INDUSTRIAL DISPUTES TRIBUNAL

Dispute No. I.D.T. 22/99

SETTLEMENT OF DISPUTE

BETWEEN

JAMAICA FLOUR MILLS LIMITED

AND

NATIONAL WORKERS UNION

AND THE

AWARD

Re: dismissals by reason of redundancy of

Simon Suckie, Michael Campbell and Ferron Gordon

I.D.T. DIVISION

Mr C. C. Davis	-	Chairman
Mr V. Harris	-	Member
Mr D. Thomas	-	Member

October 9, 2000

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

JAMAICA FLOUR MILLS LIMITED - "COMPANY"

AND THE - "UNION"

NATIONAL WORKERS UNION

REFERENCE:

By letter dated August 19, 1999, the Honourable Minister of Labour and Social Security pursuant to Section 11 A (1) (a) (i) of the LRIDA referred to the Industrial Disputes Tribunal for settlement the dispute between the above-mentioned parties.

The terms of Reference to the Tribunal were as follows:

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

DIVISION:

The division of the Tribunal selected in accordance with Section 8 (2)(c) of the Act was comprised of:

Mr. C. C. Davis	-	Chairman
Mr. Victor Harris	-	Member, Section 8 (2) (c)(ii)
Mr. Desmond Thomas	-	Member, Section 8 (2)(c)(iii)

REPRESENTATIVES OF PARTIES:

The Company was represented by:

Ms. Angela Robertson	-	Attorney-at-Law

Also in attendance were:

Mr. Jack Cwack	-	Managing Director
Mr. McClooney Blair	-	Group Director, Human Relations Development and Industrial Relations Corporate
Mr. Dennis McGee	-	General Manager
Miss Sharon Rattigan	-	Executive Secretary

The Union was represented by:

Mr. Clive Dobson	-	President, National Workers Union

Also in attendance were:-

Mr. Granville Valentine	-	Negotiating Officer, National Workers Union
Mr. Ensley Anderson	-	Chief Delegate

Also regularly in attendance was Mr. Simon Suckie, one of the aggrieved workers. Messrs. Campbell and Gordon attended two hearings.

SUBMISSIONS AND SITTINGS:

Briefs were submitted by the parties and oral submissions made during thirteen (13) sittings between the 22nd November, 1999 and the October 4, 2000.

1. THE DISPUTE

i. On 13th August, 1999, the Company executed letters terminating by reason of redundancy the employment of the three employees mentioned in the Terms of Reference.

ii. The three were at work and around 2:15 p.m. they were told to "go to the Personnel Department". They did not do so. The Union delegate was contacted and made enquiries.

iii. The three and the rest of the employees learned in different ways that the three were dismissed with immediate effect on grounds of redundancy.

iv. The other workers went on strike on that afternoon and only resumed work some eight (8) days later when in pursuance of this subject reference the Tribunal issued a cessation order.

1. **THE DISPUTE (Cont'd)**

v. The three had refused to accept the severance payments offered by the Company. Some seven (7) to ten (10) days after the 13th, two of the three (Campbell and Gordon) collected their cheques but Suckie still refused to accept the severance payment.

vi. The Company contends that-

(a) the redundancy and dismissal were in accordance with the relevant Employment Termination Redundancy Payment Act (ETRPA) and therefore being "Lawful" i.e. not "wrongful" could not be found "unjustifiable".

(b) further, Campbell and Gordon having accepted "payment in lieu of notice" had "properly terminated their contracts of employment".

vii. The Union contends that there was no genuine redundancy, that the provisions of the Labour Relations Code requiring

..... pre-consultations on possible avoidance of and/or contingency plans in case of redundancy,

..... the giving of advance information to workers, Trade Unions and the Minister and

..... the giving of dismissal notices

were dis-regarded by the Company. The result was unjustifiable dismissals and the Union requested the Tribunal to so find and in keeping with the wishes of the three workers to order their reinstatement "without loss of wages or other benefits".

2. **POTENTIAL EMBARRASSMENT OF TRIBUNAL**

At the last session of the hearings, the Chairman called attention to a Gleaner Article of 3rd July, 2000 captioned "J.F. Mills accused of Union Busting". It referred to this dispute and-

(a) reported the Permanent Secretary of the Ministry of Labour as saying that "if the workers accepted the redundancy offers from the Company, there could be no dispute"; and

(b) opined that "the development has made two disputes ..... which were referred to the Tribunal "virtually irrelevant".

The Minister's reference to the Tribunal would thus be ultra vires or at least an exercise in futility.

In the circumstances, the Chairman spoke into the records his view that these statements in the article were gratuitous, ill informed, inappropriate and most unfortunate.

He deplored the statements and expressed the confidence that the Tribunal would not be prejudiced by them in its considerations.

3. THE EVIDENCE

The evidence revealed very little if any divergence between the Company and the Union as to the dominantly relevant facts of the case as broadly recited in the section "The Dispute" hereinbefore.

The chasm is between the legal inferences drawn by the parties and the effect of such inferences.

(a) The Company's case is that:-

(i) It decided and implemented measures to reorganise its operations as it was entitled to do. This it considered desirable and indeed necessary.

(ii) One such measure was the "outsourcing" of the work performed by the three subject employees to a contractor.

(iii) This "caused the requirements of the business for the three employees to carry out such work" "to cease or diminish (or to be expected to cease or diminish)".

(iv) This empowered the Company to effect what it perceived to "constitute a lawful termination by reason of redundancy".

(v) This it did "properly" and "in the most fair and just way possible".

(vi) A payment in lieu of notice and the acceptance thereof is a lawful and effectual termination of a contract of employment. Consequently, where an employee has accepted a payment in lieu of notice, dismissal in those circumstances would not fall within the purview and jurisdiction of the Tribunal. A payment in lieu of notice can properly terminate the contract of employment once accepted. Having accepted the payment in lieu of notice, the relevant employees "properly terminated" and accepted the termination of their contracts of employment by reason of redundancy.

(vii) The Labour Relations Code is not Law. It is merely a set of guidelines and not binding and need not be complied with.

(b) The Union's case is that:-

(a) Since the subject work is still being done by others, no legal redundancy situation existed or exists.

(b) The dismissals were really part of a Union busting exercise.

(c) As to implementation, the Labour Relations Code is specific as to the steps to be followed in redundancies. The Code reads:

Para. 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-

3. THE EVIDENCE (Cont'd)

(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 it is practicable in this pursuit."

(d) Management's abandonment of and non compliance with these humanitarian requirements constitute unfairness to workers and render the dismissals unjustifiable.

(e) The acceptance of the cheques by Campbell and Gordon was not an indication of their acceptance of management's actions or dismissals nor was it a waiver of any rights accruing to them by reason of unjustifiable dismissal. The fact that they instructed their Union to pursue their perceived rights is evidentiary of their dissatisfaction. They were disgruntled about their dismissals and had complained to their Union. The Union sought postponement - alas in vain. The management refused to postpone the dismissals.

The workers subsequently accepted the cheques to diminish the obvious hardships created by their sudden and unexpected dismissals.

4. THE ACT

For ease of reference we quote hereunder the relevant references from the LRIDA conferring jurisdiction on the Tribunal in these matters.

Sec. 12 (5) - Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -

(a) .....

(b) .....

4. **THE ACT (Cont'd)**

(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award -

(i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

(ii) shall, if it finds that the dismissal was 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;

and the employer shall comply with such order".

5. INTERPRETATION OF THE ACT

The Jamaica Court of Appeal decision in the case of Village Resorts Limited vs the Industrial Disputes Tribunal etc. (Civil Appeal No. 66/97) confirming a decision of the Supreme Court and affirming the Award of the Industrial Disputes Tribunal in what is commonly referred to as "the Grand Lido case" is binding authority for the following propositions:-

(i) Section 12(5)(c) of the LRIDA transcends "the pre-industrial context of the Common Law" and "creates a new regime with new rights, obligations and remedies" "unknown to the Common Law". (pp 12-13)

(ii) "Unjustifiable" does not equate to either "wrongful" or "unlawful". It means "unfair". This is supported by the fact that the "Labour Relations Code is mandated to be designed inter alia" "to protect workers and employers" against "unfair labour practices" (Sec. 3(1)(e) of the Act).

(iii) A dismissal can therefore be "lawful" i.e. "not wrongful" at Common Law and still be found by the Tribunal to be "unjustifiable" i.e. unfair .

(iv) The critical question is - was the dismissal unjustifiable i.e. unfair and this is a matter of fact to be determined by the Tribunal based on all the circumstances and on the conduct of both parties - Employer and Employees.

(v) The Tribunal is therefore not under any obligation to make a definitive finding as to the Common Law position re "Lawful" vs "Unlawful".

(vi) The onus of proving fairness is on the Employer.

6. ACCEPTING SEVERANCE CHEQUES

a) We disagree with the Company's submission that the acceptance of their severance cheques by Campbell and Gordon properly or otherwise terminated their contracts.

b) The Company's Counsel invited us (tongue in cheek perhaps?) to have regard to and be guided by the Tribunal's decision in the recent somewhat similar "Broilers' case" (Dispute No 33/98).

We have decided to reply to this invitation in some detail because:-

..... that case has relevance and our decision in this case is diametrically opposed to the remedial element therein;

..... we consider it important that, although the Tribunal is not in law bound by its previous decisions, there are principles which in the interests of continuity, consistency and credibility must guide it when it departs from its own precedents. The Tribunal should give reasons justifying such departures; (Broilers' case without any explanation went contrary to previous decisions in the Carib Steel case upheld by the Supreme Court in 1996 and the Hampden case in 1999)

..... of regard in this particular matter for the Chairman who signed the Broilers' settlement and award.

c) The Broilers case

(i) 302 workers on arrival at work one morning were unexpectedly greeted with dismissal letters on grounds of redundancy. They were locked out.

(ii) They all protested vehemently and refused to accept the company's decision and the severance payments.

(iii) After some days (8 or so) 266 of the workers collected the severance cheques. on grounds they said of economic pressures.

(iv) Before the Tribunal, they pleaded "unjustifiable" dismissed and requested reinstatement.

(v) The Tribunal found and expressly recorded that all 302 workers were unjustifiably dismissal by the company on August 13, 1999.

(vi) The Tribunal ordered reinstatement of the 36 workers who had not collected their cheques.

(vii) In respect of the others, the Tribunal made no effective award but wrote the following untenable finding:-

"Those individuals who disregarded the Union's advice and accepted the cheques have by doing so effectively terminated their contracts of employment with the company"

6. **ACCEPTING SEVERANCE CHEQUES (Cont'd)**

This finding represents bad law and some irrelevancy ("disregarded advice") and as argued hereinafter, projects the impossible.

d) We disagree with this finding both as to Law and Logic for several reasons inter alia:-

(i) The Tribunal having found unjustifiable dismissal (and all the workers having opted for reinstatement) had no power in law except to re-instate all the three hundred and two (302) workers.

To refuse this remedy to two hundred and sixty-six (266) workers - was ultra vires - contrary to the law.

In fact, even if reinstatement was inappropriate, they would be entitled to additional compensation based on "unjustifiability".

(ii) The workers were already dismissed. They were therefore unemployed and could not be dismissed from non-existent employment either by their former employer or by themselves.

(iii) The severance payment by the Employer was a statutory (minimum) inescapable obligation for justifiable dismissal. It was not voluntary. Compensation for unjustifiable dismissal would obviously be more. Why would workers accept less unconditionally?

(iv) It is true that acceptance can in some circumstances be evidence of waiver of rights. This was obviously not so in this case. The workers had protested vehemently. The very case cited the West Indies Yeast case - indicates that such waiver would have to be with knowledge of effect and unconditional. The acceptance would have to be without protest or demur and the onus or proof of these requirements would be on the Employer.

e) We cannot follow this Broilers' case. We must be guided by proper law, logic and reason.

f) We therefore obviously disagree with the Company's submission that there was no "dispute" and that the Tribunal's jurisdiction does not extend to a finding of whether Campbell and Gordon were unjustifiably dismissed.

7. **EXTENT OF JURISDICTION**

a) Counsel for the Company submitted that:

> "The issue which arises is whether the Industrial Disputes Tribunal (IDT) has the jurisdiction to determine whether the decision of an employer to enter into a situation which resulted in the creation of redundancies was fair or not.
>
> The Tribunal does not have jurisdiction to determine the issue as stated above."

7. EXTENT OF JURISDICTION (Cont'd)

We acknowledge the substantial merit in part of this submission, but we hold that the Tribunal can decide whether a genuine case of redundancy exists in any circumstances before it.

Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employers' decision that there was a fair case of redundancy and we make none.

b) Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that "redundancy" and "dismissal" are synonymous the former being projected as merely a form of the latter. Each is a discrete entity.

c) Indeed, Counsel's written submission conceded the following:-

> "the procedure and effects of a redundancy can be challenged as unfair by a dismissed employee:-
>
> 1 .....
>
> 2. "if the redundancy was badly handled and therefore unfair on general principles".

We find that this concession is substantially relevant to the gravamen of this subject dispute.

8. THE LABOUR RELATIONS CODE

Quite often, as in this case, non compliance with the Code is explained on the grounds that it is not enacted Law but merely a set of guidelines and not binding.

This approach is morally inappropriate and procedurally unwise. The Code is as near to Law as you can get. The Act mandates it. It consists of "practical guidance" by the Minister after consultation with Employers and Employees. It was (as legally required) approved by both the Senate and House of Representatives and can only be amended in the same manner as originally established. It is a statement of National Policy.

Failure to comply with it is not an offence but Employers and Employees disobey or disregard it at the risk of other perils if disputes reach the I.D.T.

The Act at Sec. 3 (4) compels the I.D.T. (no option) to take its provisions "into account" where relevant. To quote:-

> "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 to any proceedings; but in any proceedings before the 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

8. THE LABOUR RELATIONS CODE (Cont'd)

> shall be taken into account by the Tribunal or Board in determining that question."

In keeping with this statutory mandate, we have taken the relevant provisions of the Code into account in arriving at our decisions herein.

9. ARGUMENTS

(i) Three (3) workers with periods of service 28, 14 and 13 years respectively were in our translation effectively told at around 2:15 p.m. on a work-day with but two (2) hours at most to close that

> you are dismissed by reason of redundancy. Collect your severance money and do not return to work here as of tomorrow!

(ii) The Company's explanation was that this method of dismissal without prior consultation was based on long standing Company policy, even though at least one senior officer did not endorse such policy.

(iii) The Company's policy was based on reasonably perceived sabotage and rumours of threatened sabotage by workers on two previous occasions when notices of dismissal by reason of redundancy were served. We are not however, privy to any evidence that any fear of sabotage by these three workers in particular was soundly based. We find the Company's explanation inadequate.

(iv) The Labour Relations Code expressly recognises the principles that:-

> ..... work is a social right and obligation not a commodity
>
> ..... respect and dignity must be accorded to workers
>
> ..... industrial relations should be carried out within the spirit and intent of the Code
>
> ..... Communication and consultation are essential features

The effects of these considerations should be visible in the Company's handling of the matter.

(v) If "no notice" was the Company's policy, delegates should have been notified [Para. 15(ii) (a)] and this should have been made clear to workers [Para. 9 (ii) (l)] of the Code.

(vi) We are not without some understanding of and sympathy for the fear, but we feel that Companies must find and implement effective safeguards against the risk of sabotage without abandoning the fair labour practices envisaged by the Code. As it was, the abandonment - the non-consultation etc - triggered a strike by other workers which could have had more serious results.

9. ARGUMENTS (Cont'd)

We have no evidence of the Company ever seeking or considering any alternative solutions to this perceived sabotage problem.

10. FINDINGS

(i) The workers were effectively dismissed by the Company on 13th August, 1999. The stated reason was Redundancy. There was no question of fault or misconduct on the part of the workers.

(ii) The workers were shocked, dissatisfied and disgruntled. Their subsequent conduct and the endeavours of their Union contradict any interpretation that they were waiving any rights of redress available to them. Indeed they mandated their Union to pursue their perceived rights.

(iii) It was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officers who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided.

UNJUSTIFIABLE

(iv) Having considered the weight and implications of all the matters before us, WE FIND by majority THAT:-

(a) the three workers Suckie, Campbell and Gordon were unjustifiably dismissed by the Company on the 13th of August, 1999 and

(b) all three workers wish to be reinstated.

RE: REINSTATEMENT

(v) Section 13 (5) (c) (i) of the Act leaves us no option in the light of (iv) (a) and (b) above but to reinstate all three (3) workers.

Conscious as we are of the consequent financial implications and possible difficulties in the case of the two (2) workers who accepted the severance cheques, we are constrained to record our view that a Tribunal which can order reinstatement should have the discretion to choose between such reinstatement and appropriate additional compensation in this case for unjustifiability. This case certainly bolsters this long held view.

(vi) Reinstatement involves "restitutio in integrum" (restoration to one's original position). Notes on the Employment Protection Act in Halsbury's Statutes of England and Wales (1990) at page 296 speak to it in this way:-

10. **FINDINGS (Cont'd)**

> "the employer shall treat the (unjustifiably dismissed worker) in all respects as if he had not been dismissed".

(vii) Fortunately, we are allowed one discretion in the language of Section 12 (5) (c) (i) i.e.

> "with payment of so much wages, if any, as the Tribunal may determine".

(viii) The Unions prayer is for full wages and benefits, but in exercising our discretion we take into account:

> ..... in respect of all three (3) workers, contributory fault (if any) and the appropriateness, opportunity and apparent effort in mitigating their loss and
>
> ..... in respect of Gordon and Campbell their intervening potential and real financial benefit from the severance payments e.g. Bank interest up to the present.

These considerations are reflected in the percentage of wages awarded hereinafter.

AWARD

Consequently, as mandated by and in accordance with Sec. 12 (5) (c) (i) of the L.R.I.D.A:- and sub. paragraph (iv) of the "Findings" above

(a) THE TRIBUNAL by majority HEREBY ORDERS the Company to reinstate the said workers Suckie, Campbell and Gordon with effect from the 13th August, 1999 (the date of the purported dismissals):-

(i) in respect of Mr. Simon Suckie with full wages, and

(ii) in respect of Messrs. Michael Campbell and Ferron Gordon with sixty percent (60%) of their wages up to the 21st of October, 2000 or the date on which the Company re-engages them and they resume their duties, whichever is earlier and full wages thereafter.

IMPLICATIONS

(1) This award obviously means that Campbell and Gordon as a condition of reinstatement are to refund to the Company the amounts received by them as severance payments and we so order.

(2) The following precautionary conditions are integral elements of this award but they are without prejudice to any other proceedings for recovery by the Company of any amount due it under (1) above.

(a) The arrears of wages due to Campbell and Gordon up to the 21st of October or re-engagement are to be applied towards reducing the amounts to be refunded to the Company.

(b) Unless the then outstanding differences are refunded before the first pay day after October 21, 2000 then seventy five percent (75%) of the wages thereafter earned and payable to them is to be similarly applied as at (a).

The Company may charge Interest not exceeding 6% on the outstanding balance.

(c) Unless and until the workers resume work when re-engaged by the Company wages shall cease to accrue as at the 21st of October, 2000.

We do not consider it necessary at this time to speculate concerning any other possible situations.

DATED THIS 10th DAY OF OCTOBER, 2000.

C. Clinton Davis
Chairman of the Division

Desmond G. Thomas
Member

Witness

David Chandia
Secretary