

EMPLOYMENT RELATIONS TRIBUNAL

DETERMINATION

ERT/ RN 100/23

Before

Indiren Sivaramen	Acting President
Francis Supparayen	Member
Rabin Gungoo	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Arvinduth Tilloo (Complainant)

And

Cargo Handling Corporation Limited (Respondent)

The above case has been referred to the Tribunal under the direction of the Supervising Officer acting under Section 69A(2) of the Workers' Rights Act, as amended. The Respondent was assisted by Counsel whereas the Complainant was assisted by the President of a confederation. The point in dispute in the terms of reference reads as follows:

“Whether the termination of employment of Disputant is justified or not in the circumstances and whether Disputant should be reinstated or not.”

The Tribunal proceeded to hear the case and the Complainant deposed before the Tribunal. He stated that he was employed as a General Purpose Worker (GPW). He stated that he was given a training to work as Lasher and performed as Lasher for some eighteen months. He had no reproach in his work. Then he was transferred and worked as an Ambulance driver after following a training. He stated that he had a first warning for lateness. He conceded that he came late and stated that he had a family problem. He was later given another warning for having parked his vehicle in a parking attributed to management. He had another warning because according to management, he was not in his workplace when he was contacted on his cellular

phone. He stated that his phone had broken down. He agreed that Respondent extended his probation. He did not complain as he was afraid and thought that this was how the system worked. He however suggested that he knew nobody else at the Respondent who would have had his probation period extended for as long as in his own case.

In cross-examination, Complainant confirmed that the contents of his Statement of Case were true. He agreed that he was a polyvalent worker. It was put to him that there were several complaints against him to the effect that he was always late at work, and he stated that he was not aware. He however agreed that in view of his duties as Ambulance driver, he had to be always ready and available during his shift. He accepted that one could not perform as Ambulance driver without appropriate training and that he has to be always careful in his work. He agreed that he received several warnings. He however did not agree that he was not fit to work at the Respondent. He also did not agree that he did not show a good case to be reinstated at the Respondent or that he was entitled to a compensation.

The treasurer of a trade union then deposed on behalf of the Complainant, and he stated that his trade union had sole recognition for all categories of workers at the Respondent. He stated that his trade union represents all the categories of workers except for GPWs who would nevertheless, according to him, still fall within the bargaining unit of his trade union. He stated that there was no document which defined probation at the Respondent, but that probation would, as far as he knows, be for a maximum period of one year. In cross-examination, the treasurer stated that previously the trade union did not make representations officially for the GPWs. He stated that GPWs exist only since 2018 at the Respondent, and that they are now on the establishment of Respondent. He accepted that work at the Terminal of the Respondent is dangerous, and that the availability of the Ambulance is important. He accepted that if the Ambulance driver is not there or late then that can have serious consequences.

The Human Resource Manager of the Respondent then deposed before the Tribunal, and he stated that the Board of directors decided in 2018 to take a group of workers as GPWs bearing in mind that the level of activities at the Port would vary depending on the number of vessels at quay. He stated that some 300 GPWs were recruited and that they were paid a 'polyvalence allowance' of Rs 6500 monthly at that time to encourage them to work in other sections. The Board decided to renew the contracts of the GPWs on a month-to-month basis. Then the GPWs were given their first appointment subject to one year's probation. He suggested that it was only after the probationary period was completed that the HR department would ask for information concerning the attendance and performance of the officers on probation. This would then be submitted to the Staff Committee which would decide whether to confirm or not the officer, and this

recommendation would go to the Board which is the supreme authority to decide on confirmation or extension of probation of an officer. In the case of Complainant, he stated that there was no favourable report for his confirmation. Instead, there were complaints against the latter in relation to his lateness to attend duty. He added that the Complainant could not be reached during his shift as Ambulance driver during an incident when someone was injured at the Respondent. The Complainant, though based in the Operations section, was contacted at around 4.10 p.m and he reached the site only at around 4.50 p.m. He suggested that Complainant cannot be reinstated, and that Respondent had carried out three assessments in the latter's case. He added that Complainant has not protested against the warnings given to him and that the latter has never complained that the charges against him were false. He stated that this was not a proper case to ask for reinstatement.

In cross-examination, the HR Manager confirmed that the GPWs come to work every day. The HR Manager was then confronted with the relevant provision of the Workers' Rights Act which prohibits employment on contracts of fixed duration where the worker is employed in a position which is of permanent nature, but he stated that management had decided that Complainant could be maintained as GPW. He stated that the grade of Complainant was GPW, and the latter was posted as Lasher and then as Ambulance driver. He stated that there was no need for a disciplinary committee since the Complainant was given the opportunity to defend himself. In re-examination, he stated that when Complainant failed to arrive at the site of injury on time, this constituted a breach of his duties as Ambulance driver.

A foreman for drivers at Respondent then deposed and he stated that he had five drivers in addition to the drivers for the Ambulance under his responsibility. He stated that the Ambulance driver who had to wait for Complainant on completing his shift often complained that the latter came late. He informed his superior about this state of affairs. He stated that he often had problems with Complainant, and he also referred to the Complainant who did not attend immediately to an incident where someone was injured at the Respondent.

In cross-examination, he stated that he would ask the Ambulance driver who was waiting for Complainant to come and wait at the Head Office. He however stated that he is not the one who decides in relation to the issue of probation.

Another foreman deposed and explained the difficulties he was having because Complainant was coming late several times by some 30 to 40 minutes. He stated that the Ambulance driver who had completed his shift could in fact leave, and the only drivers left were bus drivers. He referred to defined pick-up points for the Ambulance at the Respondent and the speed at which one could drive the Ambulance in that area of the port, and which would be to the knowledge of the Ambulance driver. He stated that

the big problem with Complainant was his lateness when attending work. In cross-examination, he stated that he reported the case to the HR department. He stated that he had no choice than to bear with Complainant since for long they had no employee and had difficulty to have officers to work in their department.

An Ambulance driver at Respondent then deposed and he stated that he made a complaint against Complainant. He stated that after his shift had finished, he had to go and leave the vehicle at the office since the driver who was supposed to start duty just after him did not turn up. He added that he often had this problem. He identified Doc H as being the letter he wrote. In cross-examination, he did not agree that he would phone Complainant earlier than the scheduled time to ask the latter to take over from him.

The Tribunal has examined all the evidence on record including the submissions of Counsel for Respondent and the statement made by the representative of Complainant. The relevant provision of the law under which the present matter has been referred to the Tribunal reads as follows:

69A. Reinstatement

(1) Where an employer terminates the employment of a worker for any reason, other than reasons related to reduction of workforce or closure of enterprises under Sub-part III, the worker may, instead of claiming severance allowance under section 69(4), register a complaint with the supervising officer to claim reinstatement.

(2) The supervising officer shall enquire into the complaint and where he is of the opinion that the worker has a bona fide case for reinstatement, he may refer the complaint to the Tribunal.

(2A) (a) The supervising officer shall not, unless good cause is shown, refer any complaint to the Tribunal under this section where the worker registers the complaint after 15 days of the date of termination of his employment.

(b) The supervising officer shall refer the complaint to the Tribunal not later than 30 days after the date of registration of the complaint.

(c) In paragraph (a) –

“good cause” means illness or injury certified by a Government medical practitioner.

(3) In this section –

“reinstatement” means the reinstatement of a worker, by his employer, back to the worker’s former position before the termination of his employment for any reason,

other than reasons related to reduction of workforce or closure of enterprises under Sub-part III of this Part.

Section 127(6B) of the Workers' Rights Act reads as follows:

Any complaint registered under section 69A which is pending before the Ministry prior to the commencement of this section, shall be referred to the Tribunal within 30 days of the commencement of this section.

Section 70A of the Employment Relations Act provides as follows:

70A. Referral by supervising officer

(1) Where the supervising officer refers a complaint to the Tribunal under section 69A of the Workers' Rights Act 2019, the Tribunal shall proceed to hear the case and give its determination.

(2) Notwithstanding this Act or any other enactment, the Tribunal shall give its determination under subsection (1) within 60 days of the referral.

(3) Where the Tribunal finds that the claim for reinstatement of a worker is justified, the Tribunal shall –

(a) subject, to the consent of the worker; and

(b) where it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken, order that the worker be reinstated in his former employment and, where it deems appropriate, make an order for the payment of remuneration from the date of the termination of his employment to the date of his reinstatement.

(4) Notwithstanding subsection (3), where the Tribunal finds that the claim for reinstatement of a worker is justified but the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been broken, it shall order that the worker be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act 2019.

(5) Where the Tribunal makes an order under this section, the order shall be enforced in the same manner as an order of the Industrial Court.

(6) In this section –

“reinstatement” has the same meaning as in section 69A of the Workers' Rights Act 2019

From the above, it is clear that the intention of the legislator is to give jurisdiction to this Tribunal to hear 'reinstatement' cases and that the Tribunal may find, in an appropriate case, that the claim for reinstatement of a worker is justified. This is a special jurisdiction which derogates from the exclusive civil and criminal jurisdiction of the Industrial Court under section 3 of the Industrial Court Act to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments. In fact, the First Schedule to the Industrial Court Act has been amended by the Finance (Miscellaneous Provisions) Act 2022 whereby the Workers' Rights Act

2019 has been deleted and replaced by the “Workers’ Rights Act in so far as it does not relate to section 69A”. The Tribunal should first and foremost be in the presence of a claim for reinstatement. If such a claim is indeed before the Tribunal, then the Tribunal shall proceed to hear the case and give its determination. The main focus of the Tribunal is and shall be the issue of “reinstatement” of the worker and the order for payment of severance allowance at the rate specified in section 70(1) of the Workers’ Rights Act 2019 can only come into play where the Tribunal is satisfied that the claim for reinstatement of a worker is justified but that the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been broken. Obviously, to assess whether reinstatement of a worker is justified, the Tribunal will have to consider all the facts of the case including the termination of the employment.

Sub-sections (4) and (6) of section 13 of the Workers’ Rights Act read as follows:

(4) A worker, other than a migrant worker, who is employed in a position which is of permanent nature, shall not be employed on a contract of fixed duration for the performance of work relating to the fixed, recurring and permanent needs of the continuous normal business activity of the employer.

(5) ...

(6) A worker employed on a fixed term contract shall be deemed to be in continuous employment where there is a break not exceeding 28 days between any 2 fixed term contracts.

Section 64 of the Workers’ Rights Act (as it was at the relevant time before the amendment brought by Act No.12 of 2023) provided as follows:

(1) ...

(2) Subject to subsection (3), no employer shall terminate a worker’s agreement –

(a) for reasons related to the worker’s alleged misconduct, unless –

(i) the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;

(ii) the worker has been given an opportunity to answer any charge made against him in relation to his alleged misconduct –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations;

(iii) the worker has been given at least 7 days' notice to answer any charge made against him;

(iv) the employer cannot in good faith take any other course of action; and

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations whichever is applicable;

(aa) where, for the purpose of paragraph (a)(iii), the worker is given an opportunity to answer any charge in an oral hearing following his written explanations, the 7 days' notice shall be counted only in respect of the written explanations;

(b) unless, where at the time the employer becomes aware of the conviction of the worker by the Court of first instance in respect of a charge of alleged misconduct which was the subject of criminal proceedings, the worker was in employment or under suspension –

(i) the employer, has within 10 days of the day on which he becomes aware of the conviction of the worker by the Court of first instance, notified the worker of the charge made against the worker;

(ii) the worker has been given an opportunity to answer any charge made against him in relation to his alleged misconduct –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations;

(iii) the worker has been given at least 7 days' notice to answer the charge made against him; and

(iv) the termination is effected not later than 7 days after the worker has answered the charge made against him –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations, whichever is applicable.

(ba) for the purpose of paragraph (b)(iii), where a worker is given an opportunity to answer any charge in an oral hearing following his written explanations, the 7 days' notice shall be counted only in respect of the written explanations;

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

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

(4) Where an investigation carried out under subsection (3) discloses a suspected misconduct, the employer may formulate a charge against the worker.

(5) Where the employer decides to hold a disciplinary hearing, he shall, at the request of the worker, provide him with such information or documents as may be relevant to the charge.

(6) No employer shall terminate a worker's agreement for reasons related to the worker's poor performance, unless –

(a) the worker has been given an opportunity to answer any charge made against him in relation to his alleged poor performance and the worker has been given at least 7 days' notice to answer any charge against him –

(i) in writing;

(ii) in an oral hearing; or

(iii) in an oral hearing following his written explanations;

(aa) for the purpose of paragraph (b)(iii), where a worker is given an opportunity to answer any charge in an oral hearing following his written explanations, the 7 days' notice shall be counted only in respect of the written explanations;

(b) the worker has been given at least 7 days' notice to answer any charge made against him;

(c) he cannot, in good faith, take any other course of action;

- (d) the termination is effected not later than 7 days after the completion of the hearing under paragraph (a).*
- (7) Where the opportunity afforded to a worker to answer any charge made against him under subsection (2)(a)(ii) or (b)(ii) or (6)(a) is the subject of a disciplinary hearing, he may have the assistance of –*
- (a) a representative of a trade union or a legal representative, or both; or*
 - (b) an officer, where he is not assisted as specified in paragraph (a).*
- (8) The worker and the employer may, during disciplinary hearing referred to in subsection (7), negotiate for the payment of a compensation to promote a settlement.*
- (9) Any written statement acknowledging guilt by a worker obtained at the instance of his employer shall not be admissible as evidence before a disciplinary hearing, or any authority or any Court.*
- (10) An employer shall, within 7 days of the receipt of a written request from or on behalf of the worker, give a copy of the minutes of proceedings of the disciplinary hearing –*
- (a) to the worker who has appeared before a disciplinary hearing; and*
 - (b) to the person assisting the worker in the disciplinary hearing.*
- (11) (a) The disciplinary hearing initiated against a worker under this section shall be completed within 30 days of the date of the first oral hearing save and except, and subject to paragraph (b), where owing to the illness or death of any of the parties or witnesses, or the reconstitution of the disciplinary panel or change in the legal or other representatives of the parties, such hearing cannot be completed during that delay.*
- (b) The parties may agree to extend the delay referred to in paragraph (a), provided that the disciplinary hearing is completed not later than 60 days of the date of the first oral hearing.*

The Tribunal notes that as per the law at the relevant time, an opportunity to answer any charge did not necessarily have to include an oral hearing under subsections (2)(a)(ii) and (6)(a) of section 64 of the Workers Rights' Act. What was required was that an opportunity to answer any charge against the worker was given and this could be in writing, take the form of an oral hearing or an oral hearing following written explanations. However, the procedures provided under section 64 of the Workers' Rights Act had to be scrupulously followed including proper notification of the charge

(under section 64(2)(a)(i) of the Workers' Rights Act), at least 7 days' notice to answer any charge made against the worker (under section 64(2)(a)(iii) or 64(6)(b)) and that the termination be effected not later than 7 days after the worker has answered the charge made against him in writing; in an oral hearing; or in an oral hearing following his written explanations, whichever is applicable or in the case of section 64(6) where the termination is effected not later than 7 days after the completion of the hearing under section 64(6)(a) of the Workers' Rights Act.

The Respondent and Complainant had entered into a determinate contract of employment for an initial period of one year. The Complainant assumed duty at the Respondent on 15 January 2019. The Complainant worked till 20 July 2020 when he was informed in writing by letter dated 20 July 2020 that the Respondent has agreed to renew his contract of employment on a month-to-month basis as from 16 January 2020 (Document CHC3 to the Statement of Case of the Respondent). It is apposite to note that Complainant who was employed as GPW was all this time working as Lasher after having followed a training to that effect. At the time of the commencement of the Workers' Rights Act (with effect from 24 October 2019 for the relevant provisions), the Respondent and the Complainant had not entered into a determinate agreement for a total period of more than twelve months. The Tribunal will however refer to section 13(4) of the Workers' Rights Act which was referred to by Complainant in his Statement of Case:

13(4) A worker, other than a migrant worker, who is employed in a position which is of permanent nature, shall not be employed on a contract of fixed duration for the performance of work relating to the fixed, recurring and permanent needs of the continuous normal business activity of the employer.

Though the job title of Complainant was GPW, the Tribunal has no hesitation in finding that Complainant was called upon to perform in a position which is of a permanent nature. This is not a case where the Complainant had to perform and complete a specific piece of work which was temporary and non-recurring, or that he was doing work which was project related. The evidence shows that the Complainant performed the duties of Lasher for some eighteen months and he was transferred by way of a letter dated 2 September 2020 (Doc CHC 4) to work as Shuttle Bus Driver. Finally, he worked as an Ambulance driver. There is no indication that these activities were of a temporary, seasonal, or short-time nature for the Respondent. The Complainant was also supposed to work every day though on shift.

The Tribunal notes that the Complainant was finally offered appointment as GPW at the Respondent by a letter dated 14 September 2020 (Doc CHC 5 to the Statement of Case of Respondent) as from 15 January 2020. His employment was subject to a probationary period not exceeding one year from 15 January 2020 (underlining is ours).

It is to be noted that just before 14 September 2020, that is, on 2 September 2020, Complainant had been informed in writing that he was being transferred to the Head Office as a Shuttle Bus Driver. He finally performed as Ambulance driver where it appears that his problems at the Respondent started, at least officially, since by way of a letter dated 14 September 2020, he had in fact been offered appointment as GPW.

Now, there are many disturbing facts in the present matter. The Complainant was supposed to be on probation from 15 January 2020 up to latest 14 January 2021. By way of letter dated 3 June 2021 (Doc CHC 8 to the Statement of Case of Respondent), Complainant was informed that his probationary period would be extended for an additional period of six months as from 27 May 2021 and that his confirmation will be considered at the end of his probation, obviously subject to having a clean and favourable report. Though there is no evidence of any break of service and that Complainant had all the time been working and providing his services to the Respondent, as per the own evidence and documents of Respondent, there was a period of time from 15 January 2021 up to 26 May 2021 which was not covered by the probationary period. There is no explanation whatsoever on record to explain this.

Instead, the alleged probationary period of Complainant was extended a second time by way of letter dated 24 February 2022 (Doc CHC 10 to the Statement of Case of Respondent). This time the probation period was extended for another period of six months as from 27 November 2021, that is, up to 26 May 2022. The Complainant would finally never be confirmed by the Respondent and by way of letter dated 30 September 2022 (Doc CHC 13 to the Statement of Case of Respondent), he was informed as follows:

30th September 2022

Mr Arvinduth TILLOO

General Purpose Worker – GPW183

Mauritius Container Terminal

Cargo Handling Corporation Limited

PORT LOUIS

Dear Sir

Re: Termination of Employment

We have to remind you that your confirmation in your employment as General Purpose Worker was deferred on two occasions, namely in June 2021 and February 2022, due

to unsatisfactory services and that your probationary period was extended for additional periods of twelve months in aggregate to afford you the opportunity of improvement in your attendance, conduct and performance at work.

*May we point out that in our letter dated 24th February 2022, you have been notified that you were given a **last and final** extension of six months to show a marked improvement in your attendance, conduct and performance at work and that your confirmation will be subject to having a clean and favorable report.*

In view of your recurring unsatisfactory services during your final probationary period, Management could not consider your confirmation. In line with Section 9.1.3 of the Employee Manual which stipulates that “the probationary period of a worker may be extended for a maximum of 2 extensions of six months so as to afford the employee the opportunity of improvement in any respect in which his work and/conduct has been adversely reported upon”, Management has no alternative than to terminate your employment forthwith.

Accordingly, you will be paid one month’s salary as notice.

You are kindly requested to return your MPA access pass/ RFID card provided to you by the Company.

Yours faithfully,

...

Very importantly, the Tribunal notes that as per the own Employee Manual referred to in the letter of termination, the probationary period of a worker may be extended for a maximum of 2 extensions of six months. The Respondent has made use of both the two extensions of six months as per the Employee Manual and yet it allowed Complainant to work much beyond the maximum probationary period during the period from 15 January 2021 up to 26 May 2021. The Tribunal will also note that though this final ‘extension’ of the probationary period ended on 26 May 2022, the Complainant was allowed to work up to the end of September 2022 when he was finally informed by way of the letter of 30 September 2022 that his employment was terminated forthwith.

The Complainant cannot be considered in the present matter, because of this period running from 15 January 2021 to 26 May 2021 where Complainant was not on probation at the Respondent, to have been on probation at the Respondent from 15 January 2021 onwards despite any letters which may have been issued to Complainant thereafter. The Respondent, when terminating the employment, wrongly proceeded on the basis that his termination was based on his recurring unsatisfactory services during his final probationary period. The Respondent should have proceeded by way of section 64 of

the Workers' Rights Act as it stood at the material time and should have followed scrupulously all the steps and the strict time delays provided in that section. It would have been up to the Respondent to decide whether it would have contemplated terminating the Complainant's agreement for reasons related to the worker's alleged misconduct (under section 64(2) of the Workers' Rights Act) or for reasons related to the worker's alleged poor performance (under section 64(6) of the Workers' Rights Act). No opportunity to answer any charges made against the Complainant, as contemplated under section 64 of the Workers' Rights Act (as it was at the relevant time), has been granted to the Complainant. Since the procedure provided by law has clearly not been followed in the present case, the Tribunal has no hesitation in finding that the termination of the employment is unjustified and cannot stand.

In the light of section 70A of the Employment Relations Act, the Tribunal may find that a claim for reinstatement is justified, and yet may have reason to believe that the relationship between the employer and the worker has irretrievably been broken. In the light of all the evidence on record including that there is no evidence of any official complaint or charge made against Complainant whilst he was working as Lasher following his appointment by the Respondent effective as from 15 January 2020, and the unjustified termination of the employment of Complainant, the Tribunal finds that the reinstatement of the Complainant is justified.

However, bearing in mind that Complainant is posted to perform the duties of an Ambulance driver after having followed a training over a few days, and the responsibility attached to an Ambulance driver and the importance of having an Ambulance in the operations carried out by the Respondent, and the various alleged breaches/shortcomings committed by the Complainant whilst posted as Ambulance driver, and the convincing and corroborated evidence adduced before the Tribunal as to the behaviour of the Complainant and the inconveniences which were being caused to the Respondent and employees (including foremen) in the department of Complainant, the Tribunal has reason to believe that the relationship between the Respondent and the Complainant has irretrievably been broken. In the light of the above, the Tribunal finds that the Complainant cannot be reinstated in his former position before the termination of his employment.

The Tribunal thus orders that the Complainant be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act. The Tribunal notes that as per Doc CHC 5 to the Statement of Case of Respondent, the Complainant was drawing a gross salary of Rs 16,060 as from 15 January 2020 on his appointment as GPW (i.e inclusive of Basic Salary and Additional Remunerations 2018-2020) in the Salary Scale of Rs 14,500 x 500 – 16,500 x 550 -19,800 x 600 – 22,200 x 700 – 24,300x 750 – 25,050.

(SD) Indiren Sivaramen

Acting President

(SD) Francis Supparayen

Member

(SD) Rabin Gungoo

Member

(SD) Ghianeswar Gokhool

Member

3 October 2023