EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 121/17

Before

Indiren Sivaramen	**Vice-President**
Francis Supparayen	**Member**
Karen K. Veerapen	**Member**
Arassen Kallee	**Member**

In the matter of:-

Mr Satianund Nunkoo (Disputant)

And

Beach Authority (Respondent)

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). Both parties were assisted by counsel. The terms of reference of the dispute read as follows:

"Whether the Beach Authority should have suspended me from work without pay for a period of two days with effect from Tuesday 7 March 2017."

Disputant, who is an office attendant, deponed before the Tribunal and he solemnly affirmed to the truthfulness of the contents of his Statement of Case. In cross-examination, Disputant conceded that someone else wrote the letter of 7 September 2016, a copy of which is annexed as Annex D to his Statement of Case and which triggered the charge of "gross misconduct" against him. He could not explain certain

terms as used in the said letter. He agreed that he had not informed "HR" that he was not well. He however told the person who was giving him the dispatch to do that he was not well. He agreed that in his letter of reply (to the General Manager) he did say that the officer was biased and that the fault lies with the latter. He agreed that in the letter of 25 August 2016, he was given a warning and that he was not requested to reply to the said letter. He was not agreeable with the warning issued to him and preferred to reply to the said letter.

Mr D'Emmerez, the Human Resource Officer at Respondent then deponed and he stated that Disputant did inform a "YEP" (which we understand to be "Youth Employment Program") trainee that he was ill when the latter asked him to do a dispatch. On that day, Disputant returned at the office at about 15 45/ 15 50 hrs after doing a dispatch and he was asked to do an urgent dispatch at the Ministry. He refused to do the dispatch and allegedly complained initially that there were other attendants who were sitting and who could have done the dispatch. The Respondent asked him in writing for his explanations. His written explanations were not accepted and the Respondent issued a warning to Disputant. Disputant decided to reply to this letter of warning and used strong words against the General Manager of the Respondent.

The Board of Respondent then decided to take disciplinary action against Disputant. Mr D'Emmerez stated that Disputant was asked for his explanations. The Board then decided to suspend Disputant without pay for two days. He averred that all the procedures have been followed for the said suspension.

In cross-examination, Mr D'Emmerez stated that the disciplinary procedures followed in the case of Disputant are those under Part X of the Fourth Schedule to the Act (Code of Practice). He agreed that Disputant was requested by way of a letter dated 11 May 2016 (in relation to the first incident) to furnish his explanations and the latter replied by way of a letter dated 18 May 2016. Disputant was informed on 25 August 2016 that he was given a warning. Mr D'Emmerez conceded that the words "you are strongly warned …" were used in the said letter but he then averred that strictly the letter was not a disciplinary action. Disputant was not informed how he could appeal against the letter of warning from Respondent. Disputant then sent a letter dated 7 September 2016 to the General Manager challenging the letter sent to him. Disputant was then informed by way of a letter dated 12 September 2016 that a charge of "gross misconduct" had been levelled against him. Disputant was given the opportunity to submit his explanations in writing. Disputant gave his explanations by way of a letter dated 22 September 2016. The meeting he had requested for in his letter of 22 September 2016 to be allowed to make a "verbal exposé" was not held however.

Disputant was then informed by way of a letter dated 6 March 2017 that "*the tenor and tone of your letters of 07 September, 2016 and 22 September, 2016 addressed to the*

General Manager have been considered as a serious insubordination on your part." Disputant had not been requested to give any explanation on the contents of his letter dated 22 September 2016. Disputant was not informed that he could be suspended for "insubordination". Mr D'Emmerez averred that it was not necessary in this case to give Disputant an oral hearing with his trade union representative. In re-examination, Mr D'Emmerez maintained that all relevant procedures have been followed in the case of Disputant.

The Tribunal has examined all the evidence on record including the submissions of Counsel. Respondent at paragraph 3 of his Statement of Defence has denied that Disputant refused to perform his duty on ground of illness. However, Mr D'Emmerez confirmed that Disputant had informed the YEP trainee who requested him to carry out the dispatch that he was "malade". The Tribunal has not been provided with a copy of the letter dated 11 May 2016 whereby Disputant was asked for his written explanations. The Tribunal however has a copy of the letter of explanations of Disputant dated 18 May 2016 (Annex B to the Statement of Case of Disputant). Disputant confirms therein that he replied that he was not feeling well and requested if the said dispatch could be delivered by his other colleagues who were present at the office. He added in his letter that he would have had no alternative than to deliver the dispatch if the said trainee had insisted for him to do the dispatch.

These explanations were given on 18 May 2016. More than three months later, that is, by way of a letter dated 25 August 2016, Disputant is informed that "*Following an inquiry carried out in the matter, it seems that your explanations submitted on 18 May, 2016 are totally frivolous and not convincing at all*." The letter continues as follows: "*You are strongly warned that failure to abide by any instruction issued by the Authority and, in particular, refusing any tasks allocated to you in the exercise of your duties and functions as Office Attendant would henceforth entail severe disciplinary action being taken against you.*" This letter to our mind amounted to a letter of warning and consisted of a disciplinary measure taken against Disputant.

If we proceed strictly in line with Part X of the Code of Practice, Respondent had already gone way by other avenues available to him. It is apposite to refer to sections 147, 148 and 149 of the Code of Practice though we bear in mind that the Code of Practice is not binding as such:

147. When a disciplinary matter arises, the relevant supervisor or manager shall first establish the facts and, where appropriate, obtain statements from the witnesses before deciding to drop the matter, arrange for informal counselling or initiate formal disciplinary proceedings.

148. Minor cases of misconduct and cases of sub-standard performance shall be dealt with by informal advice and counselling with the objective to help the workers to improve.

149. Formal hearing shall be held in cases of alleged misconduct.

Though Mr D'Emmerez agreed that the disciplinary procedure against Respondent was carried out under Part X – 'Disciplinary Procedures' of the Act (to be more exact Part X of the Fourth Schedule to the Act (the Code of Practice) as shown to him by Counsel for Disputant), yet the procedure used in the present matter is far from what is provided for in the said Code of Practice. A letter of warning dated 25 August 2016 was issued to Disputant following an alleged misconduct ("failed in discharging duties") after that the Respondent had taken cognizance of the written explanations of the latter. Mr D'Emmerez had much difficulty in trying to convince the Tribunal that the letter of 25 August 2016 was not a disciplinary measure. However, given the terms of the letter, this was clearly a letter of warning issued to Disputant. There is no evidence on record as to why there was no recourse to any "informal advice and counselling" or an oral warning if indeed the procedure provided in the Code of Practice was followed.

Section 157 and 158 of the Code of Practice read as follows:

157. Management may have recourse to an oral warning in case of minor infringement, where the worker fails to meet the required standards in spite of counselling. Where the worker receives a warning, he shall be informed of the reason for it and of his right of appeal. The warning shall be disregarded after three months if the worker improves his conduct or his performance.

158. Management may have recourse to a written warning for more serious infringement. The worker shall be informed of the reason for the warning and notified that a final warning would be given if there is no improvement after 6 months. He shall be informed of his right of appeal. The warning shall be disregarded after 6 months if the worker improves his conduct or performance.

It is accepted that the Disputant was not informed of any right of appeal. The letter of reply emanating from Disputant and addressed to the General Manager, with which we are mostly concerned in the present matter is the letter of 7 September 2016. The tone and words used in this letter were clearly unacceptable and the Tribunal will only refer to the following (even though the Tribunal has considered the letter in its entirety to assess whether the tone and words used in the letter were really unacceptable):

"You consider them frivolous because you nourish prejudicial temperament against me and not convincing because you are totally biased …"

..if you are not satisfied the fault lies with you. You should heal your attitude towards me."

The Disputant was then informed of the charge and details of the charge against him and duly requested to furnish his written explanations. It is however accepted that Disputant was not informed and not aware then of possible sanctions which could be meted out to him because of his letter of 7 September 2016.

The Disputant did make use of the right given to him to provide his explanations and did provide what he referred to as "explanations/ comments/ observations". Certain strong words were used such as "bad faith", "illogically" or "disdainfully" but to be fair to Disputant whilst these words were used, Appellant, sought to explain in fairly long paragraphs why, rightly or wrongly, these words were used. More importantly, he then "humbly" requested that a meeting be arranged where he would be assisted by his trade union representative to make his "verbal exposé".

A suspension from work without pay is a severe sanction even if it is for two days and affects at the very least the pay package of a worker. Mr D'Emmerez conceded that Respondent had not informed workers including Disputant of the circumstances which could lead to a suspension. This would again fall short of the guidance provided under section 141 of the Code of Practice which reads as follows:

141. Management shall make known to every worker –

(a) disciplinary rules and the agreed procedures; and
(b) the type of circumstances which can lead to suspension or dismissal.

Also, as seems to be suggested by section 149 of the Code of Practice (above), in the case of a gross misconduct, there should have been a formal hearing. By the term formal hearing, the Tribunal is not suggesting that the Respondent should necessarily turn himself into a court and hold an oral hearing. In the case of **R. Sewtohul v. La Tropicale Mauricienne Ltée 2015 IND 34**, the Industrial Court referred to relevant case-law and stated the following in relation to Section 38 (2) (a) (ii) of the Employment Rights Act:

*In the case of **Tirvengadum v. Bata Shoe (Mauritius) Co. Ltd [1979 SCJ 223]** the same view was taken. The Court stated that the law contemplates three possibilities and I find it pertinent to quote the material extract: "firstly cases where some form of disciplinary hearing (formal or informal depending upon the terms of the contract of employment or the disputes machinery in existence) is held, secondly cases where the act of misconduct has resulted in the worker being charged under the common law with*

a criminal offence, and thirdly every other case. In that third category, common sense requires us to place a situation where, on entering his kitchen, the employer sees his cook placing two pounds of sugar in her own basket and hiding it under the table. If, on being confronted by the employer, the cook says nothing and runs away, surely one cannot expect the employer to tell his cook, if she comes back to work on the following day, that he proposes to hold Court in his dining room at 10 o'clock to hear her answers before sacking her…What the law has done is to say that the worker must not be prevented from giving an explanation: this can take number of forms and it of course assumes all its importance in certain instances, such as those where the person or body of persons responsible for making the ultimate decision to dismiss hears of the misconduct at second hand, e.g. from a co- worker or junior officer."

The above decision was applied also in the case of ***P. Gopaul v. Le Meridien Hotel & Resorts Ltd [2011 SCJ 371]*** *where it was held: "We agree with what was held in* ***Tirvengadum v. Bata Shoe (supra)*** *that an employer must not necessarily turn himself into a Court and hold a formal hearing where a worker is guilty of gross misconduct. However, the employee must not be prevented from giving an explanation and as was aptly held in that case" As pointed out by the Judicial Committee in the case of* ***Bissonauth (supra)*** *and by the Supreme Court in the cases of* ***Tirvengadum (supra)*** *and* ***Planteau de Maroussem (supra)****, there is no requirement in law to hold a disciplinary committee with all the formalities of a Court hearing. What is required is that the worker must be afforded an opportunity to answer any charge and such opportunity can take a number of forms even in writing."*

The Tribunal is of the opinion that the law now specifically provides for a hearing in the case where a suspension is considered. Section 38 of the Employment Rights Act which bears the heading "Protection against termination of agreement" provides at its sub-section (9) the following:

Any suspension without pay as disciplinary action <u>following a hearing</u> shall not exceed 4 working days.(underlining is ours)

The legislator has not used the term "oral hearing" here and the Tribunal is of the opinion that the 'hearing' mentioned in Section 38(9) of the Employment Rights Act may take the form of an oral hearing or of an "opportunity to answer a charge" which is in writing (**vide College Labourdonnais (Alliance Francaise) v Seenyen 1992 MR 213**). The employer will, depending on the particular facts of a case, decide whether there is a need for the "opportunity to answer the charge" to be oral or in writing. What really matters is that the worker must have a "fair" hearing bearing in mind all the circumstances of the case.

In this particular case, the Disputant has specifically requested for a meeting to be arranged where a representative of a trade union would be in attendance and where he would be able to make a verbal exposé to show why disciplinary sanctions should not be taken against him. The Disputant was not granted an oral hearing in relation to the charge against him even though there was a meeting to try to settle the matter. A letter dated 6 March 2017 was finally issued whereby Disputant was informed that the Board of Respondent had decided at its sitting of 31 January 2017 to suspend him from work without pay for a period of two days with effect from Tuesday 7 March 2017. This letter curiously starts with "*The tenor and tone of your letters of 07 September, 2016 and 22 September, 2016 addressed to the General Manager have been considered as a serious insubordination on your part*."

The letter of 22 September 2016 could not be considered as insubordination or "serious insubordination" unless (i) the Disputant was informed formally prior to the letter of 7 March 2017 that the letter of 22 September 2016 could also constitute insubordination and (ii) he was also requested to provide his explanations in writing in relation to the letter of 22 September 2016. There is no evidence on record that this was done and this constitutes another flaw in the procedure followed.

In this particular case, we cannot say that there was a "hearing" in relation to the "tenor and tone" of the letter of 22 September 2016. A sanction was imposed on Disputant on the basis of this letter (though there was also the letter of 7 September 2016) without Disputant having had the opportunity to answer any charge which was being levelled against him in relation to that letter. This taints the procedure (which was strictly in written form despite request to be heard orally) which Respondent has adopted to suspend Disputant from work. Also, the Tribunal is not satisfied that Disputant was informed by the Respondent of the circumstances which can lead to a suspension and of any right of appeal which Disputant had after the sanction was meted out to him.

An employer has "un pouvoir disciplinaire". In the case of **Raman Ismael v UBS 1986 MR 182**, the Supreme Court stated the following: "… *the responsibility of ensuring the 'bon fonctionnement' of any enterprise rests, and must rest, with the management, however constituted. One of the legitimate means of discharging that responsibility is the power to impose disciplinary measures with a view to sanction and discourage conduct adversely affecting that 'bon fonctionnement'*." However, "*that* (a manager has an inherent power to suspend) *does not mean that such power should be unlimited or uncontrolled*." (**vide United Bus Service Ltd v Gokhool 1978 MR 1**).

For the reasons given above, the Tribunal finds that though the tenor and tone of the letter of Disputant dated 7 September 2016 were unacceptable, the arrangements which were made to deal with the disciplinary matter were unsatisfactory. An incident concerning a dispatch to be carried out was allowed to escalate until finally a

suspension was meted out to a worker. The 'gross misconduct' is based solely on two letters emanating from Disputant himself whilst the latter "humbly" prayed to be allowed to express himself orally before relevant parties. Before the Tribunal, Disputant conceded that the main letter of 7 September 2016 was written by someone else under his instructions. Disputant, who is an office attendant, had much difficulty to explain the meaning of certain terms used in his letter. Clearly this was a fit and proper case for Respondent to conduct an oral hearing after that the Disputant had specifically requested to be allowed to express himself orally in relation to the charge of 'gross misconduct' specially where Respondent was considering a suspension.

However, the terms of reference in the present case do not mention any procedural impropriety before the suspension was imposed or any remedy which is being sought for alleged failure of Respondent to follow an appropriate or reasonable disciplinary procedure. The terms of reference are directly in relation to the powers of the employer and the sanction of suspension of two days without pay meted out to Disputant. As seen above, the power to exercise disciplinary sanction is within the powers of the employer. Also, the sanction imposed, that is suspension without pay for a period of 2 days, is in line with the nature of sanctions which may be taken by Respondent under the Act. The Tribunal will no doubt intervene if a suspension constitutes, in an appropriate case, an abuse of the powers of the employer or is manifestly unreasonable.

Also and very importantly, the Tribunal does not deliver awards which are of a **declaratory nature** (**vide Mr Ugadiran Mooneeapen And The Mauritius Institute of Training and Development, RN 35/12; Mr Abdool Rashid Johar And Cargo Handling Corporation Ltd, RN 93/12; Mr Dhan Khednee And National Transport Corporation, RN 52/14**). Indeed, the Tribunal delivers awards which are binding on parties (Section 72 of the Act). An award as per the particular terms of reference in this case will not, as opposed to say, an order quashing or setting aside a sanction taken, be binding on the parties. However, for all the reasons given above and to maintain good employment relations, the Tribunal finds that this is a fit and proper case where an acceptable solution to both parties can still be worked out. Good employment relations may only be achieved when there is no stubbornness and excessive rigidity. Whilst it is no doubt a very important duty of management to maintain discipline throughout the organization in order to achieve the goals of the organization, the Tribunal is confident that in this particular case a more palatable solution and which will yet address the shortcomings on either side is still possible.

The Tribunal will thus suggest strongly to both parties to put away all bad feelings and to strive to find a solution which will be in the best interests of one and all so that this unfortunate incident is instead used as a building block for more constructive and

positive collaboration in the future. This is besides one of the main objectives of the Code of Practice.

The dispute is otherwise set aside.

SD Indiren Sivaramen

Vice-President

SD Francis Supparayen

Member

SD Karen K. Veerapen

Member

SD Arassen Kallee

Member

18 April 2018