

**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**ERT/ RN 73/20**

**Before**

<b>Indiren Sivaramen</b>	<b>Acting President</b>
<b>Raffick Hossenbaccus</b>	<b>Member</b>
<b>Karen K. Veerapen</b>	<b>Member</b>
<b>Ghianeswar Gokhool</b>	<b>Member</b>

**In the matter of:-**

**Mrs Neelah Maharaj Tilhoo (Disputant)**

**And**

**The State Investment Corporation Ltd (Respondent)**

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act (hereinafter referred to as “the Act”). The parties were assisted by Counsel. The terms of reference of the point in dispute read as follows:

*“I consider my transfer to Casino de Maurice Ltd in Curepipe as punitive and that I should be posted back to the State Investment Corporation Ltd in Port Louis.”*

The Disputant deponed before the Tribunal and she stated that the Respondent is the investment arm of the government and has a number of subsidiaries and other companies in which it has a shareholding. There are also four casinos which are companies with their own board of directors which fall under the Respondent and which are managed by the SIC Management Services Ltd. She stated that as from 2015 she was working directly with the then Acting Managing Director of the Respondent, Mrs Veerasamy. She averred that she was assisting the latter and was handling all her board meetings, ensuring all papers were ready on time and that all important and urgent matters were dealt with as required. She suggested that though her job title was

Secretary, she was performing much higher functions. After Mrs Veerasamy, Mr Beejan was the new Managing Director. The latter separated the work at the Respondent into different clusters and she was assigned the Casino Cluster together with Mr Cally. She stated that Mr Cally was then with Mr Beejan responsible for the administration of the casinos. She was providing technical assistance to Mr Cally and helping with the board papers. She suggested that she has always worked beyond her scheme of duties. She produced a copy of her letter of promotion to the post of Senior Confidential Secretary dated 17 September 2018 together with her scheme of duties for that post (Doc A). She did not agree that she was not reporting to the Managing Director and suggested that the functions and post of Senior Confidential Secretary were tied to the post of Managing Director.

Disputant stated that when Mr Beejan left, Mr Cally was posted at the casino for a while and that she was still working with the latter. Mr Cally was going to and coming from the casinos. She however averred that she was physically posted at the Respondent. In December 2019, she received a letter from the new Managing Director informing her that she has been posted at the Casino de Maurice. She produced a copy of the letter (Doc B). She stated that there had been no changes in her scheme of duties since her promotion in 2018 and that she was not asked nor agreed to be transferred to the office of the casino cluster at Casino de Maurice in Curepipe. She then produced a copy of a 'Review of pay and grading structure and conditions of employment' at the Respondent (Doc C). She is not aware of any amendments having been made to this document subsequently. She stated that there is no mobility clause in these terms and conditions of employment.

Disputant stated that the conditions of employment of the employees at the Casino de Maurice are governed by a procedural and collective agreement and not by Doc C. She stated that at the Respondent she had been appointed as Director on the Board of SIC Management Services Ltd (SICMS) which manages four casinos including Casino de Maurice whereas now she is not even posted at a clerical level at one of these casinos. She suggested that since she joined Casino de Maurice, she is doing one task, which is, to scan documents. She claimed that at the Casino de Maurice she is not performing as per her scheme of duties as Senior Confidential Secretary. She stated that she is now reporting to one of the Senior Confidential Assistants of Mr Nabobsing who is the 'Group Manager Administrative'. She averred that she does not accept her posting and has been disputing this posting since the very first day. She then explained the steps she had taken until, following a deadlock of which she was informed, the matter was referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation.

Disputant stated that her work environment at the Casino de Maurice is not the same as the environment she was enjoying at the Respondent. She stated that this amounted to a demotion according to her. Disputant then deponed as to her precarious health condition and she produced copies of medical certificates and correspondences sent to management (Docs D, D1, D2, E to H). Disputant prayed that she be transferred back to her place of work in Port Louis where she has worked for thirty-two years.

In cross-examination, Disputant stated that she has been involved with the casinos for a little over ten years. She replied that Mr Cally and herself were assigned the responsibility of the Casino Cluster though she added that they were not physically posted in that Cluster. From 2015 to 2018, Disputant was a Director on the Board of the SICMS which is a company managing four casinos including Casino de Maurice. She conceded that she holds no qualification at degree level, but she averred that she has always been given work based on her experience and abilities to do the work. She stated that her tasks were not those of a classical Secretary and that she was reporting to the Managing Director. She was downloading daily reports from the Stock Exchange, laws which came into force, and was compiling data for the Managing Director. This was over and above her scheme of duties. She agreed that as per her letter of posting at the Casino de Maurice, she had to report to Mr Nabobsing or such person as the board of Respondent may decide. She did not agree however that it was the prerogative of the Respondent to give her such a posting. She also did not agree that for such a posting in her case there was no need for prior consultation with her. Disputant was confronted with a report from an Occupational Health Physician of the Ministry of Health & Quality of Life (Doc J). She did not agree however that the Respondent had acted according to recommendations contained therein.

Disputant agreed that in January 2020 she requested for one month of vacation leave and she resumed in June 2020 after the confinement in relation to the Covid-19 pandemic. Ever since June 2020, she is working at the Casino de Maurice in Curepipe except when her health condition did not allow her to attend work. She agreed that all the extra duties, which she had referred to, did not form part of her scheme of duties. She conceded that she does not hold the required qualification as per the notice of vacancy issued for the post of 'Assistant Investment Executive', but she averred that this post was initially 'created' for her and later the benchmark for the job was put higher so that she would not be qualified for the job. She suggested however that she did perform such duties. She agreed that Mr Cally is employed by the Respondent and yet is the Chief Finance Officer of the Casinos. She however maintained that the latter is not posted at the casinos and comes at the Casino de Maurice only on a few occasions.

Disputant did not agree that she was posted at the Casino Cluster because of her experience and exposure with casino matters. She averred that she is only scanning documents at the casino and is not doing any of the works which she was doing previously. She did not agree that the Respondent was entitled to ask her to go and work in Curepipe at the Casino Cluster of Respondent. She did not agree when it was put to her that she was not demoted nor subject to any harassment at her workplace.

In re-examination, Disputant stated that she is not doing any of the tasks mentioned in the scheme of duties for Senior Confidential Secretary (Doc A) annexed to her letter of promotion to that post.

Mr Cally, Chief Finance Officer for the Casinos, deponed and he stated that Disputant was initially working as supporting staff in the Portfolio Investment and Management Department and was doing basic research, some ground works and follow up. When he moved from portfolio management to the administration and management of the casinos, Disputant was working with him. He stated that Disputant was assisting the supporting staff assisting him with the administration and management of the casinos. In cross-examination, he agreed that Disputant does not possess the qualifications for eligibility for the post of 'Assistant Investment Executive'.

Mr Brette, the Chief Operation Officer of Prime Partners which is the Company Secretary of Respondent, then deponed before the Tribunal. He stated that the Respondent has not unlawfully and unilaterally transferred Disputant. He stated that he is not involved in operations but suggested that scanning may be one of the duties which a Senior Confidential Secretary can do. He stated that the Casino de Maurice is a separate entity with a separate board of directors and provides different conditions of work for its workers. He also confirmed that the consent of the Disputant was not sought before she was transferred.

The Human Resources Assistant of Respondent deponed at another sitting and he stated that Disputant had complained of her conditions of work at Curepipe. He averred that a doctor submitted a report, and the seating arrangement and other conditions were improved by the casino. He added that all the administrative staff of the casino work there and that apart from Mr Cally who is the Senior Investment Executive and the Chief Finance Officer of the Casino Cluster, all officers who deal with casino matters are posted at Curepipe. He also stated that Disputant lives at Valentina, Phoenix which is not far from Curepipe. He did not agree that Disputant had been demoted since he stated that the latter is still enjoying the same salary and conditions of employment and that only her posting, now in Curepipe, has changed. He stated that they are aware that Disputant has medical issues but that necessary measures have been taken at the casino to improve work conditions at her place of work. He also stated that Disputant has her email and all equipment that she needs to work.

In cross-examination, the Human Resources Assistant agreed that the origin of the complaint of Disputant was her posting at the Casino de Maurice and that the latter complained that her conditions of work were not the same as those she was enjoying previously. She agreed that Disputant has always been posted in Port Louis before the letter of transfer of December 2019. He stated that it is a normal practice at the Respondent to move staff within the group. He also averred that Disputant is currently doing work which is within her scheme of duties. He stated that the scanning of old files and documents form part of the work of Disputant and that the latter is also doing other works allocated to her by Mr Nabobsing, the Group Administrative Manager.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The Respondent had taken a plea in limine litis in his Statement of Case but in the light of a document emanating from the President of the Commission for Conciliation and Mediation (Doc X), the plea in limine litis was dropped on behalf of the Respondent.

It is apposite to consider carefully the terms of reference before the Tribunal and we will reproduce same for ease of reference:

*"I consider my transfer to Casino de Maurice Ltd in Curepipe as punitive and that I should be posted back to the State Investment Corporation Ltd in Port Louis."*  
(underlining is ours)

The ordinary dictionary meaning of "punitive" is "inflicting or intended as punishment" (Concise Oxford English Dictionary). However, it is unchallenged before us that this is not a case where a charge has been levelled against Disputant nor a case where there is an averment that Disputant has committed an alleged misconduct. Whilst the terms of reference refer to the transfer of the Disputant to the Casino de Maurice Ltd, the averments in the Statement of Case of the Disputant and the evidence adduced by the Disputant before us go further and suggest the following: 1. Unlawful and unilateral transfer; 2. Change in terms and conditions of work amounting to a demotion; and 3. Harassment and health considerations. These, to say the least, are very serious allegations and may even amount to an offence or offences.

The Tribunal has thus carefully analysed the letters sent by Disputant following her 'posting' at the Casino Cluster of the Respondent. As per Doc B, the posting was to take effect as from 20 December 2019. The last paragraph of the said letter (Doc B) reads as follows: "For the performance of your duties, you will be based at the Administrative Office of the Casino Cluster, currently at CDM Teste de Buch Street Curepipe." As per Doc E (letter dated 14 January 2020 from Disputant), the Disputant informed the Respondent that referring to her transfer to CDM which we understand to be "Casino de Maurice", she assumed office on Friday 10 January 2020. She states in that letter that on her second day in office on Monday 13 January 2020, she was ill and had to be taken to the hospital. She wrote that the doctors confirmed that she was suffering from an allergy to dust. She added that the state of the building and the environment (which we still understand to be at CDM) were adversely affecting her health. She then requested that consideration be given to transfer her back to SIC or another subsidiary or still in the alternative that she be granted one month vacation leave pending the transfer to a new building which is a project she heard about from the Group Administrative Manager. There is no single suggestion that she should not have been transferred to the Casino Cluster of Respondent. There was no suggestion either that she considered herself to have been demoted or that there had been a unilateral

and unlawful transfer or that there had been a major modification (“modification substantielle”) of her conditions of work.

It is apposite to note that Disputant admitted that she was finally granted the vacation leave she had sought and in fact resumed work only in June this year because of the confinement period, which we take notice is the confinement following the Covid-19 pandemic. Ever since June 2020, she has been working at the CDM at Curepipe whilst taking breaks in between whenever her health did not allow her to go to work. Curiously, the current dispute before the Tribunal, as per the referral letter from the Commission for Conciliation and Mediation, was already reported to the President of the Commission for Conciliation and Mediation on 5 June 2020.

The Tribunal has examined a copy of the email sent by the Disputant on 22 January 2020 (Doc F) and there is again no indication that the latter is complaining about an unlawful or unilateral transfer or complaining about “une modification substantielle” of her contract of employment or terms and conditions of employment. Instead, she wrote the following: “*Further to management decision I am now posted to CDM. Trying my level best to cooperate and deliver my tasks to the best of my abilities as has always been the case. (...)*” She ended by writing “*As mentioned above I have the firm intention to cooperate and deliver to the best of my abilities and protecting my health at the same time. Thanking you for your cooperation. (...)*” She however clearly indicated the health issues she was allegedly having at CDM. The next email sent by Disputant on 27 January 2020 (Doc G) also refers exclusively to the health issues she was facing because of the environment she was working in at CDM. It was never a question of unlawful transfer, demotion, “modification substantielle” of the contract of employment or of the terms and conditions of employment and still less of harassment. Reference to these came only later.

Disputant has accepted that she has been involved with the Casinos for a little over ten years and was assigned to the Casino Cluster with Mr Cally as from 2018. She was also a director from 2015 up to 2018 on the Board of SICMS which is a company managing the Casinos. As put to her by Counsel for Respondent in cross-examination, the Tribunal finds nothing wrong, given the experience that the Disputant has with casinos, for the Respondent to have decided that Disputant will be posted at the Casino Cluster of the Respondent. More importantly, the Tribunal is satisfied that there is no evidence on record and no suggestion that the Disputant is no longer employed by the Respondent but by another entity. The Disputant agreed that she had been doing work which went beyond what is provided in her scheme of duties and she averred that she was doing so without any additional remuneration. Obviously, the nature of additional duties, if any, will depend on whom the Senior Confidential Secretary is reporting to. There is also no indication that the post of Senior Confidential Secretary is tied to the post of Managing Director, as suggested by Disputant, the more so in the light of the

own evidence of Disputant that there are other Senior Confidential Secretaries. As per the scheme of duties annexed to the letter of promotion of Disputant to the post of Senior Confidential Secretary (Doc A), the latter may be required to report to the “*Managing Director or any other Senior Staff designated by the Managing Director*”. It is not disputed that Mr Nabobsing is such a Senior Staff, being the Group Manager Administrative. The Tribunal will deal with the issue of ‘reporting’ which Disputant allegedly had to do to one of the Senior Confidential Assistants of Mr Nabobsing instead of Mr Nabobsing himself, as raised by the Disputant, later.

As far as the change for Disputant to move from offices in Port-Louis to offices in Curepipe, the Tribunal has not been impressed that this constitutes such a hardship which “rend le déplacement plus difficile, plus pénible, plus long et plus fatigant pour l’intéressé[e]”. There is evidence that Disputant currently lives with his son in Phoenix and sometimes stays in Quatre Bornes or even in Beau-Bassin at her mother’s place. In any of these cases, Curepipe cannot be said to constitute such an inconvenience for Disputant when compared to Port-Louis. The Tribunal cannot, for obvious reasons, consider the personal transport arrangements available to Disputant to travel from Phoenix or Quatre Bornes to Port-Louis. The personal transport arrangements of Disputant (which in any event would probably vary depending on where she was staying on a particular day among the locations she mentioned) or location of the place of work in this particular case cannot be said to have been a determining factor for Disputant when she concluded her contract of employment with Respondent. Also, Disputant conceded that if she had been ‘posted’ somewhere after five or ten years, she would have considered. The change in posting in the present case is very far from the facts in the case of **Bridoux Mrs B. & 32 others v Noblesse Cie Ltee 2004 SCJ 49**, where the new place of work was at one and a half hours’ travel from the factory of the respondent company in that case. The Tribunal finds nothing wrong with the transfer of Disputant to work at premises in Curepipe when Disputant has been posted at the Casino Cluster of the Respondent and that all staff involved with the administration of the Casinos (except for Mr Cally who forms part of the senior staff of Respondent and is also the Senior Investment Executive) are based there. It is trite law that the responsibility of ensuring “le bon fonctionnement” of any enterprise rests, and must rest, with the management, however constituted (**vide Raman Ismael v United Bus Service 1986 MR 182**). Management may thus, in the discharge of its responsibility of ensuring “le bon fonctionnement” of the enterprise, modify the organization of services delivered and the functions of his employees. This is possible so long as the employer does not interfere with the acquired rights of his employees or « dès l’instant où il ne porte pas atteinte pour autant aux « éléments substantiels du contrat» (4) ou ne lui apporte pas de « modification essentielle - concernant la qualification, les attributions principales, les conditions de travail ou la rémunération.» (**vide A.J. Maurel Construction Ltee v Froget HRN 2008 MR 6**). Each case will have to be decided on its own merits/facts

and the Tribunal will have to ascertain whether the change brought by management constitutes a unilateral and substantial modification of the conditions of the contract of employment of the Disputant or a mere “aménagement” of the terms and conditions of work.

In the case of **ERT/RN 77/18, Mrs Sooleka Dalwhoor And Belle Mare Beach Development Co. Ltd (The Residence Mauritius)**, the Tribunal stated the following:

*“In Tirbanee v Floreal Knitwear Ltd [2002 SCJ 146] where the alteration concerned the place of work, it was held not to be a “modification substantielle” given that “any inconvenience as to travelling would be largely tempered by the transport arrangements made by the employer”. The Court distinguished the facts of that case from those where “hardship would ensue to the workers” by a change in the place of work. If one attempts to gauge a line of reasoning that binds together all the cases concerning unilateral modification of the contracts of employment by employers, then it would be as follows:- a “modification” is considered “substantielle” if it causes undue “hardship” to the employee in the execution or performance of his or her work. This is assessed with respect to what has been agreed initially between the parties at the time of entering into the covenant. It should be such as it can be said that it was not the intention of the parties to have initially agreed to be bound in the future by conditions which are totally alien to the initial agreement or less favorable as the parties may have reasonably considered to have intended initially. Furthermore, this assessment is made from an objective point of view, that is, taking into consideration the effect of the change on a reasonable man, for example, whether the modified work time falls within “odd hours” will be objectively determined and not according to the employee’s belief that such change causes her prejudice.”*

Though the Disputant has tried to show that working at Le Casino de Maurice is causing her undue hardship, the Tribunal has not been impressed that this is the case the more so in the light of the report prepared by Dr S.Upadhyaya-Limbajee, Occupational Health Physician (Doc J) following her visit at Le Casino de Maurice, the photographs showing where Disputant works at Le Casino de Maurice and the evidence on record. There is also evidence adduced on behalf of Respondent that measures have been taken to improve the conditions of work where Disputant is working. This is not accepted by the Disputant, but the Tribunal finds no reason why the Respondent would fail to comply with the recommendations made in a report upon which it is in fact relying and its representative deliberately lie about same before the Tribunal when other staff involved with the administration of the casinos are also posted there. The Tribunal finds nothing wrong with the reason put forward on behalf of the Respondent for the posting of the Disputant physically at Le Casino de Maurice where the administration staff dealing with Casino matters are posted. There is unchallenged evidence on record that all administrative staff of the Casinos (leaving aside a senior staff like Mr Cally) are based



in Curepipe. The submission made by Counsel for Respondent that management is optimizing resources and that it is not irrational and unreasonable for an employer to harness resources cannot be discarded.

The Disputant avers that up to now she has been doing only the scanning of documents at the casino, but the Tribunal has not been enlightened as to which exact documents these are, the purpose for same and how confidential same may be. The Tribunal has also not been impressed with such an averment the more so that Disputant was shown not to be telling the truth when she initially averred before the Tribunal that she had been doing only this for eight months and later had to concede that it was in fact for five months. Also, the timing of the report of the dispute to the Commission for Conciliation and Mediation is important bearing in mind that by that time Disputant could not have known that she would allegedly be doing the scanning of documents for five months. The Tribunal will hasten to add however that an officer of the rank of the Disputant cannot obviously be asked to do only scanning tasks all day. This will flout basic elements of fairness, principles and best practices of good employment relations, decent work and will not be conducive to motivating an employee in her work. Also, besides bad management, this may entail further considerations such as reprehensible audit findings given the status and salary package of the Disputant. In the same vein, the Tribunal wishes to state in clear terms that, as per the evidence on record, Disputant has to report to Mr Nabobsing or such other person as the Board of Respondent may decide and which we understand still has to be a Senior Staff and certainly cannot be the Senior Confidential Assistants of Mr Nabobsing. The Tribunal observes that Mr Nabobsing has not been called to depone but finds that the involvement and effort of the latter are crucial to provide the necessary motivation and drive to the Disputant and to ensure that good employment relations are maintained in his department and at the Respondent.

The Tribunal has however not been impressed by the suggestion that Disputant could not be physically posted at Le Casino de Maurice (whilst remaining, at all time, an employee of the Respondent) when all the staff in relation to the administration of the Casinos are posted there. Also, it is not challenged that Disputant has for a long time been assigned the Casino Cluster and has considerable experience with casino matters. The Disputant should not consider her physical posting there as a demotion and instead should consider herself as forming an integral part of a team working for the Casino Cluster of the Respondent. Disputant may not be happy with her physical posting at Le Casino de Maurice in Curepipe but the Tribunal is not satisfied even on a balance of probabilities in the present case that this was done in bad faith to cause prejudice or hardship to the Disputant. There is no evidence that this transfer was a punitive transfer. Also, the Tribunal is not satisfied that the change of posting of Disputant, based on the facts in the present matter and bearing in mind all the evidence

on record, including the scheme of duties of the Disputant, was such as to amount to a substantial modification of the terms and conditions of employment of the Disputant.

The Tribunal will however hasten to add that the primary responsibility for the promotion of good employment relations rests with management and that management at all levels shall pay regular attention to employment relations (Articles 27 and 28 of the Code of Practice – Fourth Schedule to the Act). Also, management shall provide a safe workplace and decent work in conditions of freedom, equity, security and human dignity to workers (Article 17 of the same Code). The Tribunal trusts that both parties will endeavour to do their best so that any misunderstandings between them are cleared and that the Disputant is reassured of her valuable contribution to the organization. For all the reasons given above, the dispute is otherwise set aside.

**SD Indiren Sivaramen**

**Acting President**

**SD Raffick Hossenbaccus**

**Member**

**SD Karen K. Veerapen**

**Member**

**SD Ghianeswar Gokhool**

**Member**

**31 December 2020**