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**INDUSTRIAL DISPUTES TRIBUNAL**

**Dispute No.: IDT 6/2007**

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**SETTLEMENT OF DISPUTE**

**BETWEEN**

**PRIVATE POWER OPERATORS LIMITED**

**AND THE**

**NATIONAL WORKERS UNION**

**AND THE**

***AWARD***

**I.D.T. DIVISION**

<b>DR. ALLAN KIRTON</b>	<b>-</b>	<b>CHAIRMAN</b>
<b>MR. TREVOR GRAHAM</b>	<b>-</b>	<b>MEMBER</b>
<b>MR. CLINTON LEWIS</b>	<b>-</b>	<b>MEMBER</b>

**JULY 21, 2009**

IDT 6/2007

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

PRIVATE POWER OPERATORS LIMITED

AND THE

NATIONAL WORKERS UNION

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REFERENCE:

By letter dated March 7, 2007 the Honourable Minister of Labour and Social Security pursuant to Section 9(3)(a) 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 Private Power Operators Limited on the one hand and the National Workers Union on the other hand, over the dismissal of Mr. Garrett C.E. Francis."*

**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:

Dr. Allan Kirton	-	Chairman
Mr. Trevor Graham	-	Member, Section 8(2)(c)(ii)
Mr. Clinton Lewis	-	Member, Section 8(2)(c)(iii)

**REPRESENTATIVES OF PARTIES:**

The Company was represented by:

Ms. M. Angela Robertson	-	Attorney-at-Law
In attendance were:	-	Miss Millicent Isaacs, Business Administrative Manager
	-	Mr. Ciector Whitelock, Production Manager

The Union was represented by:

Mr. Granville Valentine	-	Vice President/Assistant Island Supervisor at the first sitting
Mr. Robert Harris	-	Senior Negotiating Officer at subsequent sittings
Mr. Donat Robinson	-	Negotiating Officer
In attendance were:	-	Mr. Delroy Smith, Chief Delegate
		Mr. Kevin Webley, Delegate
		Mr. Garrett Francis, Aggrieved Worker

### **SUBMISSIONS AND SITTINGS:**

Briefs were submitted by the parties and oral submissions made during eighteen (18) sittings, from the 1<sup>st</sup> October 2007 to the 23<sup>rd</sup> December 2008.

### **BACKGROUND:**

The Company, Private Power Operators (PPO) is a limited liability company which operates the 60MW slow speed Diesel Plant located at 100 Windward Road in the parish of Kingston and which is owned by Jamaica Private Power Company (JPPC). JPPC's primary business is power generation and the sale of wholesale electricity at the high potential side of its main transformers. The Company's primary business is the management operation and maintenance of the aforesaid Plant.

The Plant began commercial operation in January 1998 and is comprised of two 30MW slow speed diesel engines, two heat recovery steam generators, and a 4MW steam turbine generator. The diesel design is marine-based. There are other comparable plants in the world located in India, the Bahamas and Macao.

JPPC's only customer is Jamaica Public Service Company (JPS). The Plant represents roughly ten percent (10%) of Jamaica's electrical generating capacity. JPS has contracted for the Plant's output for the first 20 years of the Plant's operation.

The Company operates and maintains the Plant under the terms and conditions of the Construction Management, Operation and Maintenance Agreement with JPPC. The initial term of the Agreement, which expired December 31, 1999, is five years. The Agreement, thereafter, is automatically extended annually by mutual agreement.

The **National Workers Union** is a registered Trade Union with offices situated at 130-132 East Street, Kingston and is the bargaining agent for and on behalf of the categories of workers which include Instrument Technician 11 at Private Power Operators Limited.

### **COMPANY'S CASE:**

Mr. Garrett C. E. Francis ('Francis') was offered employment as an Instrument Technician II with the Company by letter dated 13<sup>th</sup> June 2006 and he accepted same on the 21<sup>st</sup> June 2006.

The aforesaid letter contained the Company's policy in relation to the "Probationary Period" and the "Staff Manual". Under the rubric Probationary Period it said:

**"you will be required to serve a probationary period of three months during which time either party may terminate the employment without notice or by the giving and receiving of two weeks written notice"**

and under the rubric "Staff Manual" it said:

**"You will be provided with the Personnel and Employment Manual which elaborates and guides on practices and procedures relating to its employees and standard terms and conditions of employment. The provisions of this Manual will form part of your terms and conditions of employment."**

Being a part of the employees terms and conditions of employment once Francis accepted the Company's offer of employment as he did on the 21<sup>st</sup> June 2006 he was bound by the provisions under the rubric "Payroll Policies" hereunder:

**"Payroll payments for Employees will be effected monthly via direct deposit to employee's accounts. Payroll payments for all Employees will be available at 1,200 hours by the last working day of each month."**

**Company's Policy re Electronic Banking:**

In 2000 The Bank of Nova Scotia (hereinafter called (BNS) introduced electronic banking for payroll purposes to the Company and all employees were required to have BNS accounts for receipt of salaries. Initially there were glitches in the system but these were overcome and the employees' pay was received very early on the monthly pay date, many times by 6:00 a.m.

Between July and August 2006, First Caribbean International Bank (FCIB) tried the payroll processing through their accounts with the manual information still going to BNS and each month the Company had employees' complaints about late payment of salaries.

Between September and November 2006, FCIB installed its electronic payroll system and commenced transmitting to the other banks and discovered that BNS and National Commercial Bank were not yet on board with the intra bank transfers and this created undue delays in salary payments to employees with BNS accounts.

As of December 1, 2006, FCIB and the other banks were all connected to the intra bank system and the information for salary payments could be uploaded electronically to the other banks, but the transfer to the individual account was still at the receiving bank's discretion. FCIB account holders were credited by 8:00 a.m. on the salary date.

To ensure a timely transfer for all the Company's employees, management requested that all employees employed after June 1, 2006 open payroll accounts with the Company's bank.

**The Dispute:**

By letter dated June 21, 2006, Mr. Francis responded to the Company's offer of employment referred to above by indicating his unavailability to commence work until

the 31<sup>st</sup> July 2006. A notation on the aforesaid letter, however, stated that by agreement Mr. Francis would commence work on the 24<sup>th</sup> July 2006.

This was confirmed by letter dated 22<sup>nd</sup> June 2006 to Mr. Francis.

By letter dated 8<sup>th</sup> November 2006, Mr. Francis wrote to Mr. Handel Lamey, Maintenance Manager in the Transport and Electrical Department, enquiring about his letter of confirmation and the commencement of benefits due upon confirmation in light of the fact that he had completed his three (3) months probationary period.

By memorandum dated 29<sup>th</sup> November 2006, Mr. Lamey wrote to Mr. Cietor Whitelock, Production Manager, in relation to Mr. Francis' performance and informed him that he was recommending his appointment as an Instrument Technician II within the Maintenance (Instrument) Department.

Pursuant to that memorandum, the Company's Business and Administrative Manager wrote to Mr. Francis by letter dated 5<sup>th</sup> December 2006 confirming his employment on specified terms and conditions including, inter alia, the under-mentioned:

**"This is a unionized position which attracts overtime payments.  
Your present salary remains in effect until January 1, 2007  
and will now be paid into a First Caribbean International Account."**

Mr. Francis was required to sign the aforesaid letter acknowledging his acceptance of the contents thereof. Mr. Francis failed and/or refused to so do.

In a meeting with the Company's representative he intimated that the Bank Account requirement that was set out therein was verbal and not written and he did not like how it was written in the letter. This reference by Mr. Francis to a verbal agreement was to an agreement made with the Company's representative in relation to the Company's request that he open an account with FCIB in accordance with the Company's payroll policy.

This was a binding term and condition of his Contract of Employment as a contract may either be oral or in writing or both.

Notwithstanding the above, the Company's representative by letter dated the 12<sup>th</sup> December 2006, again wrote to Mr. Francis outlining his intention to confirm him on terms and conditions including, inter alia, the under-mentioned:

**"This is a unionized position which attracts overtime payments. Your present salary remains in effect until January 1, 2007 and will now be paid into a First Caribbean International Bank Account effective 1 December 2006."**

Mr. Francis was required to sign acknowledging acceptance of the terms and conditions stated therein. He failed and/or refused to so do.

Upon receipt of the aforesaid Mr. Francis indicated that he would open the relevant account and then close it once the salary was deposited therein. As this would have been a breach of his terms and conditions of employment, the Company's representative retrieved the aforesaid letter from Mr. Francis.

Mr. Francis' failure and/or refusal to acknowledge his acceptance of the terms and conditions of employment was a unilateral variation of his terms and conditions of employment set out in his letter of offer dated 13<sup>th</sup> June 2006. It clearly stated in his letter of employment that the Staff Manual formed part of his terms and conditions of employment. As set out herein the Staff Manual makes it abundantly clear that payment will be made by electronic transfers and this together with his oral agreement to open an FCIB account were part of his terms and conditions of employment which he could not unilaterally vary.

Mr. Francis' unilateral breach of this term and conditions of employment and his attitude demonstrated in dealing with this issue, left management with no alternative but to treat his conduct as a repudiatory breach of same.

Accordingly by letter dated 15<sup>th</sup> December 2006, Mr. Francis' contract of employment was terminated with immediate effect. Mr. Francis received payment in full for the month of December 2006.

The Union took issue with the termination of Mr. Francis' contract of employment and as the parties were unable to settle this dispute at the local level or at the Ministry of Labour, the dispute was referred to the Industrial Disputes Tribunal for its adjudication.

The Company relied on the following propositions, inter alia, for which cogent authority exists:

**The Law:**

The law in relation to the termination of contracts of employment for the purposes of Jamaica is based on, and governed by, the English common law, as well as statute. The main piece of legislation is the (Employment Termination and Redundancy Payments) Act, (the ETRPA).

**The Contract of Employment:**

The relationship between employer and employee is governed by the contract of employment which is regarded as the determinant of the contractual obligations between the parties. It should be noted that a contract of employment is a contract like any other. As such, the parties are bound by the terms and conditions which were offered by the employer and accepted by the employee.

A contract of employment may either be oral or in writing, and as such it is an established principle of law that the terms of a contract of employment may be expressed or implied.

Further, the expressed terms of a contract of employment may be derived from a number of sources and it is well accepted that **the letter offering or confirming an appointment, and any documents about terms and conditions of employment which accompany it, form the fundamental terms of the contract of employment of the employee who takes up the job.**

In Halsbury's Laws of England Vol. 16 para. 75 it is stated: As well as being implied, terms of a contract of employment may be incorporated from some other source. Historically the principal source of such terms has been a collective bargain, but more recently **documents such as work manuals, company handbooks or company policy statements have become potential sources of terms and conditions of employment.'**

Based on the above statement of the law therefore, the Company's Personnel and Employment Manual ("the Manual") is to be considered a source of terms and conditions of employment where it is "incorporated into the contract of employment". Incorporation may be either expressed or implied.

Applying these authorities mentioned above, and other decisions relevant to the case at hand, it is submitted that the method of payment was an expressed term of the contract of employment between Mr. Francis and the Company. By refusing to accept payment of wages by way of direct deposit into a FCIB account, Mr. Francis was in breach of the agreed terms of the contract of employment, and consequently was justifiably dismissed.

In conclusion, the Company's position is that it was a term of the contract of employment that after the probationary period there would be a performance evaluation and based on the results of the same the Company could decide whether or not to confirm Mr. Francis.

In keeping with the same, a performance evaluation was conducted and the Company decided to confirm Mr. Francis in his position. However, Mr. Francis had an issue with

the method of payment, namely the fact that the Company would pay him by direct deposit into an account at FCIB.

Mr. Francis was unequivocally advised both verbally and in writing via the Company's manual, that the method of payment would be by bank transfer to FCIB and accordingly this mode of payment formed a term and condition of his contract of employment. By attempting to unilaterally alter the same he was in breach of contract and the Company accepted the repudiation and terminated the contract of employment.

### **UNION'S CASE:**

The Union's presentation showed important differences in emphases in certain areas especially as it relates to procedure, consultation and the management performance of the Company. For example, in the case of his confirmation, the Union points out that Mr. Francis after noticing that the three (3) months' probationary period had elapsed wrote to his Manager, Mr. Handel Lamey (in a letter dated November 8, 2006) seeking his assistance in completing his confirmation.

There was no response to Mr. Francis' letter of November 8, 2006. He was given verbal assurance that he would be confirmed and that it was just a matter of completing the paper work. These included interviews with Mr. Francis and an assessment/evaluation document to be produced. Mr. Francis was asked to read and sign the said document.

The Company subsequently presented a confirmation letter to Mr. Francis on Wednesday December 13, 2006. He read it and enquired about the omission of a certain condition that he had questioned and which was being stipulated by the Company. He also questioned the Company's insistence that he discontinue using his bank account at Bank of Nova Scotia for salary purposes and open such an account at First Caribbean International Bank. Mr. Francis wanted that stipulation in writing from the Company as he had fears that there could be difficulties with FCIB in the future.

The Union further pointed out that Ms. Millicent\ Isaacs, Business Administrative Manager, then retrieved the letter and said she would have further discussions with the Production/Operations Manager and have the letter amended.

Mr. Francis complied with the Company's request to open the account at First Caribbean International Bank. He supplied all relevant information to the company to facilitate the process. He subsequently received a letter from First Caribbean International Bank dated December 21, 2006, which indicated his account number. (This letter was mailed to Mr. Francis' home by First Caribbean International Bank). Mr. Francis did not attend the Bank to carry out this exercise. Everything was done by the Company.

On Friday, December 15, 2006, Mr. Francis was handed a letter of dismissal dated that same day and signed by the then General Manager, Mr. James Zimmer. The letter stated that the Company had decided not to confirm him in the job as Instrument Technician 11 with immediate effect. It stated the reason for dismissal as "*unsatisfactory completion of probationary requirements*". For this statement the Union referred to the Collective Agreement for the Bargaining Unit, page 19 under the heading "**Probation**". At no time during his employment was Mr. Francis advised that his probation was being extended.

The Union and the Company met on January 3, 2007. The discussions surrounded several issues which arose as a result of the dismissal. The Company requested additional time to have further consultations with other management personnel.

On or about January 11, 2007, the Union was advised by way of telephone conversation with the General Manager, Mr. J. Zimmer that the Company would be sticking to its original position, that is, not to reinstate Mr. G. Francis. The Union expressed its disappointment and advised the management that the matter would be taken to the next level.

The matter was referred to the Ministry of Labour and Social Security, seeking their assistance in resolving same. However, after two (2) meetings between the parties on February 2, 2007 and February 16, 2007 at the Ministry, the matter remained unresolved.

### **TRIBUNALS RESPONSE:**

The crux of the dispute boils down to why did Mr. Francis not sign the letter of confirmation in the specially provided space for "Employee's Acknowledgement" thus accepting the additional conditions stipulated therein (in addition to those in his original letter of appointment) and hence completing the process of his confirmation.

In this letter of confirmation, it is stated that "your present salary remains in effect until January 1, 2007 and will now be paid into a First Caribbean International Account." Mr. Francis objected to this banking arrangement in the letter of confirmation and indicated both in examination in chief and in cross-examination that what he wanted in his letter of confirmation was a guarantee that the Company would be responsible for any sums he had in the Bank if the Bank got into problems.

The Company indicated, through Miss. Millicent Isaacs, Business and Administrative Manager, that there was no way that the Company could do that because if it was done for one employee, it would have to be done for all and the Company could not take on that liability. In any case such a liability was not contemplated under the Company's Payroll Policy referred to earlier.

Consequently, the letter of confirmation having not been acknowledged and signed by Mr. Francis, the Company decided not to confirm him and wrote him to that effect vide dismissal letter.

The Company is of the view that Mr. Francis was well aware of the Company's

(a) Payroll Policies, and having signed the appointment letter on 21<sup>st</sup> June, 2006 was

bound by those provisions;

- (1) The probation period of ninety (90) days had elapsed by over 15 days without any communication from that department to Mr. Francis. It was Mr. Francis who reminded the Company that his 90 days period of probation had elapsed and his evaluation was not yet done, nor was his probation officially extended.
- (2) In addition to the verbal communication with the Business and Administrative Manager no letter or circular was produced at the Tribunal which informed Mr. Francis on the proposed change from BNS to FCIB as the Company's main banker;
- (3) No memorandum, circular nor other information mechanism was produced to confirm the holding of the general staff meeting to inform of the change from BNS to FCIB.

Surely there must have been some minutes or record made of this important meeting such as the nature of discussion and who attended.

We are not here contesting the evidence given that such a meeting was held – as both sides agreed, though one only reluctantly, that this was so. It should also be noted, that under cross examination Miss Isaacs did not remember the date of the meeting and seemed vague about it. Mr. Francis said he did not attend.

- (4) No memorandum or letter regarding Mr. Francis's requests to add the clause making the Company liable for his money if FCIB fails, nor Miss Isaacs's reply on behalf of the Company, were presented.
- (5) No record was presented of the discussion with Mr. Francis on orientation day, 24<sup>th</sup> July, 2006 when he was told that he had to open an FCIB account in order to receive his salary. In fact, evidence presented indicated that his

application was sent to the Bank only on 12<sup>th</sup> December, 2006. Notice, also, that in the covering letter from the Company to the Bank, Mr. Francis's name was mis-spelt (Garette rather than Garrett).

It should be noted, however, that PPO claims, through its witnesses, that the late submission of the application to FCIB was due to the late return of the forms by Mr. Francis to officials of Private Power Operators. Again no back up note or document was presented.

It can be argued that many managers might not commit to memoranda, the issues raised at 1-5 above, but such memoranda can become very important where there is doubt or disagreement between the main actors.

For example, in this connection, it should be noted that under examination in chief, Mr. Francis insisted that:

- (1) he did receive the confirmation letter dated 5<sup>th</sup> December, 2006 but only on or about the 12<sup>th</sup> December, 2006 and definitely did not receive the confirmation letter dated 12<sup>th</sup> December, 2006.
- (2) he did not have a discussion with Mr. Whitelock re the Opening of the FCIB account.
- (3) on the 24<sup>th</sup> July, 2006 - the day of his orientation - he was not told by Miss. Isaacs of the necessity of opening an FCIB account for receipt of his salary.

There were no suitable documents available to the Tribunal which could help to solve these inconsistencies.

As noted, the absence of such memoranda creates a certain amount of uncertainty and doubt regarding the management of this whole affair and while not condoning or justifying the absence of Mr. Francis's signature accepting the confirmation letter, it does create some questions given the deficiencies highlighted above and consequently, the deficits in the Company's Human Resource Management skills at that time.

This also led to a situation where Mr. Francis was in an uncertain position between the 24<sup>th</sup> October 2006 - the end of his Probationary period - and the 12<sup>th</sup> December, 2006.

**Company's Rights and Responsibilities to Conduct its Business:**

The Collective Labour Agreement between Private Power Operators Limited (PPO) and the National Workers Union (NWU) states that the Company has the sole right and responsibility to conduct its business and manage its operations in such a manner as it shall think fit. Accordingly, the Company has the right in its sole discretion:

- (a) to manage its works; to plan, direct and control operations and the working force including the days, time, methods and manner of working, allocation of work and the number of Employees required in any department or operation; to determine from time to time in which rate or category any job or employee falls; to lay off employees for lack of work or other reasons;
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) .....
- (h) .....
- (i) .....
- (j) to make rules and regulations the Company considers necessary or advisable

for the orderly, efficient and safe conduct of its business and to require Employees to observe such rules and regulations.

It is clear that in the Personnel and Employment Policy Manual under the rubric "Payroll Policies", the statement "Payroll Payments for Employees will be effected monthly via direct deposit to Employees' accounts" was one such rule/regulation that the Company considered necessary, if not crucial for the orderly, efficient and safe conduct of its "business."

It cannot be denied that the basic financial arrangement e.g. collection of revenue and determination of expenditure, debt, and the selection of its banking institutions etc. is a sole and fundamental right of the management of the Company. We can, therefore, appreciate why no specific bank(s) were mentioned in the section of the manual on Payroll Policies for this could be too cumbersome for smooth management especially in the event of the need to change its bank.

The Company in its Brief and through evidence gave cogent reasons why it was necessary to move its accounts from BNS to FCIB. The Company gave employees, who had been employed with the Company on a permanent basis, an option to remain with their existing banks for payroll purposes, but determined that all new employees must open an account for payroll purposes at FCIB as from 1<sup>st</sup> December, 2006. Some complied, but Mr. Garrett Francis had a problem with FCIB and wanted a special clause included in his letter of confirmation.

The Company indicated that they could not agree to this new condition requested by Mr. Francis and he was subsequently informed that he would not be confirmed in the post of Instrument Technician II.

The fact is that having accepted his offer of appointment on 21<sup>st</sup> June, 2006 Mr. Francis seem to have had already agreed to the 'open ended' Payroll Policy stated in the Private Power Manual and as noted above, the 'open ended' policy was a necessary tool of

management to operate efficiently and effectively in the changing economic and financial environment.

**Conclusion:**

According to Miss Isaacs the change to FCIB was communicated to Mr. Francis as early as 24<sup>th</sup> July, 2006 by her on his orientation day and also about the 4<sup>th</sup> December, 2006 when he met with her re his confirmation. We feel he should have **signed and returned his Confirmation Letter**. He would have plenty of time afterwards to complain about his perceived failings of FCIB.

We agree that Mr. Francis did not complete the Company's requirement for confirmation on its permanent staff by signing in the appropriate place provided and returning to the Company. .

We cannot, however, fail to note the Company's lapses in procedure and communication which contributed to the unfortunate outcome.

The management deficits referred to above, especially the delay in the probation process (with no official extension) and the absence of certain written back-up documents have led to some uncertainties generally.

It should be noted that the Labour Relations Code, Section 3 of the LRIDA, stresses the importance of the development of good management practices and industrial relation policies and also the value of face to face meetings and word of mouth communications, backed-up by written documentation.

In this specific case, it appears that some of these desirable characteristics were in an early stage of development.

It also placed Mr. Francis in an uncertain state between the end of the probationary period on the 24<sup>th</sup> October 2006 and the receipt of his belated confirmation letter dated 5<sup>th</sup> and /or 12<sup>th</sup> December 2006 – a period of six (6) to seven (7) weeks in limbo.

What is also note-worthy is that the apparent nonchalance and neglect demonstrated in the process of his confirmation contrast significantly with the speed, efficiency and clinical nature of his non confirmation and hence dismissal.

Accordingly, in the special circumstances of this case:

1. the management deficit outlined above;
2. the non confirmation of Mr. Garrett Francis;
3. his limited service (less than six (6) months);

though there may have been solid reasons for non confirmation and dismissal of Mr. Garrett Francis, there were certain extenuating factors which made the dismissal unjustifiable and these should be taken into account.

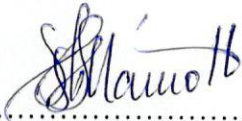
### **AWARD**

In accordance with Section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act (LRIDA) the Tribunal awards that:

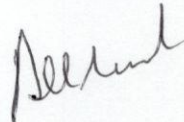
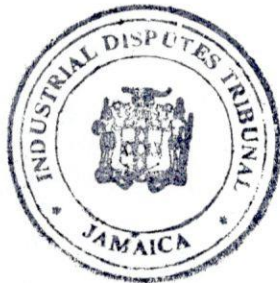
- (a) The Company re-instate Mr. Garrett Francis effective 16<sup>th</sup> December, 2006 on or before 12<sup>th</sup> August 2009.
- (b) Failure to re-instate Mr. Garrett Francis as stipulated in (a) above, the Company shall pay to him compensation in the amount of thirteen (13) weeks normal wages as relief.

DATED THIS 21st DAY OF JULY 2009.

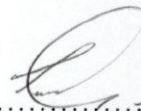
Witness:



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



.....  
Dr. Allan Kirton  
Chairman



.....  
Mr. Trevor Graham  
Member



.....  
Mr. Clinton Lewis  
Member