TRINIDAD AND TOBAGO:
COMPLAINT NO. GSD-IRO 031 OF 2015

IN THE INDUSTRIAL COURT

BETWEEN

STEEL WORKERS' UNION OF TRINIDAD AND TOBAGO
- PARTY NO. 1

AND

ARCELORMITTAL POINT LISAS LIMITED
- PARTY NO. 2

CORAM:

Her Honour Deborah Thomas-Felix	**- President**
His Honour Albert Aberdeen	**- Member**
Her Honour Bindimattie Mahabir	**- Member**

APPEARANCES:

Mr. Douglas Mendes, S.C.	**)**
Mr. Anthony Bullock	**) – Party No. 1**
Attorneys at Law	**)**
Mr. Reginald Amour, S.C.	**)**
Miss Vanessa Gopaul	**)**
Mr. Derek Ali	**) – Party No. 2**
Miss Tamilee Budhu	**)**
Attorneys at Law	**)**

DATED: 10th March, 2016

JUDGMENT

DELIVERED BY HER HONOUR MRS. DEBORAH THOMAS-FELIX

1. This complaint of an Industrial Relations Offence (IRO) is filed pursuant to the provisions of Section 84(1) of the Industrial

Relations Act, Chapter 88:01 (IRA) by the Steel Workers Union of Trinidad and Tobago (the Union) against ArcelorMittal Point Lisas Limited (the Company).

2. In filing the instant complaint of an IRO, the Union alleges that the Company:

   i. Engaged in illegal industrial action contrary to Section 63(1) of the IRA;
   ii. Failed to recognise the Union as the Recognised Majority Union, contrary to Section 40(1) of the IRA; and
   iii. Failed to treat with the Union in good faith for the purpose of collective bargaining and the resolution of disputes, contrary of Section 40(1) of the IRA.

THE BACKGROUND

3. The Company is involved in business in the steel industry and has operated an iron and steel plant at the Point Lisas Industrial Estate, Trinidad since May 1989. The Union is the Recognised Majority Union (RMU) in the Company for Bargaining Units I, II, III and V comprising, we are told, about 550 hourly, weekly and monthly rated workers.

4. Before the Court is the Evidence and Arguments of the Company, the Union and the witness statements of Christopher Henry, President of the Union, Deonath Patrick Marajh, General Manager, Industrial Relations of the Company, Dharmendra Singh, Corporate Controller of the Company and Emillio Sawh, Manager, Logistic of the Company. Mr. Henry, Mr. Marajh and Mr. Singh testified in Court. The matter was argued over a period of five days and we are grateful for the very deep, thoughtful, erudite research, arguments and submissions of counsels for both sides.

5. The undisputed facts as far as material are that the Company claims, and the Union does not appear to dispute, that it has been experiencing economic challenges due to the vagaries of the global steel market which have adversely impacted on its profitability and its cash flow. Mr. Dharmendra Singh, the Company's Corporate Controller, in his witness statement paints a bleak picture of the falling prices of the Company's products, in addition to the difficulty the Company faces in competing in the global market. Mr. Singh added that "the reduced prices at which the Company had been selling its products has exacerbated its cash flow to the point where the Company is, and has been for the past two years, reliant on its parent Company to fund short falls in its operating expense, including the salaries and wages of its workforce."

6. As a result, the Company engaged the Union in a series of meetings from December, 2014 to December, 2015 to discuss and attempt to agree upon the best approaches to address these challenges. The parties exchanged several pieces of correspondence on the issue and during that year they signed several Memoranda of Agreements (MOA) designed to address the situation. They agreed, for instance, on the hours of work for shift workers and management issues related to these workers.

7. As an example, the MOA of 28th October, 2015 provided for workers to attend all training as directed by line management and it also outlined the shift arrangements of workers. This agreement was for the period of 2nd November, 2015 to 27th November, 2015.

THE VACATION LEAVE PROPOSAL

8. At a meeting held on the 26th November, 2015, the Company proposed to the Union that employees who had accumulated vacation leave proceed on their leave. The Company informed the

Union that there were 401 employees who had accumulated more than fifteen (15) days vacation leave and 129 employees with less than 15 days. In the witness statement of Mr. Marajh, the Company explained that its vacation leave proposal would see the approximately 401 employees who had 15 days leave or more proceed on vacation leave during the period of 30th November, 2015 to 8th January, 2016 (a period of five weeks), and that persons with less than 15 vacation days would be offered alternative duties at the Direct Reduce Iron Department (DR) and the Material Handling Department. Since Mr. Marajh testified that there are approximately 550 workers in the bargaining units represented by the Union, the Company's vacation leave proposal would affect the majority of the Union members in the bargaining units.

9. In response the Union questioned the Company's use of vacation leave as a strategy to remedy its cash flow problem, specifically, how its cash flow problem would be relieved by workers taking paid vacation. The Union also argued that the Collective Agreement was clear on the way the accumulation of vacation leave was to be handled. The Company explained that the measure was to "reduce the liability on vacation which the Company has". The Union enquired why the Company had allowed the workers to accumulate "so much leave".

10. The Company's policy on accumulation of vacation leave is contained in Article 14.2 in the Collective Agreement for Bargaining Unit 1. This Article mirrors the provisions of the corresponding article in the Collective Agreements of the other Bargaining Units. Article 14.2 provides that:

> *"A worker who becomes entitled to leave in any year must take at least 5 days of such leave when it becomes due. The balance of any leave not taken at*

due date, may, by arrangement with the Company, be accumulated and taken with his full leave entitled for the following year.

No portion of leave may be accumulated more frequently than once in two (2) years".

11. Although, at the 26th November, 2015 meeting, the parties signed another MOA for the period 30th November, 2015 to 4th December, 2015 in which it was agreed that workers would attend training in addition to having changes to shift arrangements being put in place, the vacation leave proposal was not a part of that agreement. Thus no agreement was reached on the issue of the vacation leave proposal. At the end of the meeting Mr. Henry, the Union's President, agreed to take the issue to the Union's General Council and to the membership of the Union. The parties also agreed to meet on the 4th December, 2015 to further discuss the vacation leave proposal.

12. By letter dated 27th November, 2015, the Union sought and was granted time off from work on 27th and 30th November and 4th December, 2015 for members of the Executive to present the vacation leave proposal to the workers. Mr. Henry testified that the Union's Executive instead utilised those the three (3) days to prepare a PowerPoint presentation of a counterproposal to the Company.

13. At the 4th December meeting, the Union made the PowerPoint presentation of its counterproposal to deal with the market challenges some of which were, for example, that the Company:

    a) Seek to have the Trinidad and Tobago Bureau of Standards restrict the importation of low quality steel from China;

b) Embark on an aggressive sales campaign for the Company's products;

c) Stockpile iron, and

d) Focus on the procedures which could achieve maximum start-up readiness for when the market challenges subside.

14. The Company, however, continued to press for the Union's acceptance of its vacation leave proposal. The Union, on the other hand, insisted that the Company should handle the issue in accordance with the provision of the Collective Agreement. The Union indicated, that it was advised by its consultant and its lawyer that the Company's vacation leave proposal violated the terms of the Collective Agreement. Indeed, the Company admits that the Union in fact was willing to concede that "it had no issue with the Company sending workers on vacation as long as the Collective Agreement was not violated."[1] Mr. Henry in his witness statement states that the Company asked for time to liaise with its corporate office before responding to the Union position.[2]

15. The parties next met on 7th December, 2015 after the Union received a letter from the Company signed by Mr. Marajh inviting the Union to attend, what it termed, an "emergency meeting" with the Company. It is not clear from the letter or the evidence presented to the Court what was that emergency. At that meeting of 7th December, 2015 the Company informed the Union that its vacation leave proposal was still open for acceptance by the Union "on that day" and that in the absence of an agreement, the Company, for the first time, indicated that it would "proceed with a

[1]Evidence and Argument of Party No. 2 at para. 16.
[2]Witness Statement of Christopher Henry at para. 14.

layoff of all workers with immediate effect."[3] The Company at the meeting outlined the terms of the layoff to the Union namely, that the laid off workers would have the option for vacation leave "encashment" of no more than twenty (20) days and receive a stipend of $2000.00 for the period 7th December, 2015 to 15th January, 2016. Those workers who were on vacation leave at the time would be removed from vacation status to layoff status and they would be allowed to "encash" the remainder of their vacation days.

16. Mr. Marajh stated in his evidence that the Company informed the Union at that meeting of 7th December that "the Company's vacation proposal was still open for an agreement to be done today and… in the absence of an agreement today the Company would proceed with a layoff with immediate effect". On the other hand, Mr. Henry deposed that while the Union was told that the vacation leave proposal was being made because the Company was experiencing a cash flow problem, "he did not explain what he meant by that or how it would be relieved by all workers taking their vacation."[4]

17. The Union rejected the Company's proposal but requested to have the opportunity to speak to its members. In response, the Company reiterated its intention to implement its layoff proposal that same day. The Company told the Union that it can "go ahead and meet with the workers but they were going to do what they have to do". The Company complained, through the witness statement of Mr. Marajh, about the Union's decision to opt to rely on the advice of its consultant and lawyer rather than take the vacation leave proposal to the membership contrary to the previous representation to the Company that it would do so. Therefore, the Company justified its

[3]Evidence and Argument of Party No. 2 at para 17.
[4]Witness Statement at para 16.

refusal not to delay the threatened immediate layoff because in its opinion the Union had, to use Mr. Marajh's words, "squandered an earlier opportunity to present and discuss the Vacation Proposal to (*sic*) its membership".[5]

18. Mr. Marajh admitted to the Court that the "layoff letter" was in fact prepared on the weekend preceding the meeting of the 7th December and that "the Company sent out layoff letters immediately after the meeting ended to each affected worker".

19. Bypassing the RMU, the workers first heard of the layoff not from their Union but from the Company. These letters were addressed directly to the workers and were dated 7th December, 2015 and signed by Vijayalakshmi Jaigopal, Chief Legal and Human Resources Officer. The following is an excerpt of the contents of one of the letters which was sent to the workers by the Company.

> *"e) With **immediate effect**, i.e. December 7th, 2015, you will not be required to report for duty due to a period of temporary layoff initiated by the Company.*
>
> *f) The temporary layoff will be with no pay for the period December 7th, 2015 to January 16th, 2016. However, in order to alleviate the financial challenges that laid-off employees may experience the Company shall make payment of an ex gratia amount of TTD2,000.00 by December 18, 2015. Payment will be made in the way usually for salary remittance by bank transfer or cheque as the case may be.*
>
> *g) The Company shall seek to convene a meeting with the Union on January 11th, 2016, in order to explore the latest developments in the global steel markets so that a decision on the way forward could be made using all options of discussions which are applicable.*

[5]Evidence and Arguments of Party No. 2 at para 23.

h) Unless you are otherwise informed, it is hoped that you will be rostered to perform normal duties in the week which commences on January 17th, 2016.

i) During the period of the above-mentioned layoff, you will be able to access your Saving Plan, Health Plan Coverage and Employee Assistant Program.

j) This period of temporary layoff shall not be treated as a break in service.

k) *The Company will continue to pay the premium for the Life Insurance Coverage during the lay off* period.

l) If you are already on jury service leave, vacation leave, extended leave with pay and injury leave during the period of layoff, the days of such leave falling within the period of lay off shall be encashed and paid to you.

m) If you have accumulated vacation leave, you shall be allowed to encash up to twenty (20) days of that leave during the temporary layoff, using the normal procedure i.e. completing the necessary vacation leave encashment form at any time during the layoff period from Monday to Friday between the hours of 8:00 am to 4:00 pm at Security Charge Room".

20. It is important to note that the meeting of the 7th December was the first time that the Union was hearing of a layoff from the Company. Mr. Marajh's testimony with regard to the Company's discussions with the Union on the issue of layoff is instructive. He testified that "with respect to meeting of 20th October and 23rd October we did not communicate anything about our intention to layoff anyone". He also admitted that "the Company did not communicate anything to the Union about a layoff on 26th November".

21. Significantly also, at the meeting of the parties on 4th December the issue of layoff was not discussed, in the words of Mr. Marajh **"**it is correct that the Company did not say that they are going to layoff anyone on that occasion."

22. Mr. Henry stated that when he and the other officers were on their way back from the meeting to the Union's office, they started to receive calls from workers of the various departments informing them that they were in receipt of letters which advised them that they were laid off with immediate effect. It meant that the letter for each of the 550 affected workers was prepared and ready to be delivered to them on the 7th December prior to the meeting with the Union. This raises a concern about the Company's bona fides and willingness at that meeting to come to a mutually acceptable agreement. The "emergency meeting" it appears was to implement a unilateral layoff if the Union did not agree with the Company's vacation leave proposal. From the evidence it is clear that the affected workers were going home on the day of the meeting, the 7th December, either on voluntary leave or forced layoff.

23. It was not until the afternoon of following day, 8th December 2015, that the Union received a letter dated 7th December, 2015 from the said Ms Vijayalakshmi Jaigopal which "confirmed the layoff" of the workers represented by the Union.[6] The letter concluded by stating:

> *The Company remains open to discuss relevant and alternative suggestions which seek to replace the implemented layoff with a negotiated arrangement between the parties. However, it must be borne in mind that under no circumstances will the Company be able to commit to any option which will require a*

[6]Evidence and Arguments of Party No. 2 para. 22.

substantially larger cash flow commitment in comparison to the layoff package presented above.

24. The Union wrote to the Company on 9th December requesting a meeting with the Company on 10th December at 1:00 p.m. to discuss the layoff of the workers. The Union challenged the accuracy of the Company's statements in its letter to the Union as to the discussions that took place at the 7th December meeting and disclosed that it had recorded the discussions.

25. The Company refused the Union's request to meet, making it clear that it would not meet with the Union to discuss the layoff because, in its view, the Union had failed to respond to the Company's vacation leave proposal and it would not meet unless the Union did so "prior to fixing any further meetings." At this juncture, it should be pointed out that the Union had in fact responded to the vacation leave proposal at the meeting on the 4th of December and the 7th of December 2015.

26. On 9th December the Union wrote to the Minister of Labour seeking her intervention and asked that she convenes a meeting between the parties. The Union met alone with the Minister on 14th December and by that evening it received a call from the Minister to report that the Company had informed her that about 360 workers had already applied to encash their vacation leave. The Union, as the RMU, was entirely out of the loop. It is against this background that it filed the instant IRO complaint of the 21st December 2015 based on the conduct of the Company.

THE RELEVANT CONSIDERATIONS

27. This case raises very important issues relating to the procedure which must be adopted in a situation in which there is any proposed change in the terms and conditions of employment as is

exemplified in this case which deals with changes in vacation leave arrangements and layoff of workers by a Company. It provides this Court with the opportunity to issue guidelines in this regard so as to generate a less contentious process which lessen the angst of workers, serve the interests of the employers and unions and ultimately the general public, especially in these times of global economic challenge which affects everyone.

28. The Court takes judicial notice of the volatility of the present world economic conditions, especially falling oil and gas prices in the global economy and the negative impact which these depressed energy prices have on our energy based economy. It stands to reason that the prevailing global conditions will have an impact on employment in many sectors of the economy and indeed on the industrial relations climate in this country. The Court also notes from the evidence submitted in this complaint of an IRO that global commodity prices and prevailing economic conditions have affected the local steel industry. The Union does not dispute the harsh economic circumstances which the Company is facing, nor does this Court question the Company's need to take action to remedy its seeming precarious financial situation, on the one hand, and the Union's responsibility to attempt to protect the best interest of its members as it sees fit. This is the balanced view with which this Court approaches this case and all cases under its jurisdiction.

29. There is a responsibility for the social partners to understand that the change of economic circumstances requires reasonableness and adjustment on both sides. There is a requirement, now more than ever, for workers to be more productive and for employers to press for cost efficiency. Moreover, there is also a need for trade unions to educate and inform their membership of the global economic conditions and the implications of such conditions in the world of work.

30. It is critical for parties in the employment relationship to understand that in this country, under the industrial relations framework , while the employer's managerial prerogative and the workers' contractual rights are the starting point, the controlling considerations are the standards stated in the IRA section 10(3), namely,

> *10(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall—*
>
> *(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;*
>
> *(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.*

31. As this Court has had occasion to remind both employers and workers:[7]

> *It is noteworthy that this country does not have a labour code to give detailed guidance to employers, workers and trade unions regarding the day to day conduct of their relationships. Instead the legislature has provided overarching principles and has emphatically positioned the Industrial Court as guardian of the national standards of what constitutes good industrial relations principles and practice. Thus, the importance of the role of the Industrial*

[7] *Trinidad and Tobago National Petroleum Marketing Co Ltd v Oilfields Workers' Trade Union* TD 717 of 2013 and IRO 23 of 2013

Court in issuing guidance to shape the industrial relations jurisprudence in the country cannot be overemphasized.

32. We do not question the managerial prerogative which a Company has to organize and reorganize its business but this must be balanced with the right of the worker to job security, equity and fairness, and above all, to the processes that are laid down by the various legal principles, especially the provisions of the IRA which mandates adherence to the principles and practices of good industrial relations as that term has come to be understood, so as to ensure industrial peace.

33. When faced with harsh economic circumstances, as it is alleged in this case before us, there are several strategic options which are available to the parties. Some are in the exclusive remit of the managerial prerogative, while others require the consent and cooperation of the workers both in their individual capacity as well as in their collective capacity where the workers are part of a bargaining unit subject to a collective agreement.

34. The approach which the parties in this complaint of an IRO adopted from December, 2014 through November, 2015 exemplifies the approach which trade unions and employers are to take when changes to the terms and conditions of employment, including, as in this case changes in leave arrangements and layoff, are contemplated. It is imperative that parties meet, consult and negotiate in an attempt to agree on strategies to tackle the challenges being experienced and to facilitate a peaceful adjustment upon agreement. We therefore wish to commend the parties to this complaint for engaging in a series of consultations and negotiations for about a year and for the signing of several Agreements with a view to peacefully resolving the economic problems the Company was facing. However, somewhere along the

line matters got out of hand and it is to this that we now turn our attention.

NON-RECOGNITION AND FAILURE TO NEGOTIATE IN GOOD FAITH CONTRARY TO SECTION 40(1)

35. The Union alleges that the Company failed to recognise it as the Recognised Majority Union, and failed to enter into negotiations with it in good faith for the purpose of collective bargaining and the resolution of disputes, contrary to Section 40(1) of the IRA. That section provides:

> *40 (1) Where a trade union obtains certification of recognition comprised in a bargaining unit in accordance with this Part, the employer shall recognize that trade union as the recognized majority union, and the recognised majority union and employer shall, subject to this Act, in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining.*
>
> *(2) A recognised majority union or an employer that fails to comply with this section is guilty of an industrial relations offence and liable to a fine of four thousand dollars.*

36. In order to fully grasp the significance of the acts or omissions of the parties, it is necessary to first place in its legal context the proposed alternative placing workers on vacation leave or laying off workers that the Company presented to the Union in relation to the its financial situation. These options must not only be viewed in the context of collective bargaining and industrial relations principles which are laid down in the IRA, but also the managerial prerogative rights of the employer and the legal contractual rights of the individual worker.

THE VACATION LEAVE PROPOSAL

37. In an attempt to address its financial woes, the Company made a vacation leave proposal which was inconsistent with the Collective Agreement. This in fact was that the workers would proceed on leave en masse and at the instigation of the Company rather than on the application of the individual worker. Vacation leave is the individual contractual right of each worker who is entitled to indicate when he or she wishes to take such leave, of course, by an arrangement consequent to the Company, as the Collective Agreement provided. The difficulty which the Company faced was that no provision of the Collective Agreement gave it the exclusive right to decide when a worker goes on leave. This necessarily had to be by agreement or by waiver of right.

38. We find the case of *Duncan v Attorney General for Grenada*[8] illuminating of the nature of the right to leave. In that case, the Eastern Caribbean Court of Appeal addressed the issue of leave entitlement in an employment relationship. While that case concerned a public officer, the statements of Byron CJ (Ag), as he then was, is very instructive to the complaint before us. Therein, the officer was told to go on leave to facilitate the 'reorganization' of the Ministry. In addressing the legality of this action, the learned Acting Chief Justice said:

> *"The Staff Orders categorise a variety of types of leave. These include "departmental leave"; "leave on the ground of urgent private affairs"; "overseas leave"; "leave prior to retirement"; "leave prior to resignation"; "vacation leave"; "sick leave". There is provision for the grant of leave to facilitate improvements in the organisation of a department or Ministry.*

[8] Civil Appeal 13 of 1997 decided December 8 1977 (unreported)

An allegation that one's absence from work is necessary for making improvements in the workplaceis a serious complaint about one's ability or attitude. Requiring an officer to be absent from work for that purpose is not for his benefit. It implies dissatisfaction with the officer. In my view it cannot be leave."

39. We note that the vacation leave proposal made by the Company was itself part of a temporary workforce reorganization, not as a complaint against the workers, but to meet the dire financial situation faced by the Company. We agree with the Eastern Caribbean Court of Appeal that leave is the contractual right and privilege for the benefit of the worker not the employer and we use this as the starting point. The Court said.

> *"This argument highlighted the difficulty of the respondent, because it conceded the essential fact that the appellant's absence from work was required to facilitate the reorganization of the Ministry.*
>
> *This leads to the important question of whether an absence from work for that purpose is leave. What therefore is leave?*
>
> *What is Leave?*
>
> *The Concise Oxford Dictionary 8th edition, describes "Leave" as "Permission to be absent from duty." The Staff Orders regulate the circumstances and procedure for the grant of leave. The context of these orders clearly indicate that leave is a privilege for which the public servant becomes eligible as an incident of his employment. It is for the benefit of the worker."*

40. A similar situation exists in relation to the Collective Agreement in this case. Therefore, to use the workers' contractual legal right to

vacation leave as a strategy to assist the Company in its operations, which, albeit is in a dire economic circumstances, demanded not only consultation but also consent of the workers to waive their legal rights. In addition, we find that the Union was not unreasonable in indicating this when it informed the Company that its consultant and its attorney had advised that the proposal of the Company was in violation of the Collective Agreement. This, as we said before, is the starting point of negotiations and was not really an insurmountable impasse.

41. We take note of the Company's own evidence that the Union did not object to the Company taking the initiative to send workers on leave who had accumulated vacation leave, with the lone proviso that such an action be in conformity with the Collective Agreement. Indeed, the principles and practices of good industrial relations supported this concession and conversely it dictated that the response of the Company should have been to continue negotiations with the Union as RMU of the workers, not to hold the threat of layoff of all workers over the Union's head like the Sword of Damocles.

THE LAYOFF

42. Layoff in times of depressed prices and economic challenges has been a strategy in our industrial relations culture and practice for decades and the procedure governing layoff is a usually included term in many collective agreements in this country.[9] A layoff in fact is a temporary suspension of an employee's contract of employment at the employer's instigation due to no fault or misconduct by the employee with the intention that the employee resumes the contract when the situation causing the layoff has

[9]Transport and Industrial Workers' Union v Consolidated Appliances Ltd C.A. No. 9 of 1986

abated. It is less drastic than termination for redundancy. However, the legal difficulty which the employer faces is that the employer has no inherent right to suspend a worker and fail to pay wages due by means of a layoff because of a redundancy situation[10] unless it is an express term of the contract of employment or incorporated by way of a Collective Agreement pursuant to Section 47(2) of the IRA, or implied using the regular principles of the law of contract or the custom of the particular trade or industry. This is well-established principle in law which this Court has recognised. Moreover, even if there is such a right, the implied duty of respect trust and confidence which an employer owes to the employee requires reasonable notice of such an action even if such notice was not stipulated in the Collective Agreement.

43. In the Company's evidence the term layoff is used interchangeably with redundancy. So there is no question from all of the evidence that the Company was attempting to deal with the issue of surplus labour due to financial challenges.

44. The IRA is silent on the term "layoff" and the Collective Agreement between the parties is also silent on the issue of "layoff". In Trinidad and Tobago, the Retrenchment and Severance Benefit Act, Chap. 88:13 (RSBA) is the legislation which provides a structure and framework for redundancy or retrenchment at the workplace, unlike the comparable legislation in other jurisdiction such as the United Kingdom and some Commonwealth Caribbean states. This Act does not provide for "layoff". Instead it defines retrenchment as "termination of employment of the worker at the initiative of the employer for reason of redundancy", and sets out the guideline which should be adopted if there is redundancy or retrenchment. It is the absence of any statutory provisions or scheme governing

[10]Communication Workers' Union v Home Construction Limited T/C 267 of 2010

layoffs, it may be useful when there is collective bargaining for parties to consider always incorporating a provision of layoff in their collective agreement.

45. The parties in this case seem to accept that the Company had the right to layoff in a redundancy situation or at least the assertion by the Company that it had such a right is not contested by the Union. In our view, regardless of whether or not the Company has the right to lay off its workers, since it is the Company that is initiating the layoff, it is only fair and equitable that the spotlight be on whether the Company acted in accordance with the principles and practices of good industrial relations and the duty in respect of trust and confidence in exercising what it considers to be its right. This is especially so in this case where the Collective Agreement made no provision for layoff or the procedures attendant thereto.

46. In the absence of such provisions, this Court is guided by the accepted procedures followed in similar cases that have come before it. Also, since this was akin to a redundancy situation, and we note that the Company has put its case to us on this footing, using layoff almost synonymously with retrenchment, the guidance provided both by the RSBA, and the decisions of this Court, give general directions on how the parties ought to conduct themselves in arriving at the standards which governs good industrial relations practice.

47. The most significant procedural considerations in the RSBA are formal detailed notice of the proposed action, the date of the proposed action and the criteria used in the selection of the workers to be affected[11] and significantly, prior to giving formal notice, enter into **consultation with the RMU** with a view to exploring the possibility of averting, reducing or mitigating the effects of the

[11]See section 4

proposed action.[12] It is within this understanding that the statement of His Honour Mr. Addison Khan, former President of the Industrial Court, should be understood when he opined:

> *"The practice of a temporary layoff is well recognized in industrial relations practice. A temporary layoff is a remedy which may be utilized by an employer to obtain relief where circumstances beyond his control warrant its implementation. It is a right which an employer may use only when the circumstances demand it. It must not be abused or be as a result of a whimsical decision. It must be required by the circumstances which must be beyond the control of the employer and not of his own making"*[13].

48. We also agree with the dicta of His Honour Mr. C.S.E. Beckles where he stated:

> *"Colin Bourne, the learned author of the texts: "Redundancy Law and Practice" – Butterworths 1983 – in discussing the question of lay off defines it thus "An employee may be said to be laid off when he is not offered work for a temporary period".*
>
> *"And our own Court has stated in IRO 23/87 – T.I.W.U V. Bata Limited, 'It is a well established practice… that the employer is entitled to lay off temporarily the necessary number of workers where in the course of business circumstances arise which make this necessary"*[14].

[12]See section 5

[13]**I**.C.A. No. 9 of 1986 Transport and Industrial Workers Union and Consolidated Appliances Limited

[14]Trade Dispute No. 99 of 1990 Communications Workers Union and J.N. Harriman and Co. Limited

49. The gravamen of the Union's complaint under this provision is that, as the RMU, it was not consulted on the issue of layoff before the actual day on which the layoff was implemented, and; it was not given the opportunity to speak to its members in relation to the proposed layoff. It also complains about the fact that the Company bypassed the Union and went directly to the workers with the vacation leave plan that the Union had rejected and in so doing failed to give recognition of the Union as the RMU.

50. Mr. Mendes, S.C. in support of the Union's case cited the dicta of Lord Justice Glidewell[15] which addressed the issue of fair consultation as follows:

> *"Fair consultation means:*
>
> *a) Consultation where the proposals are still at a formative stage;*
> *b) Adequate information on which to respond;*
> *c) Adequate time in which to respond;*
> *d) Conscientious consideration by an authority of the response to consultation.*
>
> *Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".*

51. Mr. Armour, S.C. argued that that definition is limited to that particular case. He stated:

[15] R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others (1994) IRLR 72

"It is clear on the face of the case that consultation was being construed by the Divisional Court in the British Coal Corporation case, having regard to the language of Section 46(1) of the Coal Industry Naturalization Act and to a lesser degree, the Trade Union and Labour Relations Consolidation Act when you construe the Section as any Court ought to, as a whole, in the context of the Act as a whole, informs the submission which I make that this case on consultation is within the context of the meaning of the Section and, therefore, does not assist the Court……. so I am saying that this case is construing the term consultation within the meaning of Section 46(1) of the Coal Industry Naturalization Act, 1946 and, therefore, cannot assist this Court beyond the cases …… this Court has produced as to the proper meaning of consultation in an industrial relations context".

52. We do not agree that Lord Justice Glidewell's definition of what is fair consultation is limited to the facts of *R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others* but is all-encompassing. The definition is applicable to what is considered to be fair consultation in the industrial relations context.

53. In our view, consultation with a RMU is an integral part of the procedural duty of employers where redundancy or layoff is contemplated. This consultation must be fair and adequate to allow the RMU the opportunity to deliberate and to respond to what has been contemplated by the Company. The level of consultation which is required with the Union can be no less than the type of consultation which is contemplated in redundancy and retrenchment cases as provided by the RSBA. It must be pointed out that in a layoff, it is the Company who benefits by not having

either to pay wages or to pay severance benefits. The only hope for the laid off worker is re-employment.

54. We hold therefore that the procedures which are provided in the RSBA should serve as a guideline for what constitutes good industrial relations in instances of layoff, redundancy and retrenchment.

55. It is our finding that the Company failed to treat with the Union in good faith for the purpose of collective bargaining when it did not give the Union the opportunity to deliberate and to respond to its proposal which was raised for the very first time at the meeting on 7th December. Even when the Union requested a meeting after the layoff was put into effect, the Company refused to meet with the Union, giving it no option but to resort to the procedures under the IRA and the instant proceedings.

56. The Company's big stick tactic of effectively forcing the acceptance of the vacation leave proposal without prior notice or discussion and its refusal to afford the Union the opportunity to meet with its members is extremely unfortunate and goes against the spirit of co-operation which existed between the parties for the preceding twelve (12) months. The Company did not discuss or even mention the issue of layoff in any of the meetings in the month November nor did it discuss it at the meeting on the 4th December, 2015. When the issue of layoff was presented to the Union on the 7th December it was presented together with the vacation leave proposal and the approach of the Company was take it (vacation leave) or leave it (layoff). In other words, negotiations, as far as the Company was concerned, were at an end. There was no prior warning about the layoff or proper consultation and indeed no opportunity for the Union to discuss such a serious issue with its membership. Instead, immediately after the meeting with the Union

ended, the Company served each affected worker with a layoff letter which was prepared the weekend prior. The workers were laid off summarily and without notice.

57. This disruption of the employment relationship without notice constituted a fundamental breach of the workers' contract and violation of the implied obligation of trust and confidence was indeed unlawful even if a Union was not involved. It entirely negated any layoff right that the Company claimed. In addition, the so-called right to "encashment" of up to 20 days vacation leave was a subtle, colourable device to pressure the workers who were left without any means of financial support during the Christmas season to take their vacation leave by way of this 'encashment'. In essence, the workers were asked to take the vacation leave, vacation leave which their Union had refused to approve and consent and which was regarded by their Union as being in violation of the Collective Agreement. The Company ignored the right of the worker to dictate when this leave is taken and undermined the Union as RMU. To paraphrase the words of Byron CJ (Ag), this cannot be 'leave' as it is defined and commonly understood. We agree with counsel for the Union that the layoff was an attempt to compel the acceptance of the Company's vacation leave proposal. Additionally, the Company failed to recognize the Union as the RMU and when it put its vacation leave proposals directly to the workers.

ILLEGAL INDUSTRIAL ACTION CONTRARY TO SECTION 63(1) OF THE IRA

58. Industrial action is defined as:[16]

> *"strikes and lockout, and any action, including sympathy strikes and secondary boycotts (whether or*

[16]IRA, Ch. 88:01

not done in contemplation of, or in furtherance of, a trade dispute), by an employer or a trade union or other organisation or by any number of workers or other persons to compel any worker, trade union or other organisation, employer or any other person, as the case may be, to agree to terms of employment, or to comply with any demands made by the employer or the trade union or other organisation or by those workers or other persons, and includes action commonly known as a "sit-down strike", a "go-slow" or a "sick-out", except that the expression does not include –

i) a failure to commence work in any agricultural undertaking where work is performed by task caused by a delay in the conclusion of customary arrangements between employers and workers as to the size or nature of a task; and

ii) a failure to commence work or a refusal to continue working by reason of the fact that unusual circumstances have arisen which are hazardous or injurious to health or life".

59. We agree with His Honour Mr. J.A.M. Braithwaite, former President of the Industrial Court, when he examined the definition of industrial action as provided by the IRA and he opined:

"The definition tells us that for action to fall within the category of industrial action it must be for the purpose of enforcing compliance with a demand; and that this demand need not be in relation to a trade dispute or to terms and conditions of employment……

> *Regarding the mode of the action, the definition recognizes the strike and its counterpart, the lockout, as being the archetypal forms of industrial action. To those it adds "any action", including a number of specific types of action and excluding certain types of action. The examples given of action that is included as industrial action are all examples of the withdrawal of labour in whole or in part by workers acting in concert, contrary to their terms of employment. The examples of exclusions similarly relate to withdrawal of labour which in the attendant circumstances would not be in breach of the terms of employment. These latter examples perhaps include as well, refusal by an employer to offer work in those circumstances."*[17]

60. Simply put and utilising the purposive approach to the interpretation of the statute and the jurisdiction of the Industrial Court and other operators designated by the IRA, 'industrial action' is commonly understood to mean any measure which restricts or disrupts the normal operation of the employment relationship which is undertaken either by the employer or anyone or entity acting on its behalf or collectively by the workers or union.[18]

61. There is no evidence before the Court to suggest that the Company's circumstances changed from 4th December to 7th December, 2015 or any sense of urgency which warranted immediate action. Indeed, the Company's own witnesses depose that this financial condition has been going on for almost two years.

[17] R. J. Shannon and Company (Trinidad) Limited and Transport and Industrial Workers' Union delivered on 10 March, 1980.
[18] S. Deakin & G Morris *Labour Law* (Hart Publishing, Sixth edn) para. 11.1

Thus there is certainly not one scintilla of evidence to justify the lack of proper consultation by the Company with the Union other than a disdain for the orderly system of collective bargaining set out in the IRA. When the vacation leave proposal was rejected by the Union, the Company used "layoff" as a strategy of enforcing compliance by the Union to accept those very proposals.

62. The Company's approach amounted to "accept our proposal or face layoff of a large number of workers". Good industrial relations practice demands that the Union, a Recognised Majority Union, should have adequate reasonable notice from the Company of its intention to layoff. The Union should also have been given a proper opportunity to examine the proposal and to respond. The layoff of such large number of workers has serious social and economic implications and warrants discussion among the Union and its members as well as discussions between the Company and the Union.

63. It is imperative especially in these times of global economic challenge that social partners follow the canons of good industrial relations, namely that they meet, they discuss, they negotiate and they treat in good faith on these issues. In this case, the Company went directly to the workers and put its proposal to them even though there is a RMU. This is simply unacceptable as good industrial relations practice.

64. The Company and the Union agreed that it is within a Company's right to layoff workers. The notion that a Company has a right to layoff does not mean that that right can be exercised arbitrarily, inhumanely and in a manner which is not in keeping with the canons of good industrial relations. This right must be exercised having regard to the Company's rights, duties and obligations

towards its workers and in accordance with the principles and practices of good industrial relations.

65. To lay off workers with immediate effect and as Mr. Mendes, S.C. pointed out at Christmas time by going directly to them, issuing letters to them informing them that they would no longer be required to attend work with immediate effect, goes against the grain and spirit of good industrial relations principles and practices. It also goes against the principles of fairness and what is expected of a Company in those circumstances.

66. We are therefore satisfied that the Union has discharged its burden of proving the commission by the Company of the complaint of illegal industrial action as alleged.

THE BUSINESS OF A UNION

67. When the Company made its vacation leave proposal on 26th November, 2015 the Union requested the opportunity to consult with its members. As a result, the members of the Executive sought and was granted time off from work by the Company to do so. It is noteworthy that there was no proposal regarding the layoff at the 26th November meeting. There appears to be some issue by the Company related to which group of workers the Union held its meeting. The Company argued that although the Union's Executive sought and was granted leave from work to meet with the membership, namely, all members of the Union, the Union met only with the General Council and some members of the Union.

68. It is important for employers to understand that a Trade Union has a number of duties and obligations to its membership. In fact, among the main duties of a Trade Union is to seek the interest of workers through collective bargaining with employers, and to enter into negotiations and make decisions which are in the best interest

of its members. Just as a Company has the prerogative (generally speaking) to manage its affairs so does a Union. It is therefore not open to the Company to question and to determine which part of its membership the Union should meet and/or consult to discuss the business of the Union. Indeed, the Union has the exclusive right and authority to make decisions on behalf of its members even if it has not consulted all of its membership.[19]

TAPING OF THE 7th DECEMBER, 2015 MEETING

69. The Company in its submissions attempts to make much of the unilateral and voluntary disclosure by the Union in a letter to the Company dated 9th December, 2015 requesting a meeting to discuss the layoff of the workers that it had recorded the discussions had between the parties on 7th December. The Company submits that this was covert and surreptitious and contrary to good industrial relations in that it was *"indicative of bad faith on the part of the Union and/or is an example once more of lack of intent on the part of the Union to engage in genuine and bona fide consultation with the Company."* In its written submission, the Company asked the Court to give its "unequivocal condemnation of the Union's conduct."

70. In response, Counsel for the Union, quite rightly in this Court's view conceded that this was unbecoming conduct and assured us that the Union has taken the advice that it must not record meetings secretly in the future. This is a gracious concession and disposes of the issue as far as this Court is concerned as well as signals to all others the manner in which parties should conduct themselves in negotiations.

[19] Cite Cases

71. However, such a secret recording can have no effect on the findings of this Court as the Company has not shown how this affected the manner in which it behaved and conducted the consultation with the Union over the central issue of vacation leave and layoff. The disclosure was made after the act and the events, the inference therefore is that the Company did not believe that it rose to the level of misconduct as it failed to formally file a complaint of an IRO for any violation of Section 40(1) of the IRA.

72. *The case of Oilfield Workers' Trade Union v Caribbean Tyre Company Limited*[20] cited by both parties is sufficient to dispose of any argument by the Company that this conduct of secretly taping the meeting affects in any way its liability for the industrial relations offences alleged. In that case, the "scandalous and abominable" behaviour of the Union, did not preclude the Court from finding that the Company was guilty of engaging in an illegal industrial action. So while we join Counsel for the Company in condemning the action of secretly taping the meeting between the parties, we do not believe that it is relevant to the decision that we have to make in this case and note that the recording was not submitted in evidence, while the notes taken by the Company at the meeting were submitted and received in evidence.

DISPOSITION

Workers' Entitlement to Unpaid Wages

73. As a consequence of what has been said above, it goes without saying that in light of the illegal conduct of the Company, in instituting the layoff and violating the principles and practices of good industrial relations, the workers are entitled to all the wages they would have earned had the illegal layoff not taken place.

[20] IRO 31/1985 and CA 106/1988

Encashment of Vacation Leave

74. With regard to the encashment of the vacation leave which workers were forced to utilise after they were deprived of wages, we agree with Counsel for the Union that no order should be made for its return or deduction from the amounts due to the workers. Our view is that in order for the Company to recover such payments, it would have to establish that the workers waived their contractual rights by encashing the vacation leave. In this regard we adopt the reasoning of the Privy Council in the case *Jamaica Flour Mills Limited v The Industrial Disputes Tribunal*,[21] an appeal from the Court of Appeal of Jamaica, where their Lordships in dismissing a similar contention said:

> *"Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the persons whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement".*

75. In that case the Board held that the cashing of the cheques, which were given to the workers as severance payments after the company violated the consultation requirement on a retrenchment, did not amount to a waiver because,

> *"The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the*

[21] *Jamaica Flour Mills Limited v The Industrial Disputes Tribunal* and National Workers Union (Intervenor) [2005] UKPC 16

Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under Section 12(5)(c) [of the Labour Relations and Industrial Disputes Act (Jamaica)]"[22]

76. Similarly in this Complaint the encashment of the vacation leave did not amount to a waiver of the vacation leave entitlement and did not amount to consent to the Company's illegal action. The Union protested promptly and wrote the Company on the said 7th December, 2015 and filed the instant complaint of an IRO in Court on the 21st December, 2015.

77. Further, we also adopt the reasoning of their Lordships in that case that waiver was not present for the additional reason that there was no indication that the Company in that case or any representative of the Company thought that the two employees were intending to relinquish their statutory rights. "Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent. Their Lordships would add that they do not see this as a case where the employees were put to an election between inconsistent remedies, i.e. cashing the cheques or pursuing their statutory remedy."[23]

[22] [20]
[23] Ibid.

78. We adopt the sound reasoning of the Privy Council which is fully applicable to this case and agree with Counsel for the Union that there is no basis upon which we can order the return of the encashed vacation leave.

Should the Company be repaid the $2,000.00?

79. Mr. Mendes, S.C., asked the Court to make an order for the workers to be paid any unpaid wages that would ordinarily be due to them.

80. He submitted

> *"……that any Agreement that the workers entered into to encash their vacation leave is null and void, which means that whatever vacation leave that they would have encashed would be restored to them so that they will go forward with their full accumulated leave…... Now, we say, respectfully, that those orders ought to be made without any deduction even though the company may have paid $2,000.00 to the workers, and may have paid them money for the encashment of the vacation leave, that the Court ought to hold that the Company cannot recover it…. The Company cannot get what in effect will be a return of the monies that were paid under an illegal contract. That is the general principle of common law. You cannot get the return of monies that are paid under the illegal contract, more particularly since in this case, they are the perpetrators of the illegal contract".*

81. Mr. Amour, S.C. disagreed and argued: *"That is an order of a punitive nature, which does not arise on the facts because there is*

no allegation that the layoff is a false layoff, notwithstanding the language of the Union about 'guise'. There is no allegation that this is a sham and that the Company has conjured this up out of the air".

82. This is not a case of mistaken payment but payment that was made deliberately to advance a cause that we have found to be assailable in light of the provisions of the IRA. We agree with Counsel for the Union that this Court will not lend its aid to recover any illegal payment made to undermine the very pillar of the principles and practices of good industrial relations. The doctrine of *ex turpi causa* precludes the Court's aid in this recovery, therefore we refuse any credit or deduction in relation to the sum of $2,000 paid to the workers under the scheme.

FINDINGS:

83. In the premises on the totality of all evidence we find as facts that:

1. The Company engaged in illegal industrial action in violation of Section 63 of the IRA;
2. The Company failed to treat and enter into negotiations with the Union in good faith for the purpose of collective bargaining contrary to Section 40 of the IRA;
3. The Company failed to recognise the Union as the Recognised Majority Union by treating directly with workers.

ORDER

84. This Court hereby orders that:

(1) For the offence of illegal industrial action the Company pays a fine $20,000.00, the said sum to be paid on or before 24th March, 2016.

(2) The Company pay a fine of $4000.00 on or before 24th March, 2016 for failure to treat and enter into negotiations with the Union in good faith for the purpose of collective bargaining contrary to the provisions of Section 40 of the IRA.

(3) The vacation leave which was utilised by the affected workers in December 2015 and January 2016 be restored to each worker.

(4) The affected workers be paid all of their wages for the period 7th December, 2015 to 15th January, 2016 on or before 29th April, 2016.

We so rule.

Deborah Thomas-Felix
President

Albert Aberdeen
Member

Bindimattie Mahabir
Member