

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 19/2018

Before:

Shameer Janhangeer	-	Vice-President
Raffick Hossenbaccus	-	Member
Bharuth Kumar Ramdany	-	Member
Parmeshwar Burosee	-	Member

In the matter of:

Mr Saccaram RAMMA

Disputant

and

New Mauritius Hotels Ltd

Respondent

The present matter has been referred to the Tribunal voluntarily by both parties to the dispute pursuant to *section 63* of the *Employment Relations Act 2008* (the “Act”). The Terms of Reference of the dispute read as follows:

- 1) *Whereas Mr Saccaram Ramma avers that there is an existing anomaly in his salaries and that it should be corrected by an increase of 40%;*
- 2) *Whereas the Hotel avers that there is no existing anomaly in his salaries but, without prejudice, it has made proposals as annexed.*
- 3) *Whether the Tribunal should award as per the averment of Mr Saccaram Ramma or as per the averment of the Hotel or otherwise and to determine the effective date.*

Both parties were assisted by Counsel. Mr E. Mooneapillay appeared for the Disputant, whereas Mr Y. Hein appeared for the Respondent. The parties have each put in their respective Statement of Case in the present matter.

THE DISPUTANT'S STATEMENT OF CASE

Mr S. Ramma has notably averred that he has more than 27 years of service, working in the main restaurant at Le Paradis under the supervision of a Head Waiter. In 1994, there was a collective agreement to move to a more social roster of 3 days' work and 1 day off. In July 2002, he was suspended for a period of 11 months and resumed work as Waiter in the same restaurant. In September 2005, he was suspended for a period of 2 years and 7 months and resumed duty on 6 May 2008 as Waiter under a new roster of 5 days' work and 1 day off. He was posted at Le Palma Beach Restaurant and has been working under drastic conditions.

In November 2008, he complained that his lost increment in salary should be refunded to him in his salary from 2005 to 2008 (4 x Rs 166.00). finally, an increment per year was paid with arrears for the period December 2008 in January 2009. In February 2009, he complained of drastic working conditions with a change of job title in his pay slip. Having asked the Human Resources Manager (HRM) to look into the matter, the latter refused to consider his request. He has never applied for the post of *Chef de Rang*, neither undergone any interview nor signed any job contract concerning the said post. The Food and Beverage Manager continued to impose more responsibilities on him combining the posts of Head Waiter, Bartender and cashier without any help. He contacted the Union to take up the matter with the HRM of Le Paradis Hotel.

Following a joint meeting, the HRM made a proposal of Rs 1,255 representing approximately 10% of his basic salary of 2011. He did not agree to the proposal as the post of *Chef de Rang* is not recognised by the remuneration orders and that a Waiter can be promoted to Head Waiter. He reported a dispute at the labour office and was unresolved for 2 years. Eventually, he filed a dispute at the Commission for Conciliation and Mediation. The management refused to consider his demand of 40% of salary since 2016; 20% as allowance for breaking roster; and 20% for working without a job contract, without scheme of duties, working in high temperature, dust and rainy weather without protective equipment and appropriate uniforms and performing an overload of duties as Waiter, Head

Waiter, Bartender and Cashier respectively without helper or runner. The Respondent has invented a fictitious post of *Chef de Rang*. The Disputant prays for an award ordering the Respondent to correct the anomaly in his salary by an increase of 40% effective from a date to be determined by the Tribunal.

THE RESPONDENT'S STATEMENT OF CASE

The Disputant took up employment with New Mauritius Hotels Ltd on 1 November 1990 as a Waiter. In 1994, the roster was changed to 3 days' work and 1 day-off following an agreement with the Union but not through a collective agreement. Since 1995, management showed concern about the Disputant's self-discipline and attitude towards supervision. In July 2002, he was suspended for four days without pay; suspended again on 24 September 2005; reinstated on 6 May 2008, where it was agreed that he would be posted in another outlet as Waiter and would work on a 5 – 1 roster without added remuneration and given a severe warning.

Mr Ramma was promoted *Chef de Rang* on 1 December 2008 with a new basic salary of Rs 9,883 and was granted an increase on 1 April 2009 as compensation for shifting from a 3 – 1 to a 5 – 1 roster. Proper uniforms are issued to employees at Le Palma Restaurant and during rainy weather, the open part of the restaurant is closed. Mr Ramma was granted an increase, as per the Fokkan Award, of Rs 664 for his promotion but no compensation for the loss of increments during the period 2005-08. He has been performing as *Chef de Rang*, although he never applied for the said post. Its job description includes the functions of Head Waiter, Waiter, Barman and Cashier as per the collective agreement.

On 14 March 2012, the Union started discussions with management to address the Disputant's loss of revenue (during his suspension) as compared to his colleagues having the same length of service. At a meeting on 28 March 2012, the Union request a compensation of Rs 1,500 to align his salary wise with his colleagues. Management proposed an offer of 5 increments to his salary scale amounting to Rs 1,288 with effect from 1 September 2011. The scope of promotion of a Waiter (scale 3) is to Head Waiter (scale 5); whereas promotion form *Chef de Rang* (scale 5) is to Supervisor (scale 8).

Beginning May 2013, management received another complaint from the Disputant on being assigned other duties whilst his job title is Waiter under his actual contract; and of

being called upon to work as barman and cashier contrary to his contract. At the Labour Office, on 28 May 2013, he asked to be reverted to Waiter. In another meeting, on 25 June 2013, management agreed to revert Mr Ramma to the position of Waiter with a reduction in basic salary and consequently, he would have to be transferred to either beach service or room service or bar. On 17 July 2013, the Disputant, in writing, refused the proposal. The case was taken at the level of the Ministry of Labour and no agreement was reached. The last meeting held was on 3 March 2016 at the aforesaid ministry.

Mr Ramma was selected, following an interview, for the post of Cashier at the Blue Marlin. Management proposed an increase in his basic salary as the new position would include working on the day and night shift. Disputant expressed his wish to discuss further with management on his new working conditions, to which the latter proposed a 16% increase of Rs 2,508. Mr Ramma took time to consider and on 28 May 2016, made a new proposal, which was rejected, for a total increase of Rs 3,258 representing 20.7%. On 17 October 2017, another proposal was made to Mr Ramma, which took into consideration his suspension, and represented an increase of approximately 14%. Same was not accepted. In a spirit of good faith and conciliation, management reiterates the proposal of a 14% increase in basic salary, *viz* a new basic of Rs 19,047.

THE DISPUTANT'S ADDENDUM TO HIS STATEMENT OF CASE

Mr Ramma had notably averred that he has 28 years' service at Le Paradis Hotel. He was employed as Waiter but is presently referred to as *Chef de Rang*, a post unilaterally introduced by the employer. He has always performed his duties to the best of his ability. He was suspended with pay in September 2005, but did not receive any yearly increments (4 in all) during the 2 year and 7 months of the suspension period. He could not do otherwise than accept the conditions of his reinstatement in May 2008, among which were to work in another outlet on a 5 – 1 roster. Had he refused, he would not have been reinstated. He had to adhere to the offered conditions to contest them after.

In addition to the change of post to *Chef de Rang*, the employer is making him work at the level of Head Waiter and perform the combined duties of Waiter, Barman, Cashier and Head Waiter. This is against the prescribed duties of Waiter. He has, at different times, discussed the issue of duties, salary and compensation through his Union and the Ministry of Labour. He maintains that he is a Waiter performing additional duties and that his salary should be fixed accordingly. He applied for a 40% increase but was only offered 14%, which

he cannot accept for the combined additional duties. A colleague of his (Mr Bernard Iram, also a *Chef de Rang*) earns Rs 23,000 monthly, whereas he draws Rs 16,770 (a difference of 37%). He would be satisfied with an increase of 37% in salary.

THE RESPONDENT'S ADDENDUM TO ITS STATEMENT OF CASE

It has been averred that the post of *Chef de Rang* has been introduced at Le Paradis Hotel since 1996 following negotiations with the Union and the job title is to be found in the collective agreement. The warning letter 30 April 2008 addressed to Mr Ramma has never been challenged and it is only now that he is coming up with such an explanation. Yearly increments are only awarded to employees rated satisfactory and above through the Performance Appraisal System and no such increments are due to Disputant for the period 2005-08.

Mr Ramma was reinstated in humanitarian grounds and management would not have expected that he would unreasonably take advantage of same to contest the conditions attached. The salary of Mr B. Iram is inferior to that stated by the Disputant. To be on the same level as Mr Iram would represent an increase of approximately 10%, which is less than what management is prepared to offer.

THE EVIDENCE OF WITNESSES

Mr Saccaram Ramma stated that he joined New Mauritius Hotel on 1 November 1990 as a Waiter working in Brabant restaurant in Le Paradis Hotel. In 1994, there was a collective agreement whereby the roster became 3 days' work and 1 day off. In 2002, he was suspended for 11 months and resumed work with a severe warning. In 2005, he was suspended for a period of 2 years and 7 months and resumed work on 6 May 2008 with a severe warning. He resumed as Waiter on a new roster of 5 days' work and 1 day off in La Palma Beach restaurant working under a *Maitre d'hotel*. He worked in the sun and even when it rained serving customers on the beach.

Mr Ramma further stated that he was given shorts, white pullover, white polo as uniform as well as a cap but no sunglasses or sun cream. He had to continue to work when it

rained. When windy and dusty, he had to serve customers on the beach. In November 2008, he received a sum of Rs 664 for increments lost during his suspension. In February 2009, without having applied for the post nor interviewed, his job title was changed to *Chef de Rang* and this was imposed on him. The responsibilities of the post are that of Waiter, Head Waiter (on scales 3 and 5 respectively) and that of Barman and Cashier.

He raised the matter with his Union. In a meeting with management, he was proposed about Rs 1,500, which he refused as it was not enough for the effort he puts in. The post does not figure in the *Catering and Tourism Industry Remuneration Regulations*. He complained at the Chemin Grenier Labour Office in 2013 and finally reported a dispute to the CCM asking for a compensation of 40% of his salary. This represents the new roster for which he has not been compensated. All other workers were given 15 to 20% of their salary. He was never called by management for same. He does the work of Barman, Head Waiter and Cashier in addition to his own work as Waiter. This is why he is asking for 40% compensation with arrears as from 27 February 2018, when the present matter was called before the Tribunal.

Mr Ramma is also asking for a contract of employment with a scheme of duties and scope of promotion and which mentions his place of work, roster and other details. As *Chef de Rang*, his salary has not been increased. He is now on 5 – 1 roster, has no contract of work and his duties are not in writing. He is therefore asking for 40% increase in salary and that he be provided with protective equipment and appropriate uniform to enable him to work in the aforementioned conditions. As Waiter, he could be promoted to Head Waiter. The post of *Chef de Rang* is on scale 5, like that of Head Waiter, but he cannot be promoted.

Mr S. Ramma was thoroughly questioned by Counsel for the Respondent. Mr Ramma notably stated that he was suspended in 2005 to 2008 but there was no disciplinary committee, although he was supposed to appear before one. He is a trade union representative since long. He was not satisfied with his reinstatement at work, which was in another restaurant as Waiter to work on a 5 – 1 roster instead of 3 – 1. He was given a severe warning. The post of *Chef de Rang* exists in the collective agreement. He agreed that from 2000 to 2005, the post of Head Waiter was being phased out. He is not aware that he was promoted to *Chef de Rang* on 1 December 2008, it is a post he never applied for. He would have preferred to have been promoted to Head Waiter and thus remain as a Waiter to be promoted to same.

Mr Ramma, moreover, stated that in April 2009, he agreed that he received an increase in salary. He did not receive anything for the change in roster and did not agree that the increase included the roster. He did not agree to the hotel's offer of five increments of Rs 1,288 with effect from September 2011 in March 2012. The letter dated 9 August 2012 (at Annex 1 to the Respondent's Statement of Case) was drafted by Mr Bizlall and he did not agree to same as colleagues had received better offers. He was not asked if the compensation was adequate and was only told that a solution had been reached and that's it. The collective agreement is signed by the President of the Trade Union only and not by all the workers. On 26 March 2013, before the Labour Office, he asked to be reverted to the post of Waiter, which he subsequently refused as per a letter dated 12 July 2013 (at Annex 2 to the Respondent's Statement of Case).

Mr S. Ramma also agreed that he was selected for the post of Cashier. He was proposed an increase of 16%, i.e. Rs 2,508/- and made a counter offer, which was not acceded to. He does not recall if he was made an offer in October 2017 by the hotel. He does not agree to the proposal of 14% increase made by the hotel in a spirit of conciliation and good industrial relations. He agreed that increments are performance based but did not agree that his performance was below par. He is asking for a 40% increase as he was employed as Waiter, he was suspended from 2005 to 2008, his roster was changed and his colleagues were compensated by 15 to 20% of their salaries. He is working in different conditions to what he used to work before. He now works as Head Waiter, Cashier and Barman. For all these responsibilities, he is asking for 40%. He is not aware of complaints made by his colleagues as to working conditions despite being a trade union representative.

Mr Ramma further stated that he does not know of Mr Bernard Iram's package. Mr Iram, as *Chef de Rang* at La Palma Restaurant, does not have similar responsibilities to him, not working Bar(man) nor Cashier. He agreed that he reported a dispute to the CCM on 9 May 2016, whereby it is written '2009' in relation to the act or omission which gave rise to the dispute. The form was filled by trainees, he read and signed and understood what he read. A second Report of Dispute Form (received by the CCM on 22 June 2016) was shown to Mr Ramma and he confirmed that it was unsigned. He is not aware that he reported the dispute outside delay according to the law. He is not aware of the procedures. Mr Jack Bizlall handled his case from when he was suspended in 2005.

In re-examination by his Counsel, Mr Ramma notably stated that the dispute started since 2008. The problem was not resolved during the period from 2008 to 2010 and from 2012, to 2019. It has not been resolved up to today. The dispute regarding the 40% increase

in salary is since 27 February 2018. The dispute of his promotion to *Chef de Rang* dates back from 2009 and up to today no solution has been found.

Mr Rakesh Ramkurrun, Senior Labour & Industrial Relations Officer, was deputed by the CCM and deposed on behalf of the Respondent. He produced two report of dispute forms made before the CCM received on 11 May 2016 and 22 June 2016 respectively (Documents A₁ and B₁). When questioned by Counsel for the Disputant, he stated that the first form was obsolete.

Mr Dominique François, Director Human Resources and the Respondent's representative, was called to depose on behalf of the Respondent. He confirmed the correctness of the Respondent's Statement of Case. He stated that the Disputant started employment as a Waiter with a basic salary of Rs 1,776. As at now, a Waiter can aspire to become a *Chef de Rang* or another post in the hierarchy. Waiter is at level 3 and can aspire to promotions at levels 4 to 7, etc. The post of *Chef de Rang* exists since 1995 and was created for the Italian Restaurant La Palma and the Creole Restaurant La Ravanne thereafter. The post combines the jobs of Waiter, Head Waiter, Barman and Cashier. It is to be found in the collective agreement and was created after consultations with the trade union. With the introduction of the aforesaid post, it was intended that the post of Head Waiter would be phased out. The Head Waiters are still being phased out since 2001 and there are still 2 or 3 posts remaining and once their holders retire, the post will be non-existent at Le Paradis for operational reasons.

Mr François also stated that in 1994, Mr Ramma was put on a 3 – 1 roster from a 2 – 2 roster. In 1995, management had concerns regarding Mr Ramma, in particular disciplinary issues regarding his behaviour towards superiors. The hotel recommended that Mr Ramma improve regarding his behaviour at work and he was rated below standard regarding discipline in the performance appraisal in 1998. On 18 February 2002, he was convened before a disciplinary panel. He was suspended for having refused to obey his superior's instructions. He was suspended anew on 24 September 2005 and there was a disciplinary committee set up on 15 September 2006 but was adjourned as the Trade Union was negotiating for Mr Ramma's reinstatement. Mr Ramma was given a severe warning.

The representative also stated that on 1 December 2008, Mr Ramma was promoted to the post of *Chef de Rang* as all who were working in the restaurant were occupying that post given that the post of Waiter was not suitable for the restaurant. He was promoted to be equal to his fellow artisans at the restaurant. He received a new salary of Rs 9,883 and as

from 1 April 2009, he was compensated for his change in roster from 3 – 1 to 5 – 1. His salary was thus Rs 10,593. La Palma is a beach restaurant and those working therein assure the same service and work under the same conditions. Mr Ramma's colleagues never complained of the conditions prevailing at the restaurant. Save for Mr Ramma's complaints, he never had any problems with the Labour Office. When it rains, clients in the uncovered area of the restaurant are brought inside and the *Chefs de Rang* also use umbrellas to serve clients when it drizzles. The employees working on the beach are given caps and recently have been given sunglasses.

Mr François also stated that Mr Ramma was not given any increments for the period 2005 – 08 and when he was suspended, no increments were due. The Rs 664 Mr Ramma mentioned represents four increments and were paid according to the Fokkan award. As from 2009, Mr Ramma asked to be paid for the increments not paid, that his conditions be reviewed and that he be returned to his post of Waiter as he never asked to be *Chef de Rang*. In 2012, there were discussions with the union for the Disputant to be compensated in the sum of Rs 1,500 to enable him to be aligned with his colleagues who started at the same time. An agreement was reached as per a letter dated 9 August 2012 prepared by Mr Bizlall. The agreement was for the Disputant to be compensated Rs 1,288 as from 1 September 2011 as discussed and accepted by the union.

It was also stated that Mr Ramma made a complaint to the Labour Office regarding being assigned other duties to the post of Waiter and asked to be reverted to this post. The hotel agreed for the Disputant to be reverted to Waiter, which Mr Ramma then refused. A *Chef de Rang* can aspire to Supervisor or Assistant Restaurant Manager and eventually may be Restaurant Manager. Waiter is a level 3 and *Chef de Rang* and Head Waiter are at level 5. Mr Ramma thereafter sent a letter asking for a compensation of 20% of his salary. Management proposed, in a spirit of conciliation, an increase of 16% representing Rs 2,508. Mr Ramma insisted on a 20.7% increase, which management refused and reiterated its initial proposal. Thereafter, there was a meeting at Beachcomber Head Office with Mr Bizlall and the Chief Human Resources Officer and a proposal of 14% was refused by Mr Ramma. The proposal took into account the increments not paid during his suspension, compensation for the change of roster from 3 – 1 to 5 – 1. Two increments were proposed for the period of suspension.

The representative further stated that Mr Bernard Iram is also a *Chef de Rang* in the same restaurant as the Disputant. Mr Iram's salary in 2018 was Rs 18,442 not Rs 23,000 as averred by the Disputant in his Statement of Case. The Rs 19,047 proposed to Mr Ramma is more than that of Mr Iram. A table was produced to explain why 14% has been proposed

(Document C). The demand of 40% of Mr Ramma is far-fetched and it must be considered that there is a collective agreement, a procedure agreement and a Joint Negotiating Panel with the Union whereby salary matters are discussed and decided upon. The demand is not justified. The demand is as from 2009. The Disputant's payslip for the months of December 2008, January 2009 and March 2009 were also produced (Documents D, D₁ and D₂). From December 2008 to January 2009, the basic salary changed. The pay slip of March 2009 shows that he was compensated for the change in roster with his April salary increasing to Rs 10,593. There is no letter for the change in title to *Chef de Rang*.

Mr François was questioned by Counsel for the Disputant. He notably stated that an increase of 40% has no reason to be in the present context and even outside the present context. Mr Ramma never gave his disaccord to being promoted *Chef de Rang*. It is not mentioned that Mr Ramma had to appear before a disciplinary committee in February 2002 as per the Respondent's Statement of Case. There are thirteen *Chefs de Rang* at La Palma Restaurant with five working in a shift. Mr Ramma asked to be reverted to Waiter at the Labour Office and then did not accept. Mr Ramma was promoted as he was the only Waiter and the rest of the workers in the restaurant were *Chefs de Rang*.

Mr François also stated that a proposal of 16% was made to the Disputant in a spirit of conciliation and this was based on the salary grid. The 16% increase has been lowered to 14% as Mr Bizlall, during negotiations, wanted management to take into account the increments unpaid during suspension and that Mr Ramma be at the same level as his colleagues who joined at the same time as him. If Mr Ramma were to be aligned with Mr Iram, it would represent an increase of 10% and they have maintained their proposal of 14%. Sunglasses and equipment have been provided since 2 to 3 years to employees for their comfort. This was recommended by their Health and Safety Officer for employees working on the beach and is not solely related to the Disputant. Explanations were also given as regards the table produced as Document C, notably in relation to the government increase and management increase given to Mr Ramma.

Upon re-examination by his Counsel, Mr François stated that to give such an increase in these times exceeds exaggeration. Every three years there is a collective agreement at the Respondent and issues of salary and categorisation are discussed with the union in accordance with the law. Employees at Beachcomber Hotels are paid more than what is provided for in the Remuneration Orders and are granted benefits such as medical insurance and pension plans. Salary increases are made through the Union and by a collective agreement.

THE RESPONDENT'S PRELIMINARY OBJECTION

A preliminary objection in law was raised by the Respondent. It was convened that this would be taken on the merits of the dispute in view of the fact that evidence would be required to substantiate same. The objection reads as follows:

The Employment Relations Tribunal has no jurisdiction to hear this case in view of section 2 of the Employment Relations Act 2008 as per the definition of 'labour dispute' sub-section (c).

Learned Counsel for the Respondent submitted that the dispute reported before the Tribunal dates back to more than three years and referred to *sub-paragraph (c)* of the definition of a labour dispute under the *Act*. Two documents were produced by the representative of the CCM. In the first (Document A₁), the report of dispute form dated 11 May 2016 reads '2009' at paragraph 5, which is the date of the act or omission which gave rise to the dispute. This date is not present in the second form received by the CCM on 22 June 2016 (Document B₁). Mr Ramma did acknowledge, when cross-examined, that he had read, understood and signed. The date of the act or omission which gave rise to the dispute is therefore 2009.

Learned Counsel, moreover, referred to the rulings of the Tribunal in *Veerasamy and MEDCO (ERT/RN 39/2015)* and *Laloo and MPA (ERT/RN 153/17)*. He notably submitted that the case of *Ramyead-Banymandhub v Air Mauritius [2018 SCJ 252]* can be distinguished as the words '*or otherwise*' were present after '2001' in the Terms of Reference of that case. Although the same words are present in the current dispute, it has nothing to do with the date of the act. Despite the referral to the Tribunal being voluntary, does the Tribunal have jurisdiction to hear the matter or not? Counsel submitted that the Tribunal has no jurisdiction and that the matter should be set aside.

Learned Counsel for the Disputant, on the other hand, submitted that the dispute is continuous as in the case of *Ramyead-Banymandhub [supra]*. The representative of the CCM stated, on 11 September 2020, that the first form – which mentions '2009' – is obsolete. He would therefore ask the Tribunal not to refer to this form. The issue of time bar does not

arise inasmuch as per the evidence of the Disputant, the dispute is a continuous matter and has not been resolved. Counsel also stated that no date is being mentioned in the present Terms of Reference and this is why the Tribunal should not consider whether the dispute started in 2009 or afterwards.

RULING ON THE PREMILIMINARY OBJECTION

The preliminary objection raised is grounded under *sub-paragraph (c)* of the definition of a labour dispute under *section 2* of the Act. A labour dispute does not include a dispute that is reported more than three years after the act or omission that gave rise to the dispute. The aforesaid sub-paragraph reads as follows:

“labour dispute” –

...

(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute;

The following can be noted from what was stated by the Supreme Court in *Ramyead-Banymandhub v The Employment Relations Tribunal [supra]* on this particular exclusion provided under the law:

Whilst considering the nature of the objections raised by the co-respondent, the Tribunal was therefore first called upon to spell out the act or omission which triggered the applicant’s labour dispute and to then determine at what point in time such act or omission took place. This is in line with the provisions of article 2271 of the Code Civil which provides as follows:

“Le délai de prescription court à compter du jour ou le droit d’action a pris naissance.”

The Tribunal has noted that prior to the present voluntary referral, the Disputant did report a dispute to the CCM as per the two Report of Dispute Forms produced by the latter’s representative. The first form, dated 9 May 2016, was stated to be obsolete by the representative. It may be noted that the section on the other party to the dispute had been left blank in the form. However, the terms of the dispute stated therein may be noted as follows:

1. *Whether I should draw an allowance representing 20% of salaries for having worked in the Beach Restaurant without protective equipment.*
2. *Whether Management should refund increments not paid (4) for the period starting 2005.*
3. *Whether a salary increase of 30% with effect from May 2008 should be paid to me for “manque à gagner” for not having been promoted Head Waiter.*
4. *Whether Management should compensate me for having performed higher duties without additional remuneration and consent.*

The second form produced by the CCM’s representative is undated but was received on 22 June 2016 at the Commission. It should be noted that the form did not ask the Disputant to insert the date of the act or omission which gave rise to the dispute. The terms of the dispute stated therein differ from what was inserted in the previous form:

Whether the salaries of Mr Ramma Sacaram should be increased by 40% to become effective as from May 2014 to take into account the following factors:

1. *The change in title of his post when he was re-instated from suspension.*
2. *Additional duties performed by him as from the date he was appointed as Chef de Rang.*
3. *Salary connectivity with his colleagues recruited on the same date.*

When comparing the terms of the dispute set in the two forms produced to the terms of the present voluntary referral, it can be noticed that the terms are not exactly similar although they may concern *inter alia* the same issue. In the present matter, the Disputant is notably asking the Tribunal to correct an anomaly in his salary by increasing same by 40%. Whereas, as per the first form he is seeking an allowance of 20% of his salary; unpaid increments; an increase of 30% for not being promoted; and compensation for performing higher duties. As per the second form, Mr Ramma is seeking a salary increase of 40% due to his change of job title; additional duties performed as *Chef de Rang*; and salary connectivity with colleagues recruited on the same date.

Although the substance of the issue as per the aforementioned terms of the disputes may be similar, the terms as couched are by no means identical. One significant distinction

that has to be borne out is that the Tribunal is being asked to determine the effective date, as per the third limb of the Terms of Reference of the present dispute, if it should so award as per the Disputant's averment as set in the first limb to the current Terms of Reference.

Given the discrepancies in the wordings of the terms of the disputes in the two aforementioned dispute forms when compared to the Terms of Reference of the present dispute, it would be dubious for the Tribunal to rely on the date of 2009 mentioned in Document A₁ to ascertain the date of the act or omission of the dispute. The more so, that the form has been termed as obsolete by the representative of the CCM.

As per his evidence before the Tribunal, the Disputant has stated that he is seeking a compensation of 40% of his salary because of the change in post from Waiter to *Chef de Rang* in February 2009; the additional responsibilities he performs as *Chef de Rang*; the change in roster to 5 – 1 in May 2008; and being made to work at La Palma Beach Restaurant serving clients without any protective equipment under the sun and in rainy conditions since being posted there when resuming, after suspension, in May 2008. It may be noted that this last complaint has been attended by the Respondent, who now provide the restaurant workers with sunglasses and umbrellas to serve clients when it drizzles. Mr Ramma also stated that he cannot aspire to become a Head Waiter since becoming *Chef de Rang*. Thus, the date of the acts which the Disputant is basing himself upon to demand a 40% salary compensation have arisen in 2008 and 2009.

The Disputant has contended, in re-examination by his Counsel, that his dispute arose since 2008 and has not been resolved up to today. However, he also stated that the dispute regarding 40% increase in salary is since 27 February 2018 whereas the dispute as to his promotion to *Chef de Rang* dates back to 2009. However, having noted that the matter was referred to the Tribunal by way of a letter dated 24 January 2018 received on 15 February 2018, it would be inconceivable for the dispute to have arisen after the date the matter was referred to the Tribunal.

Moreover, it has also been noted that as per Document B₁, the Disputant reported a dispute as to a salary increase of 40% effective May 2014. As per his evidence, the Disputant also stated that he made a complaint to the Chemin Grenier Labour Office in 2013 and finally reported a dispute to the CCM asking for a compensation of 40% of his salary. The Tribunal cannot thus accept the veracity of the Disputant's date of 27 February 2018 on this particular issue.

The Tribunal has also noted that the Disputant clearly stated that the dispute arose as from 2008 and has not been resolved up to today. He also stated that the dispute as to his promotion to *Chef de Rang* dates back to 2009. Thus, as per the Disputant's own evidence, the act or omission which gave rise to the dispute is in the years 2008/2009, which is consistent with the date of the acts giving rise to the dispute as previously noted. The matter having been referred voluntarily by both parties to the Tribunal in February 2018, there is no doubt that the dispute has been reported to the Tribunal more than three years after the act or omission which gave rise to same.

The Tribunal has also noted that the Disputant is asking for 40% compensation with arrears as from 27 February 2018, being the date when the matter was first called before the Tribunal. Having found that the date of the act or omission, which gave rise to the dispute, was in 2008/2009, hypothetically awarding a 40% increase as from when the matter was before the Tribunal does not affect or change the actual date of the act or omission which gave rise to the dispute and will not exclude it from the ambit of *sub-paragraph (c)* of the definition of a labour dispute under the *Act*.

The Disputant has not challenged that the dispute arose as far back as 2009. However, it has been contended that the dispute is continuous and has not been resolved. It must be, in this vein, noted that *sub-paragraph (c)* of the definition of a labour dispute under the *Act* makes no exclusion as to whether a dispute is continuous or ongoing. It simply states that a dispute reported more than three years after the act or omission which gave rise to it is not included in the definition of a labour dispute under the *Act*.

Thus, the context in which a dispute is said to be continuous must be examined. In the case of *Ramyead-Banymandhub* [*supra*], it was held that the Tribunal had failed to consider the possibility that the employer's alleged omission could be continuous. The Supreme Court notably had to following to say:

The Tribunal therefore appears to have been inexplicably selective when it considered the purport of its terms of reference, especially with regard to the words "or otherwise", since the ruling does not indicate why the Tribunal chose to favour 2001 as the point at which time would have started running whilst clearly ignoring the words "or otherwise". In the absence of the Tribunal's line of reasoning on that issue, we must conclude that it incorrectly equated the year on which the applicant was assigned to her current post with the year on which the dispute would have arisen.

It would be apposite to note that in the *Ramyead-Banymandhub* case, the Terms of Reference mentioned the words 'or otherwise' in relation to the date 2001. In the Terms of Reference of the present matter, the same words, although present, are not used in an identical context and is being used in relation to the effective date of an award of the Tribunal, should it so award. The words appear in the third limb of the Terms of Reference of the present dispute, which is asking the Tribunal in whose favour should it make award an award: the Disputant, the Respondent Hotel or otherwise. The aforesaid words are not being used in relation to the date of the act giving rise to the dispute. The use of 'or otherwise' in the present terms of the dispute cannot therefore imply the dispute to be continuous.

Although Counsel for the Disputant has also stated that there is no date mentioned in the Terms of Reference, this does not mean that the Tribunal cannot consider the date of the act or omission which gave rise to the dispute as per *sub-paragraph (c)* of the definition of a labour dispute under the *Act*. The Tribunal has jurisdiction to arbitrate on labour disputes as defined under the *Act* and it would be perfectly in order for the Tribunal to determine whether a particular dispute reported or referred before it falls under the definition of a labour dispute under the *Act*.

Although it has not been challenged that the present dispute has remained unresolved since 2009, it would be apposite to note the purpose of a limitation period as enunciated by the Tribunal in the matter of *Mrs S. Veerasamy and Mauritius Educational Development Co Ltd (ERT/RN 39/2015)*:

It would also be pertinent to note the comments of S. Sime (supra) on the nature of a limitation period:

Expiry of a limitation period provides a defendant with a complete defence to an action.

If a claim is brought a long period after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.

Likewise, the following may be noted from Prescription Extinctive in Dalloz Répertoire de Droit Civil, Tome IX on the nature and basis of the 'prescription extinctive' which is to be found in the Titre Vingtième, Chapitre Cinquième, Section Troisième of the Code Civil Mauricien:

Elle résulte du non-exercice des droits par leurs titulaires, pendant un certain délai. L'extinction du droit se manifeste par la perte de l'action en justice contre laquelle une exception peut alors être opposée. Elle se justifie par l'intérêt d'ordre public et de sécurité juridique qu'il y a d'empêcher des procès devenus difficiles à juger ou inopportuns par suite du temps écoulé, alors que, par ailleurs, l'inaction prolongée du titulaire du droit constitue une négligence grave.

It may also be noted that Article 2219 of the Code Civil Mauricien defines a prescription as follows:

La prescription est un moyen d'acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi.

The Tribunal, having considered the acts which gave rise to the dispute as well as the date of the acts giving rise thereto and having considered whether the dispute could be said to be continuous, therefore finds that the present dispute has been reported more than three years after the act or omission which gave rise to it. Thus, the present dispute falls foul of the definition of a labour dispute as provided under *sub-paragraph (c)* of the aforesaid definition under *section 2* of the Act.

The Tribunal, having upheld the preliminary objection, therefore sets aside the dispute.

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SD Shameer Janhangeer
(Vice-President)

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SD Raffick Hossenbaccus
(Member)

.....
SD Bharuth Kumar Ramdany
(Member)

.....
SD Parmeshwar Burosee
(Member)

Date: 5th February 2021