

INDUSTRIAL DISPUTES TRIBUNAL

Dispute No.: IDT 7/2009

SETTLEMENT OF DISPUTE

BETWEEN

ST. ANN BAUXITE LIMITED

AND

UNIVERSITY AND ALLIED WORKERS UNION

AND THE

AWARD

I.D.T. DIVISION

MR. NORMAN WRIGHT, Q.C.	-	CHAIRMAN
MR. RION HALL, J.P.	-	MEMBER
MR. D. TREVOR McNISH	-	MEMBER

JUNE 5, 2015

IDT 7/2009

INDUSTRIAL DISPUTES TRIBUNAL
AWARD
IN RESPECT OF
AN INDUSTRIAL DISPUTE
BETWEEN
ST. ANN BAUXITE LIMITED
AND
UNIVERSITY AND ALLIED WORKERS UNION

REFERENCE:

By letter dated May 21, 2009 the Honourable Minister of Labour and Social Security pursuant to Section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (hereinafter called "the Act"), referred to the Industrial Disputes Tribunal for settlement in accordance with the following Terms of Reference, the industrial dispute described therein:-

The Terms of Reference were as follows:

"To determine and settle the dispute between St. Ann Bauxite Limited on the one hand and the University and Allied Workers Union on the other hand over the termination of employment on the grounds of redundancy of the following workers as listed in the attached document."

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:

- Ms. Angela Robertson - Attorney-at-Law

In attendance were:

- Miss Marshalee White - Legal Officer
- Mrs. Pansy Johnson - President
- Mr. Nathan Thompson - Personnel & Industrial Relations Manager
- Mrs. Nordia Tracey - Training & Organizational Development
Human Resource Specialist

The **Union** was represented by:

- Senator Lambert Brown - President
- Mr. Garfield Harvey - 3rd Vice President

In attendance were:

- Mr. Herman Brown - Chief Delegate
- Mr. Alfred Hemmings - Deputy Chief Delegate
- Several other Workers/Delegates

SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during fifty-nine (59) sittings, from March 24, 2010 to January 12, 2015.

BACKGROUND TO THE DISPUTE:

St. Ann Bauxite Limited, which was formed in 2004 when it took over the operations of Kaiser Bauxite Company, became Noranda Bauxite Limited (NBL) on September 23, 2009. The facility presently owned and operated by NBL started mining and shipping bauxite in 1967. It is a limited liability Company incorporated under the Companies Act of Jamaica with registered offices at Port Rhodes, Discover Bay Post Office in the parish of St. Ann. It exports bauxite. It excavates, hauls, rails, dries and ships bauxite.

The employees and contractors are stationed at three principal locations in its operations:-

Brown's Town – Property Office

Water Valley – Mine Technical, Mine Production and Mine Maintenance

Discovery Bay – Plant Operations, Railroading and Administrative Functions

The world bauxite and alumina industry was thrown into turmoil in September 2008 with world alumina prices starting a dramatic downturn from \$3200 per ton to low of \$1320 per ton in December of that same year. The dramatic fall off in the price went hand in hand with a slump in the demand for the product. The key industries which utilize alumina and its by products slowed down dramatically, resulting in many orders being terminated, deferred or reduced. The fall in these industries resulted in significant job losses.

Companies in these industries were further weakened by worldwide collapse of the financial industry. With reduction in credit facilities and cash reserves, both residential and commercial consumers exhibited record reduction in the purchase of products. World alumina companies took drastic steps to stay in business by cutting costs howsoever possible, which included closing plants, reducing production, selling assets and reducing workforce, among other strategies.

The owners of NBL, having reviewed the financial and cash position of all the companies in the group, determined that in order to remain in the alumina industry, they had to reduce and contain cost. The workforce was alerted to the Company's poor and worsening financial position by a notice from the General Manger dated November 10, 2008, which indicated that all discretionary expenses were suspended with immediate effect.

Mary Palmer et-al, being the list of workers attached to the Terms of Reference to the Industrial Disputes Tribunal (IDT), in January 2009, were active employees of the Company and were part of the bargaining unit represented by the University and Allied Workers Union (UAWU), herein after called "the Union". Among the areas from which these employees were drawn, are Admin Services, Administration, Automotive, Cardumper, Drying, Haulroad Construction, Lab, Loco Maintenance, Mine Maintenance, Mine Production, Mine Technical, Power House, Railcar Maintenance, Reclamation, Shop Maintenance, Track Maintenance, Tractor Shop and Welding Shop.

On or about Friday, January 30, 2009, Mary Palmer et-al received letters terminating their services with the Company with immediate effect. The letters sought to make payment in lieu of notice to the employees. These employees had varying years of service with the Company and some had been employed for as long as 28 years. Four of the approximately seventy (70) employees were Union Delegates. The Union submitted that consultation as required by the Labour Relations Code and the Collective Labour Agreement between the Company and the Union, did not take place and that the Company was in breach of them.

CASE FOR THE COMPANY:

In support of its contention that the decision to terminate the employment on the grounds of redundancy of a number of workers is in accordance with the law, the Company adduced evidence and made legal submissions as follows:-

1. That the redundancy exercise which resulted in the dismissal of the workers was a consequence of the Company-wide re-organization arising from a downturn in its business, rendering those jobs surplus to the requirement of the business.
2. That the world bauxite and alumina industry was thrown into turmoil in September 2008, with world aluminum prices starting a dramatic down- turn from \$3,200 per ton to a low of \$1,320 per ton in December. The dramatic fall-off in prices went hand in hand with a slump in demand for the product. The key industries which utilize alumina and its by-products, slowed down dramatically, resulting in many orders being terminated, deferred or reduced. The fall in production in these industries also resulted in significant job losses within those industries.
3. That the NBL is one of only two operations currently producing in the industry in Jamaica. Production levels for the year 2009 for NBL, were revised to 2.9 million Dry Metric Tonnes (DMT), as against an initial plan made in August 2008, of 5.1 million DMT for 2009. This reduction was due to the decline in the demand for bauxite by its customers, who were experiencing and expecting to experience, a sharp fall-off in demand from their customers. The industry and its clients were operating in a period, which is said to be the worst financial and economic depression since the great depression of the early 1900s.
4. That the plunging share prices of Century Aluminum and Noranda Aluminum, which at the time of the redundancy exercise, St. Ann Bauxite was co-owned by them, and the non-availability of credit from financial entities, forced the companies to look to those activities which required the use of cash and the

identification of ways by which to cease and reduce cash expenditure while increasing operational efficiencies. There were steps that needed to be taken in the short term and with immediacy, in order to ensure that NBL had a chance of surviving, not only in the short term but also in the medium and long terms. The failing health of its two customers, one of which was a sister Company, was also a critical component that NBL had to consider, if it was to continue as a viable entity. This involved a determination as to whether Gramercy Alumina could operate at reduced production for a sustained period of time. In January 2009, a decision was arrived at that indicated clearly that it was uneconomical for Gramercy to continue to operate at the existing level.

5. That the owners of NBL, having reviewed the financial and cash positions of all the companies in the group, determined that in order to remain in the alumina industry, they had to reduce and contain costs and do all that was necessary to make the companies more efficient in light of the actual and further contemplated reduction in output. In January 2008, the Company did not have in place a contract with one of its customers, as that customer had experienced failure in its system, which meant that it would not be purchasing the same volume of bauxite as the previous year. Gramercy was experiencing falling demands as Century Aluminum had reduced production at smelters supplied by Gramercy and were making plans to close at least one smelter. NBL, at the end of 2008, was staffed to produce 5.1 million DMT. Faced with dwindling markets and a reduction in the cost of the commodity, staffing levels at NBL were cut to more efficiently produce 4.3 DMT.
6. That in January 2009, the owners of NBL communicated that the size of the workforce had to be realigned vis-à-vis the reduced production target for 2009 and advised that a possible further reduction was likely, as no agreement was in place for continued shipment to Sherwin Alumina. Management further pointed out the severity of the financial crisis, the reduced demand for and the inventory level of

alumina on the London Metal Exchange, noting that projections as at January 2009, were that the crisis was likely to last for a minimum two (2) years.

7. That NBL's management team examined the circumstances and determined that there would be reduced need for certain positions and for persons to perform certain work in certain positions, as there would be inadequate work or none at all. Meetings were scheduled with all the stakeholders involved as a matter of urgency.

Labour being a substantial cost of production, an assessment was done of the positions that were required to achieve the revised production plan and targets. A review of all the positions was objectively carried out by way of an assessment conducted of each position in the organization. While the Union made a request for consideration for voluntary redundancy in the meeting of January 14, 2009, this could not be accepted as it was likely to compromise the ability of NBL to meet its production targets.

8. That NBL, recognizing the deteriorating economic position at its Plant and the deterioration in the international competitiveness of its operations, reviewed all aspects of its cost base. During this process, the inevitability of a redundancy programme became clear. The required consultative process in respect of that programme with all stakeholders, including the Unions, was implemented as follows:-

- i. On January 9, 2009, the Unions were invited to a meeting in Kingston to discuss the redundancy exercise.
- ii. On January 14, 2009, representatives of the Company, including its General Manager, met with representatives of the UAWU in the absence of the President, who, they were informed was not available as he was performing Jury Duty. The Union officer and delegates were informed that a redundancy exercise was being contemplated and could possibly affect 150 positions, amounting to approximately 20% of the workforce.

The NBL management team also explained that the exercise was to be conducted before the end of the first quarter of 2009 and would affect all categories of workers.

- iii. On January 14, 2009 – in small interactive departmental groups, the entire workforce was informed by managers, superintendents and supervisors, that NBL was contemplating a redundancy exercise in the first quarter of the year. A cross section of employees was present at these sessions, including union delegates. Each employee was informed that counselling would be made available to the entire workforce prior to any redundancy exercise. Each employee was also advised to prepare for the possible redundancy exercise and was given the opportunity to ask questions and express concerns. Questions were taken from the workers and a question and answer sheet was prepared and circulated to managers, superintendents, supervisors and HR personnel, in order to ensure that questions and queries from the workforce could be answered in the same manner by each representative of the Company.
- iv. Monday, January 26, 2009 – HR Manager, Mr. Nelson Barton, called Mr. Lambert Brown from his office in the presence of Mrs. Pansy Johnson. Mr. Barton invited further dialogue with the Union, in the process advising Mr. Brown that the positions occupied by some of his Delegates, including his Chief Delegate, were slated to be made redundant. Mr. Brown made no representation in response.
Wednesday, January 28, 2009 – a meeting was organized between Mrs. Pansy Johnson and Mr. Lambert Brown to take place in Ocho Rios after work since Mr. Brown was on jury duty and would not be available during working hours. Mr. Brown was however unable to attend.
- v. On January 29, 2009, meetings were arranged with the Union and the worker delegates by the Human Resource Manager. The Union's Chief Delegate informed the Human Resource Manager that he would have to call the President of the Union and get back to him. The Chief Delegate subsequently informed that the President would not be attending. The

meeting proceeded as planned, with the union delegates in attendance. On this day also, a list of persons represented by the Union and proposed to be made redundant, was sent via email to the Union President and Chief Delegate.

9. That on January 30, 2009, the redundancy exercise was implemented. Based on the positions that were made redundant, 138 persons, including the 70 Union represented employees named on the list attached to the Terms of Reference to the (IDT), were affected. Of the 70 persons affected, one employee was terminated on the ground of medical redundancy. The redundancy exercise was conducted without incident. Sixty nine (69) persons accepted their letters of termination by reason of redundancy and accepted cheques for redundancy payments and payment in lieu of notice. They also returned any Company property in their possession.
10. That before the implementation of the redundancy exercise, the Company made numerous attempts to have consultation meetings with the Union but those attempts never materialized as a result of the Union's failure to make itself available. Consequently, in the absence of the Union, the Company held consultation meetings and counselling sessions with the workers.
11. That the Company is not in breach of Section 3(1) of the Employment (Termination and Redundancy Payments) Act (ETRPA) by making payments to the workers in lieu of notice. This is based on the fact that the Company's evidence is that it was the custom and practice of the Company, when undertaking redundancy exercises, to make a payment in lieu of notice to employees and this was known and accepted by the workers as well as their unions. Further, there was no 'protest' and or refusal to accept the cheques with payment in lieu of notice. All cheques were en-cashed; none indicated that they were cashed 'under protest'. Therefore, it must be noted that the facts of this case are entirely different from those considered in the Jamaica Flour Mills case.

In the Jamaica Flour Mills case, the protest against the dismissals was immediate and the union took on the case of those workers, leading to a reference before the IDT. It was some time after the referral to the IDT that the relevant cheques were cashed.

12. That it is the Company's submission, that should the IDT find that the dismissals were unjustified and Award either of the Union's requests i.e. reinstatement and compensation or compensation for the period out of the jobs, such Award would jeopardize the viability of the Company's business and possible loss of employment for the existing workforce.

The Company also submitted that it would not be just, fair and equitable in circumstances where the Company did everything to consult with the Union and in the Union's absence, consulted with its employees. At the time of the exercise, all employees accepted their cheques without protest and were paid in lieu of notice in accordance with custom and practice at the Company. In addition, most of the workers have mitigated their losses in the circumstances where the Company was doing everything to ensure its continued operations in the worst recession the world has experienced since World War 1 and specifically with what was happening in the bauxite industry.

Further, as demonstrated, even though the dismissals took place in 2009, the hearings before the IDT did not commence until April 2012, although the Company submitted its Brief on the 23rd March 2010. The age/circumstances of the employees who were granted early retirement should also be taken into account.

13. That in the alternative, the Union has asked the IDT to consider the remedy of compensation, if the IDT was not minded to reinstate the employees. It is the Company's submission that in light of all the evidence before the IDT, this would

not be an appropriate remedy, as the Union is asking for compensation to include immediate loss as well as potential future loss. It is submitted that an order for compensation must not make the employees any worse off, than if they were reinstated. The Company takes issue with the Union's submission that it had to provide evidence that the employees had received employment at higher or equivalent wages at the time of their dismissal. The Union under this head asked the IDT to award compensation on the basis of the amount that they would have received, if they were reinstated minus the redundancy payment, i.e., US\$11,261,553.00 plus at least the equivalent of five (5) years additional salary at the current rate in the existing Collective Labour Agreement (CLA).

14. That the Company submits, that based on all the evidence before the IDT, it was justified in terminating the contracts of employment by reason of redundancy of the employees and it did not commit any procedural breach in that it consulted with its employees as required by Section 11 of the Labour Relations Code. That it tried to consult with the Union, which contrary to its normal practice, failed and/or refused to consult with the Company at a time when the Company most needed its cooperation. That in the alternative even if the IDT felt that it had not consulted sufficiently or at all, case law makes it abundantly clear that such failure does not mean the dismissals were unfair. That in its consultation process the Company did not breach the principles of Natural Justice as in accordance with custom and practice, the Company made payment in lieu of notice and the employees, having accepted the same, mitigated their losses. Accordingly, for the reasons outlined above, reinstatement and/or compensation are not appropriate remedies.
15. That it is the Company's submission that, given all the evidence and the legal submissions made, the IDT should make an Award that the employees' contracts of employment were justifiably and fairly terminated by reasons of redundancy.

CASE FOR THE UNION:

In support of its contention that the Company's decision to terminate the employment of a number of workers on the grounds of redundancy is unjustified, the Union adduced evidence and made legal submissions as follows:

1. That whereas the conditions existing in the alumina industry at the time could have led to a redundancy situation, this does not vitiate the need for fairness. Even if a redundancy situation existed, the termination of the contracts of employment must be done fairly.
2. That the Union conceded that there was a redundancy situation in the Company in January 2009; however, this does not obviate the need for those implementing this exercise to act justly and fairly in its execution. It is not enough to say that there was a redundancy situation. The Company cannot ignore the Laws of Jamaica, **the Labour Relations Code**, the **Collective Labour Agreement** and/or **good Industrial Relations Practice**. The **Jamaica Flour Mills** case, the **J. Wray & Nephew** case and the **Iberostar** case, are examples which show that notwithstanding the existence of a redundancy situation, a company has a duty and an obligation to act fairly.
Where they fail so to do, the Tribunal must rule against the company and find that the dismissals were unjustified.
3. That the burden of proof is on the Company to show that each worker was fairly terminated and but for those from the Mine Production (Exhibit 12), there is no evidence to demonstrate by what selection process or method they were chosen to be terminated.

4. That subjectivity was the basis on which the selection process was based as demonstrated by the evidence of Company's witness, Mrs. Pansy Johnson, who told the Tribunal that the Union's Chief Delegate, Mr. Herman Brown, was chosen because he had requested voluntary redundancy in 2008, yet the Company said, in answer to a question from the same Mr. Herman Brown in the meeting of January 14, said that they were not entertaining voluntary redundancy. The Union found it strange that Mr. Herman Brown with the longest service in the department, clean record, no complaints about performance, is the only one chosen from his department to be made redundant. They asked if this can be fair.
5. That on previous occasions, where the Company was faced with a similar situation as in 2009, the Union has always co-operated with the Company on issues of redundancies. The evidence before the Tribunal reveals that the Union responded to the Company's email of 9th January 2009, even though the reason for the meeting was not stated to be a redundancy exercise. The Union attended even though its President was not available to attend because of Jury Duty. This was well known to the management at the time. At that meeting the Union insisted on at least 10 occasions that a process of consultation must take place.
6. That subsequent to the meeting of the 14th, the Union wrote the Company requesting a meeting to discuss the impending redundancy exercise. The evidence of the Union's Chief Delegate, Mr. Herman Brown, that the Union always cooperated with the Company in all prior redundancies is unchallenged. Efforts to blame the Union for the lack of consultation in January 2009, are baseless. This betrays the Company's desire to fault the Union for the Company's decision to exclude the Union from the process. Only a single meeting was planned by the Company to meet with the Union.

7. That no future meeting was scheduled or planned by the Company.
Mr. Nelson Barton told the Tribunal that none was held with the other two unions before January 29, 2009. This contradicts the testimony of Mrs. Pansy Johnson about meetings being held with the other Unions. Mr. Nelson Barton told the Tribunal that subsequent to January 14, a conscious decision was taken not to provide the list of workers to be made redundant to the Union, until close to the time of redundancy. As he said, the decision was to provide the list 'like a day before.' That is what the Company did. The Union asked that the Tribunal accept the evidence of Mr. Nelson Barton as the truth.

8. That in 2009, what was different was the approach of the management. There was a determination that they would not have the time to consult. Evidence exists, and has been presented that subsequent to January 2009, the Company conformed to the Collective Labour Agreement as was done in 1999 and 2004. That is, Exhibits 60 and 60(a) which was the agreement in March 2009 to avoid making eighty-four (84) workers redundant. Also, in 2010 there was proper consultation in respect to Contract Mining.
Clearly in 2009 January, the management went about it 'their own way, the wrong way, the unfair way.' In so doing their action amounted to unjustifiable dismissal of the workers.

9. That the evidence before the Tribunal is that the department, Truck Maintenance, is essential to the operations of the Company. These workers never contemplated that their services would not be required. Neither the Union nor the workers were informed that the Truck Maintenance Department would be outsourced.

10. That the Companies failure to ensure that adequate effective procedure was in place for consultation with the Union before embarking on the redundancies is in violation and breach of Section 2,5, 11 and 19 of the Labour Relations Code.

11. That the Company is in breach of paragraph 24 of the Collective Labour Agreement under the subject Workforce Reduction – ***“When a reduction of the workforce is to be made at any time by at least ten (10) regular employees covered by this Booklet, the Company undertakes to give reasonable notice to the Union, and if requested, supply in writing the names of the employees involved.***
Management reserves the right in consultation with the Union to solely determine the employees to be made redundant bearing in mind that the final decision rests with the Company.”
12. That the Company in executing the redundancy did so in breach of Section 3(1) of the ETRPA. The evidence points to the fact that only one day notice was effectively given to the workers (Exhibit 33). Further evidence confirms that no waiver was sought from the workers nor is there any evidence that any waiver was given. Also, there is no evidence that notice was given before a credible witness. In the case *Delaney v Staples* on page 692 G, the act of not giving proper notice amounts to a breach of contract which is an unfair/unjustified act.
13. That once the Union had information that the Company had executed the redundancies on Friday, January 30, 2009, by letter of February 2, 2009, it wrote to the Company protesting the dismissals by reason of redundancy (Exhibit 24). Also, by letter dated February 2, 2009, the Union sought the Ministry of Labour’s urgent intervention to settle what it considered to be a dispute (Exhibit 73).
14. The egregious breach of the Collective Labour Agreement, Labour Relations Code and Employment (Termination & Redundancy Payment) Act by the Company should not be rewarded. The employees have lost a lot, because of the unfair acts by the Company in terminating them in a cruel, inhumane and less than dignified manner.

An order for compensation must not make the employees worse off than if they were reinstated. Compensation is not a lower order of award from reinstatement and should not be so treated. It is a discretion provided to the Tribunal to not rejoin the employee and employer in an employment relation but it does not say compensation must make the employee receive less of a benefit than if he had been reinstated.

15. That the employees be paid a sum at least equivalent to the amount they would have been paid if they were reinstated minus the redundancy payment. Plus, at least, the equivalent of five (5) years additional salary at current rate of pay for the particular category of employees as reflected in the current Collective Labour Agreement existing between the Company and the Union. This would be subject to any of the employees reaching age of pension, age 65 years old before the additional five (5) years payment. In the case of people reaching retirement age earlier, then retirement would be triggered. All other employees would be allowed the five (5) years minimum to deal with future losses.

The case of **HAMILTON v UGI** supports this approach. We recommend this to the Tribunal.

TRIBUNAL'S RESPONSE:

The Tribunal having heard the evidence, twelve (12) witnesses and examined eighty-nine (89) exhibits, must now make a decision in settlement of this dispute. This is made somewhat easier owing to the fact that the Union, after hearing the evidence of the Company on the economic reasons for the redundancies, conceded that there were cogent reasons to conclude that a redundancy situation existed.

What the Tribunal must now examine is the contention by the Union of procedural breaches and impropriety, in that the Company, before executing the redundancy

exercise, failed to ensure that adequate and effective mechanism was in place for consultation with the Union. In addressing this contention, the following excerpt from the evidence of Company's witness, Mrs. Pansy Johnson, gives a clear perspective of the Company's modus operandi:

A. "This is the first redundancy exercise that I had very close involvement with, I repeat that, and I don't think the company's action was high handed. Again I repeat that we tried to involve the unions as soon as we had pertinent information. It was unfortunate that we did not get all the unions on board to come and sit with us. We had very tight timeline within which to operate and we did as much as we could do because again what we were trying to do was to prevent our owners from closing the company. If we had more time we would have consulted for longer, but within the timeframe that we were given, we invited the unions in, and we gave them as much time and as much information as we had."

1. The evidence is that the Company invited the Union to a meeting which was held on January 14, 2009. At that meeting it was disclosed to the Union that the Company planned to reduce the workforce by twenty (20%) percent in the first quarter of 2009.

The Union's representative at the meeting, Mr. Garfield Harvey, 3rd Vice President, made an inquiry and observations such as:-

- i. Why was the Union not 'apprised', as it seems as if the decision has been taken before any discussions?
- ii. The Company by this action is showing that the Union is being treated as an adversary and no longer a partner.
- iii. The Union's position is that there was no discussion and therefore no consultation. The Union would view the meeting as one of information and expect a "meeting to be convened to begin from process and look forward to that".

iv. *“Mr. Harvey*

spoke of belief that there should be consultation.

- *Discussion is not consultation, we are aware of economic climate globally. Funny thing with this company – we should be the ones to lead others because we have been here before. This time is no more uncertain than 10 years ago when Grammercy blew up. This union and company were able to pick their way through the rubble and put itself back on track. We did it together with numerous consultations and meetings.” (Minutes of meeting held on January 14, 2009).*

2. Subsequent to that meeting of January 14, 2009, at which the Company’s plan to restructure the workforce was announced, the Union by letter dated January 19, 2009 wrote to the Company (Exhibit 9), reproduced below.

Dear Sir;

Our Union has been informed of your company’s intention to make a number of our members redundant. I am hereby requesting a meeting with you, to begin proper consultation, consistent with the Labour Relations Code of Jamaica. We do not accept that the mere provision of information can sufficiently be described as “consultation”.

Preliminary to this meeting, we are requesting the following information:

- 1. When specifically will this redundancy be taking place?*
- 2. Who are the persons on the list to be made redundant?*
- 3. What is the basis on which these persons were chosen?*

(emphasis supplied)

We wish to advise you that our Union is open to discuss with you alternative approaches, to avoid or minimize redundancy at this time. We would also wish to

discuss, at that meeting, the Terms and Conditions that should be applicable to employees being made redundant.

We assure you that this approach of our Union is consistent with the Ministry of Labours' Special Tri-partite Committee to mitigate job losses, arising from the impact of the global crises. It is also consistent with how we have dealt with past redundancies at the company.

We are sending a copy of this letter to the Minister of Labour, the Chairman of the Tri-partite Committee, the General Secretary of the Jamaica Confederation of Trade Unions' and the President of the Jamaica Employers' Federation because we believe the approach we adopt at St. Ann Bauxite could have significance for the Industrial Relations practices in the country.

We are,

Yours sincerely

UNIVERSITY & ALLIED WORKERS' UNION

Lambert Brown, C.D.

PRESIDENT

3. By letter dated January 23, 2009, (ex 27) the Company replied to the Union as follows:

Dear Mr. Brown

RE: RESTRUCTURING EXERCISE

Your letter of Monday, January 19, 2009 has been received and duly considered.

The meeting to which you were invited in Kingston on Wednesday, January 14, 2009, was for the precise purpose of engaging all the Unions representing workers at SAJBP in the process of consultation to which your letter refers. While you were unable to attend the meeting, your 3rd Vice President Mr. Garfield Harvey and a number of worker delegates were present to discuss the proposed restructuring.

SAJBP maintains that the consultation process has started and are quite willing to have another meeting with you, on either Wednesday, January 28, 2009 or Thursday, January 29, 2009, at 10:00 a.m., at SAJBP'S Administrative Offices in Discovery Bay, at which time we will provide feedback to the questions raised in your letter.

We trust you will find it convenient to attend, in which event we ask that you advise us as soon as possible, as to which day is more convenient for you.

Yours truly,

*Lawrence Luehring (Mr.)
General Manager*

It is important to note that in the Union's letter it had requested certain information which it considered necessary to have for a meaningful consultation meeting to be held. There is no evidence before this Tribunal that that information was ever provided to the Union. It is also important at this juncture for the Tribunal to point out that the Labour Relations Code at Part V—Communication and Consultation, Section 19 (b) provides as follows:

(b) **Consultation**

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

(i) *Management should ensure that in establishing consultative arrangements—*

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

(b)

In the English industrial jurisprudence, Consultation in their Code at paragraph 65 and 68 provides as follows:

“65—Consultation means jointly examining and discussing problems of concern to both management and employees. It involves seeking mutually acceptable solutions through a genuine exchange of views and information.

68—In setting up the consultative arrangements, management should ensure that:

(i)....

(ii) employee representatives have all the information they require to enable them to participate effectively in discussions.”

4. The wording and interpretation of the above definition of “Consultation” in the Labour Relations Code, give the clear understanding that the onus of providing the relevant information rests with the employer, in this case Noranda Bauxite Limited, formerly St Ann Bauxite Limited. Thus, the Tribunal finds that Noranda Bauxite Limited failed to provide the Union with the relevant information it requested to facilitate the consultation process.

5. Another important observation made from the Company's response to the Union's letter of January 19, 2009 is the dates of January 28 and January 29, 2009 proposed for a meeting. These dates, examined against the background of the cheques for the redundancy payments being printed on January 27, 2009, the list of workers to be dismissed being sent to the Union at nearly 5:00 p.m. on January 29, 2009, and the redundancies being effected on January 30, 2009, raises the question as to whether the Company was genuine about having meaningful discussions with the Union, consistent with the spirit and intent of the meaning of "consultation" under the Code.

The Tribunal accordingly concludes that, the company fell down in the area of timely communication which is the essence of consultation. Without communication and the consequent opportunity of responding, there can be no consultation.

6. The Union on January 27, 2009 replied to the Company's letter of January 23, 2009 as set out below (Exhibit 10):

Dear Mr. Luehring

RE: RESTRUCTURING EXERCISE

We hereby acknowledge receipt of your letter re the above mention caption dated January 23, 2009, which was received by my office on January 26, 2009.

We wish to state that the meeting of January 14, 2009, was a meeting in which very limited information was provided by your company. In no serious way could that be considered the beginning of consultation process.

In all previous redundancies at Kaiser Jamaica Bauxite Company/ St Ann Bauxite Limited, the Union was an integral part of the process. Alternatives to

redundancies were discussed, terms and conditions relative to the people being made redundant were provided to the Union, discussed and agreed on along with the reason for the selections. The list of people to be made redundant is always provided to the Union in reasonable time prior to the redundancy being effected.

Your approach to this redundancy runs counter to good Industrial Relations practices and represents a breach of our Collective Labour Agreement. To make matters worse senior members of your management team have indicated that the redundancies are to be effected this Friday, January 30, 2009.

I am hereby requesting that no redundancies take place on Friday and that the proper consultation, including the provision of a list of workers to be made redundant is provided to our Union. Meaningful consultation can only take place in the context of full disclosure of relevant information.

Finally, the dates proposed by you are not convenient, however, we are available to set a convenient date as soon as we have received the information requested in our letter dated January 9, 2009.

We are,

Your sincerely,

UNIVERSITY & ALLIED WORKERS' UNION

Lambert Brown, C.D.

PRESIDENT

**C: Permanent Secretary – Ministry of Labour
Delegates**

7. The Company responded by letter dated January 28, 2009, which states as follows:-

Dear Mr. Brown

Re: RESTRUCTURING EXERCISE

Your letter of Tuesday, January 27, 2009 has been received and carefully reviewed.

The meeting to which you were invited in Kingston on Wednesday January 14, 2009, was for the purpose of engaging the Unions in the process of consultation. The information we provided at that meeting, was in keeping with the "reasonable notice" referred to in Clause 24 of the Collective Labour Agreement, and as such, SAJBP is not in breach of the Collective Labour Agreement. Indeed, the aforementioned clause states in its entirety:

24. WORKFORCE REDUCTION

- a. *when a reduction of the workforce is to be made at any time by at least ten (10) regular employees covered by this Booklet, the Company undertakes to give reasonable notice to the Union and, if requested, supply in writing the names of employees involved.*
- b. *Management reserves the right in consultation with the Union to solely determine the employees to be made redundant, bearing in mind that the final decision rests with the Company.*

SAJBP maintains that it has made (and continue to make) efforts to engage the Unions in the consultation process.

Finally, due to the current downward economic spiral resulting in reduction in bauxite orders, increased costs and scarcity of cash, and we hereby advise you that we cannot accommodate your request to delay the restructuring exercise.

Yours truly,

Lawrence Luehring

General Manager

Copy: Permanent Secretary, Ministry of Labour

8. In the Collective Labour Agreement between the Company and the Union there is a **clause 24 outlined above** - which speaks to a communication and consultation process in the event of the necessity to reduce the workforce.

Under (a) the Tribunal takes into consideration the evidence which is replete with the Union making requests to be provided with a list of the names of the employees to be affected by the incidence of the reduced workforce, disclosed to it at a meeting held on January 14, 2009. There is no evidence before this Tribunal that the Union's request was satisfied until approximately 5:00 pm the evening of January 29, 2009, before the redundancies were effected on the morning of January 30, 2009.

In regards to (b), the evidence is that a ranking system was implemented for the selection of workers to be displaced from the Mines Production Department but this method of selection was never discussed with nor communicated to the Union. As to the actual selection of the employees whose services were terminated by redundancy, there was no consultation of any kind. No information was given to the Union; there were no agreed criteria for selection or the method of applying the criteria. Not even a list of those selected was provided for meaningful scrutiny by the Union before the dismissals were effected.

9. As to whether or not the Company is in breach of Section 3(1) of the ETRPA is a matter of law and has to be examined in accordance with the provisions of the statute. The statute provides for minimum periods of notice to be given by an employer to an employee whose contract of employment is being terminated. It also allows for either party to waive his right to notice or to accept a payment in lieu of notice.

This however, has to be by agreement and should not be imposed unilaterally by one party without the consent of the other. If "without the agreement of the employee, the employer summarily dismisses the employee and tendered a

payment in lieu of proper notice, the employer is in breach of contract by dismissing the employee without proper notice.” (**Delaney v Staples (t/a De Montfort Recruitment) [1992] 2 WLR 451**). The company maintains that it is customary for it to do so, and has done so in similar circumstances prior to this. However, this Tribunal cannot accept that custom and practice can take precedence over a statute, which the ETRPA is.

The Tribunal therefore finds that the Company was in breach of section 3(1) of the ETRPA by not giving proper notice, to those workers whose services were terminated by reason of redundancy, on January 30, 2009.

10. The Company has contended that the employees who were dismissed by reason of redundancy, having en-cashed the cheques given to them by the Company, clearly demonstrated an acceptance of the redundancy and this operates as a waiver to their right to any redress. The Tribunal disagrees with this contention, as consistent with the judgement in the Jamaica Flour Mills case; the protest from the Union was immediate. The redundancies were effected on Friday, January 30, 2009, and on Monday, February 2, 2009, the next normal workday, the Union protested to the Company by letter (Exhibit 24) and on said date referred the matter to the Ministry of Labour (Exhibit 73) as a dispute.
11. On the matter of mitigation, the Company submits that, an employee is required to mitigate his loss in circumstances where his contract of employment is terminated. It is not that he is to do nothing in the expectation that he will be compensated for the loss of his employment. The Union, on the other hand, has countered that the evidence of the investigator whom the Company had engaged to investigate the employment activities of the dismissed employees, revealed that many of the said employees were not able to find employment.

This witness, testifying on behalf of the Company, was not able to provide any evidence of the earnings of those dismissed employees who got an occasional job

here or there. It was further submitted for the Union, that there was absolutely no evidence provided to say that the employees whose services were terminated by reason of redundancy, found “employment of a permanent nature at an equivalent or higher level salary or wages than the employees enjoyed when dismissed. “DENCH V FLYNN & PARTNERS [1998] IRLR 653”

12. The Company has argued that its effort to get the consultation process moving was frustrated by the Union’s intransigence in agreeing to a meeting date. While the Tribunal does not accept that the unavailability of one party should hinder the progress of a serious exercise on which person’s livelihood is at stake, the persistent requests of the Union to the Company from the outset on January 14, 2009, for relevant information cannot be overlooked.

In support of this, the Tribunal finds the evidence of Noranda Bauxite Limited’s former Human Resource Manager, of interest, especially his testimony that the date of the redundancies was known to Noranda Bauxite Limited before the meeting with the Union on January 14, 2009. Also of note to this Tribunal is his further testimony which suggests that Noranda Bauxite Limited had taken a conscious decision not to provide the list of the workers to be terminated by reason of redundancy to the Union until close to the date on which the redundancies were to be effected.

13. The Company has maintained that consistent with Section 11 of the Labour Relations Code, in the absence of the Union, it held consultation sessions with the workers.

11. “Security of Workers

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

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

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

However, the evidence before this Tribunal indicates that counselling sessions were held with workers and in informal assembly referred to by the workers as “parliament”; questions relating to terminal benefits arising from the imminent redundancies were raised.

This, the Tribunal finds, does not satisfy the spirit and intent of Section 11 of the Code as enunciated above.

14. Finally, the Tribunal must endeavour to point out that under Section 5A.– (1) of the Employment (Termination and Redundancy Payments) Act, a Company has the option to resort to the laying off the workers for a period of up to one hundred and twenty days (120). During this period, meaningful and genuine consultation can take place in an atmosphere conducive to the principle of collective bargaining, freely conducted on behalf of workers and employers with due regard to their mutual interest as was done in March of 2009, as shown in Exhibit 60.

15. In light of the foregoing, the Tribunal concludes therefore, that notwithstanding the fact that there are cogent reasons to conclude that a redundancy situation existed, the execution of the exercise, has failed the test of consultation as required under the Labour Relations Code and the Collective Labour Agreement.

Accordingly, consistent with the case of Jamaica Flour Mills, these dismissals by reasons of redundancy, implemented in this manner, are unjustified. Having regard to the evidence that confirms the existence of a redundancy situation and taking into consideration the period that has elapsed between the reference of the dispute in 2009 and now, approximately Three Hundred And Twelve (312) weeks, the Tribunal makes the following Award as redress in full and final settlement of this dispute.

AWARD:

- (i) That Noranda Bauxite Limited (St. Ann Bauxite Limited) reinstates the workers whose employment were terminated on the grounds of redundancy and whose names are listed in the document attached to the Terms of Reference, on or before June 29, 2015;

OR

- (ii) On failure to comply with (i) above, that said workers be paid an amount, being the equivalent of 104 weeks basic pay at current rate, by way of compensation.

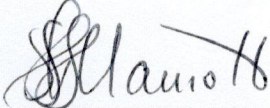
AND

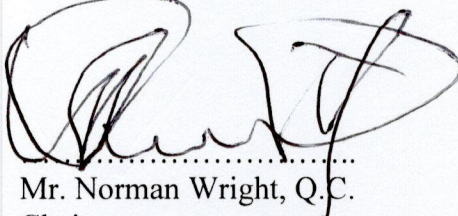
- (iii) In the case of Calvert Grant, who is deceased and whose name appears on the List, the compensation awarded in (ii) in respect to him, be paid over to his estate.

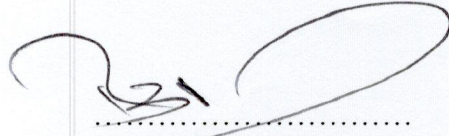
DATED THIS 5th DAY OF JUNE 2015.

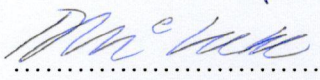


Witness:


.....
Nicola Smith Marriott (Mrs.)
Secretary to the Division


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


.....
Mr. Rion Hall, J.P.
Member


.....
Mr. D. Trevor McNish
Member

List of Names

- Mary Palmer
- Ewan Allerdyce
- Doreen Anderson
- Samuel Guthrie
- Dobson Brown
- George Henry
- Timothy Smiley
- Michael Ferguson
- Horace Lee
- Martin Allen
- Stanford Reid
- Vassell Russell
- Frankly Brown
- Marvin Vassell
- Hubert Wray
- Patrick Walker
- Trevor Green
- Junior Bromfield
- Renaldo Fleckleton
- Herman Brown
- Clive Brown
- Peter Davidson
- Gery Thompson
- Kayde Walker
- Michael Bennett
- Mark Campbell
- Nicholas Marshal
- Alvin McFarlane
- Errol Duncan

- Alvin Watson
- Trevor Fung-Chung
- James Linton
- Oral Mighty
- Paul Barton
- Alvin Brown
- Rohan Hull
- Gerald Wright
- Delroy Rodney
- Eric Evans
- Audley Bowens
- Randall Willis
- Calvert Grant
- Ernel Clarke
- Davian Wishart
- Basil Gayle
- Ronald Walker
- Kirkpatrick Thompson
- Peter Gayle
- Rayon Gryzzle
- Herman Wallace
- Winston Campbell
- Owen McLean
- Rohan Stewart
- Kenneth Allen
- Ira White
- Lowell Stewart
- Alfred Alexander
- Daniel McKoy

- Marlon Anderson
- Norval Ferrigan
- Lindsay Morrison
- Winston (Joseph) Ward
- Keon Edwards
- Dadral Gordon
- Verrick McKoy
- Antonio Miller
- Bonnie Walford
- Leeford Stewart
- Randy Vassel
- Wayne Brown
- Donald Brown