The Bahamas: Employment Challenges With COVID-19

Tara Archer-Glasgow
Higgs & Johnson
Nassau

Introduction

The current global pandemic has caused great disturbance within the employment market in The Bahamas. The forced closure of businesses during intermittent, necessary, lockdowns has strained profit streams; and the resultant temporary closure of our boarders had a freezing effect, in particular, on the tourism sector. Many commercial businesses such as hotels, banks, food chains and airlines have had to mitigate the financial consequences of this crisis by making employment adjustments. Most places of employment have had to establish a new way of operation and many employees, if among the fortunate, have had to learn to work from home. This economic woe has affected not merely our closet trading and touristic partner, but the entire world. In order for many businesses to survive they have had to down size and avail themselves of the legal provisions that facilitate lawful layoffs, redundancies and termination of employment relationships.

In this article, we will provide practical guidance for employees and employers to avoid unnecessary litigation whilst navigating through employment challenges precipitated by this COVID-19 crisis.

Legal Framework

The employment relationship in The Bahamas is governed by the Employment Law Act, 2001 which was amended by the Employment (Amendment) Act, 2017 ("the EA"). The EA prescribes the minimum rights and benefits that are to be applied to the employment relationship. If there is an employment contract in place which contains greater benefits for the employee a court will apply the more favourable provisions to any employment dispute. The EA also sets out the manner in which an employment relationship can be manipulated lawfully in an economic down turn. The EA provides for employers, in the appropriate circumstances and upon complying with the correct procedure, to be able to make an employee redundant (with a consideration for suitable alternative employment), to lay off an employee for a set period of time and to place an employee on short time ("alternative working arrangements")[1]. Many employers utilize these aids in a bid to avoid a complete termination and some employees tend to be amenable to management implementing such alternative working arrangements as a business strategy to at least preserve employment.

NAVIGATING THROUGH THE EMPLOYMENT CHALLENGES FACED DURING THE COVID-19 PANDEMIC REQUIRES CAREFUL FOCUS AND ANXIOUS CONSIDERATION

If ultimately termination is inevitable due to the economic despair of the business, the EA provides for termination of employment with notice or with payment in lieu of notice along with severance pay[2]. During the infancy stages of interpreting the termination provisions of the EA, it was generally opined that a reason for the termination of an employment relationship was not necessary. The only obligation was to ensure that the correct notice and service pay were provided. However, recent case law has suggested that employers should be mindful that whilst they may not be subject to a claim for wrongful dismissal, due to terminating without cause, they may be liable to a claim for unfair dismissal[3].

Unfair dismissal is a creature of statute and there is no similar provision known to the common law. The EA states four express grounds upon which a dismissal is deemed unfair; and they are: (1) dismissal relating to trade Union Membership, (2) dismissal on the grounds of unfair selection in a redundancy, (3) dismissals on the grounds of pregnancy and (4) dismissal in connection with a lock

out, strike or other industrial action. It has been argued that the express grounds in the EA were the only grounds upon which an employee could make a claim of unfair dismissal. However, Section 35 of the EA states that the question of whether dismissal of the employee was fair or unfair is to be determined in accordance with the substantial merits of the case. Accordingly, this section has been interpreted by Judges, in recent cases, to mean that the express grounds in the EA are indeed not exhaustive. Additionally, it is almost settled law now that an employee has a right not to be unfairly terminated notwithstanding any terms that may or may not exist in his/her employment contract. Consequently, an employee can make a claim for both wrongful and unfair dismissal[4]. In current circumstances, it is not unthinkable that an employee may advance an argument that termination during the Covid-19 crisis, when recovery is possible, is unfair. Finally, the EA also makes provision for summary dismissal for misconduct which traditionally requires no notice or severance pay to be provided. However, a summary dismissal does require a reasonable investigation into the alleged misconduct; and recent case law suggests that the employee may have a right to be heard prior to such dismissal.

What to do if Termination is Imminent and Unavoidable

- Most businesses globally, regardless if they admit it or not, are undergoing introspection to determine how and if they will be able to survive during this conundrum. Whether the concerns are alarmist or not, it must be conceded that there is going to be, even if only temporarily, a lack of availability of jobs to meet the demands of the employment market. The anticipated downsizing of business and closure of various operating locations will force most employers to consider terminating employment relationships as a cost cutting mechanism. During these times, employees also tend to become more litigious in a bid to obtain a more generous severance package in order to outlast the downturn.
- The first step to avoiding litigation is to make a sound business decision and ensure that termination is not a knee jerk reaction to the current crisis. Before deciding to terminate an employee, the employer should give consideration to whether the termination of a particular employee is a sacrifice of long term value for short term relief. In a bid to avoid termination, in the first instance, the employer should consider alternative working arrangements. If in the end termination is inevitable, the employer should ensure due consideration of, amongst other things, the following:
- whether the employee ought to be made redundant or whether the termination of the employee's contract is more appropriate;
- the position of the employee;
- whether notice is required;
- the selection process and acting in good faith;
- the correct calculation of severance pay;
- whether the dismissal is being carried out fairly; and
- whether a release is appropriate;

Conclusion

Navigating through the employment challenges that most businesses now face during the COVID-19 pandemic requires careful focus and anxious consideration in order to find the best course of survival for employers and employees. When we are at our most vulnerable, economically, the propensity to litigate increases. Whilst The Bahamas boasts of a robust judiciary, should an employment dispute arise, ligation is a costly and time consuming exercise. As such, employers should seek to avoid litigation by taking the appropriate advice, prior to varying or ending an employment relationship. Being ever the optimist, it is hoped that with the implementation of a sophisticated restructuring of the business and with employers and employees working together, organizations should be able to successfully weather the current turbulent environment.

1. Section 26 &28 of Employment Act
2. S.29 of the Employment Act
3. S.34 of the Employment Act
4. Bahamasair v. Omar Ferguson in Scciv App No.16 of 2016 & Cartwright v. US Airway (2016) 1 BHS J. No. 96