

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 9/2020

SETTLEMENT OF DISPUTE

BETWEEN

NATIONAL WATER COMMISSION

AND

KEVIN WILLIAMS

AWARD

I.D.T. DIVISION

MR. DONALD ROBERTS, CD., JP.	-	CHAIRMAN
MRS. JACQUELINE IRONS, JP	-	MEMBER
MRS. CHELSIE SHELLIE-VERNON	-	MEMBER

APRIL 10, 2024

DISPUTE NO. IDT 9/2020



INDUSTRIAL DISPUTES TRIBUNAL
AWARDS
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
NATIONAL WATER COMMISSION
(THE COMPANY)
AND
MR. KEVIN WILLIAMS
(AGGRIEVED WORKER)

REFERENCE

By letter dated May 12, 2020, the Hon. Minister of Labour and Social Security, pursuant to Section 11A (1)(a)(i) of the Labour Relations and Industrial Disputes Act, 1975 ("the Act") referred to the Industrial Disputes Tribunal ("the Tribunal") for settlement, the dispute between the National Water Commission and Mr. Kevin A. Williams with the following Terms of Reference: -

"To determine and settle the dispute between the National Water Commission on the one hand, and Mr. Kevin Williams on the other hand, over the termination of his employment by reason of redundancy".

DIVISION

The division of the Tribunal selected in accordance with Section 8(2)(c) of the Act to deal with the industrial dispute comprised:

Hon. Mrs. Justice Marjorie Cole-Smith (Retd) - Chairman
Mrs. Jacqueline Irons, JP - Member, Section 8(2)(c)(ii)
Mrs. Chelsie Shellie-Vernon - Member, Section 8(2)(c)(iii)

REPRESENTATIVES OF THE PARTIES

The **Company** was represented by:

Ms. Angela Robertson	- Attorney-at-law
Mr. Christopher Cowan	- Attorney-at law
Mrs. Andrea Gyles	- Vice President, Corporate Services
Mr. David McDonald	- Industrial Relations Manager

The **Aggrieved** was represented by:

Mr. Kevin Williams	- Attorney-at-law (self-represented)
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In attendance:

Ms. Marjorie Segree	- Former employee
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SUBMISSIONS AND SITTINGS

The parties submitted briefs to the Tribunal and made oral presentations over fifty-three (53) sittings covering the period August 13, 2020 through to February 28, 2024. Over the course of the sittings the Tribunal examined forty-nine (49) exhibits along with testimonies by way of oral evidence.

At the start of the proceedings both parties submitted that although there were two separate terms of references relating to Mr. Williams and Miss Segree, the facts surrounding the disputes are quite similar in many respects. They therefore requested the Tribunal to consider treating the matter jointly.

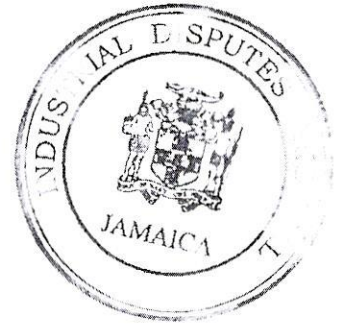
The Tribunal granted the request to the application, in accordance with the powers granted to it under Section 20 of the Labour Relations and Industrial Disputes Act, and advised the parties that, in light of the referrals, two separate awards would have to be written.



Before the commencement of the 26th sitting on September 6, 2022, the Chairman, Justice Mrs. Marjorie Cole-Smith, demitted office and the parties were advised that Mr. Donald Roberts was assigned as the new Chairman of the panel. Consequent on that the parties in writing, agreed, pursuant to Section 8(4) of the Labour Relations & Industrial Disputes Act, that they would wish for the proceedings to continue as if they were not interrupted.

The new panel assigned to continue hearing the matter comprised of:

- Mr. Donald Roberts, CD, JP - Chairman
- Mrs. Jacqueline Irons, JP - Member, Section 8(2)(c)(ii)
- Mrs. Chelsie Shellie-Vernon. - Member, Section 8(2)(c)(iii)



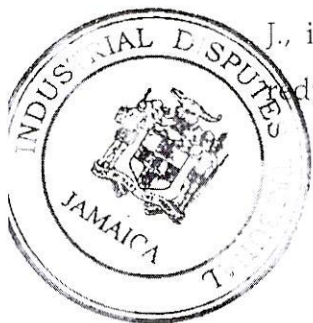
BACKGROUND TO THE DISPUTE

1. The employer, the National Water Commission (hereinafter referred to as "the NWC"), is a statutory organisation charged with the responsibility of providing potable water and wastewater services for the people of Jamaica. Mr. Kevin Williams, ("the aggrieved worker"), was employed to the National Water Commission as Vice President, Legal Affairs, Properties & Compliance, and was also the Corporate Secretary to the NWC's Board.
2. In 2015, the NWC began a review of its Organisational Structure. It contends that since its last review in 2003, there has been a shift in its strategic direction, and as a consequence the existing organisational structure should be reviewed and recommendations made for the decentralisation of the operations of the NWC into two regions: East and West.
3. A consultant, Mr. Tony Lewars, was engaged by the NWC to review the existing structure and make recommendations to correct issues across the organisation relating to lack of co-ordination, potential conflict and friction among internal groups, unclear roles and function overlaps, among others.

4. The recommendations arising from the report resulted in the consolidation of a number of senior management positions, more so, a reduction in the number of Vice Presidents, including those covering the functions of Legal Affairs, Properties and Compliance Management; Planning and Special Projects; Information and Communication Technology; Customer Service, Marketing & Sales; and Human Resources and Corporate Services. The Report noted that the responsibilities of these Vice Presidents would be merged with other units. Discussions were held with the NWC's executive management team, collectively and individually, regarding the proposed changes to the Organisational Structure.
5. A number of new posts at the executive level emerged from the restructuring exercise, and Mr. Williams applied for one of those positions, namely, Vice President, Corporate Services. His application was not successful and he was so advised. This resulted in the NWC terminating his contract of employment on 5th February, 2016, by reason of redundancy.

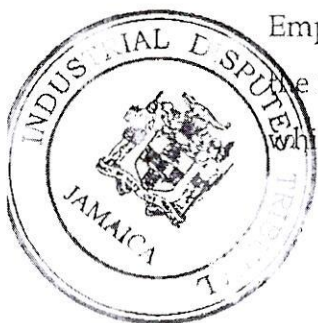
THE COMPANY'S CASE

6. Counsel for the Company, Miss Robertson, made a submission in respect of the Tribunal's jurisdiction to hear the matter of redundancy in light of two previous court rulings. She argued that the Tribunal would have to consider the legal principles relating to redundancy in order to determine whether the National Water Commission was justified in terminating the contract of employment of Mr. Williams.
7. In referencing the two cases: *Cable and Wireless Jamaica Limited v. IDT and Winston Sewell* ([2020] JMSC Civ. 25) and *Chartermagnates Limited v. IDT and Norma Roberts* ([2020] JMSC Civ. 26), Counsel noted that the rulings of Anderson, J., in respect of these cases were that the Tribunal had no jurisdiction to hear redundancy matters. She noted, however, that these rulings have been challenged



and in light of that requested the Tribunal to suspend further hearing on this matter until the Court of Appeal hears the appeal cases and hands down a judgement.

8. The Tribunal, however, decided that it would proceed with the hearing in light of the fact that its authority comes from the Minister of Labour and Social Security, and mentioned that in another case: **Advanced Farm Technologies Jamaica Limited v. Minister of Labour and Social Security** ([2019] JMSC Civ. 192), cited by Ms. Robertson, the Supreme Court took the opposite view that the Tribunal had jurisdiction to hear redundancy matters.
9. In her opening submission, Counsel for the Company said that the terms of reference of the dispute “...are limited to you [the Tribunal] making a determination as to whether or not there would have been a genuine reason for the dismissal by reason of redundancy.” She said the evidence will demonstrate that as part of an on-going organisational redesign, the Board of Commissioners requested a review of NWC’s organisational structure. She noted that the review was conducted by Mr. Tony Lewars and the findings of the Report were acted upon by the Board after all the regulatory approvals were obtained.
10. Mr. David McDonald was the first witness for the NWC. He said he was employed to the NWC since August 2007 and presently occupies the position of Industrial Relations Manager. He described his role as providing “guidance in terms of industrial relations practices, ...labour law practices, and also to advise management and staff on grievance and disciplinary proceedings.”
11. Mr. McDonald said that the NWC has five (5) unions; the Bustamante Industrial Trade Union (BITU), the Jamaica Association of Local Government Officers (JALGO), the National Workers Union (NWXU) and the Union of Private and Public Employees (UPOPE), representing the pre-supervisory and supervisory groups. At the management level there is a fifth union, the NWC Executive Staff Association, which is affiliated to the University and Allied Workers Union (UAWU). He

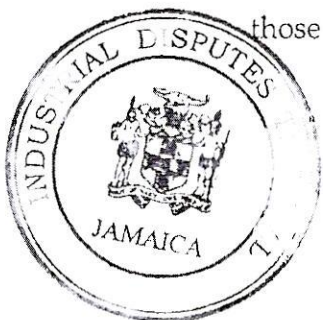


informed the Tribunal that the management level consists of four (4) grades, which are classified as M1, M2, M3 and M4. He said the M4 is the senior management group, and that the Assistant Vice Presidents, Vice Presidents and President, as part of that group, are not represented by any union.

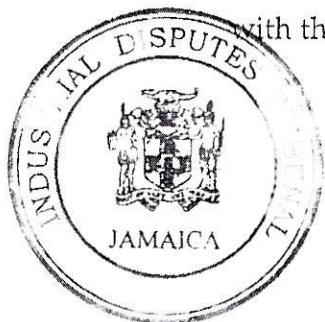
12. Mr. McDonald testified that a restructuring exercise had begun sometime between 2010 and 2011, and remained ongoing as the organisational structure of the NWC had not yet been finalised. He pointed to a letter addressed to Mr. Williams in April 2013, in which he was advised that his new title and function was that of Vice President, Legal Affairs, Properties & Compliance, but that *"the other terms of your [his] current contract of employment will remain unchanged."* Mr. McDonald averred to a paragraph in the letter which states that –

"Your appointment to this post represents the culmination of one phase of the ongoing organisational redesign process, and you will be required to be integrally involved in the full implementation of other phases, including, but not limited to selecting second-tier managers below..." [exhibit 2]

13. He reiterated that the Executive Team Structure in 2013 stopped at the level of Vice Presidents, and that Mr. Williams, in his new appointment as Vice President, Legal Affairs, Properties and Compliance, would be expected to fully participate in the next phase of the organisational redesign to include completing the positions below him in his department.
14. Mr. McDonald averred that to the best of his knowledge the letter of April 2013, appointing Mr. Williams to the position of Vice President was submitted to the Ministry of Finance for approval. Discussions, he said, were ongoing with the unions representing the employees in the pre-supervisory, supervisory as well as the senior management group regarding the re-organisation of the structure, and those discussions continued up to April 2016.

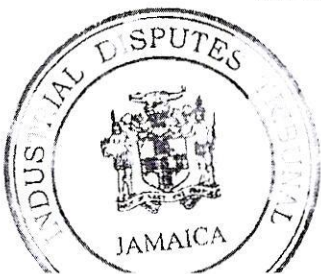


15. He attested that discussion began with the unions in 2012, and a retreat was held involving the President and Vice Presidents of the NWC, along with the Officers and Delegates of the respective unions, where the Vice Presidents were invited to give an overview of their areas of responsibilities and answer questions.
16. He noted that during the retreat the then President made it clear "*that the exercise would not result in any mass redundancy...*", but did not say "*... that there was not going to be any redundancy*". He said following the Management/Union Retreat the parties signed a Heads of Agreement on June 11, 2013 [see exhibit 31] outlining the steps to be taken in the continued re-organisation of the NWC. He highlighted paragraph 2 of the Agreement which stated that - "*the implementation of the new structure will be undertaken on a phased basis which started with the Vice Presidents effective May 1, 2013, and will continue...*"
17. Mr. McDonald said the re-organisation of the structure of the NWC continued since then, resulted in further changes and the engagement of new consultants. He outlined the process involving the creation of new positions in the organisation, stating that these positions would be first advertised internally, and in the event no suitable candidate is selected, then the position would be advertised externally. Mr. McDonald informed the Tribunal that where a position is no longer on the structure, the incumbent would be offered a comparable position, and where there is no comparable position, the position would be made redundant, as stated in paragraph 5 of the Agreement.
18. He made reference to the 2012-2015 and 2015-2017 Heads of Agreements between the Government of Jamaica (GoJ) and the Jamaica Confederation of Trade Unions (JCTU), and said the members of the NWC Executive Staff Association could be entitled to any of the benefits agreed by the GoJ/JCTU that are "industry-wide" with the approval of the Ministry of Finance. This, he said, was set out under item

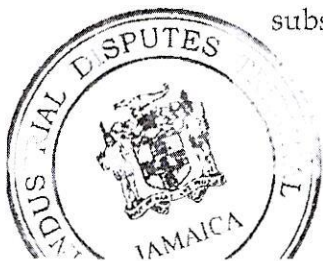


20 of the 2015-2017 Heads of Agreement signed between the NWC and the NWC Executive Staff Association [See exhibit 36].

19. Mr. McDonald testified that the NWC's Grievance Procedure, which is contained in its 'Procedures for the Settlement of Grievances, the Maintenance of Discipline and the Methods of Assessing the Performance of Employees' [exhibit 30] does not deal with matters relating to redundancy.
20. He said the 2004 Heads of Agreement signed between the four (4) Unions representing NWC workers and the National Water Commission [see exhibit 29], spoke of "*red circling arrangements*" in certain given circumstances.
21. Under cross examination Mr. McDonald disagreed with the assertion that clause 4.19.4 of the 2012-2015 Heads of Agreement between the GoJ and the JCTU, dealing with redundancies/separations would remain in force beyond the period of the Agreement.
22. Mr. McDonald conceded that he was not present at any of the 'consultation' meetings involving Mr. Williams or Ms. Segree up to the time of their termination by means of redundancy.
23. Mr. Gladstone Lewars was called as the NWC's second witness. He said he is a retiree but previously worked at Price Waterhouse Coopers as a partner and head of its Advisory Division, which included areas covering Human Resource Management, Organisational Development and Financial Reviews. Mr. Lewars, said he is generally referred to as 'Tony Lewars', and has been in private consultancy since his retirement, with the National Water Commission as one of his clients. He said his consultancy practice focuses on HR matters, including organisational development, job evaluation, developing incentive schemes, doing compensation surveys and corporate governance.

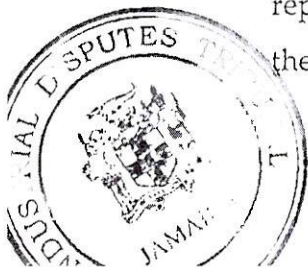


24. Further in his testimony, Mr. Lewars said that he was asked by the NWC *"to review the Organisational structure and to look at it and to come up with a new structure that would basically address the needs and the new vision of the Water Commission."* Mr. Lewars contend that he was aware that an organisational review was done twelve years prior by KPMG and the board thought it necessary to re-examine the structure since they were of the view that it was top-heavy with nine Vice Presidents reporting to the President, and that sixty percent of the top-level staff were involved in administrative matters and therefore less focussed on their core responsibilities at the NWC.
25. He said he was given the exercise either late 2014 or early 2015 and the terms of reference limited the organisational review from the President down to the Assistant Vice Presidents' level. Mr. Lewars testified that he met with the President and the Board before conducting the review, and based on the problems identified applied the *"value chain"* business model to arrive at a new organisational structure to meet the objectives of the NWC.
26. He added that the new structure identified four 'direct reports' to the President, namely; Engineering and Capital Works; Operations divided into East and West, Corporate Affairs to include Industrial Relations, Human Resources, Information Technology and other supporting functions, including Security; and a Vice President for Finance. According to Mr. Lewars this would reduce the number of Vice Presidents reporting to the President to four (4) down from nine (9) previously. The review was subsequently embodied in a document entitled: 'National Water Commission - Review of Organisational Structure, Recommended Divisional Structures,' dated 27th March, 2015. [exhibit 43].
27. Mr. Lewars told the Tribunal that he attended two consultation meetings with the Executive Management Team of the NWC in June and July of 2015. He averred to a subsequent meeting he was invited to by the President to include the Vice



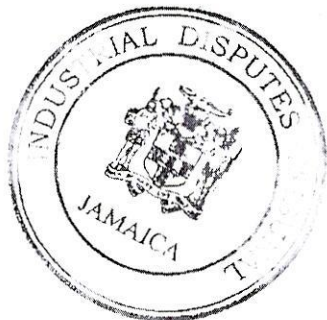
Presidents. At that meeting he and the President *“outlined again the structure, to indicate that some positions would be made redundant”*, and advised the Vice Presidents that they *“could apply for any position that was on the new chart, that they believe that they would be suitably qualified to occupy.”* He explained that the June and July meetings were with all the Vice Presidents collectively, and follow up meetings were with the Vice Presidents individually.

28. Mr. Lewars attested that Mr. Williams was present at the two presentations made in June and July, 2015, as well as a meeting on October 9, 2015, where the final report and the organisational chart were presented. Mr. Lewars said at the October meeting the word *“redundancy”* was used for the first time. He told the Tribunal that Mr. Williams was informed at the October meeting *“that his contract of employment could be terminated by reason of redundancy.”*
29. Mr. Mark Barnett, the President of the NWC was the final witness for the Company. He said he has been employed to the NWC for more than twenty-six (26) years, and was appointed President in October 2015.
30. Mr. Barnett testified that on the instructions of the Board of Commissioners, the NWC began reorganising the Executive group. He said prior to the start of that exercise there were some eleven (11) Vice Presidents and other persons reporting to the President. The services of Mr. Tony Lewars were engaged to examine the then existing organisational structure with a view to ensuring greater synergies and a strategic focus on the core objectives of the NWC. Impediments were also to be identified that would prevent the strategic objectives from being met.
31. Mr. Barnett said that Mr. Lewars provided a report which was discussed by the Board since they had responsibilities for the appointments of the Assistant Vice Presidents, Vice Presidents and the President, the primary area of focus in the report. He stated that the NWC explained its intention, the rationale for conducting the exercise and the proposed structure emanating from the report to the Ministry



of Finance and the Public Service and received its approval. [see exhibit 39]. He further added that the restructuring was discussed with the parent Ministry - the Ministry of Water, Land, Environment and Climate Change - and also received their written approval. [see exhibit 41].

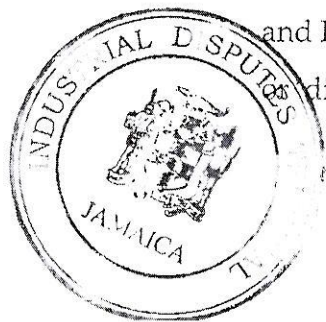
32. The proposed re-organisational structure was discussed with the Executives at a meeting in June and July, 2015, and he along with Mr. Lewars met with the executive members individually, after the two initial meetings. According to Mr Barnett's testimony, no executive member provided feedback on the report between June and October of 2015. He averred that it would have been "*premature*" to use the term 'redundancy' at the July meeting, since the consultation process was to take place, even although it was obvious that there would be a reduction in the number of executives.
33. Mr. Barnett testified that he met with Mr. Williams on October 9, 2015, to discuss with him the changes which would take place arising from the new structure. As his VP position was affected he advised Mr. Williams that he could apply for one of the new VP posts. He further advised him that in the event he was not successful he may be placed in a lower post but would continue to enjoy his existing remuneration. He said at no time during the meeting did he indicate there would be a "*diminution in benefits*" to Mr. Williams, but rather that his salary would be "red circled"; nor did he at any time told Mr. Williams he had the option to resign.
34. The new positions were advertised internally and externally, and most of the executive members applied for positions in the new structure. Mr. Williams applied for the post of Vice President, Corporate Services. Mr. Barnett said Mr. Williams was not successful in his application for the new post and was subsequently advised by letter. Mr. Williams was dismissed by reason of redundancy on February 5, 2016.



35. Mr. Barnett said the appointments of the new executives were done on December 23, 2015, with January 3, 2016, as the effective date, and this was done prior to the termination of Mr. Williams' services by reason of redundancy.
36. Mr. Barnett said that the executives are not part of the Heads of Agreement signed between the Government of Jamaica and the Jamaica Confederation of Trade Unions on behalf of Public Sector workers, since they are not members of a union. He said the Heads of Agreement do not automatically extend to the NWC as prior approval has first to be obtained from the Ministry of Finance before any benefits negotiated between the GoJ and the JCTU can be implemented.
37. He admitted that there was no report going to the board outlining the prospects of redundancy, and that the letter of April 10, 2015 from Mr. Wayne Jones, the Deputy Financial Secretary at the Ministry of Finance and the Public Service, did not give approval for redundancy [*exhibit 38*]. He further stated that Mr. Lewars' report did not speak of 'redundancy' but of 'elimination' of certain posts, and that the Ministry of Labour and Social Security was not informed of the redundancy exercise.
38. Mr. Barnett added that Mr. Williams did not avail himself after the December 17, 2015, meeting, despite the request, for further discussions regarding alternative options for the redundancy.

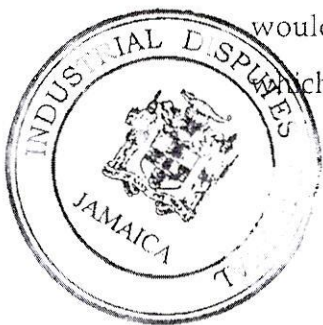
THE AGGRIEVED WORKER'S CASE

39. Mr. Williams, the Aggrieved Worker, was self-represented. In his opening submission, Counsel said that the reason for his termination by way of redundancy, was said to be based on the "cessation" or "diminution" of his functions, as set out by the Chairman of the NWC, Mr. Prakash Vaswani in his letter to him dated February 5, 2016. This, he said, was inconsistent with the Employment (Termination and Redundancy Payments) Act ("the ETRPA"), since there has been no 'cessation' and 'diminution' in his functions as Vice President. He said the Lewars' Report which



triggered the restructuring exercise never mentioned 'cessation' or 'diminution' or the need for redundancy.

40. He further averred that no consultation took place relative to the redundancy, and in any event, he argued that no meaningful consultation could take place because the NWC had not sought and obtained approval prior to any consultation. Counsel argued that at the June 23 and July 21, 2015, meetings there was no indication that there would be consultations with the Vice Presidents and that redundancy was on the cards. He noted that the Lewars' Report was provided to the executives via email on August 19, 2015, and neither the email nor the presentation made reference to redundancy.
41. The Aggrieved Worker said the first reference to redundancy was at the October 9, 2015, meeting where he was advised that new positions would be advertised and if interested he should apply. He made reference to a letter from Mr. Barnett dated December 18, 2015, stating that they could apply for suitable positions under the new structure and if he was not successful his current post would be made redundant. In disputing his redundancy he said he contacted Mr. Oneil Grant, the President of the Jamaica Civil Service Association who wrote to Mr. Barnett requesting a number of documents which were never provided.
42. He testified in examination-in-chief that he disagreed with Mr. Lewars' findings in relation to the role and scope of the Legal Department which was part of his portfolio responsibility at the time. He was never interviewed by Mr. Lewars and that he (Mr. Lewars) "*completely misrepresented what took place in the Legal Department*" when he spoke about duplication and overlapping of duties across departments.
43. He said when he was called to the meeting on October 9, he was told his position would no longer exist on the new structure, and that new positions would be added which he could apply for but if he was not successful he could resign or his position



would be made redundant. He said he was never offered any position of a lower rank and told that he would be red-circled, as suggested by the President.

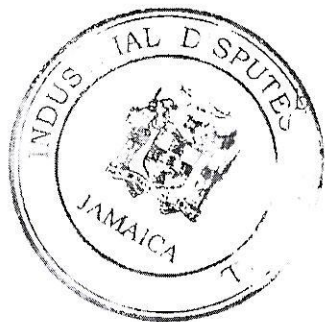
44. He however admitted that he emailed Mr. Wayne Jones about the restructuring exercise sometime in October 2015, noting that his position no longer appears on the new structure and enquiring of the Ministry's policy on 'red-circling'.
45. The Aggrieved Worker affirmed that the Labour Relations Code ("the Code") was not followed in the redundancy exercise, that the management knew of the redundancy from March 2015 but he was only told about it in October of that year. He said the NWC was "bound" by the two Heads of Agreements signed between the GoJ and the JCTU, and that Mr. McDonald was incorrect in asserting that it was not applicable to the NWC. The Aggrieved Worker pointed to the 2012-2015 Heads of Agreement where "there is an express prohibition on redundancy", and in the alternative, where redundancies may be unavoidable prior approval from the Ministry of Finance would first have to be obtained.
46. The Aggrieved said there is no evidence to support the claim that an application was made before the Ministry of Finance's Post Operations Committee (POC), and further asserted that he did not believe an approval was given by the Ministry of Finance as no evidence was provided to Mr. Grant based on his request arising from the February 3, 2016, meeting with Mr. Barnett.
47. He testified that he met with Mr. Barnett in December 2015, which he said was a repeat of the October 9 meeting where he was told that his position was no longer on the establishment and he would be made redundant. He avowed that the entire redundancy process "lacked transparency", there was no consultation with him as the affected party between March 2015, "when it was clear a redundancy would arise", and June at the first meeting with Mr. Lewars.

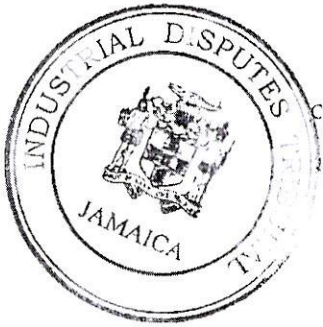


48. He maintained that at the October meeting he was not given an opportunity to make suggestions, and by that time "*we would have long passed the formative stage for effective consultation.*"
49. Under cross examination, the Aggrieved Worker admitted that the executive management group, in which his position falls, was not part of the bargaining unit represented by the NWC Executive Staff Association. He acknowledged that he made no comments during the presentations on the re-organisation/restructuring held on June 27 and July 21, although he conceded that particular aspects of the presentation "*would be of some concern to him.*" [see exhibit 54, p.10]. He suggested that the email sent to him on August 19 from Mrs. Ena Lee, with the attached presentation, did not invite a response.
50. The Aggrieved Worker proffered that when the issue of 'red circling' arose he wrote to Mr. Jones at the Ministry of Finance seeking clarification, as, in his mind 'red circling' at the NWC is either a disciplinary sanction unilaterally imposed, or accepted by agreement.

ISSUES

51. In reviewing the evidence, the Tribunal deliberated on the following issues in arriving at its findings:
- a. Whether the provisions of the Employment Termination & Redundancy Payments Act were adhered to as determinative of the fairness or otherwise of the dismissal;
- Whether, in the event that (a) above is deemed to be compliant with the ETRPA, the NWC, pursuant to the redundancy exercise, acted in conformity with the requirements under Paragraph 11 of the Labour Relations Code; and





c. What weight or consideration, if any, should be given to the 2012-2015 and 2015-2017 Heads of Agreements signed between the Government of Jamaica and the Jamaica Confederation of Trade Unions, in arriving at a decision within the scope of the Tribunal's remit.

ANALYSIS AND FINDINGS

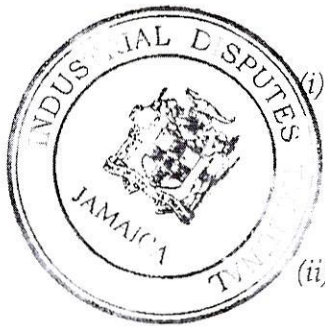
A. Whether the provisions of the Employment Termination & Redundancy Payments Act were adhered to as determinative of the fairness or otherwise of the dismissal

52. It is important at the outset to determine how we should frame our response in view of the fact that we are constrained to act within the confines of the statute governing our jurisdiction. Counsel alluded to our jurisdictional remit when she suggested two notable judgements at the Supreme Court (which were earlier cited), that may very well impact our right to hear matters pertaining to redundancies. A contrary view, we noted, exist in the **Advanced Farms** case ruling where Palmer Hamilton, J. opined that it is well within the jurisdiction of the Tribunal to hear matters regarding 'redundancy' and not 'redundancy payments.' This distinction is important for us in light of the terms of reference of the dispute we are called upon to settle.
53. The terms of reference of this dispute are very clear, it mandates the Tribunal -
"To determine and settle the dispute between the National Water Commission on the one hand, and Mr. Kevin Williams, on the other hand, over the termination of his employment by reason of redundancy."
54. A second reference is worth citing, and that is the case of **Yellow Media (Jamaica) Limited v. The Industrial Disputes Tribunal**, where Wolfe-Reece, J. pronounced that even where a redundancy is genuine it is not outside of the scope of the Tribunal's jurisdiction to make an award referencing the provisions of the ETRPA, as *"a statement of the law... and not compensatory in nature"*. A number of the rulings we referred to are under appeal, and therefore it can be said that no precedent has yet been established where conflicting rulings in courts of coordinate jurisdiction

are still at large. The jury, therefore, is still out on whether the Tribunal's jurisdiction, conferred upon it by statute, does include the right to hear and settle disputes involving dismissals by reasons of redundancies.

55. The Tribunal, however, notes that its Terms of Reference are identical to that of the **Advanced Farms** case and **Yellow Media**, but not so in relation to either the **Chartermagnates** or the **Cable and Wireless** cases [supra] in which Anderson, J. provided his rulings.
56. The Tribunal, under the Labour Relations and Industrial Disputes Act, is entitled to hear disputes (meaning 'industrial disputes') where such a 'dispute' as defined in law, relates to the "... *termination or suspension of employment*". Further, section 12(5)(c) of the LRIDA states that -

"If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award -



- (i) *may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal determine;*
- (ii) *shall, if it finds the dismissal unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;*
- (iii) -----"

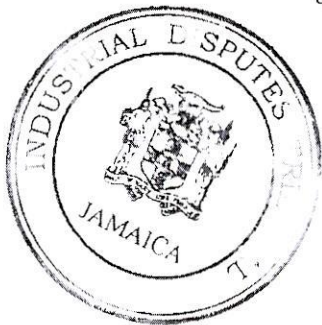
57. Unlike the UK's **Employment Rights Act, 1996**, neither the Act, nor the ETRPA list the potential fair reasons for dismissals. Section 5(2) of the ETRPA does, however, indicate that a dismissal can take place on the grounds of redundancy where it states that "*an employee shall be taken to be dismissed by reason of redundancy...*"; and section 3(5) suggests that dismissals can also take place by reason of conduct. It is our considered view therefore, that dismissals, whether by reason of redundancy or conduct, would properly fall within the powers granted to the Tribunal under the Act.

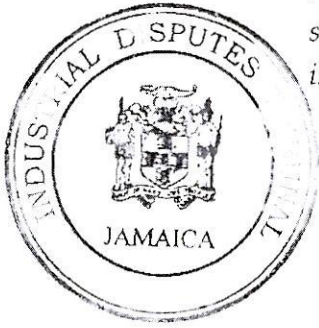
58. What is clearly entrenched in the minds of the Tribunal is that redundancy claims fall under section 17(1) of the ETRPA, where such matters rest in the hands of the Resident Magistrates' Court (Parish Court) to deal with "any action arising from... any claim in respect of a redundancy payment...". The matter of a claim in respect of redundancy payment is, therefore, not before us; what is before us is the settlement of a dispute for which remedies in relation to unfair dismissal is provided for in statute.
59. In examining whether the NWC proved substantiality of reason for the dismissal of Mr. Williams, having regard to the provisions of the ETPRA, we first have to set out those provisions.
60. Section 5(2) of the ETRPA provides the grounds to consider where a dismissal takes place by reason of redundancy. It notes –

"For the purpose of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –

- (a) *the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employer was so employed; or*
- (b) *the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where was so employed, have ceased or diminished or are expected to cease or diminish; or*
- (c) -----"

61. The NWC embarked on a revision of its operations structure sometime around 2014, and contracted Mr. Lewars to undertake the project. A report dated March 27, 2015 and entitled: NWC: Review of Organisation Structure – Recommended Divisional Structures, was submitted to the board. The background and objectives of the exercise was set out in the Report. It stated thus –





"The Board of Directors and the Senior Management are now of the view that after more than a decade since the implementation of the recommended KPMG structure and given a shift in its strategic direction, the organisation structure should be reviewed as a means of addressing the following current issues:

- *Lack of coordination: work unfinished, teams isolated and out of step*
- *Potential conflict and friction among internal groups*
- *Unclear roles and function overlap*
- *Gap in skills or misused resources*
- *Reduced responsiveness by slow reactions to environmental shifts*

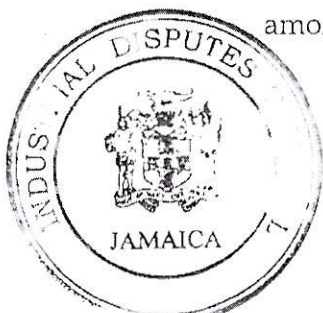
This report presents the structure that we have developed to correct these imbalances."

62. The 2013 structure had a total of nine (9) Vice Presidents reporting to the President. The Lewars Report recommended a reduction in the number of vice presidents from nine (9) to four (4), with one being the Senior Vice President/Chief Operating Officer. None of the four (4) Vice Presidents carried the title: 'Legal Affairs, Properties & Compliance', the new title assigned to Mr. Williams with effect from May 1, 2013, based on changes to the organisational structure at the time. The letter to Mr. Williams, dated April 26, 2013, stated that his appointment to the post "*represents the culmination of one phase of the ongoing organizational redesign process...*", and he would be "*... require[d] to be integrally involved in the full implementation of other phases, including but not limited to selecting second-tier managers and below, as well as lead the process of cascading the balance scorecard for your division in collaboration with other internal stakeholders and our consultants.*"

63. Mr. Lewars' June 2015 presentation to the Executive Management team on the new organisational structure, dealt with "*...apparent overlaps between units/divisions with limited shared processes...*" where there exists the misalignment between responsibilities and functional areas. The report specifically highlighted as an example of this the reporting functions between property management and legal affairs, functions which fell under the responsibility of Mr. Williams as Vice

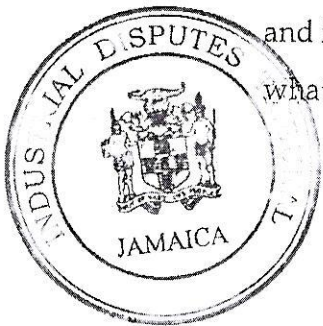
President. The report recommended a broader category, namely 'Corporate Services' to be part of the new structure to incorporate Legal Services, along with other responsibilities to include: employment management relations, information technology, marketing and PR and call centre. Functions relating to compliance and properties fell outside of its responsibilities.

64. This was a huge 'red flag' that should indicate to Mr. Williams that his position appears likely to be eliminated, and in those circumstances redundancy would be the likely outcome if efforts are not successful in finding him alternative employment. In our view - as Lord Gifford argued on behalf of the Union in the **Private Power Operators** case - there must be "*evident need for a redundancy and not a mere possibility.*" And even where this was evident Mr. Williams admitted during his testimony, that he asked no questions, and appeared to be relying on the physical copy of the report for further consideration.
65. A second presentation to the executive management team was done on July 21, 2015, with a recap of the June presentation, and the incorporation of the proposed organisation structure. Mr. Williams received the July 21 presentation on August 19 and concluded that nothing in the presentation suggested that a redundancy exercise would be undertaken which would affect the position of Vice President - Legal Affairs. Although armed with the presentation in August, Mr. Williams did not raised any questions or concerns prior to the meeting to which he was invited by the President on October 9, 2015.
66. The immediate question is whether the condition precedent existed for a redundancy? A first phase of a restructuring exercise undertaken by the NWC was completed, and the fact that the number of Vice Presidents was to be reduced from nine (9) to four (4) is a clear indication that there is a realistic prospect of redundancy among the remaining five (5) vice presidents' post.



67. The Tribunal is grateful to counsels for the case law references in support of their respective positions on whether or not a redundancy situation existed at the NWC. Mr. Williams placed emphasis on the issue of the 'diminution or cessation' of his role, while Ms. Robertson applied a broader meaning relating to the effects of a reorganisation on the diminution of the employer's requirements for the employee to carry out his work. It seems that if we were to go down the path of Mr. Williams, an employee's only options in a restructuring/reorganisation exercise, with a similar outcome to the NWC, would be to resign or be dismissed without the right to redundancy payments. Such a dismissal, we are sure, would be the subject - and rightly so - of a challenge on the grounds of it being unfair.

68. We hold to the view that the cases cited by counsel for the NWC are more persuasive. It is a well-established common law ruling that the Tribunal, comprising of experts in the field of industrial relations and acting within the confines given to it under the Act, must on its own volition determine what is fair. In that regard, we believe section 5(2) of the ETRPA must be interpreted to give effect to its significance and intent. Selwyn's Law of Employment, Eleventh Edition, 2000, in contemplating what would form the basis for a proper construction of a statute notes that -



It is not the actual words which are used which are significant, but the intention behind them, and this must be ascertained from all the surrounding circumstances and the accompanying words..."[p. 332]

69. The NWC had completed the first phase of its restructuring exercise, resulting in a diminution in the number of vice presidents' post from nine (9) to four (4), which means that unless alternatives are found, five of the holders in the vice president slot face the prospects of losing their job through no fault of their own. It is the diminution in the employer's requirement for four, and not nine vice presidents, that the significance and intent of section 5(2) of the ETRPA would satisfy. The correct interpretation of that section could not, in our view, be so narrowly

determined as to vitiate the right to redundancy of employees in a restructuring exercise similar to the NWC.

B. Whether, in the event that (a) above is deemed to be compliant with the Act, the NWC, pursuant to the redundancy exercise, acted in conformity with the requirements under Paragraph 11 of the Labour Relations Code"

70. Having established that the grounds for redundancy existed, the more pertinent question for the Tribunal is to determine whether the relevant provisions of the Labour Relations Code ("the Code") was complied with.

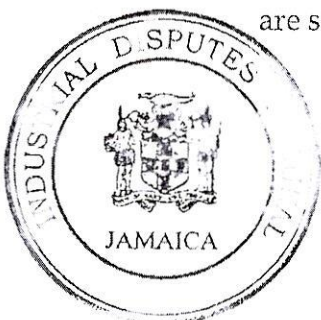
71. Under Part III, paragraph 11, heading: 'Security of Workers', the Code states as follows:

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

- (i) provide continuity of employment, implementing where practicable, pension and medical scheme;*
- (ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;*
- (iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. In this regard, management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;*
- (iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit."*

72. In the conduct of a redundancy exercise we are fully aware that communication and consultation are essential ingredients on which it will be judged. The significance of communicating and consulting on such matters are expressed in the Code. They are seen as-

"...necessary ingredients in a good industrial relations policy as these promote a climate of mutual understanding and trust which alternately result



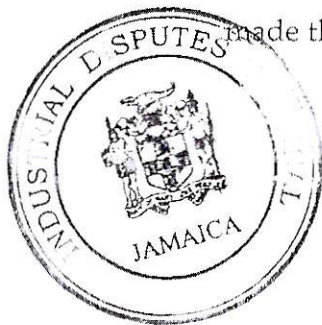
in increased efficiency and greater job satisfaction. Management and workers or their representatives should therefore co-operate in promoting communication and consultation within the organisation."

73. 'Communication' is defined in paragraph 19(a) of the Code as "...two-way flow of information between management and workers or their representatives." It recognises "word of mouth" as "the most important medium of communication..." and "...should be supplemented where necessary by such means as... meetings for the purpose of exchanging views and information."

74. In respect of 'consultation', paragraph 19(b) defines it as -

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

75. In *Union of India v. Sankal Chand Sheth and Chand ANR 1977 INSC*, the court made the following observation in respect of 'consultation' -

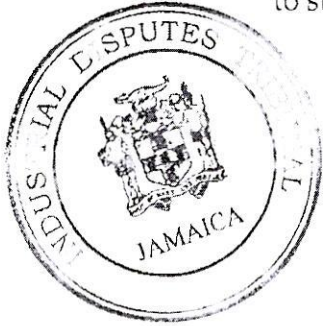


"...deliberation is the quintessence of consultation which implies that each case must be considered separately on the basis of its own facts. It is the contention of counsel that the respondent in this case failed to examine the merits of the views of the applicants and instead took a rigid approach thereby creating no room for deliberation which is at the core of full and effective consultation..."

76. Unlike the **Private Power Operators** case, cited by Counsel, where restructuring was one possible option to avoid redundancy, NWC had completed the first phase of its restructuring, and the number of Vice Presidents' posts would have been diminished.

77. In its award in respect of the dispute between **Private Power Operators Limited and the National Workers Union** [IDT 28/2013], the Tribunal noted that - "*the company had put on the table seven initiatives which it considered in order to restructure its*

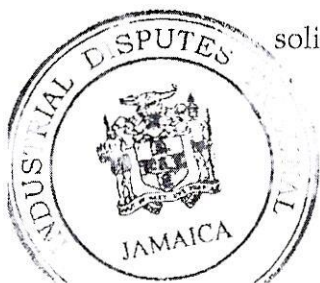
operations [and] did not convey a clear and precise decision on redundancies." It went on to state that -



"the inevitable conclusion to be drawn is that there was a discussion between the company and the union about "proposed restructuring" exercise, but we are not of the view that this satisfies the requirements under Paragraph 19 of the Labour Relations Code which requires the company to inform the union when the need arises for redundancy and make genuine efforts to avoid such redundancies." [pages 25]

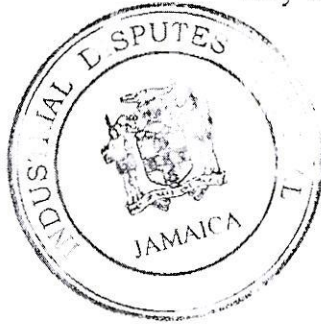
78. A redundancy situation under those circumstances could readily be seen as equivocal since several options were on the table for discussion in the proposed restructuring exercise. The **Private Power Operator** case is however distinguishable from the case at bar, as at the NWC the restructuring exercise was completed and there was to be a reduction, a diminution in the number of vice presidents. The fundamental question for us would be whether at this point consultations took place to avoid redundancies. In other words, whether the NWC set about to determine whether, instead of dismissing Mr. Williams, they could offer him alternative employment. The absence of a mention of the word "redundancy" could not, in our view, obfuscate the evident need of an impending redundancy arising from the completed restructuring exercise.
79. The NWC, according to Mr. Barnett, offered Mr. Williams a lower position of Assistant Vice President, to be 'red-circled' in light of the broadening of the scope for the new vice presidents. The issue of 'red-circling' is normally a condition based on market rate for the job and need not be debated here, except to say Mr. Williams' understanding of what it means does not accord with the concept as understood in the literature contained in Human Resource Management theory and practice. And even if we were to accept Mr. Williams' assertion that the experience at the NWC has seen the use of 'red circling' as punitive, the circumstances of this case would not, in the least, give rise to that consideration.

80. The fact is the proposed new structure would need to accommodate elsewhere 5 of the 9 Vice Presidents. The amalgamation of the functions of Vice President, Legal Services into a wider span of vice-presidential responsibilities under the new structure is entirely the prerogative of management. Legal services sit as only one aspect of a much wider span in the new structure under Vice President, Corporate Services. The inclusion of human resource management, public relations and marketing, for example, suggest the need for different levels of competencies and skills set, and, from the perspective of the management, would not lend itself to the automatic transfer of Mr. Williams to the new post, and we are obliged to accept that.
81. The offer to Mr. Williams of a suitable Assistant Vice President's position, to be red-circled, appears to be the NWC's attempt at an alternative to redundancy, which, at that time seems a realistic prospect.
82. Mr. Williams was invited to apply for one of the new Vice Presidents positions, which he did. He applied for the Vice President, Corporate Services but was not successful and therefore the offer of redundancy was put on the table.
83. In the *Private Power Operators Limited v Industrial Disputes Tribunal, et. al* [2021] JMCA Civ. 18, Dunbar-Green, J (Ag)(as she then was) in her ruling, noted that *"the question of when consultation should begin or had begun was not one of pure law..."* She quoted from Donaldson MR in *O'Kelly v. Trust House Forte Pic* [1984] QB 90, 122H-123A where he stated that -
- "...[The] appeal tribunal has no jurisdiction... to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law."*
84. In that regard, we have formed the view that the presentations to the Executive Management Team at the June 23 and July 21, 2015, was an attempt by the NWC to solicit an exchange of views and information on the restructuring exercise. This was



the commencement of the consultation, which from the presentation, signalled the likelihood of redundancies emanating from the exercise.

85. The sharing of the July presentation with Mr. Williams can only be seen as a further attempt by management to open the door to consultation on “*problems and matters*” that may have been affecting Mr. Williams. Mr. Williams inasmuch indicated that they were. In his closing submission he stated thus –

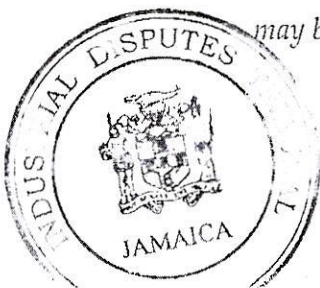


“...Mr Lewars noted that the current dispensation, at June 2015, no one knew who the property department reported to: whether legal, administrative, Human Resource or some other department. Those utterances by Mr. Lewars were at best:

- i. Contrived to fit the narrative that he and the NWC President had devise; and/or*
- ii. Represented a full-blown misunderstanding of the NWC’s organizational chart relative to the property management.”*

86. These are extremely damning accusations coming from Counsel and ill behoves him – ‘without more’ - to speak in such scurrilous manner that serves only to impugn the professional integrity of Messrs. Lewars and Barnett. By his own admission he remained reticence at the June 2015, although inferring a preference to respond when he has a hard-copy of the presentation. This he received in August but did not communicate with the President about what evidently were his concerns.
87. The Tribunal formed the view that the door to communication was thrown wide open by the NWC, but the two-way flow - to make for meaningful communication - was jettisoned by Mr. Williams’ reluctance or unwillingness to take up the offer and express his concerns about the restructuring process.
88. The October 9, 2015, meeting used the term “redundancy” for the first time, and indicated to Mr. Williams that in the event his application of the Vice President’s position is not successful, his position would be made redundant.

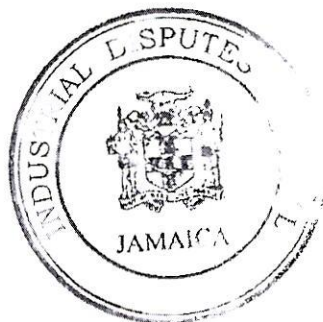
89. Mr. Williams' email to Mr. Barnett of October 30, 2015, coming out of the October 9 meeting, provides insight into his thinking regarding the restructuring and redundancy exercise. His primary concern, it would appear, was the diminution of his current benefits under any new arrangements, which led him to form the view that 'red-circling' would result in a decrease in the benefits to which he is entitled. He further stated in his email that the NWC *"does not have the power to undertake a redundancy in circumstances of my [his] employment..."* He thereafter concluded, in paragraph 6(b) that he has *"not been provided with an articulation of how any of these positions (referring to the vice presidents' positions) will be drilled down to the bottom."*
90. The Tribunal is entitled to, and so makes, specific findings of facts based on the adduced evidence, in particular, but not limited to Mr. Barnett's response of November 14, 2015, to Mr. Williams' email. To that end, we have formed the view that Mr. Williams' position on the three points raised above is mistaken. First, we had earlier resolved that the notion of 'red circling' does not take account of any diminution of benefits, but rather a protection from loss of pay or benefits to the terms and conditions of employment as a result of organisational changes. Second, the ETRPA does give the employer the right to undertake a redundancy exercise in strict conformity with the provisions outlined in the statute. Third, from the evidence, it was clear that Mr. Williams was well aware that the restructuring exercise would, in the first phase, be limited to the positions of Vice Presidents and Assistant Vice Presidents, and for him – as expressed in his April 26, 2013 – to be *"integrally involved in the full implementation of other phases, including but not limited to selecting second-tier managers and below..."*
91. Where the management erred was in their failure to observe the provisions of paragraph 11(c) of the Code, which asserts that management *"...should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancy."* Section 3(4) of the Act states that –



"A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable for any proceedings, but in any proceedings before a Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal in determining the question."

While we are satisfied that the Worker was informed, the Minister of Labour and Social Security was not, but, given the circumstances, we do not consider this misstep fatal.

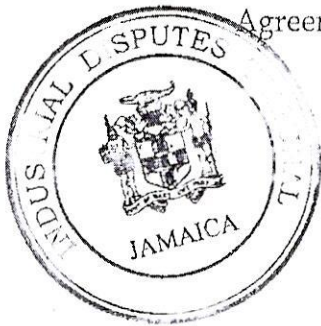
92. The Tribunal concludes that when the entire circumstances of the case are taken into account, the purpose and essentiality of the Code were complied with in respect of the redundancy exercise. This is so based on the fact that:
- (a) the number of Vice Presidents' position had been diminished under the restructuring exercise paving the way for the consultation to commence;
 - (b) meaningful attempts at consultation were evident from the June and July 2015 meeting and the submission of the hard-copy of the presentation in August, except for Mr. Williams' *"rigid [reticence] approach thereby creating no room for deliberation;"*
 - (c) attempts were made, prior to the need been evident for such redundancies, to provide alternative employment to Mr. Williams through the 'red-circling' of his position, were he to accept the Assistant Vice President post; and
 - (d) suitable efforts to avoid redundancy through the invitation to him to apply for a suitable Vice President's position under the new structure.



Jama

- C. What weight or consideration, if any, should be given to the 2012-2015 and 2015-2017 Heads of Agreements signed between the Government of Jamaica and the Jamaica Confederation of Trade Unions, in arriving at a decision within the scope of our remit.

93. Mr. Williams relied on the two (2) Heads of Agreements signed between the Government of Jamaica and the Jamaica Confederation of Trade Unions to make the case that the redundancy was unlawful. He highlights clause 4.19.4 of the 2012-2015 Agreement which states that -



"The Partners agree that there will be no redundancies/separations in the public sector during the life of this Agreement except as a result of the implementation of the Master Rationalization Plan accepted by Parliament or as a result of natural attrition or voluntary separation as per contractual agreement. All separation outside of natural attrition or voluntary separation should be forwarded to the Public Sector Monitoring Committee for final approval prior to implementation."

94. Mr. Williams further highlighted clause 43 of the 2015-2017 Agreement which notes that *"all agreements reached in previous Memoranda of Understanding remain applicable except in cases where amendments have been made to some specific items."*

95. In his October 30 email to Mr. Barnett he stated thus:

"... as far as I am aware, the NWC has not been given any exemption to undertake a redundancy exercise. Secondly, my understanding is that only the Public Sector Transformation Unit can undertake such an exercise."

96. The Tribunal is a creature of statute and its remit is limited to the LRIDA, its Regulations and the Code as well as an objective assessment of the specific factual circumstances of the case. The Act, as Rattray, P. (as he then was) states in the **Grand Lido** case, *"provides a comprehensive and discreet regime for the settlement of industrial disputes in Jamaica."* He further went on to add that -

"The Labour Relations and Industrial and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment."

It creates a new regime with new rights, obligations and remedy in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace."

97. In that regard we turn to the Act to determine if NWC's failure to follow the negotiated terms of the Heads of Agreement between the Government and Jamaica and the Jamaica Confederation of Trade Unions, represent an 'industrial dispute' within the meaning of the law.
98. The definition of an 'industrial dispute' is "*a dispute between one or more employers or organisations representing employers and one or more workers or organisations representing workers*", and in the case a non-unionised worker it is –

"... a dispute relating wholly to one or more of the following:

- (i) the physical conditions in which any such worker is required to work;*
- (ii) the termination or suspension of employment of any such worker; or*
- (iii) any matter affecting the rights and duties of the employer or the organisation representing employers or any worker or organisation representing workers."*

99. Despite counsel's passionate and exuberant submission, we are of the opinion that this matter falls outside of the jurisdiction of the Tribunal. If the Ministry of Finance is of the view that a Ministry or Public Body is acting contrary to the terms of the Agreement, then it represents a dispute between the Ministry and the public body, not Mr. Williams and the NWC.

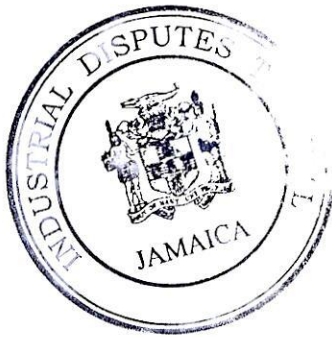


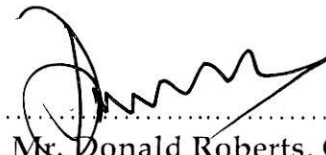
100. Our jurisdiction is squarely foreclosed by statute, and as this matter falls outside of our jurisdiction we form no opinion on whether or not the NWC acted in accordance with the terms of the 2012-2015 and 2015-2017 Heads of Agreements.


DECISION

101. Having reviewed all the evidence and examined the matter fully and in the round, the Tribunal has concluded that Mr. Kevin Williams' dismissal on the grounds of redundancy was justified.

The Dated this 10th day of April, 2024

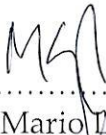



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Mr. Donald Roberts, CD, JP
Chairman


.....
Mrs. Jacqueline Irons, JP
Member


.....
Mrs. Chelsie Shellie-Vernon
Member

Witness:


.....
Mr. Mario Ling
Secretary of the Division