

# Policy Brief

## Unfair Dismissal

### Legislation and Constitutional Provisions

As it stands, the Labour Relations and Industrial Disputes Act which governs these matters does not prohibit discrimination on the basis of sexual orientation. Outside of a lack of an enshrined course of action, this loophole in the law also facilitates employers inputting clauses that would be discriminatory in effect into contracts of employment. An example of one such clause would be a ‘Morality clause’. In the case of morality clauses a strong argument can be made that the employee was made aware of the provision and assented to the terms of the contract with full knowledge of that even if the morality clause does not explicitly address sexual orientation. Though interpreted narrowly, there is also the matter of ‘summary dismissals’ which are allowed for under the Labour Relations and Industrial Disputes Act and are defined as the termination of an employment contract without notice on the basis of the violation of a term in the contract that is so fundamental to the existence of the contract that to violate it would be to the effect of repudiating the contract as a whole. That is to say that if an employer who, for example, has a morality clause, can prove that that clause goes to the root of the contract, there is a possibility that persons who, by not being heterosexual, fall outside of that morality clause can be dismissed without notice and that dismissal not be viewed as unjustifiable. There is also no protection against discrimination on the basis of sexual orientation in the Jamaican Charter of Rights.

### Defining Unfair Dismissal vs. Wrongful Dismissal

Unfair Dismissal and Wrongful Dismissal are separate legal terms. An action for wrongful dismissal may arise in cases where the employer terminates employment in a way not in keeping with the terms of the employment contract (procedural impropriety). A common example of wrongful dismissal is with regards to Notice. Notice in the law speaks to the period of time stipulated in employment contracts that employers must give before termination can take effect i.e. if the contract states that an employee must be given 30 days’ notice of their termination prior to the day they are expected to leave and an employer fires that employee and tells them to leave right then, that employer would be liable for Wrongful Dismissal. Unfair dismissal deals more with the manner of the dismissal than the procedure. In other words, while wrongful dismissal claims –

happen purely on a procedural basis, unfair dismissal seeks to assess the substantive as well as the procedural. In assessing unfair dismissal cases, a two-part test is applied. This test analyses 1. The reason for the dismissal and 2. The reasonableness of the employers conduct in respect to the circumstances surrounding the dismissal. In *Dietmann v Brent*, having committed a criminal offence was regarded as a reasonable reason for dismissal. Cases show violation of contract, redundancy and liquidation as also being justifiable reasons for dismissal.

Unfair dismissal requires an in-depth look into a multitude of aspects of the employment relationship. In the case of *Wilson v Racher*, the Court assessed the fact that the employee who had been dismissed had always been efficient and respectful and therefore the solitary occasion on which he used profanity at his boss, after being provoked, would not justify dismissal. Here, an act that would in many instances be construed as ‘misconduct’ did not justify dismissal based on the Court’s assessment of the long-term conduct of the employee, the circumstances under which it happened and the employment relationship. This is a good example of how the Courts decide unfair dismissal cases on the basis of the specific facts of each case.

The burden of proof lies with the employee in cases of Unfair Dismissal i.e. it is up to the employee to prove that they were unfairly and unreasonably dismissed rather than on the employer to prove that they were dismissed for just cause.

## Constructive Dismissal

It is important to note that an employee need not be dismissed for a claim for unfair dismissal to prevail. If the conditions of employment become so intolerable that it would be ludicrous to expect the employee to stay, an employee may resign and still claim unfair dismissal. This is called a **constructive dismissal** and still allows the employee to make a claim for unfair dismissal. Even though the employee resigned, the law regards that, as the resignation was caused by the employer’s creation of an unbearable work environment, the resignation was not truly voluntary and the employee has a right to a course of action. The doctrine of ‘implied term of trust and confidence’ was initially developed in *Malik v Bank of Credit and Commerce International SA [1997]* to tackle constructive dismissal cases. This was seen in the case of *Morrow v Safeway Stores plc [2002] IRLR 9* which is further explained below in the paragraphs explaining the common law position.

Constructive dismissal, in effect, would mean that even if an employer does not fire an employee, if he/she creates a work environment (**for e.g. subjects employee to discrimination (verbal, physical or otherwise) based on his/her sexual orientation or gender identity**), that employee may resign and still bring a claim for constructive dismissal and unfair dismissal. This does not guarantee that the employee will be successful in that claim, as the Courts will weigh the treatment being alleged to have created a hostile work environment and whether it was a breach of the implied term of trust and confidence.

## Common Law

The common law presents us with the principle of the ‘implied term of respect, trust and confidence’. As established in the case of *Malik v Bank of Credit and Commerce International SA [1997]*, the common law in labour cases has seen judges develop the willingness to impute new implied terms in the contract of employment. Although it applies to the employer as well, it is typically relied upon by the employee. This is evident in a line of cases which have seen the evolution of an implied term in the contract of employment that –

“an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

In *Morrow v Safeway Stores plc [2002] IRLR 9*, the applicant was employed in the supermarket as a bakery production controller. She had had a bad working relationship with the store manager who she felt unreasonably harassed her. He gave her a strong ticking off in front of staff and a customer, saying 'If you cannot do the job I pay you to do, then I will get someone who can'. Two hours later he gave her another telling off. She was extremely distressed at the way she had been spoken to and resigned claiming constructive and unfair dismissal. The Employment Tribunal found that the public criticism by the store manager was a breach of the implied term of trust and confidence, but what had happened was not serious enough as to entitle her to resign and claim constructive dismissal. The appeals tribunal ruled differently that a breach of the implied term of trust and confidence is enough to render the contract void or voidable.

Therefore, persons who have been dismissed on the basis of their sexual orientation, or persons who have resigned due to discrimination on the basis of their sexual orientation and claim unfair dismissal, though not afforded statutory protection, may bring an action in Court on the grounds of there being a violation of the implied term of trust and confidence.



J-FLAG is a human rights and social justice organization focused promoting the rights, well-being and livelihood of LGBT Jamaicans.

