# EMPLOYMENT RELATIONS TRIBUNAL

**ERT/RN 305/11**

## AWARD

**Before:**

| | | |
|---|---|---|
| **Rashid Hossen** | **-** | **President** |
| **Jheenarainsing Soobagrah** | **-** | **Member** |
| **Renganaden Veeramootoo** | **-** | **Member** |
| **Jean Paul Sarah** | **-** | **Member** |

**In the matter of:-**

**Miss Yean Lam Kin Cheung** **(Disputant)**

**And**

**Mauritius Institute of Training & Development** **(Respondent)**

On 15 October 2010, the Disputant, reported to the Commission for Conciliation and Mediation the existence of a labour dispute between herself and the Respondent by virtue of **Section 64 (1) of the Employment Relations Act 2008 (Act No. 32 of 2008).**

As per the referral letter dated 23rd December 2011 of the President of the Commission for Conciliation and Mediation, conciliation meetings were held at the Commission and no settlement was reached.

The Terms of Reference read:-

***"Reinstate to same post as Training Officer forthwith on same terms and conditions."***

The Disputant put in a Statement of Case in which she averred:-

She was offered employment as Training Officer Food Production in 2000 following an advertisement in the local press and a selection exercise carried out by the directorate of the Respondent and a panel of several members. She started in the employment of the Respondent on the 15th May 2000 and worked continuously up to the 14th November 2005. She was paid a gratuity by virtue of her contract for three consecutive years from 2000 to 2003. No gratuity was paid to her thereafter following a meeting with the Acting Divisional Manager HR, Mrs Hardowar who proposed to her to work on permanent establishment. Her employment has been unilaterally terminated consequential to verbal, psychological and sexual harassment at work. She was never told about the shortcomings in her performance. One Ravin Abeelack, her alleged sexual harasser who was the Acting Coordinator Hotel School Surinam Branch assumed a position of supervising the Disputant. He drew up appraisal report that was fundamentally flawed, according to Disputant.

The Disputant further averred that she was performing satisfactorily and that her dismissal amounted to victimization. Mr Abeelack was charged with sexual harassment and was convicted for that offence. The Respondent has been advised by the State Law Office that a payment of three months' severance allowance be paid to her.

The Disputant is praying for an order to be reinstated in her post.

In reply, the Respondent averred in a Statement of Case that the offer of employment to the Disputant was on a two year contract with effect from 15 May 2000. Same was extended for another period of two years with effect from 15 May 2002. On 16th February 2004, the Training Centre Manager recommended the non-renewal of the contract of employment of Disputant. On the 5th April 2004, her contract was however extended but only for a period of six months with effect from 15th May 2004 due to shortcomings noted on her part. The Officer in Charge of Le Chou Multipurpose Training Centre was requested to monitor the work and conduct of Disputant during that period and to submit a report thereon to Management. The contract of employment for Disputant was further extended for a period of six months with effect from 15 November 2004. In view of her continued shortcomings that include poor performance and lateness, the Acting Deputy Director did not recommend the extension of her contract. On 18th April 2005 a Committee comprising of the Chairman of the Council, the Director of the Industrial and Vocational Training Board and the Divisional Manager HR, met the Disputant whereby she was informed of her shortcomings as identified by her Supervising Officer. On

the 5th August 2005 the Director of Industrial and Vocational Training Board and the Divisional Manager HR met the Disputant and informed her of her continued weaknesses, poor punctuality, trainees being left unattended, poor quality of hand outs, poor interpersonal relationship and non-signing of movement book. On 25th October 2005, the Acting Training Centre Manager (TCM) gave an adverse report on the conduct and performance of the Disputant and same was submitted to Council which decided not to renew her contract of employment.

The Respondent further averred that the Disputant was never employed on a permanent basis and her contract of employment was not renewed following unsatisfactory performance. With regard to the complaint made by Disputant against Mr R. Abeelack it is averred that since the alleged offence was committed outside working hours the Disputant was advised to refer the case to the police. It is also averred that upon non-renewal of her contract of employment, Disputant was paid a net sum of Rs 69,047.70 representing salary in lieu of notice. Disputant failed to cash the cheque within 12 months and returned same to the Respondent. It was on the 5th of February 2009 that the Disputant made a complaint to the Ministry of Labour. The Respondent is still willing to pay the said amount to the Disputant and moves that the dispute be dismissed.

The Disputant deponed before the Tribunal and confirmed the correctness of the contents of her Statement of Case. During cross-examination she revealed that she was led to believe that her contract was on a permanent basis following payment of severance allowance that was

offered to her. She was also verbally told by Mrs Hardowar in 2003 that she would be placed on a permanent basis. Mrs Hardowar was then Divisional Manager HR. She further stated that she understood that Mr Abeelack was convicted for the offence of sexual harassment given the fact that he was given a warning.

Mr Suryakant Calleechurn, Assistant Manager HR Division deponed on behalf of the Respondent. He stated that the Disputant was employed on a contractual basis after having confirmed the correctness of the Respondent's Statement of Case. Mr Chellen was the person who decided on extension of the Disputant's contract and when he was on leave it was one, Mr Nosib who decided. After renewing the Disputant's contract on a number of occasions and allowing her to improve in her work, it was finally decided not to renew any further. It was only in April 2009 when the Disputant returned the cheque and informed the respondent that it had not been cashed, that was a year and a half after the renewal of her contract, that respondent became aware of the state of affairs. Respondent is still willing to effect payment of the said cheque. Mr Abeelack was Acting Coordinator at Ecole Hotelière at Surinam and he was not the direct supervisor of Disputant. It is the manager who eventually prepares the report of performance of the workers and the Board Council decides. The witness added that as per the repealed Industrial and Vocational Training Board Act, recruitment of workers or any decision regarding the staffing is the sole responsibility of the Council and it is not the Board's practice to offer employment verbally. When Disputant reported the sexual harassment complaint, the employer put at her disposal an officer to accompany her to

the Police Station. As regards the issue of gratuity, it was paid to Disputant following successful performance only on the first occasion. On the issue of reinstatement he stated that there is no vacancy. There are various coordinators who furnished explanation regarding the employee's performance. At Le Chou it was Mr Tolbize who was responsible for such exercise whereas at Surinam it was Mr Abeelack. On 1st March 2005, Mr Abeelack prepared his report and forwarded it to Mr Nosib and it is the latter who could make recommendations upon renewing a contract. The witness further added that he does not find the report of Mr Abeelack to be negative. He confirmed that with regard to the case of sexual harassment, Mr Abeelack was given a warning by both the police and the employer. He agreed that on 29th October 2004 there were two Supervisors, namely Mr Sahye and Mr Moonshiram who made a favourable report on behalf of the Disputant. He further agreed that Mr Tolbize's report was a negative one. There was also one favourable report that was made on the 25th May 2005 but the witness is not agreeable to its contents. With regard to the cheque that was tendered to the Disputant, it represents three months' salary in lieu of notice. The Disputant was informed of her shortcomings on several occasions. Following a downsizing exercise at the level of its Food Production Trainers at Ebène and Pointe Jérome, it was felt necessary not to renew the contract of the Disputant. The witness finally added that the three months' salary in lieu of notice was a kind gesture towards the Disputant for having served the institution.

Counsel for the Respondent submitted that this is a purely contractual basis where the person has been paid gratuity because she is not on a

permanent and pensionable establishment. This is a case where a contract has not been renewed and it is a contract *à durée déterminée* and reinstatement cannot be considered. The offer of salary in lieu of notice is a gesture of goodwill. Also, no one at the Respondent can offer employment verbally. It is for the Council to decide. With regard to the sexual harassment complaint, there has been no further action.

Counsel for the Disputant submitted that the latter falls within the definition of "worker" as per **Section 2 of the Employment Relations Act**. A worker means a person who has entered into a contract of employment and that includes a former worker. A labour dispute refers to a dispute between a worker and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work and reinstatement. Counsel also referred to **Section 97 of the Employment Relations Act subsection (d)** in which reference is made to the principles of natural justice. Those principles are to be applied when the Disputant has made an allegation and an assessment report was based at one point in time on a person who has made an alleged sexual harassment. Also, sexual harassment cannot be limited to working hours. The test to be applied is whether an impartial and independent bystander when observing such a situation would come to the conclusion that such person has been fairly treated. Counsel submitted that there is enough evidence that such report at the point in time had been used as the basis of the recommendation for non-renewal and this is in breach of the principles of natural justice. It is further submitted that **Section 108** of the transitional provisions of the **Employment Relations Act** stipulates that any application, complaint or appeal made

under the Repealed Act before the commencement of this Act shall be dealt with in accordance with the present Act and the Tribunal is therefore empowered to reinstate. As regards the offer of payment, this shows that the Disputant has been in continuous employment by virtue of the **Labour Act.**

The tenor of the Disputant's Statement of Case is a complaint based on an alleged harassment on her person that culminated into alleged sexual harassment. We need to reproduce the contents of certain documents annexed to the Statement of Case of the Disputant for ease of reference. In a letter addressed to the then Director of Industrial and Vocational Training Board dated September 5th, 2005, Disputant writes:-

*"Mr Roland Dubois*
*The Director Industrial and Vocational Training Board*
*Phoenix*

*Sir,*

*I wish to place on record the harassment I have undergone for the past 3 years.*

1. *Year 2002-2003*

    *I was compelled to take over the work at NAS although I had a full load of work at HSM in 2002. There was no handover whatsoever from Ms Angelique Laville and Mr Philippe Baucaumont who have left. Still I managed to lead my students to success, motivated them to take part in culinary competitions.*
    *In spite of my hard work and contribution, I was reprimanded by the Training Centre Manager.*

2. *January 2003*

*In January 2003, following a staff meeting at NAS, I was requested to stay over and once again I was harassed by the Training Centre Manager, the Coordinator and my colleague Marc, supported by Mr Ravin who already informed me that a separate meeting will be held concerning the Monacco Culinary competition. I was humiliated during the meeting. I was rebuked for having contributed in the culinary competition and all of them insisted that it was my colleague Marc who had to accompany the student although earlier Mr Chellen had already praised my good work in a Trainer's meeting on the 13th January 2003.*

3. *March-April 2003*

*In April 2003, the coordinator Deven rudely told me "Qui ou croire la boutique chinois ici' for a list of jury members coming for interview sessions, on which Marc and I had already worked upon. Should anybody be harassed on the ground of ethnicity?*

4. *May 2003*

*Very often Mr Ravin threatened me; for instance he accused me of taking "confidential" document which was in fact just an "application form" & a list of trainees convened for interview. Furthermore he compelled me to return these documents and rush to the TCM who came instantly to NAS. I was further humiliated by him. These documents were in fact not confidential as I was also involved in the interview panel.*
*Although Mr Ravin was a Training Officer, he used to barge in my class very often and disturb the smooth running of my class.*

5. *August 2003*

*During the Jeux des Iles de L'Ocean Indien, my colleague Marc closed his kitchen when more than 100 athletes had not taken dinner. I catered to them although it was the responsibility of my colleague Marc who had to do so. I did not let down my school. I was able to provide the food to the satisfaction of the athletes, despite the short notice.*

6. *October 2003*

   *In October 2003 again I was compelled to leave the Nas students this time, to take a posting in Rodrigues, as M.s Angelique Laville had been given a scholarship to go to France. Hence I had to start from scratch again as there was no hand over whatsoever, still I have a very good report from the Officer in Charge, Mr Tolbize for having accomplished a good work.*

7. *October 2003-August 2004*

   *The Coordinator further is responsible for breaking open my drawer where my personal belongings and library books were kept. It all happened during my posting in Rodrigues. When I came back from Rodrigues, I was denied access at NAS. I was given no time-table and I was "excluded" completely and Mr Ravin who is only my colleague told me to go and sit at home. This was also told by the Training Center Manager: "Je n'ai pas d'emploi de temps pour vous"*

8. *January 2003-May 2005*

   *Many such cases where I was being harassed have been verbally reported to you and the Acting Director Industrial and Vocational Training Board, Mr Seegolam but as you had gone on leave, no follow up could be done and hence it culminated into sexual harassment.*

9. *June 2005-August 2005*

   *Hereby is enclosed a transcript of SMS messages sent to me by my colleague-Acting coordinator HSM Surinam. (as per annex:2 pages)*
   *I find it surprising that in spite of my contributions, my hard work and commitment to the Industrial and Vocational Training Board my contract was not renewed in May 2005. Fortunately the Industrial and Vocational Training Board council reconsidered my case and my contract was renewed for another period of 6 months. It would be greatly appreciated if my contract is renewed for a longer period (2 years: as it was in 2002) as I am continuously harassed by TCM, Coordinator and acting Coordinator…*

*I sincerely hope, Sir, that such a thing does not happen to me again.*

*Thank you."*

There was no further action at the level of the Director of Public Prosecutions Office in that the alleged harasser was given a warning by the police. Disputant mistakenly understood the warning exercise to be a conviction.

Reference may be made *en passant* to **Section 54 of the Employment Rights Act 2008** under the heading **"Violence at Work"**

*"(1) No person shall –*

*(a) harass, sexually or otherwise;*

*(b) assault;*

*(c) verbally abuse, swear at or insult;*

*(d) express the intention to cause harm;*

*(e) bully or use threatening behavior towards;*

*(f) use aggressive gesture indicating intimidation, contempt or disdain towards;*

*(g) by words or act, hinder,*

*a worker, in the course of or as a result of his work.*

*(2) Any person who contravenes subsection (1) shall commit an offence and shall, on conviction, be liable to a fine not exceeding 75,000 rupees and to imprisonment for a term not exceeding 2 years.*

*(3) For the purpose of subsection (1), a person sexually harasses another person where, in circumstances in which a reasonable person would have foreseen that other person would be humiliated, offended or intimidated, he –*

*(a) makes an unwelcome sexual advance, or an unwelcome request for a sexual favour to that other person; or*

*(b) engages in any other unwelcome conduct of a sexual nature towards that other person."*

This is within the jurisdiction of the Industrial Court.

Disputant, as stated earlier, based her complaint on a report that she considers to be unfavourable to her by the alleged harasser. We reproduce the full contents of that report:-

***"INDUSTRIAL AND VOCATIONAL TRAINING BOARD***
***HUMAN RESOURCE DIVISION***
***REPORT ON CONTRACT OFFICER***

*NAME OF CONTRACT OFFICER: Miss Yean Tching LAM KIN CHEUNG*
*POST: Training Officer*

| ***CRITERIA*** | ***APPRAISAL/REPORT*** |
|---|---|
| ***ATTENDANCE/PUNCTUALITY*** | *Very poor. Most of the time she is* |

| | |
|---|---|
| | *late or do not report to the centre.* |
| ***JOB PERFORMANCE***<br><br>*TECHNICAL*<br><br>*PEDAGOGICAL*<br><br>***PERFORMANCE INDICATORS***<br>*PASS RATE*<br>*DROP-OUT RATE* | - *Most of the time, trainees are left unattended.*<br>- *She keeps on copying books to give to trainees.*<br><br>*N/A* |
| ***ATTITUDE*** | - *Always late in class.*<br>- *Regular in monitoring of trainees.* |
| ***INTERPERSONAL RELATIONSHIP/TEAMWORK*** | *Always on her own.*<br>*Never asks questions or give suggestions during meeting or group work.* |
| ***CONDUCT/BEHAVIOUR*** | *Satisfactory* |
| ***INITIATIVE FOR EXTRA CURRICULAR ACTIVITIES*** | *None* |
| ***CONTRIBUTION IN CONNECTION WITH GENERATION OF REVENUE FOR CENTRE (eg conduct of short courses)*** | *None* |
| ***LEARNING AND DEVELOPMENT PLAN*** | *TCVT not completed* |

| | |
|---|---|
| ***OVERALL ASSESSMENT*** | *Satisfactory* |
| ***RECOMMENDATION*** | *Renewal for one year* |

***NAME OF REPORTING OFFICER:*** *ABEELACK Rajsingh*

***DESIGNATON:*** *Ag. Co-ordinator*

***SIGNATURE:*** *[(sd) R Abeelack]*

***DATE:*** *01/03/05"*

We fail to see in what way the Report can be termed negative altogether when the overall assessment speaks of her performance to be satisfactory and goes as far as recommending a renewal of her contract for one year.

The documentary evidence shows that Disputant was offered an employment contract by the Respondent which was of a fixed duration of 2 years and took effect on 15/5/2000, the day she assumed duty. Her contract was extended for another period of 2 years with effect from 15/5/2002. Despite a recommendation by the Training Centre Manager on the 16/2//2004 not to renew her contract, it was nevertheless renewed on 5/4/2004 but only for a period of 6 months with effect from 15/5/2004 and was again further extended for a period of 6 months with effect from 15.11.2004.

We note various documents emanating from various persons occupying posts of a supervisory nature that support the view of a non-renewal of Disputant's contract. In a report put up as far back as 13/02/2004, Mr. G. Tolbize complained that since Disputant assumed duty at Le Chou in Rodrigues, things worsened between Disputant and trainees of the Food

Production and the Administrative Section of the Training Centre. There were complaints of her not attending to the trainees as expected. The recommendation for non-renewal came from Mr Harmon Chellen, the Training Centre Manager. Previous to that, on 2/5/2003, Mr. K.Venkatasubhadu, reported in writing of circumstances where Disputant took possession of a photocopy of a confidential document without authorization. Again, on 28/5/2003, the Coordinator, Mr. K. Venkatasubhadu complained in writing to the Training Centre Manager about the Disputant leaving school premises on several occasions without authorization. She also failed to fill in weekly visit planning as required and the office was not informed of the hotels visited by her. She made use of the Industrial and Vocational Training Board car for personal use instead of hotel visits. She was also being reproached for lateness on 35 occasions. Mr. J. Lejongard also put up a document dated 13/02/2004 that is unfavourable to the Disputant with regard to her posting in Rodrigues.

The Officer in Charge, Mr. G. Tolbize sent a letter to Disputant on 10/06/2004 giving her a warning. It was in relation to a day's work which Disputant scheduled on 1/06/2004 from 9.00hrs to 15.00hrs but she never turned up on that day. According to an annexure to a letter dated 6/10/2005 signed by Mr. K. Nosib, the Acting Training Centre Manager, a meeting was held between the Director (Industrial and Vocational Training Board), the Human Resource Representative and Disputant on 5/08/2005 whereby Disputant was informed of her poor punctuality, unattendance to trainees, poor quality of handouts, poor interpersonal relationships and non signing of movement book. She was invited to improve.

On 25/10/2005, Mr. K. Nosib, forwarded a complaint in writing to the Acting Training Centre Manager regarding Disputant's failure to make proper entries in the movement book and same according to him amounted to false entries. We find also a memorandum emanating from Mr. M.K.Sahye, then Acting Food and Beverages Coordinator reproaching Disputant for failure to submit a given task.

The testimonial and documentary evidence clearly point towards a sweet and sour relationship that ultimately deteriorated. However wrongly inspired the Respondent may have been in not renewing any further the employment contract with the Disputant, we need to consider whether it had power to do so. Each contract accepted by the Disputant clearly specified its time frame and the various reductions in their mandate are explained by the employer to be on the basis of poor performance. The Tribunal considers that separate contracts between the employer and the employee cannot be equated to a '*contrat indeterminé*' in that the specific time set was what had been agreed between the two parties. The evidence reveals that upon the lapsing of the contract that took effect on 15/05/2005, the Respondent decided not to renew it any further and under the terms of the contract, it was perfectly entitled to do so. It is apposite to quote part of the relevant provisions of the contract:-

*"**Re**: **Extension of Contract** –*

*Further to our letter dated 05 April 2005, this is to inform you that IVT Council at its meeting of 18 April 2005, has approved that your contract be*

***exceptionally*** *extended for a further period of* ***six months with effect from 15 May 2005****.*

*You are hereby requested to ensure that your performance, punctuality and work conduct be improved and meet the expected performance standards as will be discussed with you by your Supervising Officer.*

*Your attention is hereby drawn to the effect that should you fail to improve your work performance and conduct, Council may terminate your contract of employment."*

The Tribunal finds that the whole tenor of the evidence is to the effect that the contract of Disputant had lapsed in November 2005 and the Respondent chose not to renew it as opposed to what had been done in the past. The issue is one of non renewal of the contract which Respondent was empowered to do. Dismisal or termination of the Disputant's employment does not arise in the circumstances of the present case. In **Mauritius Steam Navigation Co Ltd V. Roussety (1977 MR 25)**, the Appellate Court commented:-

***"……….it results plainly from the terminology of the Ordinance(as it would also from the words "at the initiative of the employer" in the title of the Recommendation of the international Labour Organisation) that the provisions regulating the severance allowance were meant to operate only in those cases where the employment of a worker was ended by the unilateral act of the employer…………………………………………………………….***

***It is thus quite evident that the Ordinance does not find its application in the case of a contract of determinate duration which comes to an end by the happening of the event predetermined and agreed upon by the parties. Such end does not come through the agency of the employer, but by the common will of the parties."***

The now defunct Labour Act provided the termination of contracts "*à durée déterminée*" in two ways. Section 30 (1) of the Labour Act provided as follows:

*"Subject to any express provision of the agreement and to subsections (2) and (3), every agreement shall terminate on the last day of the period agreed upon or on the completion of the specified piece of work."*

Contracts of fixed duration are now expressly recognized in Section 5(3) of the Employment Rights Act 2008 which has replaced and repealed the Labour Act:-

*"Any agreement may be entered into for a specified type of work for a specified period of time."*

In L**.E. Sadien V. The Trust Fund for the Social Integration of Vulnerable Groups (2009 SCJ 400)** where several renewal contracts were involved, the Court found : - " *The tenor of the evidence is clearly to the effect that each contract was an autonomous one. Each year upon the expiry of the current contract, the employee asked for and was granted, a new one year contract for the forthcoming year with the possibility, not certainty, of further renewal. In the circumstances it can hardly be said that because of the four successive renewals, the contract had been turned into one of an indeterminate duration."*

We are unable to agree with the submission that an offer of 3 months paid salary in lieu of notice converts the contract into a contract of an indeterminate duration. The contract being of a determinate nature, there

was no obligation for an offer of "*3 months salary in lieu of notice*". This only adds to confusion and such legal advice was clearly not in order. Each of the contract issued to Disputant is with regard to the appointment that "*may be determined at any time by giving one month's notice*". If Respondent was really keen to offer 3 months on humanitarian ground, the terms used as compensation were not called for.

We also do not find relevant the issue of "*tacite reconduction*". Citing **Vacoas Transport Co. Ltd V. Pointu (1970) MR 351**, the Court held in **Mauritius Steam Navigation Co. Ltd (supra)**:- "*We shall now advert to cases relating to the termination of contracts of fixed duration which should, for the purposes of the Ordinance, be treated in the same manner as those relating to the termination of contracts of indeterminate duration. Upon the authority of decisions of French Courts, this Court has already ruled that where a contract made for a definite period is renewed by "tacite reconduction" for several periods of fixed duration the number of which is indeterminate the total duration of the contract will also be indeterminate, (**Vacoas Transport Co. Ltd. V. Pointu (1970) MR 351**, and the unjustified termination of such a contract will entitle the worker to the same redress under the Ordinance as he would have had if his contract had been of indeterminate duration".*

In the present matter each contract had been expressly renewed without any "*tacite reconduction*".

In short, nothing in law imposed an obligation upon the Respondent to extend the contract and this being so, the issue of reinstatement does not arise.

The dispute is accordingly set aside.

**(SD) Rashid HOSSEN**

(President)

**(SD)Jean Paul SARAH-**

(Member)

**(SD)Jheenarainsing SOOBAGRA**

(Member)

**(SD)Renganaden VEERAMOOTOO**

(Member)

**Date: 28 June 2012**