EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 1001

Before:

Rashid HOSSEN	**-**	**President**
Geeanduth GANGARAM	**-**	**Member**
M.P. Jacques Henri DE MARASSE-ENOUF	**-**	**Member**
Hurryjeet SOOREEA	**-**	**Member**

In the matter of :-

The State Bank of Mauritius Staff Union

and

State Bank of Mauritius Ltd

This dispute has been referred by the Minister responsible for Labour, Industrial Relations & Employment by virtue of Section 82 (1) (f) of the then Industrial Relations Act 1973.

The newly enacted Employment Relations Act 2008 makes provision for such dispute to be heard before the present Tribunal:

"108 Transitional Provisions :-

Any proceedings pending immediately before the commencement of this Act before the Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal shall be deemed to be proceedings pending under this Act and may be proceeded with before the Tribunal".

The point in dispute is :-

"*Whether Management can compel its employees to work outside their normal working hours. In the affirmative, whether such hours of work should be*

remunerated at not less than twice the rate at which the employee is remunerated during the stipulated hours on a week day, or otherwise."

Statement of case of the APPLICANT :

1. The stipulated hours of work have been set down by mutual agreement between the Bank and the Union.

2. Through a collective agreement dated 1994, the Bank grants time off in lieu of payment to their staff performing overtime.

3. If the staff wants to receive payment instead, he has to fill in a requisition form and has it approved by the Manager.

4. The Supreme Court in its judgement took the view that "any collective agreement which does not go against the spirit of the law - Labour Act – be adhered to by parties".

5. The time off facility mentioned in the agreement is "not considered as being less beneficial or detrimental to the interest of the employees". The time off being 1.5 hours off for every 1 hour's work.

6. The Union's contentions are :

   a. The Bank should not interpret the collective agreement as an obligation from the employee to work overtime after working hours on week days and/or Saturdays.

   b. If the employee accepts to work overtime, he should be remunerated at double rate on account of duress sustained by the employees.

   c. There are many abuses from the part of the Bank in the application of the existing collective agreement.

Statement of case of the RESPONDENT :

1. The Bank submits that the collective agreement between the Bank and the Union and the judgement of the Supreme Court be applied in toto.

2. The dispute declared by the Union is unwarranted and the claims made by the Union are not justified.

While deponing, Mr. A. Jugessur, President of the Union and applicant's representative, confirmed that a collective agreement concerning time-off facility was signed in July 1994, which agreement was renewed until July 2007. But since then, this point has been disputed. He mentioned that the time-off facility is not to the advantage of either the employee or the Bank. He explained that this facility affects the Bank's Customer Service as all the work that has to be delivered by the staff who has been granted time-off falls on his other colleagues, creating additional pressure on them. As for double rate pay, tellers dealing with cash and different types of customers are stressed.

In cross examination, Mr. A. Jugessur agreed that the Bank's tellers have 1 hour 15 minutes after the Bank has closed down to balance their bill; that it happens only at end of month when the staff is called to work overtime; had the Union won their appeal at the Supreme Court, there would have been no problem.

In his submission, Mr. D. Ramano commented on the Supreme Court judgment in that a "regime collectif" has priority over individual claims, the more so when its content is not less beneficial to the employee. But he underlined the fact that collective agreements are not immutable as mentioned in the Case of Government and Non-Government General Employees Union against the Central Electricity Board, 1st July 1971. Parties can re-discuss, re-negotiate, re-bargain, to come to terms on different issues, "*but if a collective agreement could, because of its perpetuity, renew frictions and thereby damage Employer/Labour relations, such an Agreement would defeat the very purpose for which it was entered into in the first instance."*

Respondent's Counsel, Sir Hamid Moollan, Q.C., submitted as follows:

There is no evidence where employees have been compelled to work overtime. It is rather the nature of the work and the exigencies of the service, which sometimes so demand. When this happens, the content of the collective agreement applies and this has been confirmed by the Supreme Court. Instead of receiving payment, the employee gets time-off, which is not less beneficial. This has been so for more than 10 years. Moreover, there is nothing to support the double rate pay, if only that the employees will receive more money to do the same work.

After considering the testimonial and documentary evidence including Counsel submissions, the Tribunal comes to the following conclusions:-

1. There has been no evidence shown where an employee has been compelled to work outside the normal working hours.

2. Those doing overtime work are getting time-off, as per a collective agreement, which is not less beneficial to the employees.

3. Although the applicant explained in résumé how the time-off facility could affect the Bank's Customer Service, nothing was said about how the employee benefiting of the said time-off is at a disadvantage, save that it should be replaced by double rate pay.

4. We are asked whether Management can compel its employees to work outside normal working hours and if so, whether such hours of work should be remunerated at not less than twice the rate of which the employee is remunerated during the stipulated hours on a week day, or otherwise. We refer to the following authorities with regard to the first issue and as for the item of '*overtime*', we deal with it in paragraph 5 below.

In **Cigarette Manufacturing Employees Union v/s The British American Tobacco (Mtius) PLC SCJ 364 of 1995**:

"the applicant is a registered trade union which represents the majority of the hundred or so employees of the respondent. There exists between the two parties a collective agreement which regulates the terms and conditions of employment of the members of the applicant with the respondent and which, it is averred, cannot be amended unilaterally. Negotiations started between the two parties some time in June 1995 to provide for a new collective agreement which would pave the way for the introduction of shift work. The union avers that it had made it quite clear that any agreement would have to be vetted by its General Assembly. After several meetings, the representatives of the applicant signed an agreement with the respondent on 27 July 1995 relating to the introduction of shift work "as from September 1995." This agreement was not submitted to the General Assembly of the applicant. On 23 August 1995 the respondent informed its employees that it would be introducing shift work as from Monday 11 September 1995."

"…. although it is agreed on both sides that the introduction of shift work would bring some inconvenience and hardship to the employees, there is unrebutted evidence that the respondent had invested in new machinery and equipment in order to maintain its competitive edge in the region. This new equipment could never give a positive return unless the shift system was introduced."

It is interesting to observe what was held in **Hong Kong Restaurant Group Ltd v/s Mr T. Chummun SCJ 105 of 1957:**

Whilst the Catering Industry (Remuneration Order) Regulations 1987 provides that a worker is required to work 48 hours per week excluding meal breaks, there is nothing which prevents an employer from granting more favourable conditions of employment.

We read at note 73 of Encyclopédie Dalloz: Droit du travail, Verbo contrat de travail (Modification) that:-

"La durée du travail est généralement considérée comme un élément substantiel, ne serait-ce que parce qu'elle détermine le salaire. »

The change in the number of hours of work is a substantial one in the present case and this cannot be done unilaterally. However, we hasten to add that nothing prevents the employer from modifying those hours for the better running and exigencies of the business provided he pays for the overtime.

Coupled with the right to change the number of hours of work, there is also the right of the employer to modify the time at which work must start. But this does not entitle the employer to fix odd hours of work unless the concern has odd business hours. It must be borne in mind that the employer has the inherent power of administration and he can organize his business according to the exigencies of the service but within the labour law and its remuneration orders (vide: Encyclopédie Dalloz: Droit du travail – Verbo Contrat de travail (Modification) notes 32 and 34.

Now, can an employee refuse to accept a unilateral change in one of the substantial terms of his contract of employment and if so, what would be its consequence?

At notes 37 and 91, encyclopédie Dalloz: Droit du travail, Verbo Contrat de travail (Modification), we read that :-

« note 37 :- Le salarié a le droit de refuser d'effectuer des tâches non prévues par le contrat, de se plier à un horaire différent de celui qui a été déterminant de son engagement, même si l'ordre est justifié par l'intérêt de l'entreprise.

Note 91 : Le salarié n'a ni à accepter ni à refuser une modification non substantielle, qui s'impose immédiatement à lui. Mais son acquiescement est nécessaire si la modification est majeure pour la formation d'un avenant au contrat du travail. Et il a le droit de refuser la modification substantielle, son refus ne pouvant justifier une sanction. »

Another authority for the proposition that the employer has the right to modify hours of work is **S. L'Ingénie v/s Baie du Cap Estates Ltd SCJ 171 of 2000:**

"It must be borne in mind that the employer has the inherent power of administration and he can organize his business according to the exigencies of the service but within the labour law and its remuneration orders. No doubt the number of hours of work is one of the substantial terms of employment and as such cannot be changed unilaterally. (Vide **Hong Kong Group Ltd v Manick (1997)."**

We held in **G. Rousseau & Ors and Le Warehouse Ltd RN 1013 Award of 2010:**

« We consider that the Employer has the prerogative of organizing and re-organizing its work structure and in the present matter it changed the hours of work within what is permissible under the Labour Laws and after paying the appropriate overtime and that for the "better running and exigencies of the business. (**Hong Kong Restaurant Group Ltd v/s Mr. T. Chummun** (**Supra**).

On the principles of good practices of good industrial relations as provided for in section 97 of the Employment Relations Act, it is essential that there should be an 'entente' between the Employers and the Employees. Good human relations between Employers and Employees are essential to good industrial relations. Indeed, changing the number of hours of work has an impact on the workers' life in general. One should not lose sight of the fact that both Employers and Employees have a common interest in the success of the undertaking.

In Cayeux Ltd. v De Maroussem (1974 MR 166) it was held that " *a unilateral modification by the employer of the conditions of a workman's contract of employment of indeterminate duration may entitle the worker for the purposes of a claim under the Termination of Contracts of Service Ordinance, l963, to treat the agreement as having been terminated by his employer. An employer has, on the other hand, the right, in the discharge of his responsibility to ensure the efficient running of the undertaking, to modify the organization of his services and the functions of his employees. Neither of the principles involved in those two propositions is absolute and both must be taken into account by the Court when adjudicating upon a claim for severance allowance…."*

We invite management in the present case to engage into dialogue with workers in future and whenever a change is being considered in the affairs of the enterprise where the workers are concerned. »

5. The Supreme Court has already ruled on that issue. Indeed we need only to reproduce part of the judgment to show the extent of the "*autorité de la chose jugée*." (**State Bank of Mauritius Limited v/s A. Jagessur (SCJ 17 Jan 2008).**

« .....One of those terms and conditions was precisely that the employer would grant time off to its staff who had performed overtime in lieu and stead of paying a monetary compensation. The learned magistrate of the Industrial Court found that Section 16 of the Labour Act prevailed and gave judgment in respondent's favour.....

.....The learned Magistrate found that the agreement reached, whereby time off would be granted whenever "*extra hours have been accumulated*" (vide Document A), did not exclude monetary payment for those "*extra hours*." We believe that that finding of the learned Magistrate is flawed in law. Nor is it reflected in the overall evidence of the case.....

.....Consequently another finding of the learned Magistrate that "*the employer was dictating to the worker that in lieu of remuneration, he will get time off, leaving the latter with no option*" is again too loosely expressed in that it does not take into perspective the fact that the question of time-off was canvassed, resolved and agreed upon following a collective agreement which was subscribed by the trade union. The Third Schedule to the Industrial Relation Act sets out a Code of Practice which provides practical guidance for the promotion of good industrial relations and for the grant of negotiating rights. It also assists employer and trade unions of employees to make effective collective agreements. Article 8 of the Code of Practice states that the principal aim of trade unions of employees is to promote their members' interests but that they also share with management the responsibility for good industrial relations. Article 14 provides that "*the individual employee has obligations to his employer, to his trade union if he belongs to one, and to his fellow employees*...".

It is a fact that section 16(1) and (2) of the Labour Act provides in imperative terms for the payment by an employer for extra work (overtime) performed by a worker. However, it is subject to section 16(3) which in turn provides that an agreement may provide that the remuneration includes payment for work on public holidays and overtime where the maximum number of public holidays and the maximum number of hours of overtime covered by the remuneration are expressly stipulated in the agreements. .....

.....The minutes of proceedings of the Joint Negotiation Council dated 28 September 1994 inter alia mentions that "*the Chairman informed the Union's representative that in case of those staff who have accumulated extra hours, they will be granted time off to the mutual satisfaction of both parties, i.e. staff and management. The Union agreed to this proposal.*".....

.....We consider that whether an agreement is beneficial to an employee or not is a matter of subjective appreciation. Overtime which is convertible into time-off afforded to an employee

instead of being paid monetary compensation, would not necessarily be considered as less advantageous to an employee……

……..Consequently, we hold that the collective agreement whereby an employee would be granted time-off in exchange. "*whenever extra hours have been accumulated*," is not against the spirit of section 16 of the Labour Act and is not to be considered as being less beneficial or detrimental to the interest of the employees……..

……We accordingly quash the decision of the trial Court ordering payment of overtime. The respondent is, on the other hand, entitled to time-off, in exchange for the extra hours put in by him, in accordance with the terms of the collective agreement reached between the employer and the union and which the employer has always been ready to implement. The appeal is allowed. With costs against the respondent. »

In the light of the above, the Tribunal considers that the case of the Applicant has not been made out.

The dispute is therefore set aside.

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(sd) Rashid Hossen
President

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(sd) Geeanduth GANGARAM
Member

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(sd) M.P. Jacques Henri DE MARASSE-ENOUF
Member

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(sd) Hurryjeet SOOREEA
Member

Date: 30th April 2010