EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 54/12

Before

Indiren Sivaramen	**Vice-President**
Christian Bellouard	**Member**
Jheenarainsing Soobagrah	**Member**
Maurice Christian Aimé Laurette	**Member**

In the matter of:-

Chemical Manufacturing and Connected Trades Employees Union (the "First Party")

And

Compagnie Mauricienne de Commerce Ltée (the "Second Party")

The two parties have jointly referred the disputes mentioned below to the Tribunal for voluntary arbitration under section 63 of the Employment Relations Act. The parties were initially before the Commission for Conciliation and Mediation (hereinafter referred to as "the Commission") but no agreement has been reached between them and they thus referred the matter to the Tribunal. The points in dispute read as follows:-

"1. That all employees forming part under the bargaining unit of the Union should benefit from all benefits of Collective interest agreed between the employees represented by the above Union and the Company.

2. That all employees forming part under the bargaining unit of the Union without excluding any new recruits should benefit from one Saturday off after having worked for the precedent Saturday which results from one Saturday at work and one Saturday off and thereon repeatedly."

Mr B. Frappier, a clerk, deposed before the Tribunal and he averred that he was the Secretary of the Tyre Retreading Factories Workers Union. He stated that workers requested for 'one Saturday on and one Saturday off' and that the union then made a request to the Second Party through a letter (copy produced and marked Doc A). He stated that the principle of having alternate Saturdays off was put into practice, and that following several verbal requests from the trade union, Management would have agreed to include same in the collective agreement.

In cross-examination, Mr Frappier however conceded that the 'agreement' concerning 'Saturday off' was never put in writing. He however accepted that there were good relations with Management and that the latter was ready to negotiate terms in the collective agreement. In re-examination, Mr Frappier stated that the Tyre Retreading Factories Workers Union was not representing only workers of the Second Party but was representing employees working in eight or nine different companies. Mr Frappier stated that Management was responsible for drafting all agreements with the union.

Mr R.Foiret, Assistant Senior Manager, then deposed before the Tribunal and he swore to the truthfulness of the Statements of Case/Reply filed on behalf of the Second Party. He produced a copy of a 'Particulars of Work Agreement' dated 17 December 2009 for a new recruit (Doc B). He maintained that even for new recruits after 2008, everything that was agreed in the Negotiated Agreement with the trade union was being passed on to them. He produced a copy of a Negotiated Agreement (Doc C) which he said was still in force between the two parties. He added that the union (initially Tyre Retreading Factories Workers Union and now the First Party) and the Second Party have always negotiated and that the two parties have signed several agreements following negotiation.

Mr Foiret stated that there was a written request from a group of workers for them to work one Saturday and to have one Saturday off. The reason for making such a request was also given (copy of request produced and marked Doc D). The request was acceded to by the Second Party and this applied to all workers for the period from 1982 up to 2008. Mr Foiret however added that Management has always considered this as being a privilege given to workers and that this was done in a particular context in 1982 when the load of work was low. He stressed on the fact that the union always wanted this privilege to be formalized but that the Second Party did not want to bind the company. He produced a copy of a document showing a request made by the union to formalize the principle of one Saturday on and one Saturday off (Doc E) and a copy of an Agreement between the parties effective as from 1991 (Doc F).

Mr Foiret stated that as from the year 2008, all new recruits have to work on Saturdays as per their conditions of work. He averred that the context has changed and that the Second Party has to manufacture much more than in 1982. He produced a document purporting to show the annual production figures from 1984 up to 2001 (Doc G). Mr Foiret stated that the production had almost trebled from 1984 up to 2008 so that it was no longer possible to have workers not working on Saturdays. Workers work up to noon on Saturdays. Mr Foiret then referred to the fact that in 1982 there was some fifteen

local retread factories whereas in 2011 there would be a maximum of seven entities the others having been forced to close down. He referred to the very competitive market and averred that as a responsible employer, the Respondent had to ensure that it was as efficient as possible so as to be able to continue its business and thus save jobs. This also contributes to maintain economic growth.

According to Mr Foiret, as at today, the 'new recruits' (workers concerned with the dispute) would represent 33% of the workers. He added that the privilege of having alternate Saturday off is not being withdrawn from those workers who have already benefited from same. Only the 'new recruits' are concerned and have to work every Saturday but with time the privilege of 'Saturday off' was going to fade away. The representative produced copies of the relevant Remuneration Orders (Docs H, I and J). He stated that the salaries of new recruits exceed those provided in the relevant Remuneration Orders and that new recruits are employed on the basis of the salary scale normally applicable on the third year of service. He produced a comparative table to show the salaries actually paid to workers as compared to what are provided for in the relevant Remuneration Orders (Doc K). Mr Foiret then referred to various bonuses which workers at the Second Party are entitled to including a training bonus for new recruits. Workers can even benefit from overtime. Mr Foiret avers that on average workers are paid 41% to 81% above their basic salaries so that they are paid well above what is provided in the Remuneration Orders. According to him, the company would be at risk if it has to pay the workers overtime for work on Saturday (up to noon) on top of the various bonuses paid to them.

In cross-examination, Mr Foiret accepted that a new recruit (in a particular bargaining unit) should benefit from everything that a trade union has negotiated for that bargaining unit. He stated that there was an agreement between the parties on salary, allowance, vacation leave, leave, production and incentive bonuses. Mr Foiret was shown a document (Doc M) purported to emanate from the Second Party and which a new recruit had signed. He agreed that for 'leave entitlement', it was provided "As per Office Attendant Remuneration Order". He agreed that leaves negotiated by the union such as six days wedding leave, three days special leave on the occasion of a child's marriage, mortality leave are not provided for in the Office Attendant Remuneration Order. He was shown another document (Doc L) and he confirmed that it was written "As per Distributive Trades Remuneration Order". He could not answer however when it was put to him that it was not true that the Second Party would give all the benefits negotiated by the union for a bargaining unit to new recruits in the same bargaining unit.

Mr Foiret stated that the Second Party implemented a request which was made but that it has never signed any agreement in relation to same. He stated that the company did not have to negotiate with the union on the issue of 'Saturday off'. He could not define the term "collective interest". When asked what the impact on productivity was in 2008 when the company adopted this measure in relation to new recruits, Mr Foiret conceded that the impact was perhaps not big but he added that there was a pattern to change since production had already increased. He agreed that trainees have to be "fully fledged" before having an impact on production. When questioned about a possible

discrimination, Mr Foiret stated that one has to consider the length of service of those benefitting from Saturday off as compared to a new comer who joins the company at a different salary scale. He stated that there was a request from workers and this was backed up by a letter from the union. Management acceded to the request but did not enter into any agreement.

Mr J. P Langlois, Manager, then deposed before the Tribunal and he was shown Docs B, L and M. Despite Docs L and M, he maintained that it is the terms which have been agreed with the union which are given to new comers at the Second Party. In cross-examination, Mr Langlois stated that Management has always refused to sign an agreement in relation to 'Saturday off' since it considers that this is a privilege which existing workers have. On being further questioned in relation to the veracity of the contents of the documents signed by new comers at the Second Party, Mr Langlois replied "C'est faux dans un sens mais on les donne plus" (meaning more than what is provided for in the relevant Remuneration Order).

Counsel for the Second Party submitted that all the items of collective interests which have actually been signed and form part of the collective agreement are currently being applied to the workers. She argued that there was never any written agreement with the union as to 'Saturday off' so that this cannot be taken as "un acquis" for those workers who were not yet in employment before 2008. She referred to the economic reasons given by Mr Foiret for asking new recruits as from 2008 to work on every Saturday. Counsel submitted that there is no discrimination between a worker who is employed before 2008 and another worker in the same bargaining unit who is employed after 2008. She argued that a new recruit (as from 2008) never benefitted from 'Saturday off' which applied not only to factory workers or workers in the bargaining unit but also to staff administration indiscriminately. Counsel then submitted that if ever the Tribunal was to find that there was in fact discrimination, then the principle of 'equal remuneration for work of equal value' under section 20 of the Employment Rights Act should be read in conjunction with section 4(3) of the same Act. She submitted that the evidence adduced on behalf of the Second Party should be assessed to determine the reasonableness of the measure taken in relation to new recruits.

Counsel also submitted that the Second Party as a responsible employer has to ensure continuity of employment of his workers bearing in mind the economic conditions prevailing at the relevant time. She also referred to principles mentioned in sections 97(g) and 97(h) of the Employment Relations Act which, according to her, should be applied in the present matter. She concluded by arguing that the condition to work on every Saturday for new recruits as from 2008 is reasonable, not discriminating and was not done to undermine the bargaining process.

The representative of the First Party made a statement to the effect that though Management has not agreed up to now to sign an agreement in relation to one Saturday at work and one Saturday off, Management has not amended in any manner the request made by the Union before accepting the said request. He observed that Management could have discussed with the recognised trade union and that it has

failed to do so. Finally, he stated that the five or so new recruits at the relevant time were trainees and that there were no benefits in making them work every Saturday.

The Tribunal has examined all the evidence on record including documents produced and submissions of Counsel. The present matter raises many important issues and the Tribunal wishes to place on record the positive attitude of both parties to jointly refer the matter to the Tribunal for voluntary arbitration under section 63 of the Employment Relations Act. In relation to point in dispute no 1 as per the terms of reference, if there is a recognised trade union in a bargaining unit, only the said trade union (or a joint negotiating panel) may act, under our law, as a bargaining agent for the said bargaining unit. The recognised trade union or the employer may initiate negotiations with a view to reaching a collective agreement or renewing or revising the agreement if it exists already. Benefits of 'collective interest', which we understand to be benefits which will be in the common interest of all workers in a particular bargaining unit will be included in a collective agreement. But what is important is that these benefits must be agreed between the employer and a recognised trade union in the bargaining unit. The agreement is not between the workers themselves and the employer. The recognised trade union (though representing the interests of its members) does not sign the collective agreement on behalf of the workers so that the workers are not parties to a collective agreement. This is clear from section 56(1) of the Employment Relations Act which provides as follows:

56. Application of collective agreement

(1) A collective agreement shall bind-

(a) the parties to the agreement; and

(b) all the workers in the bargaining unit to which the agreement applies.

Indeed, a reading of this provision shows the distinction made between the parties to a collective agreement and the workers in the relevant bargaining unit. The terms of the collective agreement apply to the workers by application of the law and not because the workers are parties to the collective agreement. We may thus refer to section 56(7) of the Employment Relations Act which reads as follows:

(7) The terms of the collective agreement made under section 55 or under this section shall become implied terms and conditions of the contract of employment of the workers covered by the agreement.

Since any agreement on "benefits of collective interest" will be negotiated and agreed by an existing recognised trade union and not the workers themselves, the terms of reference have been wrongly drafted under point in dispute no 1 to such an extent that the point of dispute itself cannot stand. In the circumstances and without having to go into the merits of the dispute, point in dispute no 1 is set aside.

In relation to point in dispute no 2, Management has since 1982 agreed that the relevant workers be allowed to work one Saturday and to have one Saturday off. This practice has continued for more than twenty-five years and the representative of the Second Party avers that this was merely a privilege granted to the workers. The Tribunal does not share this view and finds that, at the very least, this was "un usage obligatoire". Indeed, there is evidence that this "usage" of working one Saturday and having one Saturday off was applied continuously over a long period of time and that this principle applied indiscriminately to all relevant workers (including new recruits during that period) and not to a few individual workers. There is nothing to indicate that this principle of working one Saturday and having one Saturday off was not 'fixed' in its application over the years. Indeed, there was no evidence of any issue in relation to how this principle of having one Saturday off was put in practice. The Second Party has not adduced any evidence to show that it informed workers that this was a mere privilege. The length of time during which this practice has been applied, and this despite the fact that production had almost trebled, is clearly indicative that this was not "une simple tolérance".

We have perused Docs C and F and none of these agreements refers to hours of work. What matters most however is that it is admitted on behalf of the Second Party that the request relayed by the union following the petition of the workers (as per Doc A) had been put into practice. Mr Foiret was very much ill at ease on this issue in cross-examination and he stated "Nous ine mettre la demande (meaning the request made by the union) en pratik mais nous jamais ine signe aucaine accord dans sa sens-là." Since the principle was not laid down in a written agreement signed by both parties, it did not *sensu stricto* form part of the collective agreement between the parties. Indeed, section 55(1) of the Employment Relations Act reads as follows:

"Where a recognised trade union, a group of recognised trade unions, a joint negotiating panel and an employer reach an agreement on the terms and conditions of work and employment, they shall draw up in writing a collective agreement and shall sign it."

Section 61 under the same Sub-Part E of the Employment Relations Act even provides for registration of the collective agreement with the Tribunal and the relevant Ministry. However, under the old law, this requirement for a collective agreement to be in writing was less obvious and reference to same can only be found in the Code of Practice in the Third Schedule to the now repealed Industrial Relations Act.

As the said principle of one Saturday at work and one Saturday off was put into practice, it was with the consent of the employer so that this was necessarily based on an agreement. This agreement was in relation to an essential element of the contract of work of all relevant workers at that time whereby the workers were benefitting from an improved condition of work. The Tribunal finds that this principle of one Saturday at work and one Saturday off was more than "un usage obligatoire" and very much in the nature of an agreement between Management and the Union.

The Second Party no doubt has an inherent power of administration and he can organise his business according to the exigencies of the service but within what is permissible under the Employment Laws (vide **Gerard Rousseau & ors and Le Warehouse Ltd RN 1013** where the following cases were referred to: **Hong Kong Restaurant Group Ltd v Mrs A.Manick 1997 SCJ 105** and **L'Ingénie S. v Baie du Cap Estates Ltd 2000 SCJ 131**). This power of administration is thus subject to existing agreements with recognised trade unions, provisions such as 'protection from discrimination in employment and occupation' and 'equal remuneration for work of equal value' as per sections 4 and 20(1) of the Employment Rights Act.

For there to be discrimination under the Employment Rights Act, there must be discrimination under one of the incriminated grounds. Thus section 4(1)(a) of the Employment Rights Act provides that "*No worker shall be treated in a discriminatory manner by his employer in his employment or occupation*." Section 4(5) of the same Act then provides as follows:

"*For the purpose of this section –*

(a) "discrimination" includes affording different treatment to different workers attributable wholly or mainly to their respective descriptions by age, race, colour, caste, creed, sex, sexual orientation, HIV status, religion, political opinion, place of origin, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

In relation to the principle of equality and protection from discrimination under sections 3 and 16 of the Constitution, their Lordships of the Judicial Committee of the Privy Council in the case of **Matadeen and Anor v Pointu and Ors (Privy Council) 1997 PRV 14** (referred to in the Supreme Court case of **Thandrayen & Anor v. The State of Mauritius & 2 others, 2010 SCJ 358**) concluded as follows*: "is that sections 3 and 16, even if construed with section 1, do not apply to inequalities of treatment on grounds falling outside those enumerated. Such inequalities are not subject to constitutional review. The question of whether they are justifiable is one which the Constitution has entrusted to Parliament or, subject to the usual principles of judicial review, to the Minister or other public body upon whom Parliament has conferred decision-making authority."*

The Tribunal finds that under the Employment Rights Act, treatment in a discriminatory manner under section 4(1) will refer to affording different treatment to different workers attributable to one of the grounds included in section 4(5)(a) of the Employment Rights Act (see above). In this particular case, the new condition of having to work on every Saturday is being applied to all new recruits in that bargaining unit, and thus without having to consider section 4(3) of the same Act, we find that there is no discrimination on any of the grounds mentioned in section 4(5)(a) of the Employment Rights Act.

As regards section 20 of the Employment Rights Act, the Tribunal will be guided by French and English case law in its approach. Section 20(1) of the Employment Rights Act provides as follows:

*"**20. Equal remuneration for work of equal value***

(1) Every employer shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work."

'Remuneration' is defined in the same Act at section 2 as follows:

(a) means all emoluments, in cash or in kind, earned by a worker under an agreement;
(b) includes –
(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work;
(ii) any money to be paid to a job contractor, for work, by the person employing the job contractor; and
(iii) any money due as a share of profits.

It is not disputed that new recruits in the bargaining unit of the union will be performing the same type of work (but not necessarily identical) as other relevant workers in the same bargaining unit. Remuneration is defined in wide terms under the Employment Rights Act (in line with the definition given in the **International Labour Organisation Convention No 100**) and will thus include all components of remuneration including overtime, cash value benefits, work materials such as uniforms, tools, utensils and so on.

From the evidence adduced before us, it is clear that workers recruited prior to 2008 work one Saturday and have one Saturday off and thereon repeatedly. New recruits as from 2008 will have to work every Saturday. They will work according to their respective Remuneration Orders. However, a worker who joined before 2008 will be entitled to overtime if he works every Saturday (which the Second Party avers it cannot afford) whereas a new recruit who works every Saturday (up to noon) will not be entitled to overtime. The remuneration of a new recruit joining after 2008 (in the same bargaining unit) will be less favourable than that of another relevant worker who joined before 2008.

In Constitutional law, the principle of equality is not absolute but subject to limitations. In the case of **Police v Rose 1976 MR 79**, the Supreme Court observed that "Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently." Their Lordships in the case of **Matadeen and Anor v Pointu and Ors (Privy Council) 1997 PRV 14** cited with approval the above and referred to same as one of the building blocks of democracy. The Tribunal thus finds that similarly section 20 of the Employment Rights Act does not create an absolute

right for equal remuneration but must be read as being subject to there being a valid reason for two workers to be treated differently.

This is in line with French and English case law. Under French law, the Court ("Cour de Cassation") has accepted a number of circumstances which could justify the non-application of the principle of "à travail égal salaire égal". These would include for instance "la décision justifiée par "des considérations liées à l'intérêt de l'entreprise" (*Corrignan-Carsin Danielle, "Un nouvel embauché n'est pas fondé à invoquer une violation du principe "à travail égal, salaire égal", des "raisons objectives" justifiant la différence de rémunération", JCP 2006, éd. G, n° 5, II, 10017*), « une différence pour éviter la fermeture d'un établissement » *(Soc., 21 juin 2005, n° 02-42.658, Bull. 2005, V, n° 206)* and personal qualities ('the personal equation') of the workers concerned such as « l'expérience professionnelle acquise » (*Soc., 29 septembre 2004, n° 03-42.033,Soc ; 15 novembre 2006, n° 04-47.156, Bull. 2006, V, n° 340 ; Soc., 19 décembre 2007, n° 06-44.795)* or « une différence de compétence reconnue de manière transparente » (*Soc., 17 octobre 2006, n° 05-40.393)*. The circumstances will be analysed " in concreto" by the Court to decide upon the relevance of the reason/s given. In his report to *L'Arrêt n° 574 du 27 février 2009 - Cour de cassation - Assemblée plénière*, Mr Mas, « conseiller rapporteur » wrote :

« *Au fil du temps la Cour* [meaning « la Cour de Cassation »] *a même augmenté ses exigences, puisqu'elle a dans un premier temps exigé des justifications objectives, puis des justifications objectives et pertinentes et enfin que ces justifications soient appréciées "in concreto" par le juge, qui doit en contrôler concrètement la pertinence. »*

Under English law, the principle is found in the Equal Pay Act and Sex Discrimination Act. We need not go in detail in the relevant provisions but suffice it to say that variation in treatment in the sphere of employment must be genuinely due to a material difference between each relevant worker's case. In **Rainey v Greater Glasgow Health Board [1987] IRLR26 HL**, the House of Lords ruled that an employer has to show "objectively justified grounds" for the difference in pay.

In relation to the facts of the present case, the Second Party is relying on total production which has almost trebled from 1984 to 2008. Reference has been made to the need for efficiency, the existing competition in this market and that some companies have had to close down. Finally, it was averred that if the company did not deliver according to clients' needs, it might have to close down also. The Tribunal will be guided by the principles mentioned above. The Tribunal thus has to analyse 'in concreto' the evidence adduced to assess how relevant or valid are the reasons given for the difference in treatment between existing workers in the bargaining unit and new recruits (in the same bargaining unit) as from 2008.

In the present matter, the Second Party has produced Doc G to show that the total production of the company has increased from 106,441 kgs in 1984 to 301,227 kgs in 2008. The production in 2007 was slightly higher than that in 2008 at 301,449 kgs. Thus, whilst showing a general increase in production, these figures very importantly

show that the company has been able to increase its volume of production by having the relevant workers working on alternate Saturdays. The volume of production not only dipped in the year 2008 but also in 2009 when total output was 298,695 kgs. There is no evidence that making new recruits work every Saturday up to noon (instead of alternate Saturdays) had a real impact on production capacity. In any event, the issue in the present matter appears to have more to do with the additional costs and administrative difficulties for the company to have workers work on Saturdays on which they are not supposed to work. This was hardly addressed before us. No evidence has been adduced on the financial situation and profitability of the company and Mr Foiret though referring generally to the threat of the Second Party having to close down did not adduce evidence in relation to the capacity to pay of the company.

Reference has been made to other competitors which allegedly have had to close down with time. The Second Party presumably wanted to show the fierce competition in this market but at the same time, the fact is that with the closing down of some or many competitors, competition is likely to decrease instead of increasing further. Reference has been made by Counsel for the Second Party to section 97(g) and (h) of the Employment Relations Act. These relate (1) to the need to increase the rate of economic growth and to protect employment and to provide greater employment opportunities and (2) to the need to preserve and promote the competitive position of local products in overseas market. The Tribunal has no doubt that these are very important considerations which however need to be balanced with other factors mentioned in the same section 97, that is, the interests of the persons immediately concerned, the principles and best practices of good employment relations and the need to fix wages on the basis of job content. These principles are fairly similar to principles already existing under the then section 47 of the repealed Industrial Relations Act.

Bearing all the above into consideration (and though the Tribunal could have relied essentially on the agreement between the trade union and the Second Party), the Tribunal finds that it was not warranted for the Second Party to unilaterally change terms and conditions of work albeit for new recruits in the bargaining unit of the union. There is no evidence of any positive impact on productivity (except for evidence of total production nearly trebling over the years) and good employment relations which this decision of granting ‘one Saturday at work and one Saturday off’ has had over these 25 years in the company but the Tribunal is convinced that allowing uniformity of terms and conditions of employment for workers in the same bargaining unit is paramount the more so when there is no concrete evidence as to serious and real prejudice to the viability of the employer. There are indeed other means and ways whereby the Second Party may tackle this issue and it may, for example, provide adequate motivation for both new recruits and workers already in prior to 2008 to work every Saturday. This is where guiding principles such as “harmonious employment relations” and “building up shared values” highlighted in the Employment Relations Act assume all their importance.

In relation to point in dispute no 2, the Tribunal awards that all employees forming part under the bargaining unit of the union including any new recruits should benefit from one Saturday off after having worked for the precedent Saturday which results from one Saturday at work and one Saturday off and thereon repeatedly.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Christian Bellouard
Member

(Sd) Jheenarainsing Soobagrah
Member

(Sd) Maurice Christian Aimé Laurette
Member

28 September 2012