EMPLOYMENT RIGHTS TRIBUNAL

BARBADOS

CASE: ERT/2014/064

IN THE MATTER OF:

CUTIE LYNCH
(Acting herein on her own behalf and on the behalf of former employees of the National Conservation Commission as listed) **CLAIMANT**

AND

NATIONAL CONSERVATION COMMISSION **RESPONDENT**

Before: Mr. Hal McL. Gollop, Q.C., Mr. Edward S. Bushell and Mrs. Beverley P. Beckles

Dates of Hearing: 30 September 2015; 1, 2 October 2015; 14,22,25,26 January 2016; 2 February 2016.

CASE: ERT/2014/063

IN THE MATTER OF:

ANDERSON CHASE
(Acting herein on his own behalf and on the behalf of former employees of the National Conservation Commission as listed) **CLAIMANT**

AND

NATIONAL CONSERVATION COMMISSION **RESPONDENT**

Before: Mr. Hal McL. Gollop, Q.C., Mr. Edward S. Bushell, Mr. Frederick A. Forde

Dates of Hearing: 9,10,12 May 2016.

Decision Given: On the 15th day of July 2016.

ERT/2014/064

CUTIE LYNCH ET AL V. NATIONAL CONSERVATION COMMISSION

LIST OF NAMES SUBMITTED BY THE NUPW

NUMBER	NAME
1	ALKINS, ANDREW
2	ALLEYNE, BENJIE
3	ALLEYNE, JENNIFER
4	ALLMAN, ERIC
5	ARCHER, JUDY
6	BARROW, ANDERSON
7	BEST, DERRICK
8	BEST, KENNETH
9	BEST, KIMAR
10	BLACKMAN, LUCY
11	BLACKMAN, SHERNELL
12	BOXILL, SUZANNE
13	BOYCE, ANN
14	BRADSHAW, MARCIA
15	BRATHWAITE, NORMA
16	BREWSTER, OMAR
17	BRIDGEMAN, NATASHA
18	BRISTOL, ALLAN
19	BROOME, DANIELLE
20	BROWNE, JANELLE
21	BRUCE, KAREN
22	CALLENDER, GEMEL
23	CALLENDER, ORLANDO
24	CLARKE, BARBARA
25	CLARKE, DAVID
26	CLARKE, STEPHANIE
27	COLLYMORE, ARLEIGH
28	CORBIN, DWAYNE
29	CUMBERBATCH, TONIA
30	DOOKEY, KENNETH
31	EDEY, JENNY
32	EDWARDS, KYLE
33	FORDE, PATRINA
34	FRANKLYN, MARGUARITA
35	GILKES, ANDRE
36	GITTENS, LEMUEL
37	GRANT, RYAN

38	GREAVES, JUDY
39	GREAVES, RANDELL
40	GREAVES, SHAUNTEL
41	GROSVENOR, RANDY
42	HALL, JOHNATHAN
43	HALL, MICHAEL
44	HAREWOOD, ONEAL
45	HAYNES, MICHELLE
46	HOLLINGSWORTH, RASHEEDA
47	HINDS, KAREN
48	HINDS, MATTHEW
49	HUNTE, ISCHAR
50	IFILL, CYNTHIA
51	JOHNSON, PEARSON
52	JORDAN, RICARDO
53	KELLMAN, PATRICIA
54	KENNEDY, ICILMA
55	KNIGHT, SHEVONNE
56	LAYNE, DWAYNE
57	LAYNE, ANSEL
58	LEMON, SHELDON
59	LEWIS, TERRY
60	LYNCH, CUTIE
61	LYNCH, JAVON
62	MARSHALL, NICHOLAS
63	MCDONALD, DAMIEN
64	MOORE, COLLIN
65	NASSOR, ADE
66	NICHOLLS, TROY
67	NORVEL, GEORGE
68	PHILLIPS, NORMA
69	PILGRIM, DESMOND
70	PILGRIM, SADAINE
71	PINKETT, GLORIA
72	PRYME, CHAIMAINE
73	RAMSAY, EUDESE
74	REECE, MAUREEN
75	RICHARDS, NATASHA
76	ROLLINS, VERTIA
77	SARGEANT, MILLICENT
78	SEALY, CARL
79	SEALY, FABIAN
80	SHURLAND, GENNENE
81	SMITH, ANDRE
82	SPENCE, CHRISTOPHER

83	ST. HILL, DANIEL
84	THORNE, JENNIFER
85	VAUGHAN, COREY
86	WALCOTT, BARRY
87	WATSON, SANDRA
88	WATTS, OLIVIA
89	WEEKES, HEATHER
90	WHITTINGTON, DONOVAN
91	WILLIAMS, ROSALIND
92	WOOD, ROSEANNE
93	WORRELL, ANDRE
94	WORRELL, BARBARA
95	YEARWOOD, LOIS

ERT/2014/063

ANDERSON CHASE ET AL V. NATIONAL CONSERVATION COMMISSION

FINAL LIST OF NAMES SUBMITTED BY THE BWU

NUMBER	NAME	YEAR EMPLOYED
1	ALKINS, ANDREW	2007
2	ARCHER, JUDY	2003
3	BRISTOL, ALLAN	2007
4	BROWNE, JANNELLE	2008
5	CALLENDER, GEMEL	2007
6	CHANDLER, KENVILLE	2009
7	CHASE, ANDERSON	2007
8	CLARKE, BARBARA	2008
9	CLARKE, STEPHANIE	2008
10	FRANKLYN, MARGARITA	2007
11	GREAVES, RANDALL	2007
12	HALL, MICHAEL	2008
13	HINDS, KAREN	2007
14	HURLEY, ROBERT	2011
15	KELLMAN, PATRICIA	2007
16	KENNEDY, ICILMA	2008
17	PAYNE, ERNA	2011
18	PHILLIPS, NORMA	2007
19	RUSSELL, MONICA	2011
20	SHEPHERD, JASON	2009
21	ST. HILL, DANIEL	2008
22	TAITT, ANDREW	2007
23	WEEKES, HEATHER	2006
24	WILLIAMS, ROSALIND	2007
25	WILLIE, MONICA	2009
26	YEARWOOD, LOIS	2008

Hal McL. Gollop, Q.C., (Chairman) This is the decision of the Tribunal.

At its meeting of 12 December 2013, the Cabinet of Barbados gave approval to a measure aimed at reducing Government expenditure by decreasing the staff complement in the public sector by three thousand (3000).

This measure was also announced in a Ministerial Statement by the Minister of Finance in the Budgetary proposals, 2013. The Minister informed that the said reduction would be executed in two tranches, the first of two thousand (2,000) workers by 15 January 2014 and the second by 31 March 2014.

By Circular No. 1/2014, M.P. 6205 Vol.1.T3, the Permanent Secretary, Ministry of the Civil Service outlined the policy initiative in a ***"Framework to Effect the Reduction of Posts in the Public Sector and the Payment of Terminal Benefits"*** which was communicated to all Permanent Secretaries and Heads of Department.

The Circular particularized the framework which Cabinet had decided upon at its meeting of 16 January 2014 for the reduction of the Public Sector workers and payment of benefits to them arising out of their termination.

Some of the more pertinent aspects of the framework agreed upon by Cabinet are set out *seriatim*:

i. The policy of retrenchment should generally be Last-In-First-Out (LIFO) with care being taken to ensure that programmes were not affected;
ii. the termination benefits paid to those terminated should be in the nature of a severance payment similar to that paid to their counterparts in the private sector;
iii. there should be no compensation made to persons with less than two (2) years of completed service;

There should be no compensation to persons 66 years of age

or over at 31 December 2013 except that payment may be made to those persons who do not qualify for National Insurance Pension because they had not been able to make the required number of contributions to the scheme; and
no compensation should be paid to those retired on a pension but had been subsequently re-employed;

iv. service for which compensation is paid will not count as continuous service for future retiring benefits;

v. compensation should be calculated on any acting allowance earned over the last two (2) years of service but should not be calculated on overtime payments;

vi. counselling services should be provided for a period of eight (8) months for those individuals who are laid off; and

vii. the relevant agency should be provided with the funds necessary for the facilitating of such counseling services.

3. After having met with ***"some of the larger ministries"*** to determine the level of retrenchment to be effected in each agency, the Ministry of the Civil Service decided that the persons generally affected by the proposed reduction of the work force would be temporary officers with less than five (5) years' service using the LIFO principle. It was also indicated that by 31 January 2014 one thousand (1,000) workers should receive their letters of retrenchment from the Chief Personnel Officer; it was intended that most of the others would receive their letters of retrenchment by 31 March 2014.

It was also intended that the letter would indicate the terms of their termination assessed on their pay period and the terms outlined in their assignment letters.

4. Qualifying Officers in accordance with Cabinet approval would receive their termination payment calculated on the formula set out at paragraph 2 of the First Schedule to the ***Severance Payment Act Cap 355A*** of the Laws of Barbados.

5. The information necessary to calculate the termination payments should be made readily available by Permanent Secretaries, it being necessary to provide the dates of continuous service and retiring allowances paid over the past two (2) years for each temporary officer.

6. Arrangements had been made for the Office of Public Sector Reform to provide any counseling services that may be required by the affected officers.

The criteria for having the Office of Public Sector Reform set up the counseling facility centered around the following considerations:

In today's environment, the economic and financial climate were having a very heavy impact on business operations. Such climate may lead to job losses due to downsizing, reorganization and redundancy. And even though the impact of redundancy may vary from employee to employee, it could not be gainsaid that it did not produce in some cases such effects as shock, and anger in the sense that employees tend to lay blame on management if they considered they had been unjustly treated. The loss of a job is a matter of critical concern for the employee and may even lead to loss of identity and self esteem, and result in fear for the future and anti social behaviour.

It was therefore necessary for employees to be provided with the mechanisms that would assist in the healing process.

Negotiations to give effect to the policy decision of Cabinet were carried out between the National Conservation Commission (NCC) and the two unions representing the employees, the National Union of Public Workers (NUPW) and the Barbados Workers Union (BWU).

These two unions were dissatisfied with the manner in which the employees were selected for termination and sought the intervention of the

Chief Labour Officer to insure that the measures being taken to carry out the retrenchment process were equitably applied.

The unions challenged the decision of the NCC and when it became clear that there would not be an amicable resolution of the matter, cases were brought before the Employment Rights Tribunal (ERT) alleging that the NCC, in executing the retrenchment process, failed to act within the four walls of the Statute, ***The Employment Rights Act, 2012-9 (ERA).***

Cases were filed on behalf of a number of workers who were members of the two unions. As a result the ERT is here being called upon to adjudicate the cases brought. The two cases are: ***ERT/2014/063: Anderson Chase and National Conservation Commission and ERT/2014/064: Cutie Lynch and National Conservation Commission.***

The two cases were heard as representative actions with the Complainant ***Anderson Chase***, acting on behalf of himself and those workers who were members of the BWU and ***Cutie Lynch*** acting on behalf of herself and those workers who were members of the NUPW.

The ***Cutie Lynch Case*** was heard on 30 September 2015; 12 October 2015; 14, 22, 25, 26 January 2016 and 2 February 2016; the ***Anderson Chase Case*** was heard on 9, 10, 12 May 2016.

<u>The Case of Miss. Cutie Lynch</u>

The Complainant Cutie Lynch, a former employee of the National Conservation Commission (NCC) was employed in the temporary post of general worker. She had been employed in that post for the last five (5) years. She brought the instant action in a representative capacity on behalf of herself and those workers who at the time of termination were employees of the NCC and who were members of the NUPW and whose termination was a result of the measures taken by Government to reduce the workforce as earlier mentioned.

Miss. Lynch alleged in her Witness Statement and in evidence before the Tribunal that on 30 April 2014 she, along with several of her colleagues employed at the NCC attended a meeting called by the NCC based on the information passed on to them by their Superintendent. She found out at the meeting that she and a number of her said colleagues were being made redundant and that their services were being terminated with immediate effect.

Her letter of termination is herein reproduced:

2014-04-25

Ms. Cutie Lynch
#5 Durants Village
Holders Hill
St. James

Madam:

Re: Termination of Services

I am directed to inform you that due to severe current economic challenges facing the country, the Government of Barbados has decided on a retrenchment programme which will affect public servants, including employees of the National Conservation Commission.

In this regard, I have been directed to inform you further, that your services with the Commission will be terminated with effect from **April 30, 2014.** You will be paid one week's wages in lieu of notice and any vacation monies due to which you are entitled. These monies will be computed and paid to you on **April 30, 2014.**

You are entitled to a severance payment in accordance with the Severance Payment Act of Barbados based on your years of service and you will be duly informed regarding the date of this payment.

In an effort to help you through this period of adjustment counseling services will be provided through the Network Services Centre. You may therefore wish to contact the Commission's Human Resources Manager to have an appointment scheduled as necessary.

The National Conservation Commission will like to express its thanks and appreciation for the services which you rendered during the period of your employment.

Yours faithfully

KEITH NEBLETT
General Manager
National Conservation Commission

KAN/jgb

The Complainant Cutie Lynch gave evidence before The Tribunal stating inter alia that:

i. She commenced her employment in the temporary post of general worker from 16 February 2004.
ii. She was paid a weekly wage of $447.01.
iii. At termination she was paid $2,879.36 which represents one (1) week's wages, one (1) week's wages in lieu of notice and four (4) week's wages in lieu of notice.

Miss. Lynch's Claim

Miss. Lynch claims on behalf of herself and the ninety-three (93) other employees, members of NUPW, who have an interest similar to hers and who were made redundant from the NCC, that they were unfairly dismissed by the NCC without prior consultation pursuant to ***section 31 (4)(5) and (6)*** of the ***Employment Rights Act, 2012-9 (ERA).***

The Tribunal must now therefore determine the validity of Miss. Cutie Lynch's claim. In so doing, an analysis of the various issues which surfaced during the hearing of the evidence given by the witnesses and submissions made by Counsel for the respective parties must be made.

The Tribunal will first examine the issue relating to redundancy, the issue at the heart of the whole scenario.

Redundancy

Redundancy is a form of dismissal of an employee; in a claim of redundancy the employer is regulated by the requirement that the reason for the dismissal must relate to the fact that the employee was made redundant: ***s.31(1)(a) ERA***

s.31(2) (a) and (b) provides the following pertaining to the dismissal of an employee by reason of a redundancy.

> ***s.31(2)***
>
> An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that
>
> (a) his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) 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 the employee was so employed, have ceased or diminished or are expected to cease or diminish.

The reasons proferred by the NCC for the redundancy claimed in respect of Miss. Lynch et al were stated in evidence by its CEO and were in keeping with the action taken by Government to reduce the workforce by the measures approved by the Cabinet on 16 January 2014 as set out earlier.

The learned authors in the text ***"Labour Law" by Collins, Ewing and McColgan OUP….*** at p 877 express the view that in practice an employee who loses his job for economic reasons is likely to obtain a high level of compensation for a claim of unfair dismissal once it can be established that

there was an unfair selection for redundancy or a failure to follow a fair procedure. They further consider that a tribunal in such circumstances must apply the test of unfairness in cases of unfair dismissal to ascertain whether it was reasonable in the circumstances to dismiss for redundancy.

Important legal principles applicable to unfair dismissal claims in respect of redundancy are to be found in ***Williams v Compare Maxam Ltd. (1982) IRLR 83.***

Here the Employment Appeal Tribunal (EAT) laid down guidelines that should foster good industrial relations practice. The guidelines are not to be treated as rules of law.

1. The employer must give as much warning as possible of impending redundancies in order to enable trade unions and employees to consider alternative solutions and seek alternate employment.
2. The employer should consult with unions as to the best means by which the desired result can be achieved with minimal hardship. The criteria for selection should be agreed with the union and applied in accordance with the criteria.
3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinions of the person making the selection but can be objectively

checked against such things as attendance record, efficiency at the job, experience and length of service.

4. The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations the unions may make as to selection.
5. The employer instead of dismissing the employee should seek to offer alternative employment.

It is significant that these very principles were endorsed by the House of Lords in ***Polkey v A.E. Dayton Services Ltd. (1987) IRLR at 503.***

Here Lord Bridge of Harwich said:

> *"In the case of redundancy the employer will normally not act reasonably unless he warns and consults any employee affected, or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization."*

Fairness In The Selection Process

Fairness and reasonableness are two critical factors to be considered in redundancy. In ***British Aerospace PLC v Green (1995) IRLR 433*** it was considered that a reduction in the Company's workforce was necessary. The employer divided the workforce into twenty-one (21) categories and then determined which employee from each category would be dismissed. Each category was assessed on such factors as capability and experience and points were awarded in each area. The employer however failed to disclose the points assessment; the tribunal ordered the employer to make disclosure. The court of Appeal allowed the employer's appeal stating that the assessment of retained employees would only be ordered if it was

necessary to deal with a specific issue of assessment relating to an employee.

Waithe LJ at p 434 sounds a warning to tribunals on their role in such situations:

> *"Employment law recognizes, pragmatically that an over minute investigation of the selection process by tribunals may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely, a swift informal disposal of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."*

What ***British Aerospace*** is essentially saying is that in redundancy cases, tribunals must ensure that employers adopt a satisfactory, fair and objective system of selection. Millet LJ further advises that:

> *"the question for the industrial tribunal which must be determined separately for each applicant, is whether the applicant was unfairly dismissed, not whether some other employee could have been fairly dismissed."*

The Position Of The National Conservation Commission In Its Claim Of Redundancy

The Claim in support of the Respondent's position that redundancy was the reason for termination of the Claimant et al and it did not unfairly dismiss them was ventilated through its sole witness, Mr. Neblett, the General Manager while giving sworn evidence. The basis of that claim was that the NCC carried out the mandate ordered by Government through the Circular ***No. 1/2014, MP 6205 Vol. 1T3*** of 22 January 2014 cited earlier.

The NCC maintained also that it acted squarely within the provisions of ***s.31(4)(5)(6)*** of the ERA having regard to ***s.29(1)(b)*** and ***s.29 (2)(c).*** In that regard it rejected the claims made by the claimant.

The Tribunal finds that the Respondent, like all other Government agencies, had no discretion in respect of its decision to apply the policy enunciated in the circular; in this regard its hands were tied; it was simply forced to reduce its workforce as ordered. It is therefore our view that the Respondent has justifiably placed reliance on ***s.31*** of the Statute.

The claim by the Respondent that the Claimant was terminated by reason of redundancy is therefore sustained.

This finding however does not dispose of the action since the ERA requires that a number of related factors must also be observed to give validity to any claim of redundancy as the justification for termination.

The Tribunal will now seek to address the statutory requirement of consultation.

Consultation

The unambiguous and emphatic claim made by Miss. Lynch and her fellow workers is that they were made redundant by the NCC, the Respondent, without prior consultation being held pursuant to ***s.31(4), (5) and (6)*** of the ERA.

The relevant section of the Statute provides as follows:

31. (4) Where it is contemplated that the workforce of the business of an employer will be reduced by 10 per cent or any other significant number, before dismissing an employee, the employer shall

(a) carry out the consultations required by subsection (6) (b); and

(b) supply the employee or the trade union recognized for the

purpose of bargaining on behalf of the employee (if there is one) and the Chief Labour Officer with a written statement of the reasons for and other particulars of, the dismissal.

(5)The statement referred to in subsection (4) (b) shall contain particulars of

(a)the facts referred to in subsection (2) relevant to the dismissal; and

(b)the number and categories of affected employees and the period during which their dismissals are likely to be carried out, where any employees, in addition to the employee in question, are affected by these facts.

(6)The consultations referred to in subsection (4) (a) are consultations with the affected employees or their representative, being consultations conducted in accordance with the following requirements:

(a)the consultations shall commence not later than 6 weeks before any of the affected employees is dismissed and shall be completed within a reasonable time;

(b)the consultations shall be in respect of

(i) the proposed method of selecting the employees who are to be dismissed;

(ii) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take place; and

(iii) any measures that the employer might be able to take to find alternative employment for those who are to be dismissed

and to mitigate for them the adverse effects of the dismissals; and

(c)where, in any case, there are special circumstances which render it not reasonably practicable for the employer to comply with any of the requirements of paragraph (a) and (b), the employer shall immediately consult with the Chief Labour Officer and take all such steps towards compliance with the requirement as are reasonably practicable in all the circumstances.

The ERA therefore requires that consultation with affected workers or their representatives be carried out when redundancy arises; the provisions of the Statute are obligatory. By ***s.31 (6) (a)*** consultation must commence no later than six (6) weeks prior to the dismissal of the affected workers and must be completed within reasonable time. The section also takes into account the procedure to be employed for the dismissals and the employer must, where possible, implement measures regarding alternative employment for those made redundant. This is set out in ***s.31(6)(ii)(iii).***

It must be noted that a failure to consult with the employee or his representative would not automatically be regarded as an unfair dismissal. This view was expressed in ***Forman Construction Ltd v Kelly (1977) IRLR 468.*** However, where the employer fails to consult with the dismissed worker or his representatives, he must give reasons for such failure: ***Holden v Bradville Ltd. (1985) IRLR 483.***

<u>s.31(6) c. Special Circumstances</u>

The ERA makes provision for the application of ***"special circumstances"*** where it might not be ***"reasonably practicable"*** to comply with the requirement for consultation.

In ***Heron v Citibank-Nottingham (1993) IRLR 372,*** the Claimant was dismissed without warning due to the employer's desired policy of

implementing significant economies of scale in the business. The Employment Appeals Tribunal (EAT) held that the dismissal was unfair and indicated that if exceptional circumstances were to obviate the need for consultation it must be shown by the employer that it was necessary to carry out the dismissal when it did and at no later date.

The meaning of ***"Special Circumstances"*** was considered by the House of Lords in C***larks of Hove Ltd v Bakers' Union (1978) IRLR 366*** **– Lane LJ** pronounced that ***"Special Circumstances"*** connotes ***"something out of the ordinary; something uncommon".*** The Court was here trying to find a reasonable interpretation of the phrase in context of the legislation.

It is to be noted that the two terms ***"Special Circumstances"*** and ***"reasonably practicable"*** exist side by side.

In ***Shanahan Engineering v Unite the Union UK EA7/0411/09/DM at para 28.*** Richardson J said:

> *"The phrase "reasonably practicable" is a well-known phrase often adopted to define the scope of a requirement or obligation. Where requirements are placed on an employer subject to these limiting words, an employer does not have to prove that it was impossible to comply with the requirements or even that it was physically impracticable to do so."*

LJ Potter in ***Schultz v Esso Petroleum (1993) 3 ALL ER 338 at 345*** also had something to say on the application of the phrase:

> *"Whenever a question arises as to whether a particular step or action was reasonably practicable….the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved."*

Section 31(6)(c) gives to the employer a defence in respect of the

consultation requirement. However the fact that an employer genuinely believes that it does not recognize a trade union for collective bargaining purposes does not constitute a special circumstance that would render it not reasonably practicable to comply with the obligation to consult: ***Joshua Wilson & Bros Ltd. v Union of Shop Distributive & Allied Workers (1978) IRLR 120.***

[The issue of trade union recognition will be explored more fully later in the decision]

A test to be followed by Tribunals on the matter of consultation was laid down by the EAT in ***Mugford v Midland Bank PLC (1997) IRLR 208*** and set out as follows:

a) *If there is no consultation with trade unions or the employee representative when redundancies are contemplated, a dismissal will be unfair unless a reasonable employer can show that consultation would be useless or an exercise in futility.*
b) *Consultation with a trade union does not release the employer from an obligation to consult with the affected employee.*
c) *It will be a question of fact for the tribunal to consider whether such consultation as had taken place was so inadequate as to render dismissal unfair.*

It must however be observed that the learned author in his treatise: ***Selwyn's Law of Employment, 16th Edition, page 530 paragraph 18.86***, OUP warns that though special circumstances exist, the employer must none the less take all steps as may be reasonably practicable to consult.

As has been stated earlier, the failure to consult in accordance with the ERA was at the heart of the Claimants' claim for unfair dismissal. The main thrust of the argument in this area was made through the extensive evidence in chief of former General Secretary of NUPW Mr. Dennis Clarke.

Mr. Clarke's contention was that the NCC had committed a major breach of the ERA by its failure to carry out the required obligatory consultation pursuant to ***section 31 (4)*** of the Act; this failure was so unreasonable that it rendered the subsequent dismissals unfair.

In support of this position Counsel for the Claimant Mr. Patterson Cheltenham, Q.C. in his submission to the Tribunal relied heavily on the House of Lords' decision in the ***Polkey Case*** cited earlier.

Counsel's argument in summary was:

The NCC failed to indicate to the affected employees or to their Union the proposed method of carrying out the dismissals, including the period over which those dismissals were to take place.

(i) The right of the employees to have consultation with the NCC became particularly important where it was not adhering to the agreed method of retrenchment, LIFO.
(ii) The affected employees seemed to be randomly selected without regard to any set criteria.
(iii) In light of the change in the agreed method of selection, it was unreasonable of the NCC not to consult; such unreasonableness rendered the subsequent dismissals unfair.

Counsel also submitted that the NCC failed to provide a written statement pursuant to ***section 31(4)(b)*** of the ERA.

Section 31(4) (b) provides:

> (4) Where it is contemplated that the workforce of the business of an employer will be reduced by 10 per cent or any other significant number, before dismissing an employee, the employer shall
>
> (b) supply the employee or the trade union recognized for the

purpose of bargaining on behalf of the employee (if there is one) and the Chief Labour Officer with a written statement of the reasons for and other particulars of, the dismissal.

Counsel's view was that the failure to provide a statement together with the failure to consult, deprived the affected employees of their right to have written knowledge of when and how the dismissals were likely to be effected; such a failure hindered the said employees in their pursuit of adequately planning and providing for the consequences of the mass redundancy that resulted. He further argued that this was against the very ethos of the ERA which was intended to give protection to the worker. The action of the NCC therefore by its failure to consult in the absence of any special circumstances was unreasonable and amounted to an unfair dismissal.

Whether there was in fact consultation between the NCC and the employees was an important issue that had to be resolved and as such, the Tribunal through its Chairman posed a number of questions to Mr. Neblett the General Manager in an attempt to satisfy itself whether the statutory requirement of consultation was complied with.

The following is a verbatim account of part of the exchange between the Chairman of the ERT and Mr. Neblett as it was extracted from the transcript of the proceedings:

CHAIRMAN: Okay alright, there was a number of persons…

Mr. Keith Neblett, Witness for the Respondent: They have a number…

CHAIRMAN: Did you call them in…. Mr. Jones, Ms. Smith, Ms. Gollop, Ms. Cheltenham, Ms. Green, one at a time and consult with them?

Mr. Keith Neblett, Witness for the Respondent: No

CHAIRMAN: So that rules out individual consultation, there was no individual consultation then?

Mr. Keith Neblett, Witness for the Respondent: No

CHAIRMAN: Did you consult with them as members of the NUPW, because that is the other way that the Statute speaks about consultation?

Mr. Keith Neblett, Witness for the Respondent: Nope

CHAIRMAN: You did not?

Mr. Keith Neblett, Witness for the Respondent: I have to be careful because you say that consultation is a term within the legal aspect so I don't want to confuse myself, I am trying not to confuse myself.

CHAIRMAN: I am not going to confuse you then, I am just going to read what the Statute says and the Statute says, the Statute requires that if the work force is to be reduced there has to be consultation…..

Mr. Patterson Cheltenham, Q.C., Legal Counsel for Claimant: By 10 percent.

CHAIRMAN: Do you agree that the workforce had to be reduced by a significant number?

Mr. Keith Neblett, Witness for the Respondent: Correct,

CHAIRMAN: So that is the first condition, that the workforce had to be reduced by a significant number. We are not going to worry if it was 10 percent or 25 percent or 60 percent, a significant number. It says that when that is happening, when that occasion arises there has to be consultation with either the employee or the trade union recognized for the purpose. You did not consult with these employees separately?

Mr. Keith Neblett, Witness for the Respondent: No.

CHAIRMAN: Did you consult with the NUPW in respect of those persons who were represented by them?

Mr. Keith Neblett, Witness for the Respondent: No, we consulted with the Barbados Workers Union.

It became clear that the reason for its failure to consult with the employees'

union was that the NCC considered it was under no obligation to consult with the NUPW since that union only represented 23 per cent of the employees at the NCC; the requirement for recognition of a trade union was based on the union's ability to demonstrate that 50 plus per cent of the workforce formed part of its membership.

The NUPW former General Secretary, Mr. Clarke in his evidence however, told the Tribunal that over an extended period of years, the NCC had always sought to include the NUPW in any negotiations in matters that affected the welfare of its members at the NCC. These included wages negotiations and negotiations in respect of working conditions which even extended to matters relating to health and safety and workers' uniforms. Mr. Neblett did not deny this claim in his evidence, elicited through questions put by Counsel for the Claimant and by the Tribunal itself.

It is therefore of vital importance that the Tribunal embark upon a discussion on what may in law constitute trade union recognition and the effect of the same.

Recognition

> *"Recognition is the status of an independent trade union having a negotiating voice with the employers on behalf of its members for the purpose of collective bargaining".*

So says ***"The Law of Industrial Action and Trade Union Recognition"*** by John Bowers, Q.C., Michael Duggan and David Reade at P 215.

Employers grant trade union recognition as a means of establishing a procedural structure within which a power relationship can be mediated.

Recognition in practice could take many forms. The employer may recognize a union relating to specific issues in the workplace. For example, negotiating disciplinary procedures, inter alia. However, it has been

argued that full recognition of a union would involve full terms and conditions in respect of their employees.

In the United Kingdom, recognition for trade union purposes as set out in the ***Trade Unions & Labour Relations (Consolidated) Act 1992, s.178(3)*** means the recognition of the union by an employer or two more associated employers to any extent for the purpose of collective bargaining. Although the Statute defines what is recognition, case law in the area has developed in the context of redundancy dismissals where unions have argued that they were recognized by the employer and should have been consulted prior to dismissals taking place.

Negotiation between the employer and union requires that an agreement be reached between the two. Such an agreement may be expressed but where there is absence of such an agreement, the conduct of the parties may allow for recognition to be inferred.

In ***Nugsatt v Albury Brothers Ltd. (1978) IRLR 504***

Lord Denning advises:

> *"An employer is not to be held to have recognized a trade union unless the evidence is clear. Sometimes there is an actual agreement of recognition. Sometimes there is an implied agreement of recognition. But at all events there must be something sufficiently clear and distinct by conduct or otherwise so that one can say they have mutually recognized one another, the trade union and the employer, for the purposes of collective bargaining.*

Similar sentiments were expressed in the same case by Sir David Cairns at page 506 where he points out that the acts relied upon

> *"Must be clear and unequivocal and usually involve a course of conduct over a period of time."*

In ***Transport & General Workers Union v Andrew Dyer (1977} 1RLR 93*** Lord McDonald clearly suggests that the conduct the parties displayed to each other could lead to recognition and he states:

> *"Recognition need not necessarily involve some formal act on the part of the employer and it can be inferred from his actions and those of the union."*

What he does stress is that the actions must be clear and unequivocal and a course of conduct over a period of time is critical.

In ***Joshua Wilson & Bros Ltd. v Union of Shop, Distributive and Allied Workers (1978) IRLR 120*** the EAT ruled that recognition could arise from the cumulative contact between employer and union over the period of a year. The case also supports the view that consultation over individual matters such as union dues, discipline inter alia would not be sufficient for purposes of recognition when taken separately; taken together they would constitute clear and unequivocal evidence of recognition.

The issue of conduct as a criterion for the purpose of recognition featured in ***National Union of Tailors and Garment Workers v Charles Ingram & Co. (1977) IRLR 47*** where it was stated by the Court that

> *"Where there is neither a written agreement that the union should be recognised, nor an express agreement which is not in writing it is sufficient if the established facts are clear and unequivocal and give rise to the clear inference that the employers have recognized the union.*

In fine, the common thread running through the line of cases is that for purposes of trade union recognition, once the facts are clear and unequivocal that there has been a course of conduct between the employer and the union acting on behalf of employees, which existed over a period

of time, the Court will be willing to grant recognition status to the trade union.

In examining the principles of recognition and the law relating thereto, the Tribunal is aware that in Barbados there is no statute which provides for trade union recognition. This being the case, reliance must be placed on the common law for guidance.

The Tribunal dismisses the submission of Counsel for the Respondent Mr. Codrington, that the complainants can find no support for their claim that the NCC by its conduct over the years gave implicit recognition to their union the NUPW as a bargaining agent for its membership among the workforce.

Counsel referred to a number of cases on recognition of trade unions but failed to elaborate on the merits of any one of them in support of his submissions. He cited the cases: ***Working Links (Employment Ltd.) v Public and Commercial Services Union UKEAT/0305/12/RN; National Union of Gold and Silver and Allied Trades v Albury Brothers Ltd, [1978] IRLR 504 and Union of Shop, Distributive and Allied Workers v Sketchley Ltd.[1981]IRLR 291.*** None of these cases challenges the assertion that recognition may be inferred from a course of dealing between the parties.

The Tribunal on the evidence before it and the principals discussed, finds that the NUPW was justified in regarding itself as a recognized bargaining agent for those workers at the NCC who formed part of its membership, ***Miss. Cutie Lynch*** the complainant being one of them. The failure to consult with either the employees individually or their union the NUPW in accordance with the ERA therefore constituted a breach of their statutory right not to be unfairly dismissed. As such, the claim by ***Miss. Cutie Lynch*** and her colleagues that they were unfairly dismissed because there was a lack of consultation by the NCC with them or on their behalf is therefore sustained.

Procedures For Selecting Employees For Redundancies

It is the principal duty of the Tribunal to examine the employer's procedures taken for selecting employees for redundancies to ensure that there was fairness in the process. The factors which should be taken into consideration include:

(i) The criteria for selection should be objective;
(ii) employers must demonstrate that such objectivity is geared towards producing a legitimate aim. Examples are:
   a. encouraging and regrading staff;
   b. retraining skills; and
   c. use of knowledge that has been developed overtime.

So that where LIFO is employed by considering the various qualities of staff being considered for redundancy, there will less likely be a successful challenge to the applied procedure once the employer can show its use and application were justifiable and fairly executed.

The criteria reasonably applied should include such considerations as attendance at work, discipline, knowledge, skills, ability, aptitude and performance.

Turning to the evidence, the Tribunal was however faced with the submission by Counsel for the complainant that the LIFO principle was arbitrarily applied and not within the spirit and intendment of the said principle. Mr. Neblett for the Respondent suggested that such a claim could not be substantiated and that among the considerations taken into account were:

i) Persons who were close to retirement age were identified for termination;
ii) persons who were on sick leave on a regular basis were also selected for termination;

iii) persons who voluntarily requested to be made redundant were accommodated by the NCC; and
iv) socio-economic situations affecting some workers were taken into account.

The Tribunal, after careful assessment of the submissions, found there was no evidence adduced to displace the claim by the Complainant that arbitrary selection was the essence of the determination of the employees selected for redundancy; the claim that the employees that were retained, contrary to the LIFO principle and other criteria in respect of length of service, came from a particular geographical location, was however not substantiated by the evidence.

The directive to Ministries/Departments of Government set out in the Circular No. 1/2014N.P.6205 Vol1T3 was the method by which employees were to be selected for termination. The circular expressive of Cabinet's Policy in respect of the termination directed that:

> *"The retrenchment policy* ***should generally be Last-In-First-Out. (LIFO)."***

It was agreed by Counsel on both sides that the phrase *"should generally be"* in relation to the LIFO principle empowered the NCC with a degree of discretion in the selection process, so long as that discretion was exercised reasonably.

It was further agreed in discussion between Counsel and the Tribunal that the NCC could exercise that discretion in a manner that would ensure fairness in the selection process while further ensuring that a level of efficiency in the administration of the NCC's programme of work was maintained since the discretion of the Respondent could not be fettered.

The principles emanating from the learning on LIFO will now be discussed.

LIFO

The Implementation of an unfair selection process for the purpose of terminating employees in a redundancy will inevitably result in an unfair dismissal. Employers should therefore adopt a genuine exercise for selection of employees whom they intend to make redundant.

Where there is no pre-arranged procedure in place the employer can resort to LIFO.

LIFO has really been shown to be a very crude tool; it does not ensure that the organization retains the most skilled, experienced or best performing employees. It therefore presents a grave risk that employers would be discriminatory in the selection process.

It must be accepted that the LIFO principle is quick and simple to apply but it must be admitted that evaluating skill and performance against the future needs of the employer are more likely to leave an employer with a more productive and efficient workforce than LIFO would.

LIFO used to be one of the most commonly used methods for objectively determining who should be terminated by virtue of a redundancy. However, even thought it might be objective it might not be a fair method if it is used as the sole selection criterion.

It generally tends to discriminate against younger employees especially in cases where the younger employees are the ones who would have been the last additions to the staff and by extension the employees with the shortest work record and least experience on the job.

It would therefore be advantageous to both employer and employee if in the application of LIFO that it be undertaken in conjunction with an evaluation of other mentioned criteria.

A major weakness in the Respondent's ability to demonstrate that it had

considered some of the criteria that could have allowed it to show that it was not actuated by extraneous considerations in its choice of employees to be made redundant, but had rather acted reasonably in the exercise of its discretion to ensure that the best available persons were retained in the workforce, was the revelation by Mr. Neblett that the NCC had documentation on the performance of workers but that it was never used. An extract is herewith taken from the transcript of proceedings to highlight this evidence. It featured exchanges between Mr. Neblett and the Chairman of the Tribunal.

> **CHAIRMAN:** On questions from me Mr. Clarke agreed, I think he went back to something earlier when he discussed section 4, ahmmmm what the policy of Last In First Out intended, that it be generally applied. In reply to a question from me, Mr. Clarke agreed on the point of discretion. We went through that yesterday but he agreed to something else yesterday which we did not get to. Yesterday, he agreed with the principle that you cannot fetter the discretion of an employer as long as the discretion was applied reasonably, you remember that? Now are you saying that you have a discretion on who should be retained and who should be retrenched?
>
> **CHAIRMAN:** Are you agreeing that you had that discretion?
>
> **Mr. Keith Neblett, Witness for the Respondent:** Oh I am just trying to make sure that I say the right question, I am not quick in response like you are, so I might have to take my time. So bear with me, I am not legally trained….
>
> **CHAIRMAN:** This is no trick question, take your time. The question was did you consider that you had a discretion and was it applied reasonably?
>
> **Mr. Keith Neblett, Witness for the Respondent:** Correct.
>
> **CHAIRMAN:** Now can you tell the Tribunal, what steps did you take to ensure the reasonable exercise of that discretion, bearing in mind what we agreed on, that your principle aim was to foster good administration, you want the place to function properly, and you put that down in your document which we went through yesterday. What reasonable discretionary steps did you take in your decision?

Mr. Keith Neblett, Witness for the Respondent: I think all the steps from the beginning that I outlined, in terms of the selection of temporary workers, the whole question in terms of ensuring that the organization continued to function, the whole question of being fair to those persons who were productive as opposed to those persons who had medical issues. The question in terms of the socio-economic circumstances, so we would have looked at all those elements and reasonableness would have been applied across the board in dealing with those matters.

CHAIRMAN: Alright, in outlining those steps to me you have demonstrated that you were making comparisons throughout, this person as opposed to this person, that person as opposed to that person, am I correct?

Mr. Keith Neblett, Witness for the Respondent: I wasn't making comparisons.

CHAIRMAN: You decided to keep Mr. Cheltenham and send Mr. Gollop, did you not make decisions like that?

Mr. Keith Neblett, Witness for the Respondent: Well on that matter there you can say that there would have been selections based on information made available to you.

CHAIRMAN: So comparisons! It was a whole comparative process, is that not correct?

Mr. Keith Neblett, Witness for the Respondent: If what I explain to you and you say…

CHAIRMAN: No, no, I don't want that! You said that you chose those persons who were productive, I think you used that word.

Mr. Keith Neblett, Witness for the Respondent: That was very specific to the medicals, so it was not productivity across the board, it was very specific to the medicals

CHAIRMAN: No, you said it about a number of categories, I have just pointed to one.

CHAIRMAN: Were the medical people terminated because they were unproductive? So even in that regard you compared those who were

unproductive for a particular reason and kept those persons who were productive in comparison? is that correct?

Mr. Keith Neblett, Witness for the Respondent: Yes, we had evidence to support it.

CHAIRMAN: You have evidence to support it. Did you have that evidence documented, so that you could show that Mr. Gollop was a bad, bad worker, he does not come to work on time, he does not keep his designated area clean, he takes sick leave every other week, things like that which go towards an efficient worker? Do you have that kind of evidence as opposed to the other kind of evidence which shows Mr. Bushell as a man who is there every day, always on time, carrying out his responsibilities; did you have that kind, did you use that kind of comparison in the decision making process?

Mr. Keith Neblett, Witness for the Respondent: Yes, we had very detailed information of all, if you go back to probably a year or so we had that information on all 102 workers.

Mr. Keith Neblett, Witness for the Respondent: The process starts with 102, on every single employee.

Mr. Keith Neblett, Witness for the Respondent: Correct

CHAIRMAN: Now did you have that information in respect of 186?

Mr. Keith Neblett, Witness for the Respondent: No, because we did not look at productivity across the board, the whole question of the retrenchment did not look at the raw terms of the productivity from a medical perspective because we understand how that affect the productivity…

CHAIRMAN: Did you have information in terms of malingering, late coming, shirking work, uncooperative conduct, poor performance did you have things like that documented in your records?

Mr. Keith Neblett, Witness for the Respondent: We have things like that documented in the NCC. I am not sure about malingering, but elements in terms of lateness……

CHAIRMAN: So, you are saying that you have documentary evidence in respect

of the workers that would help you decide that this one was a better worker to keep than that one?

Mr. Keith Neblett, Witness for the Respondent: That was there but it was never used.

Mr. Patterson Cheltenham, Q.C., Legal Counsel for Claimant: He is very clear on what he has just said Sir.

CHAIRMAN: Pardon?

Patterson Cheltenham, Legal Counsel for Claimant: He is very clear on what he has just said Sir, we have had it but we have never used it, I don't understand any need for clarifying that.

Based on the evidence the Tribunal finds that the failure of the Respondent to demonstrate in its evidence that it did in effect use objective criteria for the purpose of selecting those employees to be affected by the redundancy, it failed to displace the claim made by the Claimants that it implemented an arbitrary process in its selection.

Having reviewed the evidence taken in this matter and analysed the submissions of Counsel, the tribunal finds that there was in fact circumstances existing within the NCC that forced it to adopt the institution of redundancy measures at the corporation. The NCC however while executing the said measures failed to give effect to the statutory requirement of consultation and was unable to demonstrate that during the process of carrying out the redundancy of the complainants it applied the LIFO principle objectively and fairly.

This being the case the tribunal finds that the complainants were unfairly dismissed.

The tribunal must now go on to consider what compensation may be made to the complainants in accordance with the provision of the ERA, and will first consider the remedy of **Re-instatement or Re-engagement.**

Re-Instatement and re-engagement Two Of The Remedies For Unfair Dismissal

The tribunal first addressed the remedy of re-instatement and re-engagement in the case: ***Joel Leacock and PMM Services Limited (also known as KPMG), ERT/2014/56.***

In that case, it was pointed out that the tribunal has a discretion whether to make an order for re-instatement or re-engagement depending on the circumstances of the case. In exercising the discretion there is a need to consider whether it is practicable for the employer or its successor to comply with the order. It must also consider whether the Claimant caused or in any way contributed to his dismissal.

In the present case before the tribunal no claim has been made of any contribution being made by the Claimants to their dismissal. The dismissals were due to a redundancy.

An analysis of the Statutory provisions of the ERA will now be made.

Statutory Provisions

The remedies for unfair dismissal are set out in ***section 33-37 ERA 2012.*** Where the tribunal establishes that a complaint under ***s.32*** is well founded the tribunal under ***s.33 shall***, explain to the employee the orders that the tribunal may make under subsection (2) and the circumstances in which the orders may be made; and

(a) inquire of the employee whether he wishes the tribunal to make similar orders.

Under ***s.33(2)*** where the employee indicates that he wishes the tribunal to make an order pursuant to this subsection the tribunal may, subject to subsection (3), (4) and (5) make an order for

(a) the re-instatement of the employee in accordance with ***s.34***; or

(b) the re-engagement of the employee, these in accordance with ***s.35***.

Where neither an order for the re-instatement of the employee nor his re-engagement is made the tribunal shall make an award of compensation for unfair dismissal to be paid by the employer to the employee: ***s.33(5).***

Section 34(1) provides that an order for re-instatement is an order that the employer treat an employee in all respects as if he had not been dismissed.

(2) On making an order for the re-instatement of an employee the tribunal shall specify-

(a) an amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of wages) for the period from the date of termination of employment to the date of re-instatement;

(b) any rights and privileges, including seniority and pension rights, which must be restored to the employee; and

(c) the date by which there must be compliance with the order

Section 36 provides that:

In calculations for the purposes of ***section 34 or 35*** any amount payable by an employer, the tribunal shall take into account so as to reduce the liability of the employer. This principle will be fully explored under the heading of ***"Unfair Dismissal and Mitigation of Loss."***

Section 35: Order for re-engagement

(1) An order for the re-engagement of an employee is an order, on such terms as the tribunal may determine, that the employee be

engaged by the employer, or by a successor of the employer, in employment comparable to that from which the employee was dismissed or in other suitable employment.

(2) On making an order for the re-engagement of an employee the tribunal shall specify the terms on which the re-engagement shall take place, including

(a)the identity of the employer;

(b)the nature of the employment;

(c)the remuneration for the employment;

(d)any amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have but for the dismissal (including arrears of wages) for the period from the date of termination of employment to the date of re-engagement;

(e)any rights and privileges, including seniority and pension rights, which must be restored to the employee; and

(f)the date by which there must be compliance with the order

Guidelines For The Ordering Of Re-Instatement Or Re-Engagement

Under ***s.33(3)*** in exercising its discretion under subsection (2) of ***s.33*** the tribunal shall first determine whether to make an order for the re-instatement of the employee and, where the tribunal determines it is not appropriate to make such an order, the tribunal shall determine whether to make an order for re-engagement.

(4)In determining whether to make an order for re-instatement of the employee or for his re-engagement and, if the latter, on what terms; the tribunal shall take into account

(a) whether the employee wishes to be re-instated or, in the case of re-engagement, any wish expressed by the employee as to the nature of the order to be made;

(b) whether it is practicable for the employer, or his successor, to comply with an order for re-instatement or re-engagement; and

(c) where the employee caused or contributed to some extent to the dismissal, whether it would be just to order his re-instatement or re-engagement….. and if the latter, on what terms.

(5)where neither an order for the re-instatement of an employee nor for his re-engagement is made, the tribunal shall, in accordance with ***section 37***, make an award of compensation for unfair dismissal to be paid by the employer to the employee.

It is clear that the tribunal has a wide discretion in their consideration whether or not to order re-instatement or re-engagement. This becomes a question of fact. A re-instatement order requires that the employer shall treat the Claimant in all respects as if he had not been dismissed.

The order for re-engagement is more flexible and this is where it must be made on such terms as the tribunal decides.

The statute provides that re-instatement must be considered first and then re-engagement only if there is a decision not to make an order for re-instatement. Three factors the tribunal must consider in making a re-instatement order are:

(a)whether the employee wishes to be re-instated or re-engaged ***s.33(4) (a)***

(b) whether it is practicable for the employer to comply, **s.33(4)(b)**

(c) where the employee caused or contributed to his dismissal whether it would be just to order his re-instatement or re-engagement.

Practicability is an important factor the tribunal must determine especially where the employer satisfies the tribunal that it is not practicable to comply with the order for re-instatement or re-engagement.

In ***Coleman v Magnet Joinery Ltd. [1975] ILR 46 at 52 Stephenson LJ*** stated that ***practicable*** means *"capable of being carried into effect with success"*.

The tribunal in considering whether to make a re-instatement order, must exercise its judgment on the practicability of the employer's compliance with the order as a provisional determination and must also make a prospective assessment of the practicability of compliance and not a conclusive determination of practicability. See ***McBridge v Scottish Police Authority [2016]UKSC 27*** at par 37 per Lorde Hodge. At para 34 the Lord Justice made the telling point in relation to what is re-instatement. He said,

> *"it is the contractual rights, the terms and conditions of employment which must be re-instated and the rights and privileges (such as seniority and pension rights) which must be restored to the employee under a re-instatement order"*

A tribunal therefore has no power to order re-instatement in terms which alter the contractual terms of the employee's employment.

With regard to terms of guidance for the tribunal, when making an order for re-instatement Hodge LJ at para 38 stated, it is sufficient if the tribunal reasonably thought that it was likely to be practicable for the employer to comply with the re-instatement order.

Although the tribunal must consider the two orders carefully in light of the circumstances of the case, it is important to note that,

"Tribunals are not required to decide every point raised by the parties, provided that the central issues are addressed". See Bristol Airways PLC v C Valencia [2014] UKEAT/0056/14 per Justice Simler, DBE

Agreements to re-instate or re-engage are relatively rare since a decision by a party to terminate the employment relationship is usually one where the party is unwilling to retract its decision. Tribunals recognize that in practice little purpose is served by forcefully re-uniting an employer and former employee in circumstances where they are unlikely to be able to rebuild the necessary relationship of trust and confidence: See ***The Employment Tribunals Handbook: Practice, Procedure and Strategies for Success by John-Paul Waite, Alan Payne with Alex Ustych*** p. 246

It was clearly demonstrated from the evidence taken in this matter that the practicability of re-instatement or re-engagement of the complaints at this time is too remote given the reason for the implementation of the redundancy measures in the first place; it is our view that there would have to be an adjustment to the policy articulated by the Government through the Circular ***No.1/2014, M.P. 6205 vol. 1T3*** for re-instatement or re-engagement to be practicable. And even though the complainants expressed a wish to be re-instated, an order for re-instatement or indeed re-engagement would, in the circumstances, be therefore nugatory.

This being the case, the Tribunal must look to the award of damages pursuant to the ERA as a means of compensating the Claimants.

Compensation

In accordance with ***s.37 of the ERA*** where neither an order for the re-instatement or re-engagement is made pursuant to that Part, the Tribunal shall make an award of compensation, determined in accordance with this section, to be paid by the employer to the employee.

By ***s.37(2)*** the amount of compensation to be awarded under

(a) Subsection (1)(a), shall be calculated in accordance with the ***Fifth Schedule;***

(b) Subsection (1)(b), shall be such amount as the Tribunal thinks fit having regard to the loss sustained by the employee as a result of the failure to comply fully with the order; and

(c) Subsection (1)(c), shall consist of

(i) an amount calculated in accordance with the ***Fifth Schedule***; and

(ii) except where this sub-paragraph does not apply additional compensation in the appropriate amount.

(3) Subsection (2)(c)(ii) does not apply where the employer satisfies the Tribunal that it was not practicable for him to comply with the order for re-instatement or re-engagement

(4) In subsection (2)(c)(ii) ***"the appropriate amount"*** means not more than 52 weeks' wages as the Tribunal thinks fit having regard to the circumstances of the case.

It is therefore worthy of note that compensation must be made in accordance with the ***Fifth Schedule*** against the Statutory restriction that a maximum of fifty-two (52) weeks' wages is the limit to the sum which may be awarded.

In accordance with the ***Fifth Schedule***, where neither re-instatement or re-engagement has been made, the award made by the Tribunal shall consist of the aggregate of the following amounts:

(1) A basic award in accordance with the following table. In the table ***"period"*** means the period of continuous employment of the employee:

Period	Amount
(a) where the period is less than 2 years, but subject to section 27(3):	5 weeks' wages;
(b) where the period is 2 years or more but less than 10 years:	2½ weeks' wages for each year of that period;
(c) where the period is 10 years or more but less than 20 years:	3 weeks' wages for each year of that period;
(d) where the period is 20 years or more but less than 33 years:	3½ weeks' wages for each year of that period.

(3)For the purposes of sub-paragraph *(2)(b), (c)* and *(d),* parts of a year not amounting to a complete year shall not be counted.

(4)Any continuous employment beyond 33 years shall not be counted.

(5)The amount determined in accordance with the rules set out in sub-paragraph (2) to (4) shall be reduced by the amount of

(a)any severance payment paid by the employer to the employee under the ***Severance Payments Act*** in respect of the same dismissal; or

(b)any payment made by the employer to the employee, whether in pursuance of the ***Severance Payments Act*** or otherwise, on the ground that the dismissal was by reason of redundancy.

It is therefore now the duty of the employer NCC to apply the formula set

out in the ***Fifth Schedule*** of the ERA in order to compensate the affected employees, taking into account the several categories under which they fall.

The Statute however also empowers the Tribunal to exercise its discretion by making an additional award, not exceeding fifty-two (52) weeks wages, having regard to the circumstances of the case. The Tribunal must nevertheless be cognizant of the requirement mandated by statute that in accordance with ***s.36***, a dismissed employee has a duty to mitigate his loss.

The principles involved in the act of mitigation will now be discussed.

Unfair Dismissal And Mitigation Of Loss

It is an established principle of law that an employee who has been terminated from his employment has a duty to mitigate his loss. This obligation to mitigate requires affected employees to take reasonable steps to limit their loss by looking for other employment. The Claimant has a duty to mitigate that loss as far as possible: ***Scottish and Newcastle Breweries PLC v Halliday [1986] IRLR 291 EAT.*** However the burden is on the employer to prove that the Claimant has failed to mitigate his loss: ***Fyfe v Scientific Furnishing Ltd. [1989] IRLR 331 EAT.***

A number of principles were laid down with regards to mitigation by the Court of Appeal in ***Wilding v British Telecommunications PLC [2002] EWCA civ 349.*** Whether the employee failed to mitigate by refusing re-employment

> (a)it is the duty of the employee to act as a reasonable person unaffected by the prospect of compensation from his former employer;

(b)the onus is on the former employer as the wrong doer to show that the employee has failed in his duty to mitigate his loss by unreasonably refusing an offer of re-employment;

(c)the test of reasonableness is an objective one based on the evidence;

(d)in applying that test, the circumstances in which the offer was made or refused, the attitude of the former employer, and all the surrounding circumstances, including the employee's state of mind, should be taken into account;

(e)the Court or Tribunal should not be too stringent in its expectations of the injured party.

In accordance with the duty to mitigate financial loss, ***Section 36 ERA*** provides that, in calculating for the purposes of ***section 34 or 35*** any amount payable by an employer, the Tribunal shall take into account, so as to reduce the liability of the employer

(a)any sums received by the employee in respect of the period from the date of termination of employment to the date of re-instatement or re-engagement by way of wages

(i)in lieu of notice or ex gratia payments paid by the employer; or

(ii)paid in respect of employment with another employer,

and such other benefits as the Tribunal thinks appropriate in the circumstances; and

(b)any other mitigating circumstances;

Norman Selwyn in ***Selwyn's Law of Employment 16th ed. P 504*** posits that in some cases, it may well be reasonable for the employee to become self employed and this should not be held against him, when weighed

against his employment prospects generally. So that in ***Gardiner-Hill v Roland Berger Technics Ltd. [1982] IRLR 498*** it was held to be reasonable for a 55 year old Managing Director to pursue his own business.

In such case, the costs of setting up another business would form part of the claim.

Reasonableness seems to be the crucial factor with respect to mitigation. ***John-Paul Waite et al, The Employment Tribunals Handbook: Practice, Procedure and Strategies for Success at p 359*** point out that,

> *"The extent to which, if at all a Claimant is expected to accept lesser paid work will depend upon what in the circumstances, a Tribunal considers is reasonable."*

The authors further argue that,

> *"Where, however the job is in the same bracket, they may be expected to accept the position if there is a decrease in pay."*

The duty to act reasonably was highlighted by Sir. John Donaldson in ***Archbold Freightage Ltd. v Wilson [1974] IRLR 10*** where he states,

> *"….to act reasonably and to act as a reasonable man would do if he had no hope of seeking compensation from his previous employer. It follows from that that he should accept alternative employment if, taking account of the pay and other conditions of that employment it is reasonable so to do."*

However, in light of the circumstances surrounding mitigation, the Tribunal must look at the conduct and intentions of the Claimants to

determine whether the conduct has been reasonable. There has been no evidence of unreasonable conduct presented before the Tribunal. In addition, there has been no evidence produced by the NCC before the Tribunal to show that the Claimants failed in their duty to mitigate their loss. In fact, Miss. Lynch gave evidence that she has been trying without success to find a job. As such, the Tribunal in accordance with its statutory duty makes an award of fifty-two (52) weeks as adequate compensation in the circumstances.

The manner by which there should be payment of this award shall be left to the NCC and the workers' representatives, NUPW, for negotiation. The Tribunal must be informed of the outcome.

The Case Of Mr. Anderson Chase:

The case of ***Mr. Anderson Chase*** was brought before the ***ERT*** through the representation of his Union the Barbados Workers Union (BWU) ***Case ERT/2014/063.*** It arose out of identical circumstances brought about by the decision taken by the NCC to act in compliance with the policy initiative of Government set out in the Circular ***No. 1/2014 MP 6205 Vol. IT3.***

On 13 April 2014 Mr. Chase received a letter dated 2014-04-25 from the General Manager of the NCC informing him that due to the severe economic challenges facing the country, the Government of Barbados had decided on a retrenchment programme which of necessity had to affect public servants including employees of NCC. He further informed him that his services would be terminated from 30 April 2014.

His letter of termination is herein reproduced:

2014-04-25

Mr. Anderson Chase
Block 9J Silver Hill
Christ Church

Sir:

Re: Termination of Services

I am directed to inform you that due to severe current economic challenges facing the country, the Government of Barbados has decided on a retrenchment programme which will affect public servants, including employees of the National Conservation Commission.

In this regard, I have been directed to inform you further, that your services with the Commission will be terminated with effect from **April 30, 2014.** You will be paid one month's salary in lieu of notice and any vacation monies due to which you are entitled. These monies will be computed and paid to you on **April 30, 2014.**

You are entitled to a severance payment in accordance with the Severance Payment Act of Barbados based on your years of service and you will be duly informed regarding the date of this payment.

In an effort to help you through this period of adjustment counseling services will be provided through the Network Services Centre. You may therefore wish to contact the Commission's Human Resources Manager to have an appointment scheduled as necessary.

The National Conservation Commission will like to express its thanks and appreciation for the services which you rendered during the period of your employment.

Yours faithfully

KEITH NEBLETT
General Manager
National Conservation Commission
KAN/jgb

The Complainant Mr. Chase gave evidence before the Tribunal stating inter alia:

i. He commenced his employment with the NCC on 4 June 2007.
ii. That employment came to an end on 30 April 2014.
iii. He was employed as a range warden.
iv. His gross earnings were $2221.88 per month.

Mr. Chase's Claim

Mr. Chase claims on behalf of himself and the twenty-five (25) other employees, members of the BWU, who have an interest similar to his and who were made redundant from the NCC, that they were unfairly dismissed.
The main contention for the claim of unfair dismissal was that the NCC, the Respondent, failed to apply the approved LIFO method for termination in an equitable manner; it is their view that LIFO was applied arbitrarily; those employees who were kept on after the terminations were effected resided in a specific geographical area.

The Claimants also allege that:

a) The NCC failed to give to the Complainants or their representatives any adequate prior warning of redundancy;
b) it failed to carry out the consultation required under ***s.31(6)(b) of the ERA;***
c) it failed to supply the Claimants or their Trade Union recognized for the purpose of bargaining on their behalf with a statement of the reasons for and other particulars of the dismissal (sic); and
d) it refused to explore other avenues through which it might have been able to mitigate the adverse affects of the dismissal.

The Respondent maintains that it had complied with the provisions of the

ERA and it was merely carrying out the mandate which Government had ordered pursuant to the Circular ***No. 1/2014 MP 6205 Vol. I.T3.*** The termination of the complainants was due to redundancy.

Because of the peculiar nature of this case and its counterpart, the case of ***Miss. Cutie Lynch,*** the two of them being founded on identical facts, the Tribunal does not consider it necessary to enter into a discussion of those issues which were given comprehensive analysis in the ***Cutie Lynch Case.*** The Tribunal has therefore re-applied the analysis and conclusions arrived at in respect of the issues involving redundancy, consultation, LIFO, re-instatement and re-engagement, compensation and mitigation of loss to this case.

Support for this approach may be found in the decision of: ***British Airways PLC v Mr. C. Valencia, UK, EAT/0056/14*** where the Court stated per Mrs. Justice Simler DBE

> ***"Tribunals are not required to decide every point raised by the parties, provided that the central issues are addressed."***

In respect of the discussion on redundancy and the position as it relates to the Complainant ***Anderson Chase***, Counsel for the Respondent raised the argument that ***"there might have been a redundancy by reason of the term of his contract."*** He went further to submit that ***"there is nothing in the law governing the NCC which stipulates that a person serving in a pensionable post cannot either become redundant or whose services cannot be terminated in that post, in so far as the post is abolished in good faith."*** In support of this proposition Counsel cited ***Winton Campbell v AG (Barbados) 2008 CCV Appeal No. CV2.***

The Tribunal finds this argument fanciful in that the situation which may

give rise to a redundancy is clearly spelt out by the ERA at ***s.31.*** In addition, the ***Winton Campbell case*** was a matter founded on principles of public law which fall outside the scope of the ERA.

With regard to the issue of re-instatement and re-engagement the complainants and Counsel on their behalf made the unambiguous plea for re-instatement across the board; the Tribunal was left in no doubt that re-instatement was the desired remedy.

In the case of ***Cutie Lynch,*** the Tribunal stated the position in respect of re-instatement namely, that the remedy is only worthy of serious consideration where it can be practicably enforced. The Tribunal therefore must repeat the position that the termination of the employees was brought about in the first place by the stringent economic conditions that were set out in the Circular ***No. 1/2014, M.P. 6205 Vol. 1.T3.*** No evidence was placed before the Tribunal that would lead to the conclusion that re-instatement would be a practicable option worthy of consideration at this time. The complainants like those in the ***Cutie Lynch*** case will therefore have to rely on the remedy of compensation in accordance with the ERA.

<u>Compensation</u>

The Tribunal rules that the Complainants in this case must be compensated in identical manner to those in the ***Cutie Lynch Case,*** in accordance with the ***Fifth Schedule, ERA.*** The NCC and the affected employees must therefore get together with their union representative BWU to finalise the process of compensation and inform the Tribunal accordingly.

It is however noteworthy that ***Mr. Anderson Chase*** in whose name the

representative action was brought did make a distinct effort to mitigate his loss. In fact he gave evidence that he had indeed found alternative employment even though his remuneration was significantly reduced.

In keeping with the position adopted in the ***Cutie Lynch Case*** where it was stated that the principle of mitigation places the responsibility on the employer to show that there was failure by the employee to mitigate and in light of the fact that there was no evidence led by the NCC of such failure, the Tribunal makes an identical award as compensation under ***s.37(4)*** of the ERA of fifty-two (52) weeks wages.

In his submission to the Tribunal, Counsel for the Claimants Mr. Edmund King, Q.C. urged the Tribunal that were it to find it impracticable to order re-instatement of the affected employees to ***"make an award of substantial damages."*** It must however be noted that in accordance with ***s.37(4) ERA*** such ***"substantial damages"*** must comply with the said section and must be limited to an award of Fifty-two (52) weeks wages.

<u>Conclusion</u>

Based on the evidence which came before the Tribunal in both of these cases, it is apparent that the NCC's record keeping falls short of the standards required for proper human resources management. The Tribunal therefore considers it important to make the following necessary observations.

The NCC must make a greater effort at ensuring that as an institution with over six hundred (600) employees that there is in place an effective performance management system which could redound to efficiency in the institution. Employees would be better placed to know how they are

performing and in the event there is a need for a particular skill, the institution would be in a position to accommodate such employees by way of training.

The keeping of proper, adequate and up to date records on each employee is critical for the institution. Each employee should have his own file with information recorded for future reference.

S.13(1) ERA requires the employer to give the employee a written statement of the particulars of his employment. In this regard, when this information is recorded on an employee's file, it would be in the best interest of both the employee and the employer.

Coaching and feedback are indispensable pre-requisites for the continued relationship of employer and employee; employers would know the strengths or weaknesses of the employee and be able to give the necessary assistance in order to keep their performance up to standard in the institution. This too should redound to the benefit of both the employer and the employee.

Having such an effective management system providing coaching and feedback at appropriate periods should ensure that the employee's performance is beneficial for the proper administration of the institution. See ***Joel Leacock v PMM Services (also known as KPMG) ERT/2014/056 p 19.***

Order Accordingly

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