REDUNDANCY BOARD

RB/RN/18/2020

ORDER

Before:	Rashid Hossen	-	President
	Amrita Imrith (Mrs.)	-	Member
	Abdool Feroze Acharauz	-	Member
	Chandrani Gopaul (Ms.)	-	Member
	Suraj Ray	-	Member
	Saveeta Deerpaul (Ms.)	-	Member

In the matter of: -

Impact Production Ltd

On 13 April 2020, Impact Production Ltd, hereinafter referred to as the "Employer", notified the Redundancy Board, hereinafter referred to as the "Board", of its intention to temporarily reduce its workforce due to a rapid decline in revenue and sales following the Covid-19 pandemic.

Mr. Avineshwur Raj Dayal, of Counsel appeared for the Employer. Mr. Assad Peeroo, of Counsel assisted by Miss Sharfa Paurobally, of Counsel appeared for the employees to be declared redundant, hereinafter referred to as the "Workers".

In a further statement showing cause for the reduction dated 9th of June 2020, the Employer averred: -

- *This is an application by Impact Production Group ("the Applicant") made pursuant to Section 72 of the Workers' Rights Act to reduce its workforce by 50%.*

- *The Applicant, situated at 20 & 22 Black River Road, Camp Benoit – Petite Rivière, Mauritius and operates in the entertainment/tourism sector and currently employs 44 workers including specialist workers.*

- *The reduction of the workforce of the Applicant by 50% from 44 to 22 workers is due to the following reasons:*

  (a) The Applicant has suffered losses amounting to approximately Rs 14, 948, 186.30 cents during the lockdown period from 20 March 2020 to 30 May 2020 with cancellations of various events. All activities of the Applicant were brought to a halt, and contracts of services with clients during that period could not be honoured and/or were cancelled, which led to a

significant decrease in revenue during the period. Further, despite the lack of revenue, monthly expenses still had to be incurred.

(b) The Applicant is expected to incur losses of approximately Rs 2.3 million on a monthly basis during the following months. This is explained by the fact that the entertainment sector is heavily dependent on other pillars of the economy which have been greatly impacted by the Covid-19:

(i) The tourist industry has plunged and its economic hardship is expected to continue during a long period of time in view of the closing of most international borders. The entertainment sector, being closely and directly linked to the tourist industry including hotels and the film industry will see its level of activities, which it used to offer, largely diminished.

(ii) The cancellation of events which were planned during the forthcoming months, will result in a considerable decline in the Applicant's expected revenue due to restrictions imposed by the Government.

(iii) Due to restrictions on gatherings and social distancing measures, it is less likely that big events such as 'big fat weddings', gala dinners, concerts, team building, birthdays, launching events and all other events involving the gathering of people will be organised during the coming months.

(iv) It is also to be noted that the 2020-2021 financial budget did not cater for any of the needs of the industry the Applicant is part of.

(v) Coupled with the above, the Applicant has invested massively in equipment which the Applicant is still paying.

(vi) Furthermore, it is noted that the Applicant was leasing a property for the storage of equipment which came to an end during the confinement period. After the curfew being lifted, the applicant has been formally requested to vacate the premises and the Applicant has had to find alternative solutions for the storage of equipment and thus incurring additional expenses.

(c) Other avenues that the Applicant has explored, other than the reduction of workforce, such as decrease in overtime and shorter working hours, have failed mainly due to the fact that there is and will be a major cutback in the activities of the Applicant.

(d) To ensure the continuity of business of the Applicant and to save the employment of other workers, the only but unfortunate solution will be to reduce the workforce by 50% in view of the financial forecast.

In its reply, the Workers after admitting that the notification is made under section 72 of the Workers' Rights Act 2019 and that the Employer has 44 employees, they do not admit that it operated in the entertainment/tourism sector.

It is averred that: -

It is clear from the "historique" that Impact Production Group operates mainly in the entertainment sector. Furthermore, the Business Registration Card of the Applicant clearly shows that the "nature of business" does not include any tourist activities.

- *The Applicant mentions its alleged losses and expenses for the period starting 20 March 2020 to 31 May 2020 and same is denied.*

  – *Assuming that the Applicant is referring to the document entitled "Statement of Comprehensive Income Impact Production Ltd For: April 2020 To: May 2020", it should firstly be noted that the statements are unaudited financial statements and are therefore inadmissible. They carry no weight in depicting the expenses and losses as allegedly incurred by the Applicant.*

  – *On the other hand, a report drawn up by Moollan and Moollan Ltd, a firm of Chartered Certified Accountants, stated that the Applicant company has a net asset of Rs 19 million which evidences its "sound financial health and good performances in past years".*

- *The Applicant refers to alleged future losses which are not supported by any documents. Moreover, it is assumed that the Applicant is referring to "LETTER – SITUATION DE LA SOCIETE POST COVID-19" dated 5th June 2020. The letter in question is written by the CEO (who is neither expert nor a qualified accountant) of the Applicant itself and merely expresses its own views on the future of the company and expenses cuts. It neither supports nor proves the alleged future losses and the averment that "the entertainment sector is heavily dependent on other pillars of the economy which have been greatly impacted by the Covid-19."*

  – *No document annexed to the statement of case supports any averment made regarding alternate premises. Furthermore, even if the Applicant has had to look for alternate premises, this does not justify the reduction of workforce and does not, in any way, support the application made before the Board.*

- *The Applicant has provided no documentary evidence to show that it has indeed looked for other avenues during the short period of 23 days, that is, the period starting at the date of lockdown, that is, 20 March 2020 till the Applicant's notice to the Redundancy Board dated 13 April 2020.*

- *Assuming that the Applicant is referring to the document entitled "Statement of Comprehensive Income Impact Production Ltd For: April 2020 to September 2020", the said accounts are unaudited and are therefore inadmissible and the alleged expenses referred to therein are not supported by any other documents.*

- *The workers therefore pray from the Board for an order of a payment of severance allowance at the rate of 3 months' remuneration per year of service as the reasons*

provided by the Applicant for the reduction of the workforce are unjustified on the following two grounds:

(i) There has been a clear breach of Section 72 of The Workers' Rights Act 2019:

- *Section 72 (1) to (5) of the 2019 Act provides a concise framework prior to giving a written notice to the Board. In the present case the written notice to the Redundancy Board was given on 13 April 2020, that is, much before the employees were even informed that the company was considering reducing its workforce.*

- *The employees were informed on 5 June 2020 that there would be a meeting at the Redundancy Board on 9 June 2020. On 8 June 2020, a few employees were verbally informed by Mr. Nurvin Maungroo that a workers' representative should be elected to attend the aforementioned meeting.*

- *The Applicant had therefore sent its written notice to the Redundancy board nearly two months before approaching the employees. It is therefore evident that the Applicant had conclusively decided to reduce its workforce much before it even talked to the concerned employees. They were only verbally told by Applicant to attend the Redundancy Board meeting without any further explanation.*

- *There is no evidence that the applicant has considered any other alternative other than the intention to reduce the workforce.*

- *The workers were not informed about the intention to reduce the number of workers and there were no prior negotiations. They were asked to elect a representative on 8 June 2020, that is, one day before the meeting which was scheduled before the Redundancy Board (9 June 2020) and there was no meeting to explore the possibility of avoiding the reduction of workforce as provided by section 72 (1) of the Act.*

- *Therefore in the light of section 72 (7) of the Act which provides that "A reduction of workforce or a closing down of an enterprise shall be deemed to be unjustified where the employer acts in breach of subsection (1), (5) or (6)", the Applicant has acted in breach of subsection (1) and its decision to reduce its workforce is therefore unjustified.*

- *It is noted that section 72 (5) of the Act provides that where there has been no negotiation, an employer who takes a course of action as specified in subsection (1), shall give a written notice to the Redundancy Board set up under section 73. However, it is apposite to note that subsection (1) also provides for the notification of employees as a condition precedent to approaching the Redundancy Board. In the present case, not only were there no negotiations at all but the employees were also not notified.*

(ii) Secondly, the Applicant has failed to substantiate its averment that the company is in financial difficulties.

- *The Applicant has failed to bring audited, relevant and admissible financial accounts and statements before the Board. It is apposite to note that only an extract of the financial statements is attached to the statement of case and not the whole set of financial statements. Further, the extract is neither signed nor audited by a qualified accountant and/or auditor. As such, the correctness and veracity of the information contained in the said extract cannot be relied upon.*

- *Applicant has failed to provide any expert evidence or any report to support its claim about future losses.*

- *On the other hand, the company has a net asset of Rs 19 million and employee costs represent only 20 % of total expenses.*

The Board would like to draw the attention of parties that it is seized of the present matter by way of a notification and not an application.

Testimonies

Employer's Side

The Employer's Accountant produced a financial report for the years 2017/18 and 2018 to 31 March 2019. These financial statements are audited ones. According to the witness, the company's profit for the year ended 31 March 2018 was Rs 976, 162.00 compared to 2017 which was Rs 3, 995, 555.00 and no dividend was declared in the year ended 31 March 2018. As regard liabilities, there has been an increase for the year 2017/18 in terms of Total Equities and Liabilities and it is in the sum of Rs 71, 508, 700.20. Profit for the year ended 31 March 2019 was Rs 8, 507, 061.00. Liabilities have increased in the year 2018/19 in the sum of Rs 91, 049, 047.00. Depreciation has been calculated by the auditors on a five-year basis and for the year 2017/18 it has been valued at Rs 26, 503, 660.00. The Net Book Value is the value of the asset as at 31 March 2019 taking into account the cost and the amortisation that have occurred over the year and the sum reads Rs 17, 590, 271.00. Sales for the year 2017/18 were Rs 121, 107, 650.00 and for the year 2018/19, sales came to Rs 145, 184, 120.00. Expenses for the year 2018/19 were in the sum of Rs 54, 940, 407.00. This amount relates to expenses through the month of December 2020. As regard the year ended 31 March 2020, the company has made a loss, whereas a profit of Rs 4, 089, 510.00 has been recorded for the period April 2019 to September 2019. The witness further added that the figures with respect to the months of July to December 2020 are a mere forecast and they are unaudited and not certified. He agreed that the accounts shown for the month of April 2019 to March 2020 to be unaudited ones. Losses in the sum of Rs 2, 202, 811.28 have occurred from April to May 2020 and similar losses are expected for the period of April to September 2020. With respect to actions taken in relation to debtors, emails were sent followed by phone calls and legal actions regarding some clients. There is no receipt, certified document or legal document such as a *mise en demeure* that has been produced. He confirmed that no legal action as such has been taken against clients. According to the Accountant, the Employer holds four accounts with the bank. The current balance amounts to Rs 803, 207.36, USD 47, 880.46 and Rs 896, 518.74 respectively.

The Auditor, Mr. Shareef Ramjan, deponded to the effect that he is a partner of SR & Partners and they act as Auditors of Impact Production Ltd, the Employer. He explained the statutory role of Auditors and the various steps they go through before finalising the auditing and that includes addressing all components contained in the Financial Statement. He added that adjustment may be brought to the Financial Statement after auditing. He certified to the correctness of the auditor's report prepared by his company in which reference is made to a profit of Rs 507, 061. As regard depreciation, he added that it is calculated and based on the policy adopted by Management in estimating the useful life of the assets and in applying a rate. It is the duty of Auditors to verify whether the calculations are accurate. He confirmed that he is currently in the process of doing the auditing for the financial year 2019/2020 which ends on 31 March 2020. It is also part of his task to verify the company's debts where he agreed that he cannot confirm the accuracy of unaudited accounts. He explained that the latest audited account is not ready as auditing exercise could not be carried on during the Covid-19 period. The witness was confronted by the report prepared by Moollan & Moollan, Chartered Certified Accountants and in particular to the reference made in the Balance Sheet of the company that shows a Net Asset of 19 million. He replied that he would tend to agree with that figure since the Net Asset position in any Balance Sheet reflects what happened in the past years. He added that those figures relate to the audited account of 2018/19. He further added that the Net Asset figures will be reduced by losses for the year 2020. The accounts are currently under audit.

Mr. Jean Luc Manneback, the Director of the company stated that the company was incorporated in 1998 and specialised in organising major events with the latest technologies in the MICE (Meeting, Incentive, Conference, Exhibitions) sector. It includes what is commonly known as the "big fat indian weddings" and the launching of products. While it is licensed to do business for setting up these events, it also deals to a certain extent with tourism organisations like Association des Hoteliers et Restaurateurs de l'Ile Maurice (AHRIM) and the Mauritius Tourism Promotion Authority (MTPA). The witness stated that following the pandemic of Covid-19, there has been a series of cancellation of events and the Employer intended to reduce the personnel on a temporary basis. They were initially twenty-one persons who were to be declared redundant and are now limited to seventeen. The cost of cancellation of events for the month March 2020 is Rs 5, 680, 675.00. Cancellation of events include both private and public sector. Events that were cancelled during the month of April amounted to Rs 5, 703, 222.00. The losses incurred for the month of May and June 2020 amounted to Rs 3, 564, 288.00 and Rs 4, 172, 863.00 respectively. The witness elaborated on expected losses for the coming months and the total of which would amount to Rs 31, 525, 039.00 up to the month of September 2020. The company normally has a fixed cost of Rs 2.5 million monthly. The witness confirmed that the profit of the company for the year 2018/19 amounted to some Rs 8 million. Oral and written proposals were made to the workers but there were no counter proposals. The proposals made on 19 June 2020 included: redeployment, reduction of salaries and leave without pay. The witness admitted that it was an extremely difficult period up to the 2nd of June, i.e. during the period of confinement. Before getting in touch with the workers, the Management was sorting things out and was also waiting for the Budget of the Government. It was on the 5th of June that the workers were informed about their redundancies and it was only then that negotiation started. A full package was proposed to those who are above retirement age. There was a reduction in some posts where required. All the technicians are placed on the list of redundancies instead of young ones as the latter are more apt in using new technologies. The witness also added that various attempts have been adopted to recover money from debtors, some of them could not be taken to Court as they are long term clients. On a different note the witness confirmed having applied and have obtained money from Wage Assistance Scheme for March, April and May 2020. He did not ask for assistance for the month

of June 2020 when he learned he will have to reimburse all the wages advanced to the company. On a closing note, the witness does not believe that on the opening of the frontier there will be travel motivation in the sector of major events.

Workers' Side

Mr. Urbin Rabaye, the representative of the twenty-one workers stated at the outset that it is during the proceeding of this case that he first learnt about seventeen workers being declared redundant. The first time the Employer contacted him was with respect to redundancy of twenty-one workers on 08 June 2020. A meeting was held on that day. No proposal or negotiation as such was made. According to the witness the Employer circulated a letter dated 05 June 2020 with reference to the business situation of the company. The witness added that the workers did not have sufficient time to reply to an email regarding proposals and same was communicated to the Employer. At no time the workers refused to go to work.

Mr. Ahmed Reaz Emamboccus, from Moollan & Moollan, Chartered Certified Accountants testified as to a report that he made dated on 23 June 2020. At the time of preparing that report, he had the Statement of Comprehensive Income for the period of April 2019 to March 2020 from the Statement of Case of the Employer, which included also some forecast and statistics. The Statement of Comprehensive Income is the profit and loss with reference to the period of April 2019 to March 2020. He was also in presence of an audit exercise for year 2019 but did not receive any audited account for the financial year 2020. According to the witness, an audited document is the only document that can be relied upon as it can be checked and audited by an auditor to be true and fair and free from material misstatement. The witness confirmed that there are reserves in the company which show that in the past years there were profits and assets acquired. This led him to conclude that the balance sheet shows Rs 19 million as net asset and the company cannot be said to be in the red overnight. It had a good past and therefore a good foundation to be able to honour anything that comes its way. The company should have called a Business Processing Re-Engineering or diligence work on figures instead of proceeding directly to laying off workers. He agreed that there has been a fall in the profit since the Comprehensive Income is lower compared to those last two years. Its turnover has been lower although its gross profit has remained the same. This is basically because of administrative costs which have increased in gross profit. Administrative expenses include basically rent, salary, office expense and depreciation of non-productive items. They are expenses which do not change even when there are changes in the activities of the company. With regard to the Statement of Comprehensive Income for the period April 2019 to March 2020, the witness stated that Management Account has not been audited and cannot be relied upon. The same applies to statement from April 2019 to September 2020. He would presumed that it would be a budget. He maintained that with regard to the comments he made in his opinion, they were general in terms of the market. It is his view that even if equipment may not have been used during Covid-19 period, it does not affect the cashflow. The witness reiterated that all his comments with regard to the financial and operational aspects are based on information and figures that are received.

Justification

The Board's duty is to decide whether the redundancy is justified and whether the selection process is objectively fair.

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.*

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.*

The burden of proving that the intended redundancy is justified is on the Employer.

Notification and Negotiation

An overview of general legal issues in managing redundancy process in Europe, France and UK is succinctly described in *"Plan de sauvegarde de l'emploi: verrou ou flexibilité" publiée le 23 décembre 2014 dans la revue Jurisprudence Sociale Lamy n°. 377 et 378"* and relevant extracts of which we reproduce below:

In Europe:

> *«…La directive européenne définit les licenciements collectifs comme "les licenciements effectués par un employeur pour un ou plusieurs motifs non inhérents à la personne des travailleurs lorsque le nombre de licenciements intervenus est, selon le choix effectué par les Etats membres :*
> *i) soit, pour une période de trente jours:*

- *au moins égal à 10 dans les établissements employant habituellement plus de 20 et moins de 100 travailleurs,*
- *au moins égal à 10% du nombre des travailleurs dans les établissements employant habituellement au moins 100 et moins de 300 travailleurs;*
- *au moins égal à 30 dans les établissements employant habituellement au moins 300 travailleurs;*

ii) soit, pour une période de quatre-vingt-dix jours: au moins égal à 20, quel que soit le nombre des travailleurs habituellement employés dans les établissements concernés (article 1.1.)."

La directive européenne offre ainsi aux Etats membres la possibilité de choisir entre deux périodes de référence (30 jours ou 90 jours) afin de définir le seuil de déclenchement de l'obligation de consulter les représentants du personnel sur les licenciements collectifs. Selon la directive, cette obligation doit porter notamment "sur les possibilités d'éviter ou de réduire les licenciements collectifs ainsi que sur les possibilités d'en atténuer les conséquences par le recours des mesures sociales d'accompagnement visant notamment l'aide au reclassement ou la reconversion des travailleurs licenciés" (article 2.1)…» *(Underlining is ours)*

In France :

«…Comme on pouvait s'y attendre, la France a fait le choix du seuil le plus restrictif proposé par l'Union Européenne (à savoir 30 jours) pour déclencher sa législation sur les licenciements collectifs puisque l'Article L. 1233-28 du Code du travail que "l'employeur qui envisage de procéder à un licenciement collectif pour motif économique de dix salariés ou plus dans une même période de trente jours réunit et consulte, selon le cas, le comité d'entreprise ou les délégués du personnel, dans les conditions prévues par le présent paragraphe". L'obligation d'établir un plan de sauvegarde de l'emploi (incorporant un plan de reclassement et contenant les mesures de nature à éviter les licenciements ou à limiter le nombre) ne concerne cependant que les entreprises d'au moins 50 salariés (article L. 1233-61 du Code du travail).

La France va même au delà des prescriptions de la directive européenne puisque lorsqu'une entreprise envisage également de licencier collectivement pour motif économique moins de 10 personnes sur une même période de 30 jours, l'employeur doit consulter les représentants du personnel sur ce projet (article L 1233-8 du Code du travail). Enfin, afin d'être sûr qu'aucune entreprise ne va contourner les règles sur les licenciements économiques par des "ruptures par petits paquets", le Législateur français a rajouté aux articles L. 1233-26 et L. 1233-27 du Code du travail des seuils de déclenchement spécifique quand (i) une entreprise (assujettie à la législation sur les comités d'entreprise, c'est à dire actuellement ayant au moins 50 salariés) a déjà procédé à plus de 10 licenciements économiques pendant 3 mois consécutifs sans atteindre 10 licenciements dans une même période de 30 jours ainsi que quand (ii) une entreprise (également assujettie à la législation sur les comités d'entreprise) a déjà procédé au cours d'une année civile à des licenciements économiques de plus de 18 salariés sans avoir été tenue de présenter un plan de sauvegarde de l'emploi…» *(Underlining is ours)*

In UK :

> *«…Concernant spécifiquement les licenciements collectifs, la législation britannique a adopté une définition encore plus large prévue à la section 195(1) du Trade Union & Labour Relations (Consolidation) Act 1992 (TURLCA 1992). Se conformant à la directive européenne n°77/187 du 29 juin 1998, le Royaume-Uni définit le motif économique du licenciement collectif uniquement comme un motif non lié à la personne du salarié « a reason not related to the individual concerned or for a number of reasons all of which are not so related ».*
>
> *Extensive dans la définition du motif économique (en prenant au surplus soin de différencier licenciement individuel et licenciement collectif), la législation anglaise l'est aussi concernant le seuil du nombre de licenciements déclenchant les obligations consultatives. Sans surprise, la Grande Bretagne a plutôt retenue le second seuil de référence (le plus large) prévue par la directive européenne pour définir les licenciements collectifs pour motif économique, à savoir au moins 20 licenciements sur une même période de 90 jours. A cet égard, la section 188(1) du TURLCA 1992 dispose que: "where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals"…» (Underlining is ours)*

No doubt the duty to consult in redundancy process is common in all the above-named jurisdictions.

In our jurisdiction, section 8 of the Termination of Contract Service Ordinance of 1963 provided: *"… an employer of more than 10 persons who apprehends a likelihood of his having to curtail his activities as to render it necessary to propose to his employees the working of short-time with consequent loss of earning of the reduction of his workforce whether temporary or permanent shall forthwith notify the appropriate office of the Ministry of Labour and of Social Security."*

In the provision of the Termination of Contract Service (Amended) Ordinance of 1966, the Board was *"to consider whether there is a valid reason for such reduction of employer's workforce having regard to the operational requirements of the undertaking establishment of service."*

The functions of the Termination of Contract Service Board were retained in the now repealed Labour Act 1975 with substantially the same principles governing reduction of workforce in Section 39 of the Act.

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

"Section 39(2) of the Act reads as follows-

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

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

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

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 repealed *Employment Rights Act 2008* (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.

Under the subtitle "Reduction of Workforce", the new Section 39B of the Employment Rights Act 2008 (as amended) provided: *"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 of workforce or closing down, as the case may be. Notwithstanding this Section, an employer shall not reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise unless he has –*

(a) in consultation with the trade union recognised under Section 38 of the Employment Relations Act, explored the possibility of avoiding the reduction of workforce or closing down by means of –
  - *(i) restrictions on recruitment;*
  - *(ii) retirement of workers who are beyond the retirement age;*
  - *(iii) reduction in overtime;*
  - *(iv) shorter working hours to cover temporary fluctuations in manpower needs; or*
  - *(v) providing training for other work within the same enterprise;*

(b) where redundancy has become inevitable –
  - *(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and*
  - *(ii) given the written notice required under subsection (2).*

When an employer reduces his workforce or close down his enterprise, the employer and the worker may agree on the payment of compensation by way of a settlement."

We note that while the Employer had a duty to "give written notice" to the Permanent Secretary of the Ministry of Labour, Human Resource Development and Training, he was also to consult the recognised trade union with a view to explore the possibility of avoiding the reduction of workforce or closing down and the subsection laid down a series of ways of doing so.

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

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

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

Section 72 of the Workers' Rights Act 2019 which is currently in force provides: -

(1) An employer who intends to reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise, shall notify and negotiate with –

(a) the trade union, where there is a recognised trade union;

(b) the trade union having a representational status, where there is no recognised trade union; or

(c) the workers' representatives, elected by the workers where there is no recognised trade union or a trade union having representational status, to explore 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;

(v) providing training for other work within the same undertaking; or

(vi) redeployment of workers where the undertaking forms part of a holding company.

……

(3) Where the intended reduction of workforce or closure is the subject of negotiation under subsection (1), the recognised trade union, the trade union having representational status or the workers' representatives may agree with the employer on any of the possibilities specified in subsection (1) or on any alternative solution or on the payment of a compensation by way of a settlement.

Notification would be inadequate and nugatory if sufficient information is not disclosed. Those workers affected by the redundancy ought to be made aware of the Employer's intention so as they may be given an opportunity to respond for negotiation purposes.

Notification is therefore not a simple formality and it consists of being an essential part in the process of reduction of workforce or closing down.

In ***Coprim Ltée V. Menage (Mauritius) (2008) UK PC 12 (21 February 2008)***, the Privy Council, while referring to the repealed Labour Act 1975 stated, inter alia, *"… 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. If the Termination Board finds that the reduction is not justified, the employer is then bound to pay a sum equal to 6 times the severance allowance or to reinstate the worker in his former employment: Section 39(6). That whole system would be rendered ineffective, if a failure to notify the Minister did not carry with it a sanction that was potentially as onerous for the employer as the possible outcome of any consideration by the Termination Board of his proposed reduction in his workforce…".*

Counsel for the Employer in the present matter contended that although the Employer sent its notification on 13th April 2020, such notification took effect on 02nd June 2020 as the Covid-19 period ends on 01st June 2020. We are unable to agree to that proposition. Regulations have been made to extend the time during the Covid-19 period to allow the Board to complete its proceedings: -

THE COVID-19 (MISCELLANEOUS PROVISION) ACT 2020
39 A. Extension of time during COVID-19 period

(4) "Where, under an enactment, a time is imposed to make a decision or give a determination and the time expires, or falls wholly or partly, during –

(a) the COVID-19 period; or

(b) a period of 30 days after the COVID-19 period lapses,

the decision or determination may, notwithstanding the time imposed, be made or given not later than such period as may be prescribed by regulations under that enactment."

"Government Notice No. 157 of 2020

THE WORKERS' RIGHTS ACT 2019
Regulations made by the Minister under section 124 of the Workers' Rights Act 2019

1. These regulations may be cited as the Workers' Rights (Extension of Time During COVID-19 Period) Regulation 2020.

2. In these regulations –
"Act" means the Workers' Rights Act 2019;
"COVID-19 period" means the period starting on 23 March 2020 and ending on 1 June 2020.

3. Where, under section 75 (8) of the Act, the time period for the Redundancy Board to complete its proceedings has expired during the COVID-19 period or during a period of 30 days after the COVID-19 period lapses, the Redundancy Board shall complete the proceedings not later than 31 August 2020.

4. These regulations shall be deemed to have come into operation on 2 June 2020.

Made by the Minister on 17 June 2020."

There is therefore no legal basis to conclude that there has been a change with regard to the date of notification in cases of redundancy.

In matters of reduction of workforce, it was very much appropriate for the Employment Relations Tribunal to determine if the employer had engaged in consultations as required pursuant to *section 39B (3)(a)* of the *Employment Rights Act 2008 (as amended)*. Indeed, the legislator introduced in the Act an obligation on the Employer to communicate with the workers. 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 *Employment Rights Act 2008 (as amended)*:

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 this regard, it would be useful to note what was stated by the Employment Relations 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.

The employer must in consultation with the trade union explore the possibility of avoiding the reduction of workforce. A list of five alternatives is laid down in section 39B(3)(a)

of the *Employment Rights Act 2008 (as amended)* and management is expected to consider these alternatives in consultation with the union. For meaningful consultation to happen, Recommendation No. 166 concerning 'Termination of Employment at the initiative of the employer' (as guidance since Mauritius is not a signatory thereof) provides that consultations should be held before the stage at which redundancy has become inevitable. As a corollary to the right to be consulted and for the union to participate effectively in the consultations, the employer should supply the union in good time with all relevant information on the reduction of workforce contemplated and the effects they are likely to have. This will include information such as the reasons for the redundancy (which is contemplated), the number and categories of workers likely to be affected and the lapse of time over which the exercise is expected to be carried out.

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

> *Authorities entrusted to take decisions in a democratic society should not assume that the exercise of their power includes power to override people's legitimate interests and acquired and settled ways of life unilaterally. The obligation to seek the views of parties that will suffer the consequences of public actions has become such a general feature in Administrative Law that where the law actually imposes a specific duty to consult, it is regarded as a statutory guarantee of the general rule rather than an exception to a contrary rule. As has been stated -*
>
> *"Administrative authorities are frequently under a statutory duty to consult before taking certain specified action. They will often wish to consult, even if not so required; but a statutory requirement is intended as a guarantee that they will do so."*
>
> *In Administrative Law, it is an extension of the duty to be fair evolved from the oft-quoted Rules of Natural Justice. Consultation constituting as it does a process of civic education for all is an exercise in mutual self-learning as it affords both people sensitization and public body sensitization. For one, the community educates itself on the problems facing the public body. For another, the public body educates itself on the problems facing the public. On the whole, it enhances the democratic process:*
>
> *"The purpose of consultation is to give those affected by a proposed action an opportunity to put their case; or where they have some special knowledge, experience or expertise, to ensure that it is put at the disposal of the authority; or both. It should ensure that the authority does not overlook matters it ought to have regard to."*
>
> *Could it not be said that the meetings which the sellers had with the District Council and the visits satisfied that duty requirement? The answer must be negative, in the light of court decisions on the point. First, consultation is a mere cosmetic exercise. It requires an invitation by the consulter for fruitful communication with the consulted. Thus, it has been decided in the*

case of ***Agricultural, Horticultural & Forestry Industry Training Board v Aylesbry Mushrooms Ltd [1972] 1 All ER 280*** *that the mere sending of a letter constitutes but an attempt to consult and this does not suffice. The test as a rule is whether reasonable steps have been taken to contact those entitled to be consulted.*

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

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

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

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

Fourth, consultation in all cases clearly requires that the opinions and views expressed be considered with, as Morris J. put it, a 'receptive' mind. If it could be shown, as in ***Wood v Ealing London Borough (1967) Ch. 364****, that*

those consulted were presented with a 'fait accompli,' there would be a failure to consult."

In ***UK Coal Mining Ltd v NUM (Northumberland Area) & another EAT/0397/06 & EAT/0141/07***, *the Employment Appeal Tribunal (EAT) has held that an employer was obliged to consult with appropriate representatives about the reasons for the closure of the workplace, which was the reason for the redundancies.*

UK Coal Mining Ltd decided to close Ellington Colliery following flooding in January 2005. The DTI was notified on 21 January that the employer was due to announce the closure. On 27 January the union asked the employer to comply with its 90-day consultation obligation but was told the employer would proceed. A written notification gave the reason for the proposed redundancies as safety issues resulting from the flooding. More than 100 employees were made redundant on 26 February 2005.

The unions sought protective awards against the employer for failing to comply with its obligations under the Trade Union and Labour Relations (Consolidation) Act 1992, section 188. Under section 188 an employer is obliged to consult appropriate representatives of affected employees where it is 'proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less'. Where the employer is proposing to dismiss 100 or more employees the consultation must begin at least 90 days before the first dismissal takes effect.

The employment tribunal found that the employer had failed to comply with its requirement to consult and awarded maximum compensation of 90 days' pay under the protective award. The tribunal found that the employer had decided to close the colliery for economic reasons and not safety factors as notified to the unions. The employer appealed, arguing that the tribunal had made errors of law that impacted on the amount of the protective award. The two unions cross-appealed the tribunal's finding that there was no obligation to consult the unions about the reason for the closure.

The EAT dismissed the employer's appeal. There was no evidence that the reason for the dismissals was safety concerns. The real reasons were economic. The employer had failed to consult in accordance with the requirements. The EAT agreed with the unions that the tribunal had been right to take into account the employer's deception when making the protective awards. In ***Susie Radin Ltd v GMB and others [2004] IRLR 400 CA*** *the Court of Appeal had made clear that the protective award should be based on the employer's default and not on the need to compensate the employees.*

With regard to the unions' cross appeal, the EAT agreed that the tribunal had been wrong to find that the employer was not obliged to consult about the reasons for the proposed dismissals. The tribunal's decision had been based on the High Court's judgment in R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Vardy and others [1993] IRLR 104 HC that section 188 did not require consultation about the reason for the redundancies. At that time section 188 required consultation 'about the

dismissals'. Since then the legislation had been amended to give effect to Article 2 of Directive 75/129/EC (since replaced by Council Directive 98/59/EC). Now employers are required to consult about, amongst other things, ways of 'avoiding the dismissals'. The EAT agreed with the unions that if there was no obligation to discuss the decision to close the workplace then this made a mockery of the obligation to consult about ways of avoiding dismissals. Further, given the broad requirement under the Information and Consultation of Employees Regulations 2004 to consult over economic decisions and the employer's economic situation, it would be strange if this obligation to consult applied up to the point of redundancies being proposed but then ceased as the 1992 Act took effect, just as the issue became more crucial for the employees. The obligation to consult about avoiding redundancies involved engaging with the reasons for the dismissals and, therefore, the reasons for the closure.

*In **Stokes v City Link, ET1800595/2015**, an employment tribunal held that the company knew in November 2014 that it would potentially have to make large-scale redundancies or face insolvency. The consultation should, therefore, have begun then because this was the "proposal' to dismiss. In fact, many of the employees of the courier company learned of their redundancies some weeks later from television news bulletins over Christmas 2014. The tribunal awarded the maximum protective award, finding no mitigating circumstances. It considered that there was a "conscious decision" not to inform employees of the company's financial problems and also not to undertake redundancy consultation.*

There has been a major reform in respect of the procedures to follow prior to reducing the number of employees in the workforce. The Workers' Rights Act 2019 (as amended) imposes not only a duty of notification but a duty of negotiation with trade union representatives prior to a redundancy situation in a view to finding any alternative solution or an agreement. If an agreement has not been reached, it is only then that the matter is to be referred to the Board.

The word 'negotiation' has been defined in the Concise Oxford English Dictionary 11th Edition (Revised) as *"discussion aimed at reaching an agreement"*. We have seen that in the repealed Employment Rights Act 2008, 'consultation' under section 39 B was compulsory and failure to observe same rendered the process of reduction of workforce unjustified. Under the new Workers' Rights Act 2019 (as amended), 'negotiation' under section 72 (1) has not been reduced to a lesser prominence. On the contrary, we view consultation to be an exercise of a lesser degree than that of negotiation, although both carry the same objective, i.e. they should take place with a view to explore 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;
(v) providing training for other work within the same undertaking; or
(vi) redeployment of workers where the undertaking forms part of a holding company.

……

(2) Where the intended reduction of workforce or closure is the subject of negotiation under subsection (1), the recognised trade union, the trade union

having representational status or the workers' representatives may agree with the employer on any of the possibilities specified in subsection (1) or on any alternative solution or on the payment of a compensation by way of a settlement."

We find therefore that the duty to negotiate to be an onerous one where the focus should be on discussion of the possibility of entering into a settlement agreement. It should include meetings with personnel to be declared redundant in order to discuss the rationale of the downsizing. Meaningful discussions should cover other roles that may be available in the business. An employer cannot just decide who should stay and who should go without careful consideration through the application of a fair process.

It is clear that in the present matter there has been indisputably no notification and no negotiation prior to the Employer's notifying the Board of its intention to reduce its workforce, be it temporarily. The Employer stated it was extremely difficult to meet with the Workers during the Covid-19 period. Yet, meetings were held among members of the top management. The Employer was more concerned with the outcome of the Government Financial Budget that was due on the 04th of June 2020 and it was the next day that letters were sent to the workers with a view to start negotiation. He admitted that he did not even contact them by telephone.

Confinement does not mean that an employer should bypass its statutory obligation to negotiate and proceed with the process of redundancy on the ground that negotiation is not practicable. An employer must still take such steps towards compliance as are reasonably practical. Indeed, virtual meetings could be held and it is for the Employer to ensure that the workers or their trade unions or representatives to have access to the relevant technology and that it allows proper negotiation to take place. Where the workers do not have the facility to participate in a video call, the possibility of conducting negotiation meeting by telephone could have taken place. We fail to understand what was the difficulty, if any, that the Employer claimed to have faced. An employer has to strictly follow the same statutory process laid down in the Workers' Rights Act 2019 (as amended) if he is to make an employee redundant during the pandemic period. It is worth noting that the Advisory, Conciliation and Arbitration Service (ACAS) in the UK has expressedly said that in effecting redundancies during the Coronavirus outbreak, employers *"…must still consult (their) employees… Its likely that (they'll) need to do this remotely…"*

The negotiation process will be considered defective if insufficient weight is given to it. The proposals made by the Employer to the workers after notifying the Board are inadequate to amount to some sort of negotiation and in any case they came after the prescribed period of notification to the Board. The Employer has put the cart before the horse with an untimely decision to reduce its workforce and the belated proposals came as an afterthought. The Board understands that the proposals made were with a view to reach a settlement before the Board. We observe *en passant* that some proposals include issues that are not in accordance with the Workers' Rights Act 2019 (as amended) such as the reduction of workers' salary without the approval of the Ministry of Labour, Human Resource Development and Training.

Considering that no notification and negotiation took place prior to notifying the Board, it cannot be said that all the avenues to explore the possibility of avoiding the redundancy within the parameters of the law have been exhausted.

Section 72 (5) of the Workers' Rights Act 2019 (as amended) provides:

> *"Where no agreement is reached under subsection (3) and (4), or where there has been no negotiation, an employer who takes a course of action as specified in subsection (1), shall give written notice to the Redundancy Board set up under section 73, together with a settlement showing cause for the reduction or closing down, as the case may be."*

Counsel for the Employer submitted that since the subsection (5) above makes provision for a situation where there has been no negotiation, there cannot be an obligation on the Employer to negotiate. We beg to differ with that interpretation. The statutory duty to negotiate remains and when such duty has not been fulfilled, *"an employer who takes a course of action as specified in subsection (1), shall give written notice to the Redundancy Board…"*

Here the duty is to notify the Board irrespective of whether the duty to negotiate has been fulfilled or not.

Subsection 72 (7) provides: -

> *"A reduction of workforce or a closing down of an enterprise shall be deemed to be unjustified where the employer acts in breach of subsection (1), (5) or (6)."*

Financial Situation of Impact Production Ltd

1.0 Analysis of Financial position of Impact Production Ltd as per documents produced

Audited Financial Statements for years ending March 2017 to March 2019

The company has submitted 3 audited financial statements for years ending March 2017, March 2018 and March 2019. As regard the financial statements for year ending March 2020, same have not been submitted being given they have not yet been audited.

A comparison of its financial position for years ending March 2017 to March 2019 is shown in Table 1 below. From the audited figures, it is found that the company was quite profitable and sustainable. The company's total assets increased from Rs 35m in 2017 to Rs 91m in 2019 and thus, its net assets as at end March stood at Rs 19m. This indicates that the company had assets value which was more than sufficient to meet its total liabilities. The company's gross profits increased from Rs 61m to Rs 90m while net profit after tax increased from Rs 4m to Rs 8.5m from 2017 to 2019. As such, as at March 2019, the company had retained earnings amounting to Rs 18m. The cash and cash equivalent as at year end March 2019 stood at Rs 3.3m.

Table 1

Financial position	***March-19 Rs m***	***March-18 Rs m***	***March -17 Rs m***
Assets			
Non-current assets	14.5	18.3	20.8
Current assets	76.5	53.2	35.3
Total assets	91.0	53.2	35.3
Liabilities			
Non-current liabilities	7.5	7.6	7.6
Current liabilities	54.4	48.2	33.8
Total labilities	71.9	55.9	41.5
Net assets	19.1	(2.7)	(6.2)
Income & Expenditure			
Revenue	145.2	121.1	138.9
Cost of sales	(54.9)	(59.0)	(77.6)
Gross Profit	90.2	62.1	61.3
Administrative expenses & other costs	80.0	61.2	57.0
Profit/(loss) before tax from continuing activities	10.5	1.5	4.9
Profit after tax	8.5	1.0	4.0
Retained earnings	18.8	15.3	14.3
Cash flow			
Cash generated from operations	5.6	25	5.3
Net cash generated from operating activities	3.7	24.8	2.6
Cash and cash equivalent at year end	3.3	13.0	6.9

Unaudited Income and expenditure Statement for period April 2019 to September 2020

In order to justify its financial difficulties in the immediate future, the company has provided the income and expenditure statements for periods:

(i) April 2019 to September 2019
(ii) April 2019 to March 2020
(iii) April 2020 to May 2020
(iv) April 2020 to September 2020

A summary of income and expenditures for the above periods is at Table 2 below.

Table 2: Summary of income and expenditure statements

	Actual (Rs m)			**Estimated (Rs m)**
	April 2019 to Sept 2019	**April 2019 to March 2020**	**April 2020 to May 2020**	**April 2020 to Sept 2020**
Revenue	80.8	121.2	0.14	0.14
Gross profit	47.9	66.5	0.14	0.14
Expenditure	(44.1)	(74.3)	(2.4)	(2.4)
Net loss before tax	(4.1)	(7.2)	(2.2)	(2.2)

The company has estimated that as from April 2020, it will incur payments to the tune of an average of Rs2.5m on a monthly basis till December 2020. In this respect the company has averred that its bank balances will not be sufficient to pay the above amounts due which are existing commitments.

It has also stated that it will not be able to recuperate amounts due from its debtors in spite of its efforts. It is to be noted that as per the company's documents submitted, the accounts receivables of the company stand at Rs 15m.

For period April 2019 to March 2020, the total expenditure figure of Rs 74m includes some Rs 25m with respect to employee costs representing 33% of the total.

2.0 Views of SRA Partners, External Auditors of Impact Production Ltd.

The External Auditors submitted a status report on the audit of the draft Financial Statements of Impact Production Ltd for the year ended 31 March 2020.

The audit firm has stated that:

(i) it conducted a preliminary assessment of the draft accounts as at 31 March 2020 on 25 May 2020 via Zoom.

(ii) it noted that the draft accounts show a loss of Rs7.3m and retained earnings of Rs11.7m.

(iii) it has identified some major issues which it needs to address and verify in depth during its auditing exercise in due course. Components which need to be addressed and verified include: COVID-19 impact, trade and other receivables, trade and other payables, borrowings and banking facilities, related parties, laws and regulations, and other external factors.

The audit firm also submitted its Audit Timetable to conduct the audit exercise by 28 August 2020.

3.0 Observations:

In view of the past trend of the company's state of affairs as at **March 2019**, it can be reasonably deduced that as a going concern, the company was profitable and viable.

From the given information regarding income and expenditure for period April 2019 to Sept 2020, the company has tried to show that since April 2019, the company has been making losses. With the impact of COVID 19, the reduction of revenue has further aggravated the situation.

It is not disputed that during the lockdown, there were no economic activities around the island. It is very much evident that there would be drastic drop in revenue since mid-March 2020 till now or even in the near future. A general slowdown has certainly affected several companies. This situation can be considered temporary even though there is still uncertainty about its duration. As a going concern the company is assumed to be continuing its activities in the future. It is therefore, expected that the company would still need its long time experienced staff. Ups and downs in the profitability of a company are in the sphere of normality.

We note that neither the audited nor the unaudited financial statement for year ending March 2020 has been provided. It is difficult therefore to embark on further analysis on the company's financial position in terms of solvency, profitability and liquidity as at present date. As such a realistic status on financial position cannot be adequately assessed since this involves analysis in relation to past years accumulated profits and movement in cash and cash equivalents compared with current financial statements. The audited accounts as at the end of March 2020 could have given more insights into the financial state prior to COVID 19 and soon after its impact. Moreover, the liquidity position could have been properly assessed based on those figures to determine whether the current assets and cash and cash equivalent were sufficiently available and were judiciously used as a matter of priority and if not whether there were major investments or other transactions that could have diminished the current assets value and liquid assets.

In their Status Report on the unaudited financial statements for year ending 31 March 2020, the external auditors have indicated that it will address each component of the major issues noted thereon in line with ISA 300 "Planning and Audit of Financial Statements during their current audit exercise. In this regard they provided an Audit timetable for the audit exercise and finalization of their report by 28 August 2020. We are therefore not in presence of any certificate from independent auditors to provide confidence and evidence on the company's current state of affairs on which reliance can be placed.

It should also be noted that the figures concerning the comprehensive Income and Expenditure submitted by Impact Production Ltd have also not been audited although the company's external auditor testified that the figures show a real picture of the current state of affairs of the company's liquidity position. The auditor relied on the auditing process adopted by its audit firm to state that the given figures could be trusted and that they are true and realistic in the present circumstances. However, the external auditor did not certify that the figures which are still unaudited, give a true and fair view of the financial position. In addition, he agreed that there might be adjustment of figures after the audit is actually carried out.

A loss for one financial year is insufficient to justify redundancy on economic grounds. An employer must prove sufficient and objective proofs of economic difficulties which would justify that it has no other alternative than to opt for redundancy. It is significant to note that the French Cour de Cassation has taken a very restrictive approach in its interpretation of acceptable economic reasons. It was held by the Employment Division of the Cour de Cassation that the loss of a market, a dropdown in sales or lower turnover or profits during the year prior to the redundancy do not qualify as economic difficulties – Soc. June 8, 2005, no. 03 – 41, 410.

Generally, a proper assessment could only be made based on Audited Financial Statements as per the International Auditing and Assurance Standards Board (IASB) since these are more reliable, trusted and has legal weight.

As required by the Companies Act 2001, [section 205, (3)] and the Financial Reporting Act 2004, all public companies and private companies, other than small private companies as defined under this Act, shall be audited as per the International Standards of Auditing (ISA) by approved Auditors. It is to be noted that only an independent Approved Auditor registered by the Financial Reporting Council (FRC Act 2004), can certify whether the financial statements give a true and fair view of the matters to which they relate and whether the financial statements have been prepared in accordance with the International Accounting Standards. {Companies Act 2001 {section 205, (2) (f)}.

In a general point of view, each going concern company has a duty to perform risk management and be prepared in case of environmental changes. The companies have to be prepared for any unforeseen situation. It is worth quoting the Impact Production Ltd own policy as regard risk management:

> *"The board of directors has overall responsibility for the establishment and oversight of the company's risk management framework. The company's risk management policies are established to identify and analyse the risks faced by the company to set appropriate measures and controls and to monitor risks and adherence to limits. Risks management policies and systems are reviewed regularly to reflect changes in market conditions and in the company's activities".*

Wage Assistance Scheme

Section 57 (g) of the Covid-19 (Miscellaneous Provisions) Act 2020 refers to amendments to the Workers' Rights Act 2019, amongst others and which reads: -

> *"in section 64, by inserting, after subsection (1) the following new subsection –*
> *(1A) (a) Subject to subsection (2), an agreement shall not be terminated by an employer during any month in respect of which the employer is in receipt of financial assistance.*
>
> *(b) In this subsection -*
> *"financial assistance" includes –*
> *(a) the allowance payable under the Wage Assistance Scheme pursuant to section 150B of the Income Tax Act; or*
>
> *(b) such other financial assistance which is paid to an employer by the State or an agent of the State, as the case may be, under any other enactment or otherwise."*

The sub-section (2) refers above reads: -

> *(2) "Subject to subsection (3), no employer shall terminate a worker's agreement –*
>
> *(a) for reasons related to the worker's alleged misconduct, unless–*
>
> *(i) the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;*
> *(ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his alleged misconduct;*
> *(iii) the worker has been given at least 7 days' notice to answer any charge made against him;*
> *(iv) the employer cannot in good faith take any other course of action; and*

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is the subject of an oral hearing, after the completion of such hearing;

(b) unless where an alleged misconduct is the subject of criminal proceedings –

(i) the employer, has within 10 days of the day on which he becomes aware of the conviction of the worker by the Court of first instance, notified the worker of the charge made against the worker;
(ii) the employer has afforded the worker an opportunity to answer any charge made against him in relation to his alleged misconduct;
(iii) the worker has been given at least 7 days' notice to answer the charge made against him; and
(iv) the termination is effected within 7 days of the completion of the hearing specified in subparagraph (ii);

(c) in cases not covered by paragraph (a) or (b) unless the termination is effected within 7 days of the day the employer becomes aware of the misconduct.

(3) Before a charge of alleged misconduct is levelled against a worker, an employer may carry out an investigation into all the circumstances of the case and the period specified in subsection (2)(a)(i) or (b)(i) shall not commence to run until the completion of the investigation."

Counsel for the Employer argued that section 57 (g) *(supra)* is not applicable to the present case in view of the provision laid down in sub-section (1A) (a) of the said Act.

We do not follow that reasoning when subsection (2) of the Workers' Rights Act 2019 deals essentially and exclusively with termination of employment that takes place otherwise than for economic, financial, structural or similar reason. It is in relation to an issue that is personal to the employee as opposed to a situation where he is not to be blamed at all.

On a different note, the affected workers in the present case are still in the Company's employment, and the Employer would be committing an offence if it terminates the employment contract *"... during any month in respect of which the Employer is in receipt of financial assistance."* The offence carries a fine not exceeding Rs 25, 000 and to imprisonment for a term not exceeding two years.

As odd as it may seen, this is an Employer who had applied and benefited from Wage Assistance Scheme for the month of March 2020, notified the Board by mid-April 2020 of its intention to reduce its workforce and continued to apply and benefited from the Wage Assistance Scheme for that month and the following month as well. The scheme is to assist employers in paying workers' salaries albeit to a certain extent. Yet, the Employer in the present matter has not lifted its foot off the pedal of redundancy in spite of receiving such assistance.

Conclusion

Based on the above observations, the Board finds that should the employer proceed with the redundancy it *"shall be deemed to be unjustified"* within the ambit of section 72 (7) of the Workers' Rights Act 2019 (as amended).

The Board orders accordingly.

(SD)
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Rashid Hossen
(President)

(SD)
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Mrs. Amrita Imrith
(Member)

(SD)
……
Abdool Feroze Acharauz
(Member)

(SD)
……
Ms. Chandrani Gopaul
(Member)

(SD)
……
Suraj Ray
(Member)

(SD)
……
Ms. Saveeta Deerpaul
(Member)

Date: **13th August, 2020**