing exercise performed in determining what is just, fair and reasonable.

An instructive British case for consideration is the Employment Appeal Tribunal (EAT) decision in *Adeshina v St. George's University Hospitals NHS Foundation Trust & Others.*[10] There, the employee was dismissed following disciplinary proceedings. She subsequently brought a number of claims against her employer, the Trust, including a claim for unfair dismissal. An employment tribunal dismissed the claims and, on appeal, it was submitted, *inter alia*, that there were procedural flaws in relation to the composition of the appeal panel. The employee objected to the participation of the employer's divisional director as a part of the appeal panel, on the basis that he had mentored the chairperson of the initial disciplinary hearing, and had some prior involvement in formulating a policy document which applied. In relation to the general manager, the complaint was that he was a junior manager who reported to the dismissing manager, in breach of the ACAS Code. (The ACAS statutory Code of Practice provides guidance to British employers and employees in managing relationships in the workplace).

The EAT held that internal disciplinary proceedings were not to be approached, as would judicial proceedings, for good reason, and even if this was the case, the EAT was satisfied that the informed observer would not consider that there was any appearance of bias in the circumstances. The EAT stated that very senior managers will mentor and have involvement in the management of a number of employees, and may well also sit on disciplinary and appeal panels in which those employees might be involved. To require an employer to avoid any such link would be both unrealistic and undesirable, as employers are entitled to want to utilise the knowledge and experience of relevant members of the senior management team in this way. The EAT stated, further, that that practice does not, without more, render the process unfair.

Interestingly, in relation to the complaint that the general manager was a junior manager, it was accepted that this was contrary to the ACAS Code, which provided that the person hearing an appeal should be senior to the original decision taker. However, the EAT determined that although there is a concern that a subordinate may be unduly influenced if considering a decision taken by a senior manager to whom they report, on the facts of the particular case, the junior manager was, in fact, a manager of some seniority; he was one of a panel of three which consisted of two senior managers, and the panel had also received independent advice from a senior professional. Accordingly, on the facts of this case, although there was a breach of the ACAS Code, the process overall was determined to be fair, taking into account all the circumstances.

It is submitted, therefore, that there is no general rule of law that excludes employees of an organisation from presiding over internal disciplinary proceedings. Indeed, under our Code, it is expected that disciplinary matters are to be handled internally by the employer, and any appeals must be to a level of management *not previously involved.* In addition, it is recognised that members of a disciplinary/appeal panel, as senior employees, may have specialised knowledge in certain areas of the business, which could be critical in reviewing the actions of an accused employee. In keeping with the spirit and intent of the Code, a level of pragmatism is necessary. To require an employer to exclude employees from internal disciplinary panels on the basis of either their employment or even minor connections among managers, is unrealistic

and undesirable, as employers are entitled to employ the knowledge and experience of senior management in addressing issues of this nature. This, without more, does not render a disciplinary process unfair. However, one should also appreciate that there may be cases where, in all the circumstances, justice and fairness may dictate the use of an independent body to conduct disciplinary hearings or appeals. In such cases, it may suit an employer to utilise an independent body, to avoid any criticism of procedural unfairness. What is abundantly clear is that, in all cases regarding the management of employees, employers must take all steps, as far as is reasonably practicable, to ensure compliance with the provisions of the Code.

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[1] Natalie Corthésy and Carla-Anne Harris-Roper, Routledge, 2014, p. 246
[2] Industrial Disputes Tribunal Award in Dispute No: IDT 8/2013 Between National Commercial Bank and Mr. Peter Jennings, delivered on April 28, 2015.
[3] *National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings*, [2015] JMSC Civ 15 (Unreported delivered May 27, 2015).
[4] *National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings*, [2016] JMCA Civ 24 (Unreported, delivered May 6, 2016).
[5] See note 1 page 13.
[6] Ibid page 16.
[7] Supreme Court Civil Appeal No 70/2015, [2016] JMCA Civ 24, (Unreported delivered, May 6, 2016).
[8] (1998) 35 JLR 292.
[9] Privy Council Appeal No. 69 of 2003 delivered March 23, 2003.
[10] . [2015] I.R.L.R 704