EMPLOYMENT RELATIONS TRIBUNAL

(EMPLOYMENT PROMOTION AND PROTECTION DIVISION)

AWARD

ERT/EPPD/RN 01/15

Before: Rashid Hossen – President
Moonsamy Ramasamy – Member
Ali Osman Ramdin – Member

In the matter of:-

Mr Santaram Babboo
Mrs Luxeemee Balloo
Mrs Padmini Rajeeya
And
Sofitel Mauritius (Belle Rivière Hotel Ltd)

In a written address dated 9th June 2014, Sofitel Mauritius (Belle Rivière Hotel Ltd), hereinafter referred to as the 'Respondent', an employer of not less than 20 employees, gave notice of its intention to lay off three gardeners namely, Mrs Luxeemee Balloo, Mrs Padmini Rajeeya and Mr Santaram Babboo, hereinafter referred to as the 'Disputants', on grounds of redundancy.

Being of the opinion that the three gardeners have a 'bona fide' case, the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training, has, therefore, in accordance with section 39B(6) of the Employment Rights Act 2008, as amended,

decided to refer to the Employment Promotion and Protection Division of the Employment Relations Tribunal the aforesaid reduction of workforce case for determination as outlined in the following terms of reference:

"In the matter of:

1. Mr Santaram Babboo of Mosque Road, Chemin Grenier
2. Mrs Luxeemee Balloo of Mousetache Road, Baie du Cap
3. Mrs Padmini Rajeeya of Royal Road, St Martin, Baie du Cap

Disputants

v/s

Belle Rivière Hotel Ltd, service to be effected at its registered office c/o Legis Corporate Secretarial Services Ltd, 3rd Floor Jamalacs Building, Vieux Conseil Street, Port Louis

Respondent

Background

(1) On 10 June 2014, the Respondent notified the Permanent Secretary of the Ministry that it would terminate the employment of the three workers on 30 June 2014 in order to reduce the operating costs of the hotel. (Copy of letter attached).

(2) On 3 July 2014, the Disputants registered a complaint with the Permanent Secretary of the Ministry.

(3) The Permanent Secretary enquired into the complaint with a view to promoting a settlement between the parties.

(4) However, no settlement was reached between the parties and the Permanent Secretary of the Ministry is hereby referring the matter to the Tribunal under section 39B (6)(a) of the Employment Rights Act (ERA).

The point in dispute:
Whether the reduction of the workforce affecting the 3 disputants is justified or not in the circumstances.

16 March 2015"

The parties were represented by Counsel.

The Respondent filed a Statement of Case, averring:-

"1. The above 3 Disputants were respectively:

- *Gardener, Team Leader with Rs. 15,000 as salary. He joined on 6th of September 2010 and left on the 30th of June 2014.*
- *Gardener, with Rs 9250 as salary. She joined on 13th September 2010 and left on the 30th of June 2014.*
- *Gardener, with Rs 9250 as salary. She joined on the 22nd of December 2010 and left on the 30th of June 2014.*

2. In view of financial constraints, the Hotel had to reduce its operating costs. Some remedial measures had to be taken, one of which was to ask the contractor already in place to shoulder the work previously executed by the 3 Disputants and to request the contractor to reduce his monthly charges by 20%.

3. The Hotel offered the Disputants alternative jobs in the Stewarding and Housekeeping Departments. But they refused.

4. The Hotel also sought to have them engaged by the contractor but that did not work.

5. Subsequently, at the Labour Office, the Hotel proposed to pay each of the Disputants, the equivalent of two months wages but there was no feedback on the same.

6. Following an observation made at the Tribunal's sitting of 31st March 2015, the Hotel is now minded to propose to the 3 Disputants, to work at the Sofitel Imperial in Flic en Flac. However, the Respondent understands that the 3 disputants have now elected to join the Workfare Program and the Respondent has already submitted the required information in thereto.

This 1st April 2015."

Mr Santaram Babboo deponed on behalf of Disputants. He was the Team Leader Gardener and entered into an employment contract with the Respondent on the 6th September 2010 and was in charge of gardening at Sofitel Hotel, Bel Ombre. He was also responsible to supervise the work and that included the cleaning up of the beach as well. He started working from 6 a.m. to 3.15 p.m. and there were initially seven gardeners. Some left soon after and four of them carried out the work. Despite the increase in the workload, they continued to deliver the goods. According to the Disputants, the increased workload was meant for them to give up and resign. However, patience prevailed. On 5th May 2014 there was a meeting with Management whereby they were informed that they would be sacked. They were never informed of any financial constraints the Hotel supposedly had to face. They were left with two options, one of signing a paper and collect a cheque or be placed on the Workfare Programme. The three Disputants refused to sign this letter. (Docs A, B, C). The letters were dated 20th June 2014. No offer was made to them to join another department and it is only before the Tribunal that they heard that the Respondent is willing to do so. The offer was that of Stewarding at the Hotel or a transfer to the Respondent Flic-en-Flac Branch which they refused. Disputants lodged a complaint with the Ministry of Labour, Industrial Relations, Employment and Training. According to Mr Babboo another firm is now doing the gardening work. He did not deny the existence of that firm at the Hotel since the latter's opening. He added that all Disputants agree to be reinstated in their former post if asked to do so.

Mr Suren Moonien, Human Resource Manager at Sofitel deponed on behalf of the Respondent. According to him, the overall hotel sector in Mauritius is undergoing difficult times and So Sofitel has been facing difficulties since the beginning. He produced a "Statement of Profit or Loss and Other Comprehensive Income" for the Year ended December 31st, 2013 whereby a loss of Rs 238,819,743 in 2013 is shown. The situation was worse in 2012 where losses of Rs 1,394,922,398 were reported (Doc. D) and now the Hotel is picking up whilst still making losses. Had they not been in ACCOR Group the Hotel would have closed down. Sofitel is a member of ACCOR.

The Hotel reduced drastically the number of hours of overtime since 2013 and had not replaced workers who had left. It employed 249 employees in 2013 and the personnel has drastically been reduced to 167. He produced a Manning Summary document showing the labour force at the Hotel. The witness gave the detailed figures of reduction of workers in the various departments at the Hotel. Scenic was the firm that organized the landscaping of the Hotel and it has been there until 1st April 2015. Scenic reduced its contractual cost by 20% and alternative jobs were offered by the General Manager to the Disputants. He could not produce the accounts for the year 2014 as they had not been audited yet although he agreed that the dismissal occurred in 2014. The basic salaries of the three Disputants would amount to Rs 33,500 per month and it is not disputed that the majority of the Disputants fall within the low paid jobs. According to the witness the Hotel is still making losses. He agreed that the notice of financial difficulties to the Ministry was

given outside delay but his information from the Human Resource Manager is that the Ministry had been made aware since May 2014.

Counsel for the Respondent submitted that the Hotel has been running at losses since its opening although the situation improved during the year 2013 with losses of Rs 238,819,743 and despite increase in sales. He agreed that no documentary evidence of the financial situation of the Hotel as at 9th June 2014 has been made available. There is only the statement of the witness to the effect that the Hotel is still operating at a loss. The Respondent intended to accommodate the three Disputants in the Stewarding and Housekeeping Department but the offer was turned down. An attempt to get them to work with Scenic did not work out. As regards communication with the parties Counsel submitted that the Disputants were made aware in a letter dated 20th June 2014 that they had been verbally informed that the post of gardeners would be declared redundant and this meant that redundancy for economic reasons was already being contemplated. It is further submitted that the Respondent has shown reasonable cause with regard to the notice to be served on the Ministry of Labour, Industrial Relations, Employment and Training, in that the Respondent was in contact with the Ministry well before the 9th of June 2014. There had been a line of communication opened so that the Ministry was aware of the situation.

It is the submission of Counsel for the Disputants that by virtue of Section 39A & B of the amended Employment Rights Act 2008 under the title "REDUCTION OF WORKFORCE AND CLOSING DOWN OF ENTERPRISE" it was necessary for the Respondent to show that it

was closing down its enterprise. Secondly, the Disputants were not actually informed that their employment would be terminated after completing the necessary formalities with the Ministry of Labour, Industrial Relations, Employment and Training and there was no mention of financial constraints. Counsel highlighted that prior to an employer envisaging reduction of its workforce there are certain procedures which it is called upon to follow, namely, (i) consultation with trade union and (ii) the duty to explore possibilities to avoid laying off of employees, amongst others.

Furthermore the notice of 30 days to be given to the Ministry has not been respected. Counsel added that the principle of equal pay and equal work has not been complied with when it comes to the reduction of 20% of the contract work of Scenic and the salary pay of the Disputants.

Procedural Aspects

(1) The Tribunal considers it was incumbent on the Respondent to notify the Permanent Secretary of Ministry of Labour, Industrial Relations, Employment and Training of its intention to reduce its number of workers within a delay prescribed by Section 39B of the Employment Rights Act 2008 as amended.

Section 39B(2) provides:-

> *"An employer who intends to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise shall give written notice of his intention to the Permanent Secretary, together with a statement of the reasons for the reduction of workforce or closing down, at least*

> *30 days before the reduction or closing down, as the case may be."*

The evidence in the present case clearly shows that the written notice dates 10th June 2014 and the Disputants were informed on 20th June 2014 that their employment would be terminated on the 30th of June 2014. We do not consider any verbal communication with regard to notification with the Ministry prior to the written notice to be *'a reasonable cause'* as provided in Section 39B(11) and which reads:-

> *"Where an employer reduces the number of workers in his employment either temporarily or permanently, or closes down his enterprise, in breach of subsections (2) and (3), he shall, unless reasonable cause is shown, pay to the worker whose employment is terminated a sum equal to 30 days' remuneration in lieu of notice together severance allowance, wherever applicable, as specified in section 46(5)."*

In **Coprim Ltée v Yes Menagé [Privy Council Appeal No 42 of 2006]**, the Judicial Committee recalls *"the notification requirement in section 39(2)* [of the now repealed Labour Act] *is no mere formality, but is the key to the system under which the Termination of Contracts of Employment Board considers the proposals of an employer to reduce the size of his workforce."*

We consider that a written notice sent through the post and which eventually got lost in transit may amount to a reasonable cause but certainly not a verbal notice as in the present case.

(2) We do not agree with the interpretation of Counsel for the Disputants regarding the limitation of redundancy to closing down of an

enterprise. Section 39B(2) clearly stipulates that the reduction can be either temporary or permanent or the employer may intend to close down his enterprise. The word "or" is not to be misled with the word "and".

(3) We agree no reliable and satisfactory evidence was forthcoming regarding the procedures actually followed by the Respondent when laying off Disputants. Apart from written notification to be given to the Permanent Secretary, Ministry of Labour, Industrial Relations, Employment and Training, the Respondent has to abide to procedures as laid down in Section 39B(3), which reads as follows:-

> *"Notwithstanding this section, an employer shall not reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise unless he has –*
>
> *(a) in consultation with the trade union recognised under section 38 of the Employment Relations Act, explored the possibility of avoiding the reduction of workforce or closing down by means of –*
>
> *(i) restrictions on recruitment;*
> *(ii) retirement of workers who are beyond the retirement age;*
> *(iii) reduction in overtime;*
> *(iv) shorter working hours to cover temporary fluctuations in manpower needs; or*
> *(v) providing training for other work within the same enterprise;*
>
> *(b) where redundancy has become inevitable –*
>
> *(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and*
> *(ii) given the written notice required under subsection (2)."*

<u>Financial Aspects</u>

Respondent claimed that the company has been undergoing losses since the opening of the Hotel.

(1) The "Statement of Profit or Loss and Other Comprehensive Income" only as at 31st December 2013 filed with the Tribunal shows that as at 31.12.12, the loss for the year was Rs 1,394,922,398 and as at 31.12.2013 the loss was Rs 238,819,743 (as disclosed by Statement of Profit or Loss and Other Comprehensive Income).

(2) The company forms part of ACCOR GROUP which is a large group that provides finance to the company monthly.

(3) The company started operation in 2010 with a total manning of 248 people as at December 2010. As at April 2015, the total manning has been reduced to 167.

(4) The Gardening department has been reduced to 0 from 8 in December 2010 and it was sub-contracted to Scenic which was already present when the Hotel was opened. Scenic had agreed to reduce its contract value by 20% for the same operation.

(5) No financial statement for year 2014 has been produced by Respondent in respect of redundancy that occurred in 2014.

(6) The Respondent effectively registered a loss in 2012 and 2013 of Rs 1,394,922,398 and Rs 238,819,743 respectively. However in 2012, an impairment loss amount for an exceptional amount of Rs 1,147,619,774 was recorded in the Statement of Profit or Loss and Other Comprehensive Income without any information regarding its

occurrence. Making abstraction of the impairment loss, the loss is reduced to Rs 247,302,624 whilst for 2013, it was Rs 238,819,743.

(7) The revenue for 2013 has been increased by approximately 37% (as compared to 2012) from Rs 110,497,740 to Rs 151,845,010.

(8) In spite of a reduction in workforce from 2010 to 2015 from 248 to 167, the employees benefit expenses which should have a direct correlation with number of employees increased by around 2.8%.

(9) The Respondent has failed to justify the increase of its operational cost in spite of the reduction of workforce. It has also been unable to provide valid reasons as to the increase in its operational expenses by approximately 15.3% whilst at the same time claiming appropriate measures were being taken to reduce the loss. No further evidence has been produced to assess the liquidity problem of the company. Documents like Balance Sheet and Statement of Cash Flows would have enabled the Tribunal to assess the liquidity position of the company. Even Doc D produced before the Tribunal is only an extract of the financial statement of Respondent for 2013 and the Tribunal has not been favoured with the whole document of the independent auditors' report.

(10) The Respondent could not disclose how the redundancy of the three workers could have impacted on the profit and loss of the company inasmuch as the sub-contract has only reduced its contracting costs by 20%.

(11) Total costs for the three employees, including National Pension Contribution and bonus would come to around Rs 484,000 annually. A 20% saving by sub-contracting the gardening department would only result in a saving of Rs 96,800 annually for the three employees. The savings of Rs 96,800 represented only 0.04% of the losses for year 2013.

(12) The Respondent's intention to reduce the number of workers on the one hand while offering them alternative jobs allegedly in Stewarding and Housekeeping departments on the other hand makes us perplexed regarding its inability to retain the Disputants in their current low paid jobs.

Conclusion

Based on the above observations and the minimal impact of the redundancy on the financials of the company, the Respondent's claim for financial difficulties does not stand good inasmuch as the Tribunal is not satisfied even on a balance of probabilities that the financial constraints of the Respondent were such that the redundancy of the three Disputants had become inevitable for the company. Its reduction of workforce is in the circumstances unjustified. Given the fact that the Disputants are agreeable to be reinstated in their former post, we order, in accordance with Section 39B(9)(a), that the three Disputants be reinstated in their former employment with payment of remuneration from the date of the termination of their employment to the date of their reinstatement.

The Tribunal awards accordingly.

(sd) Rashid Hossen
(President)

(sd)Moonsamy Ramasamy
(Member)

(sd) Ali Osman Ramdin
(Member)

14th May 2015