EMPLOYMENT RELATIONS TRIBUNAL

DECLARATION

RN 67/12

Before

Indiren Sivaramen	**Vice-President**
Christian Bellouard	**Member**
Philippe Edward Blackburn	**Member**
Renganaden Veeramootoo	**Member**

In the matter of:-

Scomat Ltée (Applicant)

And

General Workshop Workers Union (Respondent)

The Applicant has made an application to the Tribunal under section 62(2) of the Employment Relations Act for a declaration in relation to the interpretation of a provision in a Collective Agreement entered into by the two parties. The particular provision is provided under section 9 of the Agreement and reads as follows:

"*In addition to all the provisions of the R.O and Health & Safety Act, the following will be provided:*

- *…*
- *A special allowance of Rs 500 per day of intervention shall be given to all workers who are called upon to work at any dumping sites where intervention is done on machines within the dumping area.*"

Both parties have filed a Statement of Case in the present matter and the Tribunal proceeded to hear both parties. Mr Sarju, Service Manager, deposed on behalf of the Applicant and he produced a copy of the Collective Agreement entered into by the two parties (Doc A). He also produced a copy of a plan (Doc B), a letter he sent to the Human Resource Manager at the Applicant (Doc C), a copy of a draft agreement initially proposed by the union (Doc D), a copy of an e-mail with a marked up copy of a "Final Collective Agreement" with minor amendments made by the union (Doc E) and a copy of a further revised version of the collective agreement (Doc F). Mr Sarju stressed on the fact that an incentive allowance is paid to encourage workers since though they intervene on machines they do so on a dumping area where there is waste. He added

that the issue arises in relation to Mare Chicose. Indeed, workers of the Applicant have to make interventions on machines which are used to work on and push waste at Mare Chicose. As from October 2011 (after that the Collective Agreement had been signed by the parties on 4 May 2011), the Applicant also had to maintain generators installed at Mare Chicose and the location of the generators was shown by Mr Sarju on Doc B. According to him, there was a distance of some 150 metres between the "dumping area" which he located on the south western part of the plan and the generators found on the north eastern part of Doc B.

Mr Sarju made his mea culpa and stated that there was a mistake in his department whereby all technicians working at Mare Chicose were paid the incentive allowance of Rs 500 even if they had carried out interventions only on the generators and not on machines in the "dumping area". He added that prior to the generators at Mare Chicose, all technicians working at Mare Chicose were indeed being paid an allowance and that the clerk continued this practice even with workers making interventions on the generators at Mare Chicose as opposed to machines on the "dumping area". The alleged mistake was spotted following an audit in the first week of July 2012 and discussions were held with the technicians and even with their trade union. Management has decided in all fairness to continue paying the allowance to technicians working at Mare Chicose but pending the outcome following "arbitration".

In cross-examination, whilst accepting that all technicians working at a dumping site are vaccinated, he stated that this forms part of the responsibility of Applicant in relation to health and safety. He did not agree that with the generators there was a new working pattern which necessitated negotiations with the union as per paragraph 2 of the collective agreement. He stated that the generators were used to make electricity from landfill gas which he referred to as being methane. There has been no study on health issues in relation to these generators but Mr Sarju stressed that health and safety is a top priority at Applicant and all protective equipment are supplied if need be. He could not say if the allowances paid so far form part of the "remuneration" of the workers. He stated that if there are any special circumstances, the Applicant would have no objection to negotiate with the union.

Mr Levaillant, a worker who works on the generators at Mare Chicose then deposed on behalf of the Respondent and he stated that when he finishes his work he still has to clean up and go and throw any waste in the dumping area. He is not doing any intervention on the machines in the dumping area but as a professional he has to go there to dispose of any waste.

The Tribunal has examined all the evidence adduced and the submission of Counsel and statement made by the trade union negotiator. The Tribunal is not being requested to deliver an Award in the present matter but merely to make a declaration under section 62(2) of the Employment Relations Act on the interpretation to be given to the particular clause (see above) provided under section 9 of the Collective Agreement. In the draft initially proposed by the trade union (Doc D), point 4 under section 8 read as follows:

"A special allowance of Rs 800 to be provided to all workers who are called upon to work at Mare Chicose or any other Plant which perform similar operation."

The interpretation here is clear and all workers working at Mare Chicose would have been entitled to the special allowance. But this clause has not been accepted as such and the clause has been amended substantially. There have been negotiations between the parties and amendments suggested before the Collective Agreement was finalised and executed. The Tribunal has to interpret the relevant provision as it appears in the signed Collective Agreement. In fact the elaborated manner, so as not to say complicated manner, in which that provision has finally been drafted (this time as point 2 under section 9) is a clear pointer that parties wanted to have something different from what could be easily understood from the clause initially proposed by the union. For ease of reference, we reproduce that clause once more:

"*A special allowance of Rs 500 per day of intervention shall be given to all workers who are called upon to work at any dumping sites where intervention is done on machines within the dumping area.*"

There is a sort of double proviso in the said clause with the word "intervention" being used twice. Also, care has been taken to use the words "dumping sites" first and then "dumping area". The Tribunal finds that the word "area" as used means a much more restrictive zone within a whole site. Indeed, "area" is defined in the Concise Oxford English Dictionary as "***1*** *a region or part of a town, country, etc. a space allocated for a specific use: the dining area. a part of an object or surface.* ***2.*** *a subject or range of activity.* ***3*** *the extent or measurement of a surface.* ***4*** *a sunken enclosure giving access to a basement.*" The dumping area is the space allocated for the specific use of dumping. Also, the Tribunal notes that the proper appellation has not been used, that is, "disposal site" which is the term used in relevant pieces of legislation including the Environment Protection Act or even "landfill site". According to the Concise Oxford English Dictionary, "landfill" is the disposal of waste material by burying it, especially as a method of filling in and reclaiming excavated pits. Generating power from landfill gas through the use of generators is an extra step and there is nothing in the provision *in lite* to indicate that generators situated some 150 metres away from the dumping cell/s or dumping area proper are "machines within the dumping area". Moreover, at the time the Collective Agreement was entered into, the workers were only working on machines within the dumping area so that the express inclusion of this condition in point 2 under section 9 of the agreement can only refer to intervention on machines within that specific area and not elsewhere.

As regards payment of the allowance which has been made for a certain period of time for interventions on generators, we find that the evidence of Mr Sarju explaining that this was done by mistake has not been rebutted. The Tribunal is satisfied that there was indeed a mistake on the part of the employer in making such payments bearing in mind the interpretation of the relevant clause in the Collective Agreement and the evidence of Mr Sarju as to how such a mistake would have occurred. In his book, *Introduction au*

droit du travail mauricien, 1/Les relations individuelles de travail, 2eme edition, Dr D.Fok Kan writes at page 31 the following:

« L'application de l'usage ne doit pas dépendre de la subjectivité de l'employeur. Il faut effectivement qu'il y ait une volonté de la part de celui-ci d'être tenu par cet usage, ce qui exclue une intention libérale de sa part. ….

Cette volonté doit non seulement exister mais doit également être éclairée. Un usage établi suite à une erreur de l'employeur ne saurait devenir obligatoire pour celui-ci, l'erreur n'étant pas en principe créatrice de droit. C'est bien sûr à l'employeur de l'établir. Bien qu'en pratique dans la majorité des cas il s'agit de corriger l'erreur pour l'avenir, le droit civil permet ici à l'employeur de demander la répétition de l'indu. Même si la jurisprudence française semble généralement faire droit à une telle demande de l'employeur, elle retient volontiers une responsabilité à la charge de l'employeur qui doit assumer son "rôle prépondérant dans l'exécution comme dans la conclusion du contrat de travail." »

Also, the relevant clause in the agreement relates only to the payment of a special allowance referred to as an incentive allowance by Mr Sarju. It does not absolve the Applicant of any liability and of its responsibility in relation to relevant provisions under the Occupational Safety and Health Act and any regulations made thereunder and other applicable norms. Thus, the agreement to have all workers working on the site vaccinated cannot be equated with the payment of a special or incentive allowance which is paid for the awkward nature of the work where workers have to intervene on machines which are within a dumping area.

For the reasons given above, the Tribunal thus declares that point 2 of section 9 of the Collective Agreement cannot be interpreted to include workers who are required to intervene (only) on machines such as generators which are not located within the dumping area.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Christian Bellouard
Member

(Sd) Philippe Edward Blackburn
Member

(Sd) Renganaden Veeramootoo
Member **10 October 2012**