

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 151/2015

AWARD

Before:

Shameer Janhangeer	Vice-President
Sounarain Ramana	Member
Rabin Gungoo	Member
Triboohun Raj Gunnoo	Member

In the matter of: -

Asraf Ali Jhumka

Disputant

and

Road Development Authority

Respondent

The present dispute has been referred to the Tribunal for arbitration pursuant to section 69(7) of the *Employment Relations Act* by the *Commission for Conciliation and Mediation* (the "CCM"). The terms of reference of the present dispute read as follows:

Whether management should approve my application for urgent casual leave on the 30th January 2013 as I had informed management by way of an SMS that I shall not be able to attend duty due to an urgent personal matter.

The Disputant was assisted by his trade union representative Mr Narendranath Gopee of the Federation of Civil Service and Other Unions (FCSOU). The Road Development Authority (the "RDA") was represented by its Ag. Human Resource Management Officer Miss Hafiza Mookhith. Both parties have submitted their respective statements of case/defence in relation to the present dispute.

THE DISPUTANT'S STATEMENT OF CASE

Mr Ashraf Ali Jhumka, a registered professional engineer, joined the Respondent Organisation as a Manager in 2003 from the Ministry of Public Infrastructure where he was a Civil Engineer. Having been confirmed as a Senior Manager in 2004, he was promoted to the grade of Assistant Divisional Manager in 2010.

In relation to the facts of the dispute, it has been averred that Mr Jhumka had to attend to his sick wife in the morning of 30 January 2013. He informed the General Manager and the Divisional Manager, who is also his Immediate Supervisor, by way of a SMS of the fact that he would not be able to attend duty on the said day. On resumption of duty, he thereafter on 5th February 2013 filed for an urgent casual leave with the Personnel Office of the RDA. It has been averred that in no point in time was he ever informed of the status of his application for urgent casual leave.

Mr Jhumka noted a deduction of Rs 2090.32 and an adjusted deduction of Rs 19.03 from his salary for the months of March and July 2013. Upon enquiry, the Personnel Office informed him that the deductions were in respect of the unapproved urgent casual leave aforementioned. He has averred that his consent was never sought for the deductions nor did he ever give his consent to same.

THE RESPONDENT'S STATEMENT OF DEFENCE

The Respondent has averred that on Wednesday, 30th January 2013, Mr Jhumka did not notify his absence. No prior application was made for leave nor was the General Manager informed of his absence on the aforesaid day. Mr Jhumka was needed by the General Manager as his services were required. The application for casual leave was filed on 5th February 2013 and reached the General Manager on the 8th February 2013. The latter did not approve same and accounted the leave as unauthorized.

The Respondent has notably averred that it was not aware that Mr Jhumka had to attend to his sick wife and carry her to Dr Jeetoo Hospital for medical treatment on 30th January 2013. It is only when the matter was reported to the CCM that the RDA became aware of same. He was looked for by the General Manager for urgent work on all sites of work but was untraceable on the aforesaid day. Neither the General Manager nor the Personnel Section were informed of any urgent leave of the Disputant. The General Manager denies having received any SMS for urgent absence. The Disputant did not state the reason for his absence nor the delay in submitting his application on 5th February 2013. No explanation at any point in time was given to his absence for "unforeseen circumstance" to qualify as Urgent Casual Leave. The General Manager for the aforesaid reasons did not approve the application for casual leave. The Disputant's salary was deducted accordingly. Annexed to the Statement of Defence is an extract from the chapter on 'Leaves' from the *Human Resource Management Manual* (the "HRMM") as well as a copy of the application for casual leave dated 5 February 2013.

EVIDENCE OF THE WITNESSES

Mr Ashraf Ali Jhumka, Acting Divisional Manager at the RDA, adduced evidence in relation to his dispute. He was absent from work on 30 January 2013. At no moment in time was he aware that the General Manager was looking for him nor was any mail or SMS sent

to him on the aforesaid day. According to him the normal procedure adopted by management would be to call him on his mobile or send a SMS to his mobile phone. On the 30 January 2013, he did send a SMS to the General Manager but did not say for what reason he was taking an urgent casual leave. He also stated that there are reasons which he could not state and this is why he wrote urgent personal matter which was the practice at the time.

In about July/August 2013, he noticed that there was a deduction from his salary. Upon enquiry, he was informed that this was for the unauthorised leave. He sent a letter for explanations HR Department which eventually told to go and ask the Regional Manager. He was never officially informed of the deduction nor whether the leave was not approved or not. He referred to a new circular dated 3 January 2014 from the General Manager as to the way of proceeding with urgent casual leaves (produced as Document A). He produced the letter dated 13 December 2013 addressed to the General Manager wherein he took note of the deductions made in his salary slips of March and July 2013 (Document B). He received no reply to his letter nor was he ever asked for explanations. He also produced another letter dated 13 December 2013 whereby he informed the General Manager that he would be reporting a dispute before the CCM (Document C). Upon questions from the representative of the RDA, the Disputant maintained that he sent a SMS to the General Manager and to his Immediate Supervisor as well. He denied being verbally informed of his leave being unauthorized by the General Manager.

Mr Caderasen Dorsamy, former General Manger at the RDA, was called as a witness. He was responsible for the administrative and technical management of the RDA. The RDA being a parastatal body, they follow the *Human Resource Management Manual* (the "HRMM") applicable to the Civil Service. He explained that prior application should be made for causal leave sent through the officer's Supervising Officer. If the Supervising Officer's recommendation is positive, it is sent to the General Manager to approve the leave. In certain cases, the application cannot be made prior, e.g. when there is a funeral; the officer must then inform the personnel office and his immediate Supervising Officer of his absence

and he submits his application on the day he resumes work. It was up to Mr Jhumka to apply for casual leave on the next day and to give a reasonable reason why he was absent from work. He did not enquire as why the application was made, did not call Mr Jhumka to his office nor talk to him. He did not also enquire as to why the Disputant submitted his application late. It was not his responsibility to call him. He did not receive any SMS nor did anyone at the RDA receive a SMS.

Mr Dorsamy went on to state that on 30.01.2013, he was looking for Mr Jhumka for normal business, he was being looked for everywhere, on all sites of work. There was urgency for a work, a disaster meeting which Mr Jhumka had to attend. He doubted the reasonableness of the application and therefore consequently decided that to treat the leave as unauthorized. Mr Jhumka was not written to nor informed of the deduction. According to the rules, when there is an unauthorised leave the salary must be cut. Only leaves that are approved are paid. However, he could not answer properly as to where in the *HRMM* or the *PRB Report* it is stated that salary can be deducted. No consent was sought from the officer before proceeding with the salary cut. Normally salaries are not cut except for this kind of unauthorised leave.

Upon taking cognizance that the matter has been reported to the *CCM*, he referred it to the Staff Committee to reconsider refunding Mr Jhumka and made an appeal to the Board of the RDA. The Board accepted that Mr Jhumka be refunded exceptionally as the matter was before the Commission. He produced a letter dated 24 June 2015 informing Mr Jhumka of same (Document D) and the reply of Mr Jhumka dated 3 July 2015 (Document E). The Board, not being happy with the reply, did not proceed with the refund of the deduction.

Mr Dorsamy further enlightened the Tribunal stating that had he been given the proper reason for the urgent casual leave that Mr Jhumka's wife was ill, he would have

approved it. Normally, he has approved a lot of urgent leaves of this type. Despite the form being recommended for approval, he did not approve.

Mrs Zuleika Alimohamed, Acting Deputy General Manager at the RDA, was also called on behalf of the Disputant. She was the Divisional Manager under whose authority the Disputant was working under. She could not recall if she was informed of Mr Jhumka's absence on the 30 January 2013. However, when he came to her with his application on the 5 February 2013, he told her that he had to take an urgent leave as his wife was not well. She could not recall if on the aforesaid day the General Manager was looking for the Disputant for an urgent work or if she was asked to look for him. She could not also recall if there was an urgent work on site on the day Mr Jhumka was absent. She is aware of the application and did sign it for recommendation. She was not aware that the General Manager did not authorize the leave as the application did not come back to her.

The representative of the RDA, Miss Mookhith Ag. Human Resource Management Officer, maintained as to the correctness of her averments in the Statement of Defense submitted by the RDA.

THE MERITS OF THE DISPUTE

The dispute before the Tribunal is whether the management of the RDA should have approved the urgent casual leave taken on 30 January 2013 by the Disputant, as he had informed management by of a SMS that he shall not be able to attend duty due to an urgent personal matter.

The facts of the present matter have borne out that Mr Jhumka did not attend work on 30 January 2013. He resumed work on the following day. However, his application for urgent casual leave was submitted on 5 February 2013. As per prevailing practice, he did

not state the reason for his absence in the application. Eventually, he came to know that his application was not approved by the General Manager Mr Dorsamy. Mr Jhumka was not officially informed of same.

Upon noticing that there was a deduction in his salary, he wrote a memorandum to the General Manager on 13 December 2013 wherein he took '*strong exceptions to the deductions effected from*' his salary of March and July of the year 2013 on account of non-approval of his casual leave. Having received no reply, he wrote anew stating that the dispute will be reported to the CCM. Eventually, the Disputant was informed by the General Manager on 24 June 2015 that it has been decided to exceptionally refund him his deducted salary. In reply to this letter, he wrote notably stating that he wished that the refund be made only after the parties have signed the agreement before the CCM.

It is not disputed by either party that the RDA follows the provisions of the HRMM in matters of casual leave. In particular, *paragraph 4.2.2* of the HRMM has been relied upon by both parties in the matter:

- 4.2.2 (1) *The grant of casual leave shall be subject to prior approval.*
- (2) *A Supervising Officer shall satisfy himself of the reasonableness of applications for casual leave submitted on grounds of "unforeseen circumstances", prior to the grant of such leave, which shall otherwise be considered as unauthorised.*

(The underlining is ours)

Casual leaves and their purpose have been notably described at *paragraph 4.2.1* of the HRMM:

- 4.2.1 *Casual leave is normally non-accumulative, and is designed to cater for brief absences, for recreation or to attend to personal matters, including religious obligations.*

The *PRB Report*, which also caters for the terms and conditions of employment of officers of the RDA, provides for the taking of casual leaves as follows (vide *PRB Report 2013 Vol I*):

18.4.1 *Leave is one of the most attractive conditions of service in the remuneration package of Public Officers. It can be defined as an approved period of absence of an employee. It is a break from duty for recreational and recuperation purposes, for attending to personal and religious obligations, learning and development events, among others. There are various types of Leave to cater for the needs of officers.*

...

CASUAL LEAVE

18.4.5 *Casual Leave is an authorised paid absence of an officer from duty to attend to urgent personal matters including religious obligations and for recreation. It caters for short and unexpected absences in foreseen and unforeseen circumstances.*

The *PRB Report 2013 Vol I* does furthermore provide guidelines as to the monitoring and approval of casual leaves:

18.4.6 *The present provision for casual leave is as hereunder:*

(ix) *as far as possible, Supervising Officers should continue to monitor the application and approval of casual leave, which should be granted subject to prior approval. Supervising Officers should satisfy themselves of the reasonableness of the grounds prior to granting leave which has been taken without prior approval on ground of unforeseen circumstances, otherwise it should be considered as unauthorised;*

(The underlining is ours)

It is pertinent to note that both the *HRMM* and the *PRB Report 2013* require the Supervising Officer to satisfy him or herself of the reasonableness of the grounds where casual leave was taken without prior approval on grounds of unforeseen circumstances. The burden is thus on the Supervising Officer to be satisfied of the reasonableness of the application submitted on the grounds of unforeseen circumstances. If the Supervising Officer is not so satisfied, the leave should be considered as unauthorised.

The evidence adduced in the course of the hearing has revealed that Mr Jhumka did according to his version send a SMS in the morning of 30 January 2013 to the General Manager Mr Dorsamy and to his Immediate Supervisor Mrs Alimohamed. The former however has denied receiving any SMS and the latter could not recall if she did receive a SMS on the day. However, she did state that she was told that he was absent due to his wife's illness when submitting the application on 5 February 2013.

A perusal of the casual leave application form does moreover show that the leave, which was applied for on the ground of '*an urgent personnel matter*', was recommended for approval by the Immediate Supervisor prior to being forwarded by the General Manager. The General Manager, in not approving the leave, wrote '*To be accounted as unauthorised leave*'. It is pertinent to note that pursuant to *section 14(2)* of the *Road Development Authority Act*, every employee of the RDA is under the administrative control of the General Manager.

Could it therefore be said that the General Manager has satisfied himself of the reasonableness of the ground upon which the urgent casual leave was sought? Although, the General Manager as per his evidence was not satisfied with the given reason stated in the form, it has not been shown that he made any enquiries as to why the Disputant had to take an urgent casual leave prior to attending to the application nor as to why the application was submitted late. The General Manager did also state that had he been apprised of the actual reason of the Disputant's absence, he would have approved the urgent casual leave as he has normally done.

Given the requirements set out in the aforementioned provisions of the *HRMM* and the *PRB Report* on the approval of urgent casual leave, it would be incumbent for the General Manager to at the very least enquire into the actual reason for the application from the Immediate Supervisor or from the Disputant himself. The evidence of the witnesses, of

the General Manager in particular, has clearly shown that this was not done so despite the application being recommended to him for approval.

Although, Mr Jhumka did not state the actual reason why he had to take an urgent casual leave on 30 January 2013, he did however clearly state that he informed his Immediate Supervisor of same in addition to stating that he did send a SMS on the day of his absence. As per prevailing practice, the Disputant did not state the actual reason for the urgent casual leave in the application form. It may also be noted that since January 2014, the Respondent has issued a memorandum to its officers on the taking of urgent casual leaves setting rules for the taking of same.

The Tribunal therefore finds that the General Manager did not take the appropriate steps in not approving the urgent casual leave applied for by Mr Jhumka. However, it would not be appropriate for the Tribunal to substitute itself for the General Manager or the management of the RDA to decide whether the urgent casual leave should have been approved or not. This is an exercise that would be best left to the actual General Manager of the RDA itself being guided by the observations of the Tribunal and a proper reading of the relevant provisions of the *HRMM* and the *PRB Report* as aforementioned.

The Tribunal would also wish to comment on the deduction of the Disputant's salary, an issue which has been lengthily canvassed by both parties during the proceedings. The deduction which followed the General Manager's non-approval of the urgent casual leave is another sad episode in the events which has led to the present dispute. The Disputant's salary in the months of March and July of the years 2013 was deducted to the tune of Rs 2090.32 and 19.03 respectively. Despite the issue of the deduction not being part of the terms of reference of the present dispute, the record and practice of deducting the salary of a worker must be shed to light.

The *Employment Rights Act*, at section 22, has provided that an employer shall not deduct the wages of an employee as follows:

22. Deduction

- (1) No employer shall deduct any amount from a worker's remuneration, other than an amount which –
- (a) is authorised by the worker in writing –
- (i) and which is due to the employer in recovery of an advance made on remuneration, provided the deduction does not exceed one fifth of the remuneration due for a pay period; or
- (ii) where the worker wishes to pay to any body or fund;
- (b) is deducted in accordance with any enactment or a court order.
- ...
- (3) No employer shall, in respect of the payment of remuneration, deduct any amount –
- (a) by way of fine or compensation for poor or negligent work or for damage caused to the property of the employer;
- ...

Moreover, Dr D. Fokkan in *Introduction au Droit du Travail Mauricien, 1. Les Relations Individuelles de Travail, 2^{ème} édition, p.240* has emphasised the prohibition of the employer to inflict fines as follows:

Le législateur mauricien interdit également les amendes dans l'ERA. Deux remarques peuvent ici être faites. Premièrement l'interdiction ne vise pas seulement les amendes, sanction disciplinaires, mais également toute somme payée par l'employé pour « poor or negligent work, or for damage caused to property of the employer », c'est-à-dire comme sanction contractuelle. Avant la jurisprudence Devanlay en France, les employeurs contournaient l'interdiction d'infliger les amendes en invoquant le fait que la somme en question était prélevée suite à un manquement à une obligation contractuelle. Il ne s'agissait pas ainsi d'une sanction disciplinaire mais d'une sanction contractuelle et échappait à ce titre à l'interdiction du législateur. Désormais « l'amputation de la rémunération est une sanction pécuniaire dès

lors qu'elle résulte d'un manquement à des obligation qu'elles soient d'ordre disciplinaire ou contractuel ». Le législateur mauricien semble ici avoir adopté la même approche.

Deuxième Remarque. Cette interdiction ne trouve son application qu'à l'égard du 'worker' tel qu'il est défini par l'ERA. Est-ce à dire qu'à l'égard des employés ne pouvant satisfaire la définition du "worker" les amendes sont permises? Le Conseil d'État dans un arrêt en date du 1 juillet 1988 devait conclure "qu'en édictant cette interdiction (des amendes et autres sanctions pécuniaires) le législateur (français) a énoncé un principe général du droit du travail." La jurisprudence mauricienne dans l'arrêt Norton v Public Service Commission a conclu dans le même sens.

Although, the *Employment Rights Act* does not generally apply, save for certain provisions, to the worker of a statutory body (vide *section 3(2)(b)*), it would be apposite to note what was stated by the *Judicial Committee of the Privy Council* in *Norton v The Public Service Commission* [1985 PRV 56; 1985 MR 108] where the Appellant, a Principal Assistant Secretary at the then Ministry of Works, was inflicted with a fine representing seven days' pay under the *Public Service Commission Regulations, 1967*. The *Judicial Committee*, in determining whether the Commission had the power to inflict a fine upon the appellant also a public officer, held:

The powers of the Commission are derived, not from the regulations, but from the Constitution itself. The Public Service Commission has no more power than that conferred upon it by the Constitution. As was pointed out by Ahnee J. in his dissenting judgment, whatever in the past, when Mauritius was a British Colony, may have been the powers of the then Governor over Her Majesty's civil servants, cannot be of any assistance in defining the powers conferred upon the Public Service Commission by the Constitution. Sections 8(1) and 8(4) of the Constitution make it clear that there is no power to fine, unless there exists a law which gives power to impose a fine for a breach of that law. Before such a fine can be enforced, the breach of that law has to be established in the courts.

(The underlining is ours)

It may also be noted what was stated by the House of Lords in *HM Revenue and Customs v Stringer and Others* [2009] UKHL 31; [2009] IRLR 677, 678 - 679 in this regard:

*My Lords, the appellant, Mr Keith Ainsworth, complains that his former employers, Her Majesty's Revenue and Customs ('the Revenue') wrongly made a deduction from his wages. Workers have been making complaints of this kind for centuries. More surprisingly, perhaps, for centuries also, the legislature used the Truck Acts to try to prevent employers from making arbitrary deductions – for example, for errors or misconduct – which would deprive the workers of the substance of their earnings. The case law on the subject was not always consistent and eventually Parliament passed the Truck Act 1896 which prescribed what deductions were permissible and in what circumstances. The long history of the legislation is conveniently set out in the speech of Lord Ackner in *Bristow v City Petroleum* [1987] IRLR 340, 341 – 342.*

Bristow was the last case to be heard by this House under the Truck Acts for, by the second half of the 20th century, it was widely recognised that the legislation needed to be updated. The existing Acts were therefore repealed and replaced by Part I of the Wages Act 1986. In 1996 Part I was re-enacted as Part II of the Employment Rights Act 1996.

It has also been noted that the prohibition of pecuniary sanctions is also akin to French employment law. *J. Pélissier, G. Auzero and E. Dockès in Droit du travail, 26^e édition, Editions Dalloz* have stated as follows:

734 *Depuis la loi du 5 février 1932, les amendes et autres sanctions pécuniaires sont interdites. Aujourd'hui, cette prohibition est prévue par l'article L. 1331-2 du Code du travail. La jurisprudence autorise les sanctions pécuniaires indirectes, mais condamne les sanctions pécuniaires déguisées.*

The learned authors have notably cited the demotion of the worker as an indirect pecuniary sanction (vide *n.735*) and manoeuvres used by the employer which would affect the worker's salary without being qualified as a pecuniary sanction as a disguised pecuniary sanction (vide *n.736*).

In this context, it would be useful to reproduce the text of *Articles L. 1331-1 and L. 1331-2 of the Code du Travail*:

Article L1331-1

Constitue une sanction toute mesure, autre que les observations verbales, prise par l'employeur à la suite d'un agissement du salarié considéré par l'employeur comme fautif, que cette mesure soit de nature à affecter immédiatement ou non la présence du salarié dans l'entreprise, sa fonction, sa carrière ou sa rémunération.

Article L1331-2

Les amendes ou autres sanctions pécuniaires sont interdites.

Toute disposition ou stipulation contraire est réputée non écrite.

It is therefore very much clear that the arbitrary deduction of an employee's wages is contrary to the rights of a worker. Moreover, as the evidence has clearly borne out, there is no basis for the employer to have deducted the wages of Mr Jhumka. It is also of concern that Mr Jhumka was not informed of the deductions and of the reasons thereof. It is only upon his enquiry that he became aware that his salary was deducted due to the non-approval of the urgent casual leave.

Although, the General Manager has bluntly stated that the deduction was made under *paragraph 4.2.2* of the *HHRM*, it is amply clear that a proper reading of the aforesaid paragraph does not confer any power upon the employer to deduct the wages of the Disputant. Needless is it to say that the deduction was not made pursuant to a law that gives the employer the power to do so.

In the best interests of good and harmonious employment relations at the workplace, the employer should refrain from indulging in practices that would damage the employment contract entered into by the worker. More particularly with regard to the principle rights of the worker under the employment contract. It cannot be overlooked that the remuneration of the employee is one of the main elements of the contract of

employment and is the consideration for which the individual provides his services to the employer.

The worker, on the other hand, should act within the rules and regulations of his workplace and maintain a good relationship with his employer. It cannot be overlooked that good human relations between employers and workers are essential to good employment relations.

The Tribunal therefore finds for the reasons given that the management of the RDA did not act appropriately in not approving the application for urgent casual leave and orders the management of the RDA to reconsider same in light of this award.

The Tribunal, in the interests of good and harmonious employment relations, shall however order that the wages deducted pursuant to the non-approval of the application for urgent casual leave from the salary of Mr Jhumka for the months of March 2013 and July 2013 be reimbursed to him.

The dispute is otherwise set aside.

.....
Shameer Janhangeer (Sd)
(Vice-President)

.....
Soumarain Ramana (Sd)
(Member)

.....
Rabin Gungoo (Sd)
(Member)

.....
Tribhohun Raj Gunnoo (Sd)
(Member)

Date: 8th January 2016

