INDUSTRIAL DISPUTES TRIBUNAL

Dispute No: IDT 27/2013

SETTLEMENT OF DISPUTE

BETWEEN

PRIVATE POWER OPERATORS LIMITED

AND

UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY EMPLOYEES

AND THE

AWARD

I.D.T. DIVISION

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

APRIL 5, 2016

IDT 27/2013

INDUSTRIAL DISPUTES TRIBUNAL

AWARD

IN RESPECT OF

AN INDUSTRIAL DISPUTE

BETWEEN

PRIVATE POWER OPERATORS LIMITED
(THE COMPANY)

AND

UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY EMPLOYEES
(UNION)

REFERENCE:

By letter dated July 5, 2013, the Honourable Minister of Labour and Social Security in accordance with Section 9 (3) 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 Union of Clerical, Administrative and Supervisory Employees (UCASE) on the other hand, over the termination of Messrs. Windell Douse and Henry Harris."***

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, JP	-	Member, Section 8(2) (c) (ii)
Mr. D Trevor McNish	-	Member, Section 8(2) (c) (iii)

REPRESENTATIVES OF THE PARTIES:

The **Company** was represented by:

Ms. Angela Robertson	-	Attorney-at-law
Ms. Denise Samuels	-	Human Resource & Training Manager
Mrs. Petrena Watson	-	Former Human Resource Manager
Mr. Ainsworth Brown	-	Departmental Manager

The **Union** was represented by:

Mr. Granville Valentine	-	Industrial Relations Consultant

In attendance:

Mr. Windell Douse	-	Aggrieved Worker
Mr. Henry Harris	-	"

SUBMISSIONS AND SITTINGS:

Briefs were submitted by both parties who made oral submissions during forty-seven (47) sittings held between March 13, 2014 and January 18, 2016.

BACKGROUND TO THE DISPUTE:

Private Power Operators Limited (PPO) which operates the 60MW slow speed Diesel Plant located at 100 Windward Road in the parish of Kingston 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. PPO'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 30 MW slow speed diesel engines, two heat recovery steam generators and a 4 MW steam turbine generator. The diesel design is marine-based. There are other comparable plants in the world located in India, the Bahamas, and Macao.

The history of this dispute must be traced back to December 31, 2012 when the management of Private Power Operators (herein after referred to as 'the Company') wrote to the National Workers Union (herein after referred to as 'the Union'), inviting it to a meeting to discuss a proposed restructuring exercise. Arising from this initial invitation, three meetings were held subsequently and a number of related correspondences were exchanged between the parties.

At the last meeting held on June 19, 2013, the Union was informed via a statement handed to it by the Company, that the restructuring exercise would result in the redundancy of the jobs of at least fifteen employees and that this would be effective on June 28, 2013. As a result of the disclosure of the pending redundancies, the Union served a Strike Notice on the Company, resulting in the intervention of the Ministry of Labour who has mandated the Tribunal to settle the dispute under the following Terms of Reference:

> **"*To determine and settle the dispute between Private Power Operators limited on the one hand, and the National Workers Union (NWU) on the other hand, over the termination of Messrs. Windell Douse and Henry Harris."***

CASE FOR THE COMPANY:

1. The Company contended that a valid redundancy situation existed and that a fair procedure was used in carrying out the redundancy exercise. Consequently, the dismissals by reason of redundancy are not unjustifiable. Further, there are two central issues relevant to the determination and settlement of this dispute. The first is whether a genuine redundancy

existed and the second is whether a fair procedure was used in the selection of the workers who were displaced.

2. That there is sufficient evidence, documentary and oral, by witnesses who testified that the company was faced with increased pressure to reduce the cost of electricity generation and was therefore forced to take steps to improve the operational efficiency of the plant and equipment.

3. That the Company had informed and kept the Union up-to-date on all relevant information relating to the restructuring exercise and in particular, in its letter of April 24, 2013, (exhibit 3), from which the following is reproduced:

> **"Consequently, the company has to reduce the maintenance costs of the plant to continue to be viable as the compensation being received for running the plant is not enough to cover the maintenance. Recognizing that the plant is over 15 years old and that the current manner of maintaining the plant in increments would result in increased costs as the plant continues to age, the company took the decision to perform a complete overhaul to change a number of the significant parts to ensure:**
>
> - **Improved running hours;**
> - **Reduce unplanned maintenance due to engine failures which also result in forced outages and penalties**
> - **Improved efficiency**
>
> **This decision will reduce the cost associated with maintenance by approximately US$1.2M annually.**
>
> **For the bargaining units represented by the NWU and UCASE the Company has been running at over J$200M annually in labour related cost with a high of J$263M in 2012. This includes salary, overtime, lunch, allowances, etc. With the reduction in the number of employees and applying projected increases to remaining staff, it is expected that labour cost would still continue to increase to over J$300M by 2017 in comparison to almost $400M if the exercise is not**

done. Note that if the plant is expected to be operating with newer parts and therefore not requiring as many maintenance hours as it currently does, then keeping the current complement of maintenance staff would not be an optional decision."

4. That in said letter of April 24, 2013, to the Union, the Company proposed three dates in May of 2013, to continue the consultation process. The Company not having received any response from the Union, notwithstanding promises made in telephone conversations with the Company's Human Resources Manager, wrote to the Union on May 13, 2013, in the terms reproduced below. The necessity for the Company to write reminding the Union to respond to its correspondence, further demonstrates that notwithstanding every effort on the part of the Company to manage consultation meetings on a timely basis, given the urgency of the situation as it relates to operational efficiency of the Company, the Union was not acting in a proactive and co-operative manner.

"Dear Mr. Valentine

We refer to our letter to you dated April 24, 2013 and subsequent telephone conversation between you and our Human Resource Manager, Petrena Watson advising that you would have responded to the company in writing by Monday, May 6, 2013. We are yet to receive your response to our letter.

We are inviting you to another meeting on either of the dates below:

- **May 29, 2013 - anytime**
- **June 4, 2013 - afternoon**
- **June 5, 2013 - afternoon**
- **June 7, 2013 - anytime**

We have been making effort to complete the consultation process with the Union however as we have started these discussions in January 2013, we are unable to prolong this process any longer. If we do not hear from you, we will have no other option but to continue the process as we deem appropriate in the circumstances.

We anticipate your cooperation in this regard."

5. That notwithstanding the above-mentioned request for an early meeting in May, the Union was unable to meet until the 19th June, 2013. At this meeting, the Company reiterated the fact that it had provided the Union with information requested in relation to the exercise and acknowledged receipt of the Union's letter of the 14th May. It informed the Union that it intended to proceed with the exercise as the process had commenced from January, 2013 and while given the time lag, there may have been some expectation that the exercise would not have been undertaken but to remain operationally efficient and to maintain its cost competitiveness, the exercise had to be undertaken. The date for the exercise would be the 28th June, 2013. The management outlined to the meeting that redundancy payments would be made in accordance with the provisions of the Employment Termination and Redundancy Payment Act (ETRPA). The coverage for Group Health and Life Insurance would continue up to the 31st December, 2013. Personal and Financial Counseling sessions, would be provided by Leachim Semaj & Company at no cost to the employee. In addition, the Company would provide outplacement services with an employment agency for three months. The Union was further informed that the redundancy would probably be fifteen employees which may include Union delegates and once the list was finalized the Union would be informed. The selection criteria being used by the Company was discussed with the Union.

6. That by letter dated 25th June, and in keeping with its undertaking given at the meeting on the 19th June, 2013, the Company forwarded to the Union the list of categories in the bargaining unit which would be affected by the redundancy exercise. The Company informed the Union that the exercise would be undertaken on or before 28th June, 2013. The Union was further informed that the names in the relevant categories would be provided on or before Wednesday, 26th June, 2013. In addition, it was pointed out that the list was arrived at by utilizing the selection criteria mentioned by the Union and which the Company confirmed it was using in the meeting on the 19th June 2013.

7. That consequent on the overhauling of the engine at the generating plant at the Company, there was a diminution in the need for the number of employees to carry out maintenance functions on the engine. This was part of the restructuring of the Company's operation to attain operational efficiency and what is imperative in determining whether a genuine redundancy does in fact exist, is to focus on whether there is a diminishing need for employees to do the kind of work for which the employees were previously employed.

8. That the Union was aware from the outset of the discussions, that there would be a diminution in the need for employees to perform maintenance duties on the engines as soon as the restructuring exercise was complete. Further, in exhibit 33 "**Jamaica Gleaner online news**" in a report titled "NWU reps to meet with Jamaica Private Power Company" states that Granville Valentine (NWU officer) said that workers became disgruntled after they were informed that 20 positions would have been made redundant."

9. That the Company in executing this exercise with the objective of ensuring that the requisite operational efficiency is achieved and maintained, acted in compliance with the relevant provisions of the Labour Relations Code and importantly, Sections 11 & 19. In addition, all the industrial relations best practices and relevant protocol were observed.

10. That neither the Labour Relations and Industrial Disputes Act nor the Code, stipulates an obligation to engage in a selection process or how the selection of employees should take place. The Company nevertheless conducted a selection exercise in a manner that was fair to all employees. The selection was done in an "**honest and unbiased**" manner and was not actuated by malice or ill-will and in particular, toward the employees of the Union.

11. If the Tribunal accepts that there was a genuine redundancy situation but that the dismissals were unfair because of the procedure that was used, it is submitted that a reasonable award should not exceed the salary to which the employees would have been entitled during the period required for consultation, which in all the circumstances, could not be for a period of six months.

12. If the Tribunal concludes that there was no genuine redundancy situation and if it was to consider reinstatement as a possible remedy, the Tribunal should consider the following as outlined by Edwards J. at paragraph 135 of Alcoa Mineral of Jamaica v IDT:

> ***(135) "in exercising its discretion whether to reinstate, the IDT must consider, among other factors, whether the employee wishes to be reinstated, whether the post still exists or whether there is one comparable in existence and whether the reason for dismissal was as to make the order for reinstatement impracticable. The IDT in exercising this discretion is required to act fairly balancing the interest of the employer and the employee and saying in whose favour the scales of justice are tipped".***

13. The Company further submits that if the Tribunal awards compensation, then this sum should be set- off against the redundancy payments already received by the employees. If the Tribunal requires reinstatement then there must be a corresponding requirement that the redundancy payments be disgorged by the employees.

CASE FOR THE UNION:

14. That as soon as the Company informed the Union in December 6, 2012, of the proposed restructuring exercise it intended to undertake, the Union took steps to engage the Company in meaningful discussions. Accordingly, the Union met with the Company on January 21, 2013, at the Company's invitation and heard the Company's presentation. At that meeting, the Union requested the Company to document its proposals.

15. Pursuant to the Union's request, by letter dated February 12, 2013 (exhibit 2), the Company wrote to the Union as follows:

> **"The structure of Private Power Operators (PPO) Limited limits its ability to respond to changing economic environments. In this economic climate, most businesses are looking at the way in which they work and are trying to improve efficiency. The objective of the restructuring exercise is to better position the company to adapt to these changing business conditions. We have identified various inefficiencies in programs, policies and procedures which the exercise will solve.**

The necessity to embark on the overhaul of our engines became an important part of rectifying inefficiencies in this area of our operations and accordingly we commenced this exercise in October/November of 2012. This will extend the working life of the engines making us more productive and cost effective.

PPO in its management of Jamaica Private Power Company (JPPC) is evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to:

- **Introduction of a shift system for all production employees**
- **Introducing hourly payment instead of salaried/monthly pay**
- **Reduced use of casual/temporary employees**
- **Reduction or a ban on overtime**
- **Wage/salary freezes**
- **Requiring employees to take unpaid leave**
- **Redundancy of some members of the workforce**

We are inviting you to meet with us for consultation on this exercise. We are open to suggestions and recommendations on ways to improve the efficiency of the plant and reducing cost.

Yours truly

PRIVATE POWER OPERATORS JAMAICA"

16. By letter dated February 27, 2013, (exhibit #4) the Union, under the signature of Granville Valentine, responded to the Company's letter of February 12, 2013, in the following terms:

"Dear Sir:

We are in receipt of your letter dated February 12, 2013. Again we are very surprised at the company's proposals.

Firstly, we are not convinced that the company is genuine about the exercise proposed for a restructuring of the organization. In fact, it does seem more personal than practical; e.g. Bullet Point #7 clearly states that and I quote: ***"Redundancy of some members of the workforce."***

It is clear that the company has not done its homework as you have used terms/languages that go to the core of the Labour Laws of Jamaica; e.g. "Holiday with Pay Act."

To the best of our knowledge, nothing has changed in the Power Purchase Agreement (PPA) since 2008. Please inform us if any changes have been made that we are not aware of.

We would recommend that you look at the following:

- **Management cost**
- **Maintenance cost**
- **Overseas contractual cost (Expatriates)**
- **Your management style and policies etc.**

To bring you back to the more efficient company that was taken over byAEI in 2008.

It is obvious that the workers are the same and have performed their duties with due diligence and high standards and as directed by the management of AEI since 2008.
We have noticed that the company has changed the number of Expatriates and as a result, operations and labour costs have increased and it is our understanding that some of the privileges enjoyed by your company, e.g. Waivers and duty concessions are provided in order for your company to employ more Jamaicans(not Expatriates).

For us to be in a better position to assist you in your efforts, you need to be much more opened and transparent with the necessary information such as your various costs of the operations, in compliance with Section 19 of the Labour Relations Code 1976.

The truth is the problem centers around the management of the Plant. There is no need for any restructuring of the production/operations, based on the information provided in your letter.

We hereby propose the following dates to meet with you: Monday, March 25, 2013, Tuesday, March 26, 2013, and Tuesday, April 2, 2013, when you can further outline the company's true position, as this proposed position in our view does not represent any reason for a restructuring of our members.

We trust that the dates proposed will be convenient to you.
Yours truly,
National Workers Union"

17. On March 1, 2013, the Company responded to the Union's letter of February 27, 2013 and in particular took issue with the point raised by the Union on the question of bullet point 7, which related to "Redundancy" and Section 19 of the Labour Relations Code. The relevant point in this letter appears below:

"We are in receipt of your letter dated 27 February 2013 in response to ours of 12 February 2013. We note the contents.
It is incumbent upon us to deal with three issues raised by you as it relates to:

(1) Bullet point 7 in our letter dated 12 February 2013;
(2) Your reference to the Holidays With Pay Act; and
(3) Your reference to Section 19 of the Labour Relations Code 1976.

(1) <u>Bullet Point 7</u>

In that letter we clearly indicated that the management of the company was "evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to" a number of listed items

including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration.

Accordingly, we cannot accept your assertion that "we are not convinced that the company is genuine about the exercise proposed for the restructuring of the organization. In fact, it does seem more personal than practical..." you used bullet point 7 to justify this position but we can see no basis for that claim:

(3) Section 19 of the Labour Relations Code 1976

We have every intention of complying with Section 19(b) of the Labour Relations Code and in fact, in this regard, have solicited suggestions from the workforce. All relevant information will be discussed during our consultation meetings.

18. That by letter dated May 14, 2013, the Union responded to the Company's of April 24, 2013, in which the Company had provided the Union with relevant information on financial savings to be accrued arising from the proposed restructuring of the operations. The request for this information was made by the Union at a meeting held on April 10, 2013. The content of the Union's response is as follows:

"Dear Sir:

We write in response to your letter dated April 24, 2013, which was received on April 29, 2013, and seen on May 8, 2013.

We are again a bit taken aback by the reasons for the suggested restructuring exercise, but we will just comment on a few areas that are unfortunate at best.

1. **The Company's financial woes came about as a result of bad judgment and poor decision making on the part of management.**
2. **We have seen where reference was made about the Power Purchase Agreement (PPA), as it relates to negotiations, but not as it relates to manpower and the engagement of Local Labour.**

We would like to remind you that the PPA on page 16, item 6.8.3 states:

"The Company shall use its reasonable endeavours to employ Local Labour in both skilled and unskilled capacities. The company shall also develop and maintain training programmes in conjunction with Jamaica Public Service (JPS) to train qualified local persons for positions requiring special local skills. At a minimum, upon the request of JPS, the company shall train up to twenty-five (25) qualified local persons in the operation of the complex and up to fifteen (15) qualified local persons in the maintenance of the complex."

This agreement requires up to forty (40) employees in both operations and maintenance, when the Plant was brand new... It is easily argued that as it gets older, there would be the need for greater levels of maintenance; hence would be the need for greater levels of maintenance; hence no need to cut staff. In fact, you are understaffed in operations/maintenance.

We are even more convinced that the proposal to cut staff in these areas is more personal than anything else.

It has become quite obvious that there is an attempt to outsource the Jamaican workers, job, but we will not allow that; neither can we support any such move.

Your company would have budgeted and negotiated all labour costs and by extension, have signed an agreement, so any overruns would be as a result of weak management and not workers' fault.

We trust that by now you would have changed your mind about this proposed restructuring exercise, but if you don't, we will have no option but to fully inform and sensitize the main interested parties of your intent and the possibilities that may occur (the Government of Jamaica, JPS and public).

We also must officially inform you that the dates suggested by you were not convenient. As a result we are suggesting the following dates and trust they are convenient to you.

- **June 19, 2013 @ 10:30 a.m.**
- **June 20, 2013 @ 10:30 a.m.**
- **June 26, 2013 @ 10:00 a.m.**
- **June 27, 2013 @ 10:30 a.m.**

We trust also that good sense will prevail as we work together towards building a better/stronger organization.

Yours truly,

National Workers Union"

19. That the first of the dates suggested by the Union to continue discussions, June 19, 2013, was agreed to by the Company and a meeting was confirmed to be held, but on the Union's attendance at said meeting, they were handed a statement by the Company.
This statement admitted in evidence as exhibit 23, is reproduced below, in its entirety:

STATEMENT FOR MEETING WITH UNION (Exhibit 23)

Welcome, thank you once again for meeting with us. We have sent you all the information requested in relation to the restructuring exercise. We have also received your last letter however the Unions have not provided us with feasible alternatives. This process started in January 2013; we will not delay it any further and will therefore proceed with the redundancy exercise on June 28, 2013. There may have been some expectation that this would not have happened however the company must proceed with this exercise as it is a vital step towards our goal of achieving cost competitiveness.

In addition to the redundancy payment in line with the Employment (Termination and Redundancy Payments) Act, the company will provide each employee with the following:

- **Coverage up to December 31, 2013 on the Group Health and Life Insurance**

- **Personal & Financial counseling session (to be conducted by Leachim Semaj & Co.)**
- **Outplacement Services with an employment agency for three (3) months**

The employees will be evaluated against a key of criteria which is applied

fairly and consistently. Some of the criteria to be used are knowledge, skill, experience, qualification, attendance and disciplinary records. The numbers will be anywhere from fifteen (15) employees up and may include Union delegates. The final numbers and names will be submitted to the Union as soon as we have finalized same.

20. That the Union was surprised and taken aback by the disclosure that employees' would be retrenched as during the discussions and consultation so far, the Union had not been informed definitively that there would be staff cuts. It is the Union's contention that there were seven bullet point items on the table to be discussed for a proposed restructuring exercise and it had attended a meeting to continue the discussions.

21. That the Company acted in flagrant disregard of section 11(iii) of the Labour Relations Code, which stipulates that the Company should inform the Union as soon as it becomes evident that a redundancy situation exists.

22. That the Union was never consulted on, had no prior discussion with the company, or knowledge of, and did not agree to the selection matrix designed by the Company and used to evaluate the employees whose services were terminated by reason of redundancy. In this regard the Union is submitting that the selection criteria was determined unilaterally.

23. That further to the above, the conduct of the evaluation lacked transparency as those who were the subject of the evaluation were not allowed to participate or even to comment on the results. In addition, the persons who conducted the evaluation exercise were not the employees' immediate supervisor and who were available at all material times during the

exercise but were by-passed and overlooked because the Company wanted some person other than the immediate supervisor, to execute the evaluation exercise.

24. That the Selection Matrix unilaterally determined by the Company, deliberately eliminated the factor "Performance" as a criterion, even though it was listed on the Selection Matrix Form, as one of the criteria to be evaluated. This is a further indication that the selection process was flawed and lacked objectivity.

25. That the Tribunal should on the basis of the evidence adduced, find that these dismissals by reason of redundancy are unfair and unreasonable and therefore unjustified. The Tribunal in making this finding must give attention to the Union's contention that:

(a) This is not a case of genuine redundancy

and

(b) The Company failed to observe the proper procedure.

26. That the Tribunal should order that the dismissed workers be reinstated without loss of wages.

TRIBUNAL'S RESPONSE:

The material facts of this case as revealed in the documents, statements and evidence produced, have led the Tribunal to the conclusion that this dispute is best settled by the examination of the following issues:-

Genuine Redundancy:

27. The first issue to be resolved is whether or not there was a genuine redundancy situation under section 5(2)(b) of the (Employment Termination and Redundancy Payments Act). A redundancy situation occurs where the dismissal is attributable wholly or partly to:-

5(2)(a) .....

(b) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.

The Company contends that by undertaking a complete overhaul of the plant and thus reducing unplanned maintenance due to engine failures, it would not require as many maintenance hours as it usually did, then keeping the current complement of maintenance staff would not be an optional decision and therefore the need to reduce the cadre of maintenance staff. It is further contended in this regard, that the Company stood to gain significant savings which would have a positive impact on its objective of achieving operational efficiency.

28. This contention, by the Company, is countered by the Union with the response that it is unfathomable and inconceivable that a plant that required a maintenance crew of over twenty maintenance men when it was brand new, could now after fifteen years, require less than that number of maintenance men to carry out routine maintenance. This position, the Union submits, is further supported in the Power Purchase Agreement between the Company and the Jamaica Public Service Company, which requires said Company Private Power Operators, to maintain a minimum number of trained personnel to man the operations. The relevant section of said Agreement at Item 6.8.3 states:

"The Company shall use its reasonable endeavours to employ Local Labour in both skilled and unskilled capacities. The company shall also develop and maintain training programmes in conjunction with Jamaica Public Service (JPS) to train qualified local persons for positions requiring special local skills. At a minimum, upon the request of JPS, the company shall train up to twenty-five (25) qualified local persons in the operation of the complex and up to fifteen (15) qualified local persons in the maintenance of the complex."

This agreement, according to the Union, requires up to forty (40) employees in both operations and maintenance, when the plant was brand new, therefore, it can be easily and

logically explained that as the Plant gets older, there would be the need for greater levels of maintenance, hence, no need to reduce the number of the maintenance crew.

29. The Tribunal must state emphatically that the Company has the right as enshrined in Clause 5 of the Collective Labour Agreement with the Union to:-

> **"manage its works; to plan, direct and control operations; to introduce new or improved equipment methods or facilities and to change job procedures"**.

In justification of its contention that the overhauling of the unit will reduce the need for the same amount of man hours, the Company points to the significant savings that will result when labour related costs such as wages and salaries, payment for overtime, provision of lunch and other allowances etc., are eliminated or reduced.

30. This, in our view, provides cogent reason for the redundancies, as the right of the Company to manage its operations as it deems appropriate in order to achieve its organizational goals and objectives, is a managerial prerogative. This conclusion is supported in the following passage from a publication –
MANAGING SEVERANCE AND RETRENCHMENT: THE INDUSTRIAL COURT OF TRINIDAD AND TOBAGO STANDARDS by Dr. Leighton Jackson:

> **"The commercial decision that the business needs fewer employees of a particular type rests with the employer, and the tribunal will generally not inquire into whether the employer was reasonable in taking that commercial decision."**

The Tribunal is firmly of the view that this managerial decision is one which a reasonable employer could have reached in light of its assessment of the plant's technical and economic efficiency.

The Need For Consultation

31. Paragraph 11 of the Labour Relations Code sets out the requirement for consultation with respect to redundancies. Paragraph 11 of the Code provides:

> **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...;

(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. <u>In this regard management should endeavour to inform the worker, trade Union and the Minister responsible for labour as soon as the need may be evident for such redundancies;</u> (emphasis supplied)

32. Paragraph 19 of the Code defines what Constitutes Consultation and Communication. Section (b) deals especially with Consultation and states:

"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 imitative in establishing and regularizing 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."

33. In its first communication to the Union, that is, letter dated December 31, 2012, the Company invited the Union "**to a meeting to discuss a proposed restructuring exercise for the Company",** note, no mention of redundancy. The Union communicated by telephone and informed the Company that it was not prepared to attend a meeting without an agenda or being given relevant information relating to the meeting. The Company on January 9, 2013, informed the Union that:

"There are as yet, no documents relating to the proposed restructuring exercise as a consequence nothing that we can share with you at this point. The proposed meeting is to seek the input of the Union and any proposal you may have regarding alternatives to restructuring and/or the method of restructuring."

How could the Union be expected to attend a meeting to make an input under the circumstances, where it does not know what is on the table. What is a "proposed restructuring?" These are relevant questions.

34. A meeting was eventually held and at that meeting the Union again made a request for information. The Company responded by letter dated February 12, 2013, in which it stated among other points, the following:

"PPO in its management of Jamaica Private Power Company (JPPC) is evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to:

- **Introduction of a shift system for all production employees**
- **Introducing hourly payment instead of salaried/monthly pay**
- **Reduced use of casual/temporary employees**
- **Reduction or a ban on overtime**
- **Wage/salary freezes**
- **Requiring employees to take unpaid leave**
- **Redundancy of some members of the workforce**

We are inviting you to meet with us for consultation on this exercise. We are open to suggestions and recommendations on ways to improve the efficiency of the plant and reducing cost.

Yours truly

PRIVATE POWER OPERATORS JAMAICA"

There are several bullet points representing other initiatives that the Company is

evaluating with a view to introduce same in addition to the overhauling of the engines. There is no decision with respect to the introduction of these initiatives and any, some or all of them, may be implemented.

35. By letter dated February 27, 2013, the Union made a response to the Company and in particular zoomed in on Bullet Point #7 (Redundancy of some members of the workforce) on which the Union commented as follows:

> **"Firstly, we are not convinced that the Company is genuine about the exercise proposed for a restructuring of the organization. In fact, it seems more personal than practical, e.g. Bullet Point #7 clearly states that and I quote: Redundancy of some members of the workforce."**

On March 1, 2013 the Company responded to the Union on the Redundancy issue in the following terms:

> **(1) <u>Bullet Point 7</u>**
>
> **In that letter we clearly indicated that the management of the company was "evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to" a number of listed items including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration.**
>
> **Accordingly, we cannot accept your assertion that "we are not convinced that the company is genuine about the exercise proposed for the restructuring of the organization. In fact, it does seem more personal than practical..." you used bullet point 7 to justify this position but we can see no basis for that claim.**

Again, there is no clear, concrete or definitely stated position by the Company to the Union, that redundancies will take place.

36. In its response to the Company on February 27, 2013, the Union also raised the issue of the provision of reliable information in this manner:

> **"For us to be in a better position to assist you in your efforts you need to be much more opened and transparent with the necessary information such as your various costs of operations, in compliance with Section 19 of the Labour relations Code 1976."**

The Company subsequently prepared and supplied the Union with some information relating to operating costs which the Union submits, it rejected on the basis that the information could not be authenticated as it was not audited. The Union further submits that it's request for the authenticated figures relating to cost of operation, was flatly refused by the Company and this is a breach of Section 16 of the Labour Relations Code which requires an entity to:-

> **16. Collective Bargaining**
>
> **(i)...**
>
> **(ii) Collective Bargaining is more meaningful if the parties are informed on the matters being negotiated. The parties should aim to meet all reasonable requests for information which is relevant to the negotiation in hand, and in particular management should make available information which is supplied to their shareholders or published in annual reports;**

It appears to the Tribunal, that where the Code speaks of "Information" this is the standard and quality it requires and the Company was unable to convince the Tribunal that this was met.

37. It is also the contention of the Union that there was no Consultation on redundancy, as there was no decision to effect redundancies communicated to them. The evidence plainly indicated that the Union was invited to meet to discuss, not even a restructuring exercise but a "**proposed restructuring exercise.**" It is noted that there was no invitation to discuss the matter of redundancy. The question may be asked is whether this is semantic.

The Tribunal thinks not, because it is long established in the field of Human Resource Management and Industrial Relations that this is not necessarily the case. Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two. This position is supported by:

> **Harvey's on Industrial Relations and Employment Law-where the learned authors state :**
>
> > **[914]**
> >
> > **Reorganization may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of reorganization but it may arise completely independently of any reorganization. <u>There is no necessary connection between the two ideas (</u>emphasis supplied). Whenever there is a claim to a redundancy payment, it is necessary to decide whether the statutory conditions are satisfied, and it matters not whether the situation is described as a reorganization, a restructuring, a new ideal or anything else. If the statutory conditions are satisfied, the claim to a redundancy payment is made out; if not, not.**

The word **"restructuring"** can be substituted for the word **"reorganization"** as appear in the above.

38. The Company had put on the table seven initiatives which it was considering in order to restructure its operations. It did not in clear terms inform the Union on the item of Redundancy or any other of the seven initiatives being evaluated for introduction. Even in its statement to the general workforce on January 23, 2013, the Company did not conclusively convey a clear and precise decision on redundancies. This is what was contained in the statement with again, the use of the word "**may**" in regards to redundancy.

> **"As a result of the above the Company has had no alternative but to embark on an exercise aimed at improved plant performance and efficiency. This exercise will be approached with care and as such no decisions have been taken as to the method of the exercise but this may**

include, amongst other things, a restructuring of the operations of the plant and which may result in a reduction of the workforce."

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

39. This dispute had its trigger out of the events that took place at the meeting held on June 19, 2013. It's the Union's position that it attended the meeting to continue discussions with the Company on the subject matter that occupied their attention since December 2012 - **Restructuring Exercise**. At the meeting, the Union was issued with a Statement, the contents of which the Union claims took it by surprise in that what the Statement revealed, was totally unexpected and shocking. The introductory paragraph of said Statement which is reproduced in 16 below states:

"Welcome, thank you once again for meeting with us. We have sent you all the information requested in relation to the restructuring exercise. We have also received your last letter however the Unions have not provided us with feasible alternatives. This process started in January 2013; we will not delay it any further and will therefore proceed with the redundancy exercise on June 28, 2013. There may have been some expectation that this would not have happened however the company must proceed with this exercise as it is a vital step towards our goal of achieving cost competitiveness".

It must be noted that in this Statement "**restructuring/proposed restructuring**" had been metamorphosed to "**redundancy**"

40. Further examination of the said Statement leads to the conclusion that redundancy was a fait accompli. It gave information of the date it would be effected, the number of employees to be axed, the engagement of an agency to administer counseling to the affected employees and a schedule for the completion of the payment of terminal benefits.

It is clearly evident from the tone and content of this Statement, that the Company regarded and treated the restructuring exercise as a redundancy exercise as if to say that they were one and the same.

41. We have already, in paragraph 37 above, made our position clear on this point and will only add that we would find this disingenuous, as in correspondence to the Union on January 9, 2013, the letter was captioned Re: "**Proposed Restructure-Consultation**" and in subsequent correspondence on June 25, 2013, after the meeting of June 19, 2013, that letter was captioned "Re: Redundancy Exercise -Private Power Operators Limited" This clearly demonstrates that the Company was of the mind that **"restructuring"** and **"redundancy"** are not necessarily the same.

42. The conclusion therefore is that the Company made a decision to reduce the workforce sometime before June 19, 2013, and informed the Union on that date after all the necessary groundwork had been laid for its implementation. This in our view does not satisfy the requirement of Paragraph 11 of the Labour Relations Code which requires the Company to **"endeavour to inform the worker, trade Unions and the Minister responsible for labour as soon as the need is evident for redundancies."** It is not sufficient to say to the Union when it enquired about redundancy, the following, as the Company did in its response in letter of March 1, 2013, to the Union:

> **"...we clearly indicated that the management of the company was evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to" a number of listed items including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration."**

We note also, according to the evidence, that the Minister responsible for labour was not informed about the redundancies until some time later after the event.

43. On June 19, 2013, when the Union was finally informed that redundancies were

definitely on, then, consistent with the provisions of the Code, Consultation and discussions should have been held with **"workers or their representatives to take all reasonable steps to avoid the redundancies."** The Company's action in this regard as contained in the Statement handed to the Union at the meeting of said date, rendered the Consultation process to avoid the redundancies, futile and at that stage, of no effect.

44. A Fair Selection Process

The Company in its statement given to the Unions at the meeting of June 19, 2013, in the last paragraph asserts the following:

> **"The employees will be evaluated against a key of criteria which is applied fairly and consistently. Some of the criteria to be used are knowledge, skill, experience, qualification, attendance and disciplinary records. The numbers will be anywhere from fifteen (15) employees up and may include Union delegates. The final numbers and names will be submitted to the Union as soon as we have finalized same."**

The Union contends and the evidence clearly indicates that there was no consultation, discussion or agreement on the above selection matrix, designed by the Company and used to select the employees whose jobs were terminated by reason of redundancy. This Tribunal considers it a critical factor for the selection criteria to be agreed on by both parties, consistent with Consultation under the Labour Relations Code and the dictum of Brown-Wilkinson J in **Williams vs. Compair Maxam Limited (1982) ICR** 156,-an authority relied on by the Union and referenced by the Company - where he stated:

> ***"There is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent Union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:***
>
> ***(1) the employer will seek to give as much warning as possible of impending redundancies so as to enable the Union and employees, who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if***

necessary, find alternative employment in the undertaking or elsewhere.

(2) The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.

(3) Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the Union may make as to such selection.

(5) ***The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."***

In this dispute the evidence indicate that the Union was not consulted on the selection criteria. They learnt about it in the Statement given to them on June 19, 2013. The employees to be evaluated were not interviewed. Also, there was no opportunity to make representation as the result of the evaluation for selection was never made available to the Union or the employees involved.

45. A point of concern to the Tribunal is that the Collective Labour Agreement between the parties provided an agreed mechanism to be applied for the retention or promotion of employees and this was disregarded. This is set out in Clause 20 (A) (i) (ii) (iii) with (ii) stating as follows:

"The employee who in the opinion of the Company has the <u>greatest skill, competence and efficiency</u> and who in the opinion of the Company is in all respects most suitable for the particular job shall be given preference for promotion or retention whether he is of equal or more or less seniority than any other Employee (emphasis supplied)."

Of further concern is the fact that although the prescribed Selection Matrix Form had "**performance**" as one and indeed the first criteria to be evaluated on, it was not used, as that section of the Form was marked N/A i.e. NOT APPLICABLE.

The Tribunal does not understand the reason why the employees' immediate supervisor was not required by the Company to carry out the task of evaluating the employees from which the selection for redundancy or, the retention in employment would be determined. It is our view, that the employees' immediate supervisor is the most suitable company official to determine which employee has the ***greatest skill, competence and efficiency***.

46. The Company explained that the information used to evaluate the employees was taken from the employees' job descriptions'. This Tribunal cannot accept that the degree of an employee's "***skill, competence and efficiency"*** in the performance of his job, can be determined from a job description. The key in determining greatest ***skill, competence and efficiency*** is in an assessment of performance but for some unexplained reason the Company did not evaluate the employees' performance.

47. In the instant dispute, the Tribunal finds that the Company arrived at a determination as to which employee possessed greater ***skill, competence and efficiency*** without evaluating such employees' performance. You cannot fairly or reasonably arrive at a decision as to who should be retained or selected to be axed, where there has been absolutely no evaluation of performance. It seems to us, that an evaluation of the employee's performance on the job is a "***sine qua non***" for

selection to be retained or to be axed. Performance evaluation is fundamental and essential to the selection process.

48. Accordingly, as a matter of unquestionable and unchallengeable fact, the performance of the seven (7) workers was not taken into account, in respect of the eight (8), nor did even a single one of them have his performance evaluation assessed.

In other words, the grounds or essential base of a selection process for retention or promotion is the sine qua non. By extension, a proper construction of 20(A) (ii) and (iii), the performance of employees has to be the basis whereby "**the opinion of the Company is arrived at**."

It follows therefore that, the Company's Statement (exhibit 23) fails to meet the clear requirement of Section 20(A)(i)(ii)(iii) of the Collective Labour Agreement, where it is clearly implied that the performance of the employees will be evaluated to come to a fair decision. In other words the Selection Matrix, unilaterally developed and applied by the Company, is not in accordance with the Collective Labour Agreement and fell short of the required standard expected and implied in the said Collective Labour Agreement.

49. The Tribunal did not have the benefit of hearing from the General Manager of the Company, who initiated and piloted the discussion with the Union, neither were the minutes of the meetings, if any existed, made available for perusal. On account of this we are in no position to know what transpired at the first two meetings that were held to discuss the "proposed restructuring" exercise. However, from the evidence led it is clear to us that the Company failed to inform the Union in clear, precise and unequivocal terms, that it was contemplating a reduction in the staff complement. The communication to the Union was couched in language from which no factual conclusion could be drawn and deliberate action taken. In addition, there were a number of initiatives being evaluated for introduction but no relationship or interrelationship between these initiatives and redundancy was established.

50. The Labour Relations Code expressly recognizes that the principle that **"work is a social right and obligation not a commodity"** and that industrial relations should be carried out within the spirit and intent of the Code. The **"spirit"** and **"intent"** of the Code, as far as redundancy is concerned, is that as soon as a company realizes that there is the need to reduce staff, it must inform the Union of this realization and take the initiatives to discuss with the Union, ways and means as to how the redundancy can be avoided.

51. The Tribunal must also point out that although in matters regarding redundancy the onus is on the Company to take the initiative, the Trade Union also has **"a duty to maintain the viability of the undertaking by ensuring co-operation with management in measures to promote efficiency and good industrial relations" -Labour Relations Code Paragraph 7.**

In this dispute it would seem to us that the Union's co-operation with the management can be best described as tardy and will be given due consideration in making this Award.

52. The Company has contended that a number of these workers whose services were terminated by reason of redundancy have been engaged in other employment since then. The response from the Union is that any form of employment that they have engaged in was occasional and not of a permanent nature or sustainable. For this Tribunal to consider mitigation under this circumstance it would be disregarding the requirement in **DENCH V FLYNN & PARTNERS [1998] IRLR 653** i.e. **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."** There was no such evidence tendered before the Tribunal.

53. The Tribunal, taking into consideration all the circumstances of this dispute and the reasons and findings set out herein, finds that the Company fell down in its management of the Consultation process with respect to the redundancies and the selection process was done in a manner that was lacking in transparency and not in compliance with the relevant stipulations in the Collective Labour Agreement, thus rendering the process

unfair. Therefore, the dismissals by reason of redundancy are unjustified.

54. Accordingly, taking into consideration these dismissed workers many years of diligent and unblemished service to this Company and the period since the dismissal and while allowing for our observance in paragraph 51 above, the following Award is made.

AWARD

In light of the above, as mandated by and in accordance with Section 12(5)(iii) of the Labour Relations and Industrial Disputes Act and paragraph 53 above:

(a) THE TRIBUNAL unanimously HEREBY ORDERS the Company to:

(i) reinstate the said workers named in the Terms of Reference within twenty-one (21) days of the date of this Award with payment of fifty two (52) weeks wages,

OR

(iii) failure to reinstate said workers within the time stipulated in (i), above, pay Compensation to the said workers in the amount of one hundred and thirty (130) weeks wages, after deducting all amounts previously paid to them under the Employment Termination and Redundancy Payments Act,(1974)(ETRPA).

DATED THIS 5th DAY OF APRIL, 2016.

.....

Norman Wright, Q.C.

Chairman

.....

Rion Hall, JP.

Member

.....

D. Trevor McNish

Member

Witness:

.....

Gary Lediard

Secretary to the Division