**REDUNDANCY BOARD**
**ORDER**

**RB/RN/176/2020**

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| **Before:** | **Bernard C. Marie** | - | **Vice-President** |
| | **Amrita Imrith (Mrs.)** | - | **Member** |
| | **Abdool Feroze Acharauz** | - | **Member** |
| | **Suraj Ray** | - | **Member** |
| | **Saveeta Deerpaul (Ms.)** | - | **Member** |

In the matter of: -

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| **RB/RN/176/2020** | **Vikash Boodhun & Others** |
| **(1)** | **v.** |
| | **Multi Dimension Fashion Ltd** |

On the 16th of November 2020, the Multi Dimension Fashion Ltd's workers hereinafter referred to as the "Applicants", applied to the Redundancy Board, hereinafter referred to as the "Board", under Section 72(8) of the Workers' Rights Act 2019 (as amended), for an order directing Multi Dimension Fashion Ltd, hereinafter referred to as the "Respondent" to pay each of them severance allowance at the rate of 3 months per year of service.

## Background

On the 16th of November 2020, the Applicants, 24 workers as per the attached list, applied to the Board, under Section 72 of the Workers' Rights Act 2019 (as amended), for an order directing the Respondent to pay them severance allowance at the rate of 3 months per year of service.

On 25th of November 2020, the parties were convened before the Board. Mr. Vikash Boodhun was elected by the Applicants to appear on their behalf and they were assisted by Counsel. The Respondent was represented by Mr. Mushtaq Oosman, its liquidator and assisted by Counsel.

The matter was fixed for hearing on the 11th of December 2020. The Respondent has, in meantime, filed its Statement in Reply to the Application and same has been communicated to the Applicants.

On the day of hearing, the Applicants was represented by Mr. Vikash Boodhun and they were assisted by Counsel. The Respondent was represented by Mr. Mushtaq Oosman and assisted by Counsel. 15 Out of the 24 Applicants have agreed to settle the matter and withdrew their application.

The Applicants' Application together with their Statements of Case

*"Re: Application for an order to pay severance allowance under Section 72(8) of the Workers' Rights Act 2019*

*Sir,*

1. *This is an application for an order to pay severance allowance under S. 72(8)(b) of the Workers' Rights Act 2019.*

2. *Our services have been retained by 25 employees in continuous employment of Multi Dimension Fashion Ltd (In Liquidation), represented by Mr. Vikash BOODHUN. A document labeled 'General List' and containing the name of each of those 25 employees, the respective date on which each of them entered into employment with the Respondent company and the last salary of each of them is attached to this application (Annex A).*

3. *Their terms and conditions of employment were governed by the Workers' Rights Act 2019- Act No. 20 of 2019.*

4. *They were working on a FIVE (5) days a week basis.*

5. *Their pay slips for the month of July, August and September are attached to this application (Annex B).*

6. *By way of a letter sent by registered post and dated 15 September 2020, the Respondent Company terminated the employment of the employees with effect as from 30 September 2020 on the ground of reduction of workforce.*

7. *The employees were given only 15 days' notice of termination.*

8. *The Respondent company made an application to the Board which, according to our instructions, was withdrawn by the administrator acting on behalf of the Respondent company. The employees were then paid 15 days' wage.*

9. *However, the employees consider the termination of their employment to be unjustified for the following reasons:-*

i. *The Respondent company, being an employer of 15 or more workers, failed to comply with the procedural aspects with regard to reduction of workforce as contemplated under the relevant provisions of section 72 of the Workers' Rights Act 2019.*

ii. *The Respondent Company has furthermore, by its acts and doings, committed a criminal offence actionable under section 123 (1)(f)(2) of the Workers' Rights Act 2019.*

10. *In the light of the above, the Board is humbly prayed:-*

i. *To find that the termination of their employment on ground of reduction of workforce in the present circumstances was wholly unjustified; and remaining 17 Applicants' employment on ground of reduction of workforce in the present circumstances was wholly unjustified; and*

ii. *For an ORDER directing the Respondent Company to reinstate them in their former employment or to pay them severance allowance at the punitive rate (3 months per year of service) with payment of remuneration from date of the termination of their employment to the date of their reinstatement/ until the Board gives a ruling in this case."*

## The Respondent's Statement in reply to the Application

The Respondent averred in its Statement in Reply to the Application that:

"

1. *The Respondent is a private company incorporated under the laws of Mauritius and it is represented by its liquidator Mr. Mushtaq Oosman.*

*The Application*

2. *By way of an application dated 16 November 2020 (the 'Application'), the Applicants have prayed to the Redundancy Board for the following:*
   (a) *for a finding that the termination of their employment on the ground of reduction of workforce was wholly unjustified; and*
   (b) *for an order directing the Respondent to either reinstate them in their former employment or pay to them severance allowance at the 'punitive rate'.*

*Background to the Application*

3. *Through a letter dated 11 June 2020, the Respondent, through its Managing Director, informed the Applicants that it intends to close down the enterprise for financial reasons.*
4. *By virtue of a Notice dated 15 June 2020 (Annex A), the Respondent, through its Managing Director, informed the Redundancy Board that:*
   (a) *it is experiencing financial difficulties due to the repercussions of the COVID-19 pandemic;*
   (b) *it is insolvent;*

(c) *it intends to permanently close down the enterprise;*

(d) *its financial statements showed that it has suffered losses to the tune of Rs 5,937,528 for the period June 2019;*

(e) *it is not being financially supported by the bank and it has no visibility of the new orders, as 90% of its local clients are hotels; and*

(f) *the Board is requested to inquire into the cause of the closure and find that the closure is perfectly justified in the circumstances.*

5. *On 29 June 2020, the director of the Respondent resolved that the Respondent be placed in voluntary administration and Mr. Mushtaq Oosman, Insolvency Practitioner, be appointed as Administrator (Annex B).*
6. *Mr. Mushtaq Oosman accepted the appointment and informed the Director of Insolvency accordingly (Annex C).*
7. *While the Respondent was in voluntary administration, the matter related to the Notice dated 15 June 2020, was called before the Redundancy Board. Following exchanges, the Redundancy Board took the view that it did not have jurisdiction to rule on the Notice, since the Respondent did not seek financial assistance in accordance with section 72(1A) of the Workers' Rights 2019. The Respondent therefore withdrew the Notice and the matter was set aside.*
8. *The Respondent is of the view that the Redundancy Board declined jurisdiction.*
9. *With the passage of time, the Administrator of the Respondent formed the view that it was not possible to salvage the Respondent. The business could not sustain, there were no orders coming in and the majority of the Respondent's clients, being hotels in Mauritius, were facing financial difficulties. The Administrator therefore convened a watershed meeting of creditor which was held on 10 September 2020.*
10. *At the watershed meeting, the creditors of the Respondent unanimously voted that the Respondent be placed into liquidation (Annex D).*
11. *On 10 September 2020, Mr. Mushtaq Oosman accepted his appointed as liquidator of the Respondent (Annex E).*
12. *Since the Respondent was in liquidation, it had no other choice that to terminate the employment of the Applicant through a letter dated 15 September 2020 (Annex F).*
13. *The Applicants have thereafter lodged the present Application before the Redundancy Board.*

*Respondent's position*

14. *The Respondent has been placed into administration and subsequently into liquidation in line with section 162 of the Companies Act 2001, since the Respondent was unable to pay its debts as they fell due.*
15. *Evidence to that effect is as follows:*

(a) *The Statement of Financial Position as at 30 June 2020, as submitted by the Managing Director to the Administrator, shows negative figures for retained earnings for the periods ending March and June 2020, that is, losses in the Respondent's profit and loss accounts (Annex G). The accumulated losses for the period ending 30 June 2020 were Rs 11,703,192;*

(b) *Annex G also shows that the Respondent had bank overdraft balances which far exceeded its cash and cash equivalents; and*

(c) *Annex G further shows that the Respondent was unable to satisfy the solvency test as defined by section 6 of the Companies Act 2001 and hence was unable to pay its debts as they became due in the normal course of business.*

16. *It is therefore clear the Respondent could not continue its business and had to close down due to financial difficulties, associated with inability to pay debts and insufficiency of cash to continue business as a going concern.*
17. *It is quite unfortunate that following the liquidation and close of business, the employment of the Applicants had to be terminated. In view of the financial position of the Respondent, the latter cannot in good faith take any other course of action.*
18. *On 24 November 2020, after having realized the Respondent's assets during the liquidation, the Respondent drew up cheques for its former employees and summoned them to collect their payment for compensation (the 'Compensation'). Each employee was being severance allowance, end of year bonus and refund for leaves as provided by law. All expatriate employees and few Mauritian employees collected their cheques. None of the Applicants accepted the Compensation.*

*The position in law*

19. *The Respondent does not dispute that the termination employment was done without the ratification of the Redundancy Board, for the simple reason that the Redundancy Board was of the view that it could not hear the matter.*

20. *The Respondent could not keep the 25 Applicants in employment since it would not be able to pay their monthly salaries, for lack of funds. Needless to point out that no funds to pay salaries means that the Applicants cannot be reinstated in their former employment. In any event, since being placed into liquidation, the Respondent has not performed any business operations as it has completed all its orders and sold all its stocks.*

21. *The Applicants were given 15 days' notice of termination and have already been paid 15 days' salary.*

22. *For the purposes of the termination and calculation of the Compensation, the Respondent, being in liquidation, has to follow two steps, as set out under the law:*

(a) *Firstly, the Respondent has to calculate the Applicants' severance allowance at the statutory rate of 3 months' remuneration per year of service, as per the Workers' Rights Act 2019; and*
(b) *Secondly, in distributing the Respondent's assets to pay out its debts, the Respondent has to abide by the Fourth Schedule to the Insolvency Act 2009 (Preferential Claims), where according to item 1(5), payments with respect to first ranking fixed and floating charges have to be made pari-passu with payments for unjustified dismissal / termination of employment.*

23. *Bank facilities contracted by the Respondent with the Mauritius Commercial Bank Ltd, with an outstanding balance of Rs 9,053,780.67 (Annex H), has to be paid pari-passu with sums due to the Applicants for the termination of their employment, that it, the Compensation.*

24. *The Respondent has in fact applied paragraphs 22 and 23 above, when it proceeded with the payment of the Compensation. A table showing the sums calculated is attached as Annex I.*

25. *The Respondent's total assets which was available for distribution according to the Preferential Claims was Rs 1,567,759.*

26. *According to Annex I, the total amount calculated for all the Respondent's former employees' compensation (including 3 months' remuneration per year of service, end of year bonus and refunds for leaves) is Rs 11,275,307. This has to be ranked paripassu with the loan balance of Rs 9,053,780.67.*

27. *Therefore, out of the total assets, Rs 869,540 was available for distribution to Respondent's former employees and Rs 698,219 was available for distribution to the Mauritius Commercial Bank for the loan balance.*

28. *The total sum of Rs 869,540, has been apportioned among the Respondent's employees and the amount payable according to law to each employee is listed under the heading 'Distribution Amount Payable' in Annex I.*

29. *The Respondent reiterates paragraph 18 above that it has drawn up cheques to pay the amounts listed under the heading 'Distribution Amount Payable' in Annex I to all its former employees. For some reason, the Applicants have refused to collect their cheques, though the cheques represent the amounts to which the employees are entitled by law.*

30. *The Respondent draws attention to the fact that any further delays in completing the liquidation will inevitably increase the costs of liquidation (which head of claim takes precedence over any other claim under the Preferential Claims). An increase in costs of liquidation would imply a decrease in the assets which can be distributed to the Applicants and the latter may find themselves with less compensation than what they are obtaining as at date. The liquidation has to be completed in a timely manner so that the liquidator can file his Liquidation Report to the Director of Insolvency.*

31. *The Respondent further highlights that the Applicants' prayers at paragraph 10 of the Application are academic since the Respondent is already paying to the Applicants the Compensation to which they are entitled according to the Worker's Rights Act, coupled with the Insolvency Act.*

*32. In the event the Board grants the prayers at paragraph 10 of the Application, this will not in any case alter the Compensation which the Respondent is paying to the Applicants. The decision of the Redundancy Board will therefore be an academic one.*

*33. Finally, in view of the allegation made by the Applicants at paragraph 9(ii) of the Application, the Respondent denies that it has committed a criminal offence under section 123(1)(f)(ii) of the Workers' Rights Act. That section makes it an offence to flout "any order or direction given under this Act." There has been no order or direction given under the Workers' Rights Act and hence the Respondent cannot be said to have committed an offence under that section. In any event, the Respondent has all along, acted in accordance with the relevant laws.*

*34. For the foregoing reasons, the Respondent humbly prays that the Redundancy Board makes a finding that the distribution of compensation to the Applicants is in accordance with the law."*

Evidence on behalf of the Applicants:

Mr. Vikash Boodhun, Machinist, deponed as follows: -

In examination in chief, Mr. Vikash Boodhun stated that he was in employment at the Respondent's company and his employment had been terminated on the 30th of September 2020. He claimed that there had neither been any negotiation nor any exploration into the possibility of avoiding termination of the Applicants' employment. He had received only 15 days' notice of termination. He further said that he had neither been paid his end year bonus nor had been offered any compensation. He said that he had been paid his monthly salary up to the month of September 2020. In cross-examination, he agreed that he had been made aware in a meeting that the Respondent had gone into liquidation after Covid-19 period but did not know how the liquidation process had been carried out. He maintained that the Respondent had to negotiate with the representative of the Trade Union. He agreed that he had been paid 15 days in lieu of notice. He stated that he is not well versed in law. In re-examination, He confirmed that he had been given 15 days' notice followed by the termination letter.

Evidence on behalf of the Respondent:

Mr. Mushtaq Oosman, Chartered Accountant, deponed to the effect that:-

In examination in chief, the witness identified and produced the charges inscribed on the assets of Multi-Dimensions Ltd (Document A). He stated that he is a Licensed Insolvency Practitioner and is the Liquidator of the Respondent. He confirmed that he had filed a Statement in Reply together with annexures (A) to (J). He said that the purpose of liquidation is to realize the assets and distribute them accordingly to the law. He explained that he had been appointed as Administrator to salvage the

company but he had not been able to do so and in his opinion the only way, was to heavily inject capital in the Respondent to which its shareholders had not been willing to do and the banks had not extended further facilities to the Respondent. The witness further stated that he had been appointed as Administrator by the creditors themselves. He had concluded that the Respondent was insolvent due to the fact it had its capital wiped off completely, had a nine million deficiency and had continuously been incurring losses. He explained that the Respondent's liabilities was in the region of 15 million rupees, the capital had showed a loss of 11 million rupees. The inventories although it had disclosed 9 million had been overestimated. He stated that the assets were much less and not enough to pay its liabilities. He said that at the watershed meeting, the creditors had decided to put the Respondent into liquidation and he had been appointed liquidator. He had issued notice on the employees as per the law and had calculated their severance allowance. As a liquidator he does not have to comply with section 72 of the Workers' Rights Act and his role as liquidator was to find ways to pay the severance allowance in accordance with the Insolvency Act. The Respondent's creditors are the MCB, the MRA, suppliers and creditors. He further explained how the distribution of the assets would be carried as per Schedule four of the Insolvency Act and what he had realized as at to date. He had realized 1.5 million out of which on pari passu basis Rs 869,000 for the employees and Rs 698,000 for the MCB. After negotiation with the MCB, he had managed to get the bank to release an additional Rs 300,000 for the workers who had turned them down. He stated that the MCB was the first rank charge to the tune of 9 million. He claimed that the compensation to be paid to the Applicants in case the termination was found to be unjustified was to the amount of 11 million and added to the bank amount due would come to the figure of 20 million. The Applicants would have to be paid in a proportion of 11 to 20 times of the available funds. He maintained that the termination is justified and the reinstatement of the Applicants is inconceivable. In **cross examination,** he agreed that he had notified the Applicants on the 15th of September and the termination had occurred on the 30th of September 2020 but the end of year bonus had not been paid. He conceded that he had not applied for an extension as per Section 225(4) of the Insolvency Act and it was not worth the risk due to lack of fund. He accepted that the Respondent's directors had not applied for a loan from the government institutions and that he had been appointed well after and that the law in regards to redundancy had retrospective effect but he had not applied for an extension of time. He contested that it is not because he had not applied for loan that the Respondent was insolvent. He argued that he was not in possession of any document to show that the Respondent was insolvent but the statement of affairs and the balance sheet as at 30th June 2020 which have been produced clearly revealed same. He maintained that after the assets had been disposed, there were no fund left. He agreed that the statement of affairs had not been signed by an Accountant but by the Directors of the Respondent who took full responsibility for their signature. He further said that as far as he is aware, in liquidation cases, you will not find an Accountant to certify the company's account and this document had not been filed to the MRA yet. He denied that had the Respondent obtained financial assistance from any of the three government institutions, it would not have been insolvent and it would not have terminated the Applicants' employment. The Witness confirmed that the liquidation of all assets of the Respondent had been completed and he had realized Rs 1.5 million out of same. He did not bring any receipt to sustain that all assets had been sold and two cars had been returned to the leasing company but he can produced them at a later date. He maintained that as Administrator he had not advised the Respondent to seek financial assistance knowing that the Respondent had no new orders from its hotel clients and further loss would have been the end result.

He claimed that due to the situation prevailing at that time, the Respondent had not been willing to commit itself and he could not forecast on the arrival of tourists. No **re-examination**.

Submission of Counsel appearing on behalf of the Respondent

*"Mr Chair, the application is based on two prayers, firstly for re-instatement and secondly if re-instatement is not possible for payment of severance allowance. Mr Oosman has given evidence that there were no orders coming to the company when the company was placed into liquidation, there were no funds. He was satisfied with the statement of affairs submitted by the Director and the resolution which is Annex B. I do not quite agree with my friend that it has to be signed to be admissible, in laws of evidence that would have been the case in criminal proceedings, but in the Courts Act any document whether signed or not is admissible. The weight to be attached is of course in the discretion of the Board. It is my submission, Mr Chairperson that when a company is placed into liquidation, the liquidator does not have to comply with Section 72 of the Workers' Rights Act. I will refer the Board to Section 72 in the bundle of authorities I have filed previously. If we look at subsection (1), Mr Chairperson, it says that "an employer intends to reduce the number of workers either temporarily or close down his enterprise shall notify and negotiate with the Trade Union". The correct interpretation of that section in my humble submission, Mr Chairperson is that closing down of business is for an entreprise which is not in liquidation. When a company is in liquidation, now I will refer the Board to Section 138 of the Insolvency Act which is at page 6 of the bundle, under that Section 138, subsection (1) Mr Chairperson. It reads as follows "a company shall from the commencement of its winding-up seize to carry on its business except so far as in the opinion of the liquidator required for the beneficial winding-up of the company". So ultimately either way the company should close down eventually. I do not believe that a company closing down under Section 138 can keep workers in employment. I will now refer the Board to the next page which is page 7, Section 146 of the Insolvency Act which states that "subject to Sections 336 and 337 and the fourth Schedule, the property of a company shall on its winding-up be applied pari passu in satisfaction of its liabilities and it is according to that fourth Schedule itself that Mr Osman has calculated the debt or the severance allowance to be paid to workers if ever the Board finds that the termination is unjustified and that compensation has been applied pari passu with the charge of the MCB which I refer the Board to page 12 of the bundle which is the fourth Schedule, subsection (5) where it is stated that "payments made pari passu with first ranking fixed and floating charges and mortgages". The next page pari passu with any compensation for unjustified dismissal that accrues or crystallizes before completion of winding-up. Obviously, we are before the completion of the winding-up. So, in the event the Board finds that the termination given by Mr Oosman when the company was placed into liquidation is unjustified, so this is how the distribution will be performed and how it has been calculated. Well I am preempting if I may what my friend may submit, if ever my friend submits that well, look the Workers' Rights Act states clearly that in the event termination is unjustified, workers have to be paid three months' salary per year of service. The fourth Schedule precisely takes account for that under subsection (5). In fact, another schedule I wish to refer the Board to is the sixth Schedule of the Insolvency Act which is page 18 of that bundle. "The liquidator of a company has power to do all or any of the following", the subsection (b) part "carry on the business of a company to the extent necessary for the liquidation". So, as I have already submitted, after the liquidation has been performed, ultimately workers employment has to be terminated because the law*

*specifically provides that in a liquidation the company must cease to carry on business. These are my submissions under Section 72 of the Workers' Rights Act and under the Insolvency laws. Now obviously the Board has to decide whether the termination is justified or not. It is my submission that the termination was perfectly justified because it's a company which has been placed into liquidation and the question of reinstatement in any event does not arise because of the lack of funds and I don't think it will be appropriate for workers to work without at the end of the month getting the salaries. These are my submissions, Mr Chairperson."*

Submission of Counsel appearing on behalf of the Applicants

*"My submission will be very short. I will file this case and the law, I have a copy for my friend as well. The respondent terminated the employment of the applicants illegally. Respondent did not negotiate with the workers' representatives or Trade Union and did not explore the possibility of avoiding the reduction of work force or closing down. Respondent thus acted in breach of Section 72(1) of the Workers' Rights Act. Respondent acted contrary to Section 72(1)(a) of the Workers' Rights Act coupled with the Workers' Rights Prescribed Period Regulations 2020 by terminating applicants' employment between the 1st June 2020 and the 31st of December 2020. Respondent fail to prove that they were suffering from financial difficulties before terminating applicants' employment. Only a document signed by the Directors of the supposed dead company which is irrelevant which is biased. Besides, if the company was suffering from financial difficulties he had the option of seeking financial assistance but it chose not to. Mr. Oosman was appointed Administrator in June 2020. Respondent did not attempt to preserve the employment of the applicants since it did not bother to apply for financial assistance from the Development Bank of Mauritius, Mauritius Investment Corporation Ltd, State Investment Corporation Ltd. The respondent argued that Insolvency Act overwrites the Workers' Rights Act. In my submission that such is not the case. I have filed a copy of the ruling in which the Board clearly explains at page 8 of that ruling, that a section of the Insolvency Act does not overwrite the provisions of the Workers' Rights Act if it is notwithstanding the Workers' Rights Act. That same ruling also mentioned that for the termination of employees' employment to be lawful the provision of the Workers' Rights Act have to be compiled with. Here the respondent did not compile with the provision of the Workers' Rights Act. In the light of my submission and in the light of the ruling of the Health Contact Center Ltd, the case is filed therefore the Board is prayed for an order directing the respondent company to pay severance allowance at the putative rate three months per year of service together with payment of any remuneration from the date of the termination of the employment and the date on which a ruling is delivered in this case. If my friend has something to add..."*

## ANALYSIS

The Redundancy Board is established with restricted jurisdiction and the purpose of which is detailed in **Section 73 of the Workers' Rights Act 2019(as amended)** where it is stated that:

> *"There shall be a Redundancy Board which shall deal with all cases of reduction of workforce and closure of enterprises for economic, financial, structural, technological or any other similar reasons."*

**Section 72(1A) (a) of the Workers' Rights Act 2019 (as amended)** provides as follows:

> *"Subject to paragraph (b), an employer shall, during such period as may be prescribed, not reduce the number of workers in his employment either temporarily or permanently or terminate the employment of any of his workers."*

The prescribed period as provided in **the Workers' Rights (Prescribed Period) Regulations 2020** which has now been extended to 30th June 2021 **(Government Notice 312 of 2020)**. At the time the applications were entered, it covered the period starting on the 1st June 2020 and ending on 31st December 2020.

And a breach of **Section 72(1A) (a) of the Workers' Rights Ac 2019 (as amended)** by an employer, enables a worker to seize the Board for redress under **Section 72(8)** of the said Act which provides that:

> *"Where the employment of a worker is terminated in breach of subsection (1), (1A), (5) or (6), the worker may apply to the Board for an order directing his employer – (a) to reinstate him in his former employment with payment of remuneration from the date of the termination of his employment to the date of his reinstatement; or (b) to pay him severance allowance at the rate specified in section 70(1), and the Board may make such order as provided for in subsection (10) or (11)."*

The Board notes, which is not contested, that the letters of termination were sent by the Respondent to the Applicants on the 15th of September 2020. However, although it seems clear at first instance that the termination falls squarely within the prescribed period, hence, contrary to **Section 72(1A) (a) of the Workers' Rights Ac 2019 (as amended)**, it remains to be decided whether the Board has jurisdiction to entertain this application, when the Respondent has been put into liquidation and a liquidator has been appointed.

The Board further notes that Counsel appearing for the Applicants, in his submissions, has invited the Board to apply the ratio in its previous decision: **Jeewoonarain & Ors v. Health Contact Center Ltd (2020) RB/RN/172/2020.**

**Section 222 of the Insolvency Act 2009 as amended** sets out the Administrator's role and provides that:

> *"(1) While a company is in administration, the administrator –*
>
> *(a) has control of the company's business, property, and affairs;*
> *(b) is required to investigate the company's affairs and consider possible ways of salvaging the company's business in the interests of creditors, employees and shareholders;*
> *(c) may carry on that business and manage that property and those affairs with the objective of salvaging the company's business in the interests of creditors, employees and shareholders;*
> *(d) may terminate or dispose of all or part of that business, and may dispose of any of that property; and*

*(e) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not in administration."*

In **Jeewoonarain & Ors v. Health Contact Center Ltd (2020) RB/RN/172/2020,** the Board concluded that:

*"In the present case, we note at Paragraph 5(b) of its Statement of Case dated 30th November 2020, the Respondent has contended that the Administrator terminated the Applicants' employment so as to escape liability in accordance with the provisions of Section 225(3) of the Insolvency Act 2009 as amended. Indeed, this is a misconception of the provisions of the law protecting Administrators from personal liability.*

*It is our firm view that for the termination of Applicants' employment to be lawful, the provisions of the Workers' Rights Act have to be complied with. The provisions of Section 225(3) of the Insolvency Act 2009 as amended do not override the provisions of the Workers' Rights Act 2019 as amended inasmuch as the provisions of Section 225(3) of the Insolvency Act 2009 as amended are not "notwithstanding" those of the Workers' Rights Act 2019 as amended. (Underlining is ours) "*

But the Board tends to disagree with the submissions of Counsel appearing for the Applicants on that issue to the extent that a company in administration differs from a company put in liquidation. A company in administration does not automatically lead to the closing down of the company whereas a company in liquidation puts an end to the conduct of the business where the prime objective is the realisation of the company's assets for the repayment of debts.

**Section 145(2) of the Insolvency Act 2009** under **Section C- Voluntary Winding up** provides that:

*"After the commencement of a winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court thinks appropriate." (Underlining is ours)*

**Section 2 of the Insolvency Act 2009** defines "Court" as "Bankruptcy Division of the Supreme Court" and "liquidation" in relation to a company means the winding up of the company.

In **Saturn Investments Sarl v. Wah Bon Ching Edmond & Ors (2016 SCJ 5)** the Supreme Court held as follows:

*"As rightly submitted by Learned Senior Counsel for the Defendants in his written submissions, the declaration of winding up triggers some fundamental changes in the regime governing a company. Pursuant to section 101(2) and (4) of the Insolvency Act 2009 the declaratory order of the Court or the resolution for voluntary winding up or the creditors' winding up resolution should state the date and the time of the declaration. These have legal consequences on the company and immediately the liquidator shall take into his custody or under his control all the property to which the company is entitled (section 112 of the Insolvency Act 2009). The appointment of the liquidator suspends the rights of any creditor to take action or proceedings*

*against the company except with the leave of the Court (section 145 of the Insolvency Act 2009). The aim of the liquidator is to realise and distribute the assets of the company applying the principle of pari passu distribution among the creditors in satisfaction of its liabilities subject to the preferences and priorities as established by law (section 146 of the Insolvency Act 2009) and although the assets remain in the ownership of the company, they are said to be held on trust for the creditors."*

The former quasi-judicial body, the Termination of Contract of Service Board (TCSB) established under **Section 38 of the Labour Act 1975** reached similar conclusion in **Re: Jalifc Hotels Ltd (TCSB 967/2001)**.The Termination of Contract of Service Board observed that given that the company had gone into liquidation, the Board had no jurisdiction to try the case and it should per se be withdrawn.

Reference may also be made to the decision of the High Court of New Zealand in the case of **Warren Metals Limited v. Damien Grant and Steven Khov [2013] NZHC**, an appeal case of a decision of the Auckland District Court. The Court referred to **Section 248(1)(c) of the New Zealand Companies Act 1993,** a similar provision to **Section 145(2) of the Insolvency Act 2009,** which provides that:

*"248 Effect of commencement of liquidation*

*(1) With effect from the commencement of the liquidation of a company,—*
*(a) The liquidator has custody and control of the company's assets:*
*(b) The directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part of this Act:*
*(c) Unless the liquidator agrees or the court orders otherwise, a person must not—*
*(i) commence or continue legal proceedings against the company or in relation to its property; or*
*(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company" (Underlining is ours)*

The High Court Judge observed at paragraph 23 of his judgment that:

*"Once a company has been put into liquidation the rights of unsecured creditors are limited in proving their claims. To continue a claim against the company requires leave."*

Hence, in light of the above observations, the Board holds that it has no jurisdiction for the purpose of this application and the Applicants are to seek leave before the proper forum before applying to the Board for an order for severance allowance.

The Board therefore orders that the application be set aside.

*(SD)*

*Bernard C. MARIE*
(Vice-President)

*(SD)*

*Mr Abdool Feroze Acharauz*
*(Member)*

*(SD)*

*Mrs Amrita Imrith*
*(Member)*

*(SD)*

*Mr Suraj Ray*
*(Member)*

*(SD)*

*Ms. S. Deerpaul*
*(Member)*

09 April 2021