TRINIDAD AND TOBAGO
TRADE DISPUTE NO. 197 of 2002

IN THE INDUSTRIAL COURT

Between

OILFIELDS WORKERS' TRADE UNION -Party No. 1

And

SCHLUMBERGER (TRINIDAD) INCORPORATED -Party No. 2

CORAM

His Honour Mr. H. Soverall -Presiding Member
His Honour Mr. P. Rabathaly -Member
His Honour Mr. A. Ramrekersingh -Member

APPEARANCES:

Mr. R. Boodoosingh Attorney at Law	)	
Mr. J. Manswell Industrial Relations Consultant	)	**for Party No. 1**
Mr. B. St. Louis Industrial Relations Consultant	)	
Mr. K. Garcia Attorney at Law	)	
Ms. V. Jaisingh Attorney at Law	)	**for Party No. 2**

Dated: November 22nd, 2005

JUDGMENT

Delivered By His Honour Mr. Augustus Ramrekersingh

This trade dispute between the Oilfields Workers' Trade Union (the Union) and Schlumberger (Trinidad) Incorporated (the Company) concerns the alleged

constructive dismissal of Seunath Nagoo (the worker) with effect from March 29, 2001

On May 03, 2002 the Minister, acting in accordance with Section 59(1) of the Industrial Relations Act (Ch. 88:01), issued a Certificate of Unresolved Dispute which states that "the dispute as reported by the Union concerns the **constructive dismissal** (our emphasis) of Seunath Nagoo, effective March 29, 2001."

After having granted an extension of time to both parties to file their written Evidence and Arguments, the Court began hearing the matter on January 21, 2003 and concluded hearing in September 2005. Supplementary written submissions were ordered by the Court and that process was completed on October 10, 2005.

There were several reasons for the protracted hearing of this trade dispute:

i At the start of the hearing (January 21, 2003) both parties applied to the Court for an adjournment in order to facilitate bilateral discussion with a view to settlement.

ii When hearing resumed on October 27, 2003 the parties acknowledged that bilateral talks had not been successful and applied under Section 12 of the Industrial Relations Act to have the matter conciliated by a member of the Court.

iii The conciliation process (supra) did not result in a resolution of the dispute.

iv In March 2004 the Union's legal representation changed. Mr. R. Dass applied for leave to withdraw from the matter and was replaced by Mr. R. Boodoosingh.

v Counsel was unavailable for several days in the period from April to May 2004.

vi A key Company witness was unavailable until the end of 2004.

vii In January 2005 Counsel for Party No. 2 applied for an adjournment

As a result of the foregoing (i – vii) and in order to complete the hearing of this trade dispute, the Court utilised part of its vacation period.

Despite the change of its legal representative, as mentioned above, the Union did not change nor amend its Evidence and Arguments.

WRITTEN EVIDENCE AND ARGUMENTS

i The Union

It is the Union's contention that the worker was in the continuous employ of the Company from February 24, 1958 to March 29, 2001. During this period:

> "the company inveigled the worker into signing several letters which purported to terminate his services, but in spite of each and every one of them, the worker continued in unbroken service with the company over the entire period of February 24, 1958 to March 29, 2001. It is admitted that with regards (sic) to some of the supposed terminations, the company paid to the worker several sums purporting to represent separation benefits. The latest payment in

> relation to such terminations prior to March 29, 2001 is reflected in the Company's calculations (Appendix B). However, upon termination of the worker's services by letter of March 29, 2001 the Company again calculated the worker's terminal benefits (Appendix C) and paid him accordingly."

The Union further contends that the worker's dismissal was wrongful and harsh and oppressive. As a consequence the Union's prayer is that the worker should be paid his wages from March 29, 2001 to May 25, 2002, and his terminal benefits should be calculated for the period from February 24, 1958 to May 23, 2002. Additionally, the Union's prayer includes a claim for damages.

During his closing address to the Court, the legal representative of the Union submitted, in response to the Court, that:

> "…in the circumstances the Honourable Court finds that the worker was unfairly dismissed and the quantum of damages to be awarded to the worker should be calculated in accordance with Appendix D of our Reply filed on 13th January, 2003."

In summary, the claim for damages reflected in Appendix D, amounted to $538, 830.87.

ii **The Company**

The Company does not deny that the worker was employed with it from February 24, 1958 but contends that in 1969 the worker's service as a temporary worker was terminated and he was placed in the monthly paid category. The

worker was paid terminal benefits for the period from 1958 to 1969. When the Provident Fund for workers at the Company ended in 1974, the members of that Fund (including the worker) were paid for their shares. The Company and the Union signed a Collective Agreement in 1977 (registered as **C.A No. 48 of 1977**). That Collective Agreement included a provision that workers who had received their Provident Fund benefits would not be paid for their service prior to January 01, 1974.

The Company further contends that the worker voluntarily resigned with effect from August 31, 1994 and was paid his severance benefits in accordance with the Collective Agreement. The Company does admit though that through an oversight, the calculation omitted the period from January 1st, 1974 to December 31, 1976. It attempted to correct that oversight but the worker refused to accept the money.

Finally, the Company contends that subsequent to his resignation in 1994, the worker was hired on an **"intermittent"** basis until April 05, 2001 when he became redundant in the Wireline Division. He was then paid severance benefits for the 1994 – 2001 period based on the formula in the Retrenchment and Severance Benefits Act (No. 32 of 1985).

It is the Company's prayer that this trade dispute should be dismissed.

INITIAL OBSERVATIONS

The proceedings in this trade dispute have been a virtual Odyssey; the parties have travelled far, wide and long. The Court, however, has to focus on the issue before it as set out in the Minister's Certificate of Unresolved Dispute as stated earlier, that is, **"the constructive dismissal of Seunath Nagoo, effective 29th March, 2001".**

In this regard, we adopt the statement in **Trade Dispute No. 335 of 1986 between Managers and Supervisors Association of Trinidad and Tobago Richmond Service Centre Limited** (delivered on May 02, 1991) that

> "…the Union did not include in their report of the trade dispute to the Minister the additional claims on behalf of the worker and the Minister made no reference to them in his Certificate of Unresolved Dispute and we, therefore, have no jurisdiction to entertain them. The only issue which is properly before us is the Union's claim on behalf of the worker that the Company has failed to pay retirement benefits to the worker."

In this instant matter, the **only** claim before us is the constructive dismissal of the worker.

Before the Court can entertain a trade dispute, it must have been first reported to the Minister. In our opinion, the statement by Wooding, C. J. (as he then was) in the **Judgment of the Court of Appeal between Trinidad Bakeries Limited and National Union of Food, Hotels, Beverages and Allied Workers and the Attorney General, Vol. XIX (part 1) of Trinidad and Tobago Reports, p. 230 and p. 235,** is applicable to trade disputes reported under the Act. In that case, he said:

> "In my judgment, it is plain from a perusal of these enactments that the jurisdiction of the Court to hear, inquire into and investigate a trade dispute

> extends to such trade disputes only as are before it, by which must be meant, I think, as are properly before it under the authority of the Act. Just as it cannot intervene in so as to take seisen of a trade dispute **ex mero muto**, so also neither one nor even both of the disputants conjointly can approach it directly and invoke its intervention or assistance. Trade disputes get before it only via the Minister, and his authority to take cognizance of them depends upon the making of a report to him of their existence or apprehension."

Moreover, we endorse the statement of the Court in **<u>Trade Dispute No. 335 of 1986 between Managers and Supervisors Association of Trinidad and Tobago and Richmond Service Centre Limited</u>** (supra) to the effect that

> "There is also a time limit within which a trade union may report a trade dispute to the Minister. Section 51 (3) of the Industrial Relations Act, Chap. 88:01 ("the Act") ordains:
>
> > "A trade dispute may not be reported to the Minister if more than six months have elapsed since the issue giving rise to the dispute first arose, save that the Minister may, in any case where he considers it just, extend the time during which a dispute may be so reported to him."
>
> We believe that it is not in accordance with the principles of good industrial relations practice for workers to wait for several years and then make claims against their employers for breaches of their terms and conditions of employment. In this case, the worker's claims are in respect of a period ranging between four and five years prior to his retirement."

To this end, the statement of the Court in **<u>Trade Dispute No. 47 of 1989 between National Union of Domestic Employees and Port and Quarry Limited</u>** (delivered on April 27, 1992) is commended to the parties:

> "It is true that this Court is not bound by the rules of evidence stipulated in the Evidence Act but this does not mean that the Court can act without evidence. This Court, like any other Court of justice, must determine the issue before it only on the evidence and not "by spinning a coin or consulting an astrologer"…"

This trade dispute therefore is not about

i The termination of the worker's services in 1969. The worker accepted his terminal benefits, (October 29, 1970) and raised no grievance.

ii The Provident Fund payments for the period from 1969 to 1973. The worker accepted his payment and raised no grievance.

iii The worker's benefits for the 1974 – 1976 period resulting from C.A. No. 48 of 1977. Indeed the Company admits its indebtedness in that regard.

iv The circumstances of the worker's resignation with effect from August 31, 1994. The worker received his terminal benefits for the period from 1977 – 1994 based on the Collective Agreement subsisting in 1994. The worker raised no grievance through his Union at that time and for the following six and one half years. Indeed, by his own admission, the worker did not think that the events surrounding his resignation constituted the basis for a trade dispute.

v The worker's acceptance of contract employment in September 1994. He raised no grievance at the time and continued to sign contracts on a six monthly basis until August 2000. His action in that regard constituted

affirmation of the employment contracts which he signed at six monthly intervals.

The trade dispute before the Court therefore relates to the events in the early months of 2001 which led to the termination of the worker's services by letter dated March 29, 2001. As a consequence, the Court will only deal with those parts of the evidence and submissions which are pertinent to the instant trade dispute.

In this regard the Court does not deem it necessary to deal with the arguments raised by Counsel for the Company at the start of the hearing nor to make a ruling on the admissibility of the written statement of Gerard Orji.

ORAL EVIDENCE

The Union called two (2) witnesses while the Company called three (3).

i The Union

Seunath Nagoo – the worker.

The worker joined the Company in 1958 in a temporary position of Office Boy. Between that time and 1994 he progressed in the Company and at the time of his "resignation" in 1994 his position was that of Sonde Technician II.

On September 13, 1994 the General Manager (sic), Gerard Orji, called him to his office and told him that he had a contract for him. In response to his (Nagoo's) question "what contract?" Orji told him it was the policy of the Company and that if he did not sign the contract, he would not have a job. He was told to sign a "simple resignation letter" and to "continue working as usual." He wrote a resignation letter then and there (Exhibit SN5) and at Orji's request, backdated it to August 31, 1994. Orji endorsed the letter saying that it was only a resignation on paper, that he had nothing to worry about and would be paid for his service. He was then given a letter containing a contract (Exhibit SN6) and told to go downstairs and read it.

The first contract was dated September 01, 1994 and was for a period of six months. His position was described as Sonde Man, which the worker interpreted to be the same as Sonde Technician. He was offered and accepted in writing twelve (12) such contracts over a six (6) year period. His last signed contract expired on January 31, 2001. While he did not sign a new contract for the period starting February 01, 2001 he continued working after January 31, 2001. On March 29, 2001 he was given a letter (Exhibit SN7) stating that his contract had not been renewed. He was paid termination benefits for the period from September 01, 1994 to April 05, 2001 in the sum of $35, 852,59 (Exhibit SN 11). His benefits were not calculated in accordance with the Collective Agreement.

Having received his cheque, he went to Todd Parker (Operations Manager) and complained that he had not been treated fairly; that the company owed him money. Parker told him that "when you signed the contract, you signed away your rights. However I would have an answer for you on Monday afternoon."

On April 04, 2001 Parker told him that he did not have all the details and they went to Laurence Richardson (Personnel Manager). Parker left him with Richardson who denied that he (Nagoo) had been dismissed. He said that it was a case of non-renewal of contract; that the ratio of the people in the shop to those in the field was too high. As a result the company decided not to renew his contract.

Richardson went on to say that in any case the worker only had a year to go before retirement. Richardson asked him "what do you want from the company? When you have a figure, you can call me; in the meantime I am going to see my lawyers to find out whether the company may be on a limb." Another meeting was scheduled for April 17.

On April 17, Richardson told him that his legal advice was to the effect that the company only owed him for the period from 1974 to 1976 and that he would write him to that effect and attach the appropriate cheque. Richardson insisted that he had not been dismissed; that it was only a non-renewal of contract. He insisted that he should have been paid in accordance with the relevant Collective Agreement (Exhibit SN 12).

He subsequently took the matter to the Union (as well as Attorneys) but there was no resolution and the dispute was referred to the Court.

As at March 29, 2001 there were two Sonde Technicians, himself and Navin Mungroo who had joined the company three years before and had been trained and supervised by him. After his departure from the company, he was told by a Manager and the Shop Steward that his job "was still going on" and Mungroo was doing it. The Sonde was the most critical part of the Company's operations and it could not operate without a Sonde Technician.

In his forty-three years with the Company no disciplinary action had ever been taken against him, his performance appraisals showed that he was an exceptional worker and he had received several commendations (Exhibit SN8).

He was not "intermittently employed" but continuously employed between 1994 and 2001. He had not resigned and had not seen an employment contract dated February 01, 2001, (submitted by the Company as Appendix K in its written Evidence and Arguments), until it was shown to him by Attorney at Law, Ramlogan, subsequent to his departure from the Company. He insisted that he was not paid his correct terminal benefits.

Cross Examination

The worker insisted that he was responsible for the maintenance of the Sonde component in the Wireline segment of the Company while another technician was responsible for the Electrical Cartridge component. He conceded that he was not a seismologist and was only responsible for maintaining the seismic equipment not for the interpretation of seismic data.

Contrary to his claim during his evidence in chief that the Company could not function without the Sonde component, the worker admitted that if the Sonde Laboratory did not exist, the laboratories in the other segments would still be there. He denied that anyone ever told him that he was redundant.

The worker was familiar with the Collective Agreement and the manner of calculating benefits. The sum of $35, 852.59 which he received was wrongly calculated. In respect of payment from the Provident Fund in 1977 (Exhibits SN2 and SN3) he admitted to receiving the money, but denied knowledge of the Provident Fund.

Russel Foster

The evidence of the Union's second witness who worked with the Company at the material time was generally neither helpful nor germane to the trade dispute before the Court. He did confirm, however, that Mungroo continued to work after the worker's departure and performed the latter's functions.

ii <u>The Company</u>

Laurence Richardson (Personnel Manager)

He joined the Company in June 1998. As custodian of the Company's personnel files, he was familiar with the worker's history at the Company. He was aware that the worker had resigned from permanent employment and had simultaneously become a contract worker. As a result of his knowledge of **RSBD No. 4 of 1996** between **The Oilfields Workers' Trade Union** and **Schlumberger Trinidad Incorporated** (**delivered February 24, 1997**) he adjusted the worker's contract to bring it into conformity with the contents of that judgment.

The worker became redundant in April 2001. The Financial Controller presented economic and financial data to the Operations Manager which indicated the revenue per employee and the drop in seismic and wireline activity. Based on that data, a decision was taken to cut staff in the wireline division. The worker was selected for retrenchment because he was "temporary" whereas the other employee – Mungroo – was permanent. The quantum of the worker's terminal benefits were stated in Exhibit SN 11 dated March 29, 2001.

He had discussions with the worker subsequent to his retrenchment. The worker claimed not to have been correctly paid. He disagreed with the worker's claim on the basis of the legal advice he received. He did not tell the worker

anything about the ratio of people in the shop, that he was over sixty and when he (the worker) had a figure he could get back to him.

Cross Examination

As a temporary worker from September 1994 the worker was not paid in accordance with the provisions of the Collective Agreement. It was normal for temporary workers since they were not part of the bargaining unit. The last contract which the worker signed was for the period from August 01, 2000 to January 31, 2001. The worker did not sign a contract dated February 01, 2001 (Exhibit SN6). At the time of the worker's retrenchment there was no existing contract.

The letter of March 29, 2001 (Exhibit SN7) did not specifically mention redundancy but implied such and gave notice of retrenchment. However, the worker was not paid in lieu of forty-five 45 days notice.

Nagoo was a fortnightly worker though he was paid monthly at his request. The Certificate of Recognition (Exhibit LR2) did not cover fortnightly workers. Since the worker was not part of the bargaining unit, he was not paid according to the Collective Agreement.

In response to questions by the Court, Richardson admitted that he met with Nagoo twice at the material time. On the first occasion it was at the urging of

Parker (Operations Manager) after the worker received the letter of March 29, 2001 (Exhibit SN7) and the worker was told that he was being made redundant. Richardson continued as follows; "I think even at that meeting he did not want to sign. He wanted to go away and think about it." The issue of the quantum of the severance payment arose and he told the worker that he had been advised legally on the matter. He denied telling the worker he had to seek legal advice and would see him again after he had received such advice.

On the second occasion the worker came to see him of his own volition and told him that his treatment was harsh and oppressive.

Nicholas Pantin (Operations Manager, Wireline Division)

At the material time (2001) he was the Senior Field Engineer reporting to the Operations Manager whose responsibility centred on "Business Effectiveness". The Operations Manager analyses the raw data presented to him by the Financial Controller.

Using a "Revenue per Employee" Chart (Exhibit NP1) for the period January 01, 2001 to December 31, 2003, he interpreted the data in relation to the period January 01, 2001 to June 2001. Revenue was falling and there was a decrease in the number of seismic jobs procured by the company. In such a situation the company looked at support staff with respect to redundancy. The worker was

retrenched; Mungroo was retained. No one has subsequently been hired to fill the worker's position.

Natasha Jebodhsingh

At the material time (2001) she was Financial Controller. She prepared the Revenue and Expenditure information for each segment and presented it to the respective Managers. At the request of the Company's attorneys in 2005 she prepared a document in respect of the Wireline segment in 2001 (Exhibit NJ1). It showed declining revenues and increasing costs. In March 2001 Richardson asked her to calculate severance benefits due to the worker. She used the Collective Agreement as the basis for her calculations.

ADDRESSES

The Union

Counsel for the Union submitted that there were two issues for the determination of the Court:

- Was termination of the worker's services justified in the circumstances; and
- Whether the payments made were inadequate in view of the worker's service and under the Collective Agreement?

The worker's evidence showed that he was employed by the Company since 1958. In 1994 he was inveigled into resigning and the start of his first contract predated his resignation. The worker was a member of the bargaining unit at all material times and he was monthly paid. The Company's claim that the worker was redundant was not supported by evidence.

There were contradictions in Richardson's evidence – the issue of the worker's age and the failure to mention redundancy in the letter of termination (Exhibit SN 7). The question of redundancy was an afterthought.

Pantin's evidence did not assist the Court. The only value of Jebodhsingh's evidence was her claim that she calculated the worker's severance benefits in accordance with the provisions of the Collective Agreement which contradicted to Richardson's claim that it was done in accordance with the Retrenchment and Severance Benefits Act (Act No. 32 of 1985).

Counsel further submitted that the Court should believe Nagoo's evidence which remained unshaken under cross-examination. He was a good enthusiastic worker who felt aggrieved by his dismissal.

Orji's statement – made ten (10) years after the fact – should not be admitted and if it were, then it should be given no weight.

The worker was wrongly terminated. Payments of benefits should have been in accordance with the Collective Agreement. The Company was in breach of Recommendation 160 of the ILO Convention dealing with "Termination of Employment at the initiative of the Employer," and the Court's judgment in **RSBD No. 4 of 1996** (supra). The worker should be awarded damages in accordance with Appendix D of the Union's additional written Evidence and Arguments (January 13, 2004) in which the residual balance is calculated at $538, 830. 87.

The Company

Counsel submitted that there were two issues to be determined by the Court:

- Was the worker's resignation in 1994 genuine; and
- Was there a genuine situation of redundancy in 2001?

Once those issues have been determined the Court's role is limited to correctly calculating the quantum of benefits due to the worker.
(In view of the Court's preliminary observations (supra) Counsel's submissions in respect to the worker's resignation in 1994 are superfluous).

On the issue of redundancy in 2001, Counsel submitted six (6) items of evidence to support his claim.

- The Company presented economic and financial data showing that operating costs needed to be reduced;

- The decrease in seismic activity resulted in insufficient work for two (2) Sonde Men in the Sonde Laboratory;
- There was a decline in overall activity in the Wireline Department;
- There were two Sonde Men, one permanent and the other on contract;
- The Company retrenched the contract worker;
- Since the worker's retrenchment, no Sonde Man has been hired to fill that position.

Individually and collectively, Counsel further submitted, the six (6) items (supra) established a case of genuine redundancy. Apart from the lack of data on profits in Exhibit NJ 1, the Union has not challenged the Company's data.

Counsel concluded by citing the following cases in support of the proposition that the profitability of an enterprise is not germane to the determination of the real question in redundancy cases, which is whether there existed a surplus of labour or not and "the real test is whether replacement labour was used after the worker's retrenchment to do the same job that was declared redundant.":

- **"Trade Dispute No. 119 of 1993** between the Seamen and Waterfront Workers' Trade Union and Port Authority of Trinidad and Tobago (delivered on February 27, 1998);

- **Trade Dispute No. 91 of 1996** between Oilfields Workers' Trade Union and Nestle Trinidad and Tobago Limited (delivered on December 15, 1998);

- **Trade Disputes Nos. 10 and 12 of 1998** between Transport and Industrial Workers' Union and CGA Limited (delivered on October 16, 2000);

- **Trade Dispute No. 1 of 2000** between Oilfields Workers' Trade Union and Petroleum Company of Trinidad and Tobago (delivered on June 01, 2001).

Trade Dispute No. 184 of 2000 between Transport and Industrial Workers' Union and Tracmac Engineering Energy Division (delivered on April 09, 2002) was cited to support the proposition that the Court should "only interfere with a retrenchment" if it were shown that serious violations of basic industrial relations practices took place.

Trade Dispute No. 131 of 1993 between Oilfields Workers' Trade Union and Schlumberger Trinidad Incorporated (delivered on November 22, 1995) was cited in support of retrenching the worker who was on contract as opposed to a permanent worker.

Counsel for the Company was granted leave by the Court to make further submissions in writing. Counsel took the opportunity to respond to some of the Union's oral closing submissions. In summary Counsel's responses were:

i the worker was not a member of the bargaining unit ;

ii while redundancy was not specifically mentioned in the letter of March 29, 2001 (Exhibit SN7) that did not preclude the Company from "relying on the

genuineness of the worker (sic) redundancy. Moreover, the issues were raised by Richardson at the time of the worker's dismissal.

iii Jebodhsingh was mistaken in respect of the basis on which the worker's severance benefits were calculated, "a lone item of mistaken testimony" by the Company witness:

THE UNION

In his supplementary written submissions, Counsel for the Union contended that:

(i) the issue to be decided was constructive dismissal and not redundancy;

(ii) it was the Company which sought to introduce evidence of economic performance as a determinant in the Company's action to terminate the services of the worker;

(iii) the worker was in continuous employment and was therefore a permanent worker;

(iv) the Dewsbury case **(RSBD No. 4 of 1996)** was applicable;

(v) the worker was monthly paid and therefore a member of the monthly paid bargaining unit;

(vi) Jebodhsingh was **instructed** to calculate benefits based on the Collective Agreement;

(vii) The worker was senior and more experienced than Mungroo;

(viii) A Court of Equity should interfere in order to make things right.

ISSUES

The Court has to determine whether:

i the worker was constructively dismissed on March 29, 2001; and

ii there existed a situation of redundancy in the Wireline Division in and around March 29, 2001.

The issue at (ii) above arises from the reason advanced by the Company in its rebuttal of the Union's position and in support of its action to terminate the worker's services.

FINDINGS ON THE FACTS

i The trade dispute referred by the Minister to the Court relates to the constructive dismissal of the worker on March 29, 2001. It was the Union's responsibility to establish that the worker was constructively dismissed. Incredibly, the Union never addressed, or even alluded to, the issue of constructive dismissal during the hearing. In his supplementary written submissions Counsel for the Union asserted that the dispute was about

constructive dismissal but did not attempt to argue the case. The Company therefore had nothing to rebut on that issue.

There seems to be considerable misunderstanding of the concept of constructive dismissal, and not only in this dispute. We therefore use this opportunity to offer some guidance.

Constructive dismissal occurs in circumstances where the behaviour of the employer is so unreasonable or intolerable that it amounts to a fundamental breach of the employment contract. The essence of constructive dismissal is captured by Lord Denning in **Western Excavating (ECC) Ltd v Sharp (1978) Q 13/ 761:**

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is **constructively dismissed.** The employee is entitled in those circumstances to leave at the instant without giving any notice at all and alternatively he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be **significantly serious** to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

A similar view is articulated in **Schumacher v Toronto Dominion Bank (Ontario Court of Appeal, Court File No. C27382; May 19, 1999).**

See also **Trade Dispute No. 37 of 1988** between **Managers and Supervisors Association of Trinidad and Tobago** and **Bilmor Limited (delivered on February 17, 1992).**

The foregoing should not be interpreted to mean that constructive dismissal only embraces a single breach going to the root of the contract. There may be a series of breaches over time culminating in the final straw at which point the employee leaves and may be considered to have been constructively dismissed. See **Lewis v Motorworld Garages Ltd (1985) IRLR 465** as well as **Omilaju v Waltham Forest London Borough Counsel (2004) EWCA Civ 1493.**

An employer has an **implied duty** to act towards his employees in good faith. The House of Lords held in **Mahmud v Bank of Credit and Commerce International SA (1997 IRLR 462) that "the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship or confidence and trust between employer and employee." (our emphasis)**

One word of caution, though, not every breach is a fundamental breach; the breach must go to the root of the contract. **De minimis non curat lex** – the law is not concerned with trivial things. Moreover, there must be a direct

causal relationship between the decision to leave and the repudiatory breach by the employer.

In **Contracts of Employment** (7th Edition, Butterworth, London, Edinburgh, Dublin, 1997) Crump and Pugsley summarise very succinctly the questions to be answered when deciding on constructive dismissal:

> "1) Was there a contractual term?
> 2) If so, what were its provisions?
> 3) Was the term broken?
> 4) If so, was the breach repudiatory?
> 5) Was the employment terminated by the employee?
> 6) Was the termination of the employment contract by the employee an "acceptance" of the employer's breach by the employee?
> 7) Was the "acceptance" before the employee had affirmed the contract?" (Ch. 15. Paragraph 49).

Harvey on **Industrial Relations and Employment Law** (DI, 401 – 544, Vol. 1, Oct. 2004) is also very helpful on the subject of constructive dismissal.

In view of all the foregoing, the Union's case for constructive dismissal of the worker – as referred by the Minister in the Certificate of Unresolved Dispute – is misconceived. **The worker was not constructively dismissed by letter dated March 29, 2001**. The vital elements of constructive dismissal – a

fundamental breach of the employment contract and the worker's departure in direct response to that breach – are not present. On this ground alone this trade dispute should be dismissed.

ii Did a situation of redundancy exist in the Wireline Division in and around March to April 2001?

Section 2 of the Retrenchment and Severance Benefits Act (Act No. 32 of 1985) defines **redundancy** as "the existence of surplus labour in an undertaking for whatever cause."

Surplus labour, contrary to the contention of Counsel for the Company, is a question of **fact** not law.

The evidence of Nicholas Pantin, in particular Exhibit NP1, which is a Revenue per Employee chart for the period from January 01, 2001 to December 31, 2003 is critical. The data show that during the period from January to June 2001 revenue was falling and there was a decrease in the number of seismic jobs secured by the Company. There were three (3) seismic jobs in 2000 and only one in the first quarter of 2001. There was the possibility of seismic activity coming to a complete stop. The result was less equipment to maintain and fewer jobs to be done.

In such a situation, according to Pantin, "we look to see who is redundant in the support staff before we look to see who is redundant in the revenue

generating staff.” The worker’s department – Maintenance – was a non-revenue generating department.

Natasha Jebodhsingh (Financial Controller at the material time) was responsible for preparing Revenue and Expenditure information and presenting it to the respective Divisional Managers. The document (Exhibit NJ1) for the material period showed that the Company’s revenues were declining while costs were increasing.

Against this background the Company had to make decisions. Counsel for the Company submitted that the profitability of an enterprise is not to germane to the real issue in redundancy cases although he led Pantin and Jebodhsingh in evidence which indicated that the Company’s performance was on the decline. He contended – referring to a series of cases listed (supra) – that the real test is whether replacement labour was used to do the same job that was declared redundant.

There is substantial merit in his latter contention. However his references – **Trade Disputes No. 91 of 1996, Nos. 10 and 12 of 1998** (supra) – do not rule out financial considerations as a factor in redundancy. At page 10 of **Trade Dispute No. 91 of 1996**, His Honour Mr. Elcock says “The fact of the matter is that **financial difficulties, or economic hardships are not in, and of themselves, adequate grounds for retrenchment** (our emphasis) although they may, and usually cause an employer to take action that

eventually results in the redundancy of workers." His Honour Mr. Elcock put it even more pointedly in **Trade Dispute No. 119 of 1993** (supra). At page 10, he rejected the Port Authority's argument that the "unprofitability of an enterprise and or an employer's inability to defray his labour costs are **ipso facto** (our emphasis) indicative of the existence of surplus labour" as defined by Section 2 of the Act."

We agree entirely that financial and economic considerations are not **ipso facto** evidence of surplus labour. The point is that declining financial and economic performance may act as a wake up call to an employer. A reduction in orders, loss of customers/clients and the external econmic environment may lead to management decisions about cost cutting or organisational change which **may** in turn have consequences for employment levels.

It is the Court's view that in the circumstances at the material time there existed a situation of surplus labour in the Wireline Department. The fact that no one was subsequently hired to replace the worker reinforced the validity of the redundancy. Indeed, Mungroo himself was temporarily laid off for some time at a later period.

The Company did not need both Sonde Technicians – the worker and Mungroo. The worker was selected for retrenchment because he was on contract while Mungroo was a permanent employee. Since 1994 the worker

was employed by the Company under an individual contract of employment. In **Trade Dispute No. 131 of 1993** (supra) the Union (OWTU) contended that in a situation of redundancy, contract workers should be retrenched before permanent workers. The worker may have been more experienced than Mungroo but the latter was permanent. **The Court, therefore, upholds the contention that a situation of redundancy existed in and around March, 2001.**

This brings us to the basis on which the worker's severance benefits should be calculated. When the worker accepted an individual employment contract with the Company in 1994 (renewed until January 31, 2001) that contract spelt out his coverage under the Retrenchment and Severance Benefits Act (Act No. 32 of 1985) and not the Collective Agreement. It should be noted **C. A. 1 of 2002** between the Union and the Company for the period February 01, 2001 to January 31, 2004 contains a provision relating to Contract Labour (Article 4: Regulation of Contract Labour) but it relates to work contracted out to contractors, not to the type of employment contract between the worker and the Company (Contract of Service).

The worker's severance pay therefore has to be calculated on the basis set out in the Retrenchment and Severance Benefits Act. Richardson (Personnel Manager) stated that the formula in Act No. 32 of 1985 was used. Jebodhsingh said that when asked to calculate the worker's severance benefits, she used the Collective Agreement as the basis for her calculation.

The fact is that the benefits paid to the worker were clearly based on S. 18 of Act No. 32 of 1985, but instead of applying the period of notice of forty-five days stipulated in Act No. 32 of 1985, he was paid in lieu of one week's notice, a condition contained in the last contract of employment signed by him in August 6, 2000 to expire on January 31, 2001. We have noted too that there was no signed contract at the date of his termination.

Act No. 32 of 1985 establishes a minimum period of notice of forty-five days and we are of the view that under the principles and practices of good industrial relations, the worker should have enjoyed a similar period of notice. The worker should therefore be paid the difference between forty five days notice and the one week which he received. (It should be pointed out in calculating the quantum due to the worker the Company paid for 71/2 years instead of 6 1/2 years (Exhibit SN 11).

Counsel for the Union, both in his oral and written submissions, relied on the **Dewsbury** case **(RSBD No. 4 of 1996** between **Oilfields Workers' Trade Union** and **Schlumberger (Trinidad) Incorporated)** in which judgment was delivered on February 24, 1997 – to support his contention that the worker was entitled to severance pay for the period starting in 1958.

Unfortunately the **Dewsbury** case is not **pari passu** with this trade dispute. In that case the Company refused to pay any severance benefits to Dewsbury although he had worked continuously for more than ten years

under “temporary worker agreements”. When his last contract expired on or about April 26, 1995, he was then employed as a casual worker until May 04, 1995, when he was retrenched. The Company contended that Dewsbury was a casual worker and excluded from coverage under the Retrenchment and Severance Benefits Act. Additionally, the Company contended that he had agreed to the terms of his contract which stated that he was not entitled to severance pay.

The Court ruled that Dewsbury was not a casual worker and the RSBA was applicable to him. The Court also ruled that the contract which denied him the right to severance benefits was an infringement of the RSBA. Finally, the Court ruled that Dewsbury was a worker in continuous employment and ordered that he be paid severance benefits under the RSBA for the entire period of his continuous employment.

Nagoo’s continuous employment as a contract worker started on September 01, 1994. He received all his benefits due to him up to that time.

The Court rejects the Company’s claim in paragraph 9 of its Evidence and Arguments that the worker received intermittent contracts in the 1994 to 2001 period. Richardson repeated the error in his evidence by claiming that the worker was “intermittently” employed. The facts are clear. The worker was employed <u>continuously</u> by consecutive six monthly contracts, starting in September 01, 1994 and ending on January 31, 2001.

Counsel for the Union in his supplementary written submissions sought to equate **continuously** employed with **permanent** employment. They are not the same. A permanent worker is continuously employed but enjoys security and certain benefits which a continuously employed worker does not. The Worker admitted, when questioned by the Court, that in accepting contract employment in September 1994 he received a compensation package and terms and conditions which were inferior to what he had previously enjoyed. He did not protest at that time and continued to accept those terms and conditions for more than six years.

Finally, while the Company's letter does not specifically mention redundancy, the evidence adduced establishes such a situation. The worker himself said that at the time he received his letter of dismissal, Richardson told him that "the ratio of the amount of people in the shop is too much and the Company has decided not to renew your contract.

CONCLUSION

In all the circumstances, and taking into account the totality of the evidence and submissions, the Court holds that:

(i) The worker was not constructively dismissed on March 29, 2001;

(ii) There was a situation of surplus labour in the Wireline Division in and around March 2001;

(iii) The worker was dismissed on grounds of redundancy;

(iv) The worker had an individual contract of employment and his severance benefits were governed by the provisions of the Retrenchment and Severance Benefits Act.

ORDER

It is hereby ordered that this trade dispute be dismissed.

COMMENTS

(i) The Court takes the opportunity to express its concern about the Company's action of paying the worker for one week in lieu of notice. Such action is unsatisfactory in terms of equity and good conscience. The worker should be paid for forty five (45) days in lieu of notice.

(ii) The Court also expresses its concern that the contract given to and accepted by the worker after his resignation in September 1994 provided for compensation and terms and conditions which were inferior to the provisions of the Collective Agreement despite the fact that the worker was doing basically the same job which he did prior to September 1994. It is unfortunate that he did not raise a grievance at the outset but continued to accept a succession of such contracts. Indeed, when the Court questioned him the distinct impression gained was that he was not unhappy with the arrangement. Nevertheless, our concern remains.

Mr. H. Soverall
Presiding Member

Mr. P. Rabathaly
Member

Mr. A. Ramrekersingh
Member