EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN1013

Before

Rashid Hossen	**President**
Abdool Feroze Acharauz	**Member**
Jean Paul Sarah	**Member**
Hurryjeet Sooreea	**Member**

In the matter of: -

Gerard Rousseau & ors

and

Le Warehouse Ltd

The point in dispute is:-

"Whether the Management of Le Warehouse Ltd is justified in unilaterally changing the hours of work from Monday to Friday 8.30 hrs to 16.30 hrs to Monday to Friday 8.00 hrs to 17.00 hrs and Saturday 8.00 hrs to noon"

The present dispute was referred for compulsory arbitration by the Minister of Labour, Industrial Relations& Employment in accordance with section 821(f) of the then Industrial Relations Act 1973.

The newly enacted Employment Relations Act 2008 that came into force last year 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 before this Act and may be proceeded with before the Tribunal.

Statement of case of the applicants

1. They were former employees of the IBL Group of companies, posted at the IBL's Domestic Appliances Division and in October 2007, the sale and maintenance of domestic appliances and electronic equipment were entrusted to Le Warehouse Ltd, their present employer.
2. When their employment was taken over by Le Warehouse Ltd, they were assured that their terms and conditions of employment as well as their years of service would be maintained.
3. They were enjoying more favourable terms and conditions of employment than those contained in the Distributive Trades Remuneration Order. Their hours of work were8.30 hrs to 16.30 hrs (with one hour for lunch) from Monday to Friday and 8.30 to noon on Saturday.
4. On 29.02.2008 they were informed by management through a letter that as from the following day their hours of work would change to 8.00 hrs to 17.00 hrs from Monday to Friday and 8.00 hrs to noon on Saturday. No previous discussions had been held between parties on that issue.

5 They consider that this unilateral change causes prejudice to their social life, period of rest, health and efficiency at work. They are inviting the Tribunal to make the employer revert to their previous working hours.

Statement of case of the respondent

1 Le Warehouse Ltd is an enterprise situated amidst its competitors who work from 8.00 hrs to 17.00 hrs on Mondays to Fridays and 8.00 hrs to noon on Saturdays. If it had not followed suit in the hours of work, it would lose clients who would go to those competitors.

2 Before the change in the working hours the employees used to work from 8.30 hrs to 16.30 hrs on Mondays to Fridays and 8.30 hrs to noon on Saturdays. After the change, which it agreed was unilateral, the workers have been compensated for the additional 51/2 hrs work they have put in. The majority of employees at Le Warehouse Ltd , about two thirds of them, were already working since 2005 according to the actual hours of work. The applicants were the only employees who were still working on another schedule until March 2008.

3 The change brought in to the working hours was necessary for the survival of the organization. Le Warehouse Ltd does not consider that it has brought about any substantial change in the terms and conditions of service of applicants.

4 The respondent clarified to the Tribunal that there is no such company as IBL Group of companies. There is an only company known as Ireland Blyth Limited (IBL).The workers were not posted at IBL Domestic Appliances Unit but were working for IBL in the domestic appliances business unit of the company. Nor were they later posted at Le Warehouse Ltd but their employment was transferred to that company with their consent and their conditions of service including their length of service were maintained.

5 Respondent denies that before the issue of the letter concerning the change in the hours of work, employees were not informed verbally of the forthcoming change approximately two weeks earlier.

6 Respondent further avers that the change in the hours of work has been fully accepted by applicants: they have cashed all dues resulting from the additional work performed and in the circumstances the present action must be dismissed.

Parties were represented by counsel who at some stage had tried to find a settlement of the issue, but failed. On the day of the hearing counsel for the applicants informed the Tribunal that Mr Gerard Rousseau had withdrawn his case and another applicant Mr Patrick Cadau would depone on behalf of the rest of the applicants.
In examination by his counsel Mr Cadau maintained whatever was contained in the applicants' statement of case.

During cross-examination the witness agreed that after the change in the hours of work, applicants have continued working and have been paid their wages. There was the employer's threat of disciplinary action against them in case of noncompliance with instructions. The witness averred that workers have been able to manage through fear of that threat. He further added that if they had ample time to discuss the change they would have proceeded differently and managed their social and familial concern so as to cause less disruption. There are 16 employees in this matter, and each one has adapted differently. No doubt the number of hours of work is one of the substantial terms of employment and as such cannot be changed unilaterally.

He also informed that he was not aware of any problem which triggered off the change in the hours of work. If the survival of the company was at stake he would have no objection but he would have preferred a meeting among the various stakeholders where everyone would have their say. He denied that there was any previous communication over the matter. There were employees who were following courses to upgrade their qualifications but had to stop such courses because the change in the hours of work came too abruptly. He agreed that in the vicinity of Le Warehouse Ltd its competitors' hours of work are longer. He admitted that the change was brought about in the interest of the company and the latter had not intimated any problem to the workers

Upon re-examination by his counsel, the witness confirmed that payment in respect of 51/2 hours of additional work was made on the basis of normal pay for such work and not on overtime basis.

Counsel for the respondent called the Human Resource Manager as witness. He informed that he was aware of the dispute and maintained the contents of the respondent's statement of case. He stressed that two weeks before the change in the hours of work took place the Workshop Manager had a meeting with the workers to explain the different changes that would be applied in the

coming weeks. The hours of work had to be changed because of utter competition and the safeguard of the employment of 160 workers. Applicants have been paid wages for the additional work they performed.

Upon cross examination he agreed that working hours and salary are closely linked but he disagreed that there is a link between working hours and volume of work. He confirmed that when Le Warehouse Ltd had taken over the services of the workers it was assured to them that their time of service together with terms and conditions of employment would be the same as with IBL. He maintained that a meeting had been held with workers to discuss the change in the hours of work. He did not agree that the letter about disciplinary action in case of non compliance was a duress on the part of the employer. The change was necessary for the safeguard of employment of 169 workers. The 51/2 hours of additional work were paid as normal working hours and not overtime even though they came as supplementary hours to the previous normal contract.

Upon re examination by his counsel witness proceeded to explain how the figure 51/2 hours was arrived at : one additional hour on weekdays and half an hour on Saturdays.

Respondent's counsel submitted that applicants are asking that the Tribunal request the employer to move back to the former hours of work, but they have already for more than a year implemented the new schedule of work meaning they have accepted the change. Moreover the decision to change the hours of work was taken in the best interest of all parties concerned.

Counsel for the applicants submitted that what the workers wished was a dialogue between parties before introducing any change. The additional hours of work could have been negotiated upon and paid as overtime instead of normal pay. The workers had to acquiesce to the change because there was duress on them by way of disciplinary sanctions. He rebutted the argument of defendant's counsel over constructive dismissal. He showed that workers did not remain silent after the change in the hours of work. They in fact protested and were threatened with disciplinary sanctions and eventually knocked at the door of the Tribunal. They cannot be said to have accepted the new condition of employment or waived their right to say that what the employer did was not right.

Counsel even hinted that workers were prepared to agree to an amount lesser than one and a half times the normal rate in respect of the 51/2 hours. Compensating the applicants in any other form than payment of normal rate would create two sets of employees with different terms and conditions and this would cause disruption. She added that the employer had recourse to the letter containing threat of disciplinary sanctions because it had no other avenue, it had the duty to run the business in the interest of 150 employees. The employer has assured the good running of the business and also paid the workers.

The Tribunal's considerations-

The Tribunal has in the course of the proceedings been faced with very different figures concerning the number of manpower being affected by the change brought about at the workplace sometimes 150, and at other times 160 and sometimes 169.

1 The Tribunal had given ample time to parties to discuss and reach a settlement in the matter. But they could not come to terms over the quantum of payment of the additional hours of work. Counsel for the applicants was prepared to accept any amount higher than normal rate but counsel for the respondent could not take the risk to create a disruption at the workplace by paying differently to two categories of workers in respect of the same hours of work.

2 There has been a contradictory version of parties regarding previous discussion on the forthcoming change in the hours of work. No convincing evidence was adduced by respondent to prove that such discussions had actually been held. But the Tribunal would invariably advise parties, especially the employers to introduce change in a consensual manner, as indicated in the Employment Relations Act 2008.

3 No doubt the number of hours of work is one of the substantial terms of employment and as such cannot be changed unilaterally. 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 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.

In the light of the above, the Tribunal does not intend to intervene in the matter and the dispute is set aside

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(sd) Rashid Hossen
President

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(sd) Abdool Feroze Acharauz
Member

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(sd) Jean Paul Sarah
Member

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(sd) Hurryjeet Sooreea
Member

Date: 22nd April 2010