

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 11/2015

SETTLEMENT OF DISPUTE

BETWEEN

CABLE AND WIRELESS JAMAICA LIMITED (t/a LIME)

AND

MR. WINSTON SEWELL

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT, Q.C - CHAIRMAN

MR. ERROL BECKFORD - MEMBER

MR. TREVOR MCNISH - MEMBER

NOVEMBER 30, 2016

Dispute No: IDT 11/2015

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

**CABLE AND WIRELESS JAMAICA LIMITED (t/a LIME)
(THE COMPANY)**

AND

**MR. WINSTON SEWELL
(AGGRIEVED WORKER)**

REFERENCE:

By letter dated April 29, 2015, the Honourable Minister of Labour and Social Security in accordance with Section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the Act"), referred to the Industrial Disputes Tribunal for settlement, in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between Mr. Winston Sewell on the one hand and Cable and Wireless Jamaica Limited (trading as LIME) on the other hand over Mr. Sewell's claim for redundancy."

The Terms of Reference was amended by letter dated January 4, 2016 to read as follows:

“To determine and settle the dispute between Mr. Winston Sewell on the one hand and Cable and Wireless Jamaica Limited (trading as LIME) on the other hand over:

a. Mr. Sewell’s claim that his contract of employment was terminated on the grounds of redundancy

or

b. The Company’s claim that Mr. Winston Sewell was separated from his employment on the basis of retirement.”

DIVISION:

The Division of the Tribunal which was selected in accordance with Section 8(2) (c) of the Act and which dealt with the matter comprised:

Mr. Norman Wright, Q.C.	-	Chairman
Mr. Errol Beckford	-	Member, Section 8(2) (c) (ii)
Mr. Trevor McNish	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

Mr. Gavin Goffe	-	Attorney-at-law
Mr. Adrian Cotterell	-	Attorney-at-law
Mr. Marlo Lyttle	-	Head of Industrial Relations Department

The **Aggrieved** was represented by:

Mr. Douglas Leys Q.C.	-	Attorney-at-law
Mr. Oliver Smith	-	Attorney-at-law
Miss Kimmone Tennant	-	Attorney-at-law
Miss Kenic Brissett	-	Attorney-at-law

In attendance:

Mr. Winston Sewell	-	The Aggrieved
--------------------	---	---------------

SUBMISSIONS AND SITTINGS:

Briefs were submitted to the Tribunal by both parties who made oral submissions during thirteen (13) sittings held between July 9, 2015 and September 9, 2016.

BACKGROUND TO THE DISPUTE:

Cable and Wireless Jamaica Limited (trading as LIME) (hereinafter referred to as the Company) is a registered company incorporated under the laws of Jamaica with its registered office located at 47 Half Way Tree Road, Kingston. The Company provides a wide range of services which include TV, Mobile, Fixed Line, Internet and Loyalty Programme, amongst other services.

Mr. Winston Sewell commenced employment with the Company on August 10, 1973 and worked there continuously until February 2014.

In early January 2014, the Company embarked upon a process of outsourcing its network and information technology functions, to Ericsson Jamaica Limited ("Ericsson") with a view to reducing its operational costs. As a result of this, it made a number of its employees redundant.

Mr. Sewell was initially informed that he was one of the employees who would be impacted by the redundancy exercise and his name and position (Network Inventory and Configuration Controller) appeared on a list of employees whose positions would be outsourced to Ericsson.

Subsequent to this information being disclosed to him, he was told by the Company that due to the fact that he was two months short of reaching the retirement age, his name would be withdrawn from the list of employees who would be impacted by the redundancy exercise.

The matter was referred to the Ministry of Labour and Social Security for conciliation, but the parties failed to arrive at a settlement. Consequently, the Honourable Minister of Labour and Social Security referred the dispute to the Industrial Disputes Tribunal for settlement.

CASE FOR THE COMPANY:

In support of its contention that Mr. Sewell was separated from his employment on the basis of retirement, the Company led the following evidence and made legal submissions as outlined below:

1. That the Company maintains that this Tribunal has no statutory jurisdiction to hear or settle this matter, as it is not a dispute as defined in Section 2 of the Labour Relations and Industrial Disputes Act. It is not a dispute over:
 - (a) the physical conditions in which any worker is required to work,
 - (b) the termination or suspension of employment of any such worker, or
 - (c) any matter affecting the rights and duties of any employer or worker.
2. That the referral to the Industrial Disputes Tribunal was based on a letter from the Bustamante Industrial Trade Union dated May 26, 2014, which, appropriately, did not describe the matter as an industrial dispute, or a dispute at all. They said that there was an “impasse” between the Company and Mr. Sewell because the Company has suddenly communicated that he will instead be separated by a process of early retirement, effective April 30, 2014, despite his redundancy having been previously indicated. That is not a complaint that Mr. Sewell’s employment had been terminated, as Mr. Sewell himself testified, it was a complaint that he had a legitimate expectation of being dismissed by reason of redundancy. A claim that a worker has a legitimate expectation of being dismissed is clearly not the same thing as being dismissed by the Company. This is obviously not an industrial dispute.
3. That this Tribunal, as a quasi-judicial body, must determine any challenge to its jurisdiction once it is raised. The Minister is not a judicial or quasi-judicial body. He has no role or authority to determine whether his referral of this matter to the IDT was *ultra virus* or not.
4. That on examination of the case put forward by the aggrieved worker, his evidence was not that the Company terminated his contract of employment on the grounds of

redundancy. He said, on cross-examination, that his claim was that the Company ought to have terminated his contract by reason of redundancy.

He said that he had a legitimate expectation of being terminated by reason of redundancy, because his name was on the list of employees whose roles were likely to be impacted. For a worker to say that he had a legitimate expectation of being made redundant, is entirely inconsistent with the Labour Relations Code. The Code protects a worker's job security. It states, in Section 11, that management should "*in consultation with workers or their representatives, take all reasonable steps to avoid redundancies*". Had the Company made Mr. Sewell redundant in circumstances where it did not need to, it could not be said that it took all reasonable steps to avoid redundancies and it would have breached the provisions of the Code.

5. That the concept of redundancy is that it is compensation to a permanent employee for the loss of the legitimate expectation of job security and continued employment. The same Labour Relations Code that places such great emphasis on job security, cannot also embrace any concept of legitimate expectation of being dismissed by reason of redundancy.

Consequently, it is irrelevant whether the Company had a written policy that it would not make someone redundant who was within two (2) months of retirement. There is absolutely nothing wrong with such a decision, whether it is a matter of company policy or not. No worker, other than someone who has been laid off without pay for the prescribed period, ever has a right to choose to be made redundant.

6. That Mr. Sewell's contract of employment is before the Tribunal as Exhibit 17B. It states that "*After appointment to the regular staff, your employment will be subject to two week's notice of termination on either side*". Mr. Sewell, quite correctly, acknowledged that this provision meant that he and his employer had agreed that his contract could only be terminated by notice in writing. He also admitted that neither he nor the Company had terminated the contract in writing and if that wasn't clear enough, he also said that neither he nor the Company terminated the

contract orally either. Based on Mr. Sewell's own evidence, his contract of employment was not terminated on the grounds of redundancy.

7. That the employment contract was also very clear on the point that it was mandatory for Mr. Sewell to join the Pension Scheme. Even his confirmation letter, Exhibit 17A, declares that having completed his probationary period, he became confirmed to the "*Company's pensionable staff*". The terms of the pension plan were therefore incorporated into the terms of the employment contract. Mr. Sewell, as with every other worker, was given the option to retire at age sixty (60) or age sixty-five (65). He chose age sixty (60) (see Exhibit 1). It was not the Company's decisions as to when he would retire. It was not the company who forced Mr. Sewell into retirement. He retired on schedule, as per his wishes, and by mutual agreement with the Company. It was agreed between the parties that once he reached the age of sixty (60), he would cease his employment and receive a pension from the Company. Neither party has done anything to modify their contractual agreement for it to terminate on any earlier date.
8. That on the issue of whether Mr. Sewell's contract was terminated orally, there is no evidence before the Tribunal that could support such a finding. Firstly, Mr. Sewell himself has testified that his contract was not terminated orally. He, of course, is one of parties to the contract. Secondly, Mr. Webb testified that when he approved Mr. Sewell's application for no-pay leave, which we see occurred on February 20, 2014, Mr. Sewell was a permanent employee with no end date.
9. That, Mr. Sewell testified that both his Head of Department, Mr. Fennell, and the President of the Company, Mr. Garfield Sinclair, told him that the Company was not going to make him redundant. Fourthly, there is no mention of an oral termination in the correspondence to the Ministry of Labour from the BITU or from Mr. Sewell. The only person who said that Mr. Sewell's contract was terminated orally was Mrs. Barrett-James, who contradicted herself when she said that Mr. Sewell would not be lying, if he said that his contract had not been terminated orally.

10. That a worker cannot be entitled to a redundancy payment if he has not been “dismissed by his employer by reason of redundancy” as stated in Section 5 of the Employment (Termination and Redundancy Payments) Act.

In the text Commonwealth Caribbean Employment and Labour Law, the authors confirmed that the three-stage test set out in **Safeway Stores Pls v Burrell (1997) IRLR 205** is applicable. The Tribunal must ask itself:

- (1) *“Was the employee in fact dismissed?”*
- (2) *“If so, was there a diminution or cessation in the requirements of the employer’s business for the employees (not the particular employee) to carry out work of a particular kind, currently or in the future?”*
- (3) *“Was the dismissal caused wholly or partly because of this state of affairs?”*

11. The learned authors of **Commonwealth Caribbean Employment and Labour Law**, go on to discuss the topic of “**What is dismissal for the purpose of redundancy?**” They say:

“It is a condition precedent for a redundancy claim that the aggrieved worker must be dismissed by reason of redundancy. In Jamaica, these circumstances are clearly delineated by statute, as follows:

- (a) *if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice;*
or
- (b) *If under that contract he is employed for a fixed term and that term expires without being renewed, under the same contract;*
or
- (c) *If he is compelled, by reason of the employer’s conduct, to terminate that contract without notice.”*

Obviously, none of the above applies in this case. There is no evidence whatsoever that the Company terminated Mr. Sewell’s employment. In fact, Mr. Sewell

repeatedly said that his case was that the Company should have made him redundant, but they did not. His complaint, as shown in Exhibit 23, was that he believed that his employer could not remove him from the list of persons whose roles would be outsourced to Ericsson and jobs made redundant.

- 12 That all of the evidence points to the fact that Mr. Sewell wanted to have his cake and eat it too. He was told from January 27, 2014, that he was not going to be made redundant and, instead, he would continue to work for LIME until his retirement date. Mr. Sewell did not remember at the time that he had elected to retire at age sixty (60) instead of age sixty-five (65). He obviously wanted to continue working and did not want to miss the opportunity to work for Ericsson on March 1, 2014. He was told, however, that in order to do so, he would need to resign and that would mean that he could not collect a full pension since he would have resigned before his scheduled retirement date. Unhappy with having to sacrifice anything at all, Mr. Sewell then “took it upon his head” that he could have the best of both worlds if he were granted leave by LIME to fill the gap between his start date with Ericsson and his retirement from LIME.
13. That this was his idea entirely and he applied for no-pay leave, on Thursday, February 20, 2014, by way of email. He did not apply using the electronic system that was in place for vacation leave applications. Mr. Gareth Webb, his immediate supervisor, immediately approved his application for thirty-one (31) days of no-pay leave. This was not vacation leave that Mr. Sewell had accumulated. He had no right to take thirty-one (31) working days of no-pay leave. According to Exhibit 14, he met with Mrs. Maria Thompson Walters, the Director of Human Resources and Communication, on Monday February 24, 2014 and raised two issues with her. The first issue was “Redundancy” and Mrs. Thompson Walter’s email confirm this as follows:

“I had indicated that I would speak with the HR team in this regard. We have met and whilst normally you would be required to resign in order to take up

Ericsson's offer, there may be a way to accommodate your employment status with LIME for pension purposes only."

14. That LIME is not seeking anything from the Industrial Disputes Tribunal. It has nothing to prove. This is not a case where the IDT has the power to order LIME to pay over Mr. Sewell's pension to him. That is a matter between Mr. Sewell and Sagikor.

The only person with a burden of proof here is Mr. Sewell. He is the one who must convince the Tribunal that he was terminated by reason of redundancy. He has clearly failed to discharge that evidential burden. He has not produced one iota of evidence that shows that he was terminated by LIME. Indeed, he could not, because his position is that he was NOT terminated by LIME, even though he ought to have been.

15. That Mr. Winston Sewell has tried to suggest that the non-payment of wages for the months of March and April, is proof that he was not an employee. This argument must fail in light of the fact that it was his proposal to take no-pay leave, so as to preserve his employment for pension purposes only. He was the one who, to use his words, "took it on his head" to propose this as a solution. This shows that he accepts that an employee can still preserve his legal status as an employee, even though he is not performing any duties for the employer and not receiving any wages or other benefits, from the employer. The argument that it was LIME who was "trying a ting" with respect to the no-pay leave is disingenuous, in light of Mr. Winston Sewell's admission it was he who had proposed it.

16. That there is absolutely no documentary evidence that Mr. Sewell had taken his proposal off the table. On the contrary, there are emails that show that there were two meetings held with Mr. Sewell to discuss his proposal. There is no evidence whatsoever that Mr. Fennell rejected any application for no-pay leave. To the contrary, Mr. Fennell's evidence was that there were discussions above his head, between Mr. Sewell and others within the HR Department, including the Head of Group HR. This is corroborated by the fact that there is evidence that Mr. Sewell was

meeting with these persons and sending emails and even text messages to them. It is clear that Mr. Fennell was not the person to whom Mr. Sewell was looking, in order to approve his no-pay leave.

17. That Mr. Sewell is seeking to take advantage of his former employer, in much the same way as Mr. Birch and Mr. Humber attempted to do, so in the well known English Court of Appeal decision in **Birch and Another v University of Liverpool [1985] ICR 470**. In that case, the Company was conducting a redundancy exercise and invited certain employees to apply for early retirement. Two employees, Mr. Birch and Mr. Humber, both applied for early retirement and the employer accepted their applications. They both retired. Immediately after retiring, they wrote to the Company and asked for their redundancy payment. They argued in support that the only reason that they retired was because of the request by the Company. The Company's response was that they were not dismissed, within the meaning of the English law, and therefore they had no claim for a redundancy. **The Industrial Tribunal** ruled in favour of the workers on the basis that the contracts of employment had been terminated by the Company. **The Employment Appeal Tribunal** overturned that ruling, and found that there had been no dismissal and accordingly the gentlemen had retired.

18. That this is a most unfortunate example of no good deed going unpunished. Mr. Sewell is literally attempting to profit from LIME's generosity. His actions are unworthy and the IDT ought not to reward him for it.

CASE FOR THE AGRIEVED:

In support of its contention that Mr. Winston Sewell's contract of employment was terminated on the grounds of redundancy, the following evidence was led on his behalf, and submissions made in his support as outlined below:

1. The grounds on which Mr. Sewell is seeking the Tribunal's ruling are as follows:
 - (a) He was continuously employed to the Company for a period well in excess of one hundred and four (104) weeks prior to his dismissal.

- (b) The Company outsourced Mr. Sewell's roles and functions and no longer included the same in its activities or alternatively, that his role has been so diminished, that he is entitled to redundancy.
- (c) The Company no longer required employees to carry out the roles and functions which he carried out, whilst in the post of Network Inventory & Configuration Controller, and accordingly, he was dismissed by reason of redundancy.
- (d) The Company did not offer him any alternative post within its organization, nor did the Company otherwise seek to re-engage him under a new contract of employment.
- (e) Alternatively, by reason of the conduct of the employer, he was compelled to terminate his contract of employment on or about February 28, 2014, and accordingly ought to be considered to have been dismissed by his employer by way of redundancy.
- (f) The effective date of the termination of the contract of employment was on or around February 28, 2014, well before the date on which he was slated to go on retirement (May 1, 2014).
- (g) His dismissal is attributable wholly or partly to his roles and functions at the Company becoming redundant, as the Company no longer required the said roles and functions, as the same were being outsourced.
- (h) The Employee's dismissal having taken place well before the date of his retirement cannot be said to have been by reason of retirement.

2. That Section 5 of the relevant provisions of the Employment Termination and Redundancy Payments Act (ETRPA) which governs the law of redundancy is relevant and provides as follows:

5-(1) "Where on or after the appointed day, an employee who has been continuously employed for the period of one hundred and four weeks ending on the

relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as may be prescribed."

3. That it is the submission of Mr. Winston Sewell that he was made redundant within the meaning of Section 5 of the ETRPA, in particular Section 5(2) and 5(5)(c). In order to substantiate his position Mr. Winston Sewell relies on the evidence given before this Tribunal.

4. That Mr. Mario Little, Head of Industrial Relations gave evidence in chief that Mr. Winston Sewell was not told verbally that he would be exiting the Company. However, the direct evidence of Mr. Winston Sewell is that he was told by Mr. Whitney Fennel his department head, that he was one of the persons who would be impacted by the outsourcing and he would be made redundant. On this issue, Mr. Winston Sewell's evidence is to be preferred as the preponderance of the evidence supports the fact that Mr. Winston Sewell was to be made redundant. Indeed, as revealed by the evidence, the Company acknowledged in writing, that Mr. Winston Sewell was to be made redundant. If the Company can go so far as committing this to writing, then Mr. Winston Sewell's evidence should be preferred to that of Mr. Mario Little, that he was never told this by the Company. This is further supported by the fact that the Company in its brief acknowledged the fact that they had made an error in putting Mr. Sewell up for redundancy, as it did not realize that he was so near to retirement. Mr. Mario Little in his evidence in chief maintains that the custom is to the effect that the names of the persons to be impacted, do not usually appear on the list of posts to be made redundant, but when there is certainty, a list is sent to the union. The evidence is clear that there was certainty as Mr. Winston Sewell's name appears on the list that was copied to Mrs. Andrea Barrett-James of the Union.
(See Exhibit 16).

5. That worthy of note, is that Mr. Mario Little gave evidence that he could not say if the job of Network Configuration Controller remained after February 28, 2014. It is the submission, that he is being less than candid when he so states as it is clear that the post did not exist after that date. Mr. Whitney Fennel, the Company's witness, stated that after this date, this was one of the positions outsourced to Ericsson.
6. Again, Mr. Marlo Little states that Mr. Winston Sewell remained after February 28, 2014 as Network Configuration Controller. This conflicts with the evidence of Mr. Whitney Fennel who states that Mr. Winston Sewell was kept on for a discrete project. It is more than passing strange that because of his position in the Human Resources Department (HRD) at such a high level he did not know that the post no longer existed.
7. On the issue of the payment of Mr. Winston Sewell's pension benefits, the evidence from Exhibit 12 is that Mr. Winston Sewell was to pay his pension benefits from his own resources. However, Mr. Mario Little's evidence is that LIME found some resources from which the benefits could be paid. These resources were not identified. The evidence on the payment of the pension benefits is contradictory. Up to the conclusion of the evidence in these proceedings, the Tribunal has not been put in a position to determine who paid these benefits. The only clear evidence before the Tribunal is that Mr. Winston Sewell did not consent to these benefits being paid by him and he did not pay for it from his own resources. The credibility of the Company's case is seriously undermined on this issue and the Tribunal ought to reject any evidence that these benefits were paid by Mr. Winston Sewell from his own or the Company's resources.
8. That there is no evidence or record produced by the Company to show that Mr. Winston Sewell consented to the payment of these benefits from his resources and he was hearing for the first time in these proceedings that his pension benefits were paid from extra resources located by the Company. Rhetorically, how can the Company genuinely contend before the Tribunal that Mr. Sewell worked up to the date of his retirement, on evidence which is at best conflicting.

9. That it is the submission of Mr. Winston Sewell, that Mr. Mario Little's evidence did not in any material respect advance the case for the Company. He was unhelpful on some of the critical issues, which could have shed more light on the circumstances surrounding Mr. Winston Sewell's separation from the Company. He could not help in any material way with the issue of the pension benefits, he could not help in any material way with the issue of the no-pay leave and he could not help with the role that Mr. Winston Sewell was to play in the Company, post outsourcing to Ericsson.
10. Mr. Whitney Fennel gave evidence in chief that he does not recall seeing Mr. Winston Sewell's application for no-pay leave, yet the Company would have us believe that Mr. Winston Sewell was on no-pay leave (see Exhibit 12). He says that in January to March 2014, there was work for both Mr. Gareth Webb and Mr. Winston Sewell, but the clear evidence of Mr. Gareth Webb and Mr. Winston Sewell, was that at that time they had no roles at LIME and all their time was spent at Ericsson. This is indeed consistent with the Companies representation to the Union that Mr. Winston Sewell's post would be outsourced and at that time no representation was made that he would be kept back for any legacy duties or any discrete project.
11. That Mr. Whitney Fennel sought to justify Mr. Winston Sewell continuing his functions at LIME by saying he was needed for "Project Dentist". However, when pressed in cross examination, he stated that there were no documents to substantiate this or at the very least, he could not produce documents which would substantiate formally the role Mr. Winston Sewell was to play, post outsourcing of the position he occupied. This is peculiar, because if Mr. Winston Sewell was kept on for this project, a renowned company like LIME, would have kept some kind of documentation to substantiate the work that Mr. Winston Sewell was doing as a matter of record and for audit purposes. Human Resource would certainly have this on record. However, no such record was produced at the hearing as to what Mr. Winston Sewell was required to do or his functions.
12. That based on the evidence, there is to a certain extent a contradiction on the Company's case. It contends vigorously that Mr. Winston Sewell was given no-pay

leave. This evidence we understand, was the Company's way of facilitating him so that he could move into retirement and to allow him to pursue opportunities at Ericsson, yet we have the said Company contending that he was kept on and could not have been made redundant, because he was pursuing this discrete part of the "Project Dentist", after his functions were outsourced. Mr. Winston Sewell submits, that on a balance of probability the evidence of Mr. Gareth Webb and Mr. Winston Sewell is to be preferred as they were both clear that after February 28, 2014, they had accepted positions in Ericsson and in the case of Mr. Winston Sewell, at Ericsson he was to essentially perform the same work that he performed at LIME. The Company cannot have it both ways. They cannot ask the Tribunal to believe Mr. Whitney Fennel, that Mr. Winston Sewell was kept on to do work at LIME and so was not eligible for redundancy and then ask the Tribunal to believe that they granted him no pay leave to enable him to take up a position at Ericsson and to obtain full pension. The case lacks credibility and on a balance of probabilities the evidence advanced by Mr. Winston Sewell is to be preferred.

13. That the Tribunal heard evidence from Mr. Gareth Webb. Mr. Gareth Webb gave his evidence in a credible way. It was frank and forthright. We heard from him that he was one of two persons employed in the Network Inventory Management in the organization and that he held the position of Network Configuration Manager. The other post in the unit was that of Network Configuration Controller which was held by Mr. Winston Sewell. He was told in the same meeting as was Mr. Winston Sewell, that his post would be made redundant as at the end of February 2014 and that he was at liberty to accept a position from Ericsson, which he did as he would be made redundant. His direct supervisor was Mr. Whitney Fennel and he gave evidence that after the outsourcing of the functions of this unit, there was nothing left for neither him or Mr. Winston Sewell to do in the unit.

14. That Mr. Gareth Webb stated quite clearly that he recommended that Mr. Winston Sewell be given leave without pay, as he was of the view that this was requested by Mr. Winston Sewell, in that he wanted some rest before taking on the position at Ericsson. Mr. Winston Sewell has stated that he did not make the request for this

position. Of course, the Company will create a firestorm over this issue and the fact that they contradict each other. It is submission of the Mr. Winston Sewell however, that whatever the reason for which the no-pay-leave was granted by Mr. Gareth Webb, it is inconsequential from the following perspective:-

15. That firstly, there is no evidence that the no-pay leave was granted. Mr. Gareth Webb gave evidence as to how the application for leave is made in the system. He states that the system is fully automated and that one would be able to pull out the records and verify that it was approved and by whom. This was not the evidence presented by the Company. The evidence was that it was approved via an email from Miss Lorraine Chin that Mr. Winston Sewell's no-pay leave was agreed with him, arising out of a meeting. (See Exhibits 12 and 20). This was after Mr. Gareth Webb had been told by Mr. Fennell, that he would not be approving any no-pay leave for Mr. Winston Sewell and Mr. Winston Sewell himself was told by Mr. Whitney Fennel, that no pay leave would not be approved. He also had a meeting with Miss Lorraine Chin who told him that he should resign and that no-pay leave would not be granted. What is interesting about this email approving the leave arising out of this agreement with Mr. Winston Sewell, is that it was never communicated to Mr. Winston Sewell. He was not copied on this email. He was not a named recipient. It is beyond ironic that the very person, who had conceptualized the idea and was told that it was rejected, was not copied on the very email which purported to grant the no-pay leave and to which he had allegedly agreed.
16. That secondly, as Mr. Gareth Webb testified, the fact is that any category of leave was granted through the Company's automated system and could easily be verified by the company, by the production of the relevant print-out. This was not verified by the Company. Verification was established by way of email. However, Mr. Gareth Webb says that he personally logged in the request for Mr. Winston Sewell in the automated system and was told that the same was not approved. He was not challenged on this. If the Tribunal accepts his evidence, then the question must be asked as to what has happened to his recommendation that the no-pay leave be granted in the system. It is lost in cyberspace. What has become of it? Why has it not

been produced in evidence, just like the other documents, in electronic format which the company has sought to produce?

Mr. Gareth Webb and Mr. Winston Sewell have no access to the system and it was therefore incumbent on the Company to produce this record. It is indeed a strange piece of coincidence, that that no record can be produced as regards the legacy of "Project Dentist" functions, that Mr. Winston Sewell was required to undertake and no records can be produced from the automated leave application system. These are the critical areas that can shed light on the issue of Mr. Winston Sewell's redundancy and would go a far way in assisting the Tribunal in resolving the issues. Unfortunately, the Tribunal has not been provided with the relevant evidence from those able to produce it.

17. That thirdly, it is more than passing strange that the Company has not sought to bring any of the personnel from Human Resources who were intimately involved with the granting of no-pay leave. The persons who attended and gave evidence cannot speak affirmatively as to the circumstances in which the no-pay leave was granted. Miss Lorraine Chin, the Author of the email who purportedly granted the leave, coming out of meetings with Maria, Nicky and Lorraine, none of whom was called to establish the circumstances in which this agreement came about and Mr. Winston Sewell who was previously told by his superiors that no-pay leave would not be granted, was not informed. It gets "curious and curiouiser", that there is no evidence that it was part of the official system and it was this "cabal" that approved same. Yet none of the members of this "cabal" was called to give evidence that the no-pay leave was approved. What was presented to the Tribunal, were two persons who could not speak directly to this approval.
18. That the Tribunal heard evidence from the aggrieved worker, Mr. Winston Sewell that he commenced working with the Jamaica Telephone Company in August 1973 and up to the time of his separation, he had given over forty (40) years of service to the Company. At the time of his separation from the Company, he was one of the two persons in the Network Inventory Management System. His immediate supervisor was Mr. Gareth Webb and the Unit Manager was Mr. Whitney Fennel.

He gave credible evidence, on which he was not challenged, that at the material time, this was his sole function at LIME and in January of 2014, he became aware of the fact that his role was being outsourced to Ericsson, and he also learnt that the functions being performed by his supervisor was also being outsourced. In other words, the entire function of his department was being outsourced. Albeit Mr. Whitney Fennel gave evidence that he performed legacy work under "Project Dentist" he was not challenged on this. He gave evidence that he was stationed at Carlton Crescent. He gave evidence that in January 2014, he met with Mr. Whitney Fennel and that he was told by Mr. Whitney Fennel, that certain services which the Company performed, would be outsourced to Ericsson and that his job would be outsourced. Mr. Whitney Fennel was evasive when questioned on this issue, but the inexorable conclusion which the Tribunal must draw from, this is that he must have been told so by Mr. Whitney Fennel as the clear admission from the Company, is that Mr. Winston Sewell was one of those persons who were to be made redundant. The Company later acknowledged that this was an error and how they sought to correct the error is a different issue relative to the fact that the Company, did intimate to Mr. Winston Sewell that he was to be made redundant.

19. That he further gave evidence, that consequent on this representation he was invited to a town hall meeting at the Knutsford Court Hotel, along with other persons who were to be made redundant and at which, the head of the department, Mr. Andrew Linton, spoke and intimated to all present and who were specially invited because they were told that their positions would be outsourced to Ericsson and consequently they would all be made redundant. He gave evidence that personnel from Ericsson was also present at this meeting and the affected persons were invited to apply to Ericsson, after which they would be interviewed, and if Ericsson found them satisfactory, it would offer them employment. The nature of this employment was similar to the roles they performed at LIME. Worthy of note is that LIME facilitated this presentation by Ericsson to their employees who were to be made redundant.
20. That accordingly, Mr. Winston Sewell applied for and was offered a position in Ericsson which he accepted. His actions were consistent with those of every rational

human being. Having been told that he would be made redundant, he accepted a position offered to him by Ericsson as he had to ensure that he put himself in a position to continue to earn a living, even after redundancy. He had a family for which he was responsible. Consistent with the representation that he was to be made redundant, there is incontrovertible evidence that his tenure at LIME had come to an end. He was requested by LIME through his unit head Mr. Whitney Fennel, to surrender his health card, his identification card and all other company property. All the privileges associated to an employee of the Company were withdrawn from him. The situation was such as was demonstrated from the evidence of Mr. Gareth Webb, that Ericsson occupied the same space as that previously occupied by LIME at Carlton Crescent and this was the space in which most, if not all the employees who were impacted by the outsourcing of the Unit to Ericsson continued to work. They gained access to this space by contract card and later an identification card issued by Ericsson. Mr. Winston Sewell gave evidence that no one from LIME objected to his presence on the premises working for Ericsson. For all intents and purposes he was accepted by LIME as an Ericsson employee.

21. That this was the beginning of his troubles. Having accepted a position from Ericsson there was a complete *volte face* on the Company's part. Mr. Whitney Fennel, his Head of Department, subsequently communicated to him that he could not support his redundancy because he was so close to retirement. The evidence is that Mr. Winston Sewell would be retiring from the Company as at April 30, 2014. He was told that if he wishes to take up the position at Ericsson, he would have to resign. One can only imagine the nightmare this worker was facing. Having been notified from the very highest levels of the Company that he would be made redundant and acting thereon by accepting a position from Ericsson, which was obviously facilitated by his Employer, to be now told that he had to resign from his job, which would jeopardize his pension benefits, he was placed in the horns of a dilemma.

In this context, one can therefore readily understand the context in which he gave his evidence that he crafted a proposal to go on no-pay leave which would enable him to escape the horns of this dilemma. He would go on no-pay leave from the Company

so as to preserve his pension benefits.

22. That Mr. Winston Sewell gave evidence that his proposal for no-pay leave was rejected. He was told by Mr. Gareth Webb that Mr. Whitney Fennel would not approve the same and that the stated position is that he should resign his job at LIME. He also spoke with Mr. Whitney Fennel who told him that he would not approve his application for no-pay leave. This is another instance where the case for the Company gets curious. Having been told flatly by his Unit head that his application for no pay leave would not be granted, there was discussion about it without his involvement, participation or consent and a revelation by way of email (Exhibit 12) that no-pay-leave was approved and that Mr. Winston Sewell would be kept on as an employee of the Company for pension purposes only, and that he would be responsible for making all his contributions from his own resources.
23. Mr. Winston Sewell gave evidence that he gave no such consent and his testimony is to be believed as it is clear that this agreement was alleged to have arisen out of a discussion with him and reflected in emails Exhibits 12 and 20 that were never communicated to him. He was not a recipient of this email and to compound the issue, he never received at any time up to the date of his retirement, any pay advice slip showing his pension contributions and how they were made. Further to this, is that up to the date of his retirement he never received any pay advice at all, as he was accustomed to receiving same up to the end of February 2014.
24. It is the submission of Mr. Winston Sewell that these actions are not consistent with a person who it is claimed was still employed to LIME. Indeed, the evidence will confirm, that up to the commencement and the close of Mr. Winston Sewell's case in these proceedings, no credible evidence has been presented to demonstrate that this was implemented and operationalised on the part of the Company. Documentation has been presented, but the best that can be said of them is that they are of doubtful authenticity, as no one from the Company has been brought to give any credibility to the fact that this was the product of pay advice slip for Mr. Winston Sewell generated from the company's computerized payment system to which all employees of LIME are guaranteed access as regards their individual salary payments.

TRIBUNAL'S FINDINGS/CONCLUSION:

1. Counsel for the Company challenged the Tribunal's jurisdiction to hear this dispute and we find it appropriate to point out that it is important for parties who appear before the Tribunal to appreciate that the Industrial Disputes Tribunal's jurisdiction to hear, determine and settle industrial disputes, is derived from the Minister's referral of the dispute under the relevant section of the Labour Relations and Industrial Disputes Act.

Where a party challenges the Industrial Disputes Tribunal's jurisdiction to hear a matter, it is in essence raising a question, or challenge as to whether the dispute was properly referred by the Minister. In such an instance, it is for the relevant party to take the necessary steps to challenge the Minister's referral and by extension prohibit the Industrial Disputes Tribunal from hearing the dispute. Where the relevant party does not take such action then, the Tribunal, in the absence of a Court order prohibiting it from proceeding to hear the dispute, will move to determine and settle the dispute.

At the first hearing of this dispute, the Company, through its Counsel, raised an objection to the Terms of Reference and to the jurisdiction of the Industrial Disputes Tribunal to determine and settle the dispute. The Tribunal having heard the challenges raised, addressed the issues.

Accordingly, the Terms of Reference was sent back to the Ministry of Labour & Social Security for review. In relation to the challenge against the Industrial Disputes Tribunal's jurisdiction, the Tribunal considered the terms of the challenge. It then ruled, in simple terms, that it would proceed to hear the matter, as the dispute had been referred to it for resolution by the Minister and upon the return of the Terms of Reference to the Ministry, it was amended and the referral sent back to the Tribunal for the dispute to be determined and settled. In light of this ruling, the Company actively participated in the hearings. The Company took no further steps to prevent the Tribunal from hearing the dispute.

2. On the evidence presented to this Tribunal the following are palpably clear:

- That at the time he joined the Company it was named the Jamaica Telephone Company and up to the point of his departure it was named Cable and Wireless Jamaica Limited trading as LIME. All told, his service with the Company amounted to about forty (40) years.
- That his last day of work with the Company was on February 28, 2014 as on March 1, 2014 he took up an employment contract with a new company, Ericsson, to whom the functions of the Unit he worked in at Cable and Wireless were outsourced and transferred.
- That it is indisputable that Mr. Sewell was informed prior to the transfer of the functions of his Unit to Ericsson, that his services would be terminated by reason of redundancy, consequent, on said transfer.
- That subsequent to being informed that his services would be terminated by reason of redundancy and his name and position appearing on the redundancy list prepared and issued by the Company to the Union, he was later informed that he was two months away from reaching retirement (May 1, 2014), therefore his services would no longer be terminated by reason of redundancy.
- That as a result of this new development, Mr. Sewell applied to the Company for no-pay leave. The evidence as to whether or not the no-pay leave was granted is critical to the determination of this dispute, and therefore requires a careful and thorough analysis.

3. It is the evidence of Mr. Whitney Fennel, Head of the Unit in which Mr. Winston Sewell worked, that he does not recall seeing an application for no-pay leave for Mr. Winston Sewell. On the other hand, Mr. Gareth Webb, Mr. Winston Sewell's immediate supervisor, testified that he received a no-pay leave application for Mr. Winston Sewell which he approved, and in discussion with Mr. Whitney Fennel was informed that the leave would not be approved. Mr. Winston Sewell also testified

that Mr. Whitney Fennel, Unit Manager, informed him that his application for no-pay leave would not be approved. The Tribunal accepts the evidence of Mr. Gareth Webb and Mr. Winston Sewell on this issue, and, in the absence of any written or oral authorization from the Company to Mr. Winston Sewell approving his application for no-pay leave, concludes that the application was neither approved nor granted. In this regard the Company wrote to Mr. Winston Sewell through the Human Resources Department as follows (Exhibit 14):

“I had indicated that I would speak with the HR team in this regard. We have met and whilst normally you would be required to resign in order to take up Ericsson’s offer, there may be a way to accommodate your employment status with LIME for pension purposes only.”

The Tribunal does not interpret the contents of this communication to be an approval for no-pay leave.

4. Now, since there is no evidence that Mr. Winston Sewell’s application for leave without pay was approved then the question to be asked is:

What was his employment status with the Company between February 28, 2014, the last day he worked at Cable and Wireless and May 1, 2014, the scheduled date of his retirement?

The Tribunal takes note of the following pieces of evidence which point to the conclusion that the Company by its action had severed the employment relationship with Mr. Winston Sewell on February 28, 2014, under circumstances which entitles him to receive redundancy payment. This conclusion is arrived at for the following reasons:

- (a) The Unit to which Mr. Winston Sewell performed duties as a Network Controller at Cable and Wireless was outsourced to Ericsson on February 28, 2014 in circumstances where the requirements for the services provided by him to the company ceased and Cable and Wireless did not offer him any alternative employment.

- (b) Although this matter arose during the proceedings there was no evidence shown that any pay advice was generated for Mr. Winston Sewell after the month ending February 28, 2014. The pay advice generated would give some indication of the employment status of the employee.
- (c) In the first week of March 2014, immediately after February 28, 2014, Mr. Winston Sewell was requested by the Company to hand over to it, his identification card and also his health card. This is of particular significance, as it is common knowledge that where the employment relationship is being severed the employee is required to surrender these items which are regarded as Company property, that the employee is allowed to keep and utilize to his own benefit whilst in the employ of the Company. The evidence indicates that this is also the policy at Cable and Wireless as shown in a letter of termination by reason of redundancy, to Mr. Gareth Webb, Mr. Winston Sewell's immediate Supervisor from the Head of the Human Resources Department (Exhibit15).

“As is customary, you will be required to hand over all company property including but not limited to, your identification card, documents and/or files, credit card and related peripherals and data in your possession to your manager or designate, on February 28, 2014.”

This Tribunal has not been pointed to any other reason than a severing of relationship that would warrant a Company to require an employee with forty (40) years of loyal and unblemished service to surrender his Identification and Health Cards. The inescapable inference is that the employment relationship is being severed.

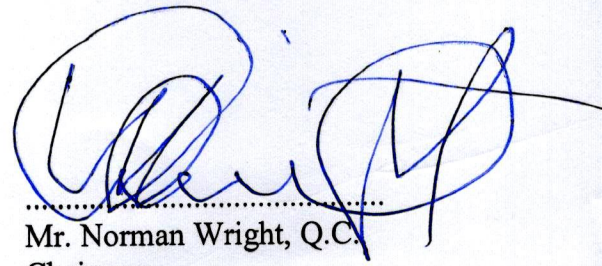
5. The Tribunal therefore taking into consideration all the circumstances of this dispute, finds that the evidence overwhelmingly points to the following:

- (i) Mr. Winston Sewell was continuously employed to the Company for a period well in excess of one hundred and four (104) weeks prior to his dismissal.
- (ii) The Company outsourced Mr. Sewell's roles and functions and no longer included him in its activities and no longer required his service, therefore his job ceased to exist in circumstances which entitled him to redundancy payment in accordance with the Employment (Termination and Redundancy Payments) Act, Section 5.
- (iii) The Company did not offer Mr. Winston Sewell any alternative post within its organization, nor did the Company otherwise seek to renew or re-engage him under a new contract of employment in the same place, position and under the same terms and condition of employment and he did not unreasonably refuse such a contract, therefore he is entitled to redundancy payment in accordance with the Employment (Termination and Redundancy Payments) Act.
- (iv) The effective date of the termination of the contract of employment was on or about February 28, 2014, well before the date on which Mr. Winston Sewell was slated to go on retirement (May 1, 2014).
- (v) The severing of Mr. Winston Sewell's contract of employment is attributable wholly to his roles and functions at the Company becoming redundant, in that the Company no longer required the said roles and functions as the same were outsourced and he was not offered alternative employment consistent with the Employment (Termination and Redundancy Payments) Act.
- (vi) The severing of the Employee's contract of employment on February 28, 2014, having taken place well before the date of his scheduled retirement (May 1, 2014) cannot be said to have been by reason of retirement.

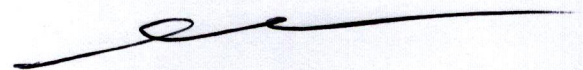
AWARD:

Accordingly, it is hereby awarded that Winston Sewell's contract of employment was terminated on the grounds of redundancy

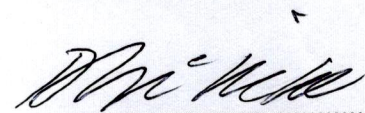
DATED THIS ^{30th} DAY OF NOVEMBER, 2016.



.....
Mr. Norman Wright, Q.C.
Chairman

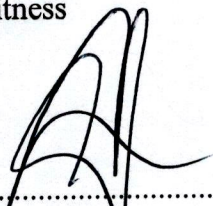


.....
Mr. Errol Beckford
Member



.....
Mr. Trevor McNish
Member

Witness



.....
Gary Lediard
Secretary to the Division

