INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 38/2013

SETTLEMENT OF DISPUTE

BETWEEN

JAMAICA BROILERS GROUP LIMITED

AND

EILEEN GRAHAM, TAMAR CHANDLER ETAL

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT - CHAIRMAN

MR. RION HALL - MEMBER

MR. D. TREVOR McNISH - MEMBER

DECEMBER 18, 2015

IDT 38/2013

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

JAMAICA BROILERS GROUP LIMITED

(THE COMPANY)

AND

EILEEN GRAHAM, TAMAR CHANDLER ETAL

(THE AGGRIEVED)

REFERENCE:

By letter dated August 30, 2013 the Honourable Minister of Labour and Social Security pursuant to Section 11A (1) (a) (i) of the Labour Relations and Industrial Disputes Act of 1975 (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 Jamaica Broilers Group Limited (JBGL), B.P. Processing and A.P. Processing on the one hand and the former workers, Eileen Graham, Tamar Chandler etal of Content Agricultural Products (a subsidiary of JBGL) on the other hand over:***

a) *who is the employer (s) of the former workers and*

b) *whether or not redundancy payment is applicable in the circumstances."*

By letter dated February 14, 2014, the above Terms of Reference was amended to read as follows:

"(A) To determine and settle the dispute between Jamaica Broilers Group Ltd (the Company) on the one hand and those individual workers who were directly engaged on contracts with the Company as per attached list (the workers) on the other han d, over whether the workers are entitled to severance payments arising from the closure of the Company's Content Meat Processing Facility in September 2012."

and

"(B) To determine and settle the dispute between the Company on the one hand and the workers who were contracted to AD Processing and B. P. Processing as per the attached list on the other hand, over

I. Whether these workers were employees of A.D. Processing and B.P. Processing or employees of the Company;

II. Whether these workers are entitled to redundancy payments arising from the closure of the Content Meat Processing Facility in September 2012, and if yes, from whom."

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. Rion Hall, J.P.	-	Member, Section 8(2) (c) (ii)
Mr. D. Trevor McNish	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF PARTIES:

The **Company** was represented by:

Mrs. Symone M. Mayhew	-	Attorney-at-Law
Mrs. K. Sewell	-	Attorney-at-Law
Mrs. C. Silvera	-	Group Human Resources Manager

The **Aggrieved** W**orkers** were represented by:

Mr. Howard Duncan	-	Industrial Relations Consultant

In attendance were the Aggrieved Workers:

Mr. Basil Pusey

Mr. Aundrey Dixon

Mr. Glenmore McFarlane

Ms. C. Burrell

SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during sixteen (16) sittings, from December 19, 2013 to April 29, 2015.

BACKGROUND TO THE DISPUTE:

This dispute has its genesis in a claim for severance benefits, by a number of employees who worked at the Content Plant, a subsidiary of the JBGL – the Company. This Plant, located at McCook's Pen, St. Catherine closed its meat processing operations in September of 2012.

Consequently, the employees made a claim on the Company for redundancy payments which the Company disputed resulting in the matter being referred to Ministry of Labour and Social Security. The matter was not resolved at that level, therefore, the Industrial Disputes Tribunal was asked to adjudicate.

The construction of the Terms of Reference is in two segments, A and B. In light of this the Tribunal will adopt the following approach in addressing the dispute.

> ***"(A) To determine and settle the dispute between the Jamaica Broilers Ltd (the Company) on the one hand and those individual workers who were directly engaged on contracts with the Company as per the attached list (the workers) on the other hand, over whether the workers are entitled to severance payments arising from the closure of the Company's Content Meat Processing Facility in September 2012."***

COMPANY'S CASE:

It is contended by the Company that:

1. As indicated in the Terms of Reference, this dispute arises from the closure of the company's meat processing facility at Content, McCooks Pen in September 2012. Consequent on this closure, the Company terminated the contracts for some of its employees who were engaged on fixed term contracts. The Company also terminated the contracts with AD and BP processing and other contractors who were engaged by the Company on successive contracts to provide labour services at the facility.

2. The affected fixed term employees, the contractors and "their workers", now claim that they are entitled to severance benefits from the Company as a result of the closure of the plant. The Contractors and "their workers" contend that they were employees of the Company and not independent contractors.

3. The workers engaged directly by the Company were employed pursuant to fixed term contracts for less than 104 weeks in duration and as such these workers are not entitled to any severance benefits as claimed. There were breaks of up to 3 weeks between the successive contracts and as such there was no continuity of employment over the period of the successive contracts. There was no automatic renewal clause and persons would have been advised if and when needed.

4. There is no dispute that the workers who were engaged on fixed Term Contracts were employees of JBGL. However the Company's position is that the workers engaged by the Company were employed pursuant to fixed term contracts for less than 104 weeks in duration and, consequently these workers are not entitled to any severance payments as claimed.

5. Under the **Employment Termination and Redundancy Payment Act** an employee engaged on fixed term contract may qualify for redundancy payments.

   Section 5(5)(b) of the **Ac**t, states:

   "for the purposes of this section an employee shall be taken to be dismissed by his employer-

   (b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract."

6. Further, an employee who has been engaged on successive fixed term contracts, may only qualify for redundancy payments if the interval between the contracts is not more than two weeks. **Section 4(5)** of the Employment **(Termination and Redundancy Payments) Act regulations states** in this regard that:

   "if after an interval of not more than two weeks after the ending of an employee's contract of employment his employer renews his contract or re-engages him in accordance with paragraph 9b) of subsection 6 of section 5 of the Act, the period of that interval shall count as a period of employment."

7. Only persons who have been continuously employed for a period of 104 weeks are entitled to redundancy payments. In cases where employees are re-engaged on successive fixed term contracts, the interval between each contract term must be in excess of two weeks in order to break the continuity of the employment, failing which, the employment will be deemed to be continuous employment which may qualify such employees for severance payment under the Employment Termination and Redundancy Payments Act.

8. Mrs. Charmaine Silvera, the Group Human Resource Manager, gave evidence on behalf of the Company. She gave evidence as to the different categories of workers at the JBGL and particularly at its division formerly called Content Agricultural Products. She testified that among the categories of workers were employees engaged on fixed term contracts and who provided services in the loading bay, sanitation and inventory areas. These contract employees were supervised by the salaried employees of Jamaica Broilers. These workers were required to sign written contracts and the contracts were prepared by the Human Resource Department. The workers were engaged for 11 months each contract period and they were paid fortnightly by the Company.

9. It has been submitted by Mr. Duncan on behalf of the workers, that the interval between the contracts was partly for vacation leave and so the interval period would constitute a period of employment. Mrs. Silvera however, rejected this suggestion. Her evidence, which was unchallenged, was that on expiry of the contracts, on the final day of the contract term, workers were paid any outstanding obligations due to them to include pay in lieu of any vacation not taken during the contract period.

10. Throughout his presentation, Mr. Duncan made much of the fact that the workers may not have been given time-off during the contract period and that the break must have been meant for "holiday with pay." However, it was Mrs. Silvera's evidence that in the event a contract worker wanted to access vacation leave during the term of the contract, this was permitted, if the employee qualified for the leave. In any event, the law is quite settled that where a worker does not take vacation leave with pay or is not granted vacation leave during the period of his employment, the employer's obligations under the **Holiday with Pay Order,** are satisfied if the employer pays the employee, on termination of his employment, a sum of money equal to holiday remuneration earned but not granted on the basis that all the holiday were then being granted. See Panton J in **Cecil July v Kirk Hall SCCA 3 of 2011.**

11. In the circumstances, by paying the workers for any unused vacation on maturity of the contract, which was the end of the employment in that contract, the company

discharged its obligations to the workers. This evidence is unchallenged, as no fixed term contract employee has testified to this tribunal, that they were not paid for unused vacation leave at the end of the contract period as indicated by Mrs. Silvera.

12. In these circumstances, it is submitted that legally, the 3 weeks break period or any part thereof cannot be regarded as a period of employment and at the same time was not vacation. This is because, all outstanding obligations having been settled on expiry of the contract term, as a matter of law, the interval period was not a period of employment. Notwithstanding that 2 of the 3 weeks were treated as vacation. Miss Cyrene Cargill clearly stated in re-examination, that no payments were made to the fixed term workers during the break. This is indicative of the fact that even if the period was commonly referred to as vacation, as a matter of law, it could not be paid vacation under the Holiday with Pay Order. There were no obligations due to the employees during the break period that could result in any of that period being construed in law as holiday with pay or other period of employment.

13. In the circumstances, it is submitted that as a matter of law, the 3 week period or any part thereof, could not be regarded as a period of employment or as vacation. This is because, all outstanding obligations having been settled on expiry of the contract term, as a matter of law the interval period was not a period of employment. This is notwithstanding the fact that 2 of the 3 weeks were treated as vacation. Miss Cyrene Cargill clearly stated in re-examination, that no payments were made to the fixed term workers during the break. This is indicative of the fact that, even if the period was commonly referred to as a vacation, as a matter of law, it could not be treated as paid vacation, under the Holiday with Pay Order. There were no obligations due to the employees during the break period that would result in any of that period being construed in law as Holiday with pay or other period of employment.

14. This would be the case even if the employees or even a representative of the company (Miss Cargill), called or treated the break period to include vacation leave. This is because as a matter of fact and law, the contract expired at the end of the contract period and there were no obligations owing by either party to the other, during the interval period.

15. Accordingly, it is submitted that as a matter of fact and law, the interval period of 3 weeks cannot be regarded as a period of employment. It follows therefore that accordingly, these fixed-terms workers were not continuously engaged by the Company for any period in excess of 104 weeks and therefore they would not qualify for severance pay under the Employment (Termination and Redundancy Payments) Act.

16. It is our further submission that the evidence led before this tribunal leads inexorably to a finding fact that no fixed term worker was engaged continuously for longer than 104 weeks and that no benefits arising from their engagement by the Company arose and/or was paid during the contract breaks. If this tribunal so finds then it must also rule that the Fixed Term Workers are not entitled to severance benefits from the Company.

17. Miss Cyrene Cargill also gave evidence relevant to the issues touching and concerning the contractors and their workers. She worked with the company for over 25 years, first as an administrative assistant and later as a Representative. Her duties were to be liaise, between the Group HR department and the local division at Content, in terms of administrative matters, such as communications, correspondence, disseminating information as it relates to Content and the workers at Content. She never worked in the plant.

AGGRIEVED WORKER'S CASE

On the other hand it is contended on behalf of the aggrieved individual workers who were directly engaged on Fixed Term Contracts with JBGL that:

They were paid for any outstanding vacation leave at the stipulated end of the contract period and after a break period the contracts were renewed.

1. The period of the break and the resumption of work under a new contract was three weeks or less, two of those three weeks being the period to cover vacation leave and the vacation leave period must not be counted as part of the break /period and by

doing so the Company is in breach of **Section 4(5)** of the **Employmen**t **(Termination and Redundancy Payments) Act Regulations** which states:

> ***"if after an interval of not more than two weeks after the ending of an employee's contract of employment his employer renews his contract or re-engages him in accordance with paragraph (b) of subsection 6 of section 5 of the Act, the period of that interval shall count as a period of employees."***

TRIBUNAL'S FINDINGS/ CONCLUSION:

In determining the questions of whether or not there was a break in these contracts, careful attention has to be paid to the evidence of Mrs. Charmaine Silvera, Group Human Resource Manager, who testified on behalf of the Company. The following relevant excerpts from her evidence, given under cross-examination are reproduced below:

Q:	*For the purpose of this matter here now, let's discuss the vacation leave issue. For those who are on fixed term how much would they be entitled to?*
Chairman:	*How much what?*
Mr. Duncan:	*Vacation leave?*
A:	*If an employee is on fixed term contract he is employed and engaged for a period of 11 months and three weeks, he would be entitled to ten days.*
Chairman:	*Keep up your voice, please.*
A:	*If a fixed term contract employee was engaged for a period of 11 months and three weeks, they would have been entitled to ten days vacation.*

This portion of the evidence indicates that the employees would be entitled to two weeks vacation leave.

Q: *Now, did you bring with you or does the Company have evidence of the duration of time that these employees worked with the Company, these that are on the front page of Exhibit number 22?*

A: *I can tell from my knowledge these persons would be employed with the Company on fixed term contract no longer than a period approximately 11 months and three weeks*

Q: *And the contract would be renewed from time to time?*

A: *Correct.* (notes of proceeding - 5th sitting)

The above testimony clearly indicates that these contracts were renewed from time to time.

Q: *Therefore, Mrs. Silvera, at what stage of that -- sorry, let me rephrase it. You have indicated to this Tribunal that your understanding of fixed term contract is that at the end of -- the end date of the contract is when the contract ends, is that what you are saying?*

A: *That is so.*

Q: *But you not taking into consideration the payment for that two weeks-- for that two additional weeks which they serve, you are not agreeing with me on that?*

A: *The two weeks or any vacation leave that is outstanding is paid to them on the last working day of their employment to the Company.*

Q: *And if the law indicates that a worker is entitled to serve holiday with pay and throughout the entire year 11 months and three weeks the workers were not given or served or paid vacation leave, but at*

the expiration they are paid two weeks, you don't agree with me that the two weeks is to be served?

A: *No, if they chose to take or request vacation leave at the end of the contract that may be granted if they so wish. If it is not taken during the period of the contract the Company has a legal right within the law to pay them their due vacation on the last working day.*

Q: *Thank you very much, Mrs. Silvera. Now, Mrs. Silvera, I am putting it to you that by including the vacation leave in the two weeks as part of the interval, that you have come to the decision that it is more than two weeks break that these workers serve?*

A: *I don't agree with you, Mr. Duncan. The persons that are employed or were employed on fixed term contracts and when the contract matures they are not employed to the Company and so there is no serving of two weeks in any interval of contract.*

Q: *I am also putting it to you Mrs. Silvera, that the interval between the ending of the contract and the resumption of work is less than two weeks?*

A: *I am not aware of that, the intervals or breaks between contracts are at most three weeks*

Q: *And this arrangement is for those workers who were on fixed term contracts employed to the Company and those other workers who were, as the Company called it, engaged with Pusey and Dixon.*

A: *Yes.*

This portion of Mrs. Silvera's evidence indicates that the workers are paid for their vacation leave at the end of the contract period on the last working day.

It is also important to take into consideration, the evidence of Miss Cyrene Cargill, Human Resource Administrator, who testified that in regards to the Fixed Term Contract workers, they received a one week break and two weeks vacation at the end of the contract period but under re-examination she clarified that the workers were paid for two weeks vacation leave.

In determining and settling the issue of whether or not the service of these employees (Exhibit 22) who were engaged on Fixed Term Contracts to Jamaica Broiler Group Limited was continuous or broken, the Tribunal will refer to the Holiday with Pay Order, 1973, for guidance. The relevant sections taken into consideration are:

2(2) For the purpose of this Order a worker shall be deemed:-

(a) to have worked, on any day of holiday with pay granted to him under this Order, for the employer by whom such holiday was granted;

7(1) Upon termination of the employment of any worker his employer shall:-

(a) where that worker earned any holiday with pay which was not granted before such termination, pay him a sum equal to the holiday remuneration which would have been payable to him if all such holiday were then being granted;

It is plainly clear to the Tribunal that under section 2(2) (a) above, where a worker is **granted** vacation leave (i.e. takes leave) during the duration of the employment, that worker is deemed to be at work. Therefore the service is not regarded as broken, but is continuous.

However, on the other hand under section.7 (1) where the worker had earned vacation leave during the duration of the contract and the leave was not **granted** (i.e. not taken) but paid for in lieu thereof after the expiration of the contract, said worker is not deemed to be at work, therefore the service is not regarded as continuous but broken.

Accordingly, on the evidence adduced and taking into consideration all the circumstances of this dispute, these employees are not entitled to redundancy benefits on the basis that they do not meet the basic qualification of working 104 weeks continuously, with the Jamaica Broilers Group

Limited and the Company is therefore not in breach of **Section 4(5)** of the **Employment Termination and Redundancy Act** as contended on behalf of the aggrieved.

> *"(B)* ***To determine and settle the dispute between the Company on the one hand and the workers contracted to A.D. Processing and B.P. Processing as per the attached list on the other hand, over***
>
> ***i. Whether these workers were employees of A.D. Processing and B.P. Processing or employees of the Company;***
>
> ***ii. Whether these workers are entitled to redundancy payments arising from the closure of the Content Meat Processing Facility in September 2012, and if yes, from whom."***

COMPANY'S CASE

In reinforcement of its position that the workers were contracted to the two entities named in the terms of Reference, the Company adduced evidence and made submissions in support, as follows:

The witnesses for the Company testified that the Company engaged contractors to provide labour services at Content Agricultural products in certain departments, such as the burger room - Basil Pusey (BP Processing), marination and slaughtering - Aundrey Dixon (AD Processing), laundry - Tisley Worrel and Canteen - Sonia Wallace (SW Catering). These contractors were engaged as independent contractors who were required to provide the services as mentioned. It was necessary for them to hire their own workers to perform the services. The Company's position is that neither they nor their workers are entitled to claim severance benefits from the Company, arising from the termination of the contract between the Company and the Contractors.

Even though much emphasis has been placed on the definition of worker in the LRIDA the fact is that the claims that are being made before this Tribunal are for entitlements under the ETRP Act and as such the definition of employee in that statute is the applicable definition.

The Tribunal must therefore determine whether the workers had a contract with JBGL as employer. The ETRPA does not set out the relevant tests to determine what constitutes a contract with an employer and so regard must be had to the common law.

Many tests have been developed by the courts and tribunal over the years and this is indicative of the difficulty that often presents in determining the exact nature of a relationship. These include:

a. The control test

b. The organization or integration test

c. The mixed multiple test

d. The economic reality test

e. The mutual obligations test

In **Franks v Reuters Ltd and another** [2003] IRLR 423 CA, the Employment Appeals Tribunal in the United Kingdom opined that:-

Before characterizing the relationship, **the tribunal must make clear and comprehensive findings of fact on the relevant evidence, including not only any documentation, but also the circumstances surrounding it, the subsequent conduct of the parties, and the way in which the parties operated and understood the situation.** Unless and until the tribunal has conducted this exercise and obtained an overall picture of the work relationships between the parties, it is impossible in many cases for it to reach an informed and sound conclusion on whether there is mutuality of obligation in the form of an express or implied contract of service.

It is clear from the passage above that the Tribunal will have to look at the matter broadly and appreciate that the presence of some of the features of the different tests (as for example control, the owner of plant and machinery) do not necessarily mean that their was a contract of employment between the Contractors and their workers on the one hand and the Company on the other. This is especially so given the express terms of the contracts between the Contractors and the Company which even though not conclusive, indicate the intentions of the parties.

It is the Company's submission that in order to look behind the signed contracts the Tribunal should be provided with cogent and credible evidence that the terms of the contracts were not a genuine reflection of the intention of the parties.

There was no evidence led before this Tribunal on behalf of Aundrey Dixon, Tinsley Worrel or Sonia Wallace.

It is our submission that as regards these contractors the Company's evidence is unchallenged and the Tribunal ought to find that they were all contractors engaged by the Company to provide specific services and were not employees.

Mr. Basil Pusey was the only contractor to give evidence and his evidence conflicted with the evidence presented by the Company and the written contracts and other documentary evidence put before the Tribunal. The Tribunal must therefore determine whether Mr. Pusey is a credible witness and for reasons set out below we submit he is not. Before turning to Mr. Pusey's evidence we must first consider the evidence of the Company on these issues.

Several contracts were tendered in evidence. These contracts were between the Company and Mr. Pusey. The evidence was that he signed successive contracts since 2001. Exhibit 11 is an example of the contract entered between the Company and Basil Pusey. The contract provided inter alia:

(a) Clause 1 - the Contractor agrees to assume the responsibility of Contractor in respect of ground Meat Operations at the Company's meat processing plant for a period of 12 months from the 2nd day of May 2011 at a fee and condition as stated in the attached schedule.

(b) Clause 2 - during the continuance of this agreement he will employ, maintain, supervise and control a workforce of the size and skill as he sees fit at the locations and at times established by the Company from time to time.

(c) That he will establish terms and conditions of employment for not less than those established by the company for the general guidance of contractors

(d) That he will provide benefits such as health insurance and group life insurance for his employees

(e) That he will take such disciplinary action as is required by the company from time to time

(f) That he will ensure that all statutory obligations for his employees are met.

Clause 6 of the agreement provides that:

> *"it is clearly understood and agreed by the parties hereto that the Contractor and or his employees, servants or agents are not employees of the company and that the Company is not responsible in any material respect for such employees, servant or agents of the contractors."*

The evidence of Mrs. Silvera was that the contractors recruited their workers and that the contractors would submit invoices to the company from time to time for services performed and these invoices would be paid. After a point in time the Contractors engaged Resource Options, a human resource company, to submit invoices and receive payments on their behalf. A letter of authority to the company from Mr. Pusey was tendered in evidence at exhibit 24. By this letter Mr. Pusey authorized the company (JBGL) to make his management and labour fees payable to Resource Options. The evidence is also that statutory returns and payroll for the contractor's staff were also done by Resource Options. The agreement required the contractor to provide proof that he was tax compliant and the company was in receipt of documents from Resource Options in furtherance of this contract obligation. The Employer's Annual Return prepared for Mr. Pusey by Resource Options is marked exhibit 2 and invoices prepared on behalf of B.P. Processing and submitted to the Company for payment is marked exhibit 26. Similar instructions were received from Aundrey Dixon with respect to A.D. Processing.

Much has been made, by the worker's representative Mr. Duncan, of the determination by the Company as to what is to be made in the burger room as being indicative of the control by JBGL over the workers so as to indicate a contract of employment. However, even if, which is not admitted, this was indicative of control, it must be viewed in the context of the company's business and that the quantity of products to be produced must be determined by market demand, which

would have to be communicated to the Contractor. Note that the evidence is not that the Company told the workers how to perform their jobs, but the quantities that were required for production from time to time.

Due to the nature of the products being manufactured at the Content facility and high cost of the necessary machinery, it was agreed that the Company would continue to provide the machinery and the Contractors would provide the workers. This was the evidence of Mrs. Silvera who indicated that the cost of machinery was high and that the company also wanted to ensure that the equipment used in the manufacture of its products was of a high standard. She also indicated that safety gear was provided by the company and that the reason for this was that the company had international guidelines that it had to maintain. This is not surprising in view of the Company's reputation and market share, not just locally but internationally.

Much has been made by the worker's representative Mr. Duncan of the determination by the Company as to what is to be made in the burger room as being indicative of the control by JBGL over the workers so as to indicate a contract of employment. However, even if, which is not admitted, this were indicative of control, it must be viewed in the context the company's business and that the quantity of products to be produced must be determined by market demand which would have to be communicated to the Contractor. Note that the evidence is not that the Company told the workers how to perform their jobs, but the quantities that were required for production from time to time.

Miss Cyrene Cargill also gave evidence relevant to the issues touching and concerning the contractors and their workers. She worked with the company for over 25 years, first as an administrative assistant and later as a HR Representative. Her duties were to liaise between the Group HR Department and the local division at Content in terms of administrative matters such as communications, correspondence, disseminating information as it relates to Content and the workers at Content. She never worked in the plant.

She denied that she circulated contracts from the Company to the Contractors workers. Her evidence was that she would distribute the contracts received from the HR Department between the Company and the Contractors to the Contractors. However as it relates to the Contractor's workers, her evidence was that sometimes the contracts were sent to her by Resource Options

and she would give them to the Contractors for them to distribute to their workers. She also indicated that sometimes Resource Options would take the contracts for the workers to the Contractors themselves but other times they would send them to her for her to distribute to the workers.

Miss Cargill denied that she exercised any disciplinary control over the Contractors and their workers. She expressly denied the suggestion by Mr. Pusey that she had disciplined him. It is to be noted that Miss Cargill's position was a HR Representative and she did not work in the plant on a daily basis, therefore making her evidence all the more credible.

It is submitted that Mrs. Silvera, Mr. Fairman and Miss Cargill gave their evidence in a cogent and fair manner. Their demeanor was good and we ask the Tribunal to accept them as a witnesses of truth.

We ask that this Honourable Tribunal finds that Basil Pusey was his own boss and the workers engaged by BP Processing were his employees. If the Tribunal so finds, it is Mr. Basil Pusey who must pay his employees' severance benefits and not the Company.

CASE FOR THE AGGRIEVED:

The contentions of the Company are countered by the aggrieved workers on whose behalf the following submissions and evidence are provided in support of their position that they were employees of JBGL and were not employed to AD Processing and BP Processing.

Mr. Basil Pusey testified on behalf of the aggrieved and the relevant portions of his testimony can be best summarized as follows:

He never made an application to enter into a contractual relationship with the Company. In or around 1995 he was made redundant and was called into the Board room and given a contract to sign. Before that he knew nothing about what was taking place as the managers who were present explained nothing to him.

- Having signed the contract to protect the security of his job, he was given the position of Supervisor at Content Meat processing Plant where he performed the duties of supervising staff in the Burger Room.

- He signed several other such contracts with the Company over the years, the final one being in 2011. After he signed these contracts, his working life continued as before the contracts were signed and he remained as a supervisor at Content. He also testified that he did not seek legal advice or other advice on the contents of the contract. Nor did he complain to anyone in the management of JBGL that he was not in agreement with the terms despite the fact that on his account what was written in the contracts was not obtained.

- The documents that he signed such as statutory returns, authorization to an agency Resource Options to do work on AD Processing's behalf, invoices for work done etc were not prepared by him, but given to him to sign by the General Manager of Content or Miss Cargill, Administrative Assistant.

- Although he supervised the workers he never interviewed, recruited or employed any worker. It is his further testimony that new workers were sent to him by Miss Cargill the Administrative Assistant employed to JBGL.

- On the matter of discipline it is Mr. Pusey's evidence that he did not discipline the employees but he was disciplined twice by Miss Cargill. This Miss Cargill denied.

- Salary and wages he does not manage or have any input in determining, neither is he consulted on any matter regarding the welfare of the staff he supervises. On the matter of the rate for the work done in the Burger Room this rate is adjusted from time to time without his involvement in the determination of the new rate.

- The Company provides him with a Health Card in a similar manner in which the other members of staff including those whom he supervised are provided. Also he along with the staff he supervised were provided with breakfast at subsidized rates and a lunch free of cost to him and the other workers by the company.

Mr. Glenmore Mcfarlane also gives evidence on behalf of the aggrieved workers. He testified that he sought employment with the Company through his friend Cyrene Cargill, the Administrative Assistant of Content in 2001. He was asked to do a math test and write an application. When he got the job he received no job letter and he did not sign a contract with the Company, instead he was asked to sign a contract with A.D. Processing. A.D. Processing also appeared on his pay slip. He was concerned by this as Mr. Aundrey Dixon was his supervisor not his employer. He did not raise the issue with Mr. Dixon or the General Manager but he decided to raise his concerns with Miss Cargill who he regarded as his boss. In this letter to his boss Ms. Cargill he expressed his concerns and requested a meeting. His request for a meeting was not granted. This witness testified also that he witnessed the General Manager of Content, Mr.Fairman taking disciplinary action against an employee who worked in the Burger Room.

It is further submitted on behalf of the aggrieved that:

I. The Tribunal should determine this dispute in accordance with the definition of a worker as defined under the Labour Relations and Industrial Disputes Act (LRIDA) as amended in March 2002.

II. That Basil Pusey had no control over the activities that took place at the Content Plant for the following reasons.

- The working hours were solely determined and fixed by the Company
- The payment of the workers wages was managed by the management of Content Plant through its parent company and Mr. Pusey had no contact or business association with Resource Options. He was merely given documents to sign as he had no input in the preparation of those documents.
- All the raw material, tools and equipment to do the job were provided by the Company.
- The quality and amount of what is to be produced was solely determined by the management of the Company.

- The workers were provided with benefits such as medical insurance, lunch, breakfast and enjoyed other staff welfare facilities such as membership in the credit union at the discretion of the management of the Company.

CONCLUSION AND FINDINGS

The relevant issue for the Tribunal to consider in settling this section of the Terms of Reference is to determine whether Basil Pusey the registered Owner of BP Processing was performing duties on a contract **for** service or on a contract **of** service and by extension those workers whom he supervised in the Burger Room.

The Company (JBGL) contends that Basil Pusey was engaged as an Independent Contractor and the workers whom he supervised in the Burger Room were employed to him through his company B.P. Processing. On the other hand Basil Pusey contends that he did not employ any worker, all he did was to supervise them

In determining this dispute the Tribunal will be guided by the definition of a "Worker as contained in the LRIDA, an Act to amend the LRIDA dated 28th March, 2002" which reads "inter alia"-

> *'Worker' means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direct, supervision and control of the employer regarding hours of work, management of discipline and such other conditions as are similar to those which apply to an employee."*

In the dictum of Denning L.J. in Stevenson, Jordan and Harrison Limited v. McDonald and Evans (1952) ITLR 101, opined that "it is often easy to recognise a contract of service when you see it but difficult to say wherein the difference (between it and a contract for services) lies."

In an Australian Government publication-"How to determine if a Worker is an Employee or an Independent Contractor" the following points are of interest:

- *Most independent contractors run their own business, control their own working times and decide how and where they undertake work. Many independent contractors also advertise their business, provide their own tools and equipment and may pay others to carry out work on their behalf.*

- *In contrast, employees are typically subject to controls on how, where and when their work is performed. They are paid regularly and cannot pay someone else to do their work for them.*

- *How do i know if they are an independent contractor?*

- *The courts have adopted a multi-factor test to determine whether a person is an employee or independent contractor. No single issue will be determinative.* ***However, courts will place greater weight on some matters, in particular, on the right to control the manner in which the work is performed***

- *In applying the test, a court will look at the whole relationship and make a decision on balance. Any written agreement stating the nature of a relationship as either employment or contractual is relevant but not conclusive.*

Also of interest is an extract taken from a publication by **United States Department of Labour-IRS 20 factor test-Independent Contract or Employee?**

The IRS test often is termed the "right-to-control test" because each factor is designed to evaluate who controls how work is performed. Under IRS rules and common-law doctrine, independent contractors control the manner and means by which contracted services, products, or results are achieved. ***The more control a company exercises over how, when, where and by whom work is performed, the more likely the workers are employees, not independent contractors.***

The International Labour Organization (ILO) is the peak international labour regulation forum that discusses issues of relevance to workers world-wide and passes resolutions from which it hopes the member states will enact regulations consistent with the ILO resolutions. The ILO is principally concerned with workers' right; however they may be defined makes the following points, in a presentation entitled **Open Submission to members of the International Labour**

Organization discussing "The Scope of the employment relationship" at the 91st session of the ILO, June 2003.

What is Independent Contracting? A general overview:

- *Independent contracting is one of those things which, when understood, appears very simple. Yet, when not understood, it appears unfathomably complex. And it is on the basis of alleged complexity and confusion that the ILO discussion paper mounts many of its arguments*

- *Independent contracting is the achievement of an individual's desire to have control of his or her own working life. This reality is reflected in its legality held sacred under well developed principles of law. Independent contracting comprises both an attitude and a set of behaviours.*

- *Independent contractors are, by definition, people who want, and have achieved, independence in their thoughts and actions in their working lives. They have adopted business attitudes as their working life motivations. They accept the disciplines of the commercial contract- in which they exercise equal rights to control the terms of their contract/s - as the process by which they organize their work.*

- ***And it is only when the reality of this organized independence along contractual lines is clear evidence, that the courts will accept that independent contracting exist. Where the tag of 'independent contracting is used but the real-life evidence presented to a court indicates traditional employment -type control, the courts reject the independence tag and state the truth***

The amendment (2002) to the Labour Relations and Industrial Disputes Act, mentioned above made the vital distinction between a "contract of employment" (which would normally exclude a contract with an independent contractor), and a "contract however described." The new definition requires the adjudicating body to look at the substance of the transaction and not the form of words which the parties have used. If in substance the relationship between the parties is that the worker works under the direction and control of the employer as described in the definition, then that worker is an employee.

Having given very careful consideration to the evidence presented, the submissions of both parties, the definition of a "worker" under the Labour Relations and Industrial Disputes Act (LRIDA) and other various definitions from other jurisdictions which is seen and appear to be consistent with the Jamaican definition which sets out the applicable tests to determine who is an independent contractor, the Tribunal therefore concludes that under item (i) of Part B of this Terms of Reference

I. Basil Pusey (BP Processing) signed documents indicating that he was an independent contractor but in reality he was an employee of the Company performing supervisory duties and consequently the workers he supervised and whom the Company claims were employed to him, were employees of the said Company.

II. Whereas this Tribunal has, on the evidence adduced, found evidence to support its conclusion that these persons named in the list were not employees of BP Processing (Basil Pusey) but to the Company (JBGL), it has found no evidence which conclusively supports any contention that their periods of service were continuous for a duration of 104 weeks, which would entitle them to redundancy payments under the Employment Termination and Redundancy Payments Act, (1974).

Therefore the Tribunal accepts the evidence of Mrs. Silvera that this group of workers were treated in like manner to the Fixed Term contract workers in terms of vacation and the interval between contract breaks and renewal.

It must be noted that the Tribunal did not have the benefit of hearing testimony from Aundrey Dixon (A.D. Processing), Sonia Wallace (S.W. Catering) and Tisley Worrel (T.W. Laundry Service) all three of whom the company claimed were Independent Contractors, similar to Basil Pusey (B.P. Processing).

AWARD

The Tribunal accordingly makes the following Award.

a) In respect to Part A of the Terms of Reference the Tribunal finds that these workers are not entitled to severance payments.

b) In respect to Part B of the Terms of Reference the Tribunal finds as follows:

i. that these workers were employees of the Company Jamaica Broilers Group Limited at the Content Plant.

ii. that these workers are not entitled to redundancy payment.

DATED THIS 18th DAY OF DECEMBER 2015

.....
Norman Wright Q.C.
Chairman

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Rion Hall, JP
Member

.....
D.Trevor McNish
Member

INDUSTRIAL DISPUTES TRIBUNAL JAMAICA

Witness:

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Gary Lediard
Secretary to the Division