REPUBLIC OF TRINIDAD AND TOBAGO:
COMPLAINT NO.GSD-IRO 36 OF 2018

IN THE INDUSTRIAL COURT

BETWEEN

OILFIELD WORKERS' TRADE UNION - PARTY NO. 1

AND

TRINIDAD CEMENT LIMITED - PARTY NO. 2

CORAM:

Her Honour Ms. D. Thomas-Felix - President
His Honour Mr. A. Aberdeen - Member
His Honour Mr. M. Mitchell - Member

APPEARANCES:

Harrison Thompson)
Industrial Relations Consultant) - for Party No. 1

Derek Ali)
Attorney at Law) - for Party No. 2

Dated: 15th November, 2019

JUDGMENT

Delivered by Her Honour Deborah Thomas-Felix

1. The parties to this Industrial Relations Offence (IRO) are the Oilfields Workers' Trade Union and Trinidad Cement Limited.

2. Trinidad Cement Limited (the "Company") is a Company incorporated under the Companies Act 1995. Its operations include the production and distribution of cement.

3. The Oilfields Workers' Trade Union (the "Union") is a Trade Union duly registered in accordance with the Trade Union Act Chapter 88:02. The Union is the Recognized Majority Union of five Bargaining Units of workers employed with the Company.

4. The Union has filed an IRO before the Court wherein it has alleged that *"…the Company is in breach of Sections 6, 7, 14 and 15 (1) and (2) of the Retrenchment and Severance Benefit Act, Chapter 88:13 when they put into effect the whole of their Retrenchment Proposals. Still further, the Company terminated all the Workers services with immediate effect thereby denying the Workers the terms and conditions of their employment as described in Section 15 (1) and (2) of the said Act."*

FACTS

5. The facts which are material are that on September 11, 2018, the Company served the Union and sixteen (16) workers with notices of Retrenchment. The main issue of contention in this IRO is that the retrenchment notices which the Company served to sixteen workers did not give **any** period of formal notice.

6. The Union claims that, *"contrary to Sections 6 and 7 of the Retrenchment and Severance Benefit Act, Chapter 88:13 and the provisions of the respective Collective Agreements, the Company did not give any period of formal notice which is fifty (50) days in the respective Collective Agreements."*

7. However the Company contends *"that Section 17 of the RSBA allows for the parties, by mutual consent, to adopt a procedure other than that in the RSBA."* The Company points to the Notice of Termination Clause of Article 21(2) contained the Collective Agreement between the parties which states as follows*: "If the services of a worker are terminated on the grounds of redundancy after not less than one year's continuous service with the Company, he/she shall be entitled to (50) fifty days notice or (50) fifty days full pay in lieu thereof."* The Company further argues that this Clause was adopted in accordance with the provisions of Section 17 of the RSBA and allows for the Company to retrench workers without giving any notice.

ANALYSIS

8. The Industrial Relations framework in Trinidad and Tobago and laws which relate to retrenchment are governed by the Retrenchment Severance Benefits Act Chapter 88:13 (the "RSBA") and the Industrial Relations Act Chapter 88:01 (the "IRA"). As this Court stated in IRO 31 of 2015:[1] *"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…..*
>
> *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 mandate adherence to the principles and practices of good industrial relations, as that*

[1] Complaint No. GSD-IRO 31 of 2015 Steel Workers' Union of Trinidad and Tobago and Arcelormittal Point Lisas Limited

term has come to be understood, so as to ensure industrial peace.

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."

9. The relevant sections of the RSBA which relate to this IRO are as follows:

> 5. *"Notwithstanding section 4, an employer may, prior to the giving of formal notice in writing of retrenchment, enter into consultation with the recognised majority union with a view to exploring the possibility of averting, reducing or mitigating the effects of the proposed retrenchment.*
>
> 6. *Subject to section 7, the minimum period of formal notice required by section 4 shall be forty-five days before the proposed date of retrenchment."*
>
> 7. *Where, due to unforeseen circumstances it is not practicable for an employer to comply with the requirements of section 6 with respect to formal notice, he shall give the maximum notice that he can reasonably be expected to give in the circumstances and the onus shall be on him to prove that the circumstances which prevented him from complying with section 6 were indeed unforeseen."*

10. The Company maintains that it has not committed an IRO and seeks to invoke the provisions of Article – 21 (2) of the existing Collective Agreement between the parties and also to rely on Section 17 of the RSBA to support its contention.

11. The Company argues there is no requirement to give notice to the workers, since *"Section 17 of the Retrenchment Severance Benefit Act allows for the parties by mutual consent to adopt a procedure other than that in the Retrenchment Severance and Benefits Act".* The Company submits that Article 21 (2) of the Collective Agreement is a procedure *"other than that"* of the RSBA.

12. Therefore an interpretation of Section 17 of the RSBA is necessary before we can determine if the Company has committed an IRO. Section 17 of the RSBA provides that *"By mutual consent, the parties to a Collective Agreement may adopt a procedure other than that prescribed in this RSBA but such procedure shall be set out in their registered Collective Agreement and shall satisfy the requirements— (a) that a period of notice to retrench be stipulated; and (b) that the Minister be notified in writing in accordance with section 4."*

13. An examination of the RSBA shows that Section 6 provides for a minimum period of formal notice of 45 days to be given to workers before the proposed date of retrenchment. If however, due to unforeseen circumstance, it is not practicable for an employer to comply with the requirements of the minimum period of formal notice, Section 7 allows the employer to give the maximum notice that he reasonably can be expected to give in the circumstance. The onus is placed on an employer to prove that there are circumstances which prevented him/her from complying with the provisions of Section 6 of the RSBA and that these circumstances were indeed unforeseen.

14. In other words, there might be an unforeseen event or circumstance which has arisen, which makes it impossible or impracticable for an employer to give the requisite forty-five (45) days' notice, in those circumstances, the employer can give notice for a period of less than forty-five (45) days and of course explain the nature of the unforeseen event.

The RSBA does not have a provision whereby parties can consent, through the collective bargaining process, for **no** notice to be given to workers or to any term which violates the provisions of the RSBA and IRA. Indeed, it is settled law, that where there are clauses in consent agreements which are unlawful and contrary to law and public policy; such clauses render the Agreement or the term in the Agreement (in this case a provision in the Collective Agreement) void.

15. The Parliament of Trinidad and Tobago, by virtue of Section 6 of the RSBA, has outlined the minimum standard of notice which can be given to a worker when there is a retrenchment. This Section does not speak to a situation of **no** notice. Indeed Section 17 requires that when parties adopt a "procedure other than that prescribed" that a period of notice is stipulated. Section 17 does not provide for no notice. It stands to reason therefore, that the minimum notice outlined at Section 6 can be increased but the requirement for notice cannot be removed through collective bargaining by the parties.

16. It is trite law that legislation enacted by the Parliament (IRA and RSBA) cannot be negotiated, altered or waived during the collective bargaining process unless the legislation specifically provides for such alteration, negotiation or waiver. It is erroneous therefore for parties to believe, that by the mere insertion of a clause to a collective agreement of a provision for no notice which states *"if the services of a worker are terminated on the grounds of redundancy …., he/she shall be entitled to 50 days' notice or 50 days full pay in lieu thereof*", that in so doing they have adopted a *"procedure other than that provided"*, by the RSBA.

17. Collective bargaining has to be done within the confines of the law; what the parties have done is to substantially and materially alter the provisions of the RSBA through the collective bargaining process, contrary to law.

Does the RSBA provide for an automatic waiver of notice?

18. In our view that the RSBA does not contemplate an automatic waiver of notice. Moreover, the principle of *"pay in lieu of notice"* is not provided for in the RSBA

itself. Instead, it is a principle of good industrial relations which is usually invoked when for good and proper reason an employer is unable to provide the requisite notice required by the terms of employment or by the stipulated law. Therefore, employers cannot inform workers that they have elected not to provide a period of notice and that they have chosen instead to "*pay in lieu"* of notice. Moreover, employers are duty bound, in law and in the practice of good industrial relations, to prove that there are unforeseen circumstances and show that those unforeseen circumstances are of such a nature that it is impractical or impossible to comply with the requirements for a minimum period of notice.

19. The question of providing **no** notice whatsoever to workers is not a provision of the legislation. Even if the notice which can be provided is below the minimum statutory standard of notice, notice is required, save in circumstances we have mentioned before. We remind parties, that a proper and genuine reason must be given for not meeting requirements of the forty five (45) days minimum standard of formal notice. We emphasise that to terminate workers with immediate effect is in total violation of what a retrenchment exercise is about and also contrary to the practice of good industrial relations.

20. Thus, when the Company provided letters of retrenchment to the sixteen (16) workers and these letters afforded **no** period of notice to the workers, the Company has contravened the provisions of the RSBA and has not acted in accord with the principle and practice of good industrial relations provided for in the IRA.

21. The Union is seeking a finding of the court pursuant to Section 25 of the RSBA. We repeat what was stated in GSD-IRO 31 of 2015, *"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 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 proposed action.[2]"

22. When retrenchment is contemplated by a Company one must always bear in mind that the retrenchment is never due to the fault or misconduct of a worker, instead it is mainly due to the financial and other constraints proffered by the Employer. Indeed, the period of notice of retrenchment provides the worker with the opportunity to prepare for whatever his/her future may be and to adjust to the new situation, as well as for the Company to use that period to see if there are other areas within the organization, where the worker can secure alternative employment in an effort to mitigate and/or to reduce the impact of the proposed retrenchment.

FINDINGS OF FACT

a. We find that the parties have substantially altered and breached the provisions RSBA by adopting Article 21(2) of the Collective Agreement during collective bargaining.

b. We find that the reasoning which has been advanced by the Company in its interpretation of Section 17 of the RSBA is flawed.

c. In accordance with the principles of equity, good conscience and the substantial merit of this case, we find that the Company is in breach of the provision of the RSBA and that the Company is guilty of an Industrial Relations Offence.

RULING

a. While we find, on the totally of all the evidence, that there have indeed been breaches of the RSBA which occurred with the concurrence of the Union during the negotiation of the parties for the Collective Agreement.

[2] Complaint No. GSD-IRO 31 of 2015 Steel Workers' Union of Trinidad and Tobago and Arcelormittal Point Lisas Limited.

b. The Union cannot “approbate and reprobate” at the same time. We remind parties of the maxim, *“He who comes into equity must come with clean hands*”, the Union cannot on one hand agree through the collective agreement that the Company could give *“50 days full pay in lieu of notice.”* and then on the other hand seek to prosecute the Company for so doing.

c. The parties are ordered to amend Article 21(2) of the collective agreement within 14 days of this Judgment.

d. The Company is guilty of and Industrial Relations Offence, however, the other orders which are sought by the Union are denied.

e. The Company is reprimanded and discharged.

We so rule.

Ms. D. Thomas-Felix
President

Mr. A. Aberdeen
Member

Mr. M. Mitchell
Member