

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 117/14

Before:

Rashid Hossen	– President
Vijay Kumar Mohit	– Member
Rajesvari Narasingam Ramdoo (Mrs)	– Member
Renganaden Veeramootoo	– Member

In the matter of :-

Mr Jean Claude Elias

Disputant

And

Municipal Council of Beau Bassin/Rose Hill

Respondent

On 2 April 2013, Mr Jean Claude Elias (hereinafter referred to as the Disputant) reported to the President of the Commission for Conciliation and Mediation the existence of a labour dispute between himself and the Municipal Council of Beau Bassin/Rose Hill (hereinafter referred to as the Respondent) in accordance with Section 64(1) of the Employment Relations Act 2008, as amended. Conciliation meetings were held but no settlement has been reached. The Commission has therefore referred the matter to the

Tribunal for Arbitration in terms of Section 69(7) of the Employment Relations Act 2008, as amended.

The Terms of Reference reads:

“Whether the contract of employment of Mr. Elias Jean Claude as Caretaker concerning his duties and hours of work should be respected.”

Both parties were represented by Counsel.

The Terms of Reference as couched are not the best one referred to the Tribunal by the Commission. Indeed all contracts of employment are meant to be respected. In the present matter it is only after a perusal of the Statement of Case that some clarity gradually emerges. The Tribunal on a number of occasion laid emphasis on the importance of clarity and specificity that should characterize Terms of Reference.

The Statement of Case of the Disputant is as follows:

“1.1 Mr J.C. Elias was appointed as Cleaner by the Municipal Council of Beau Bassin/Rose Hill in 1982.

1.2 As from 13 March 1990, Mr. Elias was assigned the duties of Caretaker.

1.3 *He was appointed as Caretaker by the Local Government Service Commission with effect from 19 August 1996. Mr. Elias reckons about 32 years continuous service with the Municipal Council of Beau Bassin/Roe Hill.*

1.4 *Since he joined employment, Mr Elias was working from 7.00 hours to 16.00 hours (normal hours of work) and performed overtime from 16.00 hours to 19.00 hours, i.e. three hours overtime daily from Monday to Friday. On Saturdays, he worked overtime from 12.00 hours to 19.00 hours. In all, he was performing regularly 22 hours of overtime work weekly.*

1.5 *Mr. Elias had signed the option form handed to him following the publication of the **Pay Research Bureau Report 2008** but has not opted for recommendations made by the PRB in its report of 2013.*

1.6 *On the 21 May 2012, Mr. Elias received a letter from the Chief Welfare Officer of the Municipal Council of Beau Bassin/Rose Hill informing him of his new hours of work which he had to adhere to at Mare Gravier Municipal Centre. The new hours of work were as follows:-*

- i. Monday & Tuesday: from 14.00 hours to 20.00 hours*
- ii. Wednesday to Friday: from 14.00 hours to 21.00 hours*
- iii. Saturday: 12.00 hours to 20.00 hours*

His hours of work had changed and his overtime work had been reduced.

1.7 *Subsequently, on 18 March 2013, he received another letter whereby he was required to work as from 15.00 hours to 20.30 hours from Monday to Friday as from 7.00 hours to 20.30 hours on Saturdays. Since then no overtime work has been provided to him and as a result his income has been reduced drastically.*

2.1 *Since Mr. Elias has joined employment, he has always been working from 7.00 hours to 19.00 hours, that is, his normal working hours of work was 7.00 hours to 16.00 hours and he was required to perform regularly 3 hours overtime work from 16.00 hours to 19.00 hours from Monday to Friday. Moreover he was requested to perform overtime work on Saturdays and Sundays whenever required.*

2.2 *The Respondent's management had submitted the following hours of work document to him on 17 February 2005, 17 February 2006 and 12 April 2006 respectively. Mr. Elias considered these hours of work to be his official hours of work which included structured overtime work, that is, which had become a fixed element of his contract of employment.*

2.3 *Mr. Elias had thus been benefitting an average of 22 hours of overtime work every week consistently during nearly thirty consecutive years. As such, he had always considered his earnings to consist of his basic salary and his regular overtime, and had planned his entire personal family budget accordingly. Even the bank had granted him loans based on his income comprising his basic wages and overtime payment.*

2.4 *However, through a letter dated 21 May 2012 Management informed him that his hours of work were to be as follows:-*

- i. Monday & Tuesday: from 14.00 hours to 20.00 hours*
- ii. Wednesday to Friday: from 14.00 hours to 21 hours*

iii. Saturday: 12.00 hours to 21.00 hours

His hours of work had changed without his consent and his overtime work had been reduced.

- 2.5 As from 18 March 2013, Mr. Elias has been required to work from 15.00 hours to 20.30 hours from Monday to Friday and from 7.00 hours to 20.30 hours on Saturday. He has thus been working twenty seven and a half hours from Monday to Friday and twelve and a half hours on Saturdays to complete 40 hours of work at normal rate. He was no longer being provided with any overtime work since then.*
- 2.6 Mr. Elias considers that Management had brought a unilateral change in his contract of employment by changing his hours of work and unfairly removing completely the overtime work which was previously performed by him on a continual basis.*
- 2.7 Mr. Elias was not made aware of the content of the PRB report 2013 regarding changes in his hours of work and himself not having a sufficient academic education to read and understand the PRB report, had signed the option form handed to him following the recommendations of the PRB report 2008 without knowing its implications.*
- 2.8 The change in hours of work is severely impacting on the pay-packet of Mr. Elias so much that his pay-packet has been reduced by nearly half, and after deductions made from his wages including payment for loans, his take home money is only about Rs. 1,800.00.*
- 2.9 This unilateral change to the hours of work of Mr. Elias made by the Respondent has brought him all of a sudden to face an acute financial difficulty which has disturbed seriously his family and his social life.*

He is unable to pay amongst others, his bills and bank loans which has been the source of great distress to him.

The Disputant is therefore praying for an award from the Tribunal to the effect that his hours of work should be restored together with his structured overtime as it was the case prior to May 2012 or otherwise an alternative compensatory solution be applied to his case.”

In its Statement of Case, Respondent avers:-

- “1. Respondent admits paragraph 1.1, 1.2, 1.3 and 1.4.*
- 2. As regards to paragraph 1.5, Respondent avers that Disputant is no longer a caretaker/Attendant, as he has signed the Option Form – PRB Report 2008, when his post has been restyled to that of Attendant.*
- 3. Respondent admits paragraph 1.6.*
- 4. As regards paragraph 1.7, Respondent avers that on 18 March 2013, a letter was issued to Disputant, regarding his hours of work. Respondent denies the averment “that since no overtime work has been provided to him, and as a result his income has been reduced drastically”.*
- 5. Respondent admits paragraph 2.1.*
- 6. As regards paragraph 2.2, Respondent takes note that documents regarding hours of work have been handed over to Disputant. Respondent denies that the hours of work are official hours of work, which included structured overtime work, which had become a fixed element of his contract of employment. There is no such thing as structural overtime, because there is a policy to strictly control overtime by the Central Government.*

7. *Respondent denies paragraph 2.3 and avers that overtime is not a right. There is no such thing as permanent overtime in the Local Government.*
8. *As regards paragraph 2.4, Respondent admits that the hour of work has changed. That the issue of Disputant consent is absolutely not material as to the new hours of work that the allocation of overtime work is a matter of policy issued by the Ministry of Local Government & Outer Islands.*
9. *Respondent admits paragraph 2.5.*
10. *As regards paragraph 2.6, Respondent avers that Disputant is performing according to the Scheme of Service of his post. Respondent also denies the fact that a unilateral change has been brought to his contract of employment.*
11. *As regards paragraph 2.7, Respondent avers that Disputant has signed the Option Form and as such, he has accepted the salary structure as well as the conditions of service of the PRB Report 2008.*
12. *Respondent denies paragraph 2.8. Respondent cannot be held responsible for loans taken by an employee in outside institutions.*
13. *As regards paragraph 2.9, Respondent cannot be held responsible for the financial difficulties being faced by Defendant.*
14. *All the issues raised by Disputant have been taken at the level of the Commission for Conciliation & Mediation of the Ministry of Labour and Industrial Relations and no solution has been found.*

15. *Respondent considers that the case of the Disputant has no merit and should be set aside.*”

The Disputant testified and confirmed the contents of his Statement of Case. He joined Respondent Town Council since 1981 and was employed as a ‘relief’. As from 1996 he was working at the Mare Gravier Social Centre amongst other sites from 7 a.m. to 4 p.m. as normal hours working preceded by 3 hours of overtime from Monday to Friday. On Saturday he has been working up to noon as normal working hours and then to 7 p.m. as overtime. He was also asked to come to work on Sundays whenever the need arose. In 2008 he opted for the PRB conditions of work and his hours of work remained unchanged including the overtime which in total came up to 22 hours of work (overtime). He has been signing the Attendance Book. In May 2012 he received a letter informing him of the change in his hours of work which would be from 2 p.m. to 8 p.m. on Monday and Tuesday and 2 p.m. to 9 p.m. on Wednesday to Friday and finally on Saturday it would be from 12 noon to 8 p.m. However in practice he continued to work according to the former hours of work and was paid although not fully. On the 18 March 2013 he received a letter informing him of his transfer to Social Centre of Chebel. His hours of work have now changed to 3 p.m. to 8.30 p.m. and he worked according to this newly set time. He added that while he was doing the overtime to 18 March 2013 no one stopped him from doing the work and he kept on signing the Attendance Book. He did not opt for the PRB 2013 Report.

Mrs Jacqueline Novel, Human Resource Management Officer at the Municipality of Beau Bassin/Rose Hill represented the Respondent. She confirmed that Disputant has been working at the Municipality of Beau Bassin/Rose Hill since 16 November 1982 and he started as 'Cleaner'. He signed the Option Form of the PRB Report of 2008 thereby opting for the new salary structure and conditions of service. She agreed that Disputant was performing overtime and that until 2012. She referred to guidelines issued by the concerned Ministry dated 29 December 2004 and among which is stipulated that overtime should be performed only occasionally and should not be considered as entitlement and mandatory. She added that the scheme of service of Attendant prescribed on 21 April 2011 that Attendants are expected to work at staggered hours and on a roster basis without payment of any extra remuneration and that the hours of work are to be determined by the Chief Executive. She also referred to the PRB Report 2008 where mention is made that each organization schedules its employees' starting and departure time within specified limits in order to meet operational requirements. Restructuring at the Municipality was necessary due to an increase of employees being recruited. According to the witness, the Disputant does not have any right to overtime as from 2013 since he has not been performing such duties.

Counsel for the Respondent submitted that overtime work is not an acquired right and that the Disputant cannot claim that it was part of his contract of work. According to Counsel, we are bound by the basic contractual rules and overtime work is regulated by the Employment Rights Act.

Counsel for the Disputant submitted that Option Form of 2008 signed by the Disputant referred to his post as Caretaker/Attendant. He stressed that the Disputant has been performing overtime work on a permanent basis and on that score, it should be considered as an acquired right. He further added that until March 2013 Disputant was allowed to perform overtime.

We agree with the contention of Counsel for the Disputant to the extent that the special feature of this case is that Disputant has been performing overtime despite communication issued to him for changes in the hours of work and that until 18 March 2013. Although he opted for the conditions of work regarding the PRB Report 2008 the Respondent acquiesced to him performing those overtime duties since he has been signing the Attendance Book and nothing was done to stop him from performing overtime duties. Certified copies of Disputant's signature in the Attendance Book (Doc. E) have been produced by Respondent. They relate to overtime effected by Disputant. The contents of those documents have remained unchallenged. Fairness requires that consideration be given for the overtime work effected. However we find no legal basis in considering his former overtime performance as part of a novated contract.

“764 Charge et risque de la preuve. En cas de litige relatif à l'existence ou au nombre d'heures de travail effectuées, l'employeur doit fournir au juge (prud'homal) les éléments de nature à justifier les horaires « effectivement réalisés » par le salarié. Ce juge forme sa conviction au vu de ces éléments, de ceux fournis par le salarié et après d'éventuelles mesures d'instruction (art. L. 3171-4). En pratique, ces

règles trouvent surtout à s'appliquer en cas de différend sur l'accomplissement d'heures supplémentaires. La Cour de cassation souligne que « la preuve des heures de travail n'incombe spécialement à aucune des parties », pour en déduire que le juge ne peut rejeter la demande d'un salarié prétendant avoir effectué des heures niées par son employeur au seul motif d'insuffisance des preuves qu'il propose. Mais, si le salarié n'a pas à fournir la preuve de la durée du travail, du moins doit-il présenter au juge des éléments de nature à étayer sa demande. Ainsi, par exemple, la présentation d'un décompte des heures effectuées, mois par mois, peut être considérée comme un élément étayant suffisamment cette demande. Il appartient alors à l'employeur de fournir ses propres éléments et, s'il n'y parvient pas, le décompte effectué par le salarié démontrera la réalité des heures effectuées.»

*(Daloz – Droit du Travail - 2012 – 26^e Edition, Page 785
Pélissier, Auzero, Dockès)*

We find apposite also to refer to what the Tribunal held inter alia in **Banumattee Rungee (Mrs) and The Municipal Council of Quatre Bornes (ERT/RN 64/10)** and which was upheld by the Supreme Court:

*“(1) It has not been disputed that Mrs Rungee signed an option form accepting the recommendations of the PRB Report 2008. In **Telecommunications Workers Union and Mauritius Telecom (RN 754)** dated 12th January, 2005, the Tribunal held that an employee cannot have it both ways in accepting the recommendations of the Pay*

*Research Bureau (PRB) only to contest them just after. In **University of Mauritius Academic Staff Association and University of Mauritius (RN 890)** dated 27th May 2005, the Tribunal held that one has to look from the angle of the actual relationship existing at the relevant time. It is a question of contract. «La convention fait la loi des parties et c'est un lien de contrat de travail régi par le Labour Act.»*

- (2) *The Disputant cannot seek a perpetuation of a past mistake that has been corrected upon insisting to maintain her system of work that was on up to 9th February, 2009. The organizational requirements at the Municipality of Quatre Bornes do not make room for her tantrums. The PRB has delegated powers to Municipalities to decide on their operational hours but run their libraries in accordance with schedule of hours within the PRB's working hours scale.*

- (3) *..... the Respondent is expected to implement organized structural administrative set up for the best running of the department as long as it is within the parameters of the PRB's recommendations. Implementing recommendations of the Bureau after same have been opted for and in an irrevocable way cannot lead to a situation of unilateral change.”*

We refer also the following extracts in the PRB Report 2008:

“General Principles

18.5.64 *Overtime work is work undertaken over and beyond an officer's normal working hours. The general principles governing the payment for overtime in the public service may be summarized as follows:*

- (a) *Overtime work should be kept to a minimum and should only be undertaken when unavoidable.*
- (b) *Overtime work may be compensated by time-off in lieu of payment.*
- (c) *Employees would not work extra hours unless specifically requested to do so by their supervisors in the interest of the service.*
- (d) *Senior Officers of certain levels are not eligible to payment of overtime.*

Control of Overtime

18.5.65 *Overtime is occasionally necessary to get the job done but excessive overtime is hurtful to taxpayers. Every attempt should, therefore, be made to schedule workload so that the need for overtime is kept to a minimum. However, situations may arise which make overtime unavoidable such as staff illness, special*

projects, and emergencies. Improved monitoring should ensure that overtime when performed is in effect the most cost-effective way to meet goals and responsibilities.”

It is relevant also to refer to Section 3(2) of the Employment Rights Act 2008, as amended, which reads:

- “(2) This Act shall not apply to –*
- (a) a public officer or a local government officer, except for sections 4, 20(1), 54, 61(1)(a) and (d) and (4), 62, 63 and 67(1)(e)(i) in so far as it applies to such public officer or local government officer, (2) and (3) of this Act;*
 - (b) a worker of a statutory body who is governed by the recommendations made by the Pay Research Bureau, except for Parts VIII and XI and sections 4, 20(1), 46(1), (2), (3), (4), (5), (5B), (7), (8), (9), (10), (11) and (12), 48, 61, 62, 63, and 67(1)(e)(i) in so far as it applies to that worker, (2) and (3) of this Act.*

Amended by (Act No. 14 of 2009)”

We see therefore that ‘overtime’ in the public sector is governed by the conditions of service laid down in the Pay Research Bureau Report and not by the Employment Rights Act 2008, as amended.

The Tribunal holds that the Disputant is to be paid all overtime he performed that are due to him, if any, up to 18 March 2013 subject to the criterion of

eligibility i.e. that he had performed the minimum required hours of work to be entitled to overtime.

The dispute is otherwise set aside.

The Tribunal awards accordingly.

(Sd) Rashid Hossen
(President)

(Sd) Vijay Kumar Mohit
(Member)

(Sd) Rajesvari Narasingam Ramdoo (Mrs)
(Member)

(Sd) Renganaden Veeramootoo
(Member)

9 December 2015