EMPLOYMENT RELATIONS TRIBUNAL
(EMPLOYMENT PROMOTION AND PROTECTION DIVISION)

AWARD

ERT/EPPD/RN 01/16

Before: **Indiren Sivaramen – Vice-President**
Arassen Kallee – Member
Ali Osman Ramdin – Member

In the matter of:-

1. **Mr Dhanraj Kissoon** **(Complainant No 1)**
2. **Mr Rajvansh Gupta Kumar Bachoo** **(Complainant No 2)**
3. **Ms Kalawuttee Toolooa** **(Complainant No 3)**
4. **Mr Mohammad Nageeb Deedarun** **(Complainant No 4)**
5. **Ms Pharvine Bibi Edun** **(Complainant No 5)**
6. **Ms Marie Annick Cristelle Raffaut** **(Complainant No 6)**
7. **Ms Nilmala Madhub-Foolell** **(Complainant No 7)**
8. **Mr Kylash Ujoodah** **(Complainant No 8)**
9. **Mr Zorabnawab Goburdhun** **(Complainant No 9)**
10. **Mr Sanjaydutt Seesaha** **(Complainant No 10)**
11. **Mr Jean Daniel Edouard** **(Complainant No 11)**

(Complainants)

And

The Mauritius Shipping Corporation Ltd
(Respondent)

In a letter dated 23rd June 2015, the Mauritius Shipping Corporation Ltd, hereinafter referred to as the 'Respondent', an employer of not less than 20 employees, gave notice to the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training of its intention to restructure the company and to reduce its workforce due to the following reasons:

(a) Losses of Rs 145 million in previous two financial years along with sale of M/V Mauritius Pride;
(b) Overstaffing;
(c) Lack of competence;
(d) Outdated business model;
(e) Inefficient organizational structure.

On 16 November 2015, the employment of Complainant No 1 was terminated without notice on ground of abolition of his post of Chief Manager (Terminal & Logistics) following a restructuring exercise with payment of one month remuneration in lieu of notice.

On 4 December 2015, Complainants No 2 to 11 were given notice of termination of employment for 5 January 2016 on grounds of restructure of the Respondent.

On 16 November 2015 and on 5 January 2016 respectively, Complainant No 1 and Complainants 2 to 11 registered their complaints with the Permanent Secretary of the Ministry, contesting the reasons put forward by Respondent for reducing its workforce and claimed for their reinstatement except for Complainants No 4 and No 7, who were claiming severance allowance. The Permanent Secretary enquired into the complaint with a view to promoting a settlement between the parties. However, no settlement has been reached between the parties. The Permanent Secretary of the said Ministry has referred the matter to the Tribunal under section 39B(6)(a) of the Employment Rights Act 2008, as amended (hereinafter referred to as the "ERA"). The point in dispute as referred to the Tribunal is as follows:

"Whether the reduction of the workforce affecting the Disputants is justified or not in the circumstances."

Complainant No 1 has filed a Statement of Case and a Reply to the Statement of Case of Respondent. Complainants No 2 to 11 have filed their Statement of Case. An oral Reply to the Statement of Case of Respondent was also made on behalf of Complainants No 2 to 11. Respondent has filed a Statement of Case (with a Response to the Case of all Complainants) and a Reply to the Statement of Case of Complainants No 2 to 11. All these Statements of Case/Reply were very detailed documents. All the parties were represented by Counsel before the Tribunal. The relevant deponents before us have solemnly affirmed to the truthfulness of the contents of the different statements of case/reply filed.

A senior labour officer from the Ministry of Labour, Industrial Relations, Employment and Training deposed and he stated that a conciliation meeting was held on 19 November 2015 with the representative of Respondent following representations made by Complainant No 1 who had by then already been made redundant. For obvious reasons, the Tribunal cannot and will not consider whatever took place at such a conciliation meeting. Another officer from the same Ministry deposed and he could not enlighten the Tribunal as to whether a list of workers to be made redundant was sent to his Ministry. A Lead Analyst from the Ministry of Finance and Economic Development then deposed but he was not aware of any report prepared on the financial health of Respondent. The Finance Manager of Respondent also deposed and he produced the audited financial statements of Respondent for the years 2011 to 2013 (Docs C, D and E). The accounts for the years 2014 and 2015 were not ready. He agreed that the

Respondent had a positive total equity for each of the financial years 2011 to 2013. There is no auditor's report saying that the company is not solvent. The Respondent had positive earnings before interest, tax and depreciation adjustments for each of the three years. However, he also stated that the Respondent had accumulated losses of over Rs 260 million from 2009 to 2013. He conceded that the Respondent was late in filing its accounts and even hinted to the possibility of Respondent having to pay a fine.

As regards Complainants No 2 to 11, only Mr Deedarun (Complainant No 4) deposed before the Tribunal. He averred that Complainants No 2 to 11 are aware of the contents of their statement of case and agree with the contents thereof. He was Operations Officer in the Logistics and Trade Forwarding Department. He produced copies of certificates and stated that he had all the qualifications required for his post. In cross-examination, he agreed that was in the same department as Complainants No 6 and 9. He stated that his department was abolished following the restructuring. He did not agree that his department was not making profits.

Mr Tan Yan, Negotiator for the relevant trade union, then deposed before the Tribunal. He stated that the union did not submit any proposal on 3 July 2015 as they did not receive any restructuring plan from Respondent. No list of staff concerned with the restructuring exercise was given to them and there was no indication as to what would happen to the staff. There was only a proposal to reduce the number of departments at Respondent from 9 to 6. There was no reference to redundancy. He received a list of workers (in relation to the redundancy) only in November 2015. The trade union was asking for documents including a HR audit report (following a HR audit which had been carried out) and the restructuring plan. He averred that the Respondent did not have consultations with the union to consider alternatives to redundancy of the workers concerned.

Even on 16 December 2015, the trade union was still requesting in writing the statement of accounts of the company for 2014 and other information relating to the restructuring exercise. He did not receive any such information before 16 December 2015 (that is even after the Complainants were made redundant). At the meeting of 30 November 2015, it was not possible to consider the case of each targeted redundant worker. It was allegedly conveyed to him that the decision had already been taken at higher quarters. He referred to the case of Complainant No 10 and the harsh consequences which resulted on another worker who has to replace the redundant worker in a department where there are very demanding conditions and where one is on call 24 hours a day. In cross-examination, he agreed that the union itself had sent a letter to the new Minister of Fisheries, Ocean Economy and Marine Resources to complain about several issues of mismanagement (Doc M). He was not agreeable however that the Respondent uses this letter to justify what he has done. He averred that the Respondent is recruiting people in almost the very same positions as those who have been made redundant. He produced a copy of a notice of vacancies for "Management Trainees" at Respondent (Doc N). Mr Tan Yan did not agree that there were full discussions with the union over the restructuring exercise at Respondent. He averred

that the letter dated 2 July 2015 from Respondent was too vague. He agreed that Respondent acceded to the proposals of many workers out of the initial 30 workers who were on the list of workers to be made redundant. He however stated that many had been re-employed on contract and that one should appreciate the situation in which an employee finds himself when he is being forced to accept to go on contract instead of being placed on the redundant list.

An Analyst from the Procurement Police Office then deposed and she explained how she provided her services as Analyst to the Ministry of Labour, Industrial Relations, Employment and Training. She was given the accounts of Respondent for the years 2009 to 2013 but with some documents missing for 2009 and 2010. She carried out an analysis and drafted a report. She produced her report (Doc J). She averred that though the company was still making a loss there was a slight improvement from 2012 to 2013. In cross-examination, she agreed that considering the period 2009 to 2013, the company was doing badly.

Mr Ally AckbarHossen, an independent auditor, then deposed and he stated that he was asked to perform an analysis on the financial ratios of Respondent. His analysis was for the accounts for the last three years available (2011, 2012 and 2013) at the Registrar of Companies. Accounts for the period 2014/2015 had not been filed. He produced a copy of his report (Doc O). He stated that the auditors had given an unqualified audit opinion for each of the three years. There is no sign of financial distress or going concern and the company has reported a positive total equity for each of those financial years. The company showed positive Earnings before Interest, Tax and Depreciation Adjustments (EBITDA). The current liquidity and solvency ratio (as per the appendix to his report) indicate that the company was solvent as at 31 December 2013. He averred that all these show that the company has been profitable for the last three years ended 31 December 2013. He mentioned that the company is fully owned by the Government of Mauritius directly and indirectly and that it is common knowledge that such companies have no going concern problem because Government usually guarantee their debts and make up for their losses whenever they arise.

In cross-examination, he agreed that if a shareholder, rightly or wrongly, decided to stop pumping money he would be entitled to do so. He stated that EBITDA is used to measure profitability. He referred to non-cash adjustments and stated that if the company incurred large amounts of depreciation, this would wipe off the profits.

Complainant No 1 then deposed before the Tribunal and solemnly affirmed to the truthfulness of his Statement of Case and his Reply to the Statement of Case of Respondent. He joined the Respondent in 1993 and was the Chief Manager, Terminal and Logistics when he was made redundant. The passenger terminal, all the support services (drivers, messengers, security service) the procurement department and the clearance and forwarding of spare parts, among other things, fell under his responsibility. He averred that the passenger terminal still exists and all the employees are still there.

The support services department still exists with one or two workers made redundant. Procurement is still there. It is only the clearing of spare parts department which has been abolished and the work contracted out. He could not say if the passenger terminal was running at a loss since it is a service offered to passengers. He averred that his work in relation to the passenger terminal has been assigned to someone working on contract after the latter has taken VRS. He was informed in writing on 16 November 2015 that he was being made redundant as from the same date. He was present at a meeting in July 2015 in relation to the restructuring exercise to be carried out but there was no reference that his post would be cancelled or that he would be made redundant. Respondent did not even consider an alternative job or training for him. He stated that staff cost is not that much compared to dry docking expenses.

When questioned by counsel for Complainants No 2 to 11, he stated that the clearing of spare parts division was a profit making department. He stated that their redundancy was a "fait accompli" and that the whole restructuring exercise was a mere "façade" for this act. In cross-examination by Counsel for Respondent, he stated that though he attended meetings, there was no consultation and the Respondent did not propose any alternative to him. The other workers were luckier because they had the opportunity to make proposals and have meetings with the Ag Managing Director whereas he just received his letter of termination and had to leave the company.

A senior labour and industrial relations officer then deposed and he was requested to identify certain letters. In cross-examination, he confirmed that until October 2015 there was no list of workers or departments from which workers were to be made redundant emanating from Respondent in his file. The formal notification which was to be sent by Respondent as referred to in the letter of 23 June 2015 is nowhere to be found in his file.

Mr Ronoowah, the Ag Managing Director of Respondent, then deposed and he solemnly affirmed to the correctness of the contents of the Statement of Case of Respondent and the Statement of Reply to the Statement of Case of Complainants No 2 to 11. He produced a bundle of copies of documents (Doc S). He stated that there was a decision of Cabinet to restructure the Respondent. The Respondent had changed its financial year end and the accounts for January 2014 to June 2015 had not yet been finalized nor audited. He averred that one of the Finance Managers had a health problem. He referred to a snapshot document made to show the financial situation of the company (for the period 2009 to 2013) and to a document showing statistics pertaining to Respondent in relation to the number of ship voyages/ passengers over the years. The Government of Mauritius has injected Rs 120 million in the company in 2010. Since then, there has been no capital injection and instead loans were granted.

The accumulated losses for 2009 to 2013 amount to Rs 260 million. The gearing ratio had gone up from around 92 in 2009 to reach 169. Mr Ronoowah stated that normally

according to industry practice, a gearing ratio of 50% is acceptable. For current asset ratio normally the industry practice is two. Respondent has a current asset ratio below two. He stated that the business model now is more cargo-oriented instead of being passenger-based. Normally, passenger is more labour intensive compared to cargo. He then stated that there were both formal and informal meetings held in relation to the restructure exercise. Out of the 30 workers who were on the redundant list, some 25 made counterproposals. The Respondent managed to reach agreements with the workers except for the Complainants who were before the Tribunal. Fifteen were retained in the company and four left on VRS.

In cross-examination, Mr Ronoowah agreed that in the letter of 23 June 2015 addressed to the Permanent Secretary, there was no mention of the name of any worker who was going to be made redundant. The Permanent Secretary was sent a list of the names of workers to be made redundant on 13 November 2015. There was no consultation with Complainant No 1 on any alternatives to redundancy. In further cross-examination, he explained why the financial situation of the company was as it was by insisting on the lapse of time that went by before Government acted and later advised that the company could dispose of the M/V Mauritius Pride which was not financially sustainable. He agreed that the Respondent operates very much under the control of Government in terms of passenger fares and freight rates. He also agreed that Respondent is providing an essential public service. At this stage, when pressed with question as to the Cabinet decision, Mr Ronoowah stated that in fact there was a note for mention that was sent to the parent Ministry. This was confidential and could not be produced before the Tribunal.

Mr Ronoowah maintained that there were several meetings with the union but he could not say if there were discussions with the trade union on the matters (alternatives considered to explore the possibility of avoiding the reduction of workforce) he mentioned at page 5 of his letter of 13 November 2015. He stated that the company has recruited trainees and that there was no such “specialised people” in the company before. Finally, he did not agree that he was not entitled to rely on the justifications which he has given to make the Complainants redundant.

TRIBUNAL’S CONSIDERATIONS

The Tribunal has examined all the documentary and testimonial evidence adduced and submissions made and the Tribunal considers that:

(1) Written notice of intention to reduce the number of workers to be given to the Permanent Secretary.

Section 39B(2) of the ERA, as amended, provides as follows:

"An employer who intends to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise shall give written notice of his intention to the Permanent Secretary, together with a statement of the reasons for the reduction of workforce or closing down, at least 30 days before the reduction or closing down, as the case may be."

The letter purporting to be the "written notice" by Respondent to the Permanent Secretary of the relevant Ministry under section 39B(2) of the ERA is a letter dated 23 June 2015 (Doc B). The events which would have led the Board of the Respondent to take the decision that a restructuring and rightsizing exercise had to be carried out as soon as possible at Respondent are spelt out in this letter. It was "*estimated*" in the said letter that "*about 20 to 30 office-based staff could be surplus to the requirements and therefore may be made redundant*". No list of workers to be made redundant was given. The letter continued as follows: "*However, in the spirit of social responsibility, MSCL Board and its management are currently working on a plan to minimize the number of redundancies and, in this perspective, consultations will shortly be held between management and the trade union to explore the options available, which inter alia include compression of personnel, abolition of a number of posts, recourse to workfare programme and VRS scheme.*

8. Pending a formal notification to you of the list of employees to be made redundant, we would welcome any advice and guidance your ministry could kindly provide to MSCL to ensure a smooth completion of the restructuring exercise. (…)"

A list of 30 targeted redundant staff was sent to the relevant trade union by way of letter dated 13 November 2015 with mention that the final list of redundancies could change depending on counter proposals from the union and/or individual staff (Annex 19 to the Respondent's Reply to the Statement of Case of Complainants No 2 to11). This letter was only copied to the Permanent Secretary, Ministry of Labour, Industrial Relations, Employment and Training. The list of 30 targeted redundant staff was then placed on Respondent's notice board on 17 November 2015. Following counter proposals in relation to 25 out of the targeted 30 redundant staff, the Respondent on 4 December 2015 informed the trade union of the Board's decision on the counterproposals. Respondent issued redundancy letters to fourteen employees on the very same date, that is, 4 December 2015. Complainant No 1 had on his part already been issued a letter of termination of employment since 16 November 2015. On 5 December 2015, Respondent informed the Ministry of Labour, Industrial Relations, Employment and Training of the final list of workers who were made redundant.

If we assume that notice was given only on 13 November 2015 when the names of the 30 targeted redundant staff was sent to the Permanent Secretary (and not 23 June

2015), the employer did not give written notice at least 30 days before the reduction of workforce.

Section 39B of the ERA reads as follows:

39B. Reduction of workforce

(1) In this section, "employer" means an employer of not less than 20 workers.
(2) An employer who intends to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise shall give written notice of his intention to the Permanent Secretary, together with a statement of the reasons for the reduction of workforce or closing down, at least 30 days before the reduction or closing down, as the case may be.
(3) Notwithstanding this section, an employer shall not reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise unless he has —
(a) in consultation with the trade union recognised under section 38 of the Employment Relations Act, explored the possibility of avoiding the reduction of workforce or closing down by means of—
(i) restrictions on recruitment;
(ii) retirement of workers who are beyond the retirement age;
(iii) reduction in overtime;
(iv) shorter working hours to cover temporary fluctuations in manpower needs; or
(v) providing training for other work within the same enterprise;
(b) where redundancy has become inevitable —
(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and
(ii) given the written notice required under subsection (2).
(4) Where an employer reduces his workforce or closes down his enterprise, the employer and the worker may agree on the payment of compensation by way of a settlement.
(5) (a) Where there has not been any settlement for payment of compensation, a worker, as defined in section 40, may —
(i) join the Workfare Programme in accordance with Part IX; or
(ii) register a complaint with the Permanent Secretary.
(b) (i) A worker shall register his complaint with the Permanent Secretary within 14 days of the termination of his employment.
(ii) The Permanent Secretary may, on reasonable cause shown, extend the time limit specified in subparagraph (i).
(c) The Permanent Secretary shall enquire into the complaint with a view to promoting a settlement between the parties.
(6) Where no settlement is reached under subsection (5), the Permanent Secretary —
(a) shall, subject to subsection (7)(a), refer the matter to the Tribunal, if he is of the opinion that the worker has a bona fide case and thereupon the worker as defined in section 40 shall be entitled to join the Workfare Programme;

(b) …."

It is clearly laid down in the letter of referral from the Permanent Secretary of the relevant Ministry (and not disputed) that Respondent is an employer of not less than 20 employees. The written notice under section 39B(2) has to be given at least 30 days before the reduction in work force. The Tribunal notes that the procedures laid down before an employer of not less than 20 workers can reduce the number of workers in his employment under the ERA (as amended) differ to some extent from the procedures which were available under the repealed Labour Act more particularly in relation to how the then Termination of Contracts of Service Board (TCSB) intervened in the matter. The main difference is that once a written notice was given by the employer (as defined) to the relevant Minister of his intention to reduce the number of his workers, the Minister then and there referred the matter to the TCSB for consideration and the matter was sort of 'frozen' until the TCSB came out with its findings. Under the new law (ERA), provided conditions mentioned in section 39B have been complied with (mandatory consultation with the recognised trade union and then establishment of the list of workers to be made redundant when redundancy has become inevitable) and the required notice (and prescribed delay has been complied with) has been given, the employer may proceed with the reduction of his workforce. The Tribunal may be called upon to consider the reduction of workforce only if a worker registers a complaint with the Permanent Secretary of the relevant Ministry. Even then, as per section 39B of the ERA, the matter may not come before the Tribunal at all. It is only if the Permanent Secretary is of the opinion that the worker has a bona fide case that he will refer the matter to the Tribunal (provided that the worker did not institute proceedings before the Court). The Tribunal then conducts an assessment *a posteriori* to decide whether the reduction of workforce was indeed justified or not.

In the case of **Edouard Trading Ltd v Tang Yat Hee & Ors 1994 MR 40**, the Supreme Court stated the following in relation to section 39(2) of the now repealed Labour Act:

"Section 39(2) of the Act reads as follows-
(2) Any employer who intends to reduce the number of workers in his employment either temporarily or permanently shall give written notice to the Minister, together with a statement for the reasons for the reduction.

Clearly this can only refer to an intention to reduce the number of workers by actively terminating their employment, i.e. by dismissing them. It cannot refer to a situation where the employer proposes to canvass lawful means of finding alternative employment for the workers, or enabling them to do so. It follows that the obligation to notify the Minister only arises when the employer forms the intention to dismiss one or more workers.

Let us assume that X who employs 12 persons decides that, for economic reasons, he can rearrange his business to make do with only 7 workers. X then calls a meeting of his employees and explains the situation; if within a week, one worker dies, another emigrates, and a third takes up employment with a sister company, it cannot then be said that X has incurred an obligation to notify the Minister as from the time he thought about the matter."

In the case of **Mr Deepacksing Ramjeet And Sugar Investment Trust, ERT/EPPD/RN 02/15,** the Tribunal found, inter alia, that the notice (a letter dated 4 June 2015) given under section 39B(2) of the ERA was flawed. The Tribunal stated the following:

"We consider it insufficient that an employer simply gives notice of intention to reduce without some specificity regarding the reduction as this would allow an employer to terminate employment of workers without them having a chance to make representations before their redundancy actually takes effect. (…) Indeed in the present matter the list of workers whom the Respondent intended to terminate their employment was only communicated following the Board decision on the 18th of June 2015. It is on that list that Complainant's name appeared. The intention to reduce cannot be an ongoing process."

Section 39B(3)(b) of the ERA further provides that "notwithstanding this section, an employer (as defined) shall not reduce the number of workers in his employment unless he has where redundancy has become inevitable (underlining is ours)-

(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out, and

(ii) given the written notice required under subsection (2).

The Tribunal is of the opinion that the notice is to be given where redundancy has become inevitable, that is, where alternatives have been duly explored in consultation with the union. The list of workers to be made redundant has to be established. There are valid reasons for notifying the Permanent Secretary who may then intervene and assist in respect of every worker concerned with the intended reduction of workforce. It is apposite to note that section 39B(4) of the ERA provides specifically that where an employer reduces his workforce, the employer and the worker may agree on the payment of a compensation by way of a settlement (even before any complaint is made with the Permanent Secretary). Though the Code of Practice under the Employment Relations Act may not find its application in relation to the case before us, yet the Tribunal finds that it may provide useful guidance as to the role to be played by the Ministry. Thus, article 62 of the Code provides for example that where redundancy

becomes inevitable, management shall offer help to workers in finding other jobs, in co-operation with the Ministry responsible for employment.

Though we highlighted the differences between the procedures for reduction of workforce under the old law (Labour Act) and as they now apply under section 39B of the ERA, yet we find that the notice given to the Permanent Secretary should contain the names of the workers who are to be made redundant. In the present case, this "formal notification of the list of employees to be made redundant" was given only on 13 November 2015 to the Permanent Secretary, that is, less than 30 days before the reduction of workforce.

(2) **Exploring the possibility of avoiding the reduction of workforce in consultation with the relevant trade union**.

In relation to consultation with the relevant trade union as required under section 39B(3)(a) of the ERA, the Tribunal has examined the evidence adduced by all parties and the detailed statements of case/reply including the Tables annexed pertaining to the consultations allegedly held.

The duty to consult the relevant trade union is mandatory in this particular case and is a requirement of the law. Even in the absence of such a mandatory requirement under section 39B(3)(a) of the ERA, the Tribunal is of the opinion that management would still have had the obligation to consult the recognised trade union in the light of general principles of good employment relations. Thus, article 66 of the Code of Practice (see above) provides that "*Communication and consultation are particularly important in times of change. (…) Major changes in working arrangements shall not be made by management without prior discussions with workers and their trade unions, if any*." The question in this particular case is whether the Respondent has complied with the requirements of section 39B(3)(a) of the ERA and explored sufficiently the possibility of avoiding the reduction of workforce by means of the alternatives specifically listed in that provision of the law in consultation with the relevant trade union.

The various meetings held and correspondences exchanged suggest that the Marine Transport & Ports Employees Union (MTPEU) was informed of the restructuring exercise since 23 June 2015. It is not challenged before us that MTPEU was indeed the relevant trade union for the purposes of section 39B(3)(a) of the ERA. Complainant No 1 was a Chief Manager and was allowed by management to be present at meetings as a representative of non-unionized staff.

We may here refer as guidance to a **Good Practice Note (August 2005)** on "Managing Retrenchment" by the **International Finance Corporation**. The Good Practice Note states that "*without consultation, companies run the risk of not only getting key decisions wrong, but also breaching legal rules and collective agreements and alienating workers and the community. Workers can often provide important insights and propose alternative ways for carrying out the process to minimize impact on the workforce and the broader community*."

The employer must in consultation with the trade union explore the possibility of avoiding the reduction of workforce. A list of five alternatives is laid down in section 39B(3)(a) of the ERA and management is expected to consider these alternatives in consultation with the union. For meaningful consultation to happen, Recommendation No. 166 concerning 'Termination of Employment at the initiative of the employer' (as guidance since Mauritius is not a signatory thereof) provides that consultations should be held before the stage at which redundancy has become inevitable. As a corollary to the right to be consulted and for the union to participate effectively in the consultations, the employer should supply the union in good time with all relevant information on the reduction of workforce contemplated and the effects they are likely to have. This will include information such as the reasons for the redundancy (which is contemplated), the number and categories of workers likely to be affected and the lapse of time over which the exercise is expected to be carried out.

The Supreme Court in the case of **R. Mohun R & Ors v The Ministry of Public Infrastructure & ors, 2003 SCJ 253** had the opportunity to consider the requirements of "consultation". That case was in relation to a decision taken by a public authority which touched on the livelihood of the applicants in that case and the principles highlighted for an entity to satisfy its statutory duty to consult are very helpful. The Court thus had this to say:

Authorities entrusted to take decisions in a democratic society should not assume that the exercise of their power includes power to override people's legitimate interests and acquired and settled ways of life unilaterally. The obligation to seek the views of parties that will suffer the consequences of public actions has become such a general feature in Administrative Law that where the law actually imposes a specific duty to consult , it is regarded as a statutory guarantee of the general rule rather than an exception to a contrary rule. As has been stated -

"Administrative authorities are frequently under a statutory duty to consult before taking certain specified action. They will often wish to consult, even if not so required; but a statutory requirement is intended as a guarantee that they will do so."

In Administrative Law, it is an extension of the duty to be fair evolved from the oft-quoted Rules of Natural Justice. Consultation constituting as it does a process of civic education for all is an exercise in mutual self-learning as it affords both people sensitization and public body sensitization. For one, the community educates itself on the problems facing the public body. For another, the public body educates itself on the problems facing the public. On the whole, it enhances the democratic process:

"The purpose of consultation is to give those affected by a proposed action an opportunity to put their case; or where they have some special knowledge, experience or expertise, to ensure that it is put at the disposal of the authority; or both. It should ensure that the authority does not overlook matters it ought to have regard to."

Could it not be said that the meetings which the sellers had with the District Council and the visits satisfied that duty requirement? The answer must be negative, in the light of court decisions on the point. First, consultation is a mere cosmetic exercise. It requires an invitation by the consulter for fruitful communication with the consulted. Thus, it has been decided in the case of Agricultural, Horticultural & Forestry Industry Training Board v Aylesbry Mushrooms Ltd [1972] 1 All ER 280 that the mere sending of a letter constitutes but an attempt to consult and this does not suffice. The test as a rule is whether reasonable steps have been taken to contact those entitled to be consulted.

Second, once the process of consultation is engaged, there is a duty not merely passively to receive and consider the views expressed but actively to ensure that an opportunity is given for the views to be expressed: see Rollo v Minister of Town and Country Planning [1948] 1 All ER 13.

Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496 was a case for an order challenging the designation of a new town on the ground of failure to consult. Though the application failed on the facts, Morris J. indicated what consultation meant. It comprised (a) the authorities putting of their case so to speak to the interested parties and (b) giving the latter an opportunity of saying anything they wanted to say.

Third, an opportunity afforded to the invitees should be real and not illusory. Thus, the persons consulted must, subject to any statutory time-table, be allowed reasonable time to put their case: see Lee v Secretary of State for Education and Science 1968 66 LGR 211. The authority in this case gave the interested parties four days. The Court held that four days was wholly unreasonable and extended the time by four weeks on the ground that there was a duty to give a real and not an illusory opportunity to make representations. Similarly, in the 1965 Mauritian case before the Privy Council, which involved consultation of the local authorities for a change of town boundaries, it was commented that eleven days to submit their comments seemed to the Board to be 'remarkably short and particularly so in the absence of stated reasons which pointed to a measure of urgency': Port Louis Corpn v A-G of Mauritius 1965 AC 111. Admittedly, the precise requirements of consultation will differ from case to case and 'the nature and effect of consultation must be related to the circumstances which call for it.' But that

does not absolve the public body from the duty of undertaking a proper and an adequate consultation in the circumstances.

A question might arise as to whether the authorities may not plead urgency as in this present matter? In R v Secretary of State for the Environment, ex p Association of Municipal Authorities [1986] 1 All ER 164, consultation did take place but on the account of urgency, it was rushed and inadequate. The court ruled that, as the regulations were about a scheme that was to be administered by local authorities because of their expertise in the particular matter, it was essential ('mandatory') that they be consulted. The defendant sought to justify the inadequate consultation on the ground of urgency. The court said that urgency could not absolve the authorities from the duty of adequate consultation and urgency, on the facts, was no excuse.

Fourth, consultation in all cases clearly requires that the opinions and views expressed be considered with, as Morris J. put it, a 'receptive' mind. If it could be shown, as in Wood v Ealing London Borough (1967) Ch. 364, that those consulted were presented with a 'fait accompli,' there would be a failure to consult.

It is not disputed that there were several meetings and correspondences exchanged between management and the union in relation to the restructuring exercise. Right from the first letter dated 23 June 2015 (Doc B) from Respondent, it would appear however that reduction of workforce was already considered as inevitable and the consultations envisaged were to minimize, if possible, the number of redundancies. This is also borne out from the minutes of the meeting held on 23 June 2015 where union representatives were informed that the restructuring of Respondent would result in rightsizing of Respondent's personnel. The minutes of the meeting of 23 June 2015 (p46 of Doc S produced by Mr Ronoowah) include the following:

"MSCL Management informed the union on the following:

…

The restructuring process would inevitably lead to loss of employment at MCSL."

The Respondent then had not even explored the possibility of avoiding the reduction of workforce in consultation with the union. The union then informed management that they would not make any proposal until they were informed of the policy of Respondent in respect of the restructuring process, what would happen to employees, the objectives of MCSL and how and when the restructuring process would be carried out. Information was sought by the union and management did provide some information including in a letter dated 2 July 2015 (at page 7 of Doc S). At another meeting held on 9 July 2015, information was provided by management in relation to the categories of employees who would be more affected by the restructuring exercise. The union however was

informed that the HR audit report which was mentioned in Respondent's letter of 23 June 2015 could not be disclosed. The accounts for 2014 (in fact we should now refer to accounts for the 18 months' period from 1 Jan 2014 to 30 June 2015 as per the evidence of Mr Ronoowah) were not available even when the Tribunal heard the present matter.

There was no meeting between management and the union for some time and things then moved fairly quickly starting with a meeting held on 6 November 2015. A list of 30 staff to be made redundant was shown to the union. The union refused to take the list of workers submitted to them and complained that the restructuration plan should have been carried out in consultation with the union (p 57 of Doc S). Mr Tan Yan stated that the union did not take the list because there had been no negotiation with the union. The list was eventually sent to the union by way of a letter dated 13 November 2015. This letter (Annex 19 to Respondent's Reply to Statement of Case of Complainants' 2 to 11) from Respondent includes the following:

- *MSCL Board and Management have already explored the possibility of avoiding or reducing reduction of workforce by means of-*

  - ***restrictions on recruitment**; (for example, in the HR section the Human Resources Executive as well as the Asst Manager HR and in Finance Section the Accounts Officer and Accounts Executive, Internal Auditor have not been not replaced).*

  - ***retirement of workers** who are beyond the retirement age; (Mr Ravina MSCL encouraged his early retirement last month but has not replaced him after he left).*

  - ***reduction in overtime**; (overtime figures have been reduced considerably over the past few years and will continue to be monitored and restricted to necessity cases in a new business model.)*

  - ***shorter working hours to cover temporary fluctuations in manpower needs;** (After the voluntary departure of ….)*

  - ***providing training for other work within the same enterprise**; (to save cost, a number of staff from the operations have already been redeployed to other departments/sections like spare parts purchase, agency business and crewing and manning)*

- *Some of the above measures have already been put in place as early as March 2015 (i.e since the reconstitution of MSCL Board) and without which the number of redundant employees would have been more than what is being tabled today.*

- *Despite the above measures, redundancy at MSCL has become inevitable. (..)"*

Complainant No 1 was made redundant on 16 November 2015. Requests were made for counterproposals from the targeted workers and management indeed received and considered counterproposals made. Management held a final meeting on 30 November 2015 (Annex 20 to Respondent's Reply to the Statement of Case of Complainants' No 2 to 11) with the union and proposals were made by the union. The union sent written proposals on 2 December 2015 in connection with the proposed VRS of Respondent (Annex 22 to Reply to the Statement of Case of Complainants' No 2 to 11) and asked pertinent questions in a separate letter (Annex 21 to the same Reply) on the restructuring exercise. On the next day, the Board considered the proposals of the union on the VRS (underlining is ours) and the union was informed on 4 December 2015 of the Board's decision. Termination letters were issued on 4 December 2015 to Complainants No 2 to 11.

The letter dated 13 November 2015 (as quoted above) tends to indicate that there was no consultation with the union on the issues specifically mentioned in section 39B(3)(a) of the ERA. Though there were meetings held between the union and management, the stand of management, right from day one, when the union was informed of the restructuring exercise was that the restructuring process would inevitably lead to loss of employment at Respondent. Though Mr Tan Yan when deposing referred at some point in time to "negotiation", he confirmed that alternatives to redundancy were not considered with the union. For the reasons given above, the Tribunal is not satisfied that the Respondent has in consultation with the trade union explored the possibility of avoiding the reduction of workforce (underlining is ours).

The Tribunal also fails to understand why the Respondent proceeded to terminate the contract of employment of Complainant No 1 on 16 November 2015 and thus treat the latter differently from unionised workers following one and the same restructuring exercise.

(3) Financial aspects

1. The principal activities of the Group are to:

(i) operate cargo cum passenger vessels.

(ii) provide shipping agency services.
(iii) provide crewing and marine technical management services.
(iv) provide victualling services.
(v) provide stevedoring services and
(vi) trade in duty free products.

2. The Company has registered accumulated losses before Tax as follows:

	Rs
2010 -	51,309,029
2011 -	50,260,378
2012 -	87,203,094
2013 -	55,133,946

3. The Company has reckoned an increase in Revenue :

	Rs
2010 -	409,953,132
2011 -	433,301,723
2012 -	447,649,465
2013 -	461,599,972

4. The Group has accumulated losses before Tax as follows:

	Rs
2010 -	44,189,298
2011 -	41,562,068
2012 -	86,192,180
2013 -	54,921,061

5. The Group has registered Revenue:

	Rs
2010 -	435,352,156
2011 -	453,548,950
2012 -	447,649,465
2013 -	461,599,972

6. The auditor of the Group, Messrs Nexia Baker &Arenson highlighted the Going Concern issues in their Audit Report for year ended 31 December 2013.

Observation

Since the Company is underlying accumulated losses, a financial analysis should be carried out on the liquidity and solvency of the Company and the Group to determine the financial stability of the Company and the Group.

The financial analysis is as follows:

Company

	2013	2012	2011	2010
A. Current Ratio : Current Assets / Current Liabilities	0.97:1	0.76:1	1.01:1	0.99:1
B. Acid Test Ratio : CA – Stock / CL	0.96:1	0.75:1	1:1	0.98:1
C. Debt to Equity : Total Debt / Equity	3.4:1	1.74:1	0.85:1	0.76:1

Group

	2013	2012	2011	2010
A. Current Ratio :	0.96:1	0.76:1	1.01:1	1.22:1
B. Acid Test Ratio :	096:1	0.75:1	1:1	1.21:1
C. Debt to Equity :	3.3:1	1.73:1	0.86:1	0.83:1

Conclusion

- The liquidity ratios indicated above should be considered in the context of a wholly owned Government entity.

- A major part of the debt represents borrowings from the Government of Mauritius.

- The borrowings could be capitalized in order to reduce the Debt to Equity ratio to a reasonable level. This action was previously done in 2010 and Respondent intends to make a similar request as per his own Statement of Case.

- As at 31 December 2013, the Company still appeared to be solvent.

- The Company as well as the Group does not appear to have any liquidity problems as disclosed by the statement of Cash Flows for each of the years under review.

- The Company and the Group have rather a profitability issue.

- Through the Respondent, the Government of Mauritius is providing essential services to other Indian Ocean Islands namely Rodrigues and Agalega.

- Government objectives are not to make profits but rather social implications whilst ensuring at the same time efficient organizations.

- Being fully owned by the Government of Mauritius (directly and indirectly) Respondent has social responsibilities as well as a responsibility towards the Government of Mauritius to be a sustainably profitable entity.

- In the absence of 2015 and 2014 financials, it is inappropriate to ascertain whether the profitability issues relate more to mismanagement than fall in activities as the Company has registered sustainable Revenue.

- Taking into account the above factors, with regards to profitability, liquidity and social implications, the Company appears to be solvent.

(4) <u>Criteria adopted for the reduction of workforce</u>

The "General Criteria" used to identify the original list of 30 staff whom it was intended to make redundant is provided in the Respondent's Reply to the Statement of Case of Complainants No 2 to 11. The "General Criteria" used is as follows:

- "*Last in First Out (LIFO) (on a departmental and position wise basis but taking into consideration the necessity to maintain organizational and departmental hierarchy where appropriate, or not to endanger strategic operations in critical areas such as engineering, repairs & maintenance etc.*

- *Abolition/evanescence of post as a result of change in organizational structure, reduction in departments and/or business model;*

- *Minimum mandatory qualifications and competencies required for the posts;*

- *Past disciplinary or HR records;*

- *Any other legal criteria that the Board deems appropriate*."

It is apposite to note that the criteria as listed above is different from the criteria communicated to the union in the letter dated 13 November 2015 (p 13 of Doc S).

Under section 39B(3)(b) of the ERA, where redundancy has become inevitable, the employer must establish the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out (LIFO). The law refers to LIFO as the only principle to be used in relation to the order of discharge of workers who are to be made redundant.

By expressly providing that the order of discharge is to be made on the principle of LIFO, the legislator has removed the discretion of the employer as to who is to be made redundant first. In the case of ***Concorde Tourist Guide Agency Ltd vs. Termination of Contracts & Others, 1985 MR 70,*** the Supreme Court stated the following:

"...it must stand to reason that the application of the "last in first out" principle requires a sufficient connexity in the specifics of particular posts, including their relative status, existing as between the workers concerned. Whether the required connexity exists or not would be a matter for the Board to consider in any particular case and its decision on the point would only be reversed by the Court on review if it appeared that the Board had manifestly misdirected itself"

The LIFO principle requires sufficient connexity between the posts (including relative status) of the workers concerned. There will thus be cases where a worker may not be made redundant even though he may have been recruited last in an enterprise if there is no sufficient connexity between his post and other posts identified for redundancy. More importantly, there must be a valid and reasonable criterion why particular posts (as opposed to workers) have been identified for redundancy. Once the post has been identified, all workers occupying posts having sufficient connexity in the specifics of the identified post should be on the list irrespective of the department where they may have been posted. The order of discharge then will be purely on the basis of LIFO. In this way, a worker who has been recruited last but who, for example, is the only one responsible to ensure that the M/V Trochetia meets all the requirements for seaworthiness may not be made redundant first at the Respondent.

Also, the Tribunal is of the view that when there is a reduction of workforce under section 39B of the ERA, the employer cannot generally rely on "un motif de licenciement inhérent à la personne de l'employé licencié". The reduction in workforce (under section 39B of ERA) is essentially a "licenciement économique" and will include termination of the agreement of a worker for economic, technological, structural or similar nature affecting the enterprise. There is then "suppression du poste".

In the present case, LIFO as applied on a 'departmental basis' is most regrettable. 'Past disciplinary records' or lack of competencies, which has been referred to as a criterion, may be dealt with under other provisions of the law.

For the reasons given above and in our conclusions below, the Tribunal does not propose to analyse the case of each individual complainant separately.

Conclusions

The Tribunal finds that things were certainly not rosy for Respondent and that a need to restructure the company was no doubt called for. The change in the business model from passenger-based services to cargo-based services may require adjustments at the level of the Respondent. The Tribunal however has much difficulty in grasping the rationale for the reduction of workforce as carried out by Respondent. Our difficulty starts with what really triggered the whole exercise bearing in mind the letter emanating from the union (Doc M). There are averments made in Respondent's Reply to the Statement of Case of Complainants No 2 to 11 (dated 31 March 2016) which we cannot reconcile with the evidence adduced before us. Reference is made at paragraph 18(b) to the M/V Anna which is a cargo vessel and which we understand from the evidence of Mr Ronoowah to be a vessel coming with its own crew under the charter agreement. At paragraph 7 of the same Respondent's Reply, it is provided as follows:

"*On the other hand, with the projected acquisition of a second vessel, opportunities had opened up for well remunerated employments (monthly salary of Rs 30,000 or more) on board that new ship as crew members but also on board Respondent's existing vessel M/V Trochetia.(…)"*

Paragraph 9 provides as follows: "*Respondent wishes to place on record that, had the Disputants accepted the training opportunities that appeared in their letter of redundancy dated 04 Dec 2015, today they would already have been recruited as crew members.(…)*" Doc N which shows a notice of vacancies dated 27 January 2016 for management trainees at Respondent has not been challenged. The notice relates to strategic positions in six newly restructured departments at Respondent namely Technical & Engineering, Operations, Administration & Corporate, HR, Finance and Internal Audit. Doc N also mentions the following:

"Salary: An all-inclusive package of Rs 30,000 to Rs 50,000 p.m. during the training period."

Mr Ronoowah confirmed in evidence that trainees had been recruited one month back. Whilst there is abolition of a number of managerial positions, management trainees are being recruited shortly after. Whilst an entity may recruit new relevant staff or trainees even after a reduction of workforce exercise, this must be done in good faith. In the present case, Respondent has specifically averred (not later than 13 November 2015 in Annex 19 to Respondent's Reply to Statement of Case of Complainants' 2 to 11) that the Board and management had duly explored the possibility of avoiding or reducing reduction in workforce by means of-

*"**restrictions on recruitment**; (for example, in the HR section the Human Resources Executive as well as the Asst Manager HR and in Finance Section the Accounts Officer and Accounts Executive, Internal Auditor have not been not replaced)."*

The Tribunal finds no conclusive evidence that the reduction of workforce as carried out in relation to the Complainants was inevitable. The Tribunal has been left in the dark as to any savings being made by Respondent on the short/long term. The Tribunal is not in presence of sufficient evidence to find that the reduction of workforce as carried out in relation to the Complainants (over and above the termination of contract of 50% or so of crew members (on contract) following the sale of M/V Mauritius Pride) was justified. Staff costs of the company as per the Financial Statements for the year ended 31 December 2013 represent only 7.8% of its total operating costs and administrative expenses. In the light of all the reasons given above including the non production of the HR audit report, of the 2014/2015 financials which were of utmost importance the more so following the sale of M/V Mauritius Pride in 2014 (with all necessary repercussions including effect on items such as depreciation) and the Board's decision which was taken in 2015 on the basis of financial statements running only up to December 2013, the mission and responsibilities of Respondent, the new business opportunities still contemplated by Respondent and the manner in which the present reduction of workforce has been carried out procedurally**,** the Tribunal finds on a balance of probabilities that the reduction of workforce is unjustified.

Since consent of a worker is essential before any order for reinstatement can be made and in the light of the stand of both counsel for Complainant No 1 and Complainants No 2 to 11 and the evidence before us, the Tribunal opts for the alternative course which is that of payment of severance allowance in accordance with Section 46(5) of the Employment Rights Act 2008. The Tribunal orders that the Respondent shall pay to each complainant severance allowance as follows:-

(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months remuneration; and

(ii) for any additional period of less than 12 months, a sum equal to one twelfth of the sum calculated under paragraph (i) above (sum equivalent to 3 months remuneration) multiplied by the number of months during which the complainant has been in continuous employment of the Respondent.

The Tribunal awards accordingly.

The Tribunal wishes to thank all Counsel for their understanding of the strict time limit imposed on the Tribunal to adjudicate on this matter.

(sd) Indiren Sivaramen

Vice-President

(sd) Arassen Kallee

Member

(sd) Ali Osman Ramdin

Member

9 May 2016