Trade Unions

Right to Hire and Fire
The traditional theory of employment rested on the right to hire and fire. This theory looked at employment as a mere contractual relation between a master and servant which either party can terminate at will, subject to the notice, in certain cases. The classical theory of the contract of employment assumed that in the absence of physical restraint or other direct compulsion, parties were free not only to contract on whatever terms they wished (provided they were legal) but also that they contracted on equal terms.

Unionisation of Labour
In early times the combination or association of labour for better status was not recognized. Unionization of labour was prohibited by law. Governments were indifferent to the conditions of labour and employers were hostile to employees (labourers) The oppression and suppression of workers gave rise to unionization in England in the 1820s. Labour became politically effective in England after the 1870s with the formation of the British Labour Party in 1889 by the British Trade Union Congress. Thereafter labour attained political importance. A parallel, though later development occurred in all the countries in the world and the labour organization became an integral part of industrial life. In this connection the contribution of Karl Marx’s socialist doctrine towards the unification of labour of the world cannot be ignored. Karl Marx in his book “Das Kapital” called upon the workers of the world “to unite” and told them in unambiguous words that “they had nothing to lose but their chains while they had a world to gain” The role played by the International Labour Organization (ILO) after the second world war helped to change the attitude towards Labour throughout the world.

What is a Trade Union
Trade Unions are Associations of Workers who by means of Collective Bargaining endeavor to improve their working conditions and their economic and social position. Although this description is not comprehensive it gives the fundamental function of a Trade Union. For most workers, their Trade Unions remains the basic organization for the protection of their immediate economic interest from their employer.

Our Trade Union Ordinance No. 14 of 1935 defines “trade union” as follows;

“Trade Union means any association or combination of workmen or employers whether temporary or permanent, having among objectives one or more of the following objects:-

a. The regulation of relations between workmen or employers, or between workmen and workmen or between employers and employers; or
b. The imposing of restrictive conditions on conduct of any trade or business; or
c. The representations of either workmen or employers in trade disputes; or
d. The promotion or organization of financing of strikes or lookouts in any trade or
industry or the provision of pay or other benefits for its members during a strike
or lockout”.

**Freedom of Association and Trade Unions**

Freedom of Association is a vital basic right that we enjoy in a democratic society. It is a right
guaranteed by the Fundamental Laws or the Constitution itself in most societies. Our
Constitution also recognizes and safeguards this right under Article 14(1)(c) of our constitution.
It says “Every citizen is entitled to the freedom of association”. The right of workers to organize
themselves for the protection of their rights and for the improvement of the quality of their
working life, is an extension of the Freedom of Association. Article 14(1)(d) of our constitution
guarantees “the Freedom to form and join a trade Union”. These rights are also contained in the
Convention No. 87 (1948) of the International Labour Organisation, the ratification of which has
not been done in Sri Lanka probably due to the existing guarantees in our Constitution.

**Trade Unions and the Public Sector**

Originally trade unions were permitted only for the private sector but by amending legislation the
public sector was also included. However, while in the private sector, a trade union can resort to
strike action, our Supreme Court has held that public servants cannot strike even by trade union
action: see Yasapala v Ranil Wickremasinghe (1980) S.C. Application No. 103 of 1980 and

**Industrial Disputes Act No. 53 of 1950**

The above Act which has been amended over ten times since its enactment in 1950 is, today, the
main legislation for the maintenance of industrial peace in the country. The Act is based on a
statutory framework of arbitration and adjudication with legally enforceable orders and awards
being the dominant feature rather than bilateral relations. The Act is divided into eight parts and
deals with matters such as the powers of the Commissioner-General of Labour, Collective
agreements, Settlement awards, Industrial Courts, Labour Tribunals, Retrenchment of Workmen,
Essential industries and Unfair Labour Practices.

The Industrial Disputes Act is considered as a “piece of social legislation” having as its object
the prevention, investigation and settlement of Industrial disputes. It defines an industrial dispute
as “any dispute or difference between an employer and a workman or between employers and
workmen or between workmen and workmen, connected with the employment or non-
employment, or the terms of employment or with the conditions of labour, or the termination of
the services, or the re-instatement in service of any person.”

The Act defines a “workman” as any person who has entered into or works under a contract with
an employer in any capacity, whether the contract is expressed or implied, oral or in writing and
whether it is a contract of service or of apprenticeship or a contract, personally to execute any work or labour, and includes any person ordinarily under any such contract whether such person is or not in employment at any particular time, and includes any person whose services have been terminated. There are several decided cases of our courts on the definition of a “workman” and a broad definition has been given. Thus a Head of a department in an University, a co-owner employed by the other owners, a superintendent of an estate, managing director of a company, are all “workman” covered by this definition. The existence of a contract with his employer is the sine qua non (prerequisite) for identifying a workman.

An ordinary director will not normally be under a contract of employment any will not therefore be a workman but executive directors are workman. The traditional method of identifying a contract of employment was by considering the degree of control which the employer or the “master” exercised over the employee or the “servant”. With the increased sophistication of industrial process, it is now accepted that control itself is no longer the sole test though it does remain “a factor and perhaps in some cases a decisive one”. In the search for a substitute test, ideas have been put forward of an “integration test”, that is whether the person was fully integrated into the employer’s concern or remained apart from and independent of it. Once again this is not reviewed as a sufficient test in itself. The modern approach had been to abandon the search for a single test and instead to take a multiple or “pragmatic” approach weighing up all factors for and against a contract of employment and determining on which side the scales settle.

See sections relating to the following:

- Arbitration – Voluntary and Compulsory
- Industrial Courts and Awards by them
- Collective Bargaining and Collective Agreements
- Retrenchment of workmen
- Essential Industries
- Unfair Labour practices.
Mechanism for settlement of Industrial Dispute

According to sec.2 and 3, powers of the Commissioner in regard to industrial disputes are settlement in accordance with agreement, settlement by conciliation and settle the dispute by voluntary arbitration. In sec 4 of the Industrial Disputes Act explain the power of the Minister in regard to an industrial dispute is explained. According to that the Minister will able to settle a dispute by compulsory arbitration or by the industrial court.

According to above diagram, Sri Lankan dispute settlement mechanism can be ordered in following way:

1. Dispute Settlement by Collective Agreement
2. Dispute Settlement by Conciliation
3. Dispute Settlement by Arbitration
4. Dispute Settlement by Industrial Court
5. Dispute Settlement by Labour Tribunal

Each settlement method can be described as follows;

1. **Collective Agreement**

Simply, a Collective agreement is an agreement between employers and employees which regulate the terms and conditions of employees in their workplace, their duties and the duties of the employer. According to the Industrial Disputes Act, a “collective agreement” means an agreement –

(a) Which is between,
   (i) Any employer or employers, and
   (ii) Any workmen or any trade union or trade unions consisting of workmen, and
(b) Which relates to the terms and conditions of employment of any workman, or to the privileges, rights or duties of any employer or employers or any workmen or any trade union or trade unions consisting of workmen, or to the manner of settlement of any industrial dispute.
A collective agreement should be written and signed by both the parties of the agreement or by the representative of each party and may transmit the agreement to the Commissioner; and the Commissioner shall forthwith cause the agreement to be published in the Gazette. Every collective agreement which is published in the Gazette under section 6 shall come into force on the date of such publication or on such date, if any, as may be specified in that behalf in the agreement. When collective agreements come into force, it will be binding on the parties, trade unions, employers and workmen referred to in that agreement in accordance with the provisions of section 5(2); and the terms of the collective agreement shall be considered to be implied terms in the contract of employment between the employers and workmen bound by the agreement.

According to provisions of section 3, the Commissioner himself endeavors to settle an industrial dispute by using collective agreement of any organization.

Collective bargaining is negotiation about working conditions and terms of employment between an employer, a group of employers and one or more representative workers.

**Conditions for Collective Bargaining**
- Encouragement by the state
- Freedom of association
- Strong and stable trade union movement
- Sufficient representation of worker and recognition by employers
- Good faith

**Compulsory Bargaining**
No employer shall refuse to bargain with a trade union which has in its membership not less than 40% of the workmen on whose behalf such trade union seeks to bargain.

**2. Conciliation**
Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement.

The conciliator may have an advisory role as regard to the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.
Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties’ needs, takes feelings into account and reframes representations.

**Advantages of Conciliation**
1. Speedy Settlement
2. Less Cost
3. Greater acceptance of the term of settlement
4. Encourages people to clarify their positions, take responsibility and to behave generously
5. A range of issues can be put on the table to be dealt with, some of which may not have been part of the presenting problem
6. Emotional dynamics are acknowledged and dealt with
7. Recognizes power relationships and the parties' differing approaches to the world
8. Future oriented - works towards solutions; encourages people to move ahead
9. Parties own the solutions - they are not imposed
10. Confidential - the matter is kept contained
11. Relatively prompt in contrast to a formal complaint
12. Escalation of complaint may be avoided
13. Minimal written records
14. No winners and losers, although there may be compromises.

**The role of the Conciliator**
The Conciliator is a neutral and independent facilitator, trained in mediation and conciliation, and usually knows very little about the details and circumstances of the conflict before the conciliation conference is held. A conciliator is impartial and non-judgmental, directs and controls the process but not the content of the conciliation.

**Conciliation process**
The conciliation process involves bringing the people in dispute together to talk about their issues in an informal, private meeting and try to reach an agreement.

The conciliation process is closely linked to the hearing process, rather than as a separate step of dispute resolution, and is regularly used in conjunction with group listings. Conciliation is also used extensively in matters involving multiple applications about the same dispute, for example in residential parks and retirement village matters.

**3. Arbitration**
Arbitration, a form of alternative dispute resolution (ADR), is a legal technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons by whose decision they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides. Arbitration is often used for
the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

Arbitration can be either voluntary or mandatory (although mandatory arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all disputes to arbitration, without knowing, specifically, what disputes will ever occur) and can be either binding or non-binding. Non-binding arbitration is, on the surface, similar to mediation. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable.

Arbitration is a proceeding in which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed, or legislation has decreed, will be final and binding.

Arbitration is not the same as:
- Judicial proceedings, although in some jurisdictions, court proceedings are sometimes referred as arbitrations
- Alternative dispute resolution
- Expert determination
- Mediation

**Advantages**

Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

1. When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed
2. Arbitration is often faster than litigation in court
3. Arbitration can be cheaper and more flexible for businesses
4. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
5. In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the country of the competent court will be automatically applied
6. In most legal systems there are very limited avenues for appeal of an arbitral award, which is sometimes an advantage because it limits the duration of the dispute and any associated liability
**Disadvantages**

1. Arbitration may become highly complex
2. Arbitration may be subject to pressures from powerful law firms representing the stronger and wealthier party
3. Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job
4. If the arbitration is mandatory and binding, the parties waive their rights to access the courts and to have a judge or jury decide the case
5. In some arbitration agreements, the parties are required to pay for the arbitrators, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes
6. In some arbitration agreements and systems, the recovery of attorneys’ fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however most arbitration codes and agreements provide for the same relief that could be granted in court
7. If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee
8. There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned
9. Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays
10. In some legal systems, arbitrary awards have fewer enforcement options than judgments; although in the United States arbitration awards are enforced in the same manner as court judgments and have the same effect
11. Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of member or a small group of members in arbitration due to increasing legal fees, without explaining to the members the adverse consequences of an unfavorable ruling
12. Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law
13. Discovery may be more limited in arbitration or entirely nonexistent
14. The potential to generate billings by attorneys may be less than pursuing the dispute through trial
15. Unlike court judgments, arbitration awards themselves are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies, called an action to "confirm" an award
16. Although grounds for attacking an arbitration award in court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.
**Arbitral awards**

Although arbitration awards are characteristically an award of damages against a party, in many jurisdictions tribunals have a range of remedies that can form a part of the award. These may include:

1. Payment of a sum of money (conventional damages)
2. The making of a "declaration" as to any matter to be determined in the proceedings
3. In some jurisdictions, the tribunal may have the same power as a court to:
   - Order a party to do or refrain from doing something ("injunctive relief")
   - To order specific performance of a contract
   - To order the rectification, setting aside or cancellation of a deed or other document.
   - In other jurisdictions, however, unless the parties have expressly granted the arbitrators the right to decide such matters, the tribunal's powers may be limited to deciding whether a party is entitled to damages. It may not have the legal authority to order injunctive relief, issue a declaration, or rectify a contract, such powers being reserved to the exclusive jurisdiction of the courts.

4. **Industrial Court**

Every order of the Minister under section 4 referring a dispute for settlement by an industrial court shall be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties (Cited from Industrial Dispute Act). The industrial court shall be constituted by selecting either one person or three persons from the panel appointed by the president.

**Duties and powers of industrial courts**

According to industrial dispute act there are some duties of industrial courts such as follows.

1. Which any dispute, application or question or other matter is referred or made under this Act, as soon as may be, to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award as may appear to the court just and equitable.
2. Act in respect of procedure, an industrial court conducting an inquiry under this Part may lay down the procedure to be observed by such court in the conduct of the inquiry.
3. Reference shall be made in every award of an industrial court to the parties and trade unions to which, and the employers and workmen to whom, such award relates.

An industrial court to which an application under section 27 in relation to any award is referred may in its decision:

- (a) Confirm the award
- (b) Set aside the award
- (c) Set aside the award and make a new award in place thereof
- (d) Vary or modify the award in such manner as may appear necessary.
The award of an industrial court shall be transmitted to the Commissioner who shall forthwith cause the award to be published in the Gazette. Every award of an industrial court shall come into force on the date of the award or on such date, if any, as may be specified therein. Every award of an industrial court made in an industrial dispute and for the time being in force shall, for the purposes of this Act, be binding on the parties, trade unions, employers and workmen referred to in industrial dispute act.

5. Labour Tribunals
Labour Tribunals are the most well-known courts to which employees (workmen) go for relief when their services have been wrongfully terminated. Labour Tribunals which were established by Part IV of the Industrial Disputes Act is the judicial body that provides the principal legal forum for employees to take disputes relating to termination of their employment for adjudication. It is not applicable to officers in the public service who usually resort to fundamental rights applications in respect of unjust or arbitrary treatment.

Application may be made to the Labour Tribunal by a “workman” within the meaning of Section 48 of the Industrial Disputes Act or by a trade union on his behalf. For relief or redress in respect of;

   a) The termination of his services by the employer;
   b) The question of whether any gratuity or other benefits are due to him on termination;
   c) Such matters relating to terms of employment and conditions of labour as may be prescribed by regulations.

The first Labour Tribunal (LT) was established on 2nd May 1959. Today there are more than 36 LT sin operation in different parts of the country – the most number being in Colombo.

The main law relating to LTs is found in Section 31A to 31DDDD of Part IVA of the Industrial Disputes Act (as amended). In 1983, LTs were empowered to look into non-payment of gratuity also. The LT judge is called the “president”. They are appointed by the Judicial Service Commission from among practicing lawyers with at least 6 years experience or from among Administrative officers with a degree and with 10 years experience.

In terms of the Act, LTs shall inquire into the application, hear the evidence from both parties and make orders in a fair and equitable manner.

Our Supreme Court has repeatedly emphasized that the order of LT President must be “just and equitable”. Those are the key words. The President must be fair by both the employer as well as the employee, and findings that were excessively sympathetic to the workman have been set aside by the Appeal Courts.

Where the employee alleges that his termination was unjustified, the burden of proof is on the employer to show that it was justified. But if the employer’s case is that he did not terminate the
workman but that the workman vacated post, the burden of proof would first be on the workman to prove that his services were terminated by the employer.

An employee can claim for gratuity and other benefits in the Labour Tribunal irrespective of whether the termination was by the employer of employee.

Where the Tribunal finds that the employer had unjustifiably terminated the workman’s services it can order either re-instatement or compensation. The workman himself may indicate in his application whether he is seeking re-instatement or compensation. However, the Tribunal will not normally order re-instatement where the employee’s post was of a personal or confidential nature and the employer no longer desires to employ him.

**Procedures to be followed by LTs**
In reaching a conclusion that is “just and equitable” the Industrial Disputes Act specifically states that the provisions of our Evidence Ordinance will not apply to proceedings before LTs. However, our Superior Courts have held that LT Presidents cannot totally disregard rules of evidence. It is also important to note that an employee seeking relief must apply to the LT within 6 months of his termination. Appeals from a LT order has to be first made to the appropriate high Court and from there on can go further to the Court of Appeal and the Supreme Court. However, if it is the Employer who wishes to appeal, he must deposit the amount awarded by the LT before lodging the appeal. This requirement which is not found in other civil appeals, discourage employers from appealing against LT orders.

**Employees’ Councils**
The establishment of Employees’ Council is of fairly recent origin. This was done by the Employees’ Council Act No. 32 of 1979 as amended by Act No. 5 of 1984. The legislation is limited to state undertakings such as public corporations and state entities other than the traditional government Ministries and Departments. Nor does the legislation apply to the private sector. The legislation is in addition to and not in derogation of any other law such as the provisions of the Trade Unions Ordinance or any other written law relating to employers or employees. The main objective of the legislation is the promotion of the effective participation of employees in all affairs of the undertaking to achieve efficiency and production and industrial peace.

**Termination of Employment**
Generally speaking, Termination of Employment can occur by several ways, such as,

1. If the contract is for a fixed term, at the end of that term
2. By the death of the employer of employee
3. Upon the employee reaching retirement age
4. By the employer, either with notice or summarily
5. By the employee, either with notice of resignation or by vacation of post.
There is no law requiring an employer in the private sector to hold an internal disciplinary inquiry prior to dismissing an employee, and even if one is held, the Labour Tribunal is not bound by its findings. However, the holding of such an inquiry will help to establish the employer’s good faith and negative any charge that he acted in an arbitrary manner. In the public service, such procedures are set out in the Establishments Code.

**Termination for Misconduct**

The type of behavior that would justify termination for misconduct depends on the nature of the work and the position held by the employee. The following have been held to be sufficient grounds.

1. Habitual absentism
2. Serious negligence (whether or not damage actually resulted);
3. Insurbodination
4. Disobedience to reasonable orders
5. Abuse of superiors (provided there was no provocation)
6. Assaults or threats of bodily harm to superiors or fellow workmen
7. Making false allegations against superiors
8. Habitual drunkenness
9. Dishonesty or fraud. Fraud has been held to warrant summary dismissal. *Ceylon Oil Workers Union v Ceylon Petroleum Corporation* (1978-79) 2 SLR 12
10. Today, an employee abusing the Internet facilities at his workplace by downloading pornographic material and sending abusive or offensive emails would amount to misconduct of a serious nature.

**Termination of Employment of Workers (Special Provisions) Act No. 45 of 1971**

The above Act which is well-known to Employers in Sri Lanka is one that prevents the “Hire and Fire” rule available to employers in the western world. The legislation was enacted after the April 1971 youth insurrection by the Janatha Vimukthi Peramuna (JVP). The insurgency led to mass retrenchments and layoffs of staff by employers. The above legislation (first made applicable by a Government Gazette) was introduced to curb the above trend. The statute was amended in 1976 and 1988 and is now strictly enforced.

Under Section 2 of the Act, no workman in any “scheduled employment” can be terminated other than for a disciplinary reason without:

a) The prior consent in writing of the workman; or
b) The prior written approval of the Commissioner General of Labour

Most workmen/employees are protected by this Act because those coming within the Wages Boards Ordinance, Shop and Office Act and the Factories Ordinance (which constitutes the majority of labour in Sri Lanka, other than plantation (estate) workers) are categorized as “scheduled employment”.
**What is Termination?**

Section 2 defines a termination under the Act to mean and include one that is not imposed by way of punishment. It includes non-employment of workman, temporarily, or permanently or non-employment consequent to a closure of any trade, industry or business. The definition covers a situation of a temporary lay-off as well.

Prior consent of a workman has been construed to mean a ‘declaration consenting to the termination of his services’. In *St Anthonys Hardware Stores Ltd v Ranjith Kumar* (1978-1979) 2 SLR 6, it was held that incompetence and inefficiency are not situations of indiscipline.

An amendment made in 1988, makes it mandatory for an employee to issue a letter in writing giving reasons in cases where an employee’s services have been terminated for disciplinary grounds.

Under Section 3, the provisions of the Act does not apply to:

i. An employer who has less that 15 workmen (on average) six months prior to making the application.

ii. An employee who has been in employment for less than a year and who had not completed 180 days of service commencing that year.

iii. Employees in Government Service or in the service of local authorities/local government service, Public Corporations

iv. Employment that is considered illegal.

**Consequences of contravening the Act**

- The termination is illegal, null and void and has no effect
- The Commissioner may order reinstatement as well as back wages (Section 6)
- In case of closure of business, trade or industry, the Commissioner can order compensation in lieu of reinstatement. (Section 6A)
- Any payment ordered by the Commissioner can be enforced through the Magistrate’s Court on a petition by the workman.

Under the Act, in cases of retrenchment, employers should adopt a clear criteria of selection for example, “last come first go” basis. An employer may target a specific group of employees whom he wishes to terminate. However, the criteria for such selection should be transparent and should not be discriminatory.