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YOU DON'T HAVE THE RIGHT TO REMAIN SILENT

Last summer, the law was changed to give non-unionized workers the right to access the Industrial Disputes Tribunal (IDT), a right formerly reserved for unionized workers. Last Friday, the Supreme Court reminded the IDT of its role in settling disputes related to dismissals. Today, we look at how all of this affects employers and employees alike.

Many employers are understandably fearful of being dragged before the Ministry of Labour and/or the IDT. And this is precisely what may happen to any employer since the law changed to give all private sector employees access to the IDT. All employers should now give the reason for dismissing the employee (whether their contracts allow for dismissal without cause or not) since any employer may be called upon to prove to the IDT that the dismissal was justifiable. Should it fail to do so, the IDT can do what the Courts cannot, which is force the employer to reinstate the dismissed employee.

All this makes the Supreme Court Judgment in **The University of Technology, Jamaica v. The Industrial Disputes Tribunal** & **University & Allied Workers Union**, handed down last Friday, so relevant and timely. In this case, a laboratory technician was charged with unauthorized absence warranting dismissal. Before the date of the employee's disciplinary hearing, her union wrote to the Ministry of Labour to complain about a failure on UTech's part to follow proper procedures. Utech proceeded with the disciplinary hearing, but the lab technician and her union refused to attend to answer the charges. The lab technician was dismissed and the matter was referred to the IDT. The IDT proceeded to examine whether her absence from work had in fact been authorised by UTech, as opposed to reviewing UTech's conduct and whether the dismissal was justifiable based on the little information known by UTech at the time of the dismissal. The IDT considered the lab technician's defence (which UTech was hearing for the first time at the IDT hearing) and found that the employee's absence had been authorised by UTech and therefore the dismissal was unjustifiable. The Supreme Court quashed the IDT's ruling on several grounds, most importantly on the basis that the IDT substituted its discretion for UTech's. The IDT conducted its own hearing into the facts instead of reviewing Utech's decision based on facts known to UTech at the time of the dismissal.

As was said by the Hon. Ms Justice Mangatal in the written judgment, "*In relation to unfair dismissal and unjustifiable dismissal, the reasonableness of the dismissal must be judged on the basis of facts and circumstances known to the employer and acted on by him at the time of the dismissal and not circumstances which subsequently come to light. This is because the I.D.T. is here concerned not with whether there has been any injustice*

to the employee, but rather with the question of whether the employer's conduct was unfair." The IDT therefore fell into error when it judged UTech's decision to dismiss the employee based on information that the employee raised for the 1st time at the IDT hearing but failed to say at her disciplinary hearing.

Justice Mangatal's ruling recognized that there isn't always 1 right course of action in dealing with disciplinary matters and that there is a range of responses that a reasonable employer could make based on the same facts. The IDT need not agree with the employer's decision, and should not seek to arrive at what it perceives to be a more fair decision, but instead should ask itself whether the decision was one that a reasonable employer, considering the evidence before it at the time, could have arrived at.

By way of illustration, if an employee is accused of corruption and theft, the employer need not breach the Interception of Communications Act in an attempt to gather evidence sufficient to convince a jury beyond reasonable doubt. The employer will only be required to show that it had a reasonable basis for honestly believing that the employee was guilty of the misconduct; that it conducted a proper enquiry into the facts and that it gave the employee an opportunity to respond to the charges. An employer that has done all of that is within its right to dismiss the employee on the basis of that honest belief. The issue of whether the employee is in fact guilty is immaterial, so much so that if, after the dismissal, another employee comes forward and confesses to the theft, the employer is under no duty to re-hire the dismissed employee. By the same token, if the only evidence linking the dismissed employee to the theft surfaces after the dismissal has been effected, the employer could be liable for unfair dismissal in spite of the employee's clear guilt.

Neither the employer nor the employee has a right to remain silent in disciplinary matters, and everything said, or not said, may be used against either party in subsequent proceedings. Employers are required to give reasons for dismissal and employees have a duty to put forward a credible defence when the opportunity is given. For the employer, the standard phrase that the organisation has "lost confidence" in the worker, without more, may not be enough to justify dismissal. For the employee, simply saying, "It wasn't me" in the mistaken belief that the employer has a duty to prove guilt, could be the difference between a career of a lifetime, and being unemployed at home watching Lifetime®.

Gavin Goffe is a litigation associate at Myers, Fletcher & Gordon and a member of its Labour Law Practice Group. Gavin may be contacted at gavin.goffe@mfg.com.jm or through www.myersfletcher.com