[2018] JMSC Civ. 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2016 HCV 02748

BETWEEN	**PRIVATE POWER OPERATORS LIMITED**	**CLAIMANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**DEFENDANT**
AND	**NATIONAL WORKERS UNION**	**INTERESTED PARTY**
AND	**THE UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY EMPLOYEES**	**INTERESTED PARTY**

Mr. Ransford Braham Q.C. and Mr. Jeffery Foreman instructed by BRAHAMLEGAL for the Claimant.

Mrs. Susan Reid-Jones instructed by the Director of State Proceedings for the Defendant.

Lord Anthony Gifford Q.C. and Ms. Sue Ann Lowe instructed by Gifford, Thompson and Shields for the interested parties

HEARD: October 17, 2017 and September 12, 2018

GEORGIANA FRASER, J

INTRODUCTION

[1] The Claimant, Private Power Operators Limited (hereinafter referred to as "PPO") is a company registered under the Company's Act. It operates a 60 MW Slow Speed Diesel power plant located at 100 Windward Road, Kingston 2 in the parish of Kingston.

[2] The Defendant is the Industrial Disputes Tribunal (hereinafter referred to as "IDT") and is a statutory body established pursuant to the Labour Relations and Industrial Disputes Act. The office of this entity is located at 4 Ellesmere Road, Kingston 10, in the parish of Saint Andrew.

[3] Two other entities are avidly interested in the outcome of these proceedings, namely:

A. Union of Clerical, Administrative and Supervisory Employees (hereinafter referred to as "UCASE") is a registered Trade Union seized with bargaining rights for certain categories of workers employed to the Claimant Company.

B. National Workers Union (hereinafter referred to as "NWU") is a registered Trade Union seized with bargaining rights for certain categories of workers employed to the Claimant Company.

Background

[4] The Claimant by way of Fixed Date Claim Form dated the 28th February 2017 and Affidavit in Support of even date brought an action against the Defendant for Judicial Review seeking, inter alia, an Order of Certiorari quashing the Defendant's orders relevant to a compensation award and/or reinstatement of certain workers whom the claimant had made redundant. The Claimant is also seeking declarations that the Defendant's award was manifestly excessive, unreasonable, illegal and void.

[5] This matter has its genesis in or about 2012 when the Claimant dismissed some of its employees by way of redundancy. The Claimant cited their reason for doing this as there being a need to take steps to improve the operational efficiency of the plant so as "to remain viable". Amongst such steps contemplated by the Claimant was the need to make some members of the workforce redundant. It is the Claimant's contention that prior to the dismissals they made attempts to have consultation with the interested parties (workers and unions). The attempts included a meeting that was held with UCASE on the 21st day of January 2013, at which was discussed, inter alia, the contemplated restructuring exercise of the Claimant's operations. On the 23rd January, 2013 the Claimant's general manager met with all employees and outlined the Company's position in relation to the contemplated restructuring exercise, *"which may result in a reduction of the workforce".* The workers were invited *"to make*

recommendations on ways [they] believe can assist…in improving the efficiency of the plant".

[6] It is further alleged by the Claimant that pursuant to the meeting held on the 21st day of January 2013 a missive was dispatched to one of the Interested Party's representatives, Mr. Valentine; inviting him to another meeting and which also listed initiatives that were being evaluated by management including a *"redundancy of some members of the workforce".*

[7] The Unions alleged that they were only made aware of the redundancy exercise by a statement issued at a meeting on June 19th 2013 ("the June 19th Statement") to wit:

> *"Welcome, thank you once again for meeting with us. We have sent you all the information requested in relation to the restructuring exercise. We have also received your last letter however the Unions have not provided us with feasible alternatives. This process started in January 2013; we will not delay it any further and will therefore proceed with the redundancy exercise on June 28 2013. There may have been some expectation that this would not have happened however the company must proceed with this exercise as it is a vital step towards our goal of achieving cost competitiveness".*

[8] As a result of the redundancies, the Unions served a Strike Notice on the Company, resulting in the intervention of the Minister of Labour who had mandated the IDT to settle the dispute under the following Terms of References:-

> *"To determine and settle the dispute between the Private Power Operators Limited on the one hand, and the National Workers Union (NWU) on the other hand, over the termination of Messrs. Leighton Burke, Mortimer Lara, Winston Durrant, Devon Clarke, Nigel Evans, Wayne Campbell and Esian Treasure on the grounds of redundancy".*

"To determine and settle the dispute between Private Power Operators Limited on the one hand, and the Union of Clerical, Administrative and Supervisory Employees (UCASE) on the other have, over the termination of Messrs. Windell Douse and Henry Harris."

[9] The Minister therefore specified that the Industrial Dispute Tribunal was to determine if there was a redundancy of the named workers and determine if such a redundancy justifiable. The Industrial Dispute Tribunal in its ruling had made a finding that the dismissal of nine (9) employees was unjustifiable and made awards as follows:

"In light of the above, as mandated by and in accordance with section 12(5)(iii) of the Labour Relations and Industrial Disputes Act and paragraph 53 above:

(a) THE TRIBUNAL unanimously HEREBY ORDERS the Company to:

(i)Reinstate the said workers named in the Terms of Reference within Twenty-one (21) days of the date of this Award with payment of fifty-two weeks wages

OR

(ii)Failure to reinstate said workers within the time stipulated in (i), above, pay Compensation to the said workers in the amount of one hundred and thirty (130) weeks wages, after deducting all amounts previously paid to them under the Employment Termination and Redundancy Payments Act, (1974) (ETRPA)."

[10] It is that award that the Claimant now seek to impugn and had obtain leaved to do so on the 17th of February, 2017 by the Honourable Mr. Justice G. Brown.

Preliminary Issue

[11] I had previously in another judgement, (***Kingston Wharves Limited v Industrial Disputes Tribunal & Another*****.** [2017] JMSC Civ.199 made an observation and finding in relation to the contents and presentation of the Affidavit in Support of the Fixed Date Claim Form in a case for Judicial Review. In particular I had examined the obligation of the Claimant to expressly set out in such Affidavit, the grounds on which such relief is sought; and the facts on which the claim is based; as required by rule 56.9

(4) of the Civil Procedure Rules (CPR). I am of the view that the instant Claim suffers from such a defect.

[12] Judicial Review is a two stage process, dictated by Part 56.9 of the Civil Procedure Rules (CPR). The first of which is an application for leave. After successfully obtaining leave to seek Judicial Review, the litigant must act with alacrity and commence proceedings as leave is conditional upon the litigant making a claim. The second stage involves the filing of the claim; a claim is commenced in much the same way as any other claim pursuant to part 8 of the CPR.

[13] The commencement of a claim for administrative orders requires a claim form to be filed in the Registry of the Supreme Court, namely a Fixed Date Claim Form. The Claimant must identify whether the application is for judicial review, relief under the Constitution, a declaration, or for some other administrative order, and naming it, as the case may be. The application must also identify the nature of the relief sought (56.9(1)). A Claimant must additionally file with the claim form evidence on affidavit (rule 56.9(2)), and the affidavit must state details identifying the nature of the relief sought (rule 56.9(3)).

[14] Pursuant to rule 2.4 of the CPR a “Claim” must be construed in accordance with part 8, which provides guidance to a litigant on how to start proceedings. In particular rule 8.1 stipulates that for a claim generally to exist, it must be accompanied by another originating document which sets out the details and basis for the claim which is being filed, in this case the accompanying affidavit.

[15] The Fixed Date Claim Form is irregular if filed before the leave is granted, and so too must be an affidavit in support. To be valid, requires the affidavit to be filed after the leave is granted, therefore a current claim requires a current or a fresh affidavit to be filed, even if the Claimant is intending to rely on the same contents of a previous affidavit, it must be re-filed.

[16] I have taken judicial notice that the instant application for Judicial Review does not adhere to the requirements of the CPR. After successfully obtaining leave for

Judicial Review, the Claimant did commence proceedings in the stipulated time frame and did on the 28th February 2017; file a Fixed Date Claim Form and an affidavit of sorts.

[17] I say an affidavit of sorts because what the Claimant had purported to do was to swear out an affidavit, that is the Affidavit of Ingrid Christian Baker sworn to on the 28th day of February 2017, which speaks only to the fact that they are seeking to incorporate her affidavits filed in support of the Notice of Application for Leave to Apply for Judicial Review. Those affidavits were filed on the 30th day of June 2016 and the 1st day of July, 2016 respectively. The Affiant is also seeking to incorporate the affidavit of Jeffery Foreman, one of the Claimant's Attorneys-at-Law, dated the 16th day of September 2016.

[18] I note that the affidavit filed in support of the application for leave, contained most, if not all, of the information required for the substantive application for judicial review but the question arises; as to whether there can be an incorporation of the contents of an affidavit that predates the grant for leave to apply for judicial review. I think not, and I say this based on the pronouncements of the Court of Appeal in a 2013 decision involving similar issues.

[19] I am here referring to the judgement of Phillips, JA. In ***Chester Hamilton v Commissioner of Police*** [2013] JMCA Civ. 35. The appeal in that case related to judicial review proceedings, where the appellant, having obtained leave to make a claim for judicial review, filed a fixed date claim form within the time required by the rules, but the affidavit accompanying service of the claim form was the one previously filed in support of the application to obtain leave. At paragraphs 34 and 35 of the judgement of Phillips, JA, the learned Law Lord opined that:

> *"It is also my view, however, that the previously filed affidavit could not satisfy rule 56.9(2) and so there would not have been compliance with that rule. As indicated, rule 56.9(2) states that the affidavit must be filed with the fixed date claim form. In order to comply with that rule therefore, the affidavit would have to be filed subsequent to the order granting leave just as the fixed date claim has to be so filed to have efficacy, which was stated in* ***Lafette Edgehill, Dwight Reid, Donnette Spence v Greg***

> ***Christie*** *[2012] JMCA Civ 16...there is no similar provision in the CPR to clause 425 of the Judicature (Civil Procedure Code) Law (CPC), which permitted the use of affidavits previously made and read in court, to be used before a judge in chambers. Prima facie therefore, service of the affidavit previously filed (in support of the application for leave to apply for judicial review) with the fixed date claim form (filed 14 days after the grant of the leave), would have been irregular."*

[20] The course adopted by the Claimant herein is in my view analogous to that which obtained in the ***Chester Hamilton*** case and in light of the above pronouncements of Phillips, JA. I have determined that the course adopted by the Claimant is not merely irregular but downright defective. To properly incorporate a document into an Affidavit the following procedure is required pursuant to the CPR:

"Documents to be used in conjunction with affidavit

> *30.5 (1) Any document to be used in conjunction with an affidavit must be exhibited to it.*
> *(2) Where there are two or more such documents, those documents may be included in a bundle which is in date or some other convenient order and is properly paginated.*
> *(3) Clearly legible photocopies of original documents may be exhibited, provided that the originals are made available for inspection by other parties before the hearing and by the court at the hearing.*
> *(4) Each exhibit or bundle of exhibits must be -*
> *(a) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and*
> *(b) marked*
> *(i) in accordance with rule 30.2(e); and*
> *(ii) prominently with the exhibit mark referred to in the affidavit".*

Part 30.2(e) as referred to above provides as follows:

> *30.2 Every affidavit must -*
> *(a) …*
> *(b) …*
> *(c) …*
> *(d) …*
> *(e) be marked on the top right hand corner of the affidavit with -*
> *(i) the party on whose behalf it is filed;*
> *(ii) the initials and surname of the deponent;*
> *(iii) (where the deponent swears more than one affidavit in any proceedings), the number of the*

affidavit in relation to the deponent;
(iv) the identifying reference of each exhibit referred to in the affidavit;
(v) …
(vi) …
Example:
"Claimant: N. Berridge: 2nd: NB 3 and 4:1.10.98: 3.10.98."

[21] Based on my interpretation of the above provisions an Affiant must make reference to the said document in the body of the affidavit and must ascribe to it an identifying number, for example “IC-B1”. Furthermore the documents referred to in the affidavit must be exhibited and be preceded by a reference page which is likewise executed in the same manner as the affidavit itself, for example:

“IC-B1”

This is a copy of my affidavit mentioned and referred to in paragraph 3 of my affidavit sworn to on the ….day of ….. 2018

Sworn to:

Etecera.

[22] My next consideration is whether this irregularity can be cured or is this failure to comply with the provisions of the CPR fatal. In answering my own question I again referred to the ***Chester Hamilton*** decision at paragraph 49 where Phillips, JA. had concluded that:

(i) (a) The leave granted by Daye J was conditional on the making of a claim for judicial review.
(b) The fixed date claim form filed on 8 March 2010 commenced the proceedings to apply for judicial review, and satisfied the order of Daye J and the conditional leave stated in rule 56.4(12). The leave did not lapse. The claim was not a nullity.
(c) The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3).
(ii) The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refilling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in

support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules.

[23] In this case the Affiant Ms. Ingrid Christian-Baker did not observe any of the above requirements of the CPR, and therefore the evidence which supports the application and the basis for the Judicial Review is not properly before the Court.

[24] While such conduct is deemed irregular the Court of Appeal has said that it does not invalidate the claim. The Learned Law Lord, Phillips JA; has also provided some guidance to litigants as to how such defects can be cured. The Claimant has not sought to avail itself of such remedies and in the circumstances it is my view that the Claim is not properly before the Court for review. If I am however wrong and the grounds of the Claimant's Without Notice Application has been incorporated into the affidavit in support of the Fixed Date Claim Form then I will now address the issues as argued by the Claimant.

ISSUES

[25] The issues for determination are:

(i) Whether the Defendant misconstrued and/or misapplied the Labour Relations Code

(ii) Whether the Defendant erred in finding that the method of selection employed by the Claimant was unfair.

The Claimant's Submission

[26] The Claimant is contending that the tribunal erred in its interpretation of the Labour Relations and Industrial Disputes Act and Labour Relations Code, namely Paragraph 19 of the Code which speaks to the Employer informing the Union when the need arises for redundancy and making genuine efforts to avoid such redundancies. Reliance was placed on the judgment of ***Branch Developments Limited (t/a Iberostar) v. Industrial Disputes Tribunal*** and ***The University and Allied Workers' Union*** [2015] JMCA Civ. 48. This case in essence concluded that a public authority's decision

may be impugned if it takes into account irrelevant considerations or excluded relevant ones or if the decision is so unreasonable that no reasonable tribunal may have so concluded.

[27] The Claimant further submitted that a court may intervene where the decision maker fails to adequately state reasons for its decision. In support of this point they relied on the case of ***R (Ashworth Special Hospital Authority) v. West Midlands and North West Region Mental Health Review Board*** [2002] EWCA Civ. 923.

[28] The Claimant contends that prior to carrying out the redundancies they had engaged in discussions with the interested parties through a series of exchange of letters and meetings commencing on the 31st day of December 2012 and culminating in a meeting on the 19th day of June 2013, for over a period of six (6) months. They are of the view therefore that the Defendant erred in finding that no consultation took place prior to the redundancy exercise.

[29] The Claimant has submitted that paragraph 19 of the Code requires that consultation involves discussions in which there is a genuine exchange of views and information but does not place an obligation on the parties to come to an agreement as to matters discussed. Further, in the context of redundancy, the Code speaks to the desirability of consultation between employer and employee for the purpose of taking steps to preserve employment subject to the preservation of operational efficiency.

[30] The Claimant's interpretation of the Code relative to paragraph 11(i) is that consultation is required at the point in time when any consideration of redundancy is at a formative stage and not when a definite decision has been taken. By so doing the employer would have ensured that all reasonable steps are taken to avoid redundancies. While the Claimant accepts that paragraph 11(iii) requires a development of a contingency plan to minimize the effect of redundancy on employees should such occasions arise; they nevertheless underscored that paragraph 11 does not set out the substance of the consultation exercise. It does not indicate how it should be conducted,

and for how long but limits the extent of the exercise to the operational needs of the employer. According to the Claimant, in the absence of detailed procedures regarding the extent and content of consultation; the concept must be understood by reference to the general law on consultation.

[31] In support of the point that consultation ought to be had in the formative stages, the Claimant relied upon the cases ***R v. North & East Devon Health Authority, ex parte Coughlan*** [2001] QB 213 at paragraph 108 and ***R (Sadar) v. Watford BC*** [2006] EWHC 1590.

[32] The Claimant concluded that the tribunal erred in construing the Code as requiring that consultation begins only where an employer informs the union that redundancies are "definitely on" because that stage would not have been a formative stage of consultations that would enable the parties to take all reasonable steps to avoid redundancies.

[33] The Claimant is of the view that the Defendant's error is evident in their opinion at paragraph 42 of its reasoning, which states:

> *"This in our view does not satisfy the requirement of paragraph 11 of the Labour Relations Code which requires the Company to endeavour to inform the workers, trade unions and the Minister responsible for 1 above as soon as the need is evident for redundancies".*

[34] The Claimant stated that the reason for the Defendant's determination stemmed from the use of the word 'reorganisation' in its correspondence, instead of redundancy. They sought to substantiate this by referring to an extract relied upon by the Defendant from Harvey's on Industrial Relations and Employment Law.

[35] The Claimant opined that the proper construction of the statement is that so long as the statutory requirements for a redundancy are satisfied the use of either term 'redundancy' or 'reorganisation' is of no moment for the purposes of determining whether

a redundancy situation exists. They are also of the view that in the case at bar, the relevant redundancy provision is that which is contained in section 5(2)(b) of the Employment Termination and Redundancy Payment Act (ETRPA). That provision indicates that a redundancy situation arises when "the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish" was met.

The Defendant's Submission

[36] It is the Defendant's contention that the letter sent to the Union dated December 31st 2012 was an invitation to the Union to meet and discuss "a proposed restructuring exercise of the company", and that no mention was made of redundancy. This they state is the crux of the matter for determination by this Honourable Court.

[37] The Defendant indicated that the Industrial Dispute Tribunal basis for making the award was that a 'redundancy' was not communicated to the Union until the June 19th statement, (the content of which was earlier reproduced in this judgment). They submitted that *having regard to the letters and communication that had been made before, it is indeed true that the June 19th statement is the first one that clearly stated that they will proceed with a redundancy exercise on June 28th 2013.* Further submissions were made on behalf of the Defendant that; the imprecision of the communications was compounded by the fact that the categories of persons to be made redundant were not indicated to the Unions by the Claimant until the 25th of June 2013 and that a list of names followed on the 26th of June 2013.

[38] The Defendant sought to distinguish 'restructuring' and 'redundancy' as follows:-

> *"Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two. This position is supported by: Harvey's on Industrial Relations and Employment Law…"*

It must be noted that the Defendant opined that the word 'restructuring' can be substituted for the word 'reorganisation'.

[39] It is important at this juncture to examine the letter of February 12th 2013 which reads as follows:-

"*PPO in its management of the Jamaica Private Power Company (JPPC) is evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to:*

- *Introduction of a shift system for all production employees*
- *Introducing hourly payment instead of salaried/monthly pay*
- *Reduced use of casual/temporary employees*
- *Reduction or a ban on overtime*
- *Wage/salary freezes*
- *Requiring employees to take unpaid leave*
- *Redundancy of some members of the work force.*

We are inviting you to meet with us for consultation on this exercise. We are open to suggestions and recommendations on ways to improve the efficiency of the plant and reducing costs".

[40] The Defendant is of the view that based on the communications supplied it is clear that although the process of communication and consultation was commenced by the Claimant from December 2012/January 2013, it was not effective consultation, or communication. They further stated that there appeared to be a delay on the part of the Union as it was difficult to get the Union's to agree to a date for the meeting. They concluded on this point by stating that notwithstanding that delay, the tardiness of the Union Representative cannot explain nor take the blame for the way the workers were treated in terms of when they were finally informed that particular individuals were being made redundant.

[41] The Defendant sought to bolster their position by relying on the authority of ***Flour Mills Limited v. The Industrial Disputes Tribunal and National Workers Union*** [2005] UKPC 16**.** The Defendant however conceded that the matter at bar is not as

dramatic as the ***Flour Mills*** case, in that the dismissal on the ground of redundancy in the ***Flour Mills*** case was without any warning whatsoever. Nonetheless they persevere in their opinion that the attempts at consultation and communication by the Claimant, prior to the June 19th statement were ineffective and that the actual redundancy exercise took place nine days after the said June 19th statement.

[42] They concluded that although the process of communication or consultation was commenced by the Company from December 2012/January 2013, it was not effective communication or consultation as it was never made abundantly clear that the course to be adopted was redundancy.

[43] In terms of situations where employees are represented by an independent union and recognised by the employer as such, the Defendant has submitted for the Court's consideration the English case of ***Williams and Others v. Compair Maxam Limited*** [1982] IRLR 83, where Browne Wilkinson J laid down the following principles which a reasonable employer ought to adopt:-

> "1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
>
> *3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The Interested Parties Submission

[44] The Interested Parties placed reliance on the decision by the Privy Council in the case of ***University of Technology Jamaica v. Industrial Disputes Tribunal and Others*** *[2017] UKPC 22* in terms of shedding light on the role of the court in these proceedings, driving home the point that the court in its review function has to accept the findings of fact of the Industrial Dispute Tribunal, save and except that there is no basis for such findings and further that the court is not entitled to substitute its own view of the merits of the case for those of the Industrial Dispute Tribunal.

[45] Reliance was also placed by the interested parties on section 3(4) of the LRIDA and the oft-cited case of ***Jamaica Flour Mills v. Industrial Dispute Tribunal and National Union Workers*** [2005] UKPC 16, where the Privy Council approved the earlier decision of the court and the previously decided case of ***Village Resorts Ltd. V Industrial Disputes Tribunal*** (1998) 30 JLR 292, that "*the Act, the Code and the Regulations" provided a "comprehensive and discrete regime for the settlement of disputes in Jamaica... and is a roadmap to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships*".

[46] The Interested Parties are of the view that while the Claimant PPO consulted with them over restructuring exercise, it never consulted at all when the need for redundancy became evident, but rather presented them with what the Union described as a "*fait accompli'*.

[47] They are further of the view that the duty to consult is especially necessary in redundancy situations, because redundancy means dismissal from an employment which may have lasted many years, without fault on the part of the employee. They once again brought the ***Jamaica Flour Mills*** case to the forefront in particular the enunciations of Walker JA who had posited that dismissal without warning and without consultation was "*an outstanding example of man's inhumanity to man"*.

[48] The Interested Parties indicated their support for the Industrial Dispute Tribunal's decision and submitted that it was fully entitled on the evidence before it, to find that the announcement made on the 19th June to be "totally unexpected and shocking" and that the Claimant had treated "restructuring" and "redundancy" as if to say that they were one and the same. They also concurred with the IDT's findings on the process of selection.

The Court's jurisdiction versus the role of the Industrial Dispute Tribunal

[49] There is a plethora of judicial pronouncements as to how a court is to conduct proceedings involving Judicial Review. Having regard to such pronouncements, I appreciate that my function in these proceedings is not to rehear or reconsider any disputed evidence led at the IDT hearings; but rather my function is to determine whether in making its award the IDT had erred in law. I would therefore embrace the approach recommended by Sinclair-Haynes JA and which was endorsed by Brooks JA in the Court of Appeal decision of ***National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal & Peter Jennings***, [2016] JMCA Civ. 24, where he stated at paragraph 7 that:-

> "*As has been pointed out by Sinclair-Haynes JA, the courts have consistently taken the view that they will not lightly disturb the finding of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal".*

The Applicable law & analysis

[50] The Defendant's decision against the Claimant is seemingly two fold; firstly in terms of the consultation that ought to have been had between the Claimant and the Interested parties pursuant to the Labour Relations Code and secondly in terms of the selection process of the persons who were made redundant by the Claimant pursuant to the Collective Bargaining Agreement between the Claimant and the Interested Parties. I will therefore address these topics separately.

[51] I commence my task by reminding myself that the awards made by the Industrial Dispute Tribunal are final and conclusive and ought not to be challenged except on a point of law; thus saith section 12(4) of the Labour Relations and Industrial Disputes Act (LRIDA). In light of this provision of law, a Court should be slow therefore in disturbing such awards unless there is a pellucid basis for so doing. In the instant case the Claimant is seeking to vitiate the Industrial Dispute Tribunal's award on the basis that the Tribunal erred in their interpretation of paragraph 19 of the Code. The Claimant alleged that the Defendant misinterpreted the provision of paragraph 19 of the Code, in particular the meaning of the term consultation.

[52] The starting point of my enquiry is therefore to ascertain what amounts to an error of law and thereafter to determine what definition the Defendants ascribed to the term "consultation" and whether the interpretation so ascribed amounts to an error of law which indeed vitiates the award.

[53] As to what amounts to an error of law I have had regard to the following passage from the text ***Constitutional and Administrative Law***, 12th Edition., at page 653, where the learned author opined that:

> *An error of law may take several forms. An authority may wrongly interpret a word to which a legal meaning is attributed... Questions may also arise as to whether there has been a legal exercise of power in relation to the objectives of relevant legislation, or whether a discretion has been properly exercised, or whether relevant considerations have been taken into account, or irrelevant considerations have been excluded from the decision making process.*

[54] I would hasten to point out that there exists a distinction between errors of law which go to jurisdiction and those which do not. In respect of errors of law which do not go to jurisdiction such will not operate so as to vitiate decisions made by a tribunal such as the IDT, that point was succinctly expounded in ***South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others*** [1980] 2 All ER 689. That case was an appeal from the Malaysian Court of Appeal to the Privy Council wherein the Board rejected Lord Denning's desire to discard the distinction between errors of law which affect jurisdiction, and those which do not. At page 692, Lord Fraser of Tullybelton, enunciated that:

> *"The decision of the House of Lords in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208,[1969] 2 AC 147 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' ([1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 171 per Lord Reid).But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as a breach of the rules of natural justice, then the ouster will be effective. In Pearlman v Keepers and Governors of Harrow School [1979] 1 All ER365 at 372 [1979] QB 56 at 70, Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not, should now be 'discarded'. Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane LJ when he said ([1979]1 All ER 365 at 375, [1979] QB 56 at 74): '…the only circumstances in which this court can correct what is to my mind the error of the county court judge is if he was acting in excess of jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of "structural alteration...or addition'."*

[55] It is important to note that the wording of the ouster clause in the Malaysian Industrial Relations Act (MIRA) 1967 and section 12(4)(c) of our LRIDA is similar

although the LRIDA specifically exempts points of law from a ban on impeachment. Paragraph (a) of section 29(3) of the MIRA reads; "*Subject to this Act, an award of the Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any Court of law."* The local legislation, the LRIDA at Section 12(4)(c) provides that "*An award in respect of any industrial dispute referred to the Tribunal for settlement— (a) ... (b) ... (c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."*

[56] In this jurisdiction the history and basis of entitlements as it relates to judicial review is now settled law and so I do not hold myself bound to embark upon a treatise of the same, sufficed it to say that I am guided by the weight of decided cases that the scope or role of the court that is asked to carry out a review of award of the IDT has been summarized as pertaining to illegality, irrationality or procedural impropriety. This approach was commended in the decision of ***Counsel of Civil Service Unions v Minister for the Civil Service*** [1984] 3 All ER 935. At pages 953-954 Roskill LJ in his judgment expounded the following:

> *…executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to a review on what are called, in lawyers shorthand Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 ALL ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called principles of natural justice.*

[57] The circumstances in which a judge ought to interfere with a tribunal's exercise of its discretion has been distilled from Lord Reid's judgment in the decision of the House of Lords in ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 1 All ER 208, [1969] 2 AC 147 and was later applied in the Court of Appeal decision of ***National Commercial Bank Limited v Industrial Dispute Tribunal and Peter***

Jennings [2016] JMCA 24; the following questions were itemized by the Appellate court as to what are the relevant considerations for the review court:

1. *Did the IDT in arriving at its decision, fail to consider an aspect or aspects of the dispute referred to it, or fail to do what it ought to have done or did what it ought not to have done?*
2. *Did the IDT have the power to make the orders it made?*
3. *Can it be properly asserted that it failed to comply with the principles of natural justice?*
4. *Was the decision given in bad faith or can it be asserted that although the decision was given in good faith, the IDT failed to understand what it was required to do, thereby ignoring the question remitted to it and dealt instead with some other question?*
5. *Was it that the IDT refused to consider some relevant matter or that it took into account that which it was not entitled to?*

[58] The following statement of Donaldson LJ in ***Union of Construction, Allied Trades and Technicians v Brain*** *[1981] IRLR 224****,*** at page 227 paragraph 22 is also instructive on this point:

> *"...Whether someone acted reasonably is always a pure question of fact, so long as the Tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account. But where Parliament has directed a Tribunal to have regard to equity - and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the Tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane. It should, therefore, be very rare for any decision of an Industrial Tribunal under this section to give rise to any question of law. And this is quite plainly what Parliament intended. Of course, a tribunal can approach this simple question in a way which is other than that which Parliament intended. However, where Parliament has given to the Tribunal so wide a discretion, in my judgment, appellate courts should be very slow indeed to find that the Tribunal has erred in law..."*

[59] In determining whether or not the Industrial Disputes Tribunal made errors of law, it is important to understand precisely what was referred to the Industrial Disputes Tribunal. I now therefore reiterate that the matter was referred to the Industrial Disputes Tribunal for settlement in the following terms:

> *"To determine and settle the dispute between Private Power Operators Limited on the one hand, and the National Workers Union (NWU) on the other hand , over the termination of Messrs. Leighton Burke, Mortimer Lara, Winston Durrant, Devon Clarke, Nigel Evans, Wayne Campbell and Esian Treasure on the grounds of redundancy"*
>
> *AND*
>
> *"To determine and settle the dispute Private Power Operations Limited on the one hand, and the Union of Clerical, Administrative and Supervisory Employees (UCASE) on the other hand, over the termination of Messrs. Windell Douse and Henry Harris"*

[60] The jurisdiction confer upon the Industrial Dispute Tribunal can only be impeached on a point of law, nonetheless points of facts may be an error in law, where there has been a finding not supported by the evidence. It is the Defendant's position that there was no effective consultation. In supporting their position they relied on the communications between the Company and the Unions and evidence presented at the Industrial Disputes Tribunal hearing. In coming to a conclusion regarding the submissions under this heading, the court considers important to examine the evidence that was before the Defendants and which I have summarized below.

[61] Evidence presented at The Industrial Dispute Tribunal hearing:

1. **Communication dated December 31st 2012**
   The first communication taken into consideration is the letter dated December 31, 2012 sent by the Company to the Union. The company invited the Union to a meeting to discuss *"a proposed restructuring exercise for the company."* The Tribunal comments: "Note, no mention of redundancy".

2. **Telephone communication/ Letter dated January 9th 2103**

After telephone conversation between the Company and Union (Watson/Valentine) on January 7, 2013 (This was reduced into writing in letter dated January 9, 2013) "*There are as yet, no documents relating to the propose restructuring exercise as a consequence nothing that we can share with you at this point. The purpose of the proposed meeting is to seek the input of the Union and any proposals you may have regarding alternatives to restructuring and/or the method of restructuring*". The Tribunal asked itself the question "*what is a proposed restructuring*" and noted that it was a relevant question.

3. **Communication dated February 12th 2013**

A meeting was held on January 23, 2013 and at the meeting a request was made for information from the Union. The company responded by way of letter dated February 12, 2013 in which the Company noted among other points, the following according to the page 21 of the Award:

- *Introduction of a shift system for all production employees*
- *Introducing hourly payment instead of salaried/monthly pay*
- *Reduced use of casual/temporary employees*
- *Reduction or a ban on overtime*
- *Wage/salary freezes*
- *Requiring employees to take unpaid leave*
- *Redundancy of some members of the work force.*

We are inviting you to meet with us for consultation on this exercise. We are open to suggestions and recommendations on ways to improve the efficiency of the plant and reducing costs".

" PPO in its management of Jamaica Private Power Company (JPPC) is evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to:

4. **Communication dated February 27th 2013**

The Union responded by way of letter dated February 27, 2013 indicating its skepticism in regards to the proposed restricting indicating that it seemed '*more personal than practical'* and stated ways how to improve efficiency.

5. **Communication dated March 1st 2013**

The Company responded by way of letter dated March 1, 2013 referring to bullet point 7 as follows:

> *"In that letter we clearly indicated that the management of the company was evaluating the introduction of other initiatives to reduce cost and improve efficiency which <u>may</u> include but not limited to" a number of listed items including the possibility of a*

redundancy exercise as it related to some of the workforce. It was not the only item for consideration [Emphasis added]. On page 22 of the Award it states "Again there is no clear, concrete or definitely stated position by the Company to the Union, that redundancies will take place".

6. **Meeting held June 19th 2013 according to the evidence of Mr. Douse**
   At the meeting held the Union was issued with a statement which the Union claims took them by surprise because the content of the statement was unexpected. The tenor of the statement found at page 25 of the Award of the IDT is as follows:
   "Welcome…We have sent you all the information requested in relation to the restructuring exercise. We have also received your last letter however the Unions have not provided us with feasible alternatives. The process started in January 2013. There may have been some expectation that this would not have happened however the company must proceed with this exercise as it is a vital step towards our goal of achieving cost competitiveness". The comment made in the Award immediately after this is "it must be noted that the in this statement restructuring/proposed restructuring had been metamorphosed to redundancy."

7. The Tribunal in its Award at page 24 made the point that*; "Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two".* This position is supported by Harvey's on Industrial Relations and Employment Law. The Tribunal opined that restructuring can be substituted for the word reorganization as it appears above (reference to the quote taken from Harvey's on Industrial Relations and Employment Law).

8. Examination in chief of Mr. Douse – 30TH sitting of the IDT.
The following evidence was noted:
Q. Did Mrs. Watson inform you that your position was up for redundancy?
A. No, no body informed me.
Q. Did Mr. Brown inform you?
A. No.
Q. So in the capacity as chief delegate separate and apart as a supervisor, were you made aware that your position was going to be one of those positions considered for redundancy?
A. absolutely not, at no time did anybody told me anything about that.

9. Mr. Douse was asked about workers that worked under his watch, meaning that he supervised them whether any of them was made redundant and he answered at page 32, 30th sitting indicating that persons where made redundant and gave the names of Leighton Burke and Mortimer Lara. He further indicated that he was not aware of the positions being selected for redundancy. He also indicated that he did not participate

in the selection process for them and he did not know that there was a selection process for redundancy.

10. Further in his testimony Mr. Douse indicates that at the meeting held on June 19, 2013 there was mentioned of redundancy. He went further to say that it was on the morning of June 27, 2013 by way of letter that he learnt that his position would be made redundant.

11. Mr. Douse in his evidence goes on to recount that there were three meetings held between January and June. There was one in January, April and June. The meeting in January was essentially about cost-saving and efficiency, and nothing was said in the meeting about redundancy. The meeting in April was about the same topic-cost saving methods and he note that the Union requested accounting records and it was denied as seen on pages 52-53.

12. Mr. Douse went on to page 54 of his testimony that he was not aware from January that he would be made redundant. The description of the manner in which Mr. Douse received his letter of redundancy, terminating his employment after seventeen (17) years, is telling (page 63 of the 30th sitting), he testified that:

> *"On the 27th when I came there I was handed the letter of redundancy. As a matter fact when I came there on the morning of the 27th I saw an ambulance parked in the yard. I saw heavily armed security at the plant, I don't know if they are police or security. As a matter of fact, when I came in the security informed me that I should not leave from in the yard. Soon after Mr. Ainsworth Brown came and gave me a letter and I turned back and went through the gate".*

[62] It is the above evidence which this Court must have regard to when contemplating whether there was a basis for the Industrial Disputes Tribunal's decision and what they found as proved against the Claimant. The Court also considers the importance of not attempting to supplant the findings of the Tribunal with its own views under the pretext of exercising its supervisory jurisdiction.

[63] I think it is important to stress that this case is not before the Court by way of an appeal, but as an application for certiorari. In such circumstances I am guided by pronouncements of Carey, JA in the Court of Appeal decision of ***Hotel Four Seasons v The National Worker's Union*** (1985) 22 JLR 201, at 204 where he enunciated that;

questions of fact are for the IDT. The Supreme Court is *"constrained to accept those findings of fact unless there is no basis for them".* The Supreme Court *"exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal".*

[64] In **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 953, Roskill LJ T at page 954 had expounded that the court, in this role, is *"only concerned with the manner in which those decisions have been taken*". That approach was accepted as applicable to cases involving the review of awards by the Industrial Dispute Tribunal by Marsh, J. In the decided case of **R v The Industrial Disputes Tribunal Ex Parte Reynolds Jamaica Mines Ltd** (1980) 17 JLR 16 at page 23 where he stated that:

> *"We are not, as I understand the law, entitled to substitute our judgement for that of the [IDT]. Our task is to examine the transcript of the proceedings (paying, of course, due regard to the fact that the [IDT] is constituted of laymen) but with a view to satisfying ourselves whether … whether the [IDT] has acted in excess of its jurisdiction, or in any other way, contrary to law."*

[65] As Mangatal J described it in ***Hon. Shirley Tynall and Omar Davies et al v Hon. Justice Boyd Carey and Charles Ross et al*** at Claim No. 2010 HCV 00474 (unreported) delivered on September 2, 2010 at paragraph 5.

> *Judicial Review is the process by which the Courts exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or certain administrative powers which affect the public. This is the process that allows the private citizen to approach the Courts seeking redress against ultra vires or unlawful acts or conduct of the State, by public officers or authorities. By this process the Courts have a discretion...to uphold a challenge to decisions or proceedings of such bodies on the basis...of illegality, irrationality and procedural impropriety. The Court is not engaged on an analysis of the merits of the decisions themselves, but rather is concerned with the process by which these proceedings were conducted and by which these decisions were arrived at.*

The Principle of "Unreasonableness"

[66] The case of ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*** [1948] 1 KB 223, is the classic decision on the principle of unreasonableness of an administrative body. The issue that the UK Court had to decide was whether a local authority, which was empowered by statute to grant licences for cinematograph performances, had acted *ultra vires* its enabling statute or unreasonably in imposing a condition that no children under 15 years of age should be admitted to Sunday performances, with or without an adult. The statute provided no right of appeal from the decision of the local authority and Lord Greene MR, who delivered the leading judgment, considered that the exercise of the local authority's discretion, it being a body entrusted by Parliament with the decision-making power, could only be challenged in the courts in a strictly limited class of case. The Court was of the view that by its decision the local authority had not acted *ultra vires* or unreasonably in imposing the condition which it did. The Authority they opined had properly taken into consideration the moral and physical health of children, which was a matter of public interest, and the Court was not entitled to set up its view of the public interest against the view of the authority.

[67] Lord Greene MR outlined instances in which the court can intervene to usurp the decision of a public administrative body as being unreasonable. He stated at page 233 of the judgment that:-

> *"…The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned*

only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them"

[68] Lord Greene MR continued at page 229 by opining that:-

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in ***Short v Poole Corporation*** *[1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another".*

[69] Lord Diplock, in the case of **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374 at page 410 further defined the term irrationality by stating that:-

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to

Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

The Principle of "Illegality"

[69] In the case of **Council of Civil Service Unions v Minister for the Civil Services** [1985] AC 374, at page 410 Lord Diplock stated:

"By illegality as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

[70] The head of illegality in the context of Judicial Review proceedings takes into account 1) whether Defendant considered irrelevant factors in coming to its decision, 2) whether the Defendant failed to consider relevant factors in coming to its decision, and 3) whether the Defendant acted in bad faith and used its powers for an illicit purpose.

Reorganisation versus Redundancy

[71] The Defendant submitted that the use of the word "reorganisation" by the Claimant did not convey to the interested parties that there will be a "redundancy" exercise. They contend that both words convey different meaning. They sought reliance on an excerpt from Harvey's on Industrial Relations and Employment Law page 914..... which states as follows:-

"*Reorganisation may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a reorganisation but it may arise completely independently of any reorganisation. There is no necessary connection between the two ideas. Whenever there is a claim to a redundancy payment, it is*

necessary to decide whether the statutory conditions are satisfied, and it matters not whether the situation is described as a reorganisation, a restructuring, a new deal or anything else. If the statutory conditions are satisfied, the claim to a redundancy payment is made out; if not, not....."

[72] I agree with the Defendant's submission and their reliance on the excerpt from the Harvey text, that the words "reorganisation" and "redundancy" are not synonyms. As such the reference to "reorganisation" in the Claimant's earlier correspondence did not in any way indicate to the interested parties or to the employees that redundancy was an option being explored. When matters of this nature are being explored which will have an overreaching effect on people's lives, clear and precise terms must be used for the avoidance of doubt. To my mind once there is a glaring presence of doubt in a communication, the benefit of the doubt must be given to the recipient thereof.

Consultation

[73] As it relates to the issue of consultation the Defendant is of the opinion that the Claimant's actions ran afoul of the provision of paragraph 11 of the Labour Relations Code which requires. Paragraph 19(b) of the Labour Relations Code stipulates the mode of consultation between management and worker's as follows:-

Consultation is the joint examination and discussion of problems and matters affecting management and workers. It involves seeking mutually acceptable solutions through a genuine exchange of views and information. Management should take the initiative in establishing and regularising consultative arrangements appropriate to the circumstances of the undertaking in co-operation with the workers or their representatives.

(i) Management should ensure that in establishing consultative arrangements-

(a) all the information necessary for effective consultation is supplied;

(b) there is adequate opportunity for workers and their representatives to expose their views without prejudicing their positions in any way;

(c) senior members of management take an active part in consultation;

(d) there is adequate opportunity for reporting back.

(ii) Where formal arrangements exist the rules and procedures as well as the subjects, to be discussed should be agreed between representatives of management and workers.

[74] The Defendant at paragraph 37 of the Award opined as follows as it relates to the issue of consultation:

*" It is also the contention of the Union that there was no consultation on redundancy, as there was no decision to effect redundancies communicated to them. The evidence plainly indicated that the Union was invited to meet to discuss, not even a restructuring exercise but a "**proposed restructuring exercise."** It is to be noted that there was no invitation to discuss the matter of redundancy. The question may be asked is whether this is semantic. The Tribunal thinks not, because it is long established in the field of Human Resource Management and Industrial Relations that this is not necessarily the case. Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two. This positon is supported by:*

Harvey's on Industrial Relations and Employment Law where the learned authors state :

[914] -"Reorganisation may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a reorganization but it may arise completely independently of any reorganization. There is no necessary connection between the two ideas (emphasis added). Whenever there is a claim to a redundancy payment, it is necessary to decide whether the statutory conditions are satisfied, and it matters not whether the situation is described as a reorganisation, a restructuring, a new deal or anything else. If the statutory conditions are satisfied, the claim to a redundancy payment is made out; if not, not"

The word "restructuring can be substituted for the word "reorganization" as appear in the above.

The Tribunal in paragraph 42 and 43 of its Award went on further to say:

*"The conclusion therefore is that the company made the decision to reduce the workforce sometime before June 19, 2013, and informed the Union on that date after all the necessary ground work had been laid for its implementation. This in our view does not satisfy the requirement of Paragraph 11 of the Labour Relations Code which requires the Company to "**endeavor to inform the worker, trade Unions and the Minister responsible for labour as***

soon as the need is evident for redundancies*". It is not sufficient to say to the Union when it enquired about redundancy, the following, as the Company did in its response in letter of March 1, 2013, to the Union:*

we clearly indicated that the management of the company was evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to" a number of listed items including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration."

We note also, according to the evidence, that the Minister responsible for labour was not informed about the redundancies until some time later after the event.

*On June 19, 2013, when the Union was finally informed that the redundancies were definitely on, then, consistent with the provisions of the Code, Consultation and discussions should have been held with "**workers or their representative to take all reasonable steps to avoid the redundancies".** The Company's action in this regard as contained in the statement handed to the Union of the said date, rendered the consultation process to avoid the redundancies, futile and at that stage, of no effect.*

*In paragraph 53 of the Award the Industrial Dispute Tribunal concluded that: **"** The Tribunal, taking into considerations all the circumstances of this dispute and the reasons and findings set out herein, finds that the Company fell down in its management of the consultation process with respect to the redundancies and the selection process was done in a manner that was lacking in transparency and not in compliance with the relevant stipulations of the Collective Labour Agreement, thus rendering the process unfair. Therefore the dismissal by reason of redundancy are unjustified.*

[75] It is the Claimant's contention that the Defendant misinterpreted paragraph 11(iii) of the Code in construing that consultation *begins only where an employer informs the union that redundancies are "definitely on" because that stage would not have been a formative stage of consultations that would enable the parties to take all reasonable steps to avoid redundancies*. It is noteworthy for the court to address this issue in two folds. Firstly, the relevant submission was not posited by the Defendant but was the

argument of Union Representative in outlining its case, paragraph 21 of the Award is important and I quote "*the company acted in flagrant disregard of section 11(iii) of about Relations Code, which stipulates that the company should inform the Union as soon as it becomes evident that a redundancy exists"*. Secondly section 11 (iii) makes reference to consultation with workers or their representatives to evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. It is therefore correct to say that the Union representative did not quote the correct section of the Labour Relation Code. However it must be explicitly clear that this is not the findings of the Industrial Dispute Tribunal or its submissions.

[76] In the Privy Council decision of ***Jamaica Flour Mills Limited,*** that august body had accepted as correct the view of the Code and its function as expressed by Forte, P. as also similar enunciations as postulated by Rattray, P. in ***Village Resorts***. The Code has been indisputably elevated to a position of prominence where labour relation issues are concerned; furthermore the adherence to its provisions must be observed by all relevant parties, including employers such as the instant Claimant.

[77] The factual aspects of the ***Jamaica Flour Mills Limited*** case involved a similar issue of redundancy as is the situation in the instant case. The appellant Jamaica Flour Mills Limited had employed staff for many years to operate equipment to unload imported wheat, but after the introduction of new management, the appellant decided that the unloading operation could be more cost effective if given to an outside contractor. That decision rendered three employees redundant and although the Appellant was party to a collective labour agreement with the National Workers Union, it failed to inform the Union or the employees of the impending redundancy. The three employees were dismissed and they immediately informed the Union, and thereafter the appellant's workforce went on strike.

[78] The Minister exercised his power under section 11 of the Labour Relations and Industrial Disputes Act 1975 and referred the matter to the respondent tribunal. The tribunal ordered the strike to cease and found that it had been unfair, unreasonable and

unconscionable for the appellant to effect the dismissals in the way that it had. It further ordered that the company should reinstate the employees, and gave directions as to their wages. The Full Court and Court of Appeal came to the same conclusions and found that the dismissals were 'unjustifiable' for the purposes of section 12(5)(c). The appellant appealed to the Privy Council.

> The Appellant submitted, inter alia, that the dismissals were on account of redundancy and were in accordance with the employees' respective contracts of employment, and were therefore not 'unjustifiable' for the purposes of section 12(5)(c) of the act. The appeal was dismissed. The Privy Counsel resolved that the IDT had been correct in its determination that the dismissal had been unjustifiable, pursuant to section 12(5)(c) of the Act. The employees would be reinstated and section 12(5)(c)(i) would be given its ordinary meaning, as imposing a mandatory duty to order reinstatement if the conditions of the statutory provision were met.

[79] In the instant case the Defendant is contending that the first time redundancy was put forward as a definite measure was on the 19th of June 2013, some 9 days before the actual date schedule for redundancy. If the Defendant is correct in their interpretation of the situation then the time frame would not have been in keeping with the requirements of the Code and would not amount to effective consultation.

[80] The following statement of Woolf, M.R. In the decision of ***R v. North & East Devon Health Authority, ex parte Coughlan*** [2001] QB 213 at paragraph 108; supports the position that consultation ought to be accorded adequate time so as to enable the affected party's informed decision and any deviation from this would clearly run afoul to the intentions of the legislation. The Learned Law Lord had enunciated that:

> *"……To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".*

[81] I have also had regard to the statement of Wilkie, J. in the case of ***R(Sadar) v. Watford BC*** [2006] EWHC 1590 at paragraph 29. In that case the Claimant had complained that a decision was made before consultation was had, in other words consultation had not occurred at the formative stage. The Claimant had formed that opinion based on various conduct of the Council in question and applied for an order of certiorari to quash the decision made by the Council as not being preceded by a genuine consultation and as such the decision was unlawful.

[82] After hearing the arguments from the litigants, Wilkie J at paragraph 29 of his judgment enunciated that:

> *"In my judgment, having had regard to the totality of the evidence, the Council on 5 September took a decision in principle to de-limit. Further, in my judgment, the policy of delimitation, by virtue of that decision, ceased to be a policy which was at the formative stage. The description "a formative stage" may be apt to describe a number of different situations. A Council may only have reached the stage of identifying a number of options when it decides to consult. On the other hand it may have gone beyond that and have identified a preferred option upon which it may wish to consult. In other circumstances it may have formed a provisional view as to the course to be adopted or may "be minded" to take a particular course subject to the outcome of consultations. In each of these cases what the Council is doing is consulting in advance of the decision being consulted about being made. It is, no doubt, right that, if the Council has a preferred option, or has formed a provisional view, those being consulted should be informed of this so as better to focus their responses. The fact that a Council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made. In my judgment, however, it is a difference in kind for it to have made a decision in principle to adopt a policy and, thereafter, to be concerned only with the timing of its implementation and other matters of detail. Whilst a consultation on the timing and manner of implementation may be a proper one on these issues it cannot, in my judgment, be said that such a consultation, insofar as it touches*

upon the question of principle, is conducted at a point at which policy on that issue is at a formative stage".(Emphasis added)

[83] Based on the evidence before me the first letter which made mention of the possibility of a redundancy was that dated 12th day of February, 2013 which stated that redundancy of some members of the workforce may be undertaken as a means to reduce cost and improve efficiency of the plant. Redundancy was listed as one of the possible avenues to be explored by the Claimant in their effort to improve their operational efficiency of the plant. It is to be noted that the word "restructuring" was used in the first communication dated December 31, 2012. This Court is of the view that to describe the process initiated by way of invitation to for redundancy is misleading. It is clear that the process in those letters refers to an investigation and the process in the early part of the sections refers to regulatory action where there is a clear and apparent breach for which no investigative course of action is employed.

[84] In keeping with the definition of "formative stage" as posited by Wilkie, J. in the ***Watford BC*** case; a formative stage regarding consultation may identify a number of different options when an employer intends to consult. A similar situation exists here in the matter at bar as evidenced by the Claimant's letter of February 12th 2013. I therefore accept the Claimant's submission that the Defendant erred in construing paragraph 11 of the Labour Relations Code as requiring that consultation only begins where an employer informs the Union that redundancies are "definitely on".

[85] The Defendant towards the end of its submission conceded that the Claimant had attempted consultations as early as December 2012, however they added a caveat that the attempts at consultation were ineffective and that the first clear statement regarding redundancy consultation was on June 19th 2013.

[86] I do agree that the consultation was ineffective albeit I find that it started on February 12th 2013. The basis of such finding is that there was no proper communications that took place between the time it started and the effective date of

redundancy. Paragraph 19(a) of the Labour Relations Code stipulates the form in which communication should take place between management and workers or their representatives.

"Communication is a two way flow of information between management and workers or their representatives. There should likewise be scope for a cross flow of information between various departments of management-

(i) management should following consultation with workers or their representatives take appropriate measures to apply an effective policy of communication;

(ii) ***such measures as are adopted should in no way prejudice the position of recognized workers representatives or management and supervisory representatives;***

(iii) a communication policy should be adapted to the nature of the undertaking, its size and composition and the interest of the
workers;

(iv) the most important medium of communication is by word of mouth through personal contact between management and workers or workers' representatives. However, personal contact should be supplemented where necessary by such means as-

(a) written information by way of house-journals. bulletins, notice boards;

(b) meetings for the purpose of exchanging views and information;

(c) media aimed at permitting workers to submit suggestions and ideas on the operation of the undertaking;

(d) proper orientation courses;

(v) the matters of interest to be communicated include the operation and
future prospects of the undertaking especially as they affect the worker. Information regarding training, prospects of promotion, general working conditions, staff welfare services, safety regulations, social security schemes, transfers, termination of employment, job description and procedures for the examination of grievances is a matter which management is expected to have readily available in easily understandable form. Management should undertake to explain decisions which are likely to affect directly or indirectly the situation of the workers in the establishment provided the disclosure of such information is not damaging to either of the parties.

[87] I am in agreement with the Defendant's submission that the Interested Parties were tardy in how they handled the invitations relevant to consultation sent out to them by the Claimant. I also accept the Claimant's contention that the Interested Parties frustrated attempts to have consultation because they were seemingly reluctant to participate in the exercise.

[88] My divergence however, in terms of the Claimant's contention is that they could have consulted with the employees themselves when they realised that their attempts to meet with the Representative Unions proved futile. The communication provision at paragraph 19(a) of the Labour Relation Code clearly stipulated courses which ought to have been adopted by the Claimant in such circumstances.

The Code

[89] The Labour Relations Code provides under the heading "Security of Workers" at Part 11 that:-

"Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency –

(i) provide continuity of employment, implementing where practicable, pension and medical schemes;

ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;

(iii) ***in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;***

(iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit".

Unjustifiable Dismissal Defined

[90] The finding of the IDT after over 47 sittings was that the employees of the Claimant were unjustifiably dismissed. The term "unjustifiable dismissal" is not defined

under the LRIDA, however Courts over the years have formulated various similar definitions of the term. The leading local decision in this regard is the Court of Appeal's decision in ***Village Resorts Limited v. The Industrial Dispute Tribunal and Others***. Bingham JA (as he then was) opined 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".*

[91] This means therefore, that the question of whether a dismissal is justifiable, must be answered by applying the provisions of the LRIDA, the Labour Relations Regulations and the Labour Relations Code. The Privy Council's decision in ***Jamaica Flour Mills Limited v. Industrial Disputes Tribunal and the National Workers Union***, made it 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.

The Selection Matrix

[92] Another factor which seemingly influenced the Defendant's decision was that the selection process employed by the Claimant breached the Collective Labour Agreement between the Claimant and the Interested Parties and is therefore unfair under the circumstances.

[93] The Collective Labour Agreement between the Interested Parties and the Claimant at Clause 20(A)(i)(ii)(iii) stated as follows:

> *"In matters relating to engagement, promotion, demotion, transfer, lay-off, termination of employment and re-hiring the following principles will be observed:*
>
> *(i) It is the responsibility of the company to maintain the highest level of efficiency therefore it must be the one to judge the requirements of any job and the ability of any Employee or candidate for employment to fulfil the requirements of any job.*

(ii) The employee who in the opinion of the Company has the greater skill competence and efficiency and who in the opinion of the Company is in all respects most suitable for the particular job shall be given preference for promotion or retention whether he is of equal or more or less seniority than any other Employee."

(iii) The Company agrees that when in its opinion two Employees are equally suitable in all respects for promotion or retention, it will give preference to the Employee who has the longest continuous service with the Company."

[94] However in a statement to the Interested Parties from the Claimant at a meeting dated June 19 2013, the selection process employed by them was outlined as follows:-

"*The employees will be evaluated against a key criteria which is applied fairly and consistently. Some of the criteria to be used are knowledge, skill, experience, qualification, attendance, disciplinary records. The numbers will be anywhere from Fifteen (15) employees up and may include Union delegates. The final numbers and names will be submitted to the Union as soon as we have finalized same."*

[95] The information used by the Claimant to arrive at their decision as to which employee should be kept or made redundant was their job description. They admitted that there was no evaluation of performance done for the employees.

[96] In **Williams v. Compair Maxam Limited** (1982) ICR 156 Browne-Wilkinson J set out the obligations of an employer in a redundancy situation, including the need to look for alternatives to dismissal:

'*...there are only two relevant principles of law arising from that subsection. First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an*

employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing the employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.'

[97] Browne-Wilkinson J continued by stating that:-

"*But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles*:

1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

[98] At common law the standard to be adopted by a company with regard to redundancy is contained in the ***Williams and Others v Compair Maxam*** **Limited** case referred to above, which makes it clear that if an employer deems it necessary to undertake a redundancy exercise, the means whereby the employee was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose that particular employee, rather than some other employee, for dismissal must be demonstrated. Consultation on the selection process must also be brought to the Unions and it must be agreed and the criteria listed ought to be adhered to so as to make the selection fair.

[99] In this matter at bar there was a Collective Labour Agreement between the Claimant and the Interested Parties as to how selection for a redundancy exercise ought to be carried out, the relevant section was reproduced earlier. It is quite evident that the Claimant was in breach of this agreement based on the steps they adopted in making the employees redundant.

[100] What the findings dictates is that the Industrial Dispute Tribunal had in mind and had taken account of the comprehensive evidence as to what occurred between the Claimant company and the Workers/Unions leading up to the redundancy exercise. It is entirely the prerogative of the Industrial Disputes Tribunal to say what it made of the material before it and that is exactly what it did. Whether this or any other court would come to another conclusion is irrelevant. The Industrial Dispute Tribunal demonstrably took into account the issue of communication, consultations, selection matrix and other matters in order to make the determination. The record shows that the issue of consultation was fully argued before it and that two competing approaches were

canvassed. The fact therefore that the findings and award is structured so as to favour one party rather than the other cannot, in my view, amount to or be described as an error of law. The only question for me to determine is whether there was material on which the Industrial Dispute Tribunal could ground its decision. The answer is clearly yes.

[101] Our statute speaks to errors of law only, not errors of fact but in any event in this instance there were no decisive findings by the Industrial Disputes Tribunal without evidence to support it. The Industrial Disputes Tribunal as per the notes of evidence and rightly considered the appropriate factors in arriving at its decision that the workers were unjustifiable terminated. The Industrial Disputes Tribunal within its jurisdiction considered all the relevant factors as it regards communication and consultation. Based on the findings of the Industrial Disputes Tribunal the letter dated December 13, 2012 was taken into consideration along with other communications to include a statement dated July 19, 2013 that indicated that the redundancy will commence on or before the 28th of June, 2013.

[102] The letter dated June 19, 2013 in my opinion, was the first correspondence to specifically identify and discuss redundancy as an option to restructuring the company's operation. Furthermore the Industrial Disputes Tribunal took into consideration that the redundancy exercise commenced a mere nine days later on June 28, 2013; after the dispatch of the June 19th letter. The harshness of the Claimant's action was further exacerbated by the fact that the categories of persons to be made redundant were not indicated to the Unions until the 25th day of June 2013. A list of names followed on the 26th of June, 2013 and on the 27th of June, 2013 some of the workers received letters stating that they were made redundant on that same date and were forthwith escorted off the work premises.

[103] The plight of these workers and the abrupt termination of their employment could not have been ignored by the Industrial Disputes Tribunal. The Tribunal considered the matter of communication and consultation as one of the factors in arriving at a decision as to whether the workers were unjustifiably dismissed The Tribunal made a

finding based on the evidence presented that there was no effective communication and or consultation by the Claimant. In addition to the issue of communication and consultation the Tribunal considered other factors and came to a decision on those facts that the workers were unjustly terminated.

[104] As it relates to cases of industrial relations where the employees are represented by a union recognized by the employer, the case of ***Williams and Others v Compair Maxam Limited*** is instructive, in that decision Browne-Wilkinson, J laid down the principle that :

> *" 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere…"*

[105] I will also refer to the case of **Williams and Others v Compair Maxam Limited** Browne-Wilkinson, J had this to say:

> *"We reject Mr. Morris's second submission that the industrial tribunal attached too little weight to the lack of consultation. It is not the function of this tribunal to consider the weight of the evidence. The industrial tribunal could only be said to erred in law if they failed completely to take into account the failure of the company to consult with the union. Here, the majority of the industrial tribunal criticized the lack of consultation and demonstrably took that factor into account. There is no rule of law that lack of proper consultation necessarily renders the dismissal unfair: Hollister v The National Farmers' Union [1979] ICR 542"*

[106] Thus it is my view that even if an error was said to be committed by the Industrial Disputes Tribunal it was not an error of law that goes to jurisdiction as the Industrial Disputes Tribunal acted within its jurisdiction and consider competently and appropriately the matter that was referred to it.

[107] Counsel for the Defendant also referred the court to the well-known test for reasonableness as propounded in ***Wednesbury***. She then submitted that the Claimant

must demonstrate that the award of the Industrial Disputes Tribunal was so absurd that no authority would have arrived at the same conclusion. Further, the Claimant must also demonstrate that the Industrial Disputes Tribunal excluded relevant matters from its consideration, or took irrelevant matters into consideration.

[108] There was no contention in the premises that the finding of unjustifiable dismissal was devoid of evidence to support it or that no tribunal would have concluded in the same way. Accordingly, it is my finding that that it was open to the tribunal of fact (Industrial Dispute Tribunal) to hold, on the available evidence, that the workers were unjustifiably dismissed.

DISPOSITION

[109] It is the finding of the Court that the Industrial Disputes Tribunal acted within its remit and that it's finding of fact that the dismissals were unjustifiable is neither irrational nor illegal. The Industrial Disputes Tribunal took into account factors that ought to have been taken into account and conversely did not import irrelevant factors. The Claimant has not convinced me moreover that the decision of the Defendant is one outside the contemplation of a reasonable tribunal or cannot be supported on the facts as the tribunal found them to be. Applying the test laid down in ***Anisminic*** the Industrial Disputes Tribunal considered all the relevant factors in coming to a decision that the workers were unjustifiable dismiss. It is my view therefore submitted that the Industrial Disputes Tribunal was right in its ruling, the issues raised by the Claimant are immaterial and as such the ruling of the Industrial Dispute Tribunal must stand.