EMPLOYMENT RELATIONS TRIBUNAL
(EMPLOYMENT PROMOTION AND PROTECTION DIVISION)

ERT/EPPD/RN 01/18

AWARD

Before: -

Shameer Janhangeer	**Vice-President**
Arassen Kallee	**Member**
Teenah Jutton (Mrs)	**Member**

In the matter of: -

1. **Ms Simla Douraka**
2. **Ms Lavishka Makoondlall**
3. **Mrs Kabita Jang**
4. **Mr Salah Mohamed Muhawish Al-Janabi**
5. **Mr Raja Veerabadren**

Complainants

and

Medical and Surgical Centre Ltd (Wellkin Hospital)

Respondent

The present matter has been referred to the Employment Promotion and Protection Division of the Tribunal pursuant to *section 39B (6)(a)* of the *Employment Rights Act 2008* (the *"Act"*) by the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training (the "Ministry"). The Terms of Reference of the dispute are as follows:

Whether the reduction of the workforce affecting the disputants is justified or not in the circumstances or otherwise.

The reasons for the reduction of the workforce given to the Permanent Secretary of the Ministry by the Respondent employer in its Notice dated 26 September 2017 read as follows:

> B. *The Company has, in its unrelenting quests to, inter alia, (a) optimise the business operations of WELLKIN, (b) improve its financial situation and (c) enhance, through rational means, the level of care and services which are dispensed to all its patients at the said hospital, conducted a review of its existing organizational structure.*
>
> C. *In furtherance to the said review, an objective assessment of all the scheme of duties – and corresponding job titles and positions – which are attached to each individual worker has been carried out; and the Company has come to the conclusion that it cannot, in all good faith, take any other course but to reduce, for economic / structural reasons and on a permanent basis, 15 positions.*

All the parties were legally assisted. Mr S. Mohamed, of Counsel, appeared on behalf of the Complainant Nos. 1, 3, 4 and 5 instructed by Miss G. Kissoon, Attorney-at-Law. Mr A. Sookoo, of Counsel, appeared for Complainant No.2 instructed by Mrs D. Ghose-Radhakeesoon, Attorney-at-Law. Miss D. Bismohun, of Counsel, appeared together with Mr M. Sauzier SC, instructed by Mr T. Koenig SA on behalf of the Respondent. All the parties have respectively filed a Statement of Case in the present matter.

THE STATEMENT OF CASE OF COMPLAINANT Nos. 1, 3, 4 and 5

Complainant Nos. 1, 3, 4 and 5 were employees of British American Hospitals Enterprise Ltd ("BAHEL") prior to its acquisition by the Respondent in January 2017. In 2015, the Government set up NIC Healthcare Ltd to oversee the hospital's day-to-day operation. The Respondent, through a letter dated 23 January 2017, informed the Complainants that management had taken a commitment to secure the employment of one and all and that as from 20 January 2017, they were employees of the Respondent. They were also informed that their years of service would be taken over by the Respondent.

On 26 September 2017, the Respondent informed the Complainants that following an objective and detailed assessment of all the scheme of duties, it had come to the conclusion that it could not, in good faith, take any other course but to reduce for economic/structural reasons and on a permanent basis 15 positions, which comprised the positions of the Complainants. Their posts will be abolished as from 31 October 2017. The Complainants, on 27 September 2017, registered complaints with the Permanent Secretary of the Ministry, who enquired into the complaint with a view to promoting a settlement between the parties. No settlement was reached and the matter was referred to the Tribunal.

The Complainants believe that the redundancy is unjustified for the following reasons:

1. the Respondent failed to adequately or at all explore the possibilities of avoiding the reduction of workforce with non-unionised members and the union;

2. the Respondent failed to give written Notice to the Permanent Secretary of the Ministry together with a statement of reasons at least 30 days before the redundancy;

3. the Respondent did not adopt the principle of '*last in, first out*';

4. the Respondent was not facing any economic downturn as it is solvent; its assets were more than sufficient to meet its liabilities; its Human Resources Manager Mr Clive Chung conceded, in a meeting on 8 December 2017, that the Complainants were made redundant for structural reasons and not for economic reasons as stated in the letters dated 26 September 2017; despite the abolition of a number of posts, 75 new staff were recruited from January to September 2017 as per email dated 26 September 2017 (Annex 1); many new recruits are foreigners; and the Respondent's financial status and new recruitment show that its economic structure did not in fact warrant the Complainants' redundancies.

Complainant No.1 joined the hospital in March 2009 as Personal Assistant; in April 2010, she was appointed Executive Secretary; in April 2011, she was posted to assist the GM Operations; in April 2012, she was made Executive Secretary to the CEO; in January 2014, she was offered the post of Marketing Administrator and in July 2014, the post of Business Development Executive. On 25 August 2017, the Respondent recruited a Head of Sales and on 27 September 2017, Complainant No.1 was made redundant. The new Head of Sales is performing the same duties as the two Business Development Executives, which has been restyled as the former.

Complainant No.3 joined the hospital on 6 June 2011 as Executive Secretary and in January 2014, was made Project Coordinator. In 2015, following the change in management, she was assigned other duties and carried out assignments conferred by the Chairperson of NIC Healthcare Ltd. Given her years of experience and service, she could have joined any other department of the hospital and undergo necessary training in lieu of the newly recruited staff and/or even provide assistance to the Head of Nursing.

Complainant No.4 joined the hospital as Clinical Services Development Manager on 10 August 2009 posted in the Medical Services Department. In June 2012, he was promoted to Senior Clinical Coordinator and in November 2013, he was made Deputy Chief Medical Officer being responsible for all non-clinical departments, which generate a third of the hospital's total monthly revenue. This revenue was doubled from Rs 49 million in August/September 2015 to Rs 98 million in August 2017. The revenue trends of the department under his responsibility increased from January to August 2017, yet he was made redundant.

Complainant No. 5 joined the hospital in May 2007 during its construction as Procurement Officer and occupied the position of Procurement Executive until the abolition of his post. A new recruit is now performing his duties.

The Complainants therefore aver that the redundancies were not inevitable and were made in utter bad faith. The Complainants therefore pray that the Tribunal finds that the reduction of workforce, and in particular their redundancies, are unjustified; and that they be paid severance allowance as per *section 46 (5)* of the *Act*.

THE RESPONDENT'S STATEMENT OF REPLY TO COMPLAINANT Nos. 1, 3, 4 and 5

The Respondent has notably averred that on 25 September 2017, a formal meeting was held with the representative of the trade union in accordance with *section 39B (3)* of the *Act* to explore the possibility of avoiding a reduction in workforce. Unfortunately, it was found that the redundancy of the Complainants was inevitable and a written notice was sent to them on 26 September 2017. The list of the employees made redundant was duly communicated to the representatives of the trade union prior to the aforesaid meeting. The Complainants do not have a *bona fide* case to make the present application.

The Respondent avers that a written Notice dated 26 September 2017 was given to the Permanent Secretary of the Ministry together with a statement of reasons, wherein the Respondent informed that the reduction shall take effect as from 31 October 2017 (Annex R1); the Respondent, on 06 January 2017, entered into an agreement with NIC Healthcare Ltd to take over the operations of the hospital; following the takeover, one of its main objectives was to turn a loss making hospital into a viable and sustainable business model and the Respondent had to reorganise operations so as to increase efficiency and improve patient care services. Since 2010, the hospital was running financial losses which amounted to Rs 3.5 billion from 2010 to 2016; the redundancy of the Complainant was for both economic and structural reasons as mentioned in the letter dated 26 September 2017; the principle of '*last in, first out*' was not applicable to the tailor-made positions the Complainants occupied; the hospital has been running on a loss since 2010; for effective running of the hospital, clinical staff were recruited for provision of adequate patient care services; top level foreign recruits professionals were deputed by Fortis Healthcare International Ltd (with whom Respondent has an Operation and Management agreement) to turnaround the company and improve patient care services; the recruitment of the staff is irrelevant to the Complainants' redundancies. The Respondent denies that each of the Complainants' redundancies was unjustified.

A Head of Sales, Mrs Janeeta Seebundhun, was recruited on 01 September 2017, with different and higher responsibilities to those of Complainant No.1. This recruitment is

irrelevant to Complainant No.1's redundancy as the former is at a higher position and has a different scheme of duties.

The Respondent is not aware of the duties ascribed to Complainant No.3 during the transition period 2015-16. When Respondent took over, the said Complainant did not have a clear scheme of duties and was proposed to move to the Marketing Department to assist in the rebranding of the hospital; however, she was not agreeable to perform all the duties and task ascribed to her.

The Respondent has averred that Complainant No.4, who is not a medical doctor, was made Deputy Chief Medical Officer and given responsibility for all non-clinical departments with the Medical Services Department. After careful consideration and in view to deliver better medical care programs, it was deemed more appropriate to appoint a Medical Doctor as Head of Medical Services. The said Complainant's position was no longer required in the new structure of the department in view of the more efficient running of same. The Respondent admits that the revenue trend of the department increased between January to August 2017, but this is due to an increase in patients. There were issues with the said Complainant's performance and same was brought to his attention in a meeting on 20 June 2017 followed by a letter dated 30 June 2017.

Regarding Complainant No.5, he was appointed as Material Executive and Purchase as from 1 June 2009 and confirmed as Procurement Executive on 30 November 2009. During the administration of NIC Healthcare Ltd, he was moved to the Store Department acting as interim Head of Store effective 19 September 2016. However, he did not sign any letter of appointment. When Respondent took over, he was not occupying the position of Procurement Executive and was neither performing the duties of Procurement Executive or Head of Store. The latter position was made redundant. A Head of Supply Chain Management and Procurement was recruited at group level for both hospitals under the Respondent company but not at the level of Wellkin Hospital. This recruitment is irrelevant to Complainant No.5's redundancy.

The Respondent avers that the redundancy was done in good faith in conformity with the *Act*. The Complainants' claims are not *bona fide*, unfounded and should be dismissed.

THE STATEMENT OF CASE OF COMPLAINANT No.2

Complainant No.2 has been in continuous employment as Business Development Executive since 03 November 2014 and was drawing, as at October 2017, a basic monthly salary of Rs 40,875/- together with a monthly transport allowance of Rs 8000/- and a monthly phone allowance of Rs 1000/-. On 26 September 2017, Respondent notified her of its decision to terminate her employment for alleged economic/structural reasons effective 31 October 2017. The Respondent has failed to give 30 days' written Notice together with a statement of reasons to the Permanent Secretary.

The reasons given by Respondent for her dismissal on alleged economic/structural grounds do not constitute valid reasons as one Mrs Janeeta Seebundhun was hired on a more lucrative package to that of Complainant's; Respondent has failed to comply with the '*last in, first out*' principle; Respondent has failed to consult the recognised trade union to explore the possibility of avoiding the reduction in workforce; and the Respondent has also failed to explore the possibility of avoiding a reduction of workforce by the means set out in *section 39B (3)(a)* of the *Act*. The Respondent's choice to dismiss the Complaint was clearly erroneous, wrong and arbitrary and not made in good faith. She was not afforded any opportunity to be heard prior to her dismissal. Respondent did not engage in any negotiations whatsoever to modify her conditions of work in an attempt to find other ways and means to preserve her employment. The Complainant is therefore claiming severance allowance from the Respondent in the sum of Rs 470,468.75/- and prays that the Tribunal awards her same.

THE RESPONDENT'S STATEMENT OF REPLY TO COMPLAINANT No.2

The Respondent has notably averred that Complainant No.2 was on a two-year contract from 3 November 2014 to 2 November 2016 and is not aware that the contract was renewed. Complainant No.2's primary function was to develop the Heart Centre. Respondent admits the Complainant's salary and allowances save that she was entitled to a limit of Rs 1000/- for the use of a company phone. On 25 September 2017, a formal meeting was held with the representative of the trade union in accordance with *section 39B (3)* of the *Act* to explore the possibility of avoiding a reduction in workforce. Unfortunately, it was found that the redundancy of the Complainant was inevitable and a written notice was sent to her on 26 September 2017. The list of the employees made redundant was duly communicated to the representatives of the trade union prior to the aforesaid meeting. A Notice, on 26 September 2017, was sent to the Permanent Secretary of the Ministry together with a statement of reasons and Respondent therein informed that the redundancy shall take effect as from 31 October 2017 (Annex R1).

The Respondent has averred that on 6 January 2017, it entered into an agreement with NIC Healthcare Ltd to take over the operations of the hospital; following the takeover, one of its main objectives was to turn a loss making hospital into a viable and sustainable business model and the Respondent had to reorganise operations so as to increase efficiency and improve patient care services. Since 2010, the hospital was running financial losses which amounted to Rs 3.5 billion from 2010 to 2016; in view of transforming the hospital, the Respondent had to look for top talents with specific competencies to assist in the hospital's transformation and Mrs Janeeta Seebundhun was recruited as Head of Sales with different and higher responsibilities to those of the Complainant. The recruitment of the Head of Sales was made at a higher position and she had a different scheme of duties to the Complainant and is irrelevant to the latter's redundancy. The principle of '*last in, first out*' does not apply to the recruitment. The Respondent did, at the material time, duly explore possibilities of avoiding a reduction in workforce.

The Respondent further avers that it acted in good faith at all material times and that the Complainant's redundancy was inevitable. The Respondent denies the Complainant's claim for severance allowance and that it is indebted to her in the sum claimed or for any sum whatsoever. The Complainant's redundancy was done in accordance with the provisions of the *Act* and her claims are not *bono fide*, unfounded and should be dismissed.

THE EVIDENCE OF WITNESSES

Mr Veesham Sookun, Management Support Officer at the Ministry of Labour, Industrial Relations, Employment & Training, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. He stated that the Medical and Surgical Centre Ltd ("MSCL") has a quota of 176 foreign workers, currently has 60 such workers and 10 applications are being processed. The quota relates to Wellkin Hospital. The witness produced a brief for the number of work permits issued for the periods January 2015 to 19 January 2017 and 20 January 2017 to date (Document A). The number of approvals for the first period is 130 and 102 for the second period. Under cross-examination, the witness stated that there were 111 applications for work permits for 20 January 2017 to 21 September 2018 for Wellkin Hospital and 102 approvals for the same period.

Mrs Carole Réhaut, Manager at the Economic Development Board, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. She stated that from January 2015 to 19 January 2017, 47 occupation permits were issued to BAHEL; and from 20 January 2017 up to date, 38 occupation permits have been issued of which 8 have expired. A document showing the list of occupation permits was produced (Document B) together with a recap (Document B_1).

Mr Mahendrasingh Seebarruth, Senior Labour and Industrial Officer at the Ministry of Labour, Industrial Relations, Employment & Training, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. He stated that 15 workers were made redundant by Wellkin Hospital. His Ministry received a letter dated 26 September 2017 as Notice (copy produced as Document C) in line with *section 39B (2)* of the *Act*. Complainant Nos. 1, 3, 4 and 5 each registered a complaint at the aforesaid Ministry before their termination date of 31 October 2017, following which an enquiry was carried out. The company has around 613 workers. He did not receive much information from the Head of Human Resources at the Respondent, Mr Clive Chung, during his enquiry as to what exercise the Respondent carried out. No answer was given on whether there was any consultation for Complainant No.1, who is not a member of the Union. He is not aware if consultations according to law took place as per his enquiry. Upon being informed by Mr Chung that the company was facing

financial difficulties for the past three years, a reference was made to the Senior Analyst of the Ministry of Finance. Mr Chung did not produce the financial statements for the past three years. No information was divulged to explain the economic strife of the company. He is not aware of any commitment from the new owner of the hospital regarding jobs. He did not obtain the agreement witnessing the commitment of CIEL not to terminate any jobs. Not much information was given to him regarding the structural reasons put forward by the Respondent in the Notice.

Mr Seebarruth, under cross-examination, notably stated that Complainant No. 2 does not form part of the bargaining unit. His role, upon receiving the Notice, was to enquire into the reduction. Mr Chung told him that he is not in a position to give any information. He called at the Registrar of Companies to obtain the financial statements.

Miss Saveetah Deerpaul, Senior Analyst at the Ministry of Finance, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. She stated that she was asked to carry out an analysis of the financial statements of the Respondent for the years ending March 2015, June 2016 and June 2017 in relation to a case of redundancy. She produced a report dated 13 August 2018 (Document D). From the report, she concluded that the company was making gross profits on its operations with general increases in its revenue and other comprehensive income for years 2015 to 2017; profit before tax at the end of June 2017 was drastically reduced due to an increase in finance costs including interest payments related to bank loans contracted for the purpose of the acquisition of the Apollo Hospital; there was an increase in administrative costs, which included an increase in depreciation charges following a re-evaluation exercise; an increase in transaction costs due to the activity of acquisition; and an increase in staff costs. The bank loan amounted to Rs 415 million with Rs 13 million being paid as interest on the loan per year. She produced a press release from CIEL Limited dated 15 May 2017 (Document E) stating that '*The cluster has been affected by the planned losses incurred in the month's post acquisition of Wellkin Hospital's operations.*'. She is not in a position to state if the losses were planned or not. The company is not in a financial crisis but there are events which caused the net losses in 2017.

Miss Deerpaul, under cross-examination from Counsel for Complainant No. 2, notably stated her assessment regarding solvency found a ratio of 1 : 0.6 of total assets to

total liabilities which means that the company is capable of meeting its long term debts and is quite solvent.

Miss Deerpaul was also cross-examined by Counsel for the Respondent. She notably stated that she is aware that there are two hospitals operated by Respondent company. She was only requested to carry out an analysis of MSCL and not for Wellkin individually. She noted that after taking over Wellkin, the group recorded a drastic drop in net operating profits. Net operating profits is not a true indication of the financial status of the company as expenses, such as salaries of employees, have to be deducted. The group recorded a net loss after tax as at 30 June 2017 and its liquidity position is now weaker. From her report, she cannot say if Fortis Clinique Darné ("FCD") is in a better financial position to Wellkin.

Mr Sooruj Mannick, Chartered Accountant, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. He stated that his services were retained by the aforesaid Complainants to make a report on the standing of the Respondent and Wellkin Hospital. He produced his report dated 24 September 2018 (Document F). He stated that the Company's turnover rose to Rs 1,216,000,000 for the year 2017 representing a 24% increase; as from the date of acquisition, Wellkin has contributed Rs 380 million to turnover; increases in company revenues and a decrease in the losses of Wellkin Hospital have been observed, thus the general financial performance of the company has improved. Turnover revenues for Wellkin Hospital have dropped but the Group turnover has increased. He also stated that the company since its acquisition has been financially stronger to meet its short term commitments; the company is on average generating 1.5 times revenue for every investment made in property, plant and equipment; and as per the labour efficiency ratio, the company is generating thrice Mauritian Rupees as revenues for each amount invested in human capital. There is no forecast, as per the audited reports, that the company cannot meet its liabilities and will not be able to operate in the long term. His findings are that the company as well as the Group is financially and economically stable to meet its present or future commitments. The witness also produced a copy of the audited report (Document G), which he has based himself upon.

Mr Mannick was cross-examined by Counsel for the Respondent. He notably stated that his report did not make an individual analysis of the financial position of Wellkin although he has gone over its figures for the year 2014 and for six months to 30 June 2017.

He has made an extrapolation on turnover for the later six months of the year 2017. His analysis is based on revenue. The was a dip in the loss at Wellkin from 2014 to 2017 and an improvement of operating profit over the years indicating financial improvements. He did not take into account the financial contribution made by FCD to Wellkin in the acid test ratio. The liquidity position is not very good but the company is performing well to meet its obligations. The group is doing well but not Wellkin as a unit. Goodwill is non-tangible and can neither indicate profitability or liquidity. The labour efficiency ratio is an estimate as he does not have the detailed head count of the company. He agreed that it cannot be said every employee is making three times. He agreed that he is making estimations as his report is based on the Respondent company as a group.

Mrs Prityea Chennen, Head of Accounting and Finance at Prime Partners Ltd, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. Her company is the Company Secretary of NIC Healthcare Ltd. She produced a copy of the Transfer of Business Assets deed by NIC Healthcare Ltd to Respondent (Document H); and an extract from the Asset Purchase Agreement in respect of Apollo Bramwell Hospital (Document H_1) referring to paragraph 12.1 thereof.

Mrs Katty Permal, Analyst Legal & Compliance at NIC Ltd, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. She stated that NIC Ltd is the lessee of the land and owner of the building. She produced a copy of the lease agreement dated 20 January 2017 in respect of Apollo Bramwell Hospital with the Respondent (Document J).

Mrs Darshinee Seetul, Clerk Assistant at the National Assembly, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. She has been deputed by the Clerk of the National Assembly and produced a certified copy of an extract of *Hansard No. 5 of 2017* pertaining to the session of 25 April 2017 on the sale of Apollo Bramwell Hospital (Document K) together with a consulting agreement between Omega Ark Investment Plc and Megacom Ltd, an email dated 11 May 2016 from Mr Lutchmeeparsad, Chairperson of NIC Healthcare Ltd, a correspondence dated 22 September 2015 from Megacom Ltd signed by the Project Manager and a letter dated 9 August 2016 from Omega Ark Investments Plc (Documents K_1, K_2 , K_3 and K_4).

Mr Reeaz Chuttoo, President of the *Confédération des Travailleurs du Secteur Privé*, was called to depose on behalf of Complainant Nos. 1, 3, 4 and 5. He stated having attended a meeting chaired by Counsel Mr King Fat where the Union was convened to announce that workers will be made redundant. The list of workers was announced *viva voce* in the meeting. He was there as negotiator and executive member of the Chemical Manufacturing and Connected Trades Employees Union, who is the recognised union and represents all the workers at Wellkin. Mr Clive Chung was also present. He has always tried to secure the employment of the workers first and had previously succeeded. Prior to the meeting, there was a phone call at the union office informing them that some workers will be declared redundant and the names were announced in the meeting of 25 September 2017. Regarding whether there was an attempt to explore other possibilities prior to making the workers redundant, Mr Chuttoo stated that there was a communication through the phone and only one formal meeting on 25 September; when the names were announced his reaction was whether all the possibilities to secure their jobs had been explored to which he was told that they tried their best but can't.

Mr Chuttoo proceeded to state that regarding Complainant Nos. 3, 4 and 5, he knows that there have been consultations between them and the HR Department to see how their jobs could be secured. He knows that offers were made to Mrs Jang to change jobs and she was not happy with the job offered to her; there were discussions with Mr Salah and management to see how his department could be made more profitable; and same for Mr Veerabadren. He is not aware of how many meetings took place from the moment the employer last contemplated redundancy. At the meeting, he was told that the company had purchased Apollo Hospital, they are proceeding with reforms focused on customer care and in this reform process, some jobs will no longer exist. He was told for Mr Salah that his department is not profitable; that for Mrs Jang, her job no longer exists and she is roaming searching a job to fit her. No economic reason was put forward in the meeting of the 25 September.

Mr Chuttoo was cross-examined by Counsel for Complainant No.2. He notably stated that the meeting of 25 September 2017 was at the hospital in Moka and lasted 1 ½ hours. He was informed over the phone that some employees will be made redundant prior to the meeting. It could be that the list was communicated to a trade union delegate working at Wellkin Hospital. Terms and conditions of employment of Mrs Makoondlall were not specifically discussed, there were overall discussions for all the employees. He stated to

management that all the fifteen employees should have their individual letters. At the meeting, he learnt that no individual letter was given but that they have been communicated verbally. Nothing was discussed about Mrs Makoondlall and the individual ways of saving the jobs of the workers was not discussed in the meeting as Mr Chung stated that he met with the employees and discussed with them. He stated that as the company was coming with a reform to maximise its profits, there ought to be a compensation over and above what is prescribed but this can be discussed after the employees have been given their formal letter. The employees were thereafter served with their letters of termination. Nothing was discussed about the Business and Development Department in the meeting. Mr Clive Chung asked him to make an offer at the meeting which he declined. The discussion in the meeting was not focused on Mrs Makoondlall. He cannot recall of any notes of the meeting of 25 September. The agenda of the meeting was to discuss the redundancies of fifteen employees as informed to him by Mr Chung by phone.

Mr Chuttoo was also cross-examined by Counsel for the Respondent. He notably stated that he was not present at individual meetings between the parties. Mr Chung, in the meeting of the 25 September, told him that he had meetings with all of the workers. He is aware of an article published in the press regarding seven employees of Wellkin who have received their termination letter on 13 September 2017 and produced an article from Le Defi Media dated 14 September 2017 (Document L). The verbal communications that took place prior to the meeting of 25 September were informal.

Complainant No.2, Ms Lavishka Makoondlall, was called to depose. She stated that she was recruited since 3 November 2014 by BAHEL as Business Development Executive to develop the heart centre in the Business and Development Department. She produced a copy of her contract of employment dated 8 January 2015 (Document M) which was for a period of two years. On 23 January 2017, she received a letter of the same date (produced as Document N) from MSCL. She referred to paragraph 3 of the said letter. On 26 September 2017, she was visiting doctors and received a call at 4.35 pm from Mrs Janeeta Seebundhun, the Head of Sales at Wellkin in the Business and Development Department, asking her to call at the hospital. Thereat, she received a letter dated 26 September 2017 (produced as Document O) from an employee of the HR Department. She was shocked having no idea that her job was at stake. Prior to 26 September 2017, she was not informed that her position was subject to a review; that there was a review of the organisational structure; that she was on a list of employees whose employment was to be terminated;

and that there was a formal meeting between the Respondent and the trade union on 25 September 2017 nor was she personally notified of same or was aware of the agenda. She was not approached by Mr Chung to discuss terms of work; or of reducing the hours she works; or of reducing her basic wage or travel allowance; or of her overtime; or of deploying her in another department. She is not a member of the trade union and was not aware that she was represented by a representative at the meeting of 25 September. Her position is not part of the bargaining unit. She was not informed of the meeting on 25 September 2017 by Mr Chung. She never met with the representative of the trade union.

Ms Makoondlall, referring to the Notice dated 26 September 2017, stated that neither Mr Chung nor any other person from management discussed, consulted or negotiated personally with her. From 26 September to 31 October 2017, there was no discussion held with her nor was she contacted. She and Complainant No.1 held the same position in the Business and Development Department. Mrs Janeeta Seebundhun integrated the department in August 2017 as Head of Sales. She and Mrs Seebundhun were doing the same job and working towards the same goals. Their scope of duties was basically the same. As per her qualifications, she could have been deployed to the Finance Department or to customer care. She produced a copy of her BSc Degree specialising in Statistics (Document P). Regarding the financial situation, she was employed by MSCL at the time of her dismissal and the losses of BAHEL are not relevant to her dismissal. She prayed for an award asking for compensation for her years of service.

Ms Makoondlall was cross-examined by Counsel for the Respondent. She notably stated that her contract of employment was renewed by the letter dated 23 January 2017 from MSCL and that she was paid her full salary till 31 October 2017. There was no contract between her and the Respondent in the transition period and at the time of the takeover. She was referred to her job description at Annex 1 to her contract of employment. The duties of the Head of Sales was very similar to hers. She is not aware that Mrs Seebundhun was recruited at Group level. She was not aware that since February 2017 her job was at stake nor that her unit was not operating since before the takeover. She did not agree that discussions with her started before the beginning of September. On receiving the dismissal letter on 26 September, she did not go back to the employer asking to be redeployed to other departments as her job was already redundant.

Complainant No.1, Ms Simla Douraka, was called to depose. She affirmed as to the correctness of her Statement of Case. She started work at BAHEL on 20 March 2009 as Personal Assistant and produced her contract of employment (Document Q). She elaborated on her employment history at the hospital and produced a letter dated 15 May 2015 from the Special Administrator (Document R). She also produced a letter dated 29 July 2009 (Document S) confirming her position of Personal Assistant at BAHEL, a letter dated 1 April 2010 (Document T) witnessing her transfer to the Nursing School as Executive Secretary and letter dated 22 January 2014 (Document U) confirming her position as Marketing Administrator with an increase in salary. She produced a letter dated 23 January 2017 (Document V) confirming that MSCL is carrying on with her employment as well as her termination letter dated 26 September 2017 (Document W).

Ms Douraka proceeded to state that she was first informed that her employment was being terminated on 26 September 2017 when asked to call at the HR Department while on a week's approved annual leave. She had heard two weeks before on the radio that there would be potential redundancies at Wellkin but was reassured by her Head, Mrs Seebundhun, that nothing will happen to their department. She has not had any other informal or formal meeting. She is not a member of any trade union nor has she assigned anybody to represent her in any meeting. Mr Clive Chung never spoke to her prior to the letter of 26 September nor did she have any discussions, consultation and negotiations of any sort. All the staff in the Marketing Department were performing more or less the same type of duties and the only difference was in their job titles. She was not approached for giving her a position where her qualities were required. She was not aware that Mrs Seebundhun was recruited at Group level, but they were performing the same job. Her job is still being performed at the hospital and still exists. She produced an extract of the Audited report of CIEL Limited obtained from its website (Document X). Her employer MSCL runs two hospital. After 26 September, there were no discussions.

Ms Douraka was cross-examined by Counsel for the Respondent. She notably stated that she was not aware at all that her department was being restructured nor aware of any discussions that took place nor of any changes to her department since the takeover. She and the Head of Sales are performing the same job, the only difference being the supervisory role. Referring to the scheme of duties of the Head of Sales (produced as Document Y), she recognised the duties she did therein and stated that it contains the majority of tasks she was doing. There are many other jobs she could have done at the

hospital. She was not called to any meeting on 25 September 2017 and is not aware of the contents of same. Under re-examination, Ms Douraka notably stated that in discussions as far back as January with her department not performing, the issue of redundancy was not addressed.

Complainant No.3, Mrs Kabita Jang, was called to depose. She solemnly affirmed as to the correctness of her Statement of Case. She produced a letter dated 16 June 2011 (Document Z) confirming her appointment as Executive Secretary to the Director of Nursing; her letter of promotion to Project Coordinator dated 17 July 2014 (Document AA); a letter dated 27 June 2016 (Document AB) from NIC Healthcare conferring her responsibilities; a letter dated 23 January 2017 (Document AC) from the Respondent regarding her employment; and a letter of termination dated 26 September 2017 (Document AD). On 13 September, she was called by Mr Chung to his office and was informed that her post is being made redundant. She was shocked and asked if redeployment could be considered and he said that there will be no redeployment for her.

Mrs Jang also stated that prior to this meeting, Mr Chung had assigned her to assist the Marketing Department where she was given administrative tasks by Mrs Veena Mulloo, which she carried out in her office. She confirmed that there were other times when her employer tried to make her redundant. In the meeting of 13 September, she was not proposed any retraining. Referring to paragraph E of the Notice dated 26 September 2017, she stated that no discussions were carried out. She went over a list of departments that fit her qualifications. She has a Master in Business Administration and is a certified Project Leader. She was present in the meeting of 25 September 2017 where Mr Chuttoo was representing her interests. She is a member of the trade union. In the meeting, issues of retraining her, reducing her hours of work, changing her position, accepting a lower pay were not discussed with her. She produced two lists of workers recruited by Wellkin and FCD since 2017 (Documents AE and AE_1). Since MSCL took over, there were no discussions on other options other than redundancy.

Mrs Jang was cross-examined by Counsel for Complainant No.2 and Counsel for the Respondent. She notably stated that the list of workers was not discussed in the meeting of 25 September nor about saving jobs, redeployment, training or reduction in salary but only focused on redundancy. She did not agree that she refused to assist the Marketing

Department and stated that the job was temporary. She was Project Coordinator when the NIC took over but was assisting the Finance Department. She produced the list of duties of Project Coordinator (Document AL). The meeting prior to 25 September was not to explore possibilities, she was told that she is being made redundant and that no redeployment is being considered for her. She denied that on 13 September there was a one-to-one meeting with her to see whether she could join another department and no proposals were made to her. When MSCL took over, she was assisting the HR Department. She was not aware of consultations held before 25 September.

Complainant No.4, Mr Salah Mohamed Muhawish Al-Janabi, was called to depose. He solemnly affirmed as to the correctness of his Statement of Case. He started to work at the hospital as Clinical Services Development Manager as from 10 August 2009 and produced a letter dated 25 May 2017 (Document AG) from Mr Clive Chung. He produced a letter dated 23 January 2017 (Document AH) he received from MSCL and his letter of termination dated 26 September 2017 (Document AI). He was not contracted by anyone from the Respondent for the review carried out by MSCL. He was made Deputy Chief Medical Officer responsible for all non-clinical departments within the Medical Services Department. A doctor was in charge of the said department with two deputies. He was not contacted pertaining to better medical care programmes. There are fifteen clinical and non-clinical departments each and he produced an organigram of same (Document AJ). From January 2017 to August 2017, the revenues in his departments have increased and produced a report received by email showing same (Document AK) and a report compiled by himself (Document AL).

Mr Al-Janabi also stated that on 13 September 2017, Mr Clive called him to his office informing him that his post will be abolished; Mr Clive first informed him that they have to abolish some posts no longer required, one of them being his post. It was a final decision as he was told that he does not have any alternative but to apply for two weeks per years of service. There was no other meeting thereafter. He is a member of the union and was present at the meeting of 25 September 2017. There were no discussions pertaining to other possibilities such as retraining or reduced working hours at the said meeting. The reasons given were economic and structural.

Mr Al-Janabi was cross-examined by Counsel for the Respondent. He produced his scheme of duties as Deputy Chief Medical Officer (Document AM). He is not aware of the organigram as from August 2017 when MSCK took over; it was not communicated to him. He was reporting to the Head of Medical Services, who is a doctor. He was not aware that since MSCL took over there was going to be a restructuration and this was not communicated to him at all. He denied that Mr Chung met with him several times in order to optimise his position. It was not brought to his attention since June 2017 that there will be a restructuration and that his position is at stake. He was not given any option at all by Mr Chung. He was not aware that his trade union negotiator had made contact with Mr Chung. He did not understand what the discussion was about in the meeting of 25 September, as he does not speak creole. He did not agree that he was not open to any other options after 13 September, as he wanted to negotiate a good package. The non-clinical department does not need a medical doctor. The Head of Medical Services was not appointed at Group level, but assigned to Wellkin only. He agreed that his post was abolished.

Complainant No.5, Mr Raja Veerabadren, was called to depose. He solemnly affirmed as to the correctness of the contents of his Statement of Case. He joined Apollo Bramwell Hospital on 1 June 2007. He produced a letter of reference from Dr Todorovic, the Director of Medical Services at Apollo Bramwell (Document AN) confirming his employment history. He was confirmed in the position of Procurement Executive on 20 November 2009. He was issued a letter to move to the Store Department as Interim Head of Store. When MSCL took over, he was occupying the post of Procurement Executive. He produced a letter dated 23 January 2017 (Document AO) from MSCL. His job title and assignment was Procurement Executive but he was sent to the Store to monitor and revamp same. As Procurement Executive, the Store was partly under his responsibility. Mr Ritesh Bissessur was appointed as Head of Supply Chain Management and he was never given the opportunity to apply for the said position at MSCL. He produced his letter of termination dated 26 September 2017 (Document AP).

Mr Veerabadren went on to state that on 13 September 2017, he met Mr Clive Chung along with an HR Assistant and they told him that there will be some restructuring in the hospital and due to economic reasons, his post of Procurement Executive will be abolished. They did not consider any other options before making him redundant. He did not propose any alternative being shocked. He is a member of the union and was present at

the meeting of the 25 September. No proposals in terms of retraining, reskilling, reduction of hours were made to him on 25 September. Prior to 26 September, it was only on 13 September that they announced that his post was redundant. The post he occupied must still exist. He could have done the job of the person appointed at Group level given his experience.

Mr Veerabadren was cross-examined by Counsel for the Respondent. He notably stated that his post of Procurement Executive was not abolished by MSCL. He produced a letter dated 19 September 2016 (Document AQ) showing his transfer to Interim Head of Stores. He agreed partly that he had been transferred to Head of Stores. His contract remained as Procurement Executive. He was still occupying the post of Procurement Executive when MSCL took over. The post of Head of Stores was assigned to him for an interim period. He did not agree that discussions were held between himself and Mr Chung on several occasions to find a solution for him. There was no proposition from Mr Chung. He produced an email dated 27 June 2017 (Document AR), he sent to Mr Chung. He sent the email to show what is wrong with his transfer to the Store. There were no discussions with Mr Chung on redeployment of his position. He denied that there were one-to-one meetings with him and Mr Chung beginning September 2017, that he refused to move to any other post and instructed his trade union negotiator to negotiate a package. It is not correct to say that, in the meeting of 25 September, the discussions focused on the package that would be paid to him on being made redundant. He did not agree that the new recruit has taken to do his duties as he was not performing as Procurement Executive but as Head of Stores when MSCL took over.

Mr Kevin Fok, Head of Finance, was called to depose on behalf of the Respondent. He stated that the report of Senior Analyst Miss Deerpaul shows that the liquidity position of MSCL has worsened. Wellkin has to be analysed independently and individually. Wellkin individually made a loss of Rs 112 million in the year ending 30 June 2017. He produced a report (Document AS). Wellkin was not in a position to meet its liquidity position and had to review its expenses and staff costs in order to meet its short term obligations. This loss contributed to a net loss for MSCL as a group. Mr Mannick's report is based on revenue but one should also look at the net losses. He did not agree that MSCL was financially stronger to meet its short term commitments. The analysis of Miss Deerpaul and Mr Mannick contradict themselves and he stated that the former's is correct as the liquidity position of the company has weakened. The labour efficiency ratio in Mr Mannick's report show that

staff cost as a percentage of revenue has increased compared to 2016. Regarding Mr Mannick's conclusion, Mr Fok stated that Wellkin and FCD should be looked at individually and their performance assessed separately. Wellkin's provisions show that it was a strain on the accounts of MSCL.

Mr Fok was cross-examined by both Counsel for the Complainants. He notably stated that the Complainants and himself are employed by the same company, which owns Wellkin and FCD. He is familiar with the Auditor's report on MSCL by Ernst & Young. Nowhere in the Auditor's Report is it stated that the company is not a going concern. MSCL is capable of meeting its long term debts and this is an indicator of being quite solvent. MSCL invested Rs 680 million into buying Wellkin. All the employees are employed by one company. CIEL Group has a 58% stake in MSCL. It is stated in the extract of the Audited Financial Performance of CIEL (Document X) that Wellkin's turnaround remains on track. Mr Fok also stated that as at September 2017, MSCL is a solvent company, it is financially stable and that it would be wrong to say that MSCL is financially in peril.

Mrs Veena Mulloo, Marketing Executive at Wellkin Hospital, was called to depose on behalf of the Respondent. She joined the Marketing team of the hospital on 1 April 2009. There was no restructuring to the Marketing Department. She is not aware that the post of Mrs Jang was considered for redundancy by management. She made a request to HR for a full time staff to join her and Mrs Jang was proposed to help out. The responsible of HR told her that Mrs Jang was not willing to move permanently to Marketing and that she will give a helping hand as and when needed. She produced an email 11 May 2017 (Document AT) whereby Mr Chung tells her that Mrs Jang is not willing to move in her department. There was a refusal from Mrs Jang to join. The position remained vacant and she managed on her own.

Mrs Mulloo was cross-examined by Counsel for Complainant Nos. 1, 3, 4 and 5. She notably stated that Mrs Jang wanted to work from her own office, but she wanted her to move permanently. Mrs Jang decided to work on an *ad hoc* basis, which is not what she was looking for as she was looking for someone to join her department full time. Complainant Nos. 1 and 2 shared the same office with her, but were not in the same department. She never approached human resources for the said two Complainants to join her and she is not aware of their qualifications.

Mr Clive Chung, Head of Human Resources ("HR"), was called to depose on behalf of the Respondent. He is the Head of HR at MSCL since 17 April 2017. Referring the Notice dated 26 September 2017, he stated that this was focused on Wellkin despite MSCL having two hospitals under its management. An objective assessment of all the scheme of duties were carried out; they took the first couple of months after the takeover to understand and came to the conclusion that many things were not working properly. They had to dig in, assess line by line, position by position, file by file; it took them two months to go file by file to understand the position of each one. The previous structure was very hierarchical and had many layers before arriving at the front line. It was important for them to develop a structure that focused not only on the administrative side but also on patients. They had to revisit the organigram to make it more lenient, flatter and more horizontal for the benefits of patients. He produced the organigram as at August 2017 (Documents AU and AU_1) which showed many departments. He pointed to the position of Complainant No.4 on the organigram – the first on the left. The positions in red on the organigram have been highlighted to be reduced as they have created layers in the decision making process.

Mr Chung proceeded to state that a Hospital Change Steering Committee, of which he was part of, was put in place and they identified three things as part of their objective assessment: first, the number of layers in the structure, where they saw that there are positions in the layer which are not effectively helping the business; secondly, there was a mismatch in terms of job fit. Previous management had put people in positions which do not fit their qualifications; and thirdly, there were many small departments in silos and this was not helping the patient and service flow. The Committee prepared an internal document (produced as Document AV) to explain the rationale behind the restructuring of different positions. Referring to the internal document, he stated that they wanted to bring the different small departments working in silos into a Patient Care Department and this concerned six positions. Regarding Complainant Nos. 1 and 2 in Business Development, he referred to the third section at page 6; for Mrs Jang, there was not a specific job that she was supposed to do; regarding Mr Salah, he referred to the Organisation Structure at page 4; and for Mr Veerabadren, he referred to page 6 – a mismatch in terms of jobs and responsibilities.

Mr Chung elaborated on the economic reasons stated in the Notice. The hospital was making Rs 3.2 billion losses. When MSCL took over, they asked themselves for how long could FCD sustain Wellkin Hospital? So they had to reassess the viability of the financials of Wellkin. The staff cost at Wellkin was 45% of its revenue and they are other costs, like rent and equipment. They wanted to make sure that the hospital is sustainable. Wellkin made a loss of Rs 112 million in the year ending 30 June 2017 and was pulling down FCD. He produced an organigram after the restructuration (Documents AW and AW_1). There have been monthly meetings with the Business Development Team since January 2017 to understand what they are doing and what is their value added to the business. He personally assisted a meeting in April and they stated having problems with their Supervisor, with their fuel allowance and regarding telephone. These problems were solved. All along, they have tried to help and find a solution for the ladies in the department. Referring to the list of new recruits (Document AE_1) at Wellkin, he stated that 80% of eighty-one recruits relate to Nursing or Medical, 11% for housekeeping and 9% for clerical, front office work. He produced a list (Document AX) showing the number of people who left the hospital from January 2017 to end of October 2017. Two hundred and twenty-four people in all have left.

Regarding Mrs Jang, Mr Chung stated that since April 2017 he had several discussions with her in her office to understand what she was doing, her position, her functions and he learnt that there she was assigned some projects during the transition but there were no outcomes for same. She was given assignments to help the HR team. She had nothing to do and they assigned her tasks to help them. The assessment in terms of the business model and the structure started since January 2017. He did inform her that her position was at stake in April 2017 and he even had several discussions with the trade union negotiator, Mr Chuttoo. Mrs Jang was given an assignment in the Marketing Department but she did not want to move office. Mrs Jang has a MBA and can work in any department. She let the opportunity pass by. He even talked to Mr Chuttoo in May 2017 to help him find a solution for her.

Regarding Mr Al-Janabi, Mr Chung stated that he has a PhD in Molecular Genetics and was appointed to do research work in the IVF Department. He had informal meetings with Mr Al-Janabi to discuss how to make his job more effective; there were also meetings with the CEO and they wanted him to look at the conversion rate, which how out-patients can be converted to move as in-patients after discussing with doctors. Mr Al-Janabi was not

doing this properly despite having sent many reports. He produced a letter dated 30 June 2017 (Document AY) he addressed to Mr Al-Janabi. After he received a call from Mr Chuttoo informing him that Mr Al-Janabi would like to negotiate to part on a mutual agreement and that he is not happy with the contents of the letter.

As regards Mr Veerabadren, Mr Chung stated that he was appointed Procurement Executive at Apollo Bramwell and during the transition, he was moved to interim Head of Store. Mr Veerabadren told him that the move was following grievances raised by his colleagues in the Procurement Department. Mr Veerabadren was neither doing the work of procurement or of Head of Stores. Mr Veerabadren told him that he wanted to return to procurement but Mr Chung told him that the position no longer exists. Mr Veerabadren was in the Store doing administration work, where his colleague complained that he was not doing anything and sent grievances. In April 2018, a Head of Supply Chain and Procurement was appointed at the level of MSCL for both hospitals. Procurement is one part of supply chain. It is not correct to say that the new recruit took over his position. There is no Head of Store and the position has been abolished; the same two to three persons working with Mr Veerabadren are still doing the job. The positions of the five Complainants no longer exist in the new structure.

Mr Chung also stated that he had discussions over the phone with the trade union negotiator Mr Chuttoo, who advised him to have one-to-one discussions with the workers. On 13 September, he called seven impacted colleagues to start discussions and he explained the situation of the hospital and the constraints. He asked for the discussions to be kept confidential but then the whole hospital became aware and there were articles in the press. On 13 September, he met with Complainant Nos. 3, 4 and 5. Things got out of control and he called Mr Chuttoo and thereafter legal advisers Messrs M. Sauzier and M. King Fat became involved on their side to find a solution. He told Mr Chuttoo that they need to sit and discuss; Mr Veerabadren and Mr Al-Janabi were ready to negotiate to find a mutual settlement. Regarding Complainant Nos. 1 and 2 who are not in the recognised bargaining unit, he stated that he preferred to stick to what was in the law and go only through the recognised trade union.

Mr Chung stated that there were several discussions over the phone between himself, the legal representatives and Mr Chuttoo to try to find a solution and this is where

the legal representatives and Mr Chuttoo agreed on a formal meeting on 25 September 2017. This meeting was organised between Mr King Fat and Mr Chuttoo and he was an invitee to the meeting. The rationale was explained to Mr Chuttoo. Complainant Nos. 3, 4 and 5 were present. Discussions had already started before 13 September with the recognised trade union when they agreed to one-to-one meetings. Between 13 and 25 September, there were several phone calls between Mr King Fat, himself and Mr Chuttoo. As per law there is need for a formal meeting and the meeting of 25 September was as per the law. He produced an email dated 25 September 2017 (Document AZ) he sent to the legal advisors and Mr Chuttoo with regard to the positions of Manager Sales and Manager Patient Care Services. At the meeting of 25 September 2017, position and alternative, person job fit match and working of different departments were discussed. Throughout the meeting there were discussions for each of the fifteen cases except for those not present but the conclusion was to negotiate; they did not want to return back to their jobs and wanted to find a mutual agreement.

Mr Chung also stated that the issue of new recruits is not relevant. The work permits applied for were for existing posts of nursing as there is a shortage of nurses in Mauritius. There is an Operation and Management Agreement with Fortis Healthcare Ltd in India, whereby the latter deputes personnel to assist in the operation of the hospital. These persons, being experts in the healthcare sector, came to develop the business. That he stated at a meeting at the Ministry that the redundancy was only for structural reasons has been taken out of context. The position of the Complainants were unique positions and there was no '*last in*, *first out'* with no other persons in their respective positions. There were constant meetings with the Business and Development Department and Complainant Nos. 1 and 2 knew that their department was not performing at all and had no *raison d'être* in the hospital. The aforesaid two Complainants were not proposed to move to Marketing as there were two set of competencies and responsibilities. The new Head of Sales is not performing the same job as the two Business Development Executives although one or two responsibilities are common. The job of Mrs Seebundhun is mainly strategy at a very high level. Regarding Mr Al-Janabi, the revenue of the hospital increased because of the initiative taken by management since MSCL took over, it was mainly the CEO and COO who were working on the strategies to increase the number of patients at the hospital. Procedures according to *section 39B (3)* of the *Act* have been respected and possibilities have been explored with the recognised trade union before redundancy.

Mr Chung was cross-examined by Counsel for Complainant Nos. 1, 3, 4 and 5. He notably stated that the meetings he held with the Complainants were not for avoiding redundancy but to see how to help them with their unique positions and to find solutions for them. The internal document was finalised in September 2017 with its first draft being in August 2017. The initial draft referred to more departments and included the job positions of the aforesaid Complainants. They did not talk about redundancy in May – June 2017. On 13 September 2017, he met with them informally to find alternatives to their actual positions, to save their jobs and protect them from redundancy. Marketing Administrator at page 6 of the internal document was in relation to Ms Douraka. By impacted, redundancy was contemplated as a possibility. The positions of the Complainants as put on paper were discussed in August 2017.

Mr Chung went on to answer that the new organisational structure was prepared in September and it was not shown to the Complainants. Mr Veerabadren is referred to as Procurement Executive in his letter of termination as they had to stick to what was on the payroll. The jobs of the two Business Executives was about relationships and it is a section of sales. A new department, Head of Sales, now exists. The position of Complainant No.4 does not exist and his functions were given to no one. The different sections under Mr Al-Janabi still have their Head who now report directly to the Head of Department instead of going through a Deputy.

In relation to the meeting of 25 September 2017, Mr Chung stated having the personal files of the Complainants and was aware whether they were members of the trade union or not. He confirmed that Complainant No.1 was not member of any trade union at the time of the meeting. Trade unions representatives from each department were present at the meeting. Before the meeting of 13 September, he transmitted the names of the workers to Mr Chuttoo. The legal advisor, in the meeting of 25 September, stated that the company had explored all possibilities. He did not have the manuscript of the meeting of 25 September with him. He did not call Ms Douraka on 13 September. There are no minutes of proceedings for the meetings of 13 September as he thought they could come to an appropriate solution. The Notice was sent to the Ministry about their decision to restructure and that positions will be made redundant. At the time of the termination letters dated 26 September 2017, the positions were made redundant. He personally did not have any meeting with Ms Douraka but there were meeting with the negotiators. There are no minutes pertaining between 26 September to 31 October with any trade union

representative as most of the discussions were done over the phone and there was an exchange of emails as regards the remuneration package. There were no meetings with the Complainants individually between 26 September and 31 October. Discussions with the trade union focused on monetary aspects. The possibilities of restriction on recruitment etc. were mentioned by Mr Chuttoo in the meeting of 25 September and this was addressed by himself and their legal representative.

Mr Chung was also cross-examined by Counsel for Complainant No. 2. He notably stated that Mrs Makoondlall was not present at the meeting of 25 September and he did not personally notify her of the meeting. He agreed that she is not a member of the trade union. As Head of HR, he did not consult with the representatives of the trade union as regards reducing the Complainants' working hours. In the meeting, they discussed position by position and he was questioned by Mr Chuttoo. He did not personally discuss reducing the Complainants' salaries or their allowances with the trade union at the meeting. He did not consult with the trade union on the possibility of retraining for the Complainants. The takeout from the meeting was for negotiations to go on between the recognised trade union and management. After the meeting, there were discussions between himself and Mr Chuttoo who told him to serve them their letters. He also stated that he could not dispute the words of Mr Kevin Fok. He also did not dispute that MSCL is not financially in peril at this point.

Mr Chung was also referred to the scheme of duties of the Head of Sales (Document Y) and read out the duties at paragraphs 3.14 to 3.24. Referring to Annex 1 of the contract of employment of Business Development Executive (Document M), he read out the duties under the subtitle 'New Business Development'. He then read paragraphs 3.28 to 3.31 in Document Y and the duties under the subtitle of 'Business Development Planning' in Document M. He also read out paragraphs 3.32 to 3.37 from Document Y and the duties under the subtitle 'Management and Research' in Annex 1 to Document M. However, he did not agree that the duties of Mrs Seebundhun were identical to the duties of Complainant No.2.

THE SUBMISSIONS OF COUNSEL

Learned Counsel for the Respondent referred to her written speaking notes submitted in support of her oral submissions to the Tribunal. She stated that as per the Notice, the reduction was done on the basis of economic and structural reasons. Even though MSCL is the Respondent, it is the former Apollo Bramwell Hospital that was in peril and not MSCL and this is in accordance with the Notice. Regarding the objective assessment, same was explained by Mr Chung. There were genuine attempts to find alternative positions for the Complainants. There were one-to-one meetings between Mr Chung and the Complainants as well as with the trade union negotiator. A formal meeting was called as this is what the law prescribes. Meetings took place with Complainant Nos. 3, 4 and 5 on 13 September 2017. The emails produced are not being relied on for the truth of their contents. As for the financial aspect, MSCL is now running at a loss following the acquisition. It is unfair to expect one unit making a loss of Rs 112 million to drag the other. Mr Fok explained that the Group will be adversely affected sooner or later. The figures show that the financial position of Wellkin is not good at all.

Learned Counsel for the Respondent went on to elaborate on the individual situation of each Complainant at the hospital. Regarding Complainant Nos. 1 and 2, their department was abolished and they were not needed anymore; one of them was not qualified and the other's contract had not been renewed. Complainant No.3, Mrs Jang, had refused the opportunity to move. Regarding Mr Al-Janabi, his position no longer existed and was not working. Good faith has to be on both sides. Consultations were done, but the Complainants were not open to same. There is nothing in writing to show that these attempts have been made, but the version of Mr Chung should be favoured. Mr Veerabadren was transferred to another department and it is not true to say that he was Procurement Executive when MSCL took over. He was not performing the same tasks as the Head of Supply Chain, who was recruited at Group level. It is agreed that the formal meeting that took place for the purpose of the law was on 25 September 2017. Discussions regarding redundancy were carried out prior to this formal meeting. Counsel submitted that these cases are not *bona fide*, the Complainants were not happy with what was proposed to them after redundancy had become inevitable and they are seeking a better financial settlement from the Tribunal.

Learned Counsel for Complainant Nos. 1, 3, 4 and 5 was very extensive in his submissions to the Tribunal. He notably invoked *section 5 (3)* of the *Act* in relation to the

contractual situation of Ms Makoondlall. He went on to state that MSCL is the only legal entity, and is the employer under *section 2* of the *Act*. The Head of Finance stated that the company is a going concern and not in financial peril. Even when talking about Wellkin, it is still solvent. The burden is on the Respondent to justify the reduction and whether the economic and structural reasons are justified. He referred to *section 39B (2)* of the *Act* and the case of *Edouard Trading Ltd v Tang Yat Hee* [*1994 MR 40*] with regard to the requirement of notification. The Permanent Secretary should be informed at least thirty days before the reduction. The internal document (Document AV) was already prepared as from August 2017. Regarding consultations, this should start after informing the Ministry. The consultation was not done in line with the law, it should have started from the moment redundancy was contemplated. Counsel referred to the Employment Appeal Tribunal case of *Williams v Compare Maxam Ltd [1982] UKEAT 372_81_2201* on the issue of consultations and submitted that the decision making process of termination has to be after consultations. He also put in a decision of the European Court of Justice, namely *Junk v Kuhnel Case C-188/03*. He further referred to the cases of *Ramjeet and Sugar Investment Trust* (*ERT/EPPD/RN 02/15*), *Comprim v Menagé* [*PCA 42 of 2006*] and *Lobin and Barclays Bank Mauritius Ltd* (*ERT/EPPD/RN 02/2016*). What the Tribunal has to decide is whether the reduction of the number of workers by the employer is justified or not. Reference was also made to the case of *Kissoon and The Mauritius Shipping Corporation Ltd* (*ERT/EPPD/RN 01/16*) with regard to the requirement of consultations.

Learned Counsel for Complainant No.2 offered concise submissions to the Tribunal. He notably stated that the duty to consult is on the employer as per *section 39B (3)* of the *Act*. Mr Chung never consulted the trade union representatives on the alternatives to redundancy. Regarding the economic reasons, it was submitted that the company MSCL is solvent and financially stable. He also submitted that Wellkin is a commercial name and has no legal personality relying on the case of *Sayfoo v The State* [*2014 SCJ 198*] and referred to a decision of the *Cour de cassation* of 16 November 2016. With regard to the recruitment of Mrs Seebundhun, Counsel submitted that the '*last in, first out*' principle was not applied in making Complainant No.2 redundant. The reduction of workforce with regard to the Business and Development Department is based on materially wrong facts and is not justified.

THE MERITS OF THE DISPUTE

The present matter has been referred to the Employment Promotion and Protection Division of the Tribunal by the Permanent Secretary of the Ministry. Upon a referral, the Tribunal is to proceed to hear the matter and give its award. The Terms of Reference of the present dispute is asking the Tribunal to find whether the reduction of the workforce affecting the Complainants (also referred to as Disputants) is unjustified or not, in the circumstances.

It would be pertinent to note the task former Termination of Contracts of Service Board in relation to matters of reduction of workforce under the then *Labour Act 1975*. In *La Bonne Chute Ltd v Termination of Contracts of Service Board & Anor.* [*1979 MR 172*], the Supreme Court held:

> *We accordingly hold that, in determining whether an employer is justified in reducing his work force, the Board should not limit its exercise to a mathematical computation, but consider also whether the employer has shown good cause to lay off the particular worker or workers concerned*.

Likewise, in *Concorde Tourist Guide Agency Ltd v Termination of Contracts Service Board & Ors*. [*1985 MR 70*], the Supreme Court stated the following with regard to the functions of the then Termination of Contract of Service Board:

> *What the Board is to decide in cases of intended reduction of work force referred to it by the Minister under subsection 3 is not whether the dismissal, as such, of any particular worker is justified or not, but whether the employer's reduction of the number of workers in his employment is justified or not.*
>
> *It results, however, from the decision of this Court in the cases of La Bonne Chute Ltd v TCSB [1979 MR 172] and Madelen Clothing Co Ltd v TCSB [1981 MR 284] that the Board, although finding a reduction of workforce by a certain number to be justified, is still entitled to consider whether the decision by the employer to dismiss a particular worker(s) within that number is the correct one.*

With the repeal of the *Labour Act 1975*, the Termination of Contracts Service Board is no longer in existence. Following subsequent amendments brought to the *Act* (in

particular, *Act No. 5 of 2013*), a new division of the Employment Relations Tribunal, namely the Employment Promotion and Protection Division, was created to deal with cases referred to it in matters of reduction of workforce or closing down of an enterprise.

Furthermore, it is pertinent to note what the Supreme Court recently stated in the case of *Sugar Investment Trust v Employment Relations Tribunal* [*2017 SCJ 321*] in relation to matters of reduction of workforce referred to the Tribunal:

> *As pointed out by Counsel for the Tribunal and Counsel for the employee, the issue to be determined by the Tribunal was whether the reasons put forward by the employer for its reduction of workforce were justified. It accordingly stood to reason that the onus was on the employer to show that those reasons were well-founded.*

In the present matter, the Respondent, in its Notice dated 26 September 2017 sent to the Permanent Secretary of the Ministry, has mentioned economic and structural reasons in coming to the conclusion that it had to reduce on a permanent basis fifteen positions. The five Complainants were among the holders of these fifteen positions at the Respondent company. It should be noted that the Complainants were each individually informed of their redundancy by letter dated 26 September 2017.

With regard to the economic situation of the employer, the Tribunal has found the evidence of the Head of Finance at MSCL, Mr K. Fok, to be most revealing. Mr Fok drew up a report (Document AS) whereby he, *inter alia*, submitted individual figures for Wellkin and Fortis Clinique Darné (“FCD”), which both fall under MSCL. The report clearly showed that Wellkin was being supported by FCD and that it had made losses in the financial year ending June 2017 to the tune of about Rs 112 million, which offset the profits of about Rs 98 million made by FCD resulting in an overall loss. However, we have not been told of the financial situation for the period ending 30 June 2018 which would have indicated how the financial situation at Wellkin and MSCL has evolved more than a year after the takeover in January 2017. The Tribunal has also noted that the Head of HR Mr Chung also stated that the former Apollo Bramwell Hospital had accumulated losses in the amount of Rs 3.2 billion.

It is very pertinent to note that Mr Fok, when cross-examined, recognised that MSCL is capable of meeting its long term debts and this is an indicator of it being quite solvent. He also added that it is financially stable and that it would be wrong to say that MSCL is financially in peril. He even confirmed that the Auditor's report has not stated that the company is a growing concern. He did not deny that all the employees are employed by one company, which is MSCL.

The Complainants, on the other hand, relied on the reports of the Senior Financial Analyst Miss Deerpaul and of Mr Mannick, Chartered Accountant. The former attributed the reduction in profit of MSCL in 2017 to an increase in finance costs, which included interest payments related to bank loans contracted for the purpose of the acquisition of the former Apollo Hospital, as well as noting an increase in depreciation charges, an increase in transaction costs due to the acquisition and an increase in staff costs. She found the company to be quite solvent and capable of meeting its long-term debts. In her report (Document D), it has been notably concluded that MSCL is making gross profits on its operations but that its liquidity position has weakened in 2017. Annex 1 to her report shows that MSCL incurred a net loss of about 14 million as at 30 June 2017. It must be also noted that she was aware that operating profits is not a true indicator of the financial status of the company.

Mr Mannick has found that there was an increase in company revenue and a decrease in the losses at Wellkin Hospital. He has found that the Group is financially stable to meet its present and future commitments and that there is no forecast according to the Audited reports that it cannot meet its liabilities and will not be able to operate in the long term. He recognised that the Group is doing well but not Wellkin as a unit. He also did admit to estimations made in his report, particularly, in relation to the labour efficiency ratio.

The Tribunal has also taken note of an extract of the Audited Financial Performance for the Year ended 30 June 2018 of CIEL Limited (Document X) whereby it has notably been stated that '*This year's performance has been supported by the improved results of MSCL where Wellkin's turnaround remains on track*'. CIEL Limited has a 58% majority stake in MSCL according to Mr Fok. Moreover, although the Respondent has very much emphasised

a distinction between the two hospital units that fall under MSCL, it has not been disputed there is only one employer which is MCSL.

In this regard, the Tribunal finds it appropriate to refer to a decision of the *Cour de cassation*, *arrêt no 2047 du 16 novembre 2016* (*15-19.927 à 15-19.939*), as submitted by Counsel for Complainant No.2, where it was stated:

> *Mais attendu que la cause économique d'un licenciement s'apprécie au niveau de l'entreprise ou, si celle-ci fait partie d'un group, au niveau du secteur d'activité du groupe dans lequel elle intervient ; que le périmètre du groupe à prendre en considération à cet effet est l'ensemble des entreprises unies par le control ou l'influence d'une entreprise dominante dans les condition définies à l'article L. 2331-1 du code de travail, sans qu'il y ait lieu de réduire le groupe aux entreprises situées sur le territoire national ;*

Moreover, it is pertinent to note that nowhere in the Notice dated 26 September 2017 sent to the Permanent Secretary has the nature of the employer's financial issues been described or elaborated upon. It has merely been stated that the company is in an unrelenting quest to '*improve its financial situation*' and that it cannot '*take any other course but to reduce, for economic / structural reasons and on a permanent basis, 15 positions*'.

It must be recalled that the importance of the Notice issued pursuant to *section 39B (2)* of the *Act* together with a statement of the reasons for the reduction of workforce cannot be understated in these matters. Indeed, in relation to the requirement of Notice under the repealed *Labour Act 1975*, the Judicial Committee of the Privy Council, in *Comprim Ltée v Menagé* [*2006 PRV 42*; *2008 MR 289*], was swift to emphasise that:

> *First, the Board recalls that the notification requirement in section 39(2) is no mere formality, but is the key to the system under which the Termination of Contracts of Employment Board considers the proposals of an employer to reduce the size of his workforce.*

The Tribunal having, in particular, considered the evidence of the Senior Financial Analyst and especially that of Mr Fok cannot reasonably come to the conclusion that the Respondent as a Group was in dire straits and facing any substantial financial difficulties. Although it is a fact that Wellkin Hospital was incurring losses, its turnaround was forecast to be on track by MSCL's major shareholder, CIEL Limited. Moreover, it should be expected that the cost of acquisition of the former Apollo Bramwell Hospital for the sum of about Rs 680 million ought to have an impact on the accounts of MSCL as the acquiring entity and that the acquisition transaction could have weakened its current liquidity position. Furthermore, we are not told how the losses incurred by the hospital prior to its acquisition by MSCL has impacted on the current finances of the company. It should also be recalled that Wellkin Hospital is not a legal entity nor is it the employer.

The Tribunal thus cannot overlook that MSCL is very much solvent and capable of meeting its long term financial commitments and that is a going concern according to its Auditors. The Tribunal cannot therefore reasonably find that MSCL, being the employer of the redundant Complainants, was facing substantial economic difficulties.

The Tribunal also has to examine the structural reasons put forward in the Notice dated 26 September 2017 for MSCL having reduced, *inter alia*, the positions of the Complainants from its workforce. Once again, the Tribunal has observed that the employer has merely made fleeting references to this ground in the Notice. At paragraph B of same, it is stated that the company has '*conducted a review of its existing organisational structure*'; and at paragraph C, it has been stated that the company has come to the conclusion that it cannot '*take any other course but to reduce, for economic / structural reasons and on a permanent basis, 15 positions*'. Apart from having mentioned the words '*structural reasons*' at paragraph C, nowhere in the Notice are these reasons expanded and elaborated upon.

On the issue of reduction of the workforce due to structural reasons, it would be pertinent to note the following from *Dr D. Fok Kan* in *Introduction au Droit du Travail Mauricien 1/ Les Relations Individuelles Du Travail*, *2eme édition*, *p.390*, *391*:

> *Il est à remarquer que la suppression de poste n'implique pas nécessairement l'abolition du travail qui était effectué par l'employé précédemment. Constitue ainsi une suppression d'emploi, le cas où l'employeur fait assurer une fonction précédemment*

occupée par un employé par des collaborateurs bénévoles. Il y a ici un motif "structural".

La suppression de poste ne doit pas non plus être assimilée à une compression d'effectif. Si dans la plupart des cas la suppression de poste a un tel effet, celle-ci n'est pas une conséquence nécessaire. On peut en effet envisager l'hypothèse d'une entreprise qui d'une part licencie des employés mais crée par ailleurs de nouveaux emplois suite à des considérations technologiques.

With regard to the issue of structural reasons, the evidence of Mr Chung is very much relevant. Mr Chung has notably produced an internal document emanating from the Hospital Change Steering Committee (Document AV) which has set out the rationale behind the restructuring exercise. He also produced two sets of organigrams (Documents AU and AU_1; and AW and AW_1) pertaining to before and after the restructuration where, in the former, positions are highlighted in red to be reduced. He explained that it was important to develop a structure that focused not only on the administrative side but also on patients and that they had to revisit the organigram to make it more lenient, flatter and more horizontal for the benefits of patients. Thus as per the internal document, the posts of Deputy Chief Medical Officer, Procurement Executive, Marketing Administrator, Business Development Executive – Cardiac Centre, and Project Coordinator, which concerned the Complainants, were impacted by this restructuration exercise. Moreover, Mr Chung has contended that the positions of the five Complainants no longer exist in the new structure.

The rationale behind the restructuration exercise has not been contested. From a perusal of the new organisational structure (Documents AW and AW_1), the Tribunal has observed that the positions of Business Development Executive, Project Coordinator and Deputy Chief Medical Officer no longer exists at Wellkin Hospital.

Regarding the position of Procurement Executive, although it is not present in the new structure, there is a Procurement section comprising a Head of Procurement and Procurement Officers. It thus cannot be said that the positions relating to the procurement function have been abolished at the hospital. Although Complainant No.5 was transferred to be Interim Head of Store prior to the acquisition of the hospital by MSCL, he was still referred to as Procurement Executive in his letter of termination as this was his title on the payroll. However, his position is stated as Procurement Executive in the previous

organisational structure (Documents AU and AU_1). It should also be noted that nowhere is the position of Head of Supply Chain Management to be found in the new structure. Moreover, the positions relating to the Store, such as Team Leader, have not been impacted in this exercise whereas Mr Chung stated that the position of Head of Stores was abolished.

In relation to the two Complainants holding the position of Business Development Executive, it may be noted that the position of Head of Sales appears under the Sales section in the new organigram. Although, the appellation of this position is different to that of Business Development Executive, Mr Chung has in his evidence recited the numerous identical duties of the two posts when cross examined by Counsel for Complainant No.2 in relation to the aforesaid Complainant. Moreover, Complainant No.1 has contended that she was doing the same job as the Head of Sales recruited in August 2017 except for the Supervisory function. It very much appears that the Head of Sales has absorbed the duties of the Business Development Executives as is evident from its scheme of duties. The position of Head of Sales, in the new structure, is situated at about the same position of that of the Business Development Executives in the previous structure. It must also be noted that although the Head of Sales was recruited at Group level, this is not reflected in the new organisational structure which refers only to Wellkin Hospital.

Thus, having considered the internal document on the restructuring at Wellkin Hospital as well the previous and the new organigram of the hospital structure produced by Mr Chung, the Tribunal cannot be satisfied that the positions of Business Development Executive and Procurement Executive were fully impacted by the restructuration exercise. However, as regards the positions of Project Coordinator and Deputy Chief Medical Officer occupied by Complainant Nos. 3 and 4, it is clear that their posts no longer exist within the new structure.

In matters of reduction of workforce, it is very much appropriate for the Tribunal to determine if the employer has engaged in consultations as is required pursuant to *section 39B (3)(a)* of the *Act*. It should be noted that in *Barclays Bank Mauritius Ltd v The Employment Relations Tribunal* [*2018 SCJ 145*], the Supreme Court held that the Tribunal acted in accordance with the law in enquiring into whether there were consultations.

It would therefore be in order to consider the requirements of *section 39B (3)(a)* of the *Act*:

> ***39B. Reduction of workforce***
>
> *…*
>
> *(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;*

The word '*consultation*' is very much pertinent in the aforesaid provision. This has been defined in the *Concise Oxford English Dictionary*, *11th edition (revised)* as '*the action or process of formally consulting or discussing*'. Moreover, in *King and others v Eaton Ltd* [*1996*] *IRLR 199*, it is apposite to note what was held by the Inner House of the Scottish Court of Session:

> *Although the consultation required of an employer before dismissing on grounds of redundancy may be directly with the employees concerned or with their representatives, such consultation must be fair and proper. The definition set out by Lord Justice Glidewell in R v British Coal Corporation ex parte Price, that "fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of a response to consultation" would be adopted.*
>
> *In the present case, there was no fair and proper consultation with the employees' trade union. Such discussions as there were took place after the employers'*

proposals had been formulated, and there was no indication that the union was given adequate time within which to respond or that the employers were prepared to give any real consideration to any response.

In order the examine what consultations took place between MSCL and the recognised trade union, it is important to consider the evidence of Mr Chung on this issue. He notably stated having met with Complainant Nos. 3, 4 and 5 on 13 September 2017 to explain them the situation, but thereafter the discussions were reported in the press. Then, a formal meeting of 25 September 2017 was scheduled with the recognised trade union presided by the Respondent's legal representative wherein there were discussions regarding those present among the fifteen workers being made redundant. The outcome of the meeting was to negotiate to find a mutual agreement as they did not want to return to their jobs. The issue of exploring possibilities was raised by Mr Chuttoo and the legal representative and himself addressed these concerns. Mr Chung did however admit that he personally did not consult with the trade union on the possibilities of reducing the Complainants' salaries, their working hours or retraining them during the aforesaid meeting. It must be noted that no notes of minutes to this formal meeting were produced to the Tribunal.

Regarding Complainants Nos. 1 and 2, who were not members of the trade union, Mr Chung clearly stated that he went according to the law dealing only with the recognised trade union. He did admit that he was aware of who was a member of the trade union or not. Between 26 September and 31 October 2017, there were no individual meetings with the Complainants but with the trade union representatives focusing on monetary aspects only.

The evidence as Mr Chuttoo is also relevant to the issue of consultations. He was present during the formal meeting of 25 September 2017 as a trade union negotiator of the recognised trade union. Prior to the aforesaid meeting, he was informed that some workers will be made redundant. In the meeting itself, the names of those made redundant were announced and management informed him their jobs cannot be secured. He learnt at the meeting that the workers had been met with individually beforehand. Individual ways to save the jobs were not discussed at the meeting.

Complainant Nos. 3, 4 and 5 were also present at the meeting of 25 September 2017. They were adamant that no proposals in terms of retraining, redeployment, reduction of hours or reduction in salary was made to them in the aforesaid meeting. According to Complainant No.3, the meeting focused solely on redundancy.

Prior to the formal meeting of 25 September 2017, Complainant Nos. 3, 4 and 5 related that they had met with Mr Chung on 13 September 2017 in his office, whereby they were informed that they were being made redundant. No other possibilities such as redeployment or otherwise were discussed with them on 13 September 2017. The abolition of their posts was presented to them as a final decision by Mr Chung.

In relation to Complainants Nos. 1 and 2, who were both in the Business and Development Department, they clearly related how they received their letter of termination after being asked to call at the HR Department on 26 September 2017. Both were adamant that they had no idea that they were in the process of being made redundant. They had no meetings prior to this date whereby they were informed that their positions were listed for redundancy or even subject to review. It should be noted that they are not members of the trade union and were not aware that their interests were being represented by the recognised trade union at the meeting of 25 September 2017. They were unaware of the aforesaid meeting nor did they attend same. The two Complainants were adamant that no discussions or consultations were ever held with them prior to receiving their letter of termination on 26 September 2017. Furthermore, Mr Chuttoo clearly stated that there were no discussions regarding the Business and Development Department in the meeting of 25 September 2017, whereas Mr Chung stated that discussions focused on the workers on the list who were present at the aforesaid meeting.

Although it has been contended by Mr Chung that there were regular meetings with the personnel of the Business and Development Department since MSCL’s takeover in January 2017, these meetings cannot be said to have been held in the context of the process of redundancy. As per Mr Chung himself, issues relating to the aforesaid Department were discussed in the meetings; however, it was never stated that they were concerned with the process of restructuring that would eventually lead to their positions being made redundant. Nor was it stated that these meeting were meant to be

consultations in relation to a reduction of workforce. This has moreover been admitted by Mr Chung himself when cross-examined and he also stated that the formal meeting that was held as per the requirement of the law was that of 25 September 2017.

The Tribunal, having considered the evidence on record, has noted that there was only one formal meeting held in accordance with the law, which is that of 25 September 2017. Therein, it has transpired from the evidence of Mr Chung that he did not make any proposals, as has been contemplated in the law, to explore the possibility of avoiding the reduction of workforce; in fact, it was the trade union negotiator who raised these issues with him and the Respondent's legal representative. The list of fifteen workers to be made redundant was officialised in the said meeting.

The Tribunal has also observed that Mr Chung had already informed Complainant Nos. 3, 4 and 5 that they were to be made redundant in individual meetings held on 13 September 2017. Moreover, at these individual meetings, the possibilities of avoiding the reduction of workforce were not discussed. According to the aforesaid Complainants, they were told that their respective positions were being made redundant. This shows that the decision to make them redundant had already been taken prior to the formal meeting of 25 September 2017 whereby consultations were purportedly held with the recognised trade union. Furthermore, it has not been denied that there were no meetings with Complainant Nos. 1 and 2 to inform them of any possible redundancy prior to them receiving their termination letters on 26 September 2017.

It is also interesting to note that at paragraph E of the Notice dated 26 September 2017, the following was stated:

> *Discussions, consultations and / or negotiations are, pursuant to S 39B(3) and S 39B(4) Employment Rights Act, 2008, being carried out with the said workers and the representative(s) of the recognised trade union.*

However, it is apposite to note that the Complainants received their letters of termination on 26 September 2017 itself. This clearly shows that the despite what was stated in the Notice at paragraph E thereof to the effect that discussions, consultations and

negotiations are still being carried out, the Complainants were already informed on the aforesaid date that their positions will be made redundant as from 31 October 2017 and that they are dispensed from attending duty until 31 October 2017.

In this regard, it would be useful to note what was stated by the Tribunal in *D. Kissoon & Ors. and The Mauritius Shipping Corporation Ltd* (*ERT/EPPD/RN 01/16*) in relation to the timing of consultations:

> *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.*

It should also be noted that the Complainants were not been invited for any consultations to explore possibilities of avoiding the reduction in workforce in their letters of termination nor were there any meetings with them between 26 September 2017 and 31 October 2017. Although, it appears there were discussions with the trade union representative after 26 September 2017, these were mostly over the phone, were not formal and focused more on the monetary aspect.

Bearing in mind the requirements laid down in *section 39B (3)(a)* of the *Act*, whereby an employer shall not reduce the number of workers unless he has in consultation with the recognised trade union explored the possibility of avoiding the reduction of workforce, the Tribunal has found that the exercise of consultations with the recognised trade union has not been properly carried out by the employer. It has not been disputed that Complainant Nos. 3, 4 and 5 were already informed of their redundancies on 13 September 2017, which is before the holding of the formal consultation meeting on 25 September 2017. Moreover, Complainant Nos. 1 and 2 were never informed that they were to be made redundant prior to receiving their termination letter on 26 September 2017 and there is nothing to indicate that consultations in relation to their positions of Business Development Executive were held with the recognised trade union on 25 September 2017 or otherwise. The Tribunal thus cannot be satisfied that proper consultations, as required under *section 39B (3)* of the *Act*, were held with the recognised trade union in the present matter prior to the five Complainants being made redundant.

It has also been contented that the Notice was not properly served upon the *Permanent Secretary* by the Complainants. In the present case, the Employer did serve a Notice dated 26 September 2017 mentioning '*economic / structural reasons*' for the reduction of fifteen positions.

The requirement for the employer to serve Notice together with a statement of reasons for the reduction of workforce is mandatory under *section 39B (2)* of the *Act*. This provides as follows:

> ***39B. Reduction of workforce***
>
> *…*
>
> *(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.*

Except for the requirement that the Notice must be served at least 30 days before the reduction, the above provision is couched in similar terms to *section 39 (2)* of the repealed *Labour Act 1975* which read as follows:

> *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 of reasons for the reduction*.

In the matter of *Edouard Trading Ltd. v G. Tang Yat Hee & Ors* [*1994 SCJ 284*], the Supreme Court stated the following with regard for the requirement embodied in *section 39 (2)* of the then *Labour Act 1975*:

> *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 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 intentions to dismiss one or more workers.*

Having regard to *section 39B (2)* of the *Act* and what was held by the Supreme Court in the above mentioned case, it would be incumbent upon the Tribunal to situate when did the employer, in the present matter, form the intention to reduce the number of workers in his employment and whether the Notice was given to the Permanent Secretary at least 30 days before the reduction of workforce.

The evidence of the Head of Human Resources at MSCL, Mr Chung, is very pertinent in this regard. He clearly stated that the assessment in relation to the restructuring started since January 2017. The jobs were being impacted since then. Regarding Mrs Jang, he clearly stated that he met with her in April and that he did inform her that her position is at stake. Moreover, the internal document produced by the Hospital Steering Committee (Document AV) to explain the rationale behind the restructuration was finalised in September with a first draft being ready in August 2017. This clearly shows that the employer in the present matter had already formed the intention to reduce the number of workers in its employment as far back as January 2017. At the latest, the intention to do so was present in August 2017 when the draft was the internal document was prepared. This is certainly well before the date when the Notice was sent to the Permanent Secretary on 26 September 2017.

It must be borne in mind that the employer has the obligation to notify the Permanent Secretary when it forms the intention to dismiss one or more workers at least 30 days before the reduction of workforce. Although, MSCL did not give the Notice as soon as its intention was so formed, the Notice was duly sent at least 30 days before the reduction of workforce given that the Complainants' termination was to take effect as from 31 October 2017. The Tribunal therefore finds that the requirement to give the written Notice at least 30 days before the reduction of the workforce has been satisfied in the present matter.

In the present matter, it has been observed that the issue of the Complainants' performance was raised on several occasions by the Respondent. It has notably been contended that Ms Douraka and Ms Makoondlall were no longer performing and that regular meetings were held with them to solve their issues and help them; that Mrs Jang

had nothing to do and was assigned *ad hoc* tasks; that Mr Al-Janabi was not doing his work properly in relation to the conversation rate and a letter dated 30 June 2017 was sent to him regarding his work; and that Mr Veerabadren was neither performing as Head of Stores or as Procurement Executive when MSCL took over the hospital. The Tribunal notes that these issues relate mainly to the job performance of the Complainants and are not directly concerned with the process of redundancy *per se*, which was based on economic and structural reasons as stated in the Notice dated 26 September 2017. It would thus be appropriate to note what was stated by *Dr D. Fok Kan* (*supra*), *p. 390*, in relation to dismissals for economic and structural reasons:

> *Contrairement aux autres motifs de licenciement, ceux examinés ici se rapportent à un motif non inhérent à la personne de l'employé licencié. Aucune faute ne lui est en effet reprochée, son licenciement est dû à une suppression de son poste pour des motifs "economic, technological, structural or of a similar nature". Emphase est ainsi mise sur "la suppression de poste : lorsque le salarié licencié est remplacé à son poste de travail, on voit bien que le motif du licenciement tenait à sa personne ; en revanche, si le licenciement s'accompagne de la suppression du poste, c'est le signe que la personne du salarié n'était pas directement en cause". La Cour Suprême en reprenant cette distinction dans l'arrêt Nestlés Products (Mtius) Ltd v Dabysingh confirme cette analyse.*

The Tribunal has also taken note that the Respondent has very much emphasised that Ms Makoondlall's two-year employment contract with BAHEL had expired on 2 November 2016 and was not renewed. She however remained the hospital in her position of Business Development Executive. The aforesaid Complainant has, for her part, contended that her contract was renewed via the letter dated 23 January 2017 (Document N) sent by MSCL to her shortly after its acquisition of the hospital. With regard to this issue, the Tribunal would wish to remind itself and the parties of the Terms of Reference of the present matter, whereby the Tribunal is being asked to find whether the reduction of workforce affecting the Complainants is justified or not. The issue relating to Ms Makoondlall's employment contract can be the subject matter of a dispute of its own and is not within the purview of the Terms of Reference of the present dispute.

The Tribunal, having notably considered the economic and structural reasons put forward by the Respondent to justify the reduction of workforce and for making the five Complainants redundant as well as having considered whether consultations with the

recognised trade union took place in accordance with the requirements of the law, can only come to the conclusion that the reduction of workforce affecting the five Complainants is unjustified in the circumstances.

Having noted that the Complainants have individually opted to be paid severance allowance, it would not be appropriate to consider their reinstatement in their former employment at MSCL. The Tribunal therefore orders that the Complainants each be paid severance allowance in accordance with *section 46 (5)* of the *Act*. The Respondent is to pay each of the five Complainants 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 subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer.

The Tribunal therefore awards accordingly.

SD Shameer Janhangeer
(Vice-President)

SD Arassen Kallee
(Member)

SD Teenah Jutton (Mrs)
(Member)

Date: 26th October 2018