Hilary Term
[2025] UKPC 7
Privy Council Appeal No 0019 of 2023

JUDGMENT

Private Power Operators Ltd (Appellant) *v* Industrial Disputes Tribunal and 2 others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Briggs
Lord Leggatt
Lord Burrows Lady
Rose
Lord Richards

JUDGMENT GIVEN ON
11 February 2025

Heard on 20 November 2024

Appellant
Gavin Goffe
Matthew Royal
(Instructed by Myers Fletcher & Gordon (London))

Respondent Lisa
White
Faith Hall
(Instructed by Charles Russell Speechlys LLP (London))

LADY ROSE:

1. Introduction

1. On or about 28 June 2013 nine employees at the appellant's electricity plant at 100 Windward Road in the parish of Kingston were dismissed. Seven of those employees belonged to the National Workers Union ("the NWU") and two of them belonged to the Union of Clerical, Administrative and Supervisory Employees ("UCASE") (together "the unions"). Both those unions have bargaining rights for certain categories of workers employed by the appellant ("Private Power") for the purposes of the Labour Relations and Industrial Disputes Act enacted in 1975 ("LRIDA").

2. The news of the pending dismissals resulted in the unions serving a strike notice on Private Power on 24 June 2013. This led in turn to the intervention of the Honourable Minister of Labour and Social Security. On 5 July 2013, the Minister referred the disputes to the Industrial Disputes Tribunal ("the IDT") for settlement. The IDT is a statutory body established pursuant to section 7 of LRIDA.

3. There were two references made by the Minister to the IDT under section 9(3)(a) of LRIDA, one in respect of the two members of UCASE and one in respect of the seven members of the NWU. The terms of reference required the IDT to determine and settle the dispute between Private Power on the one hand and the relevant union on the other. The panel appointed to determine both disputes was made up of Mr Norman Wright KC (chairman) sitting with Mr Rion Hall JP and Mr D Trevor McNish. They dealt with the two references together and held a hearing spread over 47 sittings between 13 March 2014 and 18 January 2016.

4. The IDT published two awards on 5 April 2016 and concluded that all nine dismissals had been unjustified: see awards IDT 27/2013 (UCASE) and IDT 28/2013 (NWU). The main reasons for that conclusion were that Private Power failed properly to consult the unions about the redundancies in accordance with the requirements laid down in section 11 of the Labour Relations Code ("the Code") and that the process by which the employees were selected for dismissal was unfair.

5. Private Power applied for judicial review of the IDT's decisions, but its application was dismissed by Fraser J in a judgment dated 12 September 2018: [2018] JMSC Civ 124. Private Power's further appeal to the Court of Appeal was also dismissed in a judgment handed down on 26 March 2021: see [2021] JMCA Civ 18. The judgment of the Court of Appeal was given by Dunbar-Green JA (Ag) with McDonald-Bishop JA and Simmons JA concurring. Private Power now appeals to the Privy Council.

2. The relevant law

6. The IDT is established under Part III of LRIDA. Section 9 of that Act provides that any industrial dispute existing in an undertaking which provides an essential service may be reported to the Minister by any party to the dispute. Subject to exceptions which are not relevant here, the Minister must then refer the dispute to the IDT. The IDT is then bound to make its award and it may set out the reasons for the award if it thinks necessary or expedient to do so: section 12(3). According to section 12(4)(c), an award is final and conclusive and "no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

7. Section 12(5)(c) of LRIDA provides that where the dispute relates to the dismissal of a worker, the IDT may, if it finds that the dismissal was unjustifiable, either order that the employer reinstate the worker if that is what the worker wishes and pay the worker such wages as the IDT may determine or, if the worker does not wish to be reinstated, order payment of compensation.

8. The Code was issued pursuant to section 3(1) of LRIDA to provide practical guidance promoting good labour relations. It was approved by the House of Representatives and by the Senate in 1976. As to the status of the Code, section 3(4) of LRIDA provides:

> "A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a [Board of Inquiry] any provision of such code which appears to the Tribunal or a [Board of Inquiry] to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or [Board of Inquiry] in determining that question."

9. The status of the Code was considered by the Privy Council in *Jamaica Flour Mills Ltd v The Industrial Dispute Tribunal* [2005] UKPC 16. Their Lordships endorsed the descriptions of the Code that had been given by the lower courts in those proceedings as establishing an environment in which the relationships and communications between the employers, the workers and the unions should operate for the peaceful solution of conflicts which are bound to develop. The Board in that case rejected a suggestion that the Code was no more than a set of guidelines and accepted the submission of the IDT that it was "as near to law as you can get": para 6.

10. Section 11 of the Code is headed "Security of Workers":

"**11. Security of Workers**

Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency—

(i) provide continuity of employment, implementing where practicable, pension and medical schemes;

(ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;

(iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship; In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;

(iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit."

11. Part V of the Code dealing with communication and consultation provides:

"**19. Communication and Consultation**

Communication and consultation are necessary ingredients in a good industrial relations policy as these promote a climate of mutual understanding and trust which alternately result in increased efficiency and greater job satisfaction. Management and workers or their representatives should therefore cooperate in promoting communication and consultation within the organization.

(a) *Communication*

Communication is a two way flow of information between management and workers or their representatives. There should likewise be scope for a cross flow of information between various departments of management: …

(b) *Consultation*

Consultation is the joint examination and discussion of problems and matters affecting management and workers. It involves seeking mutually acceptable solutions through a

genuine exchange of views and information. Management should take the initiative in establishing and regularising consultative arrangements appropriate to the circumstances of the undertaking in co-operation with the workers or their representatives.

(i) Management should ensure that in establishing consultative arrangements-

(a) all the information necessary for effective consultation is supplied;

(b) there is adequate opportunity for workers and their representatives to expose their views without prejudicing their positions in any way;

(c) senior members of management take an active part in consultation;

(d) there is adequate opportunity for reporting back.

(ii) Where formal arrangements exist the rules and procedures as well as the subjects to be discussed should be agreed between representatives of management and workers."

12. The NWU had entered into a collective labour agreement with Private Power. Clause 20 of this agreement provided:

"In matters relating to engagement, promotion, demotion, transfer, lay-off, termination of employment and re-hiring the following principles will be observed:

(i) It is the responsibility of the company to maintain the highest level of efficiency therefore it must be the one to judge the requirements of any job and the ability of any Employee or candidate for employment to fulfil the requirements of any job.

(ii) The employee who in the opinion of the Company has the greater skill competence and efficiency and who in the opinion of the Company is in all respects most suitable for the particular job shall be given preference for promotion or retention whether he is of equal or more or less seniority than any other Employee.

(iii) The Company agrees that when in its opinion two Employees are equally suitable in all respects for promotion or retention, it will give preference to the Employee who has the longest continuous service with the Company."

13. There was no collective labour agreement in force between Private Power and UCASE, at least not one which contained a provision similar to clause 20.

3. The awards made by the IDT and the judgments of the courts below

14. The two awards issued by the IDT on 5 April 2016 were in almost identical terms.

15. The IDT first set out the rival submissions presented by Private Power and by the unions. The first issue for their determination in both cases was whether a redundancy situation had existed at the plant. On that issue they concluded that Private Power had established that a genuine redundancy situation existed at the relevant time. The managerial decision to reduce the workforce was one which a reasonable employer could have reached in light of its assessment of the plant's technical and economic efficiency.

16. The second issue addressed by the IDT was the consultation with the unions. They set out sections 11 and 19 of the Code and then described the communications passing between Private Power and the unions and the meetings that had been held. The narrative started with a short letter dated 31 December 2012 simply inviting the unions to a meeting "to discuss a proposed restructuring exercise for the company". The IDT noted that the letter made no mention of redundancy. The union representative responded that he was not prepared to come to a meeting without some better idea of what the proposed restructuring might involve. Private Power wrote to him saying that there were no documents relating to the proposed restructuring exercise and as a consequence, nothing that they could share with him at that point. A meeting was, however, held between Private Power and the unions on 21 January 2013. On 23 January 2023 there was a meeting of the management with all staff where the employees were handed a memo referring to the difficult challenges facing the company and telling them that the unions had been advised of issues "including but not limited to the possibility of a reduction of the existing workforce".

17. Following those meetings, on 12 February 2013, Private Power wrote to the unions inviting them to a further meeting. That letter referred to "changing economic environments" and to the objective of the restructuring exercise being "to better position the company to adapt to these changing business conditions". The letter referred to the need for "rectifying inefficiencies" and for reducing costs and improving efficiency. Seven initiatives were listed in the letter as the options being evaluated by Private Power including the introduction of shift work, reduced use

of casual or temporary employees, a wage freeze, unpaid leave and redundancy of some members of the workforce.

18. In their reply dated 27 February 2013, the unions picked up on the reference in that letter to possible redundancies. The unions recommended that the management look at management, maintenance and overseas contractor costs and to their "management style and policies etc" if they wanted to return the company to its former efficiency. They asked the company "to be much more open and transparent with the necessary information such as your various costs of operations, in compliance with section 19 of the Labour Relations Code 1976".

19. The IDT observed in its awards that by this point, although Private Power had put on the table the seven initiatives which it was evaluating, it had not in clear terms informed the unions about redundancies. Neither the letters, nor the meeting, nor a statement that the company had made directly to the workforce on 23 January 2013, conveyed "a clear and precise decision on redundancies". On the contrary, in response to the reference to redundancy made by the unions in their letter of 27 February, Private Power responded on 1 March 2013 by letter pointing out that redundancy was one of a number of initiatives to reduce costs and improve efficiency. The letter said: "It was not the only item for consideration". The IDT noted "Again, there is no clear, concrete or definitely stated position by the Company to the Union, that redundancies will take place" (para 35 of the awards).

20. The parties were then at an impasse with the unions asking for audited information about operating costs before they were prepared to meet again with management. There was a further meeting on 10 April 2013 at which, according to Private Power, it presented a number of technical strategies to meet its objective and not just a reduction in the labour force. The management wrote again to the unions on 24 April suggesting meeting dates in mid-May. The unions responded again saying that Private Power's "financial woes" were the fault of poor management and asserting that the plant was in fact understaffed so that any overrun of the budget "would be as a result of weak management and not workers' fault".

21. As regards the communications between December 2012 and the meeting in June 2013, the IDT said (para 37):

> "37. It is also the contention of the Union that there was no consultation on redundancy, as there was no decision to effect redundancies communicated to them. The evidence plainly indicated that the Union was invited to meet to discuss, not even a restructuring exercise but a 'proposed restructuring exercise.' It is noted that there was no invitation to discuss the matter of redundancy. The question may be asked is whether this is semantic. The Tribunal thinks not, because it is long established in the field of Human Resources Management and

> Industrial Relations that this is not necessarily the case. Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two. …
>
> "38. … The inevitable conclusion to be drawn is that there was a discussion between the Company and the Union about a 'proposed restructuring' exercise, but we are not of the view that this satisfies the requirement under Paragraph 19 of the Labour Relations Code, which requires the Company to inform the Union when the need arises for redundancy and make genuine efforts to avoid such redundancies."

22. A further meeting was arranged for 19 June 2013. At that meeting the unions were handed a statement by the management in which they were told that the company would be proceeding with a redundancy exercise on 28 June 2013 and outlining the payments it would make to those workers being dismissed. The IDT commented:

> "Further examination of the said Statement leads to the conclusion that redundancy was a fait accompli. It gave information of the date it would be effected, the number of employees to be axed, the engagement of an agency to administer counselling to the affected employees and a schedule for the completion of the payment of terminal benefits."

23. In a key paragraph of the awards, para 42, the IDT concluded that Private Power had made the decision to reduce the workforce "sometime before June 19, 2013, and informed the Union on that date after all the necessary groundwork had been laid for its implementation". That did not satisfy the requirements of section 11 of the Code. The IDT went on:

> "43. On June 19, 2013, when the Union was finally informed that redundancies were definitely on, then, consistent with the provisions of the Code, Consultation and discussions should have been held with 'worker[s] or their representatives to take all reasonable steps to avoid the redundancies.' The Company's action in this regard as contained in the Statement handed to the Union at the meeting of said date, rendered the Consultation process to avoid the redundancies, futile and at that stage, of no effect."

24. In a later section of the decision, the IDT reiterated its conclusion that from the evidence before it, it was clear that Private Power had failed to inform the unions

in clear, precise and unequivocal terms, that it was contemplating a reduction in the staff complement. The communication to the unions was couched in language from which no factual conclusion could be drawn and no deliberate action could be taken: para 49. Further, the IDT observed:

> "50 The Labour Relations Code expressly recognizes that the principle that '**work is a social right and obligation not a commodity**' and that industrial relations should be carried out within the spirit and intent of the Code. The '**spirit'** and '**intent'** of the Code, as far as redundancy is concerned, is that as soon as a company realizes that there is the need to reduce staff, it must inform the Union of this realization and take the initiatives to discuss with the Union, ways and means as to how the redundancy can be avoided." (emphasis in original.)

25. However, the IDT noted at para 51 that the unions' co-operation with management "can be best described as tardy".

26. The IDT turned to the issue of the selection of the employees at para 44 of its awards. The IDT quoted from the statement given to the unions by Private Power at the meeting of 19 June 2013. The statement said:

> "The employees will be evaluated against a key of criteria which is applied fairly and consistently. Some of the criteria to be used are knowledge, skill, experience, qualification, attendance and disciplinary records, The numbers will be anywhere from fifteen (15) employees up and may include Union delegates. The final numbers and names will be submitted to the Union as soon as we have finalized same."

27. The IDT said at para 44 that a critical factor was that the selection criteria had to be agreed by both parties. This was consistent with the consultation required under the Code and also with the dictum of Browne-Wilkinson J in *Williams v Compair Maxam Ltd* [1982] ICR 156 ("*Compair*"), an authority which was relied on by the unions and referred to by Private Power. The IDT cited a passage from Browne-Wilkinson J's judgment in that case in which he said, among other things, "In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant" (*Compair* at p 162). The IDT said:

> "44. … In this dispute the evidence indicate that the Union was not consulted on the selection criteria. They learnt about it in the Statement given to them on June 19, 2013. The employees to be evaluated were not interviewed. Also, there was no opportunity to make representation as the result of the

> evaluation for selection was never made available to the Union or the employees involved."

28. The IDT then referred to a further point of concern, namely that the collective labour agreement between the parties provided for an agreed mechanism to be applied for the retention or promotion of employees and this was disregarded. Clause 20 provided that the employee who, in the opinion of Private Power, had the greatest skill, competence and efficiency would be given preference for retention. The IDT noted further that the prescribed Selection Matrix Form used to score the employees who might be dismissed had "performance" as one of the criteria to be evaluated but it was not used in this exercise. The IDT concluded at para 47:

> "In the instant dispute, the Tribunal finds that the Company arrived at a determination as to which employee possessed greater *skill, competence and efficiency* without evaluating such employees' performance. You cannot fairly or reasonably arrive at a decision as to who should be retained or selected to be axed, where there has been absolutely no evaluation of performance. It seems to us, that an evaluation of the employee's performance on the job is a '*sine qua non*' for selection to be retained or to be axed. Performance evaluation is fundamental and essential to the selection process." (original emphasis)

29. The selection matrix was not, therefore, in accordance with the collective labour agreement and fell short of the required standard expected and implied in that agreement.

The IDT concluded at para 53 as follows:

> "The Tribunal, taking into consideration all the circumstances of this dispute and the reasons and findings set out herein, finds that the Company fell down in its management of the Consultation process with respect to the redundancies and the selection process was done in a manner that was lacking in transparency and not in compliance with the relevant stipulations in the Collective Labour Agreement, thus rendering the process unfair. Therefore, the dismissals by reason of redundancy are unjustified."

30. The IDT ordered Private Power either to reinstate the employees within 21 days and pay them 52 weeks' wages or, if they were not reinstated, to pay them 130 weeks wages, after deducting previous payments for redundancy.

31. Private Power brought a fixed date claim seeking, amongst other things, an order of certiorari quashing the IDT's orders and a declaration that the awards were manifestly excessive, unreasonable, illegal and void. The claims were heard together by Fraser J and she dismissed them. The judge described the correspondence between Private Power and the unions that had been before the IDT starting on 31 December 2012 and the evidence of the witnesses at the IDT's hearings, particularly as to what had happened at the meeting on 19 June 2013. At para 72, the judge accepted the IDT's submission that references by Private Power to "reorganisation" did not indicate to the unions or to the employees that redundancy was an option being explored. She said: "When matters of this nature are being explored which will have an overreaching effect on people's lives, clear and precise terms must be used for the avoidance of doubt." But she also accepted Private Power's contention that the IDT had erred in construing section 11 of the Code as requiring that consultation only begins where an employer informs the unions that redundancies are "definitely on". She found that consultation had started on 12 February 2013 but that it was still ineffective, having regard to the requirements of section 19(a) of the Code. She accepted that the unions were tardy in how they handled the invitations relevant to consultation sent out to them by Private Power and that the unions had frustrated attempts to engage in consultation. But she concluded that Private Power could have consulted with the employees themselves when it realised that its attempts to meet with the unions proved futile: paras 87 and 88.

32. Fraser J then turned to the selection matrix used to identify the employees to be dismissed. She contrasted the requirements of clause 20 of the collective labour agreement with what Private Power had said in the statement handed to the unions on 19 June 2013. She quoted from the judgment of Browne-Wilkinson J in *Compair* which, she said, set out the common law standard to be adopted by a company: para 97. She said further that "Consultation on the selection process must also be brought to the Unions and it must be agreed and the criteria listed ought to be adhered to so as to make the selection fair" (see para 98). It was evident that Private Power was in breach of this agreement.

33. Fraser J considered whether the errors of law that she had identified had been made by the IDT justified the grant of the relief sought by Private Power. She concluded they did not (para 103):

> "The plight of these workers and the abrupt termination of their employment could not have been ignored by the Industrial Disputes Tribunal. The Tribunal considered the matter of communication and consultation as one of the factors in arriving at a decision as to whether the workers were unjustifiably dismissed. The Tribunal made a finding based on the evidence presented that there was no effective communication and or consultation by the Claimant. In addition to the issue of communication and consultation the

> Tribunal considered other factors and came to a decision on those facts that the workers were unjustly terminated."

34. Fraser J therefore dismissed the claim, holding that it had been open to the IDT to hold, on the available evidence, that the workers were unjustifiably dismissed.

35. On appeal, Dunbar-Green JA (Ag) found that both the IDT and Fraser J had erred by referring to *Compair* as a relevant authority. She said at para 33 that the Privy Council confirmed in *University of Technology, Jamaica v Industrial Disputes Tribunal* [2017] UKPC 22 ("*UTECH UKPC*") that the statutory scheme governing industrial relations in Jamaica is very different from that in the United Kingdom. In giving expression to the provisions in the LRIDA, one should not rely on what obtains in English law, if by doing so there is an importation of a foreign provision into the LRIDA: para 34. In any event, *Compair* was not authority for the proposition that the criteria for selecting employees for redundancy had to be agreed with the unions. An agreement on the selection matrix might be desirable but it is certainly not a requirement of the Code. That error had been repeated by Fraser J in her judgment.

36. As to the effect of that error on the part of the IDT, the court held that the principles outlined in *Compair* had not been determinative of the outcome of the reference:

> "50. … The IDT had reviewed the evidence dealing with the evaluation of the employees and found that the performance criterion was not used, the employees were not interviewed and the immediate supervisors did not participate in the process. These matters were considered to be unfair, quite apart from any reference to the *Compair* case."

37. Further, that error was not relevant to the IDT's findings relative to the mismanagement of and lack of transparency in the redundancy process. Fraser J had therefore been correct in not quashing the decisions.

38. Dunbar-Green JA (Ag) then addressed Private Power's complaint that the IDT had erred in finding a breach of clause 20 of the collective labour agreement because it was not part of the dispute referred to it. She held that the terms of reference to determine and settle the dispute were wide enough to incorporate reference to the agreement though it had not been the subject of submissions by either party.

39. She disagreed with Fraser J's reading of the IDT's award in an important respect. The IDT had not, in her view, construed section 11 of the Code as meaning that the obligation to consult only arose when the employer informs the unions that redundancy is definitely on. What the IDT said in its award was not, the Court of Appeal held, inconsistent with that. Rather, the IDT had said that "there ought to

have been, in the specific circumstances of this case, consultation and discussion when redundancy was definitely on, with a view to taking reasonable steps to avoid it, not when a decision had already been made and it would be futile and of no effect to consult": para 79.

40. Finally, Dunbar-Green JA (Ag) noted that the IDT had conceded that Fraser J had erred in finding that Private Power could have consulted directly with the workers in response to the unions' "tardiness" in responding to requests for meetings. But that, and other errors by the judge, did not affect the decision of the IDT which was unimpeachable.

41. Private Power was granted final leave to appeal to the Privy Council on 19 December 2022.

4. The issues in the appeal

42. The issues raised in this appeal before the Board relate to both grounds on which the IDT based its decision; the lack of consultation about redundancy and the adoption of the selection criteria. Private Power argues that the errors made should result in the remittal of the dispute to the IDT to reassess the evidence in light of the guidance that the Board gives on these two issues.

(a) Some preliminary points

43. It was accepted by the parties that if the IDT was right to find that consultation had been inadequate, that made the dismissals unjustifiable. Similarly, if the IDT was right to find that the selection process was carried out in an unfair manner, that would render the dismissals unfair.

44. It is also common ground that there was an error in the IDT's decision. The IDT were wrong to rely on *Compair* both because English authorities are not transposable to Jamaican industrial relations and because that case is not, in any event, authority for the proposition that selection criteria must be agreed between the unions and the employer before dismissals on the grounds of redundancy can be fair.

45. Although both Fraser J and the CA upheld the decision of the IDT, their reasoning was not the same. However, the Board's primary task is to consider whether the IDT's decision discloses an error of law and if so, what the consequences of that error are for that decision. The focus of the Board's analysis must therefore be on the reasoning in the IDT awards rather than on the judgments of Fraser J and the Court of Appeal.

46. In that regard, the Board bears in mind that the IDT is an expert tribunal that has been constituted with members with particular expertise in industrial relations. The

Second Schedule to the LRIDA provides that the chairman and deputy chairmen of the IDT are appointed by the Minister after consultation with organizations representing employers and workers "and shall be persons appearing to the Minister to have sufficient knowledge of, or experience in relation to, labour relations". The Court of Appeal stated in *National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal & Peter Jennings* [2016] JMCA Civ 24, para 7:

> "… the courts have consistently taken the view that they will not lightly disturb the finding of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal."

47. The IDT was the respondent to the judicial review before Fraser J; it was the respondent in the appeal to the Court of Appeal and appeared as respondent before the Board. The unions appeared as interested parties before Fraser J and before the Court of Appeal but did not appear before the Board. The Board has recently commented on the role of tribunals in defending their own decisions from a challenge brought by the unsuccessful party in proceedings before them: see *Special Tribunal v Estate Police Association (Trinidad & Tobago)* [2024] UKPC 13; [2024] 1 WLR 4252, paras 39 onwards. The Board there discussed a number of Privy Council appeals in which employment tribunals and other judicial bodies had taken an active role in opposing appeals. The Board also referred to Canadian authorities in which such a practice was strongly deprecated as discrediting the impartiality of the tribunal: see the cases discussed at paras 45 to 49 of the *Estate Police Association* decision. The Board's guidance on this issue in *Estate Police Association* can be summarised as follows.

(i) The usual practice that a tribunal should adopt a neutral stance in a challenge to its decision is "an approach that is required by internationally recognised principles of judicial independence and impartiality": para 56. A tribunal acts inconsistently with that function if it takes part in a challenge to its decision in an adversarial way aligning itself with the successful party before it.

(ii) Those principles are also violated if the tribunal seeks to defend its decision by adding to the reasons that it gave when the decision was made rather than leaving those reasons to speak for themselves.

(iii) Whether the tribunal takes any active part in the proceedings at all and, if so, what assistance it offers to the court must, in the first place, be a matter of judgment for the tribunal - circumstances vary greatly and it is not possible to be prescriptive. More active participation may be justified to ensure that the court is informed of relevant law and potential arguments, particularly if the case raises a difficult or important point of law that would otherwise go by default.

(iv) In making any submissions, the tribunal should maintain a strictly neutral stance and avoid adopting an adversarial role.

48. No explanation was given to the Board as to why it was not possible for the unions themselves to defend the challenge brought by Private Power and why they dropped out of the proceedings once the appeal reached the Board. It must be recognised too that the judgments of Fraser J and the Court of Appeal (which were, of course, handed down before the decision in *Estate Police Association* was promulgated) do not criticise the IDT in this regard.

49. Certainly, the conduct of the IDT in the present appeal does not compare to the conduct of the Special Tribunal in the *Estates Police Association* case. Ms White's submissions on behalf of the IDT were made in fair and temperate terms and assisted the Board. But the parties did at times attempt to supplement the reasoning as set out in the published awards or to put a gloss on the words used there. Similarly, Private Power's arguments sometimes sought to rely on the written or oral submissions that the IDT had made to Fraser J or to the Court of Appeal as modifying the content of the decisions. The Board is clear that this is a temptation that must be resisted by both sides. It is not legitimate for either party to treat the tribunal as being in a special position as regards interpreting the reasoning set out in the decision. The reasons for the decision are those, and only those, set out in the published version. Amplification of those reasons is neither helpful nor appropriate.

50. Finally, shortly before the hearing of the appeal, Private Power applied to amend its notice of appeal to add a further ground of appeal, namely that the Court of Appeal had erred in upholding the IDT's finding that there was a breach of a collective labour agreement between Private Power and UCASE. The reason given for the application was that Private Power "has since established" that there was no collective labour agreement in place between Private Power and UCASE. The IDT objected to the proposed amendment on the grounds that the application was an improper attempt to advance a new ground of appeal without first seeking special leave to appeal from the Board having already been granted leave to appeal by the Court of Appeal. At the start of the hearing before the Board, the Board indicated that it would hear argument on the merits of the proposed further ground without deciding whether to allow the amendment. This issue is considered at paras 66 and 67 below.

(b) Lack of consultation on redundancies

51. On the issue of whether there was a failure to consult the unions in breach of the Code, Private Power submitted that Fraser J had been correct to identify an error of law in the IDT's decision concerning when its obligation to consult arose. The Court of Appeal had been wrong to overturn that finding. The IDT had found that the obligation to consult arose only once redundancies were "definitely on" and that that situation had been arrived at only on 19 June 2013. As a result of that conclusion, the IDT then wrongly focused on the period which started on 19 June 2013 when, they thought, the obligation

to consult arose and ended on 29 June when the dismissals took place. The IDT then evaluated only the correspondence and meetings over that short period when considering the adequacy of the consultation. Unsurprisingly they concluded that there was no adequate consultation during that short period.

52. Private Power argues that Fraser J was right to say that under section 11 of the Code, the obligation to consult is not triggered only when redundancies are "definitely on" but arises much earlier – at a formative stage of the employer's plans. In light of that, it was important for the judge to re-evaluate the question of whether there had been adequate consultation by looking at the whole history of the contact between Private Power and the unions from December 2012 through to the dismissals at the end of June. A fresh evaluation of that evidence should have led to the conclusion either that there had been sufficient consultation over that six month period or, if there had not, that that was the result of tardiness and lack of co-operation on the part of the unions. Further, such consideration as Fraser J did give to the whole period was muddled by her conclusion that Private Power could and should have negotiated directly with the workers if the unions had not been co-operating. The Court of Appeal correctly found that Fraser J had erred on that point.

53. On this point the Board agrees with the Court of Appeal that the IDT's analysis was not undermined by an erroneous conclusion that the only relevant period so far as consultation was concerned was the period between 19 and 28 June 2013. The IDT and the Court of Appeal correctly understood the obligations arising from section 11(ii) and (iii) of the Code. Section 11(ii) does not identify any particular period over which the duty to consult arises before employees are dismissed; nor would it be sensible to do so given that the need for a reduction in the work force may arise suddenly or become apparent gradually. The IDT clearly understood the key point which is that in order for such consultation truly to be aimed at taking "all reasonable steps to avoid redundancies" as required by section 11(ii), the potential need to make workers redundant must, if possible, be raised fairly and squarely with the union at a time when the union can contribute meaningfully to exploring other options with the workforce. If redundancies do become necessary, then section 11(iii) requires that the consultation which takes place is aimed at minimising the hardship that will arise.

54. The IDT's awards were not based on a finding that the obligation to consult only arose when redundancies were "definitely on" so that only correspondence after 19 June was relevant to the question of compliance with the Code. The IDT set out in great detail the correspondence and the parties' evidence about what happened from December 2012 onwards, both when recording the parties' submissions about that narrative and when setting out their own conclusions. By describing the redundancies as being "a fait accompli" by the time of the 19 June meeting, the IDT clearly recognised that Private Power's decision to make workers redundant had been arrived at some time earlier.

55. The Board also rejects the submission that Fraser J or the Court of Appeal failed properly to assess the purport of the correspondence or that a fresh examination of the correspondence between the parties between December 2012 and mid-June 2013 would

have affected the IDT's decision. That correspondence and the relevant witness evidence has been described in detail by the courts below: see for example the judgment of Fraser J at paras 61 and 83 to 87 and the judgment of the Court of Appeal at para 7(i) to (xii). Ms White on behalf of the IDT took the Board through the correspondence at the hearing of the appeal. The Board concludes that there is nothing in those letters that could fairly be described as consultation about redundancies. On the contrary, Ms White is right to point out that it was the unions which wanted to discuss possible redundancies and Private Power was downplaying that as a possibility.

(c) The selection of employees for dismissal

56. The criticism made by Private Power of the IDT's awards as regards the selection criteria used to identify the employees to be dismissed is more complex. First, it reiterated that the Court of Appeal had held that the IDT erred in holding that the selection criteria had to be agreed as between the unions and Private Power. That conclusion arose from an erroneous analysis of *Compair* which was not authority for the need for there to be agreement, but only for the need to consult on selection criteria.

57. Further, Private Power said that the IDT held that there had been no proper discussion with the unions about the criteria to use and that selection was carried out in breach of clause 20 of a collective labour agreement between Private Power and the unions. Clause 20 of the collective labour agreement (set out at para 12 above) included performance as a relevant criterion but, as the IDT noted, it was clear from the completed selection matrix forms in evidence before them that performance had not been given a value. Private Power says that the IDT's criticism in this regard is unwarranted. The reason why performance was not included as a criterion was because not every relevant employee had had a performance appraisal. It would have been unfair to include a score for those who had had an appraisal but not to include a score for those who had not.

58. On this substantive issue, the Board rejects Private Power's criticism of the IDT's awards. The gravamen of the IDT's conclusion that the adoption of the selection criteria had been unfair was that there had been no discussion with the unions about what criteria would be applied. The Board was shown two examples of completed matrices headed "Redundancy Selection Matrix Form" scoring two of the employees who were dismissed. They were both signed by the managers of the mechanical and electrical departments on 21 June 2013, two days after, as the IDT found, the unions were first properly informed of the proposed redundancies at the meeting of 19 June. The list of names of those to be dismissed was, according to Private Power's fixed date claim form, forwarded to the unions on 26 June 2013. Mr Goffe, for Private Power, did not suggest that the other selection matrices would show any different date. It was clearly impossible for there to have been any consultation with the unions about how the employees would be selected.

59. In so far as Private Power attempted to argue that any such consultation was unnecessary because the selection criteria had already been agreed as set out in clause 20 of the collective labour agreement, the IDT was entitled to reject such an argument on the

basis that the previously agreed criteria in clause 20 included performance and there had been no discussion with the unions about excluding that criterion. The selection matrices show that "performance" was marked "N/A" and given a score of zero for both employees.

60. The narrative provided to the IDT in Private Power's briefs dated 12 May 2014 states clearly that it was at the meeting on 19 June that the unions were told that there would probably be fifteen employees dismissed and that "once the list was finalised the Union would be informed". It states that the selection criteria being used by Private Power were discussed with the unions and that those criteria were then used: paras 48 and 50 of the brief for UCASE. Private Power does not assert that there was any earlier discussion than that. The IDT was fully entitled therefore to conclude that the dismissals were also unjustified on the basis that the selection criteria had not been adequately discussed before the employees were chosen.

61. In addition to this substantive point, Private Power raises a procedural argument. It submits that the point about the supposed breach of clause 20 of the collective labour agreement was not a point that had been raised by the unions when they were setting out the scope of the dispute that was referred to the IDT for determination. Private Power referred the Board to the brief that had been submitted by the unions to the IDT on 17 February 2014. This set out the contention of the NWU that unionised workers were victimised by the selection process and that all union delegates except one were dismissed: "the Company carried out an act of Union busting by terminating mostly unionized positions unjustifiably". The other complaint raised about selection was that those dismissed were all the trained and qualified safety experts at the plant, leaving the workplace unsafe. UCASE's brief to the IDT was in similar terms. The briefs did not, therefore, plainly raise an issue about the absence of performance as a criterion used to select employees for dismissal. Clause 20 and the need to evaluate performance was not a point argued by the unions at the hearing before the IDT and Private Power had not been given a fair opportunity to address the point. It was unfair therefore, Private Power submits, for the IDT to rely on this point in making its awards.

62. The Board has concluded that it is not open to Private Power to raise this procedural issue for the first time before the Board. It amounts to a challenge to the fairness of the IDT's process and should have been raised in the judicial review proceedings lodged on 28 February 2017. The fixed date claim form sets out a detailed description of the errors that it is alleged that the IDT made, including as regards the IDT's findings in respect of the interpretation of the collective labour agreement: see paras 34 to 43. Those paragraphs do not challenge the fairness of the IDT having referred to clause 20 of the agreement but challenge the IDT's conclusion that performance should have been included in the selection exercise. The Board therefore rejects this complaint raised by Private Power.

63. The Board does not, however, agree with the Court of Appeal that the decision in *UTECH UKPC* is relevant to this issue. At para 56 of its judgment, the Court of Appeal referred to *UTECH UKPC* in support of the proposition that, even if the collective labour

agreement had not been put in evidence before it, the IDT could have examined its terms on the basis that it was relevant material which fell within the scope of the broad jurisdiction conferred by the LRIDA for the IDT to settle disputes. Dunbar-Green JA said:

> "This is consistent with the position upheld in *UTECH UKPC* that the IDT has its own original jurisdiction where it is a finder of fact. Accordingly, it is my view that there was no violation of natural justice or any law in the IDT's consideration of the CLA."

64. The point considered in *UTECH UKPC* was very different from the point raised by Private Power in this case. In *UTECH UKPC*, the issue was whether the role of the IDT in an unfair dismissal case was limited to asking whether the dismissal was justified by the circumstances which were known or ought to have been known to the employer at the time of the dismissal or whether the IDT could take into account matters that came to light after the dismissal. The Board upheld the conclusion of the Court of Appeal in that case that the IDT was not restricted to examining the evidence that had been before the employer's disciplinary tribunal. The IDT could find that the decision to dismiss was one that a reasonable employer could have taken on the basis of circumstances which existed at the time of the dismissal and which came to light later: see para 27 of Lady Hale's judgment. It was in that context that the Board referred to the IDT as having "an original jurisdiction to decide whether the dismissal was unjustifiable".

65. Private Power's complaint that there was a breach of procedural fairness by the IDT is not therefore answered by referring to the IDT's original jurisdiction. That would not entitle the IDT to adopt an unfair process by basing their decision on a point that the unions had not raised in their briefs if that had led to Private Power being taken by surprise and not having a fair opportunity to address the issue. In the event the Board is fully satisfied that no such unfairness arose in these proceedings.

66. The proposed amendment to Private Power's notice of appeal also concerns this aspect of the appeal: see para 50 above. The point that Private Power wishes to raise is that the IDT was wrong to treat the absence of performance as a criterion as making all the dismissals unfair because there was only a collective labour agreement – and so clause 20 was only relevant – in respect of the employees who were represented by the NWU not those represented by UCASE. This element of the IDT's reasoning could not therefore support a conclusion that the dismissals of the employees represented by the other union were unjustified.

67. The Board considers that there is no merit in this point and refuses permission to amend without needing to consider whether the application was improper for the reasons put forward by the IDT. Private Power should be aware of the nature of its relationship with the unions it recognises for collective bargaining purposes. It did not raise this point in its fixed date claim form. On the contrary, it referred throughout to the two unions as "the Union" (see para 6) and its submissions on clause 20 referred to the agreement being

between "the Claimant and the Union" without differentiating between the NWU and UCASE. That approach was adopted also by Ingrid Christian-Baker, the General Manager of Private Power, who provided affidavit evidence to the High Court on behalf of the company. She did not draw any distinction in her evidence between the two unions, referring to them together as "the Union" and noting that the same person was the Senior Negotiating Officer for both as she explained in para 7.1 of her affidavit in support of the application for leave to apply for judicial review. It would be wrong to allow Private Power to resile from that position now.

5. Should the Board remit the awards to the IDT?

68. Although the Board has rejected Private Power's grounds of challenge to the IDT's awards, the Board must still consider whether the Court of Appeal was right to uphold the judge's decision not to remit despite the admitted error made by the IDT. That error is the IDT's reliance on the *Compair* decision as authority for the need to agree or at least consult with the unions about the criteria to be applied when selecting employees for dismissal.

69. The parties agreed at the hearing before the Board that the applicable test as to whether a matter should be remitted to the decision maker when an error of law has been identified is the common law test. This was set out in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306 as confirmed recently in *Public Service Commission v Richards* [2022] UKPC 1, para 39. The question is whether the element of unlawfulness has had an impact on the decision or whether it is inevitable that the IDT would have reached the same decision if it had not made the error. In the Board's opinion, it is clear that this error does not undermine the conclusions of the IDT described above. It is not appropriate to remit the disputes.

70. Fraser J discussed in her judgment the distinction between errors of law which go to jurisdiction and those that do not, citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, see paras 54 and 57 of her judgment. It was conceded before the Court of Appeal that the judge had fallen into error when she stated that only errors that go to jurisdiction could vitiate decisions made by the IDT. That concession was correctly made and the Court of Appeal were right to go on to reject the need for any remittal.

71. Private Power relies on the decision of the House of Lords in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603. The House of Lords was considering a planning decision which was ultra vires because there had been no environmental impact assessment as required by a European Union directive. Lord Hoffmann noted that if the court upheld an ultra vires planning decision in those circumstances, that would seem to be in conflict with the court's duty to fulfil the United Kingdom's obligations under the relevant European Union Treaty. Further he said: "It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be

ultra vires": see p 616. The position here is very different from that discussed in *Berkeley* and there is no justification for applying a more stringent test for remittal.

6. Conclusion

72. The Board will humbly advise His Majesty that the appeal should be dismissed.