

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 103/14

Before:	Indiren Sivaramen	-	Vice-President
	Vijay Kumar Mohit	-	Member
	Desire Yves Albert Luckey	-	Member
	Renganaden Veeramootoo	-	Member

In the matter of:-

ERT/RN 103/14 – Mr Krishna Vullapah

(Disputant)

And

Dinarobin Hotel (New Mauritius Hotels Ltd) (Respondent)

The above case has been referred to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the “Act”). The Disputant was assisted by a trade union representative whilst Respondent was assisted by counsel. The terms of reference read as follows:

“Whether the management should revert back the roster of Mr Krishna Vullapah to the day shift instead of night shift.”

Disputant deponed before the Tribunal and he averred that he started to work at the Respondent in the year 2002 as Helper Restaurant. In 2004, he became ‘Chef de Rang’ and was working on a 5:1 roster, that is, three nights, two days and one day off. On 1 November 2012, he agreed with his Manager to move on a 5:1 roster, days only. After 1 December 2013, he was requested to work anew on the three nights, two days and one day off roster. He was not agreeable to work on that roster and the Respondent then gave him 45 days to organize himself. In January 2014, he started to work anew on day and night shifts. He still did not agree to same and worked under protest.

In cross-examination, the Disputant conceded that it was mentioned in his contract of employment that he was posted at ‘Harmonie’ Restaurant and that he may be required to move from one section or hotel to another without added remuneration. A copy of his contract of employment was produced (Doc A). He stated that when ‘Le Kabanon’ snack was opened, waiters from the beach restaurant ‘Le Morne Plage’ went to work at

'Le Kabanon' and he moved from 'Harmonie' Restaurant to work at "Le Morne Plage' Restaurant. Then he worked on a 5:1 roster, days only. He accepted that 'Le Kabanon' was not performing well and that the waiters had to be sent back to 'Le Morne Plage'. He was in turn moved back to 'Harmonie' Restaurant.

Disputant added that there are eighteen 'Chefs de Rang' at 'Harmonie' Restaurant and that they all work on the same roster, that is, three nights, two days and one day off.

Mrs Lamvohee, the acting Human Resource Manager of Respondent then deponed. She stated that 'Le Kabanon', a bar where lunch was served, was set up in 2012 and waiters from 'Le Morne Plage' were moved to 'Le Kabanon'. Disputant was then moved to 'Le Morne Plage'. This was as from 1 December 2012 up to 1 December 2013 where Disputant was sent back to 'Harmonie' Restaurant. 'Le Kabanon' did not perform according to expectations and the waiters were sent back from 'Le Kabanon' to 'Le Morne Plage'. There was thus a surplus of workers at 'Le Morne Plage' and Disputant was moved back to 'Harmonie' Restaurant.

There are eighteen 'Chefs de Rang' and they all work on a roster of three nights, two days and one day off. Mrs Lamvohee further stated that employees at the Respondent may be required to move from one section to another and even from one hotel to another, that is, to 'Le Paradis', found on the same Le Morne Peninsula and which pertains to the same employer. She averred that Disputant has to follow the same roster as everybody else as per his contract of employment.

In cross-examination, Mrs Lamvohee stated that at both 'Harmonie' Restaurant and 'Le Morne Plage', Disputant was working on a 5:1 roster and that it was only the working hours ("les horaires") which were different at these two restaurants. She stated that no allowance was granted to Disputant because there was a 'mobility' clause in his contract of employment whereby he could be moved to another outlet without added remuneration. Also, Disputant had already been working three nights, two mornings and one day off for some eleven years and there were seventeen other Chefs de Rang who were doing exactly the same work schedule as Disputant. Mrs Lamvohee added that Disputant was given some one and a half months to adapt before he started to work the day and night roster anew.

Counsel for Respondent submitted that as per the terms of reference, there is no mention of any allowance being sought. Counsel referred to the mobility clause in the contract of employment. He thus argued that 'acquired right' cannot be invoked the more so that even the conditions required for acquiring a right do not exist in the present matter. Mr Ramasamy, the trade union representative, made a short statement and referred to the inconvenience suffered by Disputant following the change in his working hours. He added that despite the mobility clause, the effect of changing the roster of an employee affects the employee.

The Tribunal has examined all the evidence on record including Doc A. As per the terms of reference of the dispute, the Tribunal is to award whether Disputant is to be reverted back to the day shift. There is no evidence before us that with the change in the working hours of Disputant, the latter is being required to put in more hours of work.

Very importantly, there is unrebutted evidence that Disputant has been working for years on the 5:1 roster doing day and night shifts. His contract of employment (Doc A) indeed refers to Disputant having to work on a 5:1 roster and also provides under the heading “**Duties**” the following:

“You will be posted at the ‘Harmonie’ Restaurant and you may be required to move on Le Morne Peninsula from one hotel or one section/outlet to another and to work outside the restaurant perimeter in the course of a day’s work and in the performance of your prescribed duties without added remuneration.”

Mrs Lamvohee clarified that the other hotel on Le Morne Peninsula referred to, would be “Le Paradis” pertaining to the same employer. She explained why Disputant was moved for one year from ‘Harmonie’ Restaurant to ‘Le Morne Plage’ and why eventually management decided to move him back to ‘Harmonie’ Restaurant on the same roster (day and night) as he was working before. These explanations have not been challenged and the Tribunal finds nothing wrong with the moving of Disputant from ‘Harmonie’ Restaurant to ‘Le Morne Plage’. In fact, Disputant agreed to move to ‘Le Morne Plage’ (in line with his contract of employment). There is however no evidence that Disputant benefited from a new contract of employment or that there was an agreement that he would henceforth work only at ‘Le Morne Plage’ or do day duty only. The evidence before us, including, the terms of the contract of employment of Disputant, the work history of Disputant at ‘Harmonie’ Restaurant, the very nature of the post held by Disputant and the relatively short period of time for which Disputant worked at ‘Le Morne Plage’ cannot, by any means, give Disputant an acquired right to work only day duty (**vide Constance & La Gaiété S.E Co. Ltd v Bhungshee 2000 SCJ 67**).

The moving back of Disputant to ‘Harmonie’ Restaurant was within the “pouvoir de direction” of management and we find nothing wrong with the reasons given for such a move. In the light of the terms of the contract of employment (and absence of evidence of change in the number of hours of work (“durée du travail”)), there was no change in the conditions of work of Disputant but in fact mere execution of the contract of employment. The evidence adduced, on the other hand, shows that Disputant has been given time to adapt before embarking anew on the day and night shifts and there is no evidence of bad faith or “intention de nuire” on the part of Respondent. For the reasons given above, the Tribunal finds no reason why management should revert back the roster of Disputant to the day shift when other Chefs de Rang at ‘Harmonie’ Restaurant are performing both day and night shifts. The dispute is thus set aside.

Indiren Sivaramen

Vijay Kumar Mohit

Vice-President SD

Member SD

Desire Yves Albert Luckey

Renganaden Veeramootoo

**Member SD
2014**

Member SD

28 November